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CPJ LAW JOURNAL

Volume XIV, Issue No. 1

JULY-2023

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MESSAGE FROM CHAIRMAN'S DESK

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

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



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

This Vol. XIV, Issue No. 1 of CPJ Law Journal is a clear reflection of our years of sincere working for the Law students, Law Academicians and respected members of the legal fraternity.

Sh. Subhash Chand Jain

Chairman

**CPJ College of Higher Studies
& School of Law**

MESSAGE FROM GENERAL SECRETARY'S DESK

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



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

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

We hope that this July-2023, Volume XIV, Issue No. 1 of our prestigious Journal will make a strongmark in the legal research fraternity.

Dr. Abhishek Jain

General Secretary

**CPJ College of Higher Studies
& School of Law**

MESSAGE FROM EDITOR-IN-CHIEF

While welcoming you to the July-2023 (Vol. XIV, Issue No. 1) edition of **CPJ Law Journal**, it is, indeed, our honour to share that CPJ Law Journal, a **UGC Care** Listed Journal, has been recognized by the legal fraternity as a leading law Journal. It is a Peer reviewed Journal that aims to create a new and enhanced forum for exchange of ideas relating to all aspects of Legal Studies and assures to keep you updated with recent developments and reforms in the legal world in the form of Articles, Research Papers, Case Studies etc. Research Studies have always been challenging with positive outcomes witnessed as a result of meticulous and persistent efforts. Researches in the field of Law have benefitted both the Industry and the Academia and it has always been our continuous endeavor to publish such scholarly Research Papers in this Bi-Annual National Journal of **CPJ School of Law**.



CPJ Law Journal is an open access Journal that aims at providing high-quality teaching and research material to Academicians, Research Scholars, Students & Law Professionals. This issue Includes papers from the Contemporary areas of Research in Death Penalty, Cyber-crime, PIL, Environmental Judicial Activism, Corporate Governance, Justice in Law, Banking Sector Laws, Wildlife Protection Act, Mob Lynching, Juvenile Justice System, Conjugal Rights of Prisoners, Marital Rapte, Liquor Prohibition, Mediation, Ethical Government, Human Rights, Reproductive Human Rights, Marine Ecosystem, Adoption Laws, ADR, Mental Health Laws, Custodial Torture, Artificial Intelligence, Digital Transformation etc.

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

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

Mr. Yugank Chaturvedi

Director General

**CPJ College of Higher Studies
& School of Law**

MESSAGE FROM EDITOR

It is with pride and enthusiasm that I present Volume XIV, Issue No. 1, (July-2023) of the CPJ Law Journal (CPJLJ). It consists of words and complete analysis of the articles/research papers covered. This issue of the Journal touches upon a number of issues worthy to note in present scenario. A highly evolved and complex justice system makes enormous demands on the people who work in it. Therefore, academicians, law students and legal professionals need upto date information as well as professional analysis on land mark judgments. CPJLJ delivers this vital information to them.



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

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

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

Prof. (Dr.) Amit Kr. Jain

Director, CA

MESSAGE FROM CO-EDITOR

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

Dear Readers,

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

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

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

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



Dr. Shalini Tyagi

Dean

CPJ School of Law

MESSAGE FROM HON'BLE JUSTICE RAJESH TANDON

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



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

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

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

Justice Rajesh Tandon

Former Judge

High Court of Uttarakhand

MESSAGE FROM SH. R.S. GOSWAMI

Dear Readers,

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

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

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



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

MESSAGE FROM SH. MURARI TIWARI

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



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

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

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

Adv. Murari Tiwari
Chairman
Bar Council of Delhi

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An Analysis of New Test for Death Penalty as Evolved by the Supreme Court of India Inshankar Kisanrao Khade V. State of Maharashtra Case

Dr. Amit Bhaskar*

INTRODUCTION

The constitutionality of death sentence was upheld by the Supreme Court of India in its landmark judgment in *Bachan Singh v. State of Punjab*.¹ While upholding its constitutionality, the Court held that the death penalty is to be awarded only in the rarest of rare cases. The Court said, “A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.” The Court further said that before imposing death sentence due regard must be paid to both the crime and the criminal and both aggravating and mitigating circumstances should be taken into account. The aggravating circumstances work against the convict whereas the mitigating circumstances work in favour of the convict. The Court said that a balance sheet of aggravating and mitigating circumstances is to be prepared and then it needs to determine whether the case falls under “Rarest of Rare” test or not. Under the balance sheet test, if the aggravating circumstances outweigh mitigating circumstances, the convict could be awarded death. However, if the situation is reversed i.e. mitigating circumstances outweighing aggravating circumstances then convict will not be awarded death penalty. While propounding the balance sheet theory, the Court did not lay down any exhaustive list of mitigating and aggravating circumstances and left it to be decided depending upon the facts and circumstances of each individual cases. The Court further said that the aggravating circumstances in order to form the basis of “Special Reasons” under Section 354(3) of the Criminal Procedure Code, 1973 (CrPC) must evidence aggravation of an abnormal or special degree. The Court said that to kill is to be cruel and therefore all murders are cruel but such cruelty may

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1 AIR 1980 SC 898.

vary in its degree of culpability and it is only when the culpability assumes the proportion of extreme depravity that "*Special Reasons*" can legitimately be said to exist for the imposition of death penalty. The current legislative framework under CrPC, 1973 requires giving of "*Special Reasons*" by the sentencing court before awarding death penalty. The new CrPC, 1973 is a marked departure from the old CrPC, 1898 in many respects. One such aspect is that the new Code requires giving of "*Special Reasons*" under Section 354(3) before awarding death.² Under the old CrPC, 1898, death was a normal rule and life imprisonment an exception for the offence of murder.³ However, the position got reversed under the new Code which is a post-independence legislation which was enacted keeping in mind the modern constitutional values. The new CrPC is considered to be more humanitarian in nature and is based primarily on rehabilitative theory of sentencing as against retributive or deterrent theory. The Supreme Court has also, time and again, pointed that our criminal justice system is reform oriented.⁴ As mentioned, due to incorporation of "*Special Reasons*" principle in the new Code, the death penalty has become an exception and life imprisonment a normal rule. As also mentioned, the new Code is considered as reformatory in nature which has been drafted keeping in mind the constitutional rights of the people in the post-independence India. In *Bachan Singh* case, the Court refused to strike down the constitutionality of death penalty on the ground of violation of Article 21 and also on the ground that it constitutes cruel and unusual punishment. The Court gave detailed reasons for justifying death penalty as one of the forms of punishment and in support also referred to 35th Report of the Law Commission of India (1967) which was also not in favour of abolition of death penalty.⁵ However, as mentioned, the

2 Section 354(3) of the CrPC, 1973 says "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. " Hence, when the Court award death sentence, it must provide special reasons for doing so.

3 See Section 367(5) of the old CrPC, 1898. It said that if the accused is convicted of an offence punishable with death and the sentencing court award any punishment other than death, then it shall state reasons for not awarding death.

4 Article, "Criminal justice system is reform-oriented: Supreme Court" Date 9/11/2021; Source: <https://www.hindustantimes.com/india-news/criminal-justice-system-is-reform-oriented-supreme-court-101636399321478.html> ; Accessed on 15/3/2022). The Supreme Court said that criminal justice system in India is reform oriented and does not aim to punish the offenders. The Court made this statement in context of applications filed on behalf of around 100 life convicts languishing in jail for more than 16 years in the State of Uttar Pradesh. The Court asked the State Government to consider their premature release.

5 See the Full report of the 35th Report of the Law Commission on this link <https://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf> (accessed on 15/2/2022). The Law Commission said, "Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population, and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment."

Court confined it to very exceptional cases which came to be known as *Rarest of Rare* doctrine. Since the judgment, this test has become the benchmark test for the judicial imposition of death penalty in India.

However, in a 2013 judgment of *Shankar Kisanrao Khade v. State of Maharashtra*⁶, the two judge Bench of the Supreme Court of India, while dealing with the death penalty for a murder convict, has propounded a new test for the award of death penalty.⁷ This new test has three components i.e. “*Crime test*”, “*Criminal test*” and “*R-R Test*”. As per the new test, it is only when the case of the convict passes through these three sub-tests, then only the death penalty could be imposed. This new test appears to be a significant departure from the *Rarest of Rare* test propounded by the Constitutional Bench in *Bachan Singh* case and also appears to raise the bar for the imposition of death penalty. The new test appears to go far beyond the test laid down in *Bachan Singh* case for imposition of death. In the light of the above background information, this paper seeks to examine the validity of this new test in order to find it out as to whether the new test is in conformity with the “*Rarest of Rare*” test propounded by the Constitution Bench in *Bachan Singh* case or whether it goes beyond the principles laid down therein.

NEW TEST FOR DEATH PENALTY: TRIPLE TEST

As mentioned in the introductory part, the Supreme Court in *Shankar Kisanrao Khade* case has laid down the new standard for imposing the death penalty which appears to be a marked departure from the test laid down in *Bachan Singh* case. Laying down the new test, the Court in Para 28 of the judgment in *Shankar Kisanrao Khade* case said that the tests to be applied for awarding the death sentence are “*Crime test*”, “*Criminal test*”, and “*Rarest of Rare test*” and not the “*Balancing Test*”. All these three tests need to be satisfied before imposing the death penalty on the convict. For the purpose of this paper this test could also be conveniently called as the Triple Test. While elaborating further on the test, the Court said that the *Crime Test* pertains to the aggravating circumstances which works against the convict whereas the *Criminal test* pertains to the mitigating circumstances which will work in favour of the convict. As per this new test, the *Crime test* has to be fully satisfied, that is, 100% which

This report can be contrasted with the 262nd Report of the Law Commission in the year 2015 where the Law Commission has recommended the abolition of death penalty on the ground that it does not have deterrent effect. Whether death has a deterrent effect or not is full of controversy.” See the full text of the 262nd Report on this link <https://lawcommissionofindia.nic.in/reports/report262.pdf> (accessed on 16/2/2022). Also see “Law Commission Report on ‘Death Penalty: A Chance to Overcome Incoherence in Indian Jurisprudence?’” Source: Economic and Political Weekly Vol. 49, No. 29 (JULY 19, 2014), pp. 15-18. Also see “Death Penalty in India: Reflections on the Law Commission Report” Source: Economic and Political Weekly Vol. 50, No. 40 (OCTOBER 3, 2015), pp. 12-15.

6 (2013) 5 SCC 546.

7 The reference to this test was also made in *Gurvail Singh @ Gala v. State of Punjab* (2013) 2 SCC 713. Subsequent benches of the Supreme Court have also followed the new test which are listed in later part of this paper.

means that all circumstances pertaining to the facts of the case must be aggravating in nature pointing against the convict. In the same breath, the *Criminal test* has to be satisfied 0%, that is to say, that there should be no mitigating circumstances favoring the accused. If there is any circumstance favouring the accused, such as the possibility of reform or young age of the accused or any other mitigating circumstance, the "*Criminal test*" may favour the accused to avoid the extreme penalty of death. Even if both the tests are satisfied, that is, 100% *Crime test* and 0% *Criminal test*, then finally, *Rarest of Rare test* (R-R test) will be applied. This test is in contrast to the rarest of rare test laid down in *Bachan Singh* case. This R-R test depends upon the perception of the society, that is, it is "society centric" and not "judge centric". This test will be based on the societal perception as to whether the society in large will approve the awarding of death sentence for certain types of crimes or not. This R-R test could also be termed as "*will of the people*" test as the perception of the society at large occupies the centre stage in this test. While applying the R-R test, the Court has to look into a variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged or suffering from physical disability, such crimes being committed against old and infirm women with those disabilities etc., the Court said. While elaborating upon the R-R test, the Court said that the courts award death sentence since situation demands so due to constitutional compulsion, *reflected by the will of the people and not by the will of the judges*. The Court said that whether a particular case will come under the "*Rarest of Rare test*" or not will depend upon the will or conscience of the people and not what judges think on the matter. Explaining this aspect of the test, the Supreme Court in *Mofil Khan v. State of Jharkhand*⁸ said that the test is to "*basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community*".⁹

PROBLEM WITH THE NEW TEST

GOING BEYOND THE BAR LAID DOWN IN BACHAN SINGH CASE

The new test as propounded in *Shankar Kisanrao Khade* case goes far beyond the principles laid down by the Constitution Bench in *Bachan Singh* case. In *Khade* case, the Court has raised the bar for the award of death penalty. This is problematic in the sense that the *Bachan Singh* is a Constitution Bench decision and hence any evolution of new test or modification of the old test could be legally and validly done only by

8 (2015) 1 SCC 67.

9 Please see Para 67 of the *Mofil Khan* judgment.

10 See "As SC Benches Fight Turf Battles, Precedents and Conventions Suffer"; Source: <https://thewire.in/law/sc-benches-turf-battles-conventions-suffer>; Date of access 1/4/2022; Also see the Madras High Court Judgment in *Philip Jeyasingh vs The Joint Registrar* ((1992) 2 MLJ 309) wherein it was held in context of Division Bench declaring the judgment of the Full Bench as per incuriam that the judgment of the Full Bench is binding precedent as it expresses the collective opinion of the Court as such.

In the same vein, the decision of the Constitution Bench is binding on all the smaller benches and could be overruled/modified only by a larger Constitution Bench.

the larger bench and not by the two judge bench. The new test evolved is violation of principle of binding judicial precedents and also judicial conventions.¹⁰ There could also be a possibility that Bench in *Khade* case misread the rarest of rare test laid down in *Bachan Singh* case and gave an interpretation which is not in consonance with *Bachan Singh* dictum.

Apart from the Constitutional issues, there are some other problems with the new test as propounded in *Shankar Kisanrao Khade* case. As per the new test, as discussed earlier, "R-R" test will come into picture only when the crime test (aggravating circumstances) and the criminal test (mitigating circumstances) is fully satisfied, that is, *Crime test* has to be satisfied 100% and the *Criminal test* is to be satisfied 0%. That is say that all the circumstances pertaining to the factual matrix of the case should be aggravating in nature and there should not be a single mitigating circumstance in favour of the convict. It is only when these two tests are fulfilled, then the third test R-R test will apply. In the course of the judgment, the Court in *Khade* case referred to four such mitigating circumstances. These circumstances are young age of the convict, possibility or chances of reform of the convict, no prior criminal background and the convict not being a menace or threat to the society. The Court added that the list of mitigating circumstance is not exhaustive.

However, the parameters laid down in new test, that is, the *Crime test* and the *Criminal test* has to be fully satisfied is not what was contemplated in the *Bachan Singh* case. In *Bachan Singh*, the Court talked about preparing the Balance Sheet of aggravating and mitigating circumstances wherein the mitigating circumstances have to be given due weight. But nowhere the Bench in *Bachan Singh* case talked about the 100% satisfaction in *Crime test* and 0% satisfaction in *Criminal test* as propounded in *Shankar Kisanrao Khade* case. The Court in *Bachan Singh* case nowhere said that the aggravating circumstances have to be satisfied 100% and mitigating circumstances have to be satisfied 0% before the imposition of death penalty. The Court in *Bachan Singh* never intended that one mitigating circumstance shall outweigh all aggravating circumstances which is the position in the new test. This new test has not only deviated from the Constitution Bench dictum but has also created further problems in judicial administration of death penalty in India.

The problems and difficulties which new test pose could be explained with an illustration. Suppose a young man of 24 years of age has committed brutal rape and murder of a young girl who was intellectually disable. The victim was in helpless condition at the time of the incident. The act was committed in the most diabolical and grotesque manner. The accused not only raped her but also kill her and in order to destroy the evidence cut her body into pieces and disposed it off in a nearby canal in the most inhuman manner. He knew the girl previously and betrayed her trust in taking her to an isolated place in order to commit the dastardly act. Applying the new test as propounded in *Shankar Kisanrao Khade* case, this gruesome act is not fit for award of capital punishment because the *Criminal test* is not fully satisfied as there is a mitigating circumstance in favour of the convict i.e. young age of the convict. This mitigating circumstance is sufficient to tilt the scale in favour of the convict so as to enable

him to escape him from death penalty notwithstanding the brutal and grotesque manner in which the crime was committed. As per the new test, even if there is one single mitigating circumstance, death could not be imposed. The problem with the new test is that it goes very much beyond the test laid down in *Bachan Singh* case and in the process breach the Constitutional Bench dictum on death penalty. In *Bachan Singh* case, as said earlier, the Court favoured the balancing test and laid down the proposition that both aggravating and mitigating circumstances should be looked into and in doing so the mitigating circumstances have to be given due weight. However, the problem with the new test is that it propounds an *Absolute test* in the sense that even one mitigating circumstance will be suffice to commute the death penalty into life imprisonment. A single mitigating circumstance should outshine the gravest of the grave aggravating circumstances. Once you prove any mitigating circumstance, it will dominate over all aggravating circumstances thus enabling the convict to escape from extreme penalty of death. Thus as per the new test in *Shankar Kisanrao Khade* case,

1 Mitigating Circumstance > 1 or 2 or all Aggravating Circumstances.

The new test laid down in *Shankar Kisanrao Khade* case was not an isolated affair but has been followed by other subsequent benches of the Supreme Court. Some of the Apex Court judgments in which the new test has been followed are *Ashok Debbarma @ Achak Debbarma v. State of Tripura*¹¹, *Amar Singh Yadav v. State of U.P.*¹², *Anil @ Anthony Arikswamy Joseph v. State of Maharashtra*¹³, *Birju v State of M.P.*¹⁴, *Dharam Deo Yadav v. State Of U.P.*¹⁵; and in *Lalit Kumar Yadav @ Kuri v.State Of U.P.*¹⁶. In all these cases, the respective benches of the Supreme Court violated the *Bachan Singh* mandate of Balance Sheet theory and instead followed the new test.

FALLACIES IN THE NEW “WILL OF THE PEOPLE” TEST

The problem with the new test not only pertains to the *Crime test* and the *Criminal test* as discussed above but also with the *R-R* (will of the people) test which is the third and final stage of the new test. It would be relevant here to discuss the problem with the new *R-R* test as propounded in *Khade* case.

The Court in *Khade* case said that the will of the people (society perception) is the essential component of *R-R* test and it has nothing to do with what judges think on the matter. However, there are several practical problems with this new *R-R* test. Firstly, it is very difficult for the judiciary to determine or measure the “*will of the people*” in order to reach to a definite conclusion in a highly populous and large society like India. It is rather very difficult to subject the *will of the people* to any precise measurement or quantification especially in a society like ours. Further, the

11 (2014)4SCC747.

12 AIR 2014 SC 2486.

13 (2014) 4 SCC 69).

14 AIR 2014 SC 1504.

15 (2014) 5 SCC 509.

16 (2014) 11 SCC 129.

will of the people varies from place to place and time to time and it is mostly determined by a host of factors such as the literacy and awareness level of the people on the matter and the sensitivity and emotive aspect of the issues involved. Further, there may also be the information gap on the subject matter which may create further hurdle in determination of *will of people*. Some people may have uninterrupted access to the matter while others may not. Further, there is inherent danger in bringing an intangible “*will of the people*” to determine the question of award of death penalty to the convict. Death penalty is not only extreme but also an irreversible form of punishment. Hence, such matter shall be dealt with all cautiousness instead of subjecting it to an intangible test like *will of the people*.

Another serious issue with the *will of the people* test has been pointed out by the Law Commission of India in its 262nd Report wherein it was said in Para 5.2.23 said that in order to find out the societal perception there is an inherent danger, as pointed out in *Bachan Singh* and *Santosh Kumar Satishbhushan Bariyar*¹⁷ cases, that “judges are likely to substitute their own assumptions, values and predilections in place of the perceptions of society, because even if one were to assume that society has determinate, stable and wide shared preferences on these matters, judges have no means of determining these preferences.”¹⁸ The Law Commission also pointed out, rightly, that the new test completely disassociate aggravating and mitigating circumstances from the rarest of rare analysis by compartmentalizing the entire test into three water tight compartments which again breach the *Bachan Singh* mandate wherein the Court categorically said that both the circumstances have to be looked together and in doing so mitigating circumstances have to be given due regard. The Commission pointed out by departing from the *Bachan Singh* dictum the new test further add conceptual confusion around the rarest of rare test analysis.¹⁹ The Commission said in Para 5.2.27 that “discussion above indicates that different judges have understood the requirements of the rarest of rare standard differently, resulting in a disparate and “judge-centric” determination of whether or not a case falls within the rarest of rare category.”²⁰

One of the parameters generally adopted for judging the *will of the people* is the reaction of the civil society groups to the particular incident. However, again this is not a foolproof test. For instance, Nirbhaya case (16th December 2012 Delhi Gang

17 *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* 2009 6 SCC 498.

18 See Page 119 of the Law Commission Report <https://lawcommissionofindia.nic.in/reports/report262.pdf>; (Date of access 19/3/2022).

19 *Supra* note 19, at page 120.

20 *Supra* note 19, at page 120.

21 See “Unprecedented protests, change in laws: How the Nirbhaya case moved the needle”; Source <https://www.thenewsminute.com/article/unprecedented-protests-change-laws-how-nirbhaya-case-moved-needle-120693> ; (Date of access 1/4/2022); Also see “Protests in India after Delhi gang-rape victim dies”; Source <https://www.bbc.com/news/world-asia-india-20863707>; (Date of access 1/4/2022). Also see “India’s “Nirbhaya Movement”: What has Changed Since Then?” Source <https://wiisglobal.org/indias-nirbhaya-movement-what-has-changed-since-then/> (Date of access 31/3/2022).

Rape case) in Delhi led to massive protest by the civil society groups in different parts of the country demanding the most stringent punishment for the accused persons involved.²¹ Responding to the civil society massive outburst, the Indian Parliament enacted the Criminal Law Amendment Act, 2013 on the basis of Justice Verma Committee report and made the anti-rape law more stringent.²² Post Nirbhaya incident, Kathua and Unnao rape were two such incidents which witnessed protest by civil society groups.²³ It led to passing of the Criminal Law Amendment Act, 2018 by the Indian Parliament providing for stringent punishment for certain classes of rapes.²⁴ But post these incidents similar gruesome incidents of rape and sexual offences including the child sexual offences have been reported from the different parts of the country.²⁵ This is also amply demonstrated by National Crime Record Bureau (NCRB) 2020 data.²⁶ However, the civil society reaction to these incidents has not been as intense as it was in the case of the above mentioned incidents, although the gravity or brutality of the crimes in later incidents may have been higher or at least at the same level. However, *Hathras* incident is one such incident where massive protest was made by civil society groups. In *Hathras* incident, a girl from the Dalit community was brutally raped in Hathras district of Uttar Pradesh. Later on the victim succumbed to the injuries and died in a hospital in a Delhi.

This is due to the fact that civil society reactions may, at times, be very spontaneous

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- 22 See the basic features of the Criminal Law Amendment Act, 2013 in the link <https://hyderabadpolice.gov.in/acts/Nirbhaya-IPC.pdf>; (Date of access 15/3/2022).
- 23 “Countrywide protests demanding justice in Kathua and Unnao rape cases” Source: <https://www.hindustantimes.com/india-news/sunday-of-protests-as-people-look-for-end-to-sexual-violence-against-women-demand-justice-in-kathua-and-unnao-rape-cases/story-tZagLwsy4yRh1hPE5bvVyK.html>; (Date of access 1/3/2022); Also see “Kathua, Unnao rapes reminiscent of December 16 case that shook India”; Source: <https://www.hindustantimes.com/india-news/kathua-unnao-rapes-reminiscent-of-december-16-case-that-shook-india/story-Y5NaNFEYeQzaJ2V6a7WrYJ.html> ; (Date of access 1/3/2022); Also see “Kathua and Unnao: Handling of these two rapes makes a mockery of Nirbhaya protests”; Source: <https://theprint.in/opinion/kathua-and-unnao-handling-of-these-two-rapes-makes-a-mockery-of-nirbhaya-protests/48565/> ; (Date of access 3/3/2022).
- 24 See the Criminal Law Amendment Act, 2018; Source: <https://www.wionews.com/india-news/india-hits-the-street-to-protest-unnao-kathua-gang-rapes-130612> ; (Date of access 25/2/2022). <https://www.mha.gov.in/sites/default/files/CSdivTheCriminalLawAct14082018.pdf> ; (Date of access 14/2/2022).
- 25 See, “Horrendous Rape Cases In 2021 So Far Show That Minors Are Biggest Victims Of Sexual Assaults” Date 9/3/2021. ; Source <https://www.outlookindia.com/website/story/india-news-horrendous-rape-cases-in-2021-so-far-show-that-minors-are-biggest-victims-of-sexual-assaults/376609>; Date of access 11/3/2022; Also See “India recorded 77 rape cases, 80 murders daily in 2020, says NCRB report; crimes against women highest in Rajasthan” (Date: 16/09/2021) <https://www.firstpost.com/india/india-recorded-77-rape-cases-80-murders-daily-in-2020-says-ncrb-report-crimes-against-women-highest-in-rajasthan-9970671.html>; Date of Access 11/1/2022.
- 26 “Crime in India 2020 Report” of NCRB. See the link <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>; (Date of Access 21/2/2022).

and uneven rather than consistent and uniform. It may also lack uniform geographical outreach. So, the *will of the people*, if judged solely or predominantly on the basis of civil society groups' reaction and protest, would be problematic. Further, taking the polls and surveys on every matter of life and death will also be impractical in a large and complex society like ours. Further, there may be inherent danger in common populace getting swayed by emotional impulse and vengeance extinct rather than by reason and logic while determining the *will of the people* especially in cases where heinous crimes have been committed. It is for these reasons that judges are expected to be well trained in their areas of law and do not get swayed by emotional impulse. Hence, it is a very difficult task to measure *will of the people* accurately in a large and complex society like ours. Hence the judiciary should never venture into it.

Another serious issue with the *will of the people* test is that in a parliamentary democracy like ours, the *will of the people* has to be reflected through the chosen public representatives and not through the judicial chambers. This is what is meant by separation of power which is a part of our basic structure doctrine. The public representatives are directly elected by the electorate and hence are fit person to reflect the will of the people who have elected them to the public office. On the contrary, judges are appointed and nominated on the basis of their expertise and training in the field of law and not on the basis of common electorate system. That is the domain exclusively reserved for the public representatives. The duty of the court is to determine the rights and liabilities on the basis of the applicable laws and past judicial precedents. There is no express constitutional and legal provision requiring judge to venture into *will of the people* domain.²⁷ Hence, it would be a highly dangerous proposition if the court ventures into "*will of the people*" domain especially in the delicate matter of life and death. Neither the law permits it nor is it feasible and practical for the courts to determine the same.

In the same context, using the cautionary language, the Constitution Bench in *Bachan Singh* case in Para 124 and 125 of the judgment had addressed the issue. The Court referred to the United States case of *Furman v. Georgia*²⁸ in which the Supreme Court of the United States of America held that the death penalty constitutes a cruel and unusual punishment, being violative of the US Eighth Amendment's prohibition on "*cruel and unusual*" punishment, and, therefore, is unconstitutional. In doing so, the Court resorted to "*contemporary standard of decency prevailing among the public of the United States.*" Justice Marshall, who was one of the judges on the Bench, even went to the extent of saying that "*it (death penalty) was morally unacceptable to the people of United States*". However, soon thereafter, this opinion of Justice Marshall was sharply refuted by the people of the USA. Due to the public outrage that follows after *Furman*, more than 32 States of the United States of America re-introduced death penalty by revising their penal laws in the light of the decision in *Furman*. In 1976, a Gallup poll taken in the United States of America showed that more than 65% of those

27 James F. Byrnes, "THE CONSTITUTION AND THE WILL OF THE PEOPLE"; American Bar Association Journal Vol. 25, No. 8 (August 1939), pp. 667-671.

28 408 U.S. 238 (1972).

polled preferred to have an operative death penalty. Thus, the public opinion of which Justice Marshall was boasting about in *Furman* was thwarted by the same public by supporting the law on death penalty. Even after fifty years since *Furman* judgment, the majority of the people in USA support death penalty. According to 2021 Pew Research Center Survey, most U.S. adult population support the death penalty for people convicted of murder.²⁹ As per the latest data available, 27 States in USA retain death penalty whereas 23 States have abolished death penalty.³⁰ In the same year (1976), in the famous case of *Gregg v Georgia*³¹, the United States Supreme Court restored the death penalty on the statute book as a form of punishment. It is to be noted that USA, like India, is one of the countries that is having death penalty on its statute book. Hence, the *Furman* case keeps on reminding us that judges should never venture into “will of the people” or “society perception” domain. As said earlier, that is the area exclusively reserved for the people’s representatives and must be reflected through them only. In this context, the Court in *Bachan Singh* case made a very cautionary observation that judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion. The Court in *Bachan Singh* case said, “Not being a representative of people it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned”. The above observation in *Bachan Singh* case is a strong reminder to all those who want to infuse public opinion into judicial chambers.

APPLYING NEW TEST TO THE FACTS OF THE CASE

Now, let’s apply the new test to the facts of the *Shankar Kisanrao Khade* case and see how it works. As per the new test, before the imposition of death penalty, three sub-tests must be satisfied i.e. *Crime test*, *Criminal test* and lastly *R-R test* (will of the people or the societal centric test).

FACTUAL MATRIX OF THE CASE

As the fact of the case goes, the deceased was a school going girl of eleven years of age who was staying with her grandmother. She was kidnapped by the appellant and was brutally subjected to rape and then murdered by strangulation. The appellant was 52 years of age at the time of the offence. A certificate issued by the President of the Handicap Board General Hospital, Amravati, Maharashtra disclosed that the

29 JOHN GRAMLICH, “Article 10 facts about the death penalty in the U.S.”; Source: <https://www.pewresearch.org/fact-tank/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/> (accessed on 1/4/2022). According to this Pew research survey, six out of ten adult in United States support death penalty for the murder convicts. Hence, there is not much change in public opinion since 1976 as far as death penalty is concerned. Also see JORDAN WILLIAMS, “Poll: Majority of Americans favor death penalty despite some reservations”; Source: <https://thehill.com/blogs/blog-briefing-room/news/556531-majority-of-americans-favor-death-penalty-despite-some/> (accessed on 2/4/2022).

30 <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>; (Date of access 1/3/2022).

The 3 States in USA have imposed moratorium on death penalty

31 428 U.S. 153 (1976).

victim was physically handicapped and was also having moderate mental retardation which goes on to show that the victim suffered from both physical as well as mental disability. The doctor who committed the post mortem test deposed that the crime was committed in the most ghastly manner. On evidence, it was also found that the rape was committed upon the deceased on more than one occasions before brutally murdering her by strangulation. The Bombay High Court having affirmed the death penalty, the appellant made appeal to the Supreme Court. The Supreme Court admitted in Para 31 of the judgment that the action of the appellant was not only inhuman but also barbaric. The Court said that ruthless crime of repeated actions of rape followed by murder of the young minor girl, who suffered from moderate intellectual disability, shocks not only the judicial conscience, but also the conscience of the society.

CRIME TEST (100%) SATISFIED

The brutal and diabolical manner in which the crime of rape and murder was committed, the *Crime test* is 100% satisfied as all the circumstances brought on the record of the case are aggravating in nature.

CRIMINAL TEST (0%) SATISFIED

Now, the next question is whether there is any mitigating circumstance in favour of the appellant. On fact, the appellant was of 52 years of age at the time of the incident and was a fatherly figure to the victim who was a minor girl of eleven years. He won the trust of the victim and lured her by offering her sweets and then kidnapped her and committed the ghastly act. He repeatedly raped the victim for several days, ultimately strangulating her to death. Considering his age i.e. 52 years, chances of reformation is ruled out which was also admitted by the Court itself. After considering all the facts, the Court said that *Criminal test* is also fully satisfied (0%) as there is no mitigating circumstance in favour of the appellant. Hence, both *crime test* and *criminal test* is satisfied.

R-R TEST (SATISFIED)

As regards the *R-Rtest*, the Court said that the crime committed was horrendous and diabolical which shocks the conscience of the society. In Para 35 of the judgment, the Court said, "*Society abhors such crimes which shocks the conscience of the society and always attracts intense and extreme indignation of the community. R-R Test is fully satisfied against the accused, so also the Crime Test and the Criminal Test.*" Hence, by virtue of the Courtown admission itself, all the three tests are satisfied and hence, as per the new test, the appellant deserves death sentence.

PUNISHMENT OF DEATH NOT AWARDED

However, despite all the three tests being satisfied in the present case, the death was not awarded. Instead, the Court imposed rigorous imprisonment for life. The reason given by the Apex Court for not awarding the death was that one of the factors

which influenced the High Court in awarding death sentence to the appellant was the previous criminal history of the accused. However, the Supreme Court noted that the appellant was not convicted in the prior criminal act as the case was still pending against him and has not culminated into his conviction. Hence, the Supreme Court felt that the approach of the High Court was wrong by taking into account the pendency of the criminal case against the appellant as one of the factors while affirming the death imposed upon him by the trial court. The Supreme Court thought that this was the wrong approach on the part of the High Court. However, this may be the wrong approach on the part of the High Court but the new test was completely satisfied in the present case by the Supreme Court own admission. The Supreme Court, as the Apex Court of the country, has the duty to correct the error committed by the lower courts. Even if the High Court wrongly took into account the past pendency of the case against the appellant while upholding death, that should not have been the relevant factor for commutation of death into life when, by the Supreme Court own admission, all the three components of the new test (*Crime test*, *Criminal test* and *R-R test*) were completely satisfied in the present case. Here lies the inconsistency in the application of the new test.

TEST NOT APPROVED IN SUBSEQUENT JUDGMENT

In *Mahesh Dhanaji Shinde vs. State of Maharashtra*³² which is a three bench judge decision, the Supreme Court did not concur with the new test as propounded in *Shankar Kisanrao Khade* case. In the course of tracing the death penalty jurisprudence in India and while elaborating upon the balance sheet theory, the Court in Para 24 of the *Mahesh Dhanaji* judgment said, “A reference to several other pronouncements made by this Court at different points of time with regard to what could be considered as mitigating and aggravating circumstances and how they are to be reconciled has already been detailed hereinabove. All that would be necessary to say is that the Constitution Bench in *Bachan Singh* (*supra*) had sounded a note of caution against treating the aggravating and mitigating circumstances in separate water-tight compartments as in many situations it may be impossible to isolate them and both sets of circumstances will have to be considered to cull out the cumulative effect thereof. Viewed in the aforesaid context the observations contained in para 52 of *Shankar Kisanrao Khade* (*supra*) noted above, namely, 100% crime test and 0% criminal test may create situations which may well go beyond what was laid down in *Bachan Singh* (*supra*)”. However, the above-mentioned observation made by the Court could be treated as obiter dicta rather than ratio decidendi. However, still the observation holds significance.

The reference of *Shankar Kisanrao Khade* case appeared in *Mahesh Dhanaji* case due to the fact that the counsel for the appellant in the latter case made reference to *Shankar Kisanrao Khade* in support of his plea for commutation of death into life of the appellant who along with others was convicted of having committed murder of around nine people for the lust of money. The counsel said that the *criminal test* was not fully satisfied (0%) in the case due to the presence of mitigating circumstances in favour of the appellant and in support referred to the new test laid down in *Khade* case. The

32 2014 4 SCC 292.

counsel asserted that *criminal test* has to fully satisfied (0%) in the sense that there should be no mitigating circumstance in favour of the appellant before the death penalty could be imposed. The Court in *Mahesh Dhanaji* instead applied the *Bachan Singh* principle of Balance Sheet theory. On facts, the Court said that although the crime committed was diabolical yet there are possibilities of reform and rehabilitation. The Court looked into the jail conduct of the appellant which inclined towards his rehabilitative potential and reached to the conclusion that the alternate option i.e. life imprisonment is not unquestionably foreclosed. The Court also took into account the poor economic background of the appellant. On these grounds, the Court commuted death into life of the appellant. As mentioned, in the course of the judgment, the Court observed that the test laid down in *Shankar Kisanrao Khade* goes beyond the principles laid down in *Bachan Singh* case. However, the Court did not expressly declare the *Shankar Kisanrao Khade* and subsequent judgments based on the new test as per incuriam. It would be interesting to see as to how the larger Bench of the Supreme Court will look into this new test in the future.

ADDING FURTHER INCONSISTENCY IN JUDICIAL ADMINISTRATION OF DEATH PENALTY

As it is well known that there is lack of consistency in judicial administration of death penalty in India.³³ This fact has been judicially admitted from time to time. The *Bachan Singh* dictum on death penalty was not followed by subsequent benches of the Supreme Court. There has been inconsistency either in applying the rarest of rare principle or balance sheet theory. The Supreme Court in *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra*³⁴ recognized this inconsistency in reference to the death penalty and admitted that there is no uniform sentencing policy in India as far as death penalty is concerned. The Apex Court also recognized the inconsistency in death penalty in *Aloke Nath Dutta v State of West Bengal*³⁵ wherein the Court after examining various judgments on the death penalty over the last two decades admitted the failure on the part of the Court to evolve a uniform sentencing policy in capital punishment cases. Again in *Swami Shraddhananda v State of Karnataka*³⁶, the Supreme Court observed, “The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this court depends a good deal on the personal predilection of the judges constituting the Bench”.

33 See “India: Lethal Lottery: The Death Penalty in India – A study of Supreme Court judgments in death penalty cases 1950-2006”; Source: <https://www.amnesty.org/en/documents/asa20/007/2008/en/> ; (Date of access 1/3/2022; Also see Ashna D, “Death Penalty Law in India: A Case of Consistent Inconsistencies”; <https://www.columbiapublicpolicyreview.org/2020/07/death-penalty-law-in-india-a-case-of-consistent-inconsistencies/>; Accessed on 1/3/2022.

34 (2009 6 SCC 498).

35 (2007) 12 SCC 230.

36 (2008) 13 SCC 767.

However, the new test propounded in *Shankar Kisanrao Khade* case adds to further inconsistency in judicial administration of death penalty in India. Due to the new test evolved, further inconsistency in judicial administration of death penalty will appear whereby some benches may follow the Balance Sheet theory of *Bachan Singh* dictum whereas other benches may follow the Absolute approach as adopted in *Shankar Kisanrao Khade* case.

CONCLUDING REMARKS

This paper aims to point out the fallacies in the new test propounded in *Shankar Kisanrao Khade* case. Not only does it breach the Constitution bench mandate of *Bachan Singh* case but it also wrongly introduced the “*will of the people*” test. This test has the tendency to raise the bar for death penalty from “*Rarest of Rare*” to “*Very Rarest of Rare*” as it would be a very rare scenario where *crime test*, *criminal test* and *R-R test* would be fully satisfied. The *Bachan Singh* and the subsequent judgments that follow talks about *Balancing Approach* whereas the new test laid down in *Shankar Kisan Rao Khade* case talks about *Absolute Approach* as even a single mitigating circumstance may outweigh all the aggravating circumstances. This was never the intention of the Constitution Bench in *Bachan Singh* case. Further, this new test aggravate the problem of already existing inconsistency in judicial administration of death penalty in India. However, as seen in the paper, the new test has not been impliedly approved by the three Judge Bench of the Supreme Court in *Mahesh Dhanaji Shinde* case wherein it was held that the 100% *crime test* and the 0% *criminal test* may create situations which may go well beyond what was laid down by the Constitution Bench in *Bachan Singh* case. However, there is no authoritative judicial pronouncement of striking down the new test or declaring it as *per incuriam*. It will be interesting to see as to how the larger bench of the Supreme Court looks into the new test in the future.

Cyber Extortion: The Novel Approach Towards Cyber-Crime

*Dr. Anchal Mittal Aggarwal**

ABSTRACT

The study intends to understand the concept of cyber extortion and its relationship with cybercrimes. Cyber extortion and cybercrime are related as cyber extortion merges into cybercrime. Countries are getting acquainted with this novel cybercrime concept with the unrest and impact it has on business and individuals. Cyberspace has unbound a plethora of cybercrimes consequently development in the forms of cybercrimes are observed. This novel form of cybercrimes targets different group, companies, government, individual culminate to financial loss, economic and social loss. There is need to conduct in depth study and have infrastructure to restrain such cybercrimes simultaneously, the law makers endeavours with the judiciary in public interest and to implementing and safeguarding right on the online world. Nonetheless, these swift developments in forms of cybercrimes has put the world in predicament situation calling for serious attention, research and section to deal the situation.

Keywords: *Cyber Extortion, Cyber-crime.*

I. INTRODUCTION

Cyber extortion is the extension of cybercrimes. Its origin is not new; however, it has gained significance in recent times. Erstwhile Thomas Whiteside had reported the first case of cyber extortion that happened in 1971 in his book *Computer Capers*. This reported case pertained to money demanded by thieves who had stolen two reels of magnetic tapes of Bank of America at Los Angeles International Airport. The extortion was not successful and the ransom was not paid because the backup of the stolen tapes was available.

The commissioning of cyber extortion crime involves minimal resources a computer machine and network. It may harm the security of the targeted person and its financial health. According to an analysis reported by Bloomberg the detection of cyberattacks can take several hundred days on an average. It also stated the estimate cost of cyberattack on global economy to be \$300 billion-\$1 trillion annually. Ransomware

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being a threat to the national security and cause of damaging billions of dollars of the global economy was mention.¹ Therefore, it is apparent that cyber extortion causes damage and loss to the security and financial position of target person with ripple effect on the economic health of a nation.

II. CONCEPT OF CYBER EXTORTION

*Cyber-extortion is the demand of money or something else of value in exchange for not carrying out threats to commit harm that would involve the victim's information systems is an evolving and costly form of criminal activity.*²

This crime is committed by cybercriminal who targeting business or confidential data against payment. The cybercriminals demand money in return to stop the attacks. As per the FBI (Federal Bureau of Investigation) there is surge in cyber extortions targeting corporates. Around 20 cases are report to the FBI on monthly basis needless, to mention many go unreported to keep victim's name away from public domain. Cyber extortion is lucrative and the least report cybercrime. Perpetrators common use a distributed denial-of-service attack to commission such attacks.³ Although, it can be done in multiple forms like denying access to data, stealing data encrypting data and holding it hostage, and threatening exposure. The two most common types of cyber extortion are ransomware and DDoS (Distributed Denial of Service) attacks.⁴ The common types of cyber extortion used by predators are:

- **Ransomware:** It is a malicious software or malware generally distributed by emails or fraudulent network or websites that are infected by malware. These mails or websites are used to trick the victim to click the infected link, consequently the victim download the malicious. The victim's device gets infected and the ransomware starts function by encrypt private files the data rendering their computers and networks unusable. In the next step the blackmailers contact the victim and offer to decrypt their files against a fee or any other valuable thing. In the Adevastating case of ransomware Cryptolocker, a demand of \$300 in Bitcoins within three days was made by the attackers. This demand was made not only to decrypt the files, but to prevent them from being destroyed forever.
- **Denial-of-service attacks:** In denial-of-service attack multiple compromised computer systems attack a single target. An organization's website or online

1 Bloomberg Intelligence, *Cyberattacks and the threat to the global economy*, September 13, 2021, <https://www.bloomberg.com/professional/blog/cyberattacks-threat-global-economy/>.

2 See, Gregory M. Bednarski, *Enumerating and Reducing the Threat of Transnational Cyber Extortion Against Small and Medium Size Organizations*, INFORMATIONWEEK, Sept. 13, 2004, http://i.cmpnet.com/infoweek/1005/IWK_CMU_Cyber_Extortion_Study.pdf.

3 Lepofsky Ron., *Cyberextortion by Denial-of-Service Attack*, <https://web.archive.org/web/20110706175959/http://www.ere-security.ca/PDF/Cyberextortion%20by%20DoS%2C%20Risk%20Magazine%20June%202006.pdf>.

4 *Understanding Cyber Extortion and How to Protect Your Business*, Risk Management, September 13, 2021, <https://www.embroker.com/blog/cyber-extortio n/>.

business is flooded by so much traffic that legitimate users are denied access. The aim of DDoS is to make the target's network temporarily unusable caused by a denial of service. In the case of cyber extortion, the predator demand money or other valuable things to stop the DDoS. The financial loss depends on website downtime of the target business. These attacks can be difficult to stop and significantly impacts financial revenue. Many tech startups are targets because many do not have the infrastructure to defend against them. Meetup, Basecamp, Bitly, Shutterstock and Mail Chimp have all been targeted.

- ***Holding sensitive data hostage:*** In this form of cyber extortion the predators steal data simultaneously threaten exposure of the data. Millions of euros were paid by Nokia in 2017 to ensure that an encryption key for their Symbian OS would not be released to the public. A cyber extortionist group called Rex Mundi in June 2014, claimed that it had records for 650,000 customers of European Domino's Pizza. This cyber extortionist group (Rex Mundi) threatened to release the records if the company didn't pay a ransom of about \$41,000. The same group (Rex Mundi) demanded a ransom in another point of time (2015) from a bank in exchange for not releasing 30,000 emails having sensitive data. The emails having sensitive data would be released if the bank didn't pay a ransom. The victim's in both these cases of cyber extortion (Rex Mundi) never paid ransom.
- ***Holding AWS accounts hostage*** – In June of last year, an attacker took over Code Spaces' AWS administrative panel, and offered to return controls for a price. When the company refused, the attacker began to delete data, backups and configurations, putting Code Spaces out of business. The same pattern of attack occurred with Websolr and Bonsai, two search application infrastructure services provided by One More Cloud LLC, but they managed to recover.

III. LEGAL LANDSCAPE OF CYBER EXTORTION IN INDIA

The Information Technology Act, 2000 does not define the term Cyber extortion. However, under the garb of clause (e), (f) and (j) of section 43 of the Information Technology Act, 2000 a cyber extortionist may be held liable for punishment with imprisonment for a term upto *three years* or with fine. The fine may extend to *five lakh rupees* and the may be liable for with *both* imprisonment and fine.⁵ Clause (e), (f) and (j) of section 43 penalizes if any person without permission of the owner or other person in charge of a computer, computer system or computer network does any of the below mentioned acts that are-

- disrupts or causes disruption of any computer, computer system or computer network,

⁵ Information Technology Act, 2000, § 66, No 21, Acts of Parliament, 2000 (India). *Read*, Computer related offences. It states that if any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

- denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means,
- steal, conceal, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage.

Such person will be liable for punishment provided under section 66 of the Information Technology Act, 2000. Simultaneously, he shall be liable to pay damages by way of compensation to the victim.⁶

Even though the Information Technology Act, 2000 is silent on the definition of cyber extortion. The term extortion can be understood as provided under section 383 of the IPC. The offence of extortion under the IPC has been explained as '*Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits extortion*'.⁷ Therefore, applying the meaning of extortion provided in the IPC it can be inferred that whoever intentionally puts any person in fear of any injury by using any computer or network thereby dishonestly induces the person so put in fear to deliver to any person any property may be committing extortion.⁸ In case of extortion the predator can be liable for punishment with imprisonment for a term which may extend to three years, or with fine, or with both. Whereas the predator will be liable for imprisonment for a term which may extend to two years, or with fine, or with both if to the committing of extortion, he puts the victim in fear, or attempts to do so.⁹

The act of cyber extortion also constitutes a crime of conspiracy where the conspiracy to commit cyber extortion involves two or more persons and there is attempt of cyber extortion. However, the such cyber-extortion does not result in the victim transferring something of value to predator. According to section 120A the Indian Penal Code when two or more persons agree to do, or cause to be, an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. Therefore, a predator can be liable for punishment provided under section 120B of the Indian Penal Code.

6 Information Technology Act, 2000, § 43, Acts of Parliament, 2000 (India). It provides penalty and compensation for damage to computer, computer system, etc.

7 *Read*, Indian Penal Code, 1860, § 383.

8 Indian Penal Code, 1860, § 384, No. 45, Acts of Parliament, 1860 (India). *Read*, Indian Penal Code provides punishment for extortion- whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

9 Indian Penal Code, 1860, § 385, No. 45, Acts of Parliament, 1860 (India). It provides that putting person in fear of injury in order to commit extortion-Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Considering the aforementioned punishment and remedies against cyber extortionist provided under the statutes, an endeavour to restrain such offences must be made. Both the Information Technology Act, 2000 and the Indian Penal Code read together forthright of cyber extortion still don't fill the lacuna. Likewise, in US extortion is a criminal act under federal and state laws.¹⁰ The succeeding portion of the paper briefly discusses the legal framework of cyber extortion in US.

IV. LEGAL LANDSCAPE OF CYBER EXTORTION IN US

According to the Hobbs Act, extortion is "*the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.*"¹¹ Cyberextortion involves the added element of a threat of committing a wrongful act involving computers or information systems.¹² Cyber-extortions are often comprised of three distinct illegal acts: *the threat*, *the act* (if committed), and often a *preliminary criminal act* to make the threatened act credible.¹³ The Computer Fraud and Abuse Act of 1986 ("CFAA") contains several sections that are related to cyber-extortion.¹⁴

The legislation should provide compensation programme for same enterprise or businesses and individual who suffer financial loss and damage by cyber extortion. This provision of compensation programme may be used only if the cyber extortionist is not traceable and has caused severe damage or loss to the victim.

Further, the Access Device Statute criminalizes the possession of counterfeit access devices knowingly and with intent to defraud when that possession affects interstate or foreign commerce.¹⁵ In the case of Ivanov and future potential cyber-extortion cases, the acquisition of customer credit card numbers and merchant account numbers constitutes a violation of this law should be defined under the Indian law.¹⁶

Additionally, if a cyber-extortion attempt does not result in the victim transferring something of value to extortionist, the fact that steps are taken to commit the crime constitute in themselves the crime of conspiracy.¹⁷ One of the counts against Ivanov was based on the federal conspiracy statute.¹⁸

10 See, e.g., *United States v. Jackson*, 986 F. Supp. 829, 831 (S.D.N.Y. 1997) (listing indictments of defendants for extortion under the Hobbs Act and New York penal law).

11 18 U.S.C. § 1951(b)(2) (2000).

12 *Cyberextortion: Information from Answers.com*, <http://www.answers.com/topic/cyberextortion?cat:technology>.

13 See, e.g., *United States v. Ivanov*, 175 F. Supp. 2d 367, 369 (D. Conn. 2001) (describing the factual situation where the defendant threatened financial ruin via illegal access into the victim's information systems after having already illegally accessed those systems in order to send out a series of unsolicited e-mails).

14 18 U.S.C. § 1030 (2000).

15 18 U.S.C. § 1029.

16 *United States v. Ivanov*, 175 F. Supp. 2d 367, 371 (D. Conn. 2001).

17 18 U.S.C. § 371 (2000).

18 Specifically, Ivanov was charged with conspiracy to commit an offense against or to defraud the United States under 18 U.S.C. § 371. *Ivanov*, 175 F. Supp. 2d at 370.

V. CONCLUSION & SUGGESTIONS

The advent and growth in the newfangled techniques of committing cybercrimes has posed nations in legal and social quandary. The recent ransomware attack on AIIMS has roused questions about the national security. It is contemplated that data of around five crore patients stored in five servers was targeted. Needless to mention that the patient data targeted includes medical records of current and former Prime Ministers, Ministers, member parliaments and other VVIPs.¹⁹ The demand of 200 crore crypto currency from hospital is being speculated however, it wasn't confirmed by AIIMS spokesperson.²⁰

After AIIMS website, the website of Indian Council of Medical Research (ICMR) wasn't spared. There were attempts to hack Indian Council of Medical Research Medical Research website beside around 6000 hacking attempts on top Indian medical body's website.²¹ These rampant hacking instances that are a form of cyber extortion have trembled the entire medical system security. Nevertheless, the need to upgrade and re-equip the legal framework and enforcement agency is the need of the hour. Special taskforce such as cyber cell need to gear up to tackle this germinating threat of cyber extortion on National security. This requires international cooperation and attention to coherently fight and ambush cyber extortion.

The limited awareness and swift development of these cyber-crimes is raising concerns to restrain them and trace them. Moreover, there is need to study these offences and nations to control these offences together. The nature of cybercrimes including cyber extortion has unbounded territory. Therefore, there are more legal complexities and limitations relating to investigation and judicial recourse. An endeavour to spread awareness, do's and don'ts with cogent legal provisions and interpretations to punish the cyber extortionist must be on place. Nations should have agreements to tackle such cybercrimes.

India should amend its IT Act and include the definition of cybercrimes and specifically tackle the issue of cyber extortion rather than relying on judicial intervention. This will set an ideal case for other nations to take lessons from Indian law.

19 AIIMS ransomware attack | Rajya Sabha member seeks explanation from government, December 08, 2022, *available at*: <https://www.thehindu.com/news/national/aiims-ransomware-attack-rajya-sabha-member-seeks-explanation-from-government/article66239350.ece>.

20 AIIMS services remain disrupted for seventh straight day amid alleged ransomware attack on its servers, November 29, 2022, *available at*: <https://www.thehindu.com/news/cities/Delhi/aiims-continues-silence-on-media-reports-of-200-crore-demand-by-hackers/article66201742.ece>.

21 After AIIMS, Hackers Attacked Top Medical Body Website 6,000 Times, December 06, 2022, *available at*: <https://www.ndtv.com/india-news/after-aiims-indias-top-medical-body-icmr-attacked-by-hackers-sources-3582248>.

Environment Protection and the Supreme Court of India: Role of the Judiciary from 2015 to 2020

Dr. Anita Ladha & Ms. Shruti Jane Eusebius***

I. INTRODUCTION

The Supreme Court of India has made notable contributions in the past to build the climate justice and environment protection narrative in India. As a catalyst in the climate justice movement, the Supreme Court has made several notable contributions including establishment of the principles of sustainable development including the precautionary principle and polluter pays principle¹ in environmental jurisprudence in India. In notable cases and in times of executive and legislative inertia, the Supreme Court addressed concerns of pollution of rivers², air pollution by industrial activity³ and by vehicular emissions⁴; and has established new frontiers of environmental law.

In recent times, newer environmental concerns have emerged – from air quality index as the silent public health emergency⁵ to concerns of global warming⁶. Inter-

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1 *Vellore Citizens' Welfare Forum v Union of India* [1996] 5 SCC 647 (SC); *M.C.Mehta v. Kamal Nath* [2000] 6 SCC 213 (SC).

2 *M.C. Mehta v. Union of India* [1988] 1 SCC 471 (SC); *M.C. Mehta v. Union of India*[1997] 2 SCC 411 (SC); *M.C. Mehta v. Union of India* [1992] Supp 2 SCC 637 (SC); *Indian Council for Envirolegal Action v. Union of India* [1998] 9 SCC 580 (SC).

3 *M.C. Mehta v. Union of India* [1997] 2 SCC 353 (SC).

4 *M.C. Mehta v. Union of India* [2001] 3 SCC 756 (SC).

5 History of Air Pollution: Have We Reached The Point Of No Return? | Earth.Org - Past | Present | Future' (*Earth.Org - Past | Present | Future*, 2022) <<https://earth.org/history-of-air-pollution/>> accessed 30 April 2022.

6 'Warning On Mass Extinction Of Sea Life: 'An Oh My God Moment'' (*Nytimes.com*, 2022) <<https://www.nytimes.com/2022/04/28/climate/global-warming-ocean-extinctions.html>> accessed 30 April 2022.

generational equity has gradually gained prominence in environmental jurisprudence with the need to conserve resources and to address concerns of environmental degradation. The paper seeks to examine the contributions of the Supreme Court to the cause of climate justice from 2015 to 2020, with a view to trace the course of environmental jurisprudence in recent time. The paper examines the contributions of the Supreme Court through reported judgments catalogued in Supreme Court Cases. The paper analyses the recent challenges in ensuring climate justice and the solutions forthcoming from the Supreme Court.

II. CONTRIBUTIONS OF THE SUPREME COURT OF INDIA TO ENVIRONMENT PROTECTION: 2015 TO 2020

A. Interventions by the Supreme Court to tackle pollution

The Supreme in the period from 2015 to 2020 has taken cognisance of incidents of pollution and taken decisive action to address the causes of pollution. The Supreme Court's role in tackling land pollution and ecological damage is notable. In *Karuna Society for Animals and Nature and others v. Union of India and others*⁷ the Supreme Court considered the issue of pollution by plastic bags and its impact on human life, animals and ecology. The Supreme Court directed the Union of India and the state governments to take all necessary steps to address this problem and to constitute committees of experts, set up an appropriate monitoring mechanism. The Supreme Court also opined that the NGT benches can monitor the situation and pass appropriate orders and directions to the concerned statutory authorities and local self-governments. The public health hazard caused by improper garbage management was a matter taken up by the Supreme Court in *In re Outrage as parents end life after Child's Dengue Death*⁸; and the authorities were directed to prepare action plan for areas of concern and take preventive measures. The lack of seriousness on part of the authorities in this matter was decried and costs were imposed on the authorities as a measure to ensure that garbage management was taken up as a matter of priority.⁹ In *Paryavaran Suraksha Samiti and others v. Union of India and others*¹⁰ the necessity of effluent treatment plants for effective treatment of sources of pollution was emphasised and the Supreme Court directed that industries can be permitted to run only if its primary effluent treatment plant, is functional. Industrial units were required to install effluent treatment plants in three months. The Pollution Control Boards were directed to carry out inspections, by prioritizing inspections of severely and critically polluted industries, so that visible results emerge at the earliest. Further, the Supreme Court directed that setting up of common effluent treatment plants should be taken up on priority. In *Municipal Corporation, Ujjain and others v. BVG India Limited and others*¹¹ the Supreme

7 [2016] 14SCC303 (SC).

8 [2016] 10 SCC 709 (SC).

9 *In re Outrage as parents end life after Child's Dengue Death* [2019] 12 SCC 653 (SC).

10 [2017] 5SCC326 (SC).

11 [2018] 5SCC462 (SC).

Court placed emphasis on municipal solid waste management, as a critical element towards sustainable metropolitan development; and directed the implementation of solid waste management policy in 2 years. In *State of Madhya Pradesh v. Center for Environment Protection Research and Development*¹² it was held that while it is within the power of the National Green Tribunal to order the implementation of the requirement of PUC Certificate for vehicles, it is not within the power of the National Green Tribunal to order that vehicles without PUC certificate not be supplied with fuel.

In *M.C. Mehta v. Union of India and others*¹³ the Supreme Court issued directions to address pollution in the National Capital Region (NCR) by industrial and infrastructural activity, wherein emphasis was placed on the adoption of proper waste disposal mechanisms and compliance with the emission norms. The concerned municipal bodies were called upon to play a proactive role to monitor compliance. The guidelines issued included the management of dust arising due to road construction, waste segregation, and installation of smog towers. The Court also sought the formulation of a comprehensive plan regarding stubble burning. Notably, the Supreme Court has also taken an initiative to promote alternative fuel sources by directing the sanction of Rs. 14 crores for carrying out study on a possible alternate fuel.¹⁴

Further, the Supreme Court has actively intervened to address the issue of air pollution. In *M.C. Mehta v. Union of India and others*¹⁵ the Supreme Court dealt with the issue of the high level of air pollution in Delhi on account of vehicular movement; and directed that vehicles not bound for Delhi should be diverted via the bypass routes, and imposed ECC on the vehicles entering Delhi. Pollution due to stubble burning in regions surrounding the National Capital Region was sought to be addressed by the Supreme Court in *M.C. Mehta (Stubble Burning & Air Quality) v. Union of India*¹⁶ by directing the formulation of a comprehensive plan to prevent stubble burning. The Court emphasised on the need to provide alternate solutions to stubble burning. Further, the Court also directed that the hotspots of pollution be identified and necessary measure be adopted to deal with the crisis.

In *M.C. Mehta v. Union of India and others*¹⁷ the damage caused to monuments by pollution from cremation was sought to be addressed and directions were given to authorities to adopt measures to address this problem and to maintain such areas. In *Arjun Gopal v. Union of India*¹⁸ the Supreme Court noted the non-determination of standards by the Central Pollution Control Board regarding pollution by bursting of firecrackers. In this case, the Supreme Court directed that firecrackers should not

12 [2020] 9SCC781 (SC).

13 [2020] 7SCC530 (SC).

14 *M.C. Mehta v. Union of India*[2020] 19SCC152 (SC).

15 [2016] 4SCC269 (SC).

16 [2020] 7 SCC530 (SC).

17 [2016] 15SCC360 (SC).

18 [2017] 16 SCC310 (SC).

19 *Arjun Gopal and others v. Union of India and others*[2019] 13SCC523 (SC).

contain antimony, lithium, mercury, arsenic and lead. Further, in this case¹⁹, the direct causal connection between burning crackers during Diwali and air pollution was recognised. It was iterated that burning of crackers as a religious practice is not entitled to the protection under Article 25 of the Constitution if it threatens the health and lives of the people. Consequently, the manufacture, sale and use of joined firecrackers was banned as the same caused huge air, noise and solid waste problems. The government was directed to adopt measures to introduce green crackers. Further, the Court directed the exploration of the feasibility of community fireworks, and also limited the duration within which fireworks can take place i.e. for two hours.²⁰ In *M.C. Mehta v. Union of India and others*²¹ pollution caused by vehicular emission was addressed by imposing a prohibition on the sale of vehicles that were not BS-IV compliant.

Protection of the Taj Mahal continues to be a matter of priority for the Supreme Court which is evidenced from its order to develop Agra as a heritage city and to prepare a vision document with the interests of the Taj Mahal and the Taj Trapezium zone at the forefront.²²

B. Role of the Supreme Court in forest conservation

In *T.N. Godavarman Thirumulpad v. Union of India and others*²³ the Supreme Court permitted a limited range of necessary activities to be undertaken in protected zones including wildlife reserves, marine reserves. These activities include laying of underground drinking water pipelines up to 4 inch diameter; 11 KV distribution lines for rural areas; telephone lines or optical fibre for providing communication facilities in rural areas; wells, hand pumps, small water tanks etc. for drinking water facilities to villagers, yet to be relocated from protected area; and construction of *anganwadies*, government schools and dispensaries essential for people who live nearer to forest areas. In *The Director, Department of Archaeology and Museums Jaipur and another v. Ashish Gautam and others*²⁴ the Supreme Court gave detailed directions to ensure that tourism activities conducted in a monument near the wildlife reserve does not disturb the forest area. The Supreme Court in *Satbir Raika and others v. State of Madhya Pradesh and others*²⁵ ruled on the issue of cattle grazing and held that the distinction drawn between cattle of different states and imposition of levy was untenable. While it is true that the forest has to be protected, but it does not imply that restrictions can be imposed where a route can be provided without allowing cattle to go by destroying any kind of reserved forests. In *T.N. Godavarman Thirumulpad In re v.*

20 *Arjun Gopal and others v. Union of India and others* [2019] 13SCC523 (SC).

21 [2017] 7 SCC243 (SC).

22 *M.C. Mehta v. Union of India and others In re, Taj Trapezium Zone* [2018] 9SCC658 (SC).

23 [2016] 13SCC 586 (SC).

24 [2020] 5SCC112 (SC).

25 [2018] 12SCC615 (SC).

26 [2018] 17 SCC767 (SC).

*Union of India and others*²⁶ the Supreme Court granted limited permission for silviculture felling in the forest including activities of thinning the forest for regeneration of trees. This order was passed with the objective of guarding against indiscriminate felling of trees. A notable intervention of the Supreme Court is in the case of *T.N. Godavarman Thirumulpad In re v. Union of India and others*²⁷ wherein the court imposed conditions on the construction of defence infrastructure in the Andaman and Nicobar Islands to protect the fragile ecology of the islands and to protect against pollution by construction activities. The Court directed that -

- Statutory clearance for diversion under S. 2 Forest Conservation Act, 1980 would be obtained and conditions of the same be complied with.
- Net Present Value and compensatory charges payable for the forest land diverted would be recovered and deposited.
- Clearance under Coastal Regulation Zone may be obtained.
- Compensatory planting of 317 trees in lieu of felled trees be undertaken. The Andaman & Nicobar Islands Forest Department will provide indigenous variety plants for the same.
- Construction material should be brought from the mainland. Quarrying is to be completely avoided.
- Temporary shelter for labourer should be kept away from forest/beach area to avoid anthropogenic source of pollution.
- Solid waste generated through construction activity should be cleared on daily basis to maintain pristine environment.
- Construction activities may be avoided in night hours to protect nocturnal animals including insects like moths and beetles.

C. Role of the Supreme Court in protection of wildlife

Issues pertaining to the protection of wildlife have also been dealt with by the Supreme Court in this duration. In *Union of India v. Zavaray S. Poonawala and others*²⁸ the Court emphasised on the need for vigilance and international co-operation to regulate cross-border trade in endangered animals and the importance of the Convention of International Trade on Endangered Species of Wild Fauna and Flora (CITES) and authorities under the same in this regard. It was held in this case that the permission of the Director General of Foreign Trade, Chief Wildlife Warden and CITES is necessary for import of taxidermy hunting trophies. A notable contribution of the Supreme Court is in *Wildlife Rescue and Rehabilitation Centre and others v. Union of India and others*²⁹. In this case, the issue of cruelty inflicted captive elephants was taken cognisance of and directions were passed to ensure humane handling of such animals. To this

27 [2018] 17SCC765 (SC).

28 [2015] 7 SCC347 (SC).

29 [2016] 1SCC716 (SC).

end, the Chief Wild Life Warden was directed to ensure that all captive elephants existing in the State were counted and registered. Appropriate action was directed to be taken against owners of elephants in case of failure to obtain the requisite certificate under Section 42 of the Wild Life (Protection) Act, 1972 and the declaration made under Section 40. Furthermore, the Supreme Court directed that the owners of elephants be required to maintain an elephant data book failing which they would be liable to action. The Supreme Court also provided detailed directions regarding use of elephants in festivals and temples.

The Supreme Court ruled on the necessity for elephant corridors and stated that the State is mandated under Article 21 of the Constitution of India to protect and improve the environment and to safeguard the wildlife and forests.³⁰ Furthermore, the precautionary principle requires the State to anticipate, prevent and address the causes of environmental degradation. The Supreme Court also took cognisance of the issue of construction in elephant corridors and held that no construction is permitted in the elephant corridors. Further, the Supreme Court directed the Collector of the Nilgiris to prepare a plan of action regarding construction activities in the elephant corridor in the Nilgiris.³¹ In *Ajay Dubey v. National Tiger Conservation Auth. and others*³² the Supreme Court directed that the guidelines for tiger conservation and tourism be complied with before tourism activities are recommenced in wildlife reserves and national parks.

D. The Supreme Court's stance on environment *vis-à-vis* development and urbanisation

A major contribution of the Supreme Court has been in striking a balance between protection of the environment and the need for development. In *Anirudh Kumar v. Municipal Corporation of Delhi and others*,³³ the running of a pathological laboratory in a residential building was held to be causing air and sound pollution affecting the health of the residents; it affects public interest and violates the rule of law. Consequently the Supreme Court directed closure of the pathological lab illegally run in the residential building as it generated noise pollution beyond the permissible extent. In *Dashmesh Educational Society v. Punjab Urban Development Authority and others*³⁴ the construction of a resort on forest land was stopped to determine the nature of land before permitting

30 *Hospitality Association of Mudumalai v. In Defense of Environment and Animals and others*[2020] 10SCC589 (SC).

31 *A Rangarajan and others v. Union of India and others* [2019] 13SCC508 (SC); *A Rangarajan and others v. Union of India and others*[2019] 13SCC504 (SC).

32 [2019] 11 SCC538 (SC).

33 [2015] 7SCC779 (SC).

34 [2015] 8 SCC 311 (SC).

35 [2016] 4SCC 105 (SC).

36 [2016] 10 SCC701 (SC).

37 [2016] 13SCC583 (SC).

any construction. In *Govt. of NCT of Delhi and others v. Anand Arya and others*³⁵ the Supreme Court appointed an expert committee to determine whether the river plain where a bus depot was constructed was viable for construction activities. In *Anil Hoble v. Kashinath Jairam Shetye and others*³⁶ unauthorised construction in the Coastal Regulation Zone were directed to be demolished. In *DDA v. Kenneth Builders*³⁷ on the issue of whether construction of residential colony will be in violation of Air act 1981 and Water Act 1974; the opinion was sought of the Delhi Pollution Control Board and the Central Empowered Committee set up under Godavarman decision (2013).

In *Goel Ganga Developers India Pvt. Ltd. v. Union of India and others*³⁸ the Supreme Court in a case of construction in violation of the Environmental Clearance, imposed limitations in construction and imposed damages of hundred crores rupees or ten of the project cost whichever was more as a cost for environmental damage and for wilful violation of the conditions of the Environment Clearance. In *Rajendra Shankar Shukla and others v. State of Chhattisgarh and others*³⁹, it was held that deviation from conditions in Environment Clearance and change in land use required a fresh Environment Clearance. In *Electrotherm (India) Ltd. v. Patel Vipulkumar Ramjibhai and others*⁴⁰ the importance of public consultation and hearing as a crucial stage in the process of consideration for grant of Environmental Clearance was emphasised. The impact of industrial activities on the natural resources and the resultant increase in pollution are matters where the public especially the persons living in the vicinity have a stake and must be heard. Any exemption granted from such public hearing is untenable as the impact on public and the community resources necessitates public hearing.

A notable observation of the Supreme Court in *Lal Bahadur v. State of Uttar Pradesh and others*⁴¹ was that it is the duty of the State to anticipate, prevent and attack causes of environmental degradation. In this case conversion of area reserved for green belt for use as a residential area was quashed. In *M.C. Mehta and others v. Union of India and others*⁴² unauthorized construction and misuse of residential premises for industrial and other commercial purposes which were sealed were de-sealed subject to certain conditions to safeguard against possible misuse of residential premises for commercial (non-industrial) purposes

In *Hanuman Laxman Aroskar and others v. Union of India and others*⁴³ the Supreme Court criticised the cavalier approach of the authorities involved in the formulation of the Environmental Impact Assessment (EIA) Report. It was stated that the role of the decision makers entrusted with authority over the EIA process is to ensure that

38 [2018] 18 SCC257 (SC).

39 [2015] 10SCC400 (SC).

40 [2016] 9SCC300 (SC).

41 [2018] 15SCC407 (SC).

42 [2018] 2 SCC144 (SC).

43 [2019] 15SCC401 (SC).

every important facet of the environment is adequately studied and that the impact of the proposed activity is carefully assessed. It was held that the Expert Appraisal Committee (EAC) as an expert body, abdicated its role and function by taking into account circumstances which were extraneous to the exercise of its power and failed to notice facets of the environment that were crucial to its decision making. The Supreme Court directed the EAC to revisit their recommendations keeping in view environmental considerations. This case pertained to a project which involved felling of a large number of trees and the EIA Report was given without proper consideration of this fact. The Supreme Court observed that environmental governance is founded on the rule of law that emerges from the values of the Constitution of India. Environment protection is intricately linked to the Right to Life under Article 21 of the Constitution. Further, it was stated that matters of environmental governance relate not to the present generation but also impact future generations and ensures sustainable development for the present as well as the future.

A notable contribution of the Supreme Court is in *Jitendra Singh v Ministry of Environment and others*⁴⁴ which related to the matter of the alienation of common waterbodies for industrial activities while purporting to provide for alternative waterbodies. It was held that such a scheme of appropriating common natural water resources for industrial activity and providing alternative manmade water sources exhibits a mechanical application of the principles of environmental protection and are liable to be struck down being violative of the constitutional principles. Provision of an alternative water body does not offset the damage caused to the natural waterbody and the ecology dependant on that waterbody. In *Southern Petrochemical Industries Corpn. Ltd. v. S. Joel and others*⁴⁵ diversion of drinking water for industrial purposes was held to be impermissible. The Supreme Court directed the formulation of an administrative mechanism to monitor use of the water and the diversion of the water for industrial purposes; to ensure that the need for drinking water and irrigation was not compromised.

In *Kerala State Coastal Zone Management Authority v. State of Kerala Maradu Municipality and others*⁴⁶ the Supreme Court took judicial notice of recent devastation in Kerala due to heavy rains compounded by unbridled construction activities which resulted in colossal loss of human life and property due to such unauthorised activity. It was stated that mere grant of permit for construction does not permit the violation of laws relating to the Environment. Accordingly, construction in protected zones were held to be illegal and directed to be removed. In *Keystone Realtors Pvt. Ltd. v. Anil V. Tharthare and others*⁴⁷ it was emphasised that construction should not be undertaken without compiling ample scientific evidence to understand the true environmental

44 [2020] 20SCC581 (SC).

45 [2020] 17SCC619 (SC).

46 [2019] 7 SCC248 (SC).

47 [2020] 2 SCC66 (SC).

48 [2019] 14SCC411 (SC).

impact of a project. In this case, the Supreme Court directed that the project should be evaluated to bring its environmental impact as close as possible to that contemplated in the Environmental Clearance. The Supreme Court also directed that compensation be levied from the appellant.

A notable contribution of the Supreme Court in striking a balance between development and urbanisation, and environment protection is in *Municipal Corp. of Greater Mumbai and others v. Hiranman Sitaram Deorukhar and others*⁴⁸ wherein the public interest in the reservation and preservation of open spaces for parks and play grounds was upheld. It was stated that such open spaces cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other use. Further, it was held to be in the public interest to avoid unnecessary conversion of open spaces for urban uses, thereby protecting against the resultant impacts of urbanization, such as pollution. In *Tata Housing Development Company Ltd. v. Aalok Jagga and others*⁴⁹ the Supreme Court ruled that housing projects cannot be undertaken near a wildlife sanctuary. The Supreme Court emphasised on the State's role under the doctrine of public trust to protect the ecological diversity.

E. Contribution of the Supreme Court in protection of bio-diversity

The Supreme Court has acted to preserve the bio-diversity in India in *MK Balakrishnan and others v Union of India and others*⁵⁰ wherein the High Courts were directed to take up matter as a *suo motu* public interest litigation to ensure that Ramsar Convention sites within their jurisdiction are properly maintained. In *Research Foundation, Science Technology and Ecology and Another v. Union of India and others*⁵¹ the Supreme Court noted the proactive approach of the government in preservation of bio-diversity in India and directed the petitioners to make a representation to the government suggesting suitable measures for protection of biodiversity and to prevent bio-piracy.

F. Supreme Court on mining *vis-à-vis* environment protection

The Supreme Court has also acted to protect the environment against indiscriminate mining. In *Talaulicar and Sons P. Ltd. v. Union of India and others*⁵² the Supreme Court directed that the Environment Clearance granted for mining be re-looked to consider pertinent environmental issues. In *Common Cause v Union of India and others*⁵³ the Supreme Court held that the holder of a mining lease was obliged to adhere to the standards laid down under the Environment (Protection) Act, 1986, Forest (Conservation) Act, 1980 as well as the laws pertaining to air and water pollution. Failure in adhering

49 [2020] 15 SCC784 (SC).

50 [2017] 7 SCC 805 (SC).

51 [2016] 14 SCC296 (SC).

52 [2016] 8SCC299 (SC).

53 [2017]9 SCC499 (SC).

54 [2020] 17SCC157 (SC).

to the provisions of the statutes or the Rules or the terms and conditions of the mining lease would render the person liable to incur penalties. Further, the Supreme Court held that the grant of an ex-post facto environmental clearance is not permissible as it would be detrimental to the environment and could lead to irreparable degradation of the environment. A similar stance is adopted by the Supreme Court in *Alembic Pharmaceuticals Limited v. Rohit Prajapati and others*.⁵⁴ In *The Goa Foundation v. Sesa Sterlite Ltd. and others*⁵⁵ the Supreme Court emphasised on the consideration of an overall perspective on mining issues to consider its impact on the environment and the people. Further, the Supreme Court stated that the exercise of executive prerogative by a public authority must serve the public interest and should facilitate distribution of scarce natural resources to achieve public interest. The cruciality of environmental and ecological interests vis-à-vis the mining policies was highlighted and it was stated that governance should seek to consider both interests and strike a balance between the two interests. In *Common Cause v. Union of India and others*⁵⁶ where mining in excess of the permitted limits was carried out, the Supreme Court directed the authorities to calculate the quantum of excessive or illegal mining carried out and determine the consequent penalty. In *Director General (Road Development) National Highways Authority of India v. Aam Aadmi Lokmanch and others*⁵⁷ the Supreme Court held the National Highways Authority of India and the mining leaseholder to be liable for destruction due to floods caused by unauthorised mining, as they were aware and could foresee the event.

III. CONCLUSION

55 [2018] 4 SCC218 (SC).

56 [2019] 11SCC674 (SC).

57 [2021] 11 SCC566 (SC).

58 Singh, V.& Mishra, V. 'Environmental impacts of coronavirus disease 2019 (COVID-19)' [2021] 15 Bioresource Technology Reports <https://www.sciencedirect.com/science/article/pii/S2589014X21001225> accessed 28 May 2022.

59 Khan I, Shah D & Shah S.S. 'COVID-19 pandemic and its positive impacts on environment: an updated review' [2021] 18(2) Int. J. Environ Sci. Technol. (Tehran) 521.

60 Down To Earth 'COVID-19 will place India's biomedical waste management under terrible strain' <<https://www.downtoearth.org.in/news/waste/covid-19-will-place-india-s-biomedical-waste-management-under-terrible-strain-77714>>, The Hindu 'Biomedical waste increases amidst second wave, sets off warning bells' <<https://www.thehindu.com/news/national/karnataka/biomedical-waste-increases-amidst-second-wave-sets-off-warning-bells/article34730820.ece>>, Times of India 'Telangana stares at biomedical waste crisis amid Covid' <<https://timesofindia.indiatimes.com/city/hyderabad/t-stares-at-biomedical-waste-crisis-amid-covid/articleshow/84533758.cms>>.

61 Central Pollution Control Board 'Guidelines for Handling, Treatment & Disposal of Waste Generated during Treatment/Diagnosis/Quarantine of Covid-19 Patients' < <https://www.cpcb.nic.in/uploads/Projects/Bio-Medical-Waste/BMW-GUIDELINES-COVID.pdf>>

The year 2020 notably brought with it the Covid-19 pandemic. From an environmental perspective, the lockdowns have resulted in a reduction of pollution due to reduction in industrial activity and vehicular use.⁵⁸ This has resulted in a reduction in the emission of greenhouse gases, and other polluting gases.⁵⁹ The pandemic has also caused an increase in bio-waste with the extensive use of masks, PPE kits and other medical paraphernalia.⁶⁰ This poses a new environmental challenge which needs to be addressed urgently to counter the damage caused to the environment. While several guidelines and rules have been issued regarding Covid-19 bio-waste management by the State Governments⁶¹, this issue has not been taken up by the Supreme Court. Judicial scrutiny of the steps taken to curb pollution and environmental damage by Covid-19 related bio-waste and the compliance with the existing policies on the same would be fruitful to ensure this issue is addressed at the onset.

The Supreme Court in the period from 2015 to 2020 has played an active role in environment protection. It has stepped into the breach where executive inertia and failure has led to grave environmental degradation. The Supreme Court has sought to make the relevant authorities realise their duty towards the environment, and has often directed their steps to ensure the damage is prevented and reversed. The Supreme Court has been a vigilant watchman seeking to ensure that every potential threat to the environment is addressed and managed. Interesting in its contribution is the line of balance that the Supreme Court draws between development activities and environment protection. This fine line of balance emphasises the goal of sustainable development – to ensure the environment and ecological diversity is preserved for future generations while allowing for necessary developmental, industrial activities which are also necessary for the existence of the human race. Wildlife also constitutes an essential element of our ecological heritage and the steps taken by the Supreme Court to conserve our wildlife is a significant contribution to the cause of sustainable development. The Supreme Court' approach is forward looking with a vision to conserve our ecological heritage for future generations.

Threat of Cyber Crimes Amid the Covid-19 Pandemic and the Need for Cyber Hygiene - A Global Event

*Dr. Atul Satwa Jaybhaye**

ABSTRACT

The entire world was fighting to overcome the spread of the COVID-19 pandemic and, on the other hand, cybercriminals started taking undue advantage of the helplessness of the public and deceived countless netizens by adopting the newest trends and techniques of cyber-attacks. The enormous threat of the COVID-19 pandemic compelled India to impose a lockdown in March 2020 as a preventive measure to fight against coronavirus. The impact of the lockdown resulted in massive use of technology and the internet for netizens, due to which victimization of cyber frauds also increased automatically. Phishing attack, Hacking, ATM Skimmer Fraud, Ransomware attack, Denial of service attack, SIM swap fraud, QR Code fraud on OLX, Data Breaches, Dissemination of fake news, Cloning of Social media accounts, Cloning of Govt websites and fingerprints, Cyberbullying, Pegasus software controversy, Juice jacking are just a few examples of global cyber-attacks. Most netizens are unaware of cyber hygiene and netiquette, which must be strictly followed while browsing or carrying out online transactions in cyberspace. There is a high need to sensitize the general public about emerging cybercrimes in the digital age and appropriate preventive measures to combat the same.

Keywords: Covid-19 pandemic, Cyber Crimes, Phishing, Dissemination of fake news, Cyber hygiene.

INTRODUCTION

Cybercriminals cheated innumerable people amid the covid-19 pandemic by adopting different tricks and techniques for committing cybercrimes. Cybercrime is a crime where a computer is used as a target or a tool for carrying out illegal activities in cyberspace. In this age of information technology, we often rely on computers, mobile phones, and other devices for executing many works. Also, due to the enormous

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growth of technology and internet users amid the COVID-19 pandemic, India witnessed an alarming threat of cybercrimes as cyber criminals were hyperactive to target the needy, greedy, and technologically unknown people. Cyber anonymity has posed various challenges where different tools can be used to commit cybercrimes and even law enforcement agencies find it difficult to trace the actual IP (Internet Protocol) address of the cyber fraudster. The darkweb is one of the examples where illegal activities are carried out such as narcotics, firearms, and stolen credit card numbers are bought and sold by hiding identity. However, the TOR browser is very much essential to access the dark web. A cyber-criminal may use VPN (Virtual Private Network) over TOR for anonymity.

The faster spread of the COVID-19 pandemic across the world was a golden opportunity for cyber criminals where there was an enormous threat in cyberspace for netizens. Phishing attack, Hacking, ATM Skimmer Fraud, Ransomware attack, Denial of service attack, SIM swap fraud, QR Code fraud on OLX, Data Breaches, Dissemination of fake news, Cloning of Social media accounts, Cloning of Govt websites and fingerprints, Cyberbullying, Pegasus software controversy, Juice jacking are just a few examples of global cyber-attacks. India was also badly affected and became a victim of cyber warfare instances due to its flawed cyber security measures. Moreover, The Information Technology Act, 2000 (hereinafter referred to as IT Act) has been criticized by many cyber experts as a 'toothless tiger' that needs more teeth to bite. The IT Act has failed to address issues concerning handling emerging trends in cybercrimes and protecting the data of the individuals in cyberspace. This Act saw major amendments in the year 2008 and needs to be revamped taking into consideration alarming threats in cyberspace. Apart from this, it seems that the victimization of netizens in cyberspace has increased due to unawareness of growing cybercrimes in the digital age. Hence, there is a need to educate them about various threats involved in cyberspace and appropriate preventive measures to combat the same. The researcher, in this article, has tried to cover the eminent cyber-attacks in-depth that took place amid the Covid-19 pandemic and has appealed to follow cyber hygiene.

CYBER-CRIME DEFINED

The term cyber-crime is not defined as such under the Indian jurisprudence, however, in general terms, cyber-crime means any illegal activity which is carried over or with the help of the internet or computers. General definitions of cyber-crime are as follows:

“Criminal activity (such as fraud, theft, or distribution of child pornography) committed using a computer especially to illegally access, transmit, or manipulate data”¹

“Criminal activities carried out by means of computers or the Internet”²

1 Available at, <https://www.merriam-webster.com/dictionary/cybercrime> (Visited on May 1, 2022).

2 Available at, <http://www.oxforddictionaries.com/definition/english/cybercrime> (Visited on May 1, 2022).

“Cyber-crime, also called computer crime, the use of a computer as an instrument to further illegal ends, such as committing fraud, trafficking in child pornography and intellectual property, stealing identities, or violating privacy”³

“Cybercrime consists of criminal acts committed online by using electronic communications networks and information systems”⁴

“The use of a computer to take or alter data, or to gain unlawful use of computers or services”⁵

CORONAVIRUS DISEASE-2019

On 30th January 2020, the Centers for Disease Control and Prevention (CDC) (2020) and the WHO (2020a) jointly announced the outbreak of a deadly respiratory novel coronavirus (COVID-19). Coronavirus Disease-2019 is an infectious disease caused by a new strain of coronavirus. The ‘CO’ stands for corona, ‘VI’ stands for virus and ‘D’ stands for disease. The virus that causes COVID-19 is transmitted mainly through droplets generated through coughing, sneezing, and exhaling from an infected person. In addition, these droplets can land on surfaces, because they are too heavy to hang in the air, and thus, touching such surfaces exacerbates the transmission and infection rates. Exponential COVID-19 infection rates were recorded between February and June 2020 in Europe, the United States, and some Asian countries. Concerning Africa, South Africa recorded an average of 2500 daily infections.⁶

To date, the WHO (2020b) stated that more than 46 million cases of COVID-19 infections have been reported globally. Out of the 46 million reported cases, more than 31 million people have recovered, whilst more than 1.2 million have succumbed to the pandemic. Countries experiencing high COVID-19 infection rates include the United States (9.4 million), India (8.2 million), Brazil (5.5 million), and Russia (1.7 million).⁷

The emergence of the pandemic had brought panic, apprehension, and anxiety to everyone with no solution or cure in sight. Whilst the global village’s attention was focused on fighting and combating the spread of COVID-19, another wave of cybercrimes was growing exponentially, creating a headache for firms and cybersecurity experts. Cybercriminal syndicates are well-versed with global trends, have up-to-date information, and know very well that everyone is focusing on the COVID-19 pandemic; therefore, with advanced intelligence, these criminals are attacking information systems designed to help fight the pandemic. These well-orchestrated attacks on information systems demonstrate the level of intelligence inherent in the

3 Available at, <https://www.britannica.com/topic/cybercrime>(Visited on May 2, 2022).

4 Available at, https://ec.europa.eu/home-affairs/cybercrime_en(Visited on May 2, 2022).

5 Available at, <https://legal-dictionary.thefreedictionary.com/cybercrime> (Visited on May 2, 2022).

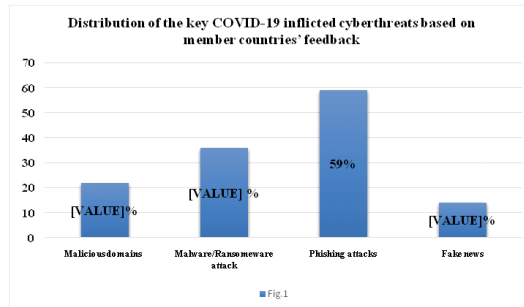
6 Chigada Joel and MadzingaRujeko, “Cyberattacks and threats during COVID-19: A systematic literature review” *South African Journal of Information Management* 23(1) 1-11 (2021).

7 Id. at 6.

minds of cyber criminals, prompting the global village, specifically cybersecurity and information systems experts, to be worried about the scourge.⁸

KEY COVID-19 CYBERTHREATS:

Comprehensive analysis of data received from member countries of INTERPOL



INTERPOL is the world's largest international police organization which assists law enforcement agencies in 194 member countries to combat all forms of transnational crime.⁹

(A) Phishing attacks:

Sensitive information can be stolen with the help of phishing attacks. In this type of cyber-crime, a cyber fraudster may send a malicious link to the victim to obtain confidential information which includes credit card details, username, password, bank details, etc. Once a cyber-criminal gains access to confidential information, he can carry out unauthorized transactions. Many times, victims are not in a position to differentiate between genuine and phishing websites/e-mails, who eventually fall into the traps of the phisher. Individuals and organizations can be easy targets of this phishing attack.¹⁰

The phishing attack was one of the most common attacks amid the COVID-19 pandemic, which is crystal clear from the analysis of data received from member countries of INTERPOL, described above in figure 1. India was also badly affected due to the alarming rise in phishing attacks. The cybercriminals targeted the health care infrastructure and also created bogus websites offering financial assistance, fake investment opportunities, sale of substandard oxygen cylinders, PPE kits, face masks, hand sanitizers, medicines, etc. It is pertinent to note that cybercriminals study the psychology of victims and easily target them by using different tricks and techniques. Therefore, the modus operandi of cybercrime keeps on changing over a period of time.

⁸ Ibid.

⁹ Available at, <https://www.interpol.int/content/download/15526/file/COVID-19%20Cybercrime%20Analysis%20Report-%20August%202020.pdf> (Visited on May 5, 2022).

¹⁰ Akarshita Shankar, Ramesh Shetty *et. al.*, "A Review on Phishing Attacks" *International Journal of Applied Engineering Research* 14(9) (2019) Available at, https://www.ripublication.com/ijaer19/ijaerv14n9_15.pdf (Visited on May 6, 2022).

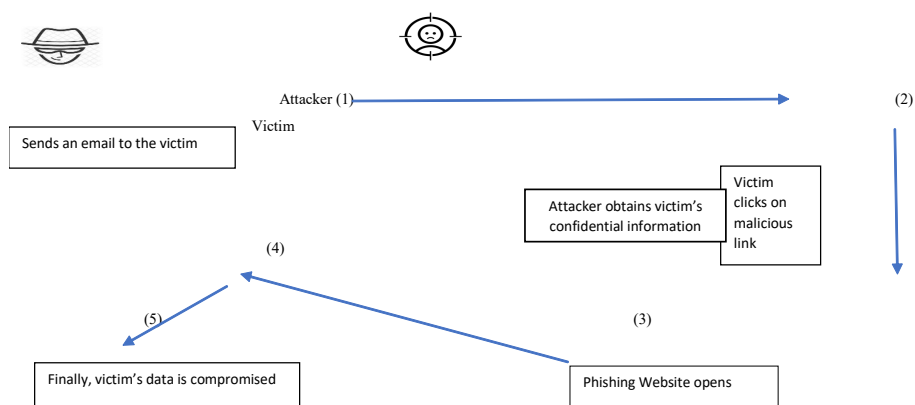


Fig. 2: Simplistic model of phishing attack

(B) SIM Swap Fraud: How does it work?

SIM swap fraud is one of the major growing concerns for mobile network operators, banks, and cell phone users alike. A cyber fraudster first may select a specific person as a target and obtains his or her personal information including banking details such as account number, credit card number, login credentials (username and password), and also registered mobile number with the bank. This confidential information can be collected by a cyber-criminal through phishing attacks, which we have already discussed above. Then, a cyber-criminal may visit a mobile operator's retail outlet posing as the victim with ID proofs and other details. Further, he requests to issue a new SIM card citing various reasons which may include SIM card loss/damage. When a SIM swap is performed, the old (victim's) SIM card is disabled and the cyber-criminal gets access to a new SIM card.¹¹

The fraudster will now use the credentials that were acquired through a phishing attack, on the online banking website of the bank where the victim has an account. Upon successful login, the bank will send an SMS notification to the account holder's cell phone number to inform him about it, but because the fraudster has hijacked his cell phone number, the notification will be delivered to the fraudster's cell phone instead. This is how a cyber-criminal can loot a victim's account by conducting fraudulent transactions.¹²

Consequently, several cases of SIM swap fraud have been reported across the globe amid pandemics. It is rightly said that technology is a double-edged sword that makes our life easier and difficult too. Therefore, everyone should be vigilant and well prepared to face unforeseen crimes in this digital era.

¹¹ Louis Jordaan and Basie von Solms, "A Biometrics-Based Solution to Combat SIM Swap Fraud" available at https://link.springer.com/content/pdf/10.1007/978-3-642-19228-9_7.pdf (Visited on May 6, 2022).

¹² Ibid.

(C) DATA BREACHES

Nothing is more indispensable today than our data which is highly at risk in cyberspace. The data is like gold which can be purchased and sold through the dark web. Cybercriminals have come up with new tricks to compromise the data of individuals and entities. COVID-19 has witnessed prominent data breaches which include Zoom App data breach, Air India data breach, Mobi Kwik data breach, Domino's data breach, etc.

Zoom video conferencing app stands out from its competitors as the app becoming one of the most popular video-conferencing players in a time when many companies globally are looking for ways to maintain communication with their employees during the transition to a work-from-home model. At a time of huge success, Zoom is pressed with many privacy and security backlash from security experts, privacy advocates, lawmakers, and governments including India. Apple silently removed the Zoom software from Macs last year after a serious security vulnerability. The scrutiny over Zoom's security practices has intensified, with a lot of the concern focused on its default settings and mechanisms in recent days. Security researchers have found that allowing anyone to get into meetings is even brute.¹³

The most damning issue that came to light is the "Zoom bombing" episode. It allowed pranksters to join Zoom calls and broadcast porn or shock videos. One of the mistakes of Zoom is its default settings do not compulsorily insist on a password to be set for meetings. It also allows any participants to share their screens. Zoom is very prominent in India during the nationwide lockdown as more and more professionals preferred working from home. The video conferencing app Zoom faced a blow from the Indian government for its privacy concerns that flipped globally. The Home Ministry cautioned Zoom users about placing important data with the video conferencing app.¹⁴

Air India in its notification to passengers has stated that SITA PSS our data processor of the passenger service system (which is responsible for storing and processing of personal information of the passengers) had recently been subjected to a cybersecurity attack leading to personal data leak of certain passengers. This incident affected around 4,500,000 data subjects in the world. The breach involved personal data registered between 26th August 2011 and 3rd February 2021, with details that included name, date of birth, contact information, passport information, ticket information, Star Alliance and Air India frequent flyer data (but no passwords data were affected) as well as credit cards data. However, in respect of this last type of data, CVV/CVC numbers are not held by our data processor.¹⁵

13 Ms.Saranya. K and E.Francisca Antoinette Radhika, "Case Study: Zoom-Bombing Sour Users On App" *International Journal Of Current Engineering And Scientific Research (IJCESR)*, 7 (10)(2020) available at <http://troindia.in/journal/ijcesr/vol7iss10/47-49.pdf>(Visited on May7, 2022).

14 Ibid.

15 Available at <https://www.airindia.in/images/pdf/Data-Breach-Notification.pdf>(Visited on June 5, 2022).

Similarly, Domino's data breach was another significant breach amid the COVID-19 pandemic where 180 million Domino's India pizza orders are up for sale on the dark web, according to Alon Gal, Chief Technology Officer of cyber intelligence firm Hudson Rock.

Gal found someone asking for 10 bitcoin (roughly \$535,000 or ¹ 4 crores) for 13TB of data that they said included 1 million credit card records and details of 180 million Domino's India pizza orders, topped with customers' names, phone numbers, and email addresses. Gal shared a screenshot showing that the hacker also claimed to have details of Domino's India's 250 employees, including their Outlook mail archives dating back to 2015.¹⁶

Jubilant Food Works, the parent company of Domino's India, told IANS that it had experienced an information security incident, but denied that its customers' financial information was compromised, as it does not store credit card details.¹⁷

(D) DISSEMINATION OF FAKE NEWS

Acting on the wrong information can kill. In the first 3 months of 2020, nearly 6000 people around the globe were hospitalized because of coronavirus misinformation, recent research suggests. During this period, researchers say at least 800 people may have died due to misinformation related to COVID-19.

At its extreme, death can be the tragic outcome of what the World Health Organization has termed the infodemic, an overabundance of information - some accurate, some not - that spreads alongside a disease outbreak. False information runs the gamut, from discrediting the threat of COVID-19 to conspiracy theories that vaccines could alter human DNA.¹⁸

Misinformation about COVID-19 has proliferated widely on social media, ranging from the peddling of fake "cures," such as gargling with lemon or salt water and injecting yourself with bleach, to false conspiracy theories that the virus was bioengineered in a lab in Wuhan, or that the 5G cellular network is causing or exacerbating symptoms of COVID-19.¹⁹

Below mentioned are some more examples of the Dissemination of fake news:

- Coronavirus can be transmitted through houseflies or mosquito bites.
- Drinking hot water, cow urine, methanol, or alcohol has been recommended as a proven cure for COVID 19.

16 Available at, <https://www.csoononline.com/article/3541148/the-biggest-data-breaches-in-india.html>(Visited on June 5, 2022).

17 Ibid.

18 Available at, <https://www.who.int/news-room/feature-stories/detail/fighting-misinformation-in-the-time-of-covid-19-one-click-at-a-time>(Visited on June 14, 2022).

19 Available at, <https://www.frontiersin.org/articles/10.3389/fpsyg.2020.566790/full>(Visited on June 14, 2022).

- Tunisian researchers discovered a cure for COVID 19.
- Israel has developed a vaccine for COVID 19.
- Communities of certain ethnicity or religion (such as Muslim communities in India) are to be blamed for spreading the virus in India.²⁰

(E) CLONING OF SOCIAL MEDIA ACCOUNTS

Modus Operandi:

- Fraudsters create fake accounts using details of the users of social media platforms such as Facebook, Instagram, Twitter, etc.
- Fraudsters then send a request to the users' friends asking for money for urgent medical purposes, payments, etc.
- Fraudsters, using fake details, also contact users and gain users' trust over a period of time. When the users share their personal or private information, the fraudsters use such information to blackmail or extort money from the users.²¹

The number of users on social media accounts is increasing tremendously day by day and many users are not aware of the safety measures to be followed on such accounts. As a result, a large number of accounts were cloned worldwide amidst the COVID-19 pandemic. The cyber fraudster doesn't require any special skills for cloning social media accounts which can be done easily by using the personal details of the victim such as photo, name, etc. Moreover, if the profile is unlocked then the task of cloning becomes easier, because, the fraudster can download the image of the victim and can go through the entire friend list too. Hence, it is always advisable to lock profiles on social media accounts to prevent any untoward incidents.

(F) LOAN APP FRAUD

Gone are the days, when we used to rely completely on brick-and-mortar offices for various works such as electricity bill payments, reservation of railway tickets, property tax payment, withdrawal and deposit of money, the requirement of the loan, etc. Now, due to the advent of technology, these essential works can be executed through android mobile applications which provide a platform for e-consumer in cyberspace. However, cybercriminals are developing bogus mobile applications/ software to lure consumers in. No doubt, mobile apps promote e-commerce and e-governance but they may pose threat to our sensitive information if we are not vigilant enough. Loan app fraud is one of the recent trends in cyber-crimes of which people are not aware and fall prey to this scam easily.

20 Available at, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7404621/> (Visited on June 14, 2022).

21 Available at, <https://rbidocs.rbi.org.in/rdocs/content/pdfs/BEAWARE07032022.pdf> (Visited on June 22, 2022).

The number of complaints about scams involving loan apps has gone up exponentially in 2021 and 2022. Thanks to the smartphone craze and dirt-cheap data plans, people, who need money, are falling prey to unauthorized loan apps.²²

Modus Operandi:

- People are lured by promising a higher loan amount without paperwork. Customers will get the money instantly but less than the promised sum. As the customer installs the app, it will have access to sensitive information of the customer.
- It will gain access to phone contacts, gallery, and other information. Using this information, the company will adopt harsh recovery tactics. The loan agents will abuse and harass the customers and will go up to the extent of calling the friends and relatives of the customers from their contact list. In some cases, customers died by suicide after cyber fraudsters allegedly circulated morphed photos for failing to repay loans taken through an instant loan mobile app.²³

RBI Findings:

A Reserve Bank of India (RBI) Working Group on digital lending said in a report that as many as 600 “illegal loan apps” are there in several app stores for Android users in India. A total of around 1,100 unique Indian loan apps that have the keywords such as loan, instant loan, quick loan, etc, are available in the App stores. To prevent illegal digital lending activities, RBI has proposed the Government of India formulate new legislation.

The maximum number of complaints have been filed in Maharashtra, followed by Karnataka, Delhi, Haryana, Telangana, Andhra Pradesh, Uttar Pradesh, West Bengal, Tamil Nadu, and Gujarat, according to the RBI report.²⁴

(G) CLONING OF GOVT. WEBSITES AND FINGERPRINTS:

This was another big challenge in front of the government to protect its website from getting cloned and hacked. As COVID-19 was on the surge, government websites were used to reach the needy people and provide medical support such as vaccination registration, helpline numbers, guidelines for home isolation, and effective control of COVID-19, Do's and Don'ts, etc. The basic idea behind launching these websites was to connect to the public at large seamlessly and to reduce the number of rising cases by creating awareness. On the other hand, cybercriminals were ready to attack the government's virtual infrastructure.

22 Available at, <https://www.oneindia.com/india/instant-loan-apps-in-india-don-t-fall-prey-to-scams-important-points-to-consider-before-taking-loa-3416706.html?story=3> (Visited on June 27, 2022).

23 Ibid.

24 Ibid.

Several member countries reported malware attacks against the critical infrastructure of government organizations, hospitals, and medical centers, which are overwhelmed with the health crisis. Such as ransomware or DDoS attacks intend to make data inaccessible or disrupt the system, exacerbating an already dire situation.²⁵

More than a third of the member countries are monitoring a growing influx of newly registered domains (NRDs) with “COVID” or “Corona” keywords. Similar to COVID-19-themed phishing campaigns, a high percentage of domains that claim to provide COVID-19 updates, tracking systems, or statistics are used for a wide variety of malicious activities exploiting the public’s thirst for information during the pandemic. As of the end of March 2020, 116,357 COVID-19 NRDs were detected, out of which 2,022 were identified as malicious and 40,261 as “high-risk”. In June 2020, INTERPOL Cybercrime Directorate’s Global Malicious Domain Taskforce identified and analyzed 200,000 malicious domains affecting more than 80 member countries.²⁶

Another area of concern is the increasing number of fraudulent websites, which exploited the recent surge in demand for surgical masks, personal protective equipment, coronavirus test kits, and medical ventilators to host illicit trade in these key supplies. The tactics of the websites’ owners differ and include copying a legitimate site, selling unlicensed items or counterfeit goods, or taking payment for the items without delivering them. Moreover, there exists a challenge when the money paid by the victims of illegal trade is sent to overseas bank accounts, which creates difficulties in both the crime attribution and recovery of financial loss.²⁷

(H) MATRIMONIAL FRAUD:

Matrimonial frauds have seen massive growth across the globe during COVID-19. It was found that Nigerians were actively involved in this type of crime. A divorcee, old-aged unmarried, and financially sound woman was a common target of the fraudster.

Modus Operandi:

- Fraudsters create fake profiles on matrimonial websites as “NRI” men looking for brides, identify their targets and insinuate themselves into their lives. After establishing the contact, the suspect would build trust through regular conversation on social networking sites.²⁸
- After stabling the high-level trust with the victim, the suspect would go in for the crime. He would tell the victim that he is coming to India and then his final execution of the plan starts where he convinces the victim that after he arrived in India he lost all his valuables to thieves, or has been detained

25 Supra Note 9.

26 Ibid.

27 Ibid.

28 Devyani Gupta and Prabhjot Singh, “Matrimonial Cyber Crimes” *International Journal of Law Management & Humanities* 4 (4) 459.

by customs officials, and then, to bribe the authorities concerned, or claiming to have no money remaining, the suspect would ask the women for large sums. By now, ensnared in the suspect's honey trap, the victim would willingly transfer the money to the suspect, after which, he would vanish into the thin air.²⁹

A 33-year-old woman swindled of Rs 22.2 lakh in matrimonial fraud:

A 33-year-old woman on Thursday filed a complaint against a man she got familiar with through a matrimonial website, accusing him of duping her of Rs 22.2 lakh on the pretext of marriage. The woman, who is highly educated, transferred the money in phases between January 2021 and March 2022 to the bank account numbers provided to her by the man. Around June last year, a man posing as a medical practitioner from the UK contacted the woman via video call. He used to tell her to book flight tickets for him or send money for his expenses. He even told her that he had sent her gold as a gift and took money for tax, said inspector Pradip Patil of the Bhosari MIDC police, Pune.³⁰

NEED FOR CYBER HYGIENE AND NETIQUETTES

As of now, we have discussed in detail different types of cybercrimes that took place amid the COVID-19 pandemic and the modus operandi of the cyber fraudsters. Now, it is essential to understand how not to fall prey to this emerging type of crime. When COVID-19 was spreading faster across the globe, we used to take precautions such as washing hands frequently, social distancing, avoiding crowded places, etc. Similarly, whenever we browse or carry out online transactions in cyberspace, we must adhere to cyber hygiene and netiquettes. However, most netizens are unaware of this and hence the number of cybercrimes is on the rise. Therefore, we need to be more vigilant and follow cyber hygiene and netiquettes listed below:

1. Always browse through HTTPS sites and not HTTP.
2. Dial 155260 to report financial frauds.
3. Report all cybercrimes on cybercrime.gov.in
4. Note down the URL address and take a screenshot of any offensive messages/images.
5. Don't trust your screen, verify all the things minutely.
6. Keep changing your passwords frequently. Don't set the password as your name, date of birth, mobile number, vehicle number, etc.
7. Use a two-factor authentication method for e-mail, Facebook, and WhatsApp accounts.

²⁹ Ibid.

³⁰ Available at, <https://timesofindia.indiatimes.com/city/pune/33-year-old-woman-swindled-of-22-2-lakh-in-matrimonial-fraud/articleshow/90314299.cms> (Visited on July 4, 2022).

8. Don't use public Wi-Fi.
9. Use Antivirus software for computers/laptops. Update your Apps and computers on regular basis.
10. Don't click on any unknown links received through the mail or social media accounts.
11. Never respond to phone calls asking for bank details. It might be a phishing attack.
12. Before registering on a matrimonial website, check the authenticity and reviews of the website. Always refrain from sharing your personal information such as number, photos, email-id, etc. until you are completely sure and have done a thorough background check.
13. Lock your social media accounts and hide your friend list which is accessible only to you and not others.

CONCLUSION

The deadly COVID-19 has taken the lives of many and has badly affected the world economy too. Whereas, cyber criminals considered this pandemic as an opportunity to target needy, greedy, and technologically unknown people. They succeeded in their plan by adopting the newest trends and techniques to commit cybercrimes. The phishing attack was most common amid COVID-19 according to data received from member countries of INTERPOL. COVID-19 has taught us a lesson that cyber hygiene is as much essential as health hygiene. If we disregard cyber hygiene then it may result in any untoward incident in cyberspace. Therefore, it is rightly said that technology is a double-edged sword that needs to be handled with care and caution.

Role of PIL in Evolution of Environmental Judicial Activism in India

*Dr. Deepa Kaushik**

ABSTRACT

Industrialization and urbanization has led to deforestation, global warming, environmental pollution which poses a serious threat to environment and people across the globe. Stockholm declaration in 1972, held that the world has one environment. Preserving the environment protects the health of every individual and a healthy individual promotes the development of the environment and nation as a whole which is the need of the hour. Although there are a number of Constitutional provisions which safeguard the environment such as Article 48-A and 51-A(g), role of judiciary, the guardian of Indian Constitution also can not be denied in interpreting Environment protection through a number of judicial pronouncements and PILs. Judiciary has evolved various principles while pronouncing judicial decisions in relation to environmental issues. Principle of sustainable development is one such approach which if followed can fulfil the basic human right of leading a healthy, dignified life. Nature has gifted us with the resources and a pollution free environment, thus this casts a duty upon the citizens to keep these resources in the same condition for the future generations.

Keywords: *Environment Protection, Judicial Activism, Sustainable Development, Judiciary, Public Interest Litigation.*

INTRODUCTION

Judicial Activism is the active role played by judiciary in safeguarding fundamental, Constitutional and statutory rights of citizens. Judiciary exercises this power when other two organs i.e. legislature and executive become inactive or fail to discharge their duties as mentioned under the Constitution of India. Apex court through its activism has created a large number of rights at societal or environmental front. As per Section 2(a) of The Environment Protection Act, 1986, the term environment "includes water, air and land and the inter-relationship which exists among and

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between water, air and land, and human beings, other living creatures, plants, micro-organism and property.” Despite of existence of a large number of environment protection legislations and Constitutional provisions, the problems such as air/water/noise pollution, contamination of water bodies, deforestation, global warming were at their peak in the last few decades due to industrialization. But it was the judiciary which developed the principle of Sustainable development in order to harmonise the economic development of the nation and protection of the wholesome environment. Right to lead a healthy life in a pollution free clean environment is not a right recently recognized by judiciary as it was acknowledged by our legal system (IPC, CrPC, CPC, Torts) earlier also. It was from the late eighties that a number of steps were taken to recognize it as a constitutionally guaranteed inviolable fundamental right (often termed as one of the third generation rights). It was because of emergence of concept of locus standi that enabled not only the aggrieved person but also any public spirited citizen to approach the apex court and High court for redressal of their grievances under articles 32 and 226 respectively. Another equally important reason was the recognition of environmental rights as an essential prerequisite to lead a healthy dignified life thereby bringing it within the ambit of Article 21 of Indian Constitution.

CONSTITUTIONAL MANDATE

Article 21 talks about right to life which is widely interpreted by judiciary by pronouncing its various aspects (such as right to pollution free environment, right to clean/safe drinking water etc) in a number judgements.

Article 47¹ emphasises upon need healthy nutrition and environment which can be ensured only by its cultivation in clean and healthy environment.

Article 48-A² also directs the state to not only protect but also improve the surrounding environment, forest and wildlife as it happens to have a direct impact on the health of public at large.

51-A (g) states, “it is a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”.

Article 253³ empowers union to make laws even on the subjects given in state list if it is to effectuate an international treaty or agreement, thereby paving way for enactment of a variety of healthcare legislations.

- 1 Duty of the State to raise the level of nutrition and the standard of living and to improve public health
- 2 Article 48-A: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.
- 3 Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Article 32 and 226 empower the higher judiciary to issue directions and writs in the nature of Mandamus, prohibition etc to safeguard the environment which otherwise can lead to violation of rights enshrined in part III of Indian Constitution.

Not only these but there are many other constitutional provisions that aid to safeguard the environment.

LEGAL DIMENSIONS

A pollution free, hygienic environment is a precondition necessary to ensure a healthy life. Majority of the cases of respiratory, gastric or skin disorders result from unhealthy environmental surroundings. In our Constitution impact of environment on health is enshrined under various provisions such as Article- 21⁴(Fundamental Rights), Article 48-A⁵(Directive Principles) and Article 51-A⁶(Fundamental duties). Environment related provisions are also enshrined under Section 91⁷ CPC, Section 133⁸, 144⁹ CrPC. A number of specific legislations are enacted for the same such as Water Act, Air Act, EPA Act, Wildlife protection Act, Biological Diversity Act, The National Green Tribunal Act, 2010, Compensatory Afforestation Fund Act, 2016 etc.

EVOLUTION OF DOCTRINES AND PRINCIPLES

- **Polluter Pays Principle:** *"If anyone intentionally spoils the water of another... let him not only pay damages, but purify the stream or cistern which contains the water..."* – Plato. This principle imposes a pecuniary and social liability on the polluter to compensate the victims along with essential measures to restore the environment to original state (to undo the harm done). Polluter pays and precautionary principle were recognized as the part of environmental laws in India in the matter of *Vellore citizen's welfare forum v. union of India*¹⁰. Similarly in Bichhri village case¹¹ harmful chemicals were discharged from the industry

4 Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law

5 Article 48-A ensures that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

6 51-A(g) states that to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures

7 It provides that, in the case of a public nuisance or other wrongful act affecting or likely to affect the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted, (a) By the Advocate-General, or (b) With the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

8 Conditional order for removal of nuisance. –. (1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate

9 Here Magistrate may direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if

10 AIR 1996 SC 2718

thereby threatening the lives of local residents, cattles (due to contaminated soil and waterbodies). Holding the polluting unit to be absolutely liable, apex court imposed a hefty fine to reconstitute the environmental damage caused by it.

- **Precautionary Principle:** Adopted in Rio Declaration, 1992, precautionary principle emphasizes upon a social responsibility to safeguard environment and the people when an industrial setup or scientific investigation suggests some possible risk attached to it. Burden of proof is on the actor to show that his actions are environment friendly and will not harm it. This principle was observed in both the cases mentioned above under Polluter pays principle. In a landmark judgement¹² High Court of Karnataka that precautionary principle is a part of Constitutional mandate to protect environment.
- **Sustainable Development Principle:** With the industrialization and urbanization, realizing the need to balance the development and environment, principle of sustainable development was evolved¹³. It states that care should be taken by the present generation while exploiting resources (in the name of development) such that needs of future generation are not compromised. This principle was also incorporated in the NGT Act, 2010. In the case of *Rural litigation and entitlement Kendra v. State of UP*¹⁴, Court stated that natural resources being the permanent assets of nation should not be exhausted for the need of any single generation.
- **Public Trust Doctrine:** Public is the beneficiary of all the natural resources such as air, water, land, sea shores etc and state is considered to be the trustee of all these, having a duty to protect them in the interest of general public against their commercial usage (to meet private interests). Apex court applied this doctrine for the environmental protection in the case of *M.C. Mehta v. Kamal Nath and Others*¹⁵, for the first time.

JUDICIAL PRONOUNCEMENTS/ PILS

In the matter of "*Rural Litigation & Entitlement Kendra (RLEK) v Union of India*" the apex court directed permanent closure of limestone quarries in U.P. to safeguard the rights of natives to lead a healthy life in a healthy environment. Court stated that even though such closure would cause hardship to the lessees of quarries but ecological balance and right to life of people cannot be compromised at any cost.

11 *Enviro-Legal Action v. Union of India*, AIR 1987 SC 1086

12 *Vijayanagar Education Trust v. Karnataka State Pollution Control Board*, AIR 2002 Kant 123

13 The principle of sustainable development was first enunciated by the Brundtland commission (WCED, 1987) and subsequently adopted in the Rio declaration, 1992. Although not legally binding, the Rio declaration, 1992 enunciated the key principles of sustainability.

14 AIR 1987 SC 1037

15 AIR 1997 1 SCC 388

In "*M.C. Mehta v Union of India (Kanpur Tanneries' matter)*"¹⁶, a social activist M.C. Mehta brought the alarming state of river Ganga to the notice of Supreme Court due to discharge of noxious trade effluents from the tanneries of Kanpur. Later they were given some time to install the pre-treatment plants. Thereafter, the court ordered the closure of those tanneries which failed to set up primary treatment plant on the grounds of financial incapacity as health, life and ecology were held to be more important than loss of revenue or unemployment.

It was in the case of "*Municipal Council Ratlam v Vardichand*"¹⁷ where for the first time Supreme Court held, "the State authorities to be mainly responsible to protect and preserve the public health as against the ill effects of environment pollution." Court also stated that financial inability can be no excuse for State authorities to discharge their functions.

Realising the fact that a number of citizens of India are unable to reach the courts to access justice due to economic or physical barriers, Hon'ble justice Bhagwati stated (in the case of *Bandhua Mukti Morcha v. Union of India*¹⁸) that even a genuine piece of letter would be considered a PIL.

In the *Taj Trapezium Case*¹⁹, judiciary protected discolouration of historical monument (Taj Mahal, a national asset) and local residents from the harmful emissions discharged by the refineries in the vicinity of Agra.

Judiciary played crucial role (through its judgement in the case of *TN Godavarman v UOI*²⁰) in protecting, conserving forests in various states by issuing directions to cease ongoing illegal mining activities, saw mills, illegal felling of trees except in accordance with law.

In the matter of *Arjun Gopal v Union of India*²¹ with an aim to protect the environment from the hazardous effects of emissions discharged due to burning of firecrackers during Diwali and GuruPurab, the Supreme court directed burning of only green crackers that too during a fixed time slot given only in specified community areas.

In another case of "*M.C. Mehta v Union of India*"²², Court laid down vehicular emission norms to be strictly followed by people to safeguard the environment from hazardous pollutants emitted by the vehicles.

In the case of "*M.C. Mehta v Union of India*"²³, hon'ble court held that citizens of Delhi, NCR region were facing infringement of their Right to life under Article 21 due to excessive pollution which was happening due to stubble burning in neighbouring

16 1987 4 SCC 463

17 1980 AIR (SC) 1622.

18 (1997) 10 SCC 549

19 1987 AIR 1086

20 1997 AIR 1228

21 2018 SCC OnLine SC 2118

22 AIR 2019 SC 401

23 2020 SCC Online SC 29

states of Haryana, Punjab, Western U.P. Court imposed restrictions on stubble burning and construction activities across Delhi NCR and neighbouring countries. The Apex Court stated "the major culprit of pollution" is industry, transport and road dust and "some part" is stubble burning. "While stubble burning is not the major cause, there is a lot of stubble burning happening in Punjab and Haryana. We request state governments to pursue farmers to stop the burning for a week," Chief Justice NV Ramana said, reading out the order. The court said the centre and states should consider work-from-home for their employees in and around Delhi and farmers should be persuaded to not burn farm waste. The court also directed the center to call an emergency meeting of states and other authorities to decide on immediate steps

Recently a PIL was filed in the Madras High Court in which the Animals welfare association or Organization filed the petition to enforce the State Government of Madras to provide Food, Shelter, Water and all the basic necessities to all the stray animals during the Covid-19 pandemic. The Petitioner submitted that due to various subsequent Lockdowns announced in the State, the Stakeholders who were earlier involved in providing the necessary food materials were either mostly closed or were afraid to step out of their houses. The Delhi high court dismissed a PIL, instead slapping a 1 lakh fine on the petitioners for seeking to halt construction progress during the epidemic, reported Abhinav Garg, emphasizing that the Central Vista is an "important and crucial" project of national importance. The HC agreed with the Centre that all Covid-related safeguards had been taken to prevent project workers from viral infection, and that "we see no reason to discontinue the work" because these workers are staying onsite during the curfew in accordance with DDMA standards.

It is clear from the origins and evolution of civil interest litigation in India that they are for the poor and needy who cannot afford to go to court. It allows a third party to fight for justice on behalf of those whose fundamental rights have been infringed. In India, the focus of public interest complaints has switched away from poverty and toward personal interest. Anyone can now file public interest charges for absolutely anything. But still, we are witnessing increasing number of cases and the concept of public interest litigation is losing its sheen. Our pioneers who led the concept must have not thought that such absurd cases will be filed in the future by public spirited people in the name of public interest.

The Apex Court has created special criteria to oversee the handling and dismissal of matters of public interest in order to prevent abuse of civil interest cases. When the court notices that the applicant who comes to court is acting in good faith and is not seeking profit, personal or political advantage, or any other vital topic, it is necessary for the court to be cautious and cautious. The Supreme Court has the authority to issue writs under Article 226, as is well known. However, Articles 32 and 226 differ in that they distinguish between the two in terms of the nature and purpose of the right conferred by these articles. While the right guaranteed by Article 32 can only be utilized to protect basic rights, the right conferred by these articles can be used to

enforce any rights. Article 226 on the other hand, which can be used not only to the exercise of basic rights but also “to any other purpose as well,” can be used to apply the rights provided by Article 32. As a result, the High Court’s jurisdiction extends beyond the powers conferred on it by Article 32, and the High Courts have the authority to issue papers not only for the enforcement of rights without basic rights, but also for the enforcement of rights without fundamental rights. Other than that, there isn’t any other reason. Parliament may empower the High Court such powers under Art 139 of the constitution. But the power of the Supreme Court to issue writs cannot undermine the Supreme Court under Art 226. Therefore, in other words the order under Art 32 will replace the orders of the Supreme Court previously passed. The document knows as an application can be made as per Art 32 of the Const. which can be made at first most in the Apex Court which is the Supreme Court because Art 32 itself is a fundamental right. It is a very powerful right and not just a process right for every citizen irrespective of his caste, creed, color, gender etc. Thus, there is no need to turn to Article 226 before going to the Supreme Court under Article 32.

CONCLUSION

Environment is so crucial to human life that it is not feasible to lead a meaningful worthy life in absence of a clean pollution free environment. Despite of so many challenges judiciary has made commendable contribution in protecting environment through landmark judicial pronouncements. Role of apex court through PIL (also termed as social action litigation) in evolving the environmental jurisprudence is commendable. Mr. Soli Sorabjee, our former Attorney-General, benefits from inmates who are in dire straits of unavoidable long-term detention, inmates of shelters and in nursing homes by saying that PIL is being abused with increasing frequency and at a faster pace in his latest letter, while advocating for the liberation of the locus standi by the high court. Rejecting questionable PIL is at the border, and in appropriate cases at the expense of the model. The courts must encourage genuine and bona fide PILs while effectively discouraging and restricting public interest litigation for non-public reasons. The PIL process should not be misused because it will create a huge gap between truth and promise. The PIL machine needs a strong and dedicated Bar and Bench in order to thrive. As we people being public spirited citizens must respect and value the court’s time and its importance. Today, public interest cases consume a significant portion of resources and court time. However, large stocks of such cases that fall into the PIL criteria cannot always be true to its facts, this leads to a serious violation of the concept. The issue of such cases and the rule is that it is still difficult to distinguish at times. At times the judiciary has been chastised for overstepping its jurisdiction and failing to carry out its decisions properly. PIL is being abused by members of the public who often misuse it for their personal interests but under disguise of supporting a public cause. Liberal judicial examination of administrative activity is desired by social justice. Standing regulations that are too

restrictive are the antithesis of an efficient management system. Participatory public justice requires activism. Many famous figures dedicated their lives to serve the society. One of them is MC. Mehta, a renowned social activist, an advocate by profession, who acted in such a way as to show that many of his key decisions in various fields, mainly the environment, were obtained by him by examining the number of PILs filed by him. It is important to sensitise people about the environmental issues especially by incorporating it further in the curriculum of not only schools but even in higher educational institutes. Directions must be given to local authorities to promote environmental protection and such must also be enforced by the courts.

Comprehensive Analysis of the Constitutional and Legislative Framework on Mental Health: National and International Perspective

*Dr. Deo Narayan Singh**

INTRODUCTION

Mental health is psychological and emotional condition or process of mind which plays a pivotal role in determining as to how we think, how we feel and how we act upon. Mental illness is a medical problem then what has law got to deal with it? Any transaction, be it contract, a marriage, a transfer of property or a will, has physical or mental elements. The written document or oral declaration containing the recitals of the gift, will or contract comprises the physical element and the intention to perform the transaction with the requisite understanding constitutes the mental element. For the legal validity of the transaction, both the physical and mental elements of the transaction are examined. Mental capacity may be significantly impaired by mental disorder. Consequently, legislative propositions and adjudicative decisions on the validity of various transactions take the presence of mental illness into account. Whether or not mental illness has the effect of rendering a transaction invalid would depend upon the scale of capacity required to undertake it. There is an inverse relationship between the legal capacity and mental disorder. The higher the degree of legal capacity, the lesser the scale of mental disorder required. For example, soundness of mind is required to exercise testamentary capacity.

Soundness of mind defined as a positive mental condition and not just absence of unsoundness of mind. To be more precise, a person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests and so a person who is usually of unsound mind, but occasionally of sound mind, can enter into a contract when he is found to be of sound mind.¹ Any life suffering or a disabling condition can render such capacity questionable. Old age and serious

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1 Section 12, Indian Contract Act, 1872.

physical illness serve as too often raised and frequently accepted examples of unsoundness. A person to be held criminally non-culpable, a person would need to be suffering from such an impairment of his cognitive faculties as to be unable to know either the nature of the act or that it is wrong or contrary to the law².

The maintenance of order is a recognized function of law. This function can be impeded by the dangerous and disruptive manifestations of mental illness. Setting up structures and procedures which control these manifestations is the second mode of legal interaction in this sphere. Confining persons of unsound mind in psychiatric institutions or other places of safe custody is the primary method of controlling the disruptive and dangerous manifestations of insanity. Measures like preventive detention are also resorted to under the policing statute or the civil commitment laws. Confinement of the vagrant mentally ill, insane acquittees and insane undertrials is aimed to fulfil this function of maintaining order. Even as a number of therapeutic dimensions are added to the civil commitment law, posing a danger to the self or others remains a principal ground for ordering compulsory institutionalization³.

Mental disorder is seen to render the bearers of the condition liable to exploitation. Insofar as one function of the law is to provide protection to vulnerable members of society, constructing a protective regime for persons with mental disorder is another task that the law performs in relation to mental disorder⁴.

IMPORTANCE AND NEED OF MENTAL HEALTH LEGISLATION

Mental health legislation is essential for protecting the rights and dignity of persons with mental disorders, and for developing accessible and effective mental health services.⁵ They face stigma, discrimination and marginalization in all societies, and this increases the likelihood that their human rights will be violated. Mental disorders can sometimes affect people's decision making capacities and they may not always seek or accept treatment for their problems. Rarely, people with mental disorders may pose a risk to themselves and others because of impaired decision-making abilities. The risk of violence or harm associated with mental disorders is relatively small. Common misconceptions on this matter should not be allowed to influence mental health legislation.

HISTORY OF MENTAL HEALTH LEGISLATION

Mental illnesses and the diagnoses and treatment of the mental illnesses has been well documented in Ayurveda, the Charak and ShushrutSamhitas, Vagbhat and Ashtanga Sangraha and Ashtanga Hridaya. Ayurveda is a science of life and not just a system of medicine. There are vivid descriptions about the symptoms, etiology

² *Id* at 18.

³ *Ibid*

⁴ *Id.* at 19-20.

⁵ Dr. J. K. Trivedi, "Mental Health Act, Salient Features, Objectives, Critique and Future Directions", *Indian J Psychiatry* 2009 Jan; 51:11-19.

and herbal medication, oil baths, fumigation, shock treatment, so also kindness and humane attitudes to be shown to the patient. But the legal aspects pertaining to the mental illness have not been mentioned anywhere in the ancient Indian literature before the advent of the British.

The Institution of Mental Asylum, was a British concept, the first lunatic asylum was established at Calcutta in or about 1787. In India, as in other parts of the world, the traditional approach to the care of the mentally ill, during the last 200 years, was custodial rather than therapeutic. This system was built by the then rulers in the mould of the mental health care delivery system of contemporary Britain. To build a chain of mental hospitals and to introduce western healing practices in them were conceived and executed by the East India Company. In the early phase of their development, in late 18th century, mental hospitals were meant exclusively for the soldiers, who fought for their British masters against the Indian princes, the civilian officers of the East India Company and the white settlers⁶.

In the early 19th century, experts and administrators believed that the tropical climate was one of the causes of mental disorders among the Europeans living in India. Accordingly European patients, who did not improve within six months after their admission in a mental hospital in India, were sent to England for treatment. The passage money and other expenses were paid by the East India Company as loan to be repaid by the recovered patient. The practice began in 1818. In course of time the cost-effectiveness of this exercise was called into question. In order to regulate the selection of such patients the need for enactment of a law became apparent. In 1851 the "Lunatics Removal Act" was passed. This Act has the dubious distinction of being the first mental health legislation in British India. In pursuance of this Act and the rules framed there under, the flow of patients gradually dwindled, till it came to an end in 1891.

CONSTITUTIONAL LAW AND PERSONS WITH MENTAL ILLNESS

The Constitution of India ensures equality, freedom, justice and dignity of all individuals and implicitly mandates an inclusive society for all including persons with disabilities. As citizens of India, the mentally ill are entitled to all those human and fundamental rights which are guaranteed to each and every citizen by the Constitution of India, to the extent their disability do not prevent them from enjoying those rights or their enjoyment is expressly or impliedly barred by the constitution by any other Statutory law⁷.

6 Gauranga Banerjee, "The Law and Mental Health: An Indian Perspective", *available at*: <http://www.psyplexus.com/excl/lmhi.html> (Visited on May 13, 2016).

7 Shiv Gautam, Sanjay Jain, LalitBatra, Rajesh Sharma and DeeptiMunshi, "Human Rights and Privileges of Mentally Ill Persons", *available at*: http://www.indianjpsychiatry.org/cpg/cpg_2009/article6.pdf (Visited on May 26, 2022).

THE MENTAL HEALTHCARE ACT, 2017 AND ITS OBJECTIVES

The objects and reasons of the Act, is to align and harmonise the existing laws of the country with the Convention on the Rights of Persons with Disabilities in 2007, which was adopted on the 13th December, 2006 at United Nations Headquarters in New York and came into force on the 3rd May, 2008 and signed and ratified the said Convention by India on the 1st day of October, 2007. An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto⁸.

MENTAL HEALTHCARE ACT, 2017:-SALIENT FEATURES

One of the significant contributions of the Mental Healthcare Act, 2017 is the insertion of the definition of “mental illness”. “Mental Illness” means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub normality of intelligence⁹;

The *Mental Health Establishment* under the Act means any health establishment, including Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy establishment, by whatever name called, either wholly or partly, meant for the care of persons with mental illness, established, owned, controlled or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, co-operative society, organisation or any other entity or person, where persons with mental illness are admitted and reside at, or kept in, for care, treatment, convalescence and rehabilitation, either temporarily or otherwise; and includes any general hospital or general nursing home established or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, co-operative society, organisation or any other entity or person; but does not include a family residential place where a person with mental illness resides with his relatives or friends¹⁰;

Determination of Mental Illness shall be in accordance with such nationally or internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organisation) as may be notified by the Central Government. The determination shall not be on the basis of political, economic or social status or membership of a cultural, racial or religious group etc. and past treatment or hospitalisation shall not affect the present or future

8 The Mental Healthcare Act 2017; The Act replaces the Mental Health Act (MHA) of 1987. It was published on 7th April 2017 in the Official Gazette of India. It provides for protection and restoration Property rights of mentally ill persons. The Act is comprised of 126 Sections and 16 Chapters.

9 *Id.* s. 2(s).

10 *Id.* s. 2(p).

determination. The determination of a person's mental illness shall alone not imply that the person is of unsound mind;

The Act envisages that all persons with mental illness are presumed to be able to make treatment decisions. Patients and young people will be provided with information and support to make decisions about their treatment and where a person makes a decision regarding his mental healthcare or treatment which is perceived by others as inappropriate or wrong, shall not mean that the person does not have the capacity to make mental healthcare or treatment decision, so long as the person has the capacity to make mental healthcare or treatment decision. *Chapter-III* of the Act enables a person to make an advance suggestion or directive to record their treatment preferences about the way that person has wished, to be treated or not to be treated, in the event that they become unwell and ceases to have capacity to make treatment decisions and require treatment.

Advance statements by the doctors will provide patients with time and also about decision whether to undergo that treatment or not. Such an advance directive may be revoked, amended or cancelled by the person who made it at any time. In case of minors, the legal guardian shall have right to make an advance directive in writing and all the provisions relating to advance directive, *mutatis mutandis*, shall apply to such minor till such time he attains majority¹¹. The procedure of advance directive shall be reviewed by Central Mental Health Authority periodically. *Chapter IV* provides that a minor shall have a right to have a right to appoint a nominated representative¹². *Chapter V* provides the rights to the persons with mental illness. The Act gives every person the right to access mental healthcare and treatment from mental health services from the Government.⁶⁴ This right shall mean treatment which is affordable, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.

THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

On 22 December, 1995, the Persons with Disabilities (Equal opportunities and full participation) Act, 1995 was introduced for the benefit of disabled persons. The Act seek to place the disabled person on a par with other sections of the society in respect to jobs, education and vocational training. The main purpose of the Act was to define the responsibilities of the central and state governments with regard to the services for disabled individuals so as to make full contribution in accordance with their disability conditions. Blindness, hearing impairment, locomotor disability, mental illness, and mental retardation are the seven disability conditions were covered under the Act¹³.

11 *Id.* s. 8(1)

12 *Id.* s. 12.

13 Niyati Raval, "An Analysis of Mental Healthcare Act, 2017", available at: <http://libertatemmagazine.com/articles/analysis-mental-healthcare-act-2017/> (Visited on July 20, 2017).

Under the Act mental retardation and mental illness are categorized as conditions of disabilities. Thus, the persons with mental illness are entitled to benefits available to Persons with disability as provided under the Act¹⁴. Recently, the government has passed the Rights of Persons with Disabilities Bill 2016 replacing the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.⁹⁵ Under the Act, the types of disabilities have been increased from the existing seven to 21. The newly added types include mental illness, autism spectrum disorder, cerebral palsy, muscular dystrophy, chronic neurological conditions, specific learning disabilities, multiple sclerosis, speech and Language disability, thalassemia, hemophilia, sickle cell disease, multiple disabilities including deaf blindness, acid attack victims and Parkinsons disease. Disability has also been defined based on an evolving and dynamic concept and government will have the power to add more types of disabilities.

CRIMINAL LAW AND THE PERSONS WITH MENTAL DISORDER

The Indian Penal Code, 1860

Section 84 of Indian Penal Code says that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law¹⁵.

The policy of the law is to control not only the sane, but, so far as is possible, also the insane. It is not, therefore, every person mentally diseased who, *ipso facto*, is exempted from criminal responsibility. Such exemption is allowed only where the insane person "is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." This Section lays down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from medical test, that the criminality of an act is to be determined. Section 84 of Indian Penal Code is the primary legislation dealing with the criminal responsibility of mentally ill persons in India.

This law is based on *Mc Naughten* Rules enacted in England. This Section, in substance, is the same as the *Mc Naughten Rules*. These Rules in spite of long passage of time are still regarded as the authoritative statement of the law as to criminal responsibility. One Daniel *McNaughten* murdered Mr. Drummond, the private secretary of Sir Robert Peel, in mistake for that statesman. The acquittal of *McNaughten* on the ground of insanity provoked such widespread dissatisfaction that it became the subject of debate in the House of Lords. In consequence of the debate, the Lords submitted the judges certain abstract questions respecting persons afflicted with insane delusions.

The Code of Criminal Procedure, 1973

Code of Criminal Procedure, 1973, Chapter XXV laid down the procedure for the trial of unsound person. The Code provides that:

¹⁴ The Mental Healthcare Bill, 2013.

¹⁵ The Indian Penal Code, 1860, s. 84.

When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing¹⁶.

Civil Law and the Persons with Mental Disorder:-The Indian Contract Act, 1872

Sections 6, 11 and 12 of the Indian Contract Act, 1872, deal with the responsibility of the insane with regards to contracts. Section 6(4) of the Act states that a proposal is revoked by death or insanity of the proposer, if the fact comes to the knowledge of the acceptor before acceptance.

Section 11 of the Act states that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

Section 12 of the Act states that A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interest. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

FAMILY LAW AND PERSONS WITH MENTAL ILLNESS

Marriage integrally links an individual with society through ties of blood and affinity. Unsoundness of mind can result in the nullification or dissolution of a marriage under various personal laws in India¹⁷. Under Hindu Marriage Act, 1955, conditions in respect of mental disorders, which must be fulfilled before the marriage is solemnized, are namely:

At the time of marriage neither party:-

- (a) Is incapable of giving a valid consent to it as a consequence of unsoundness of mind; or
- (b) Though capable of giving consent, has not been suffering from mental disorders of such a kind or to such an extent as to be unfit for marriage and the procreation of children.; or
- (c) Has been subject to re-current attacks of insanity.

In view of Sections 5 and 12 of the Hindu Marriage Act, 1955, the marriage of a person, if he or she although capable of giving a valid consent to his or her marriage suffers from mental disorder of such a kind or such an extent as to be unfit for

¹⁶ *Supra* note 103.

¹⁷ *Supra* note 3 at 181.

marriage and the procreation of children, is voidable. But to bring a case under Section 12 (1) (b) read with Section 5(ii), Hindu Marriage Act that is to say to have the marriage annulled under the provisions of the Hindu Marriage Act the petitioner is to prove that the respondent was suffering from the malady at the time of marriage.

According to the section 13 of the Act, divorce can be obtained on the ground that the person has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent¹⁸.

Explanation to Section 13 states that the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. The expression “psychopathic disorder” means a persistent disorder or disability of the mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment¹⁹.

TESTAMENTARY CAPACITY AND MENTAL ILLNESS

Testamentary capacity is the legal status of being capable of executing a Will, a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death²⁰. The Indian succession act states that every person of sound mind not being a minor may dispose of his property by Will. A married woman may dispose by Will of any property which she could alienate by her own act during her life. Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it. A person who is ordinarily insane may make a Will during interval in which he is of sound mind. No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Testamentary capacity requires a person’s full sense and mental sanity to have confirmed and signed the Will after understanding what his assets comprised and what he is doing by making a Will. He understands in full mental capacity to whom he is naming the assets to and how are they related to him and what repercussions it may have later²¹.

THE CODE OF CIVIL PROCEDURE, 1973

The Code of Civil Procedure, 1973, Order XXXII laid down the procedure for the suits by or against the persons of unsound mind. The Code states that:

18 A. N. Saha, *Marriage and Divorce* 60 (6th edn. 2002).

19 The Hindu Marriage Act, 1955, s. 13(iii).

20 The Parsi Marriage and Divorce Act, 1936, s. 32(b).

21 The Indian Succession Act, 1925, s. 59.

Every suit by a person of unsound mind shall be instituted in his name by a person who in such shall be called the next friend of the person of unsound mind. Where a suit is instituted by or on behalf of a person of unsound mind without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented²². In a case where the defendant is a person of unsound mind the Court, on being satisfied of the fact about his unsoundness, shall appoint a proper person to be a guardian for the suit for such person of unsound mind.

Further, No decree passed against a person of unsound mind shall be set aside merely on the ground that the next friend or guardian for the suit of the a person of unsound mind had any kind of interest in the subject-matter of the suit which is adverse to that of the a person of unsound mind, but the fact that by reasons of such adverse interest of the next friend of guardian for the suit, prejudice has been caused to the interests of the a person of unsound mind, shall be a ground for setting aside the decree²³. Any person who is of sound mind and has attained majority, may act as a next friend of a person of unsound mind or as his guardian for the suit. Where a person of unsound mind has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the person of unsound mind minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. Every application to the Court on behalf of a person of unsound mind minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a person of unsound mind either by way of compromise before decree or order, or under a decree or order in favour of the person of unsound mind. Next friend or guardian for the suit shall not without the leave of the Court enter into any agreement or compromise on behalf of a person of unsound mind with reference to the suit in which he acts as next friend or guardian. A next friend shall not retire without first procuring a fit person to be put in his place. Where the interest of the next friend of a person of unsound mind is found to be adverse to that of the person of unsound mind, an application should be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly²⁴.

After the retirement, removal or death of the next friend of a person of unsound mind, further proceedings shall be stayed until the appointment of a next friend in his place. Where the guardian for the suit desire to retire or does not do his duty, or

22 *Id.* o. 32, r. 2(1).

23 *Id.* o. 32, r. 4(1).

24 *Id.* o. 32, r. 7(1).

where there sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him and where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place²⁵. A person of unsound mind who is a plaintiff or a person of unsound mind who is not a party to a suit on whose behalf an application is pending, when the person concerned has ceased to be of unsound mind, shall elect whether he will proceed with the suit or application.

THE INDIAN EVIDENCE ACT AND THE PERSONS WITH MENTAL ILLNESS

Indian Evidence Act also laid down provisions for the protection of persons with mental illness. The Act *inter alia* provides that: When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts²⁶. For example: The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.²⁷ When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. For example: A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

Other Legislations and Persons with Mental Illness: *The National Trust Act, 1999*

The National Trust for Welfare of Persons with (Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act, 1999, is for single parent family or for aging parents or where the parents have died and the siblings are unable to look after the disabled individual. The National Trust plans to take over guardianship rights as well as to receive properties bequeathed by the family. This Act provides for the constitution of a body at the national level for the welfare of the disabled. It received the assent of the President of India on the 30th December 1999.²⁸ This Act is also under revision to make it United Nations Convention for Rights of Persons with

25 *Id.* o. 32, r. 10(1).

26 The Indian Evidence Act, 1872, s. 45.

27 Illustration, -(b) Section-45, Indian Evidence Act, 1872.

28 B.S Chavan, Nitin Gupta, *et. al.* (eds.), *Community Mental Health in India* 35 (2012).

Disabilities, 2006 compliant and make it more comprehensive. Management of properties of Persons with Mental Illness is supposed to be covered under the amended Act.

The Legal Services Authorities Act, 1987

In 1987, the Legal Services Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. Section 12 of the Legal Services Authorities Act, 1987 prescribes the criteria for giving legal services to the eligible persons, and includes *mentally ill persons*, those coming under section 2 of the Juvenile Justice Act 1986 or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act 1987.²⁹

INTERNATIONAL CONVENTIONS OR INSTRUMENTS ON DISABILITY AND MENTAL HEALTH

The United Nations Charter affirms the essentiality of a universal respect for, and observance of, human rights and fundamental freedoms for all without distinction. The rights of individuals with disabilities are grounded in a human rights framework based on the United Nations Charter, the Universal Declaration of Human Rights, international covenants on human rights and related human rights instruments. Persons with disabilities are entitled to exercise their civil, political, social, economic and cultural rights on an equal basis with others under all the international treaties. The full participation of persons with disabilities benefits society as their individual contributions enrich all spheres of life and this is an integral part of individual's and society's well-being and progress for a society for all - with or without disabilities³⁰. In the context of mentally ill persons, it not only refers to their privileges but remedial right of protection against infringement of their human and other statutory rights. The first human rights legal resolutions, such as ...Universal Declaration of Human Rights, did not specifically address the rights of mental health consumers. They codified more general, but still relevant rights, like right to life and liberty and right to be free from inhuman, degrading treatment. Later resolutions such as the Declaration on the Rights of Mentally Retarded Persons, 1971 and the Declaration on the Rights of The Disabled Persons, 1975, began the process of establishing international minimum standards for the treatment of persons with mental disabilities³¹.

29 NHRC, Mental Health Care and Human Rights, 74 (2008), *available at*: <http://www.bhrc.bih.nic.in/Docs/Mental-HealthCare-and-Human-Rights.pdf> (Visited on June 7, 2016).

30 UN, Human Rights of Persons with Disabilities, *available at*: <http://www.ohchr.org/EN/Issues/Disability/Pages/DisabilityIndex.aspx> (Visited on Aug. 27, 2016).

31 Shiv Gautam, Sanjay Jain, Lalit Batra, Rajesh Sharma and DeeptiMunshi, Human Rights and Privileges of Mentally Ill Persons, *available at*: <http://www.indianjpsychiatry.org/cpg/cpg2009/article6.pdf> (Visited on Sept.12, 2016).

The United Nations Charter, 1945

The United Nations (UN) Charter in its preamble articulates the determination of the international community to reaffirm faith in fundamental human rights, and in the dignity and worth of the human person. One of the central purposes of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction. Similarly, the United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development and universal respect for, and observance of, human rights and fundamental freedoms for all. The Charter, adopted as a binding treaty in 1945, requires member states to advocate and to observe the human rights of all individuals, regardless of their racial, gender, ethnic, or religious differences³². India was among the original members of the United Nations that signed the Declaration by United Nations at Washington on 1 January 1942 and also participated in the historic United Nations Conference of International Organization at San Francisco from 25 April to 26 June 1945. As a founding member of the United Nations, India strongly supports the purposes and principles of the United Nations and has made significant contributions to implementing the goals of the Charter, and the evolution of the United Nations specialized programmes and agencies³³.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights contains a comprehensive listing of key civil, political, economic, social and cultural rights. Article 3 through 21, outline civil and political rights, which include, the right against torture, the right to an effective remedy for human rights violations and the right to take part in government. Article 22 through 27, detail economic, social and cultural rights, such as, the right to work, the right to form and to join trade unions, and the right to participate freely in the cultural life of the community. Article 25 of the Universal Declaration of Human Rights, 1948 encapsulated the right to health in the following words:-Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

32 Lawrence O. Gostin and Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435443 (Visited on June 10, 2016).

33 Ministry of External Affairs, Government of India, *India and the United Nations* available at: <http://www.mea.gov.in/india-and-the-united-nations.htm> (Visited on Sept. 10, 2016).

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966 (ICCPR) AND MENTAL HEALTH

Article 7 of the International Covenant on Civil and Political Rights provides all individuals, including those with mental disorders, protection from torture and cruel, inhuman or degrading treatment or punishment as well as the right not to be subjected to medical or scientific experimentation without informed consent.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND MENTAL HEALTH

India also acceded to the Convention on 10 April 1979. While Article 12(1) of the International Covenant on Civil and Political Rights referred to the right to health in aspirational terms, Article 12(2) mandated specific measures on part of the state parties to the covenant. Article 12 recognizes the right of everyone, including people with mental disorders, to the enjoyment of the highest attainable standard of physical and mental health.

Convention against Torture and other Cruel, in Human or Degrading Treatment or Punishment, 1984 and Mental Health

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly of the United Nations on 10th December 1984 (resolution 39/46). The Convention entered into force on 26 June 1987 after it had been ratified by 20 States³⁴. India signed the Convention on 14 October 1997, but has not ratified it yet. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 is also relevant to those with mental disorders. Article 16, for example, makes States that are party to the Convention responsible for preventing acts of cruel, inhuman or degrading treatment or punishment.

CONCLUSION

The laws relating to persons of unsound mind or mental health are so pertinent and not only nationally but also internationally as the provisions are based on the concept that no persons should be denied justice, whether economic, social or legal. The non-incorporation of the provision would tender the idea not to provide justice to all but to a limited and capable persons of the society. Therefore, now it becomes the legal rights of the persons suffering from unsoundness of mind, and the legal duties of the state and its instrumentality including judiciary to implement the same with more force and dedications.

³⁴ *Supra* note 49.

The Supreme Court's Split Verdict on Whether Wearing a Hijab Should be Restricted on the Ground of Discipline or Protected as a Freedom: A Legal Introspection

*Dr. Dharmendra Kumar**

ABSTRACT

One of the most divisive items of clothing in recent years is the hijab, or Muslim veil. Muslim women cover their heads with the hijab as a mark of discretion and modesty. It illustrates a person's deep devotion to God, wearing a hijab to demonstrate one's Muslim identity outwardly. The state of Karnataka issued a directive, prohibiting the wearing of a hijab in a college. The Karnataka High Court declared that wearing a hijab is not a requirement for practising Islam after several females appealed this judgement. The court punished girls for their clothing decisions while placing a higher priority on "uniformity in the uniforms" than the girls' right to an education. This judgement was contested by petitioners before the Supreme Court. In the "Hijab Case," the Supreme Court issued a divided decision in which Justice Sudhanshu Dhulia overruled the High Court and struck down the prohibition, while Justice Hemant Gupta agreed with the High Court and upheld the ban. The High Court's decision remains valid while the case is still pending before the supreme court for final judgement.

In order to go beyond this limiting dichotomy, the current study used a holistic approach to explore the veil. Religion was the main justification for veiling, although other factors including empowerment and protection were also mentioned. By tracing the development of the test and analysing its legitimacy in a country like India, this study further investigates the socio-legal discourse around the veil in order to address the issue of the courts' ability to become a theological authority.

Keywords: Hijab, Muslim Women, Essential Religious Practice, Secular, Religion, Judiciary, Margin of Appreciation.

1.1 INTRODUCTION

Undoubtedly, religion plays a significant role in Indian nationalism. However, it is unavoidable that religion personal laws have served as the primary driver of

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discrimination in India.¹ The idea of religious freedom in India is codified in Articles 25, 26, 27 and 28 of the Indian Constitution, which also provide the government the authority to interfere in religious matters that are in conflict with the social order. In order to pursue justice, the State must step in on topics of religious concern. However, because the State has been unable to create any effective mechanisms for achieving the Constitution's fundamental goal, seeking to improve the social conditions of those who have long been burdened by inequities based on religious hierarchies - the Judiciary has been forced to take remedial action.

Furthermore, considering the significance of religion in people's lives, it became relatively necessary for the Courts to investigate the fundamentals of religion in order to give effect to social reform attempts that would otherwise have been obscured by complex religious rituals. Since then, it has been a legal journey from determining 'essential religious practises' to claiming the authority to decide the 'essentials of religion'. It is true that applying this standard has made it easier to address a number of social ills comparable to those mentioned above, furthering the interests of justice in general. However, the ability of the courts to interpret religious doctrines and make decisions solely based on their interpretation is still up for debate. Many academics have criticised this move by the judiciary as an interventionist one, despite the fact that it is vital for ensuring people's rights. In fact, the scholars think that this method has turned the Court into a place of theological rather than constitutional authority.

The fact that the concept has been applied by the Courts in a variety of instances, albeit inconsistently, demonstrates the Courts' arbitrary exercise of discretion. The similar argument raged over the Hijab, or Muslim veil, which has emerged as one of the most divisive articles of clothing in recent years. Surprisingly, wearing a hijab is considered a 'deviant' behaviour. The Karnataka state government issued a circular limiting the wearing of a Hijab in a college on February 5, 2022. To dispute this circular, some students petitioned the Karnataka High Court in order to pursue their academic goals while simultaneously practising their faith. The hijab is a personal choice, according to the petitioners. They are not being compelled to do anything, nor is it an indication of oppression. The government's directive, according to the petitioners, is arbitrary, discriminatory, and a violation of their agency autonomy rights. It diminishes their dignity and restricts their right to practise their religion. Petitioners also criticised the administration's harsh demeanour. As a result, certain rights are at jeopardy.

1.2 CONCEPT OF HIJAB

Hijab is a Muslim women's identity and is worn as a symbol of modesty and solitude. Wearing hijab can be also considered as a means of a visibly expressing the Muslim identity². It is an Arabic word meaning is "covering"³. Muslim women's, who are

1 Gary Jeffrey Jacobsohn, *The Wheel of Law* 104 (Princeton University Press, New Jersey, 2003)

2 Haddad, Yvonne Yazbeck, Jane I. Smith, and Kathleen M. Moore. *Muslim women in America: The challenge of Islamic identity today*. Oxford University Press, 2006.

3 <https://en.wikipedia.org/wiki/Hijab>; Visited 24th Dec 2022.

covering their head and neck that is called hijab⁴. Hijab is known by several names, the most prevalent of which are veil or headscarf.

Hijab is a headscarf (usually square or rectangular fabric) worn by Muslim women that covers the head and neck but leaves the face exposed.

The following Qur'anic verses are traditionally referenced to describe women's dress codes:

- a. And tell the believing women to lower their gaze and guard their modesty; to not display their beauty and ornaments except what (must ordinarily) appear thereof; to draw their veils over their bosoms and not display their beauty... And to not strike their feet in order to draw attention to their hidden ornaments (Al-Quran 24: 30-31).⁵
- b. a. Ah, Prophet! Tell thy wives and daughters, and the believing women, to cast their outer garments over their persons (while abroad): this is most expedient for them to be recognised (as such) and not mistreated. And God is kind and forgiving (Al-Quran 33:58-59).⁶

The hijab is illuminated in many ways. Some argue that Muslim women and girls must cover everything save their faces and hands, while others argue that covering everything but the eyes is difficult.⁷ Several Islamic groups have leveraged the Hijab to represent a traditional sense of Islamic identity in some nations where women are not legally obligated to wear a veil.⁸ Hijab's fundamental meaning is to conceal one's private parts and adornments in order to maintain modesty in all aspects of life.

1.2.1 Wearing Hijab: A Personal Choice

Hijab is a term that refers to the isolation of women in various Islamic societies, or it may refer to a metaphysical dimension that is routinely maintained in order to uphold modesty standards⁹. Muslim women see the hijab in a number of ways and relate it with many meanings ranging from head covering to modest behaviour¹⁰. In

4 "Definition of hijab in Oxford Dictionaries (British & World English)". Oxforddictionaries.com; "Definition of hijab". Collins English Dictionary; "Hijab - Definition and More from the Free Merriam-Webster Dictionary". Visited 24th Dec 2022.

5 <https://quran.com/>; Visited 28th Dec 2022.

6 Ibid.

7 Latiff, Zulkifli Abd, and F. N. Alam. "The Roles of Media in Influencing Women Wearing Hijab: An Analysis." *Journal of Image and Graphics* 1, no. 1 (2013): 50-54.

8 Zwick, Detlev, and Cristian Chelariu. "Mobilizing the Hijab: Islamic identity negotiation in the context of a matchmaking website." *Journal of Consumer Behaviour* 5, no. 4 (2006): 380-395.

9 *Encyclopedia of Islam and the Muslim World* (2003), p. 721, New York: Macmillan Reference USA

10 Ruby, Tabassum F. "Listening to the voices of hijab." In *Women's Studies International Forum*, vol. 29, no. 1, pp. 54-66. Pergamon, 2006.

various dictionaries and the Qur'an, the term hijab has several connotations. Lane (1984) defines hijab as: a thing that blocks, inhibits, debars, or precludes; an item that veils, conceals, hides, covers, or protects, since it prevents seeing or beholding¹¹. In the Qur'an, the concept of hijab has a dual meaning: it is both something that protects and something that might obstruct. Every woman's decision to wear a hijab is her own. They use hijab or other forms of covering for a number of reasons. Some think that God commanded women to wear it in order to fulfil his commandment of modesty. It expresses a person's genuine devotion to God. Wearing a hijab to demonstrate one's Muslim identity visibly¹². In many cases, hijab wear is also used to combat Western feminist narratives that portray hijab-wearing women as repressed or silent.

1.3 KARNATAKA HIGH COURT'S DECISION ON HIJAB CONTROVERSY

The Karnataka High Court ruled in *Resham v State of Karnataka and others*¹³ that wearing a headscarf by Muslim women is a cultural practise rather than an important religious practise under the Islamic faith and cannot be considered a core feature of religion. The court upheld the state government's decree as legal under the Karnataka Education Act 1983, ruling that the prohibition on wearing the hijab is reasonable and constitutionally permitted.

One of the petitioners also recommends the "concept of reasonable accommodation" as a substitute, asking that girls be permitted to wear the uniform-colored veil as an alternative to outright prohibiting hijabs. However, the court specifically rejected this argument on the grounds that it "offends the "feel of homogeneity" and "it will produce a sense of social separateness which is not desirable." The court ruled that if there is no uniformity in the matter of uniforms, "The goal of mandating uniform will be defeated."¹⁴ The court addresses the "institutional dignity and efficacy of the government" rather than the rights of pupils when addressing the right to dignity. Unfortunately, the emphasis on uniformity takes precedence above the objective of promoting education.

Many students demonstrated against this decision. The administration, on the other hand, issued strict directives. "Anyone disobeying the High Court order will not be able to write the examinations," the state minister insisted. The result was that 40 girls chose not to take the exams. The petitioners challenged the Karnataka High court's ruling in front of the Supreme Court, but the Apex court declined to hold an urgent hearing on the matter.

11 Ibid.

12 Haddad, Yvonne Yazbeck, Jane I. Smith, and Kathleen M. Moore. Muslim women in America: The challenge of Islamic identity today. Oxford University Press, 2006.

13 WP 2347 of 2022 Karnataka HC

14 Ibid. p 106-107

1.4 DISCIPLINE OR FREEDOM: THE SUPREME COURT'S SPLIT VERDICT IN THE HIJAB CASE

The High Court of Karnataka's decision upholding the hijab prohibition in certain State-run educational institutions was appealed by the petitioners. In the case known as the "Hijab Case," *AishatShifa v. State of Karnataka*¹⁵, a two-judge Supreme Court panel issued a split decision. Justice Hemant Gupta of the Supreme Court agreed with the High Court's decision and upheld the prohibition, but Justice Sudhanshu Dhulia disregarded the High Court's decision and overturned the ban. The Chief Justice will now need to assemble a larger bench to decide the case, which is the immediate result of this. The restriction on wearing the hijab is still in effect in the interim because the High Court ruling is still binding.

1.4.1 The Judgment of Hemant Justice Gupta - Upholding the Hijab Ban

Behind the High Court's decision was the unstated assumption that permitting the hijab would trigger a chain reaction that would destroy the concept of a uniform altogether, without which education would be inconceivable.

Furthermore, the concept of discipline is what motivates Justice Gupta the most. Twenty-two times in the ruling, the word "discipline" is used in various contexts, but it appears most frequently in the precedent that Justice Gupta chooses to cite and in his own analysis. It also tends to happen more frequently in the vicinity of the word "uniform," with Justice Gupta repeatedly emphasising how discipline - and even, on one occasion, "discipline and control!" - cannot exist without a uniform. One particularly exceptional paragraph in which Justice Gupta makes the following observations highlights his profound regard for discipline:

Discipline is one of the attributes which the students learn in schools. Defiance to rules of the school would in fact be antithesis of discipline which cannot be accepted from the students who are yet to attain adulthood. Therefore, they should grow in an atmosphere of brotherhood and fraternity and not in the environment of rebel or defiance.¹⁶

The main issue here is that Justice Gupta neglects to apply the law in his eagerness to impose punishment and suppress "rebel or disobedience" in the "pious atmosphere of the institution"¹⁷. In the verdict, the phrase "discipline" appears 22 times, yet the legal standard for determining when the State's infringement of fundamental rights is acceptable, "proportionality," appears zero times.

The case is dismissed by Justice Gupta with the well-known remark, "But the uniform!" However, if Justice Gupta wants to conclude that State conduct complies with the "injunction of reasonableness," "but the uniform!" is not a constitutional test, and it is certainly not the constitutional test of proportionality that - in accordance with

15 Civil Appeal No. 7095 OF 2022 (Arising Out of SLP (CIVIL) NO. 5236 OF 2022)

16 *Aishat Shifa vs State of Karnataka*, Civil Appeal No. 7095 OF 2022, para 188.

17 *Id.* at para 193

precedent - is imposed upon him. The assertion that Article 14 of the Constitution requires “uniformity” has never been the jurisprudential position since 1950, and at any rate, is most definitely not the jurisprudential position after the Supreme Court’s landmark decisions in *Navtej Singh Johar vs Union Of India*¹⁸ and *Joseph Shine Vs Union of India*¹⁹: it is - to use a word beloved of lawyers - trite to say that the Indian Constitution requires “uniformity”.

As a result, once “uniform” (not a constitutional test) and “uniformity” (not the correct constitutional test) are removed, Justice Gupta’s judgement is rendered ineffective.

1.4.2 The Judgment of Justice Dhulia- Striking Down the Hijab Ban

In contrast to Justice Gupta’s decision, Justice Dhulia’s decision begins at a different point and ends with a totally different conclusion, with four aspects of this decision that demand special attention.

The first concerns Justice Dhulia’s interpretation of the essential religious practises [“ERP”] test. To demonstrate that the hijab is a “essential religious practise,” one must demonstrate that it is prescribed by Islam, a command that leaves no room for choice or agency. The High Court’s decision demonstrates that the hijab is not an ERP. The position before the Supreme Court was different: whereas some of the petitioners (now appellants) focused on expression, choice, and conscience.

The ERP test is discussed in depth in Justice Dhulia’s decision. He observes that the test, while undeniably part of India’s religious freedom jurisprudence, is inapplicable in this case. Because, according to Justice Dhulia, the ERP test has historically been employed when the issues revolve around the management of religious property or the invocation of collective rights against the State. However, in this case, what is at risk is an individual right (to wear the hijab) versus the State. ERP, according to Dhulia J., is inapplicable not such a situation since there would be different perspectives on what religious doctrine genuinely means in any faith, and it is not the Court’s jurisdiction to favour one position over another.²⁰

When it comes to individual rights, Justice Dhulia believes that ERP is just irrelevant. All that matters is the sincerity of the belief.²¹ This is another significant development, because it prioritises an individual’s subjective interpretation and articulation of their religion over the diktats of religious “authorities.” In other words, Justice Dhulia saves the agency from the clutches of the ERP exam in a single stroke. If - and this is a huge if - the broader bench upholds this finding, it will mark a quiet - and urgently needed - revolution in our ERP jurisprudence.

18 AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

19 2018 SC 1676

20 Aishat Shifa vs State of Karnataka, Civil Appeal No. 7095 OF 2022, para 36.

21 Id. at para 34.

This result thus permits Justice Dhulia to shift away from ERP and instead focus on the freedom of conscience and the landmark decision in *Bijoe Emmanuel & Ors vs State of Kerala & Ors*²². This is the second most crucial part of his decision. In *Bijoe Emmanuel*, the Supreme Court allowed three Jehovah's Witnesses students to refrain from singing the national anthem in their school assembly as long as they remained in respectful quiet while it was being played. Justice Dhulia sees the instances as identical, and thus uses *Bijoe Emmanuel* to situate the notion of "reasonable accommodation" (which Justice Gupta rejects outright) in Indian constitutional law. Thus, for Justice Dhulia, *Bijoe Emmanuel* provides authority for the notions that, first, the threshold for triggering Article 25(1) protection is simply a matter of conscience, and second, once that threshold is met, there is a right to reasonable accommodation of difference.

What about the rationality in this case? This takes us to the third and most essential aspect of Justice Dhulia's decision: his fundamental difference with Justice Gupta, who confirmed that State intervention was reasonable because it served the uniform and discipline. Justice Dhulia said "Not discipline at the expense of freedom, at the expense of dignity,"²³ Constitutional ideals such as freedom and dignity empower Justice Dhulia to rule as follows:

Asking a pre university schoolgirl to take off her hijab at her school gate, is an invasion on her privacy and dignity. It is clearly violative of the Fundamental Right given to her under Article 19(1)(a) and 21 of the Constitution of India. This right to her dignity and her privacy she carries in her person even inside her school gate or when she is in her classroom.²⁴

The last decisive element is possibly the most fundamental of all: education. Justice Dhulia questions whether "denying a girl child's education simply because she wears a headscarf is making her life any better".²⁵ This statement is made in light of the recognised fact that many girls were unable to sit their exams following the Karnataka High Court's decision. The differences between Justice Dhulia and Justice Gupta are once again stark: for Justice Gupta, there is nothing to see here because the girl students' skipping exams are largely their own responsibility for refusing to wear the uniform. Justice Dhulia, on the other hand, recognises that the situation is more complicated: it is well known that in many households, access to education is a contested terrain between the girl-child and her (conservative) family, with permission to attend school depending on wearing the headscarf.

There are many complex reasons why someone might choose to wear a hijab, and it is rarely as straightforward as a total compulsion/unrestricted choice binary. In fact, agency is something that is both situated and negotiated, especially when it comes to women dealing with patriarchy, both inside and outside the home. Therefore, the

22 1987 AIR 748 1986 SCR (3) 518 1986 SCC (3) 615 JT 1986 115 1986 SCALE (2)217

23 *Aishat Shifa vs State of Karnataka*, Civil Appeal No. 7095 OF 2022, para 52.

24 *Ibid*.

25 *Id*. At para 66.

main question for Justice Dhulia is whether the Court's decision will result in the denial of access to education, and if so, what can be done to effectively prevent that outcome.

1.5 CONCLUSION

The socio-legal discussion surrounding the hijab has brought up a number of difficulties. First, it posed the issue of fundamental rights, such as those pertaining to safety and education. Perhaps the focus needs to be moved to the structural and systematic inequality that deprives women of their security and dignity and makes them poor. One needs to deal with the more important concerns of tolerance for diversity in order to build a cohesive society. Law also needs to reconsider religion as a constant, uniform, and unchanging force. The truth is that women are challenging the fundamentalist tenets of religion in order to create novel concepts.

When functioning as a religious authority in defining the basics of religion, the Supreme Court and High Court's duty as a constitutional court conflicts with its role as a guardian of individuals' fundamental rights. In such a case, it is necessary to investigate the likelihood of the Courts departing from the stated standard in cases where an alternate method may be possible.

Given that our Constitution is a social reform legislation designed to condemn and deter societal problems, the clauses concerning religious freedom should be viewed through this reform lens. However, it is entirely dependent on how the Judiciary interprets it whenever a legal challenge involving religious liberty is brought before it. The Courts' judgement of issues lends effect to social reform attempts. At one level, the difference within the bench is due to differing interpretations of the law and its implementation. However, upon closer inspection, the difference is much more fundamental: it is a difference in world-view.

According to Justice Gupta, the world is governed by iron laws of discipline and control; of rigid rules and punitive action for those who question them; of authority that tolerates no "rebellion or defiance"; of homogeneity, and of a world in which students are like undifferentiable lumps of clay to be moulded into what the authority considers to be "model citizens."

According to Justice Dhulia, the other planet embraces liberty and diversity. He believes that regulations should allow people to breathe rather than suffocate them; he prefers diversity - and the expression of diversity - to homogeneity. He sees the classroom as a site of freedom rather than control, and considers students to be autonomous, thinking beings capable of making choices, including difficult, negotiated decisions.

Indeed, Justice Dhulia's decision paints a completely different picture of the classroom: one in which the dominating value is freedom rather than discipline, and where the concept of fraternity demands us to embrace and express our differences rather than flatten and erase them. In theory, the law guarantees both the right to equality and the right to religious freedom, but in fact, neither is guaranteed. In the case of

compulsory unveiling, the law promotes religious biases in order to deny female citizens the ability to choose their apparel; in other words, the law forces a citizen to choose between her faith and her rights. To force a woman to veil or unveil is to bind her identity, individuality, being, thought and imagination.

Thus, the basic requirement in such a situation is for the Courts to take an alternate approach wherever possible by subjecting the practises to the scrutiny of fundamental rights or fundamental constitutional principles derived from the Constitution itself. In terms of the outstanding cases, we can only hope that the Supreme Court, in its wisdom, takes the best possible approach, which would be far more acceptable, in order to effect societal change.

Role of Independent Director in Corporate Governance in India: Study with Reference to Companies Act, 2013

*Dr. Dinesh Dayma**

ABSTRACT

Under the Companies Act 2013 there are two main categories of directors i.e. Board of Directors and Independent Directors. The Board of Directors (BOD) of company are bound to provide the right direction to it by their active and vigilant participation in evaluation and approval of strategies. They are also under duty of performing function of appointment and removal of chief executive officers of company and to carry out function of deciding the remuneration and amount of compensation for him as well as member of top management. On the other hand, role of Independent Directors (IDs) is mainly to focus on bringing effective internal control system and management of risk and thereby to protect interest of non-controlling shareholders (minority shareholders). Independent Directors are also required to perform watch dog function in the company and required to act tough when it is desirable. Presence of Independent Directors in the company itself is not sufficient and their role is very significant in overall control and management system of the company. Being a protector of interest of various stakeholders of the company Independent Directors have to face various challenges in their day to day functioning. With the growing complexities in corporate sector the Independent Directors have very big pressure to meet the expectations of shareholders and to avoid the gaps if any that may occur due to their ineffective performance of duties. Reasons of gap in performance of Independent Directors are due to hype of expectation by stakeholders under the corporate governance system.

INTRODUCTION

Role of Independent Directors in company is one of key element to improve performance of company towards stakeholders and thereby to attract good investors in company on regular basis. Prior to Companies Act of 2013 there was no such provision of IDs and the main object of introduction of IDs under 2013 Act was to have greater accountability on the part of companies towards minority shareholders as well. Since

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earlier there was no representation on minority shareholders of company. However, in practical aspect such object seems to be failed as independency on the part of IDs does not exist in true sense since their appointment is itself made in company through known of existing member of company and Board of Directors have significant power to approve appointment of IDs.

Apart from appointment of IDs, no effective power is given to them under companies Act 2013 as well. Neither any extent to which they will be liable towards shareholder of company in case of failure to perform legal obligation is given nor specific criteria of independence is mentioned there. Role of IDs under company's act have become symbolic only and they are found to be not must interested in putting hard questions or challenging the management and strategic decision of Board even when they are apparent to be based on some fictitious basis for assisting the ill motives of one through whom they were appointed as IDs in company. These apparent lacunas present under law and in enforcement requires a focused discussion over the factors that are main reason of increasing issues and challenges in relation to IDs and to find out the measures which can be taken as for improving their position in companies. Thus study is designed to focus on role of IDs in corporate governance. The factors that are affecting the independence on part of IDs in company. The growing issues and challenges for ID are complex in business environment and therefore they are mainly focused to find out the ways and means through which their position can be improved. However, also understand the meaning of IDs under Companies Act 2013 and their role in Corporate governance and develop understanding over key issues and challenges that brings question over independence of IDs and to find out possible ways to improve the status of independence in substance.

INDEPENDENT DIRECTORS UNDER COMPANIES ACT, 2013

Noticing the fact that there was a need for good corporate governance for approaching the domestic as well as global capital at competitive rates for Indian companies, a National Task Force was constituted by the *Confederation of the Indian Industry* ("CII") in 1998.¹ The committee suggested a code for introduction of "*Desirable Corporate Governance*" and there was a need arose to include a group of excellent, experience, professionally acclaimed non-executive directors. The code proposed certain measures such as appointment of minimum number of non-executive independent Directors. With regard to this, Securities and Exchange Board of India (SEBI) appointed a committee in order to provide this with statutory provisions in 1999 chaired by Mr. Kumar Mangalam Birla that submitted a report *to promote and raise the standard of Corporate Governance in respect of listed companies.*" This committee is of the opinion that ID helps in bringing an independent judgment to be beard on the board's deliberations particularly on issues of performance, strategy, management of conflicts

1 Report of The Confederation of Indian Industry (CII) Task Force On Corporate Governance Chaired By Mr Naresh Chandra, November 2009. Available at https://www.mca.gov.in/Ministry/latestnews/Draft_Report_NareshChandra_CII.pdf (last accessed on October 10, 2022).

and standard of the conducts. The committee therefore laid emphasis on the calibre of Independent Directors.²

The recommendations which were brought forward by *Mangalam Birla Committee Report* later culminated into the new Clause 49 containing norms for corporate governance. As a result, Clause 49 was inserted as Corporate Governance in listed Companies – Clause 49 of the Listing Agreement, that was applicable to all listed companies of a certain size.³ Since Clause 49 applied to listed companies, *Naresh Chandra Committee* was appointed by Department of Company Affairs (DCA) under the Ministry of Finance and Company Affairs in August 2003 for making recommendations on corporate governance.

Following the Enron and other global scandals, Securities and Exchange Board of India (SEBI) decided to strengthen Indian corporate governance norms and in order to achieve this *Narayana Murthy Committee* was appointed by SEBI to examine Clause 49 and recommend changes to the existing regime. Based on the recommendations of the Narayana Murthy Committee, SEBI issued a revised version of Clause 49 on October 29, 2004. After several reforms and recommendations related to corporate governance, the most important amongst them was promulgated for the growth of Independent Directors under Clause 49 of the Stock Exchange Listing Agreement by SEBI in 2000 which sets out the requirement for having Independent Directors on corporate boards, defines independence (although with amendments over the years), lays out some specific duties and obligations of independent Directors. The concept of Independent Directors which was not provided any space in the Companies Act 1956, was significantly and remarkably introduced and defined in the new act i.e., Companies Act 2013 which made the appointment of Independent Director mandatory for a company. A quick comparative overview of the definition contained in Clause 49 Article I (A) (iii) and the new Company Act, 2013 will provide a good insight into the difference made by the recent Act.

ROLE OF INDEPENDENT DIRECTORS IN CORPORATE GOVERNANCE IN INDIA

There is a strong connection between corporate governance and the performance of company. Independent Directors have important role to be played in good governance by bringing efficacy and efficiency in workplace. They act as mentors of good governance by ensuring that all functions of management and Board of Directors in company are directed towards creating value to shareholders and they at same time also serve role of protector of minority interest of shareholders. Independence on part of board

2 Report of the Committee Appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla Report of the Kumar Mangalam Birla Committee on Corporate Governance, 1999. Available at https://www.sebi.gov.in/sebi_data/commndocs/corpgov1_p.pdf (last accessed on October 10, 2022).

3 SEBI Circular on Corporate Governance in listed Companies – Clause 49 of the Listing Agreement, October 29, 2004. Available at https://www.sebi.gov.in/legal/circulars/oct-2004/corporate-governance-in-listed-companies-clause-49-of-the-listing-agreement_13153.html (last accessed on October, 2022).

permits directors of company to evaluate performance and ensure well-being of company without any adverse impact over interest of stakeholders. Independent Directors in company ensures good governance ensures that company is run in compliance with legal, ethical and best practices. Presence of majority of Independent Directors gives impression of full support and transparency on the part of them towards the stakeholders of company. THEY are in better position of raising sensitive issues in management and thereby plays the role of protector.⁴

Therefore, Independent Directors must justify their role being independent in substance and by performing required functions. Question over role of IDs came into issue due to various recent failures of big corporations like *Satyam*. An attempt has been made under Companies Act 2013 to address the all aspects related to Independent Directors under however real independence on part of Directors is always a question.⁵ In case of *Satyam* when B. Ramalinga Raju disclosed fact of falsified accounts (Rs. 7000 Crore) of company were disclosed alarming truth of corporate governance truth came in question along with independence on part of IDs on their failure to raise hard question to management and misrepresentations that were present in the books of accounts of company. It became one of the biggest scam in country and draw attention towards flows in corporate governance practices towards ineffective board, fraudulent accounts, failures on part of Independent Directors etc.⁶

In case of *Tata Group* as well question over independence were raised in board room war between Ratan Tata and Cyrus Mistry⁷. Question of "Independence" was also in Infosys by SEBI by stating that Committee of Auditors is not working, Independent Directors are not Independent and there is absence of Stewardship code in company.⁸ Under corporate governance code Independent Director is asked to make individual view over various issues of board in company including strategic, objective, code, remuneration and appointment. Effective and vigilant role on part of Independent Directors is one of the best ways of making effective corporate governance.⁹

APPOINTMENT, POWER, FUNCTION AND REMOVAL OF INDEPENDENT DIRECTORS UNDER COMPANIES ACT, 2013.

Independent Directors under Companies Act 2013 under section 2 (47) as "*Independent Director*" means an Independent Director referred to in sub-section (5) of section 149". As

4 Narayanan, N. and Gogate, M., 2012. 'Skin in the Game': A Case for Incentivising Independent Directors. *Journal on Governance*, Vol. 1 No. 6.

5 Mittal, P., 2011. The role of Independent Directors in Corporate Governance. *NUJS Law Review*, PP. 285.

6 Gupta, M., 2018. 'Independency of Independent Directors in Corporate Governance'

7 Tata Vs Cyrus Mistry [2018]

8 Singh, A., 2012. Corporate governance: Changing regulatory scenario and the role of the independent director. *Ernst & Young Pvt. Ltd.*

9 Arindam, M., 2013. The Independent Directors: Has it been Indianised Enough? *NUJS Law Review*.

per section 149 (6) the *Independent Directors* means directors other than managing Directors¹⁰ or whole time Directors¹¹ or a Nominee Director¹² who in the opinion of the board of directors is person of integrity and have the relevant expertise and experience and is not promoter¹³ or does not have any pecuniary relation with company. Neither he nor his relatives holds or has held position of key managerial personnel's, is or has been partner in three financial years, is holding or has hold more than 2% of the voting with relatives or is chief executive or director of any non-profit organisation.¹⁴

Independence on the part of directors ensures impartiality and fairness of their actions and decisions that are taken by them in relation to companies. The Independent Directors are required to take the decisions and actions by getting not affected by any kinds of influential factors¹⁵. While appointing an Independent Director certain considerations are focused like availability of IDs to meet requirements of board services, explaining the extent to which they will be liable, integrity and gravity to be there on part of IDs to challenge in board room decisions. All these are some of the factors that are required to be taken in consideration before appointment of a person as ID is done in any company.

Procedure: Appointment of Independent Director may be made out of the data bank maintained under section 150 of Companies Act 2013 by body institute and association. An appointment Independent Director is first considered by the board of directors and later on the same is approved by the company through ordinary resolution in first general meeting. However in case of subsequent appointment of the Independent Director special resolution is required¹⁶. Board is required to give the explanatory

10 Section 2(54) "Managing Director-means a director who by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its board of directors, is entrusted with substantial power of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called". Companies Act 2013.

11 Section 2(94) "whole time director- includes a director in the whole time employment of the company".

12 Section 149 (1) "Explanation- Nominee Directors means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests".

13 Section 2 (69) "Promoter- means a person— (a) who has been named as such in a prospectus or is identified by the Company in the annual return referred to in section 92; or (b) who has control over the affairs of the Company, directly or indirectly whether as a shareholder, director or otherwise; or (c) in accordance with whose advice, directions or instructions the Board of Directors of the Company is accustomed to act: Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;".

14 Malhan, Y., 2018. Independent Directors- Under The Companies Act, 2013. *Singh & Associates*.

15 Bag, A., 2018. *Appointment and role of Independent Directors under Companies Act, 2013*. Available at: <https://blog.ipleaders.in/appointment-and-roles-of-independent-directors-under-companies-act-2013/> [Accessed on 10 September, 2022]

16 Mittal, P. K., 2014. Independent Directors. *Chartered Secretary*.

note for approval of appointment of Independent Director that all requirements applicable under Companies Act and regulations are duly complied with¹⁷.

ROLE OF INDEPENDENT DIRECTORS

- ❖ They safeguard the interest of various stakeholders, especially of the minority stakeholders as they look forward to IDs to provide transparency as such shareholders are not equipped to look into those affairs of the company.
- ❖ They ensure proper monitoring and assessing the performance of the management and affairs of the company and try to bring transparency in the mechanism of working of the company.
- ❖ They are expected to take a stand for the interest of the company and its stakeholders by monitoring the performance of the executive directors and of the management of the company.
- ❖ They also contribute to business sustainability by contributing in economic growth, social responsibility and to the prevention and protection of the environment by applying their strategies and by adopting best decisions.
- ❖ They afford guarantee to all those people who are doing business with the company that the decision of the board will not be relied on a narrow vision or a short term development and expectations.
- ❖ They help in improving corporate creditability and governance standards and also play a vital role in management of risks of a company. They act as watchdogs of a company.
- ❖ They must act in the welfare of the stakeholders especially for the minority shareholders in the event when the board or management has taken any decision adversely affecting the rights of the shareholders or creditors or creditors.
- ❖ They play an effecting role in various committees such as Audit committee, Nomination and Remuneration committee (NRC), Corporate Social Responsibility committee (CSR) to assure good governance.
- ❖ They help in bettering relations of the company with the investors and enhance management reporting, transparency, accountability to improvise company's value and reputation.
- ❖ They act as an administrator of shareholders and are duty-bound to be fully aware of and question the conduct of organization on relevant issues and are expected to be independent.
- ❖ They play the crucial role of supervisory for bringing objectivity to the decisions made by the BOD. They do not take part in day-to-day affairs or decision making in the company but should be aware about the working of the management of the company and shall ask the right questions at the right time.

17 Schedule IV, "Code for Independent Directors" Companies Act 2013.

POWER OF INDEPENDENT DIRECTORS

- ❖ The IDs must have a separate meeting at least once in a year so that they can evaluate the performance of the chairperson, executive directors and the board without the presence and interference of non-independent directors as well as the other members of the company so that they can express themselves and take appropriate and unbiased decisions on the performance of the board which in turn aid in ensuring the smooth and proper functioning of the Board of Directors of a company.
- ❖ They are empowered to become the member of certain committees such as Audit Committee, Corporate and Social Responsibility Committee, Nomination and Remuneration Committee of the company and to take part or contribute in the effective implementation of the objectives of those committees and for social and economic development of the nation.
- ❖ They are empowered to exercise the authority of one-third or more of the total voting power exercisable of the company at the general meeting.
- ❖ They act as a means of creating back force and deterrent to management and controlling shareholder so that they cannot manipulate or expropriate potential transactions of self-interest under the watchful eyes of IDs.
- ❖ They may not have the voting right but has a power to make public any wrongdoing which would likely to cause unwarranted public scrutiny in the event when some wrongful act or fraud is committed or likely to commit in the company.
- ❖ Responsibility for all decisions by board is there on IDs and on the occasion of their failure to attend board meeting decision will only be taken after receiving sanctioned from at least one ID.

FUNCTIONS OF INDEPENDENT DIRECTORS

- ❖ Independent Directors helps in harmonizing the conflicting interest among the stakeholders and to safeguard the interest of minority shareholder as IDs are the important source of the information for minority shareholder with regard to the working mechanism of the company.
- ❖ They said the company in succession planning¹⁸ process by helping them in searching and identifying new directors who can replace old directors in the event of removal, retirement or death.
- ❖ They are nominated to the board for their expertise, commitment, learning experience so that they can very well analyze the performance of the management and so that the company may take effective steps for risk management of the company.

18 Section 178 "Nomination and Remuneration Committee" The Companies Act, 2013.

- ❖ They help in filling the gap of senior management in experience and skills as they are the person who possesses integrity, experience, industrial expertise and independence in their views.
- ❖ They may not be able to stop fraud at the highest level but with his expertise, skill, knowledge, high level of commitment and due diligence they may analyze the signals that demonstrate that the working mechanism of the company is not as it should be.
- ❖ They are needed to have a thorough understanding of the business of the company, its finances, markets, products, people and the time and energy which is required to be devoted so that they can aid and support the other executive directors of the company.
- ❖ They analyze most crucial issues for the board to be looked upon and assist the board in dealing with those issues and achieving consensus on those issues and also act as a facilitator outside the board room especially on contentious issues.

DUTIES, LIABILITIES AND RESPONSIBILITIES OF THE INDEPENDENT DIRECTORS UNDER COMPANIES ACT 2013

The role of independent directors in the company is performed by one who has experience of many years and on the basis of that is appointed as Independent director. They require to act as the guide for company. The main roles include improving governance standards and corporate credibility, managing of the various risks effectively and performing the function of watchdog on the functions of the board of directors and other affairs of the company. In case of listed companies there is requirement to have the committee of audit which will comprise of minimum three directors out of them two are required to be Independent Directors.¹⁹

DUTIES OF INDEPENDENT DIRECTORS:

The act prescribes the duties²⁰ to be followed by ID to improve their performance and standards. They are-

- ❖ ID shall present in all the boards and general meetings of the company and shall abide themselves with the provisions of this act and also act as a custodian of good corporate governance.
- ❖ They must report if there is any fraud or unethical practices are taking place within their knowledge.
- ❖ They shall not disclose any information which is confidential pertaining to the company.
- ❖ They shall submit the concerns of the management before the board and insure that it is documented in minutes of the board meeting.

¹⁹ Section 177, "Audit Committee" Companies Act 2013.

²⁰ Section 166 and Schedule IV "Duties of Directors" Companies Act 2013.

- ❖ They shall have their independent judgment when it comes to the aspects relating to the business and the company.
- ❖ They analyze the conduct of the management and monitor the report of the conduct and shall review the related party transaction.
- ❖ They shall act bona fide and in the best interest of the company, employees, community, shareholders especially to safeguard the interest of the minority shareholders and for the protection and prevention of the environment. Interest of the company implies the interest of present and future members of the company and should not make any secret profits²¹.
- ❖ They shall exercise their duties which are conferred on them by this act with due diligence, skill, and reasonable care.
- ❖ They shall refrain themselves from any direct or indirect conflict of interest with the company and from any undue gain or advantage.
- ❖ They shall periodically review the legal compliance reports prepared by the company and steps taken by the company to improve any abnormalities in the reporting requirement.²²
- ❖ Being member of Audit Committee under section 192A²³, all the duties and responsibilities of the Audit Committee are also required to be performed by IDs.

RESPONSIBILITIES OF INDEPENDENT DIRECTORS

- ❖ They shall furnish information about disclosure of General Notice of directorship, membership of body corporate and other entities to the company in prescribed form at first board meeting held after their appointment.²⁴
- ❖ They shall inform about any alteration in the details submitted subsequently to the company.
- ❖ They shall furnish the list of his relatives as defined in companies act and their directorship and their interest in other concerns.
- ❖ They shall have fiduciary duty to act bona-fide and in the interest of the company specially to safeguard the interest of minority shareholders and to gain proper understanding of the business.
- ❖ They shall bind themselves within the power enumerated in Article of Association (AOA) and Memorandum of Association (MOA) and shall not perform any act which is ultra-vires to the act.

21 *Cook v Weeks* [1916]AC 554

22 Clause 49(2) (iii), Listing Agreements- Corporate Governance.

23 Section 192A, "Restriction on Non-cash Transactions Involving Directors" Companies Act 2013.

24 Section 149(6), "Independent Directors", Companies Act 2013.

- ❖ They shall refrain themselves to be the Chairman of more than 5 companies and a member of more than 10 companies.
- ❖ They are responsible for the prevention and detection of fraud and to report such activities to the board in the meeting.
- ❖ They shall brace themselves comprehensively for the board meetings and contribute in forming sound decision related to the company and its business and shall be committed to the decision of the board.

LIABILITIES OF INDEPENDENT DIRECTORS

The first criticism comes to independent directors about the performance of their fiduciary duties diligently when corporate scam breakout in public. ID has limited liability. As they are liable only when the offences are committed with their knowledge (actual and constructive), negligence, connivance and are protected from liability if they are doing their work with due diligence²⁵. This encourages them to take an honest and unfettered decision which ensures good corporate governance.

Comparison: Executive Director and Independent Director

Executive Directors	Independent Directors
ED is an employee of a company as he is involved in the day-to-day management of the company or being in the full-time salaried employment of the company. He also enjoys the status of whole time director in company.	ID is not an employee of a company.
Employee stock ownership plan can be granted to executive directors.	Employee stock ownership plan cannot be granted to independent directors.
They are liable to retire by rotation.	The provision of the retirement of directors by rotation shall not be applicable to the independent directors.
They are appointed for one year and can be reappointed.	They can be appointed for 5 years at a time and can serve 2 consecutive terms.
They cannot become chairman of various committees of board.	Chairman of the committees of board has to be an independent director.
They can have monetary relationship with the company.	They do not have any material, pecuniary or monetary relationship with the company or its members.
No need to hold a separate meeting of executive directors only.	At least one meeting must be held of IDs in a year without the presence of non-independent directors so that they can express their views independently with regard to working mechanism of the company.
There are no minimum numbers of executive directors required to be appointed in a company.	Every listed company shall have minimum 1/3 of the total number of independent directors and the Central Government may prescribe the least number of IDs for public company.
It is mandatory for every company to appoint executive director.	Only companies who have fulfilled certain criteria are required to appoint independent directors.
Remuneration to ED shall not exceed 11% of net profit for current financial year of company.	ID does not have fixed remuneration and they only get seating fee and reimbursement of traveling allowances.

25 Pooja Ravinder Devedasani vs. the State of Maharashtra [2015] (1) R.C.R.(Criminal) 271.

ISSUES AND CHALLENGES

Role of independent directors has become very challenging in today's scenario. Intense scrutiny is played on part of stakeholders, high standard performance requirement is required under regulations and complexities connected with the business environment are some of contributing factors in increasing challenges for good performance on part of Independent Directors issues are mainly faced by company due to lack of clarity of various matters under prevalent legislation and regulations for IDs. While Independent directors are appointed biggest challenge faced by company is that an Independent Director has to be good in terms of meeting requirements of board services and aligning remuneration of directors with their performance and due to non-clarity of extent to which director of company can be held liable²⁶.

Level of commitment on part of directors of company for understanding industry, company and ability to put question in relation to various strategies and decision taken is also crucial factors that affect corporate governance. Ability of ID to challenge management and strategic implementation in company is also frequently faced. Independent Directors also face issues like level of support from management of company in discharge of entrusted functions.

The major issues identified in relation to Independent Directors under Companies Act 2013:

1. Issue of "Independence" on the part of IDs only mean Independent from legal stand point of view and key performance requirement for ensuring Independence on part of IDs in complete sense.
2. Issue of situation of companies suffering from crisis of Independent Director and effective measures to be adopted by company to deal with this situation.
3. Issue of segregation of power between CEO and Chairperson for appointing Independent Directors.
4. Issue of making boarding Programme effective in a company.

1) Independence:

In companies' independence of directors is generally understood as independence from legal stand point of view however it is totally different from the independence in substance. The issue of lack of actual independence is frequently faced companies like in case of Tata group, corporate breakdown took place due to lack of independence on the part of IDs. Same is the case with Saytam, where the presence of Independent directors was just symbolic and they had no substantial independence due to which the various shareholders suffered the consequences of scandal. They were failed to put question management strategy of and they were very leverage even when the financial distress was disclosed.

²⁶ CA Batth, V., Dr. Nayak, B. And Dr. Sarangi, P., 2016. Role of Independent Directors in the Changing Business Scenario in India. *International Journal of scientific research and management*, Vol. 4, pp. 3878-3882.

2) Fairness in Appointment of IDs:

Question over the Independent Directors is frequently raised as most of them are appointed by companies by utilising personal networks of member of board or promoters. In case a company appoints non-executive directors two criteria are considered i.e. relation shared by person with promoters and skill and ability of person to add value to the company. The independence in substance can only be ensured on part of IDs and company by professional standards. In which IDs will be focused towards discharge of their roles and responsibilities in fair manner and they will be focused towards asking hard questions and challenge the assumptions of management in case finding them to be not reasonable. Professionalism on part of company will help in establishment of appropriate board committee and proper code of conduct will be followed.

3) Widening the Independence:

Independent Director in company does not mean one who is focused on compliance only. ID has to be the one who can actually examine the issues in the various prospective and can value addition in that. However, in present day IDs are only understood to have one role that is compliance and due to this their scope of working has not been focused till now. In order to bring the complete independence on the part of IDs company is required to adopt more professional approach in appointment of IDs. It is very important for the companies to strategies in advance for the talent required to be there in board for the non-executive position. In order to have right personnel in board room the check list of desired skills and talent can be prepared along with the professional conduct practices.

4) Segregation of Power of CEO and Board Chair

In India generally the role of CEO and Board Chair roles are not segregated. However, with growing issues on the part of management of company and its key personnel's the issue of segregation of power of these two is frequently faced challenges in the companies. The important question arises is that whether ID as board chair will lead to effective corporate governance or not. The major reason of such challenge is authority that is connected with the post of Chairman²⁷. It is very big challenge for company to overcome that chairman will have ability to command to entire board and ability to resolve the issues of board for better governance. Another challenge is making the decision of segregation of power as sated above is that if the chairman is given the responsibility of understanding the business functions and management in deeper sense than what will be left with IDs²⁸. Another issue connected with this is that if

27 Narayanan, S., 2016. Emerging Challenges Affecting Independent Directors. Available at: <https://www.corporatecomplianceinsights.com/emerging-challenges-affecting-independent-directors/> [Accessed on: October, 2022]

28 Khanna, V. and Mathedw, S. J., 2010. The role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidencer. *National Law School of India Review*, Vol. 22(1), PP. 35-56.

Chairman is in conflict with the IDs then he may also affect the relationship of executive directors towards IDs.

5) Induction Programme for Directors:

In India there are very less companies in which in which formal induction programme is carried on²⁹. Companies are found to be very slow in putting orientation programme as part of regular practices and the attitude of Independent Directors are also not very focused towards implementation of it. It should be introduced compulsorily when new responsibilities are given to directors or when new member is introduced in the company. It is very important for Independent Directors to have knowledge of business model of company, competitive landscape and history of success or problems with financial reporting. The orientation programme has to be conducted timely and the follow up meetings must also be carried out for new directors and discussion about the issues and feedbacks must be considered under it.

CONCLUSION

It is concluded that there are various issues that are regularly faced in the business organisation due to inefficient roles of Independent Directors in the company. The Companies Act 2013 which came with the new provision of introduction of the Independent directors does not effectively address the issue of effective corporate governance on their part. Along with the legal independence on the part of directors of the company there is need to secure independence in substance as well so that effective role can be played by the directors of the company. Appointment of Independent directors by way of regular cluster of eligible candidate can be used as a primary source for appointment of directors. This method will support in elimination of biasness and will lead to the business in the positive direction. Thus reforms on part of legislature is required and it should be followed strictly on the part of directors of company. It is well established that IDs have important role in good corporate governance and for this complete independence has to be there on part of IDs in order to make them clearly liable in case of deviations.

²⁹ KPMG India 2014. Role of Independent Directors Issues and Challenges. *Audit Committee Institute*.

Judicial Process–Reinstating the Element of Justice in Law

*Dr. Gifty Oommen**

“Judicial Process is an inherent mechanism in judicial law making enabling it to keep pace with the society while keeping the edges of right and wrong tight along the framework of law”

INTRODUCTION

In an age that must be constantly reminded of the legal principles of judicial law that enlightened preceding generations in building a common awareness and human sensibility in law and policies, a study of jurisprudence has become all but necessary. Legislation would occasionally take precedence over the court in the era before democratic systems were established, which gave rise to the idea of judicial and legislative separation. Today that the legislative process is chaotic, opaque, changing with the times, and unresponsive to the needs of society, it is the job of the judiciary to clear a path for the Rule of Law.

In *Mark’s Dependents v. Gray*,¹ decided in 1929, Cardozo wrote for the Court as Chief Judge in dismissing a Workmen’s Compensation claim by the estate of a plumber’s helper. On his way to bring his wife home from a personal visit in another city, he was murdered in a vehicle accident. His employer had requested him to bring his equipment and repair some broken faucets at a house in the village where the wife was staying after learning of his impending journey. The cost of making a special journey was not necessary for the job, and it would not have been required if he had not said he would make the trip regardless of the cost.

According to Chief Justice Cardozo’s ruling, which dismissed the compensation claim, if an employee’s job necessitates travel, he is acting in the course of his employment even when he is concurrently pursuing personal goals.

But, if the need for travel was not influenced by work, if the trip had been scheduled regardless of whether the business task had been completed, and if it had been

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1 *Mark’s Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929).

cancelled only because the private goal had not been achieved, the risk would have been personal. As this incident did not occur during employment, there was technically no claim for compensation under the Workmen's Compensation Act. Logic was not on the employee's side. This decision was overruled in *Mahoney v. Michaels, Stern & Co.*,² where a compensation claim was allowed on similar facts. Here, social welfare and social justice may have played a larger role in the decision-making process. To maintain the traditional practise of moral obligation between a master and servant relationship, social welfare concept was introduced. With its ruling, the court prioritised welfare and justice over the contractual elements that govern the working relationship. Cardozo explained this change in law as a process of judicial thinking so that the commitment level between a master and servant is maintained.

The challenges of change and stability, as well as how to establish the rule of law in the legal system, are the main topics of this article. Cases must be decided in accordance with standards that have been long recognised by civilised nations and the human justice system.

CHANGE THROUGH HISTORY

Cardozo wanted that the judge should develop law from his or her experience and knowledge in every phase of life. The common law was thought to have grown static during his time and even later since it was believed that judges' primary responsibility had become to rule cases in accordance with past precedents. It was felt that judges resolved cases in a particular pattern and did not wish to change this system.³

The common law system's judicial procedures have undergone constant alteration throughout history to consider the community's evolving demands and ideas of rights. The common law system is definite in line with a changing law but maintains the binding nature of judgements of the superior courts over inferior courts. The judge's first responsibility is to evaluate the case in the light of previous decisions. At the same time, it does not mean that all precedents might be precedent for that case. The similarity of case might not be the determining factor but whether the facts considered material by the judge in that earlier case are similar to the facts considered material by the judge in the current case that could make the earlier case similar in facts to the current case. This is followed by the judge in determining the principle deciding the case in reference to those material facts. This rationalizes into a ratio-decidenti. This ratio - decidenti in that case leads to the precedent of tomorrow.

After establishing the ratio-decidenti principle in this process, the judge next decides how to apply it to the issue at hand. In essence, he establishes the direction the ratio-decidenti principle should take and develops it so that the law is established in society. Sometimes a principle could emerge through an obiter dictum or even a dissenting opinion, when the relevant facts might be seen from an angle that was

2 *Mahoney v. Michaels, Stern & Co.*, 9 N. Y. 2d 931, 217 N.Y.S.2d 97 (1961).

3 Cardozo, *The Nature of the Judicial Process* 161-62 (1921).

not considered at the time, rather than through the ratio-decidenti. The judge may consider this alternative viewpoint in a subsequent case and give it life without departing from the system of precedents.

Judges create equitable standards to evaluate the claims, facts, societal requirements, and justice for not only the parties but also for the society at large and any future petitioners. Equity is the factor that determines that both parties are treated in balance. These procedures were thought to be reasonable and just, and they were continued as the equity principle in subsequent deals. In a particular instance, the judge's cognitive process might be affected by history, custom, social utility, a strong sense of justice, or even an awareness of the overarching principles of our legal system. These factors could come to the judge's aid and provide guidance on how to continue.

The principle of social justice, which is expressed in sociology, transcends all the aforementioned and surpasses them all to become the greatest of them all. Social justice and the wellbeing of society are the ultimate goals of law. Because of this, there is more latitude in how constitutions are interpreted than there is in how the law is generally applied. Constitutions are more likely to contain fundamental ideas that must be developed and then applied to specific circumstances. Judges must fill in any gaps where the Constitution or judicial precedent do not adequately address the issue at hand by using the principles of justice and welfare established by the Constitution.⁴

ASPIRATIONS AND DUTIES - NATIONS

Aspirations and duties of any nation is fundamental to its basic philosophy as reflected in its Constitution. During the Hart and Fuller debate on law and morality a separation between the core and the penumbra distinguishes between two types of morality. The first type of morality is explained as a morality of aspiration: that can also be termed as constitutionally protected rights; also referred as the morality of Greek Philosophy, of the Good Life, of excellence,⁵ of the fullest realization of human. It discusses the concept of a subjective morality with the confidence in man's ability for self-perfection and willingness to enable his quest for self-fulfilment even as it condemns men for failing to embrace opportunities for the fullest realization of their powers and potential.⁶

In comparison, the second type of morality was understood as the morality of duty, which lays down the basic rules without which an ordered society is impossible, it speaks in terms of that thou shall not to do this or that and condemns men for failing to respect the basic requirements of social living in a civilized society.⁷

While Fuller begins by precisely examining the meaning of the two moralities as if they were mutually exclusive in the interest of conceptual clarity, he quickly defines

4 Cardozo, *The Nature of the Judicial Process* (1921).

5 Lon L. Fuller, *The Morality of Law*, (2nd ed., 1969) New Haven, CT: Yale University Press.

6 *Ibid.*

7 *Ibid.*

this opposition through the notion of a moral scale.⁸ At the bottom of the scale lies the morality of duty a formal essential for social existence. At the top of the scale lies the morality of aspiration, the realm of higher human law. Somewhere near the middle of the scale exists a point of transition from the morality of duty to the morality of aspiration, and Fuller highlights the task of locating this pointer as “a basic problem of social philosophy: If it is set too low, the notion of duty itself may disintegrate under the influence of modes of thought appropriate only to the higher levels of morality of aspiration. If the pointer is set too high, the rigidities of duty may reach up to smother the urge toward excellence.”⁹

Such conceptual ambiguity is only increased once Fuller elaborates the dual moral foundations of the law itself. The inner morality of law, upon which Fuller focuses his attention, is the basic morality in the social life which includes duties that run toward other persons generally. It is an affirmative, general, procedural morality that generally tends to warn individuals away from harmful acts but also demands that human energies must be directed towards specific kinds of achievement.¹⁰

Specifically speaking Fuller positions that the external morality of law is concerned not with procedure, or means, but with substance, or ends: it is, in Fuller’s words, a substantive natural law.¹¹

UDHR AND CIVILIZED CONCEPT

Although the higher idea of morality has always been considered in the dimensions of law and policy making at the international level, in fact they have merely anticipated a process of thinking to be launched in the country in which to be implemented. Domestic nation simply refers to the nation that has chosen to incorporate this way of thinking into its formulation of domestic policy. The UDHR’s preamble, which refers to the declaration as one of the “Civilized States,” provides a very clear view of the world as it exists under the auspices of the United Nations. Civilized refers to a higher standard of living and thought.

Though that is the vision of United Nations and its Declaration the latter Conventions and Protocols are found to be more in the functional nature comprehending the basic differences between the nations – custom, usages and indigenous nature. These actions reflect the higher thinking of the U.N. that the vision of U.N is the goal of the Nations while the conventions and protocols are the methods to reach that goal.

This International thought process can be interpreted in terms of the earlier discussed Hart – Fuller controversy wherein the ideals of aspiration can be equated to UN vision while the protocols and later conventions can be taken as ideals of duty driving the nation and building it towards higher ideals of aspiration.

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 Lon L. Fuller, *The Morality of Law*, 96 (2nd ed., 1969) New Haven and London, Yale University Press.

A country consists of individuals and these individuals form the society, the ruler or the parliament might at large represent the aspirations of the society but it might not succeed always to fulfil the duty towards each and every individual. Aspirations are always the higher ideals but an individual might not be mature enough to think on the lines of these higher ideals. There is a wide gap between these duties and aspirations. This can be only gradually filled by education, science, philosophy and continuous deliberations on different matters relating to law and man. Through these processes a method of refining takes place through errors and repair – a system of thesis and anti-thesis.

CONSTITUTIONAL FRAMEWORK -INDIA

With the declaration of Independence, India became a democracy and thereby we adopted the Constitution imbibing the United Nations Declaration of Human Rights 1948.

Our Constitution adopted most of the U.N. vision including right to life, personal liberty, freedom of thought, conscience, and religion. These incorporations reflected the vision of our forefathers who wanted India to be projected as a progressive democracy forging ahead into the 21st century hand in hand with the other big democracies like U.S. and U.K etc. These articles of our Constitution can be termed as the '*Ideals of Aspirations*' of Free India.

Though the Constitution reflected the ideals of aspirations ironically the legislations enacted by free India reflected the '*Ideals of Duty*'. One of the initial legislations to come into effect was the Hindu marriage Act 1955, this Act is an example of how a government with a progressive mentality brings a nexus between aspirations and duty towards building a society with varied customs and usage. The definition of the word 'Hindu' is given by the Act as an all-inclusive clause which brings all persons who do not come under the definition of Muslim, Christian, Parsi and Jew under the definition of Hindu. On further reading the statute refers to provisions which invalidate a marriage between sapinda and prohibited relationships but in all instances, exception is given to marriage conducted through custom. This Act stipulates the elements of a valid marriage but at the same time gives exception to custom and acknowledges those marriages. This is an ideal example of a legislation having both ideals of aspiration and ideals of duty. The aspiration is a high ideal which is yet to be achieved while the ideal of duty is the duty to satisfy the society in its present need by the government. This can be illustrated by the decision of the government following a Supreme Court decision *Seema v. Ashwani Kumar*¹² in 2006 making marriage registration compulsory. The provision of marriage registration was there in the Hindu Marriage Act 1955 but it became an enforced law only after 2006.

CONSTITUTION AND CONSTITUTIONAL MORALITY

The framers of the Indian Constitution drafted the Constitution to deal with a land

12 *Seema v. Ashwani Kumar* (2006) 2 SCC 578.

having varied culture, religion, language and custom. They never intended to implement these aspirations over above their duty to protect the already practiced behavior of the people in a compulsive manner. Rather they wanted and waited till the people attained a certain maturity level to gauge the need to look upon the aspirations through gradual training to live in a democracy through discussions, education and inherent tolerance developed towards one another in a mixed habitat.

Looking from their vision every religious and cultural question and problem should be dealt with in a much-protected ambience giving the concerned community or group a feeling of being considered important and wanted. A community whether it be a religious or cultural minority or majority is sensitive when its traditional practices are being disturbed as it brings in a feeling of insecurity e.g.: A small child being asked to remove his old clothes and wear new one, the child will start crying because he does not want a change. Especially if this is done by a stranger, he will rebel but if this same act is done by the mother by coaxing and loving the child, he will allow because now the child feels secure in the arms of his mother. This is the philosophy behind giving equal sanctity to law and custom under law. Customs and religious usage cannot be discussed in the Constitutional perspective till the people have engraved the Constitutional rights into their heart.

The government machinery should be mature enough to understand that no law prevails over the sentiments of people and so to get these aspirations to prevail the right time has to be awaited for by the government. This is the reason the Uniform Civil Code is still in an unborn stage.

Every religious or cultural matter should be first understood through the sentiments of the community rather than through the course of law. If the community is still immature then it is better to leave the matter for further time rather to make the law for them. A single wrong move can create enough pain and one will find himself fighting a losing battle. Secondly this matter should be thrown into that community's hand for them to bring in a viable solution rather than government taking a unilateral stand. Thirdly proper explanation should be presented at open forums to make the people in that community and the other viewers comfortable and feel that their sentiments have been well taken care of by the government. If a time period is required then that should be allowed with proper follow-up.

The in-built confidence of the people in the government elected by them is the foundation of Constitutional morality of a country. The basic structure principle of the Constitution is the framework on which the Nation is constructed which reflects the trust and confidence of the people, the social contract theory as enunciated by the jurists.

In Sabarimala case¹³ the clash between the constitutionally protected rights of equality and custom were found in opposition to each other. The Supreme Court gave a verdict protecting the right to equality instead of the age-old custom of preventing women within the age group of 10 to 50 years from entering Sabarimala. This decision

13 Indian Young Lawyers Association v. The State of Kerala (2019) 11 SCC 1.

did not receive that level of acceptance as was anticipated, by many people especially among women folk. One can understand that the Hindu people of Kerala felt that they were not taken into confidence regarding banning this custom and the reason for banning it. More than the question of right and wrong in regard to a custom it is often this feeling of not been considered by the government along with the sense of security in not to be disturbed regarding their religion and culture which they have got used to over the years. The need for change can be initiated by the government or its agencies but the change has to be ultimately brought in by that community itself.

In *Shayara Bano case*¹⁴ a similar question was raised where the triple talaq, to be precise talaq-e-biddat, a customary practice was in contradiction to right to equality of Muslim women. This practice enabled Muslim men to give talaq at one stretch. This practice has long been in discussion and finally in this case the Supreme Court declared this practice as unconstitutional. This decision was accepted by the community and is the law of the land.

The study of the above mentioned two cases might highlight the points of difference, though both customary practices were in contradiction to Constitutional rights, one was not accepted while the other was accepted by the concerned community. The possible reason could be that talaq issue has been in discussion for a long time and the community itself wanted a change. In the case of *Sabarimala case* the matter needs more discussion among that community and it is yet to be seen how the community itself deals with this matter in reference to the right to equality in the Constitution. The Hindu community of Kerala has overcome the customary practice of marriage among sapindas though there might be some exceptions. Customs need time to be replaced by Constitutional rights. Perseverance is needed for these matters as the feeling of confidence and security has to be simultaneously retained with the change.

CONCLUSION

The legislators and judges in each civilization know that law is a blend of history, logic, justice, welfare, and overall, the general consciousness of the society. In his historical course, Savigny argues that the government should consider the common consciousness of the population. He presented the justification that if the state acknowledges this popular consciousness, the people will feel more secure in their relationship with the government.

He was referring to customary practises that might not be accepted entirely in a state with a written constitution, but he advanced the idea that some customs that are consistently followed by the population might at least be noted and valued by the authorities, and can be accepted in some delicate situations to keep people's faith in the democratic process of Governance.

14 *Shayara Bano v. Union of India*, AIR 2017 9 SCC1(SC).

Law is a social weapon which can socially transform a society silently and unconsciously¹⁵ from one period to another but at the same time it is also a strong tool to change the society purportedly through the power of law so it is important to understand the areas where the judge has to mould the changing system silently or by a complete change in law. The judge has to understand the undercurrents in the society and distinguish between the right and the wrong and show the direction in which the river has to flow.

As the study goes deep it would again mean a struggle between the law and the morals of the society.¹⁶ The responsibility of the judge is to use the power vested in him to maintain a relation between law and the morals and between the concepts of equity, reason and good consciousness and the law of the land. Within this limit the judge has to give social justice, through his mechanisms, which is the jurisprudence of social transformation concept in a nation.

Every judge might look at the same problem from a different perspective, his thinking process developed through his likes and dislikes, his upbringings, his prejudices, and other factors¹⁷. Cardozo has discussed the forces that judges avowedly use to sculpt the structure and content of their verdicts. Rarely are even these forces fully conscious. But because they are so close to the surface, it is unlikely that their existence and effect would be denied. Even though their power has been acknowledged, the issue has not been exhausted. Other forces, including as preferences, prejudices, and a complex network of instincts, emotions, habits, and convictions, operate deeply below the level of consciousness and shape a person's behaviour, whether that person is a judge or a litigant.¹⁸

Training of judges wherein he is taught to condition himself to contain his subconscious prepossessions to enable him to give a more impartial decision but at the same time with social justice is very important. Even then as human nature has so many variants and defects, the flaws would still be evident in the legislative and decision-making process.

Through this process the system can still retain some elements such as uniformity, certainty in law along with the basic attributes of morality and consciousness. The attributes of diverse minds can bring in a check and balance in the law-making process towards transforming the social fabric for the betterment.

Many judgements have been overturned over the years, some conveniently ignored, and in certain cases, a judge's dissenting or minority view has prevailed as the law. The good decisions based on equity, justice, and good consciousness endure through this sifting process. Though laws and periods are subject to change, the inner morality of law endures because without it, law cannot exist.

15 Cardozo, *The Nature of the Judicial Process* (1921).

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

Through this process of judicial law making the fabric of law of a Nation does not change suddenly and completely. Rather it gradually and slowly gets adapted and absorbed into the masses as their pulse and life.

“Judicial Process in law means a process to maintain the transition of change with certainty in law retained so that the inner morality of law continues to link the times and the changes in law, it being like a river flowing through the terrain of humanity gathering pebbles of change through its journey some it loses in its journey some it retains till the end. Through the process of judge made law, the Rule of Law, while it gathers a lot, through its journey, gets more refined and focused.”

The testing of these principles through the present and future times develops the way through which law develops and the principle whether it develops further into rule of law depends on the inner morality of the principle. Law is a nation's source of life, so it is important for legislators and judges to protect this life in the law in order to uphold the Rule of law in the country.

The Changing Approach of Courts in Granting Divorce

*Dr. Harsimran Kaur Bedi**

ABSTRACT

Hindu marriage is a religious, indissoluble and eternal union in order to achieve moksha by practicing dharma. With passage of time, due to social changes the society started abandoning the notions of Hindu Law consequently Hindu marriage has become a dissoluble union. State took the charge of regulating marriage by enacting Hindu Marriage Act, 1955 and the courts started granting divorce within the parameters of law. The paper holistically analysis trends of courts in granting divorce in the light of basic concept of marriage under Hindu Law. It delves upon the latest developments by courts in granting divorce.

I. INTRODUCTION

In ancient times Hindu mythology and religious practices were in the knowledge of every individual. Marriage was considered an eternal union. The sacrament concept of marriage was considered as sacrosanct union. *Dharma* was practiced by man together with his wife in order to attain *moksha* thus the marriage remained indissoluble union. *Grhasthasrama* the marriage maintained everything in the society by practicing *dharma* through fulfilling their social and religious duties thereby taking care of *Brahmacarya*, old and indeed everyone in society. Consequently, the question of divorce did not arise in Hindu society. However, divorce was rarely granted among few Hindu sects as per their custom. With social change in society people started abandoning the practices of law ordained by Hindu scripts and text writers, accordingly state took the charge of regulating marriages. Marriage is a very important organ of state so the Hindu Marriage Act, 1955 was enacted with an aim to maintain Hindu marriage. With change in culture, loss of fear of society and freedom to woman matrimonial litigation increased and courts started granting divorce to parties within the parameter of law as laid down by Hindu Marriage Act, 1955 as interpreted by judicial pronouncement, and by keeping in view the conduct of parties and their social behaviour so as to uphold the sanctity of marriage as envisaged under Hindu Law, norms and

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practices. However, keeping in view liberties enjoyed by public at large, Marriage Laws Amendment Act, 1976 came in force which liberalized divorce by bringing major changes in the Hindu Marriage Act, 1955 thus courts have started granting easy divorce by keeping in mind further changes in society and changed living conditions of people in terms of circumstances of each case. After the lapse of the Marriage Law (Amendment) Bill, 1981 for enacting irretrievable ground of divorce under Hindu Marriage Act 1955, the courts have started granting divorce on the parameters akin to the irretrievable breakdown of marriage. Thus, as society left the shackles of religion and *dharma* so the courts took its stance in protecting society in unbiased and classical way there by setting new trends of granting divorce.

II. DIVORCE

Divorce is not referred in ancient texts under Hindu Law. *Vedas, Dharmashastras Smrities, Puranas, Mahabharata*, Commentators and Digest Writers have kept marriage as a sacrament- an indissoluble union which was being practiced in society. However divorce as per customs in a particular society or cult was valid and was an exception to the rule of the indissoluble union. If we penetrate deep into the psycho-socio-legal aspect of dissolution of marriage we find the concept of indissolubility is an integral part of oldest system of law- the Hindu Law-Known to the world.¹

Kautilya in exceptional circumstance allowed divorce for husband and wife if they have aversion for each other. But if marriage was solemnized according to *Dharma* Law then divorce could not be taken.² If woman married a person of other caste then she could seek divorce. Kautilya did not give sanction to divorce even when one spouse was cruel but if husband posed danger to wife then she could seek divorce by renouncing her share in property of her husband.

Lower caste Hindus used to practice divorce in ancient times. In Bengal, Bombay, United Provinces of Agra, Oudh, South India and in other tribal communities' customary divorce is practiced. The Panchayat or head of a caste could determine marriage disputes and grant divorce.³ Divorce by mutual consent has been usual practice among members of these societies. Divorce could be taken by wife on fault grounds of impotency, ill-treatment and immorality. In order to seek divorce evidence of customary practice was necessary. Thus, divorce was not valid under Hindu Law but the exception to rule was valid under customary Law.

With social change in society such as non-accessibility of India's spiritual learning, loosening of religious ties, egocentric attachment, industrialization, urbanization, democratic ideal, change in value system, women empowerment, growth of individualism, extramarital associations, renouncing duties etc. divorce took its birth

1 Prafulla C. Mishra, *Marriage: An Indissoluble Union* in Paras Diwan, Virendra Kumar (eds.), *Law Towards Stable Marriages* 51, 51 (1984).

2 Kautilya Arthashastra 12FF, Translation by R. Sharma Shastri, Chapter III (Trivandrum Sanskrit Series, 1924).

3 *Kalee Chura Shaw v. Dukhy Bebee* 5 CLR 505 (1879).

among Hindus, thereby deviating from notions of ancient Hindu Law under which marriage was regarded as a sacrament an indissoluble union.⁴ It is creation of legislature vide Hindu Marriage Act, 1955. It became necessity in certain marriages which are broken and should be ended by divorce but it is not an antithesis of marriage.⁵ The trend of courts in giving divorce has not been uniform. Initially courts after enactment of Hindu Marriage Act, 1955 restricted grant of divorce.⁶ Their main aim was to preserve marriage and divorce was granted only in extreme difficulty with strict proof of fault grounds. Thus, courts wanted marriage being sacrament should be maintained, now with passage of time cruelty and desertion have become the major causes of divorce. The courts have discerningly interpreted the law and have given decision from time to time. The decision have been taken by taking into consideration ancient Hindu Law as well as English Law depending upon circumstances of each case, as per custom, practices, notions and living of Hindu civilization as it is different from that of Western countries. In this way courts have not only protected the society but also have differentiated right over wrong thereby kept balance in society for its overall development and prosperity.

Courts in India while deciding cruelty have taken into consideration English cases like *Russell v Russel*,⁷ *Gollins v. Gollins*,⁸ *Holden v. Holden*, etc.⁹ On these lines concept of cruelty has been developed by courts in India such as intention of being cruel is not taken into consideration by courts while determining cruelty.¹⁰ In *Sayal v. Sarla*,¹¹ wife's unintentional act affected the health of husband as a result husband filed petition of Judicial separation but his application is dismissed and he filed appeal against the dismissal of application for judicial separation by District Court. The court held that "the evidence in this case leaves no doubt in my mind about the reality of fear in the mind of the petitioner. He has suffered a great deal from the hands of an ignorant wife and no amount of repentance can undo the wrong that has been wrought."¹² The wife gave suffering to husband by giving him potion as a result his health got impacted and there is nervous breakdown. Accordingly the wife's action amounted to cruelty even when she did not have intention to be cruel.

4 See: Steven J. Rosen, *Essential Hinduism* 38 (Praeger, 2006). See also: S. Pothen, *Divorce: Its Causes And Consequences In Hindu Society* 147 (Shakti Books, India, 1986). See also: Pratima K. Chaudhary, *Changing Values Among Young Women* 126 (Amar Prakashan, 1988).

5 See: B.K. Sharma, *A Modern Perspective of Our Divorce Policy* in Paras Diwan, Virendra Kumar (eds.), *Law Towards Stable Marriages* 91, 96 (Seema Publications, 1984).

6 See: B.K Sharma and Vijay Nagpal, *Let them Bury the Marriage Breakdown Theory: Its Indian Perspective* 39 *Panjab University Law Review* 83, 85 (1992).

7 (1997) AC 303.

8 (1963) 2 All ER 966.

9 (1810) 1 Hag Con 453.

10 *Williams v. Williams* (1963) 2 All ER 966.

11 AIR 1961 P&H 125.

12 *Id.* at 128 (Para 11).

The trend of courts in granting divorce has further changed after the Marriage Laws (Amendment) Act, 1976 came in force, under which scope, meaning and definition of cruelty has changed.¹³ The courts have interpreted cruelty according to new laws where cruelty *per se* is a ground for divorce. But courts still take into consideration old decisions while granting divorce on ground of cruelty.

The changing trend of courts can be seen in *Atma Parkash Arora v. Neelam*,¹⁴ wherein cruelty is defined as: “conduct or treatment which stands to undermine the health, reputation, the working career or the like or affects the reasonable happiness of married life.”¹⁵

Similarly further changing trend can be seen in *Kalpana Rao v. Shsapati Rao*,¹⁶ where the court took into account the psychological factors in defining cruelty. Cruelty has been defined by court as: “cruelty is really insensitivity and indifference to the feelings and sufferings of another. It is not mere indifference but infliction of injury upon another and absence of feeling for the suffering of victim and consideration of the consequences of the injury inflicted proportional wrong.”¹⁷

Further, the “acts of cruelty are infinitely variable, and attempt at drawing a complete list as to what constitutes cruelty never succeed”¹⁸ so the courts in India have not defined cruelty. Thus, with changing times the courts are granting divorce on different nuances.

There are plethora of cases where cruelty by wife is seen, which was never there during Vedic and Post Vedic periods infact during *Pativartya* period husband used to inflict cruelty on wife.¹⁹ The escalating trend of cruelty by wife is seen in a recent case of *Raj Talreja v. Kavita Talreja*,²⁰ where in the Supreme Court has held that the acts of the wife in filing false complaints against her husband amounts to cruelty.²¹ The court observed that wife imputed false and defamatory allegations against her husband, his family members and colleagues which derogated the reputation of husband in the eyes of those, of whom he knows and this amounts to cruelty. The recent case of Karnataka High Court has also set the similar trend in this regard. In *Parubai Raghavendra Rathod v. Ragoendra Tukaram Rathod*,²² the court held that “scandalous allegations against the character of the husband and his extra marital relationship without any piece of

13 See: U.P.D. KESARI AND ADITYA KESARI, MODERN HINDU LAW 133 (Central Law Publications, 2018).

14 (1981) 2 DMC 43.

15 *Ibid.*

16 1983 MLR 320.

17 *Ibid.*

18 Sukumar Mukherjee v. Tripti Mukherjee, AIR 1992 Pat 32.

19 See: B.S. Upadhyaya, Women in Rgveda (S.Chand and Co Pvt Ltd, 1974). See also: P.V. Kane, History of Dharmasastra (Bhandarkar Oriental Research Institute, 1941).

20 AIR 2017 SC 2138.

21 *Id.* at 2141 (Para 12).

22 AIR 2022Kar 5.

evidence definitely amount to cruelty.”²³ Further in *Narendra v. K. Meena*,²⁴ wife did not want to live with her in-laws. The court held that “a son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain parents, when they become old and when they have either no income or have a meager income.”²⁵ The rationale given by court is that wife wanted to enjoy the income of her husband. The court observed that Hindus practices are different from Western countries. Accordingly in this case also court has set example of protecting old parents in changing India along with maintaining Hindu marriage.

In *Renu Das v. Bhaskar Das*,²⁶ wife executed written agreement that husband shall live in a rented accommodation with wife and his relatives will not be allowed to come and meet him. Also, the wife on oath stated that she does not consider her husband as her husband and has stopped wearing sindoor which she used to wear after marriage. The court held that such acts by wife amount to cruelty, if husband is bound by agreement, not to meet his family members and the wife by not wearing sindoor and by making statement that “she does not consider the husband as her husband, the wife has repudiated the marriage.”²⁷ The court said that it is not a happy and surviving marriage. Such a statement by wife would hurt husband’s feelings to a great extent. Thus, when no matrimonial harmony could be seen, the court granted divorce to husband.

The recent trend of court can be seen in *Joydeep Majumdar v. Bharti Jaiswal Majumdar*,²⁸ which is a case of highly educated spouses, the appellant is an army officer with M.Tech degree and respondent wife is a lecturer with Ph.D degree. Their marriage lasted only for few months. The appellant alleged mental cruelty by wife as wife’s false complaint has affected his carrier and loss of reputation. The respondent contended restitution of conjugal rights. Family Court granted divorce to husband but High Court reversed the order of Family Court accordingly the appellant filed appeal in Supreme Court. The Supreme Court granted divorce to husband and held that “the appellant has suffered adverse consequences in his life and career on account of allegations made by the respondent, the legal consequences must follow and those cannot be prevented only because, no court has determined the allegations were false.”²⁹ The court further held that the “here the allegations are leveled by a highly educated spouse and they do have propensity to irreparably damage the character and reputation of the appellant. When the reputation of the spouse is sullied amongst his colleagues, his superiors and society at large, it would be difficult to expect condonation of such conduct by the affected party.”³⁰ Thus, court stated that the

23 *Id.* at 9 (Para 19).

24 AIR 2016 SC 4599.

25 *Id.* at 4602 (Para 11).

26 AIR 2021 Gau 45.

27 *Id.* at 47(Para 3).

28 AIR 2021 SC1165.

29 *Id.* at 1168(Para 12).

30 *Id.* at 1168 (Para13).

wrong party is not expected to continue marriage and there are ample of reasons to separate.

In *Shobha Rani v. Madhukar Reddi*,³¹ court stated that demand of dowry amounts to cruelty as it is banned under law and is itself bad. The court in this case stated that in olden days dowry was not given but only gifts were given to daughter, out of love and affection, not as dowry. Now dowry is deep rooted in our society which continues even after marriage which amounts to cruelty. Even in present twenty first century women are committing suicide because of demand of dowry and courts are giving punishment under section 498A of Indian Penal Code, 1860.³² But society is not ceasing this practice rather it is becoming monstrous day by day as woman herself has started claiming dowry which continues till the lifetime of her parents. Accordingly courts are there to protect the victims of dowry which in reality is very difficult to prove.

More to the point, the Supreme Court has elaborately given illustrations of cruelty in *Samar Ghosh v. Jaya Ghosh*.³³ In this regard court detailed many illustrations amounting to cruelty such as the conduct must be much more than jealousy, selfishness and possessiveness, refusal to have intercourse, or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty etc.³⁴ Accordingly as the society changed so did the courts interpret law discerningly according to needs of time thereby setting new trends pertaining to divorce.

Courts in India have also interpreted law pertaining to desertion. This can be seen in *Bipinchander Jaisinghbai Shah v. Prabhavati*.³⁵ Where the plaintiff could not prove desertion as wife showed her interest to comeback as factum of separation and intention to bring cohabitation permanently to end was not there. Also deserted spouse proved absence of conduct in giving reasonable cause to the spouse while leaving matrimonial home. The courts in India has relied on English Cases while interpreting desertion such as in *Thomas v. Thomas*,³⁶ *Sickret v. Sickret*³⁷ and *Pratt v Pratt*³⁸ where the English Courts have elaborately discussed desertion.

In a recent case of *Debananda Tamuli v. Smt Kakumoni Katakya*,³⁹ the Supreme Court while discussing law relating to desertion reversed the judgments of District Court and High Court and granted divorce to husband. The Supreme Court has held that the wife visited matrimonial home on account of the death of mother-in-law for only

31 AIR 1988 SC 121.

32 Gajendra Singh v. State of Rajasthan, 2014 Cri LJ 2306.

33 (2007) 4 SCC 511.

34 *Ibid*.

35 AIR 1957 SC 176, available at : Law Finder Doc Id # 112475(last visited June 8, 2022).

36 1924 P 194.

37 1899 P 278 at p. 282 (e).

38 1939 AC 417 at p. 420(g).

39 AIR 2022 SC 1099.

one day. This cannot be regarded as cohabitation as there is no intention to resume cohabitation, accordingly there is a factum of separation. Moreover, “the wife has not pleaded or established any reasonable cause for remaining away from her matrimonial home.”⁴⁰ In another recent case pertaining to desertion, in *Uttamram Ledu Singh v. Kayaso Bai*,⁴¹ the Chhattisgarh High Court held that if husband brings concubine and she starts living in the house with wife and wife leaves the matrimonial home due to this reason as she has to face physical and mental torture this act of wife will not amount to desertion by wife.

In addition courts in India are accepting evidence of preponderance of probability while granting divorce. This can be seen in landmark case in *Jayachandra v. Aneel Kaur*,⁴² where the Apex Court granted divorce on irretrievable breakdown of marriage of two doctors and stated that evidence in matrimonial cases should be preponderance of probability and not beyond reasonable doubt. This can also be seen in the latest case of *Mohandas Panicker v. Dakshayani*,⁴³ where the court granted divorce to husband on the view of preponderance of probability that wife is in adultery with another man. Similar decision has been given in English case of *Blyth v. Blyth*.⁴⁴

III. EASY DIVORCE

The trends of courts in granting easy divorce cannot be ruled out where “a society like India which aims at securing social justice to its people through implementing the concept of equality and personal liberty and calling rapid strides towards industrialization cannot afford to compel married spouse to lead a completely rotten and stressful life.”⁴⁵ Accordingly after advent of the provision of section 13(1A) of the Hindu Marriage Act, 1955 in 1964 the courts started granting easy divorce.⁴⁶ In *Madhukar v. Saral*,⁴⁷ appeal is filed by husband against the order of Lower Court where the husband filed divorce under section 13(1A) of the Hindu Marriage Act, 1955 but Lower Court granted judicial separation and not divorce to husband because husband has committed matrimonial wrong. But High Court held that: “the provision does not refer to a matrimonial offence or a wrong. It provides for maintenance of a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union, which has utterly broken down and on preventing a party to the marriage from remarrying and living respectably.”⁴⁸

40 *Id.* at 1102 (Para 11).

41 AIR 2022 Chh 66.

42 AIR 2005 SC 534.

43 2014(2) HLR 118.

44 1996 AC 643.

45 Ajai Kumar, *Institution of Marriage-Judicial Approach* 97 AIR 6, 7 (2010).

46 See: Kusum, *Irretrievable Breakdown of Marriage: A Ground for Divorce* 20 JILI 288, 289 (1978).

47 AIR 1973 Bom 55.

48 *Id.* at 59 (Para 15).

Thus, after 1964 divorce has become liberal as previously divorce could be taken by petitioner in whose favour decree of restitution of conjugal rights and judicial separation has been passed.⁴⁹ The court analyzed section 13(1A) and stated that this provision gives opportunity to petitioner to remarry and live with respect thereby benefitting the community by ending marriage which in reality is broken. Thus, new jurisprudence started by courts in India for granting liberal divorce.

Moreover, even when there is cruelty or desertion by one spouse or both spouses and difference is widened to the extent that it becomes difficult for spouses to live together the court granted divorce. In *Parihar v. Parihar*,⁵⁰ appeal is filed by wife against the decree of divorce by Lower Court. Lower Court stated that difference is widened between husband and wife. But High Court analyzed that the husband has committed cruelty. And later wife by inflicting false allegations in litigation against husband and his family inflicted cruelty. The court held that: "As a matter of fact the husband was guilty of cruelty and the wife went on quietly bear suffering. Now, if it is so, then it is more appropriate, as the learned trial Judge observed, that the couple is permitted to live apart. Their marriage is now only an empty shell which should be destroyed with maximum fairness and minimum bitterness. I am satisfied that the marriage deserves to be dissolved. If they cannot bury the hatchet, let them bury the marriage and live again."⁵¹

The court relied on English cases *Russell v. Russell*,⁵² *Horton v. Horton*,⁵³ and *Dastane v. Dastane*⁵⁴ while deciding the case and gave divorce to husband. The court stated that parties are young and remarriage is not uncommon and parties would find better partners.

Besides, in *P.L. Sayal v. Sarla Rani*,⁵⁵ the courts granted divorce even when wife was repentant to take it. The court stated that it would be injustice to keep them together. The court relied upon the observation in case *Alop Bai v. Ramphal*,⁵⁶ the learned judge observed: "In marital matters it is the attitude of mind and the feelings that count and no decree of the court can force the parties to live together. It is because of this fact that Section 23(2) provides that before granting any relief under the Act it shall be the duty of the court in the first instance to make every endeavor to bring about reconciliation between the parties."⁵⁷

49 See: Original Hindu Marriage Act, § 9, No.25, Acts of Parliament, 1955(India).

50 AIR 1978 Raj 140.

51 *Id.* at 154-155.

52 1895 PD 315.

53 1895 PD 187, 193.

54 AIR 1975 SC 1534.

55 AIR 1961 P&H 125.

56 AIR 1962 MP 211.

57 *Ibid.*

The courts in this cases relied on English cases *Kelly v. Kelly*⁵⁸ and *King v. King*⁵⁹ while holding that the marriage has been dissolved for protecting everyone.

Furthermore, with insertion of new provision of divorce by mutual consent under section 13B of the Hindu Marriage Act, 1955 by the Marriage Laws (Amendment) Act, 1976 if both parties mutually agree for breakdown of marriage then they can be granted divorce. The trend of courts in this regard is that “if you cannot live together then depart by taking divorce.” Accordingly the courts thereby are practicing speedy disposal of cases without adhering to the provision of reconciliation of parties under section 23(2) of the Hindu Marriage Act, 1955 which is mandatory to be practiced by court before granting divorce. Further under Section 13B waiting period of one year before petition and then six months after rule *nisi* is necessary to get divorce by mutual consent. But the period of six months under section 13B(2) has been waived off by Supreme Court in its recent judgment of *Amardeep Singh v. Harveen Kaur*.⁶⁰ The court held that if “the statutory period of six months specified in section 13B(2), in addition to the statutory period of one year under section 13B(1) of separation of parties is already over before the first motion itself” then parties can mutually take divorce. Along with this condition, other conditions have been stated by court these are meditation and efforts of Family Court has failed to reconcile parties, parties have genuinely settled their disputes and waiting will only prolong their agony. Thus, when parties are living in purposeless marriage and want to peacefully settle their issues then parties can be saved from unwanted suffering of living in a dead marriage by taking divorce. This trend of court will help parties who are litigating for long period of time and want to amicably seek divorce.

Recently the Supreme Court in *Amit Kumar v. Suman Beniwal*,⁶¹ has set another new trend for granting divorce by mutual consent by laying down conditions for condonation of waiting period of six months in addition to other factors for granting divorce under Section 13B(2) of the Hindu Marriage Act, 1955. In this case, the marriage of highly educated and highly placed husband and wife, being non starter lasted for only three days. The parties having failed to get relief from Punjab and Haryana High Court for condonation of waiting period of six months for grant of divorce under Section 13B(2) of the Hindu Marriage Act, 1955, approached Supreme Court of India. The Supreme Court granted divorce to parties by setting aside the orders of Family Court and High Court. The Supreme Court held that “no useful purpose would be served by making the parties wait, except to prolong their agony.”⁶² Thus, the Supreme Court by exercising its extra ordinary powers under Article 142 of the Constitution of India granted divorce to parties by waiving off the statutory period

58 (1968) 1 WLR 152.

59 *King v. King* 1953 AC 124.

60 Civil Appeal No. 11158 of 2017, Supreme Court of India, decided on September 12, 2017, <https://indiankanoon.org/doc/79830357/> (last visited June 10, 2022).

61 AIR 2022 SC 570.

62 *Id.* at 577.

of six months under Section 13B (2) of the Hindu Marriage Act, 1955. The Court gave the considerations to be considered apart from other factors for waiving off statutory period of six months. These are the time period of marriage, duration of stay of parties as husband and wife, the time period of separation, the length of time for which litigation has been pending, any other legal proceedings between the parties, chance of reconciliation, children from wedlock, are parties genuinely interested for settlement freely without any coercion or pressure for alimony, maintenance etc. Thus, this development of the Supreme Court has taken note of changing circumstances in changing times between husband and wife where marriages are lasting for few days or weeks which requires interpretation of law and its enforcement in keeping family system alive.

The 71st Law Commission of India Report, 1978 gave the opinion of enacting provision of irretrievable ground of divorce under section 13C of the Hindu Marriage Act, 1955 subsequently the Marriage Law (Amendment) Bill was enacted by government in 1981 which was lapsed due to the intervention of women organization, but courts started granting easy divorce under irretrievable ground of divorce thereby further evolving the concept of easy divorce.⁶³ In *Ramesh Chander v. Savitri*,⁶⁴ parties lived in dead marriage for 25 years. Wife has alleged desertion by husband. And that he has been mixing with undesirable women but there was no evidence. The Court held that: "in this case the marriage is dead both emotionally and practically. Continuance of marital alliance for name-sake is prolonging the agony and affliction."⁶⁵ Thus, the court granted conditional divorce under Article 142 of the Constitution by using its inherent powers as it is impossible to continue marriage and it will give only agony to parties to persist in such marriage which amounts to cruelty.

With further changes in society where scenario of matrimonial has changed to the extent that parties at any cost cannot live together and marriage is beyond repair then the courts grant divorce.⁶⁶ This can be seen in *Naveen Kohli v. Neelu Kohli*,⁶⁷ appellant has filed appeal in Supreme Court for grant of divorce against the orders of High Court where the decree of divorce by Lower Court has been reversed. Parties have filed numerous civil and criminal cases against each other. Many cases have been filed by wife and some by husband. The Supreme Court held that: "A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare *defunct de jure* what is already *defunct de facto*. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than dissolution of the marriage bond."⁶⁸

63 *Supra* note 47 at 300.

64 AIR 1995 SC 851.

65 *Id.* at 852 (Para 3).

66 See: V.S. Jaya., *Irretrievable Breakdown of Marriage as an Additional Ground of Divorce* 48 JILI 439, 440 (2006).

67 AIR 2006 SC 1675.

68 *Id.* at 1689 (Para 91).

The court said that foundation of sound marriage is tolerance, adjustment and respecting each other.⁶⁹ But this marriage has gone beyond repair and should be broken down for protecting the society. Accordingly the courts are going towards irretrievable breakdown of marriage in cases where in marriage nothing is left and is for name sake. This trend of Supreme Court in granting divorce still continues in recent times where Supreme Court in *R. Srinivas Kumar v. R. Shametha*⁷⁰ gave similar decision on irretrievable breakdown of marriage. As a result, with passage of time due to changes in society the courts started encouraging breakdown and irretrievable breakdown theory or in another perspective it can be said that as the society has lost its *dharma* so are the courts protecting the society as well as the parties in divorce case.

IV. MARRIAGE A CONTRACT BEING INTERPRETED BY JUDICIARY

The courts in India have interpreted the ingredients of the Indian Contract Act, 1872 while granting divorce to parties there by setting trend of maintaining the institution of marriage which is also the main aim of the Hindu Marriage Act, 1955.⁷¹ If marriage is solemnized by fraud then marriage is annulled by court. This can be seen in of *Babu Panmalo v. Ram Agya Singh*.⁷² In this case the father of the girl fraudently took the consent of the girl through her mother to whom he misrepresented the age of the bridegroom that he is 25-30 years old and is wealthy accordingly the girl gave her consent for marriage. But in reality the bridegroom age is 60 years. Lower Court did not dissolve marriage and appeal is filed in High Court. The High Court annulled the marriage under section 12(1) of the Hindu Marriage Act, 1955, the court analysed that the father by telling wrong age of bridegroom to mother has concealed the true facts as bride was veiled so she could not see him during solemnization of marriage. Thus, when people use all wrong means for seeking consent for solemnization of marriage then it is through courts that things come in right directions. The trend of courts in maintaining the institution of marriage can very well be seen in this case.

It is important to note that the extent of provision of fraud is taken till the point where consent of marriage is taken by fraud while solemnization of marriage and not otherwise as it would impact the sanctity of the institution of marriage then parties to marriage will have all reasons and misrepresentations for breaking their marriage.⁷³

With changing value system fraud marriages have started and people are breaking each other's trust for the sake of material gain. In *Satpal v. Mamta*,⁷⁴ the Godman of the family took the girl to depression by washing her brain to leave her boyfriend

69 *Ibid.* (Para 68).

70 AIR 2019 SC 4914.

71 See: S.Jaffer Hussain, *Hindu Marriage Act, 1955: Fraud As A Ground For Annulment*, 11 JULI 520, 520-534(1969).

72 AIR 1968 Pat 190.

73 Harbhajan Singh v. Smt. Brij Balab, AIR 1964 P&H 359.

74 AIR 2018 P&H 94.

and also started blackmailing her, as a result he married her involuntarily. His aim was to extract money from the girl in this way he forced the respondent to commit suicide. However, girl got saved by her brother. The court held that: “the marriage is definitely void as the consent of the respondent has been obtained by the appellant by using the fiduciary relationship as a Godman and trapped the respondent by false representations and poisoning her mind and creating a fear of morality and illegality in maintaining her relationship with her boyfriend.”⁷⁵ Thus, the court in this case annulled the marriage under Section 12(c) of the Hindu Marriage Act, 1955.

Even in cases where marriage is with a lunatic person the courts regard it void as lunatic person is incompetent to understand marriage and has incapacity to accept the gift of bride. It has been explicitly stated by Supreme Court in *Rameshwari Nandan v. Bhagwati Saran Singh*,⁷⁶ that the marriage of a lunatic “would not be a proper marriage at all and it could be regarded invalid on the ground that the capacity for performance of the essential ceremony of marriage was lacking in bridegroom.”⁷⁷ Accordingly courts interpret ingredients of contract while deciding validity of Hindu marriage.

With changing times when people seek divorce for unreasonable reasons then courts are there to protect the innocent party. In *Kailash Vati v. Ayodhia Parkash*,⁷⁸ the court while interpreting the provision of restitution of conjugal rights in regard to weekend marriage has stated that “the concept of the Hindu marriage of earlier time has slid down from its high altar of being sacramental to the more mundane concept where the rights and the duties of the wife are governed by status, though as yet it has not reached the stage of being a mere civil contract as in some Western countries.”⁷⁹ Thus, the Court stated that Hindu marriage is neither a sacrament nor a contract. Accordingly the court dismissed the appeal by holding that the wife by her own will without reasonable excuse has withdrawn from the society of husband and this does not come under the ambit of Section 9 of the Hindu Marriage Act, 1955.

Moreover, in cases where wife is working the court has stated that there should be an agreement between husband and wife as give and take is necessary in regard to matrimonial home. In *Swaraj Garg v. K.M. Garg*,⁸⁰ the court gave away the old notion of Hindu Law where wife has to live with her husband mandatorily. The court held that: “the wife earns better than the husband, firstly she will not expect to be maintained by the husband and secondly, it will not be, a matter of course for her to resign her job and come to live with her husband. Some kind of agreement and give and take is necessary.”⁸¹ Accordingly court stated that husband is not working and wife is

75 *Id.* at 99 (Para 16).

76 SCJ 1950 FC 514.

77 *Id.* at 564.

78 1977 CLJ (Civil) 109. See also: Law Finder Doc Id # 66153 (last visited June 10, 2022).

79 *Ibid.* (Para 46).

80 AIR 1978 Del 296.

81 *Ibid.* at (Para 15).

earning comfortably, that wife is living separately for her job is with reasonable excuse. Similar view has been taken in *Dunn v Dunn*,⁸² by English Court.

Besides, marriage is one way process; it is solemnized by will of parties but can be dissolved only by court and not by parties themselves. Once it is dissolved by court then it cannot be undone by parties themselves except by solemnization of marriage again by performing ceremonies as per law.⁸³ In *Poonam v. Naveen*,⁸⁴ the appellant after accepting divorce by mutual consent in Lower Court has filed appeal to get the divorce annulled in High Court. The appellant has alleged that fraud has been played by husband in order to dissolve marriage on the pretext that after taking divorce he will have opportunity of going abroad. The High Court held that: Marriage is the only contract that cannot be annulled by mere wish of parties outside the court. Without the imprimatur of the court, the relationships cannot be driven asunder to a dissolution.”⁸⁵ The court stated that divorce by mutual consent cannot be annulled and parties cannot restore marriage at their free will.

V. CONCLUSION

The approach of courts in granting divorce has evolved from time to time and has not remained static. Depending upon the circumstance of each case and keeping in view the social change in society courts have granted divorce to maintain institution of marriage and to protect the society which is for the benefit of state as well as the society. Initially courts were strict in granting divorce but with passage of time as society changed and the situation has reached to the extent that parties do not want to reconcile and do not want to mend themselves so the courts started granting easy divorce. Even marriage as a contract is interpreted by judiciary where courts have annulled void and voidable marriages. Accordingly, courts have discerningly given decision pertaining to divorce thereby setting new trends one after the other in public interest especially when society has left the practice of *dharma* and religion under which man and woman used to accomplish their social and religious duties in order to attain *moksha* thereby taking care of everything in society for its development and prosperity. Hence, courts have played pivotal role in maintaining the institution of marriage indeed the society.

82 1949 P 98.

83 See: R.H. Graveson, *The Conflict of Law* 185-186 (Sweet & Maxwell, 1965). See also: Sant Kultaran Singh Bedi, *Hindu Marriage and Divorce introduction* (Lawyers Publications, 1983).

84 CR No. 4141 of 2015 (O&M), in the court of Punjab and Haryana, Chandigarh, date of decision 21.01.2016.

85 *Ibid*.

Legal Protection of Food Crop Diversity and the Challenges: A Need for Sustainable Agriculture

*Dr. J. Mahalakshmi**

Earth, my mother, let me securely with bliss in full accord with heaven...

The earth which possesses oceans, rivers and other sources of water;

Which gives us land to produce good grains on which human beings depend for their survival;

May it grant us all our needs for eating and drinking: water, milk, cereals and fruit

-ATHARVA VEDA

ABSTRACT

Securing crop diversity is a requisite for food and nutritional security. Crop diversity is a global concern as it reduces environmental degradation. The importance of its conservation has been recognized in the sustainable development goals in order to ensure food security. Due to the application of technology to adapt climate changes, there are changes in agricultural practices which has resulted in the erosion of crop diversity. This paper makes an attempt to analyse the threats to crop diversity, the challenges that are emerging for a sustainable agriculture and the legislative measures for the conservation of crop diversity.

INTRODUCTION

India is primarily an agricultural country. The distinct feature of Indian Agriculture is tremendous diversity within crops that suited to ecology of agro system sustainability. Agriculture in India has contributed substantially to the national level food security through increased productivity and reduced dependence on imports.¹ Nature has enough to satisfy every one's need. This underlies the importance of sustainability in natural resources to generate health interactions within the agro eco systems. Our

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1 P.V.Srinivasan, "Agriculture and food security" (New Delhi: Oxford University Press) 2007 edition P.138-139.

traditional farming systems have also reflected sustainable agriculture by following the process of crop rotation, mixed cropping, contour farming, agro forestry, terracing etc.² The journey from stock holm³ (YN conference, 1972 to Johannesburg⁴ (WSSD, 2002) through Rio Earth Summit (1992) has greatly emphasised the concept of sustainable development. The Sustainable development denotes material growth of humans and improvement in life style with growing demands of ecological resources and maintenance of environmental quality and ecological balance.⁵ It is imperative to focus our attention towards sustainable and eco-friendly development of agricultural environment as the agricultural eco systems in India are facing certain risks of agricultural unsustainability in which the promotion of mono culture practices resulted in genetic erosion by marginalizing crop diversity. Hence, this paper makes an attempt to analyze the problem of mono culture by highlighting the significance of agro biodiversity conservation in terms of food security on sustainable basis.

GREEN REVOLUTION AND TRENDS IN FOOD SECURITY

Before the introduction of green revolution technology, the country faced massive food shortages and depended heavily on food imports⁶ and hence India strived for crop productivity enhancement by the use of high yielding varieties of rice and wheat with the heavy use of synthetic chemicals in the form of fertilizers and pesticides.

Food security is directly linked to agro-biodiversity which is essential to promote resilience in farming. Reduction in diversity through practices such as mono-culture increases vulnerability to natural courses, to test class weed attack and other plant diseases. Therefore, for smallholders and/or subsistence farmers, agro-biodiversity is a primary one since it ensures both income generation and household food security. Apart from this it also provides eco-system services on farms, such as pollination, fertility and nutrient enhancement etc., resulting in more productive farming which as nutritional and social importance.

The current food scenario is completely the opposite, where it is faced with challenge of tackling huge food grains surpluses that tend to accumulate as public buffer stocks to the extent that the government is subsidizing exports of grain.⁷ The successful onset of green revolution thus, uniformly encouraged the excessive use of chemicals,

2 Divya Agarwal, Arif Siddiquie, Anil K.Gupta and Mohammed Yunus, "Sustainable agriculture: An eco introspection for India (New Delhi; Anmol publications Ltd) 2004 edition PP 173-174.

3 The UN Conference on Human Environment placed issue of protection of bio sphere on the official agenda of international policy and law.

4 The United Nation organized a ten-day world Summit on Sustainable Development in Johannesburg from August 26 to September 2002 to protect the global environment.

5 Savindra Singh, 'Environmental Geography (Alahabad: Prayaga Pushtak Bhavan) 2010 edition P.521

6 Supra Note 1 at 131.

7 Ibid.,

water, non labour intensive machinery and high yielding varieties universally. The green revolution technologies has emerged without realizing for lasting ever green revolution and there by ignoring the ecological health and renewability of basic natural resources like land and water.

MONO CULTURE AND GENETIC EROSION

At present, in the age of ecological-concern with emergence of the modernized agriculture, it was generally understood that a high-input based rise in production could not be sustained over multiple crops of input-based varieties. The green revolution strategies promoted selected high yielding crops which was obstructed one of the nature's selection processes. The push for intensive agriculture models i.e., to bring "survival of the fittest," mono culture has changed the farming system by replacing the major portion from the multi cropping fields. Vulnerability to pests, diseases and environmental stresses has also been observed to be high in certain crop areas.

There is now overwhelming evidence that some of these chemicals do pose potential risks to humans and other life forms and unwanted side effects to the environment. No segment of the population is completely protected against the exposures to pesticides of the potentially serious health effects though a disproportionate burden is shouldered by the people of developing countries and by high risk groups in each country⁸. The world-wide deaths and chronic illness due to pesticide poisoning number about 1 million per year.⁹

IMPACTS OF MONOCULTURE

The concept of mono culture in agriculture refers to the growing of a single crop over a large area. It has certain short-term benefit as there is automation of the production process resulting in reduction in the use of labour in agriculture thereby saving the costs.

Modern age farmers faithfully inclined to immediate economic returns prefer managing such simplified agro-eco systems. Hence rice and wheat received support as they are main crop for national food security. But this monoculture has led to the rapid genetic erosion of major crops which had lost much of their varietal diversity¹⁰. Only 15-20 crop varieties are widespread in Sri Lanka, out of a total of 300-400 varieties¹¹. Major crops in developed countries now have a limited genetic base. For example, more than half of the Canadian prairie wheat lands are devoted to a single variety, Neepawa, which was developed with gemplasm from Kenya; 72% of united states potato production depends on only four varieties and the entire united states soya

8 WHO, Public health impact of pesticides used in agriculture/world health organization (Geneva) 1990 P.88.

9 Report of an Indian Council of Medical Research, "Pesticide pollution: Trends and perspective Vol.31, No.9 2001.

10 Report of food agricultural organization in 1996.

11 Goldsmith E(1982) "Organic farming in India. Alternatives 15(1) '4-13'

bean industry is derived from a mere six plants from Asia¹². In the case of rice, within its species there are estimated 1,00,000 distinct varieties. The main cause of genetic erosion in crops is replenishment of local varieties by improved or exotic varieties or species. Modern agriculture with its stress on mono culture of high yielding varieties is a major threat to genetic diversity (UPDASP, 2002)

CHALLENGES IN SUSTAINABLE AGRICULTURE:

The industrial society had viewed exploitation of resources as right to development where it has provided attractive benefits quickly. At present, the environmental degradation and ecological realities pushed seriously with regard to reconcile the Right to Development in terms of demand and duty to maintain and improve the environment as a care for the future. Hence, the concept of sustainable development has emerged to balance between ecology and development. Principle 1 of Rio Declaration also states that Human beings are centre of concerns of sustainable development and they are entitled to a healthy and productive life.

The principle of sustainable development is based on the balancing between ecology and development. The Brundtland commission has defined the concept of sustainable development by incorporating the contribution towards quality of life in terms of human needs such as food, clothing, shelter, clean water etc., to meet out the needs of present without compromising the ability of the future generations in meeting out their own needs.

Eco-development is indispensable for any country to progress in their standard of living. But it should not be compromise the ability of the present and future generations to fulfil their needs for their survival from natural resources. The concept of sustainable development has made the traditional concept that development and ecology are opposed to each other as a misconceived and false notion. Sustainable development focuses on protection of nature which is a pre-requisite for the survival of mankind. Sustainable agricultural development aims not only to maintain and conserve natural resources, but also to develop them, because future generations will want more agricultural and food products in terms of quantity and quality.

The sustainable development is a doctrine which is based on human goals related to agricultural fields to satisfy their needs and to achieve adequate agricultural productivity without interrupting any of the steps or activities that will disrupt the functioning of the bio-systems. Ancient agricultural practices evolved were in generating positive interactions within agro eco systems and there by harmonizing with the environment. The modern agricultural is exclusively chemical intensive and posing direct and indirect but serious risks to ecological systems with a view to ensure food security. Since agricultural forms back bone of our economy the green revolution has brought out positive effect by reducing many risks in farming. However, there have been significant costs and severity as a result of the current mode of agricultural activities,

12 V.K.Prabakar, "Community of ecology and environment) (New Delhi: Anmol publications) 2001 edition P.254.

because these cost causes are continuous and long-term. Prominent among such costs are for top soil depletion, ground water contamination, the decline of family farms, continued neglect of living and working conditions of farm labourers, increasing cost of productions and the disintegration of economic and social condition in rural communities¹³. Apart from these issues, economic viability is an important criterion for sustainable agriculture. Compatibility of products with ethical or cultural choices of ensuring population, as well as nutritional and health criterion requirements of target consumer population, should be taken into account¹⁴. The object of sustainable agriculture is eco-friendly crop production which is possible if the soil is healthy enough to ensure nutrient enrichment and optimum condition for growing crops. But in order to enhance food productivity chemical fertilizers, pesticides and mono culture of high yielding have been used in agricultural practices resulting in ecological imbalance. Furthermore, crop varieties that respond well to consistent fertilizer, pesticide and other technological inputs are often grown¹⁵. From the above, it is clear that agricultural eco systems are facing the ill-effects of monoculture, yield race, over use of chemicals etc., on one side and anthropogenic and technological hazards resulting in losses to farm fields, standing crops, harvests and storages on the other side.

Agricultural techniques being widely employed these days which involve extensive and excessive use of agro chemicals such as fertilizers and pesticides, herbicides, soil conditioners, fumigants etc., contribute to soil pollution. The use of chemical fertilizers adds to accumulation to the injurious chemical constituent in the soil. Besides reducing the fertility of the soil by decreasing plant nutrients, phosphates, nitrates and potassium constituents are leaked out into water courses¹⁶. The reason for intensive agriculture is due to the increase in the demand for food and that is not a sustainable type of land use. At the global scale soil erosion is the main threat to soil resources and poor land management is making it worse.¹⁷ Thus agricultural techniques which are designed to raise land productivity instead led to soil loss. Many of the world's most fertile soils are already extensively used in agriculture and forestry and soil erosion is an increasing problem in many areas.¹⁸ The recent threats to agricultural sustainability emerged in the form of genetically modified crops. Competition in global agricultural market and consequent deregulation may lead to the situation where gene crops will drive out other crops and only a few high yielding mono culture gene crops will exists at the cost of sacrificing bio-diversity and increasing rise to environment.¹⁹

13 Supra Note 2 at 179.

14 *ibid* P 178.

15 *ibid* P 180.

16 Kailash Thakur, "Environmental protection; Law and Policy (New Delhi; Deep and Deep Publications) 1997 edition P.70.

17 Barraclough D(1990), "The earth taken for granted'. *Geographical Magazine* 62(3); 36-38.

18 Chrispark, "the Environment: principles and applications (London:Routledge) 1997 edition P.522

19 J.R.Pillai Setti and Kylie Radel, Economic and Environmental issues in International trade and production of genetically modified foods and crops and the WTO, *Journal of Economics Integration* Vol.19, No.2, Developing countries in the WTO Regime, June 2004 PP 332-352.

STABILITY AND SUSTAINABILITY OF CROPS

The components of genetic diversity is of potential use to humanity as it provides the raw material for breeding new varieties of crops. Farmers are well-known for the knowledge regarding the relationship between stability and sustainability of crops as well as crop varieties on their lands. To meet the needs of human population in the midst of environmental problems such as desertification, deforestation, erosion, farmers will require new crop varieties capable of producing under diverse conditions without adding ever increasing amount of fertilizers and other agro-chemicals but expected new generation of varieties will have to be more productive than its predecessors. There might be crops mature at different times or that can be easily stored to help to ensure a stable food supply throughout the year. Simultaneously, the crops not only provide the nutritionally balanced diet but also diversifying the farmers income sources²⁰. Therefore genetic diversity contained in different varieties enables the farmers with a choice to develop from selection and breeding new and more productive crops that are resistant to pests and diseases.

LEGAL PROTECTION OF FOOD CROP DIVERSITY

Crop variety is the backbone of agriculture, allowing for the production of enough and nutritious food to be sustained.. Significant species laws could directly affect human health and welfare. Many of the major crops in developed countries have a limited genetic base as they have been attributed to breeding programmes using genetic material from related wild plant varieties or lands are devoted to a single variety. This continues in significant laws of relevant species²¹. Moreover the practice of monoculture are ecologically unstable which reduces the field's biodiversity. It increases the risk of exposure to pest and diseases by decreasing the healthy functions of the soil. Therefore, sustainable agro-biodiversity has become important for the increased demand for food is one of the major challenges to feed the world population. Furthermore, land is shrinking as a result of urbanisation and industrialisation, putting pressure on the environment to boost land productivity. As a result, plant breeding technologies were applied to reach the output level.

INTERNATIONAL INSTRUMENTS FOR PLANT VARIETY PROTECTION

International Treaty on Plant Genetic Sources for Food and Agriculture: (ITPGSFA)
This treaty makes provisions for crop variety conservation in order to assure food and nutritional security²². The following are the primary components that describe the treaty's goal:

20 M.L. Narasaiah, "Bio-diversity and Environment" (New Delhi, Discovery Publishing House) 2004 Edn. P. 125

21 Mahesh Mathur "Legal Control of Environmental Pollution" (New Delhi, Deep and Deep Publication) 1996 Edn. P. 81

22 Article 1, International Treaty on Plant Genetic Sources for Food and Agriculture

CONSERVATION AND UTILIZATION OF PLANT GENETIC RESOURCES FOR AGRICULTURE AND FOOD

The convention gives guidelines to nations on the actions and activities to be implemented to enhance the conservation and sustainable use of crop diversity²³. Article 5 addresses the conservation issue of characterising and assessing crops and their potentially valuable features. This will allow agricultural researchers and breeders to identify specific features that indicate the need for new kinds to be developed. Furthermore, it is a supplementary strategy to agricultural crop conservation in the field and in gene banks²⁴. Article 6 is focused with long-term usage, and hence focuses on the preservation of varied farming systems and the use of participatory plant breeding practices, such as collaboration between researchers and farmers for the creation of locally adopted varieties. Apart from that, they primarily promote on-farm crop diversity management in order to decrease genetic erosion and hence increase food production in a sustainable way.

FARMERS RIGHT

Article 9 of the treaty recognised the huge role that local and indigenous communities have played for generations in safeguarding and growing the genetic diversity of crops. This is what makes this treaty stand out. Its goal is to help farmers manage and protect crop diversity on their farmlands. A number of measures have been proposed under Article 9 in the protection and promotion of farmers' rights at the national level, including measures to protect traditional knowledge relevant to crop diversity, the right to participate in sharing benefits arising from crop diversity utilisation, and the right to participate in nationwide crop diversity decision-making processes.²⁵

MULTI-LATERAL SYSTEM OF ACCESS AND BENEFIT SHARING

Articles 10-13 establish it as the heart of an international convention. The multilateral system provides a transparent and reliable framework for the exchange of crop genetic resources contained in the gene pool, facilitating and favouring conservation and exchange between and within regions with similar climatic conditions, and thus contributing to the faster use of these crop genetic resources for agricultural research and breeding of new crop varieties with higher yields and nutritional values.²⁶

23 Article 5 & 6, International Treaty on Plant Genetic Sources for Food and Agriculture

24 Introduction to International Treaty on Plant Genetic Resources for Food and Agriculture, (Rome: Food and Agriculture Organisation of United Nations) 2011 Edn. P. 18

25 Introduction to International Treaty on Plant Genetic Resources for Food and Agriculture, (Rome: Food and Agriculture Organisation of United Nations) 2011 Edn. P. 19

26 Introduction to International Treaty on Plant Genetic Resources for Food and Agriculture, (Rome: Food and Agriculture Organisation of United Nations) 2011 Edn. P. 19

MOBILIZATION OF FUNDS

Article 18 mandates the development of a plan to enable the mobilisation of finances for the organization's own operations and achievement of its goals. These are multilateral funds that are collected and used to assist activities aiming at crop diversity conservation and sustainable usage. For example, in 2010, the United Nations Framework Convention on Climate Change officially added the benefit sharing fund as an opinion for adaptation funding in the adaptation funding interface(UNFCCC)²⁷. Benefit sharing funds are largely used to fund programmes in underdeveloped countries that focus on securing long-term food security in the face of climate change. As a result, the International Treaty on Plant Genetics Resources for Food and Agriculture addresses and covers a wide range of issues related to sustainable agriculture.

BIO DIVERSITY CONVENTION

The 1992 Convention on Biological Diversity was the first legally binding international pact focused at biological resource protection and sustainable usage. It covers domesticated as well undomesticated biodiversity. Sustainable agricultural transition is one of the 20 Aichi Targets (Nagoya Protocol) of this convention, which includes incorporating a larger range of crops and livestock, as well as providing well-developed environment.²⁸ The preamble of the Convention on Biological Diversity, 1992 states the following objectives: "Aware that conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population, for which purpose access to and sharing of both genetic resources and technologies are essential". "Reaffirming also that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner".The Convention also encourages contracting parties to take necessary steps to protect biological variety while using biological resources. Also it encourages customary use of biological resources in accordance with traditional cultural practices that are compatible with sustainable use requirements.²⁹

SUSTAINABLE USE OF COMPONENTS OF BIOLOGICAL DIVERSITY

The Convention on Biological Diversity (CBD) is an international legal instrument that has been ratified by 196 countries and is dedicated to "the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources."³⁰ Its overarching goal is to inspire activities that will lead to a more sustainable future.³¹

27 Introduction to International Treaty on Plant Genetics Resources for Food and Agriculture, (Rome: Food and Agriculture Organisation of United Nations) 2011 Edn. Page 20

28 <https://www.cbd.int/agro/> - last visited on 23.12.2021

29 Article 10 of the Convention of Biological Diversity, 1992

30 Article 10 of the Convention on Biological Diversity.

31 <https://www.un.org/en/observances/biological-diversity-day/convention>

IN SITU AND EX SITU CONSERVATION

There are two basic conservation strategies, each composed of various techniques, that the conservationist can adopt to conserve genetic diversity once it has been located. The two strategies are *ex situ* and *in situ* conservation. Article 2 of the Convention on Biological Diversity (CBD, 1992) provides the following definition of these categories:

Ex situ conservation means the conservation of components of biological diversity outside their natural habitats.

In situ conservation refers to the preservation of ecosystems and natural habitats, as well as the maintenance and recovery of viable populations of species in their natural environments, or, in the case of domesticates or cultivated species, in the environments where their distinctive properties have developed.

Article 8 and 9 of the Biodiversity Convention deals with *in situ* and *ex situ* conservation.

There is an obvious fundamental difference between these two strategies; *Ex situ* conservation entails sampling, transport, and storage of target species from the target location, whereas *in situ* conservation entails designation, management, and monitoring of target taxa where they are encountered. Because of this basic divergence, the two techniques have nothing in common.

BENEFIT SHARING

The concept of Access and Benefit Sharing (ABS) was introduced, ABS was characterised as the control of access to and exploitation of genetic resources, as well as the distribution of advantages deriving from this utilisation among consumers and suppliers.

One of the three goals of the Convention on Biological Diversity is to ensure a fair and equitable distribution of the benefits derived from the use of genetic resources (CBD). The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity adopted by the Conference of the ITPGRFA created an international framework which provides for concrete measures, rules and procedures to implement the CBD's third objective.

In 2012, IUCN launched the IUCN Explanatory Guide to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity at the 11th meeting of the CBD Conference of the Parties in Hyderabad, India.

GENE BANKS

Plant Genetic Resources (PGR) are conserved in gene banks under *ex situ* conditions and made available for present and future usage. As PGR diversity is the foundation of food security and climate resilience, gene banks play an important role in addressing the effects of climate change and other challenges to food security. Some gene banks, such as the Centre for Genetic Resources, the Netherlands (CGN), have evolved into genetic resource centres.

They carry out not only ex situ conservation but also in situ conservation as well as providing services to support PGR users in finding, selecting, obtaining and using PGR. Users of PGR from gene banks often look for specific traits, such as drought tolerance, resistance to diseases or pests, yield potential, or levels of nutrients or other compounds, e.g. for use in a breeding program. They may also seek diversity for one or more traits for use in a scientific study of a particular trait. Gene banks or plant genetic resources centres help the user to identify the most suitable material and obtain it. Because of ease of access, the primary source of this material often is the collection of the national gene bank, followed by other gene banks or ex situ sources, and finally in situ sources, including natural habitats for crop wild relatives and land of farmers or hobby growers for cultivated material.

SEED BANKS

The core objectives of the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) are the conservation and sustainable use of plant genetic resources. The ITPGRFA links these goals explicitly to farmers' rights. Although farmers' rights have been debated intensely at international level, their effective implementation at national level remains a major challenge. Community seed banks are a fantastic illustration of how those rights may be effectively implemented.

LEGAL FRAMEWORK FOR PLANT VARIETY PROTECTION IN INDIA

India is mostly an agricultural country, protecting plant types is critical to ensuring food security. As a result, the Protection of Plant Varieties and Farmer's Rights Act of 2001 was passed to protect plant genetic resources as well as to implement international commitments that include not only a series of obligations concerning the conservation and sustainable use of biological resources but also commitments concerning the protection of traditional knowledge and farmer's rights. In addition, there are a number of IPR duties relating to the commercial use of plant varieties. The components make up farmer's right which is conceived as the steps taken for sustainable agro biodiversity for conservation and ensure food security. As a result, the Act recognises farmers' multiple roles in cultivating, conserving, developing and selecting varieties.³²

The following rights have been conferred to farmers in order to strengthen the food and nutritional security:

RIGHT TO ACCESS TO SEED³³

Farmers have the same rights to store, use, sow, re-sow, trade, share, or sell their agricultural produce, including seed of protected varieties, as they had before the

32 S.P. Bala Ravi, Farmers Right their Scope and Legal Protection in India, P. 316 (Accessed on 23-12-2021) available at: <http://biodiversityinternational.org>

33 Section 39(1)(iv) of the Act

PPV&FR Act went into effect. Farmers, on the other hand, are not permitted to sell branded seed of a protected variety. Farmers can conserve seed from a crop they grew on their own farm.

RIGHT TO BENEFIT SHARING³⁴

Plant breeders and legal organisations including farmers that give Plant Genetic Resources (PGR) to breeders for the development of new varieties are entitled to a fair share of benefit from the commercial gains of the registered varieties. The PPV&FR Act is the first national plant variety protection law enacted since 2001 to include an Access and Benefit-Sharing (ABS) provision along with Plant Breeder's Rights (PBRs). The Biological Diversity Act of 2002 allows for the accession of genetic resources utilised in breeding. The PPV&FR Act, on the other hand, requires a breeder to certify the geographical origin of the genetic resources used in the pedigree of the new variety, as well as its accession.

RIGHT TO COMPENSATION³⁵

Agronomic performance under recommended management conditions must be fully disclosed when registered seed is sold. When such seed is sold to farmers but fails to perform as expected under recommended management conditions, the farmer may seek compensation from the breeder through the PPV&FR Authority's intervention.

RIGHT TO REASONABLE SEED PRICE³⁶

Farmers have the right to fair and remunerative access to seed of registered varieties. If this criterion is not met, the breeder's exclusive right to the variety is suspended, and the breeder is required to licence the variety's seed production, distribution, and sales to a competent legal organisation under the compulsory licencing provision. Most plant variety protection laws include measures for forced licencing of protected varieties in order to assure enough seed supply to farmers, and some of them also include provisions for compulsory licencing based on unjust pricing.

RIGHT TO FARMERS' RECOGNITION AND REWARD FOR CONTRIBUTING TO CONSERVATION³⁷

The national gene fund recognises and rewards farmers who have been involved in PGR conservation and agricultural development, and who have made significant efforts in supplying genetic resources for crop improvement. The gene fund is supported by funds raised through the Act's implementation, as well as contributions from national and international organisations. The fund's expenditures are designated to support PGR conservation and sustainable usage, making it a national analogue to

34 Section 26 of the Act

35 Section 39(2) of the Act

36 Section 47 of the Act

37 Section 39(1)(iii), 45(2)(c)

the global benefit-sharing fund established under the International Treaty on Plant Genetic Resources for Food and Agriculture.

Since 2007, the Plant Genome Saviour/Community awards, which are associated by the National Gene Fund have rewarded farming communities and individual farmers for their contributions to in-situ and on-farm conservation and PGR selection. In collaboration with the Government of India, the Authority has established five Plant Genome Saviour Community Awards of Rs. 10 lakh each, along with a citation and memento, to be given to farming communities every year for their contributions and protection of Plant Genetic Resources.

In accordance with the Protection of Plant Varieties and Farmers' Rights (Recognition and Rewards from the Gene Fund) Rules, 2010 the Authority established ten Plant Genome Saviour Farmer Reward of Rs. 1 Lakh each with citation & memento, as well as twenty Plant Genome Saviour Farmer Recognition annually from 2012-13 to the farmers engaged in the conservation of the Genetic Resources of the landraces and wild relatives of economics plants and their improvement through selection and preservation.

SEEDS ACT, 1966

Seeds Act, 1966 regulates the selling, supplying, offering, bartering of seeds which are notified by Central Government. No export or import of seeds of notified kinds or varieties which can be used for the purpose of sowing or planting by any person.³⁸ Section 2(9) and Section 5 of this Act defines what is Notified variety of seeds. The Central Government with the consultation with the concerned committee appointed can designate a group of seeds as notified varieties.

Food systems based on the sustainable use of biodiversity and traditional knowledge have the potential to provide food security and livelihoods in a sustainable manner, making them an important lever in attaining the Sustainable development goals.

THE PROTECTION OF PLANT VARIETIES AND FARMERS RIGHTS ACT, 2001

The Protection of Plant Varieties and Farmers Rights Act, 2001 is a legislation for protecting unique plant varieties discovered and cultured by the farmers. The national registry of plant varieties is a repository for plant varieties with the name of the plant breeder³⁹. The benefit sharing of the commercial exploitation of plant varieties are determined by the authority established under this Act. The extent and nature of the claimant's genetic material being used in the production of the variety for which benefit sharing is being sought.⁴⁰

38 Section 17 of Seeds Act, 1966

39 Section 13 of the Protection of Plant Varieties and Farmers Rights Act, 2001

40 Section 26 of the Protection of Plant Varieties and Farmers Rights Act, 2001

BIOLOGICAL DIVERSITY ACT

India being a party to the Convention of Biological Diversity and has adopted it with the enactment of Biodiversity Act, 2002. The objectives of the Act are: 1.) Conservation of Biological diversity; 2) Sustainable use of its components; 3.) Fair and Equitable sharing of the benefits arising out of biological resources. It is evident from the preamble of the Biological diversity Act itself that it aims for sustainable use of genetic resources for food and agriculture. For the above purpose, National biodiversity Authority is established which is authorized to issue guidelines for access to biological resources and for fair and equitable benefit sharing. National Biodiversity Authority formulates terms and conditions for equitable sharing of benefits arising out of the use of biological resources, their by-products, innovation and practices associated with their use and application and knowledge relating thereto in accordance with mutually agreed terms⁴¹. In addition to that, state biodiversity board can restrict certain activities violating the objectives of conservation if it is of the opinion that such activity is detrimental or contrary to the objectives of conservation and sustainable sharing of benefits arising out of such activity⁴². The Central Government can develop national strategies, plans etc for conservation of Biological diversity such as in-situ and ex-situ conservation.⁴³ Ex situ conservation refers to the conservation of biological diversity components outside of their natural habitats, whereas in situ conservation refers to the conservation of ecosystems and natural habitats, as well as the maintenance and recovery of viable populations of species in their natural environments and, in the case of domesticated or cultivated species, in the environments where their distinctive properties have developed.⁴⁴ In conformity with the above provision sustainable agricultural practices are now receiving greater attention with a renewed focus on integrated crop farming and livestock production systems for generating additional income to farm families. On-farm in situ conservation approach, with ex situ conservation providing a safety back-up, is being explored under different ecosystems with a view to develop workable models.⁴⁵

REVIVAL OF CROP DIVERSITY

The sustainable improvement of farming system is possible by halting further degradation of natural resource base and maintaining soil health through alternative agricultural practices such as adoption of efficient soil and water conservation measures, crop rotation, diversification of crops, reduction of tillage, integrated nutrient management involving bio fertilizers as key constituents of fertilizers, integrated pest management and efficient crop systems. Diversity of crops is significant for sustainable and safe food security, because it is also a crucial element for nutrient

41 Section 18 of the Biological Diversity Act, 2002

42 Section 24 of the Biological Diversity Act, 2002

43 Section 36 of the Biological Diversity Act, 2002

44 Section 36(5) of the Biological Diversity Act, 2002

45 Prof Kannaiyan on Agrobiodiversity and access and benefit sharing; Pg:3

balance to be maintained in soils. The crop diversity ensures constant employment generation for marginalized workers because diversity based farming can help the farmers adapt to climate variations. Since, there is a shift from traditional farming system to recent innovative agriculture practices, there is another source of foods disappearing as they are uncultivated leading to erosion of varieties of food crops. It is important to practice traditional methods of mixing two or more different crops in field, because the protection and use of uncultivated foods will result in good soil health by growing different plant species which in turn will result in sustainable agriculture by utilizing the fertility of land resources. Crop rotation was also employed by farmers in the past to alter the crops cultivated in the same field from year to year. The rotation was organised in a sequential manner to replenish the nutritional inputs used by earlier crops. This also had reduced the needs for manuring as these methods kept the soil conditioned with crop every time and thereby reducing the possibilities of soil erosion. Apart from that, combining two or more species at random has also been a common practice and resulted in multi faceted benefits to farming ecology.⁴⁶ Mixed cropping is also an effective measure of pest control because growing a single crop in a stretched field provides food sufficiency resulting to pest favouring their rapid growth⁴⁷. To cite an example: Traditional farmers in Africa, South America preferred to plant 20 different crops together in small plots. This causes crops to mature at different times, ensuring that the land is always productive and protected from soil erosion.⁴⁸ In order to meet the needs on sustainable basis, it is absolutely necessary to use the earth's national resources carefully and the natural resource must be conserved and enhanced.⁴⁹

CONCLUSION

Hence the changing human needs overtime, sustainable land management, conservation of genetic diversity resources are taken as important aspects for sustainable agriculture. It is not only the responsibility of agricultural departments, seed banks etc., alone to protect the food crop diversity from hazardous technologies that threaten the diversity. Cultivators and consumers must also work together to restore food crop diversity in order to ensure food availability with the appropriate quality and safety levels for health and nutritional balance.

46 Supra Note 2 at 199

47 Uso, J.O., (1998). Mixed cropping of yam, telfaria, maize and okra in a compound farming system of south eastern Nigeria. ISHA Acta Horticulture 123: VI Africian Symposium on Horticultural crops

48 Chiras,D.D.,(1998) Creating a sustainable system of agriculture to feed the world's people in Chiras Environmental Science, Wadsworth Publishing Company, United States of America.

49 Our common future-world commission on environment and development 1987 at 57.

Emerging Trends in Indian Banking Sector Laws for Combating Corruption and Control the Non-Performing Assets

*Dr. Jaswant Saini**

ABSTRACT

Banking business is going on under menace more than ever before during the recent pandemic crisis. The deceptive loaners and corrupt people assaulting from all sides to defraud the public money from the banking institutes. In spite of serious efforts, strategies, guidelines, regulations and monitoring systems in banking institutes, devious and deceitful peoples so able that dent our mechanism to cheat the banks easily. Definitely, weak governance in banks, poor risk management and defrauds with public money is not a recent problem, but the current pandemic crisis has made it a general phenomena. The Central Vigilance annual report (2019) has shown surprising data on the corruption in the banking sector. Upwards of 2,593 staffs and officials of Public Sector Banks were confronting litigation on different allegations as on 31.03.2019 and 136 fresh cases were registered and 143 officials were found guilty. In order to combat the banking corruption and recovery of bad loans from the willful defaulters, some major amendments have been made in The Prevention of Corruption, 1988 (the Amendment Act, 2018) and passed a new act namely Fugitive Economic Offenders Act, 2018. We are broadly analyze social practices and motivating norms that are probably going to combat the corruption.

Keywords: *Fugitive, Corruption, Banks, Economic.*

1. INTRODUCTION

Banks are considers as custodian of public money and assume an essential role in financial development and well-being of a country. A substantial and steadfast financial system guarantees the overall soundness of the economy of a nation. The connection between a strong banking system and financial development is contended to be constructive¹. The Indian financial structure comprises commercial and co-operative

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1 Greenwood J., Jovanovic B., "Financial development, growth, and the distribution of income", J. Polit. Econ., 98 (5) (1990), pp. 1076-1107

banks. The 90% of the resources of the financial system represented by commercial banks. The scheduled commercial banks are categorised on the basis of ownership i.e. public sector banks & private sector banks under the ownership of the Indian Government. The banks of the public sector represent a generous portion of the banking business in India but the rapid development in the financial sector has been hindered and burdened by expanding Non-performing assets (NPA). The NPA of the banking sector has been expanding over the years to years. As per the RBI's data, the gross non-performing assets ratio remained 9.3 percent in 2019 and 8.3 percent stood as 31.12.2020². It is expected the GNPA's (excluding write-offs) to rise to 9.6-9.7% by March 31, 2021 and 9.9- 10.2% by March 31, 2022³. *Corruption and frauds are one of the major causes of the increase in the level of Non-performing assets in our economy.* Banking business is going on under menace more than ever before during the recent pandemic crisis.

HOW CORRUPTION AFFECT THE BANKING SYSTEM

Generally, corruption is defined as the misuse of public authority for personal benefits. Among various meanings of corruption, this definition appears to point out bureaucratic corruption. Corruption in a bureaucratic system defined that were public servants take illegally personal benefits in exchange for their actions such as grafting, extortion, bias, nepotism, cronyism, undue assistance, embezzlement and bribery which is considered to most operate among various types of corruption. The study find out that corruption is a social and economic evil - provokes the complications of bad debts and interrupts the banking business⁴. Internal factors of corruption in banking institutes do influence both the demand and supply channels of the banking business. It has been observed that on the supply side, corrupt officials might take bribes in return for accepting the unusable projects of applicants. On the demand side, deceptive loaners may offer bribes to reduce their fines and punishments, henceforth enlarging the probability of loan defaults⁵. The vigilance report has shown surprising data on the corruption in the Indian banking sector. Upwards of 2,593 staffs and officials of Public Sector Banks were confronting litigation on different allegations as on 31.03.2019 and 136 fresh cases were registered and 143 officials were found guilty⁶.

2 22nd Financial Stability Report, issued by RBI on Jan 11, 2021. <https://www.rbi.org.in> (visited on 28th June, 2021)

3 "Asset quality remains monitorable despite lower increase in NPAs and restructuring estimates", press release issued by ICRA (Investment Information and Credit Rating Agency of India Limited) on 05, April, 2021.

4 Y. Chen, M. Liu, J. Su, "Greasing the wheels of bank lending: evidence from private firms in China", *Journal of Banking & Finance*, 37 (7) (2013), pp. 2533-2545

5 Goel R.K., Hasan I., "Economy-wide corruption and bad loans in banking: international evidence", *Appl. Financial Econ.*, 21 (7) (2011), pp. 455-461

6 56th Annual Report of the Central Vigilance Commission (2019) published on 22nd June, 2020

FRAUDS IN BANKING

Banks/ Financial Institutes	2018-2019		2019-20		2020-21	
	Number of Frauds	Amount Involved	Number of Frauds	Amount Involved	Number of Frauds	Amount Involved
1	2	3	4	5	6	7
Public Sector Banks	3,704 (54.5)	64,207 (89.8)	4,410 (50.7)	1,48,224 (79.9)	2,903 (39.4)	81,901 (59.2)
Private Sector Banks	2,149 (31.6)	5,809 (8.1)	3,065 (35.2)	34,211 (18.4)	3,710 (50.4)	46,335 (33.5)
Foreign Banks	762 (11.2)	955 (1.3)	1026 (11.8)	972 (0.5)	521 (7.1)	3,315 (2.4)
Financial Institutions	28 (0.4)	553 (0.8)	15 (0.2)	2,048 (1.1)	25 (0.3)	6,839 (4.9)
Small Finance Banks	115 (1.7)	8 (0.0)	147 (1.7)	11 (0.0)	114 (1.6)	30 (0.0)
Payments Banks	39 (0.6)	2 (0.0)	38 (0.4)	2 (0.0)	88 (1.2)	2 (0.0)
Local Area Banks	1 (0.0)	0.02 (0.0)	2 (0.0)	0.43 (0.0)	2 (0.0)	0 (0.0)
Total	6,798 (100.0)	71,534 (100.0)	8,703 (100.0)	1,85,468 (100.0)	7,363 (100.0)	138,422 (100.0)

- Note:**
1. Figures in parentheses represent shares in total (in per cent).
 2. Figures reported by banks & FIs are subject to change based on revisions filed by them.
 3. Amounts involved reported do not reflect the amount of loss incurred. Depending on recoveries, the loss incurred gets reduced. Further, the entire amount involved is not necessarily diverted.
 4. The dates of occurrence of these frauds are spread over several previous years.
 5. The above data is in respect of frauds of Rs. 1 lakh and above reported during the period.

Source: RBI Supervisory Returns (Operations and Performance of Commercial Banks, dated 28 December 2020).

The insidious loaners and corrupt people assaulting from all sides to defraud the public money with the banking sector. In spite of serious efforts, strategies, guidelines, regulations and monitoring systems in banking institutes, devious and deceitful peoples so able that dent our mechanism to cheat the banks easily. Reserve Bank of India, the apex body of the banking sector characterizes fraud as “A deliberate act of omission or commission by any person, carried out in the course of a banking transaction or in the books of accounts maintained manually or under computer system in banks, resulting into wrongful gain to any person for a temporary period or otherwise, with or without any monetary loss to the bank”. Generally, it is complicated to recognize the frauds at the initial stage and even too hard to charge the accused because of complicated and tangled legal processes. In the dread of losing the banks’ goodwill, these kinds of frauds are usually not brought to prosecution system⁷. One of the enormously challenging tasks in the Indian Banks is to make banking transactions set-free from electronic frauds⁸. The RBI’s Annual Report 2020-21 has shown surprising

⁷ Banks, D. G. (2004). The Fight against Fraud,” Internal Auditor, April, 34-47.

⁸ Pasricha, P. and Mehrotra, S. (2014). Electronic Crime in Indian Banking, Sai Om Journal of Commerce and Management, 1(11), November.

data on the fraudulent cases in the banking sector⁹. During the year of 2018-2019 the affairs of frauds near about 6798 involving an amount of Rs. 71,534 crore worth were reported. In 2019-20, an amount of Rs. 1,85,468 crore worth of have been identified by various banks as a whole involving 8703 incidents and during the year 2020-21, 7363 incidents of frauds were reported amounting of Rs. 1,38,422. The Magnitude of fraud cases and involving the huge amount banks/sector wise (amount in crore) in last three financial years show in below table:

OBJECTIVES OF THE STUDY

- 1) To analysis the emerging trends in the legal framework for combating corruption and fraud in Indian Banking.
- 2) To study the magnitude of corruption and fraud and their adverse impact upon India's financial health.
- 3) To study the emerging challenges and issues faced by Indian banks regarding corruption and fraud.

RESEARCH METHODOLOGY

To achieve the main objective of the present study attempts to comprehend the emerging trends in the legal framework for combating corruption and fraud in the banking sector and explore the emerging issues and challenging. The doctrinal research methodology adopted in the present study based on secondary data. The data for the study is collected from different sources like as reports released by RBI, research articles & journals, internet, News and Social Media.

RESEARCH QUESTION

As discussed in the introduction part, Corruption and fraud are one of the major causes of the increase in the level of Non-performing assets in our nation. The banking business is going on under menace more than ever before during the recent pandemic crisis. It is also presuming that the deceptive loaners and corrupt people could be trying to take advantage from all sides to defraud the public money from the banking institutes during the present pandemic. Thus, the research question of this study is formulated as "Are Both enactments namely Fugitive Economic Offenders Act, 2018 and Prevention of Corruption (Amendment) Act, 2018 able to combat and control the corruption and fraud in Indian Banking Sector."

LITERATURE REVIEW

Greenwood J., Jovanovic B. (1990)¹⁰, the authors in this study explored that how the financial system becomes more vast and speedy increased when earning level of

9 https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR202021_F49F9833694E84C16AAD01BE48F53F6A2 (visited on 28th June, 2021)

10 Greenwood J., Jovanovic B. (1990), "Financial development, growth, and the distribution of income", J. Polit. Econ., 98 (5) (1990), pp. 1076-1107

people rise and it also increased the income inequality between the poor and rich broadens. **Goel R.K., Hasan I. (2011)**¹¹, the present study analyzes the performance of banks and economic sectors in particular and general circumstances. The main context covered in the present study is on how the bad debts in the local banking sector respond to the corruption in the international banking sector, however various banking organizations are controlled for. **Pasricha, P. and Mehrotra, S. (2014)**¹², the present study examined that crime and fraud by electronic technology in various developing nations is an emerging problem present time due to deficiency of appropriate training on the matter of inspecting the electronic crimes. **Vousinas GL. (2016)**¹³, the study proved that the internal audit plays a prominent role to protect banking organizations from crime and fraud risks. The management authorities of the banks recognized the efforts and responsibilities of internal audits. The functioning of internal audit is not extended only to detect and supervise the fraud but also to investigate the occurrences whenever they emerge.

ADVERSE EFFECT OF CORRUPTION & FRAUDS

Many research scholars and academicians exposed to a diverse opinions of feasible outcomes of corruption and frauds in the banking sector, such as imbalance of income, losing GDP per Capita, lack of funding, deformation inappropriate budget allocation etc. Apart from this, erodes the public confidence in banking mechanism, depletion of income of banks, reduces the banks' goodwill, misuse of stakeholders, depletion of the capital market, imbalance the entire economy of a country and its sovereignty. The corruption in the banking business influences the capital and lower risk of banking sector and accordingly in growth in non-performing assets in the books of account¹⁴. The adverse outcomes of corruption in the banking business is too high in developing nations because of weak governance, abortive institutions and faint democracy. Corruption in the banking system also badly affected the firms' goodwill and ingress finance negatively in such nations¹⁵. Frauds has an unfavorable effect on the working performance of the banking system in India. The emerging issues faced by the banking sector in identifying frauds are the absence of customer insights, delay and non-submission of appropriate reports by the clients, non-sharing the data by various governmental departments and authorities with each other. The detriments of fraudulent cases to the community and institutes can not be assessed simply because the loss of inceptive fraud is the beginning of entire sequences of extra costs to be managed. A

11 Goel R.K., Hasan I., "Economy-wide corruption and bad loans in banking: international evidence", *Appl. Financial Econ.*, 21 (7) (2011), pp. 455-461

12 Pasricha, P. and Mehrotra, S. (2014). *Electronic Crime in Indian Banking*, Sai Om Journal of Commerce and Management, 1(11), November.

13 Vousinas GL., "The critical role of Internal Auditing in addressing bank fraud/ : A conceptual framework", *Journal of Economics Literature* M42. 2016; 5(3):67-81

14 D. Chen, Y. Guan, T. Zhang, G. Zhao, "Political connection of financial intermediaries: evidence from China's ipo market" *J.Bank. Financ.*, 76 (2017), pp. 15-31.

15 S. Qi, S. Ongena, "Will money talk? firm bribery and credit access" *Financ. Manag.*, 48 (1) (2019), pp. 117-157.

noteworthy coefficient impact of fraud was proven in a study of Brand and Price¹⁶. The negative financial effect of frauds is too extreme on the banking sector than different areas of finance. In the banking business, fraud may cause loss of goodwill and lead to a deficiency of probable clients¹⁷. The Banking sector suffered great losses on a large scale not witnessed since the financial crises. It is exactly this unique “threaten evaluator” task that makes the banking business especially misty. The ambiguity of the banking sector has likely expanded for few years because of formational changes achieved by economic development and loopholes in regulations. New Changes that have made the banking business prominently more complicated, abundant large, more cross-border and supported by capital markets.

EMERGENCE REFORMS FOR CAMBATING CORRUPTION

There are Numerous enactments like as Central Civil Services (Conduct) Rules 1964, All India Services (Conduct) Rules 1968 (Service Rules), Central Vigilance Commission Act, 2003, Right to Information Act, 2005, Foreign Contribution Regulation Act, 2010, The Lokpal and Lokayuktas Act, 2013, Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015 etc.in regards to corruption and fraud in the banking sector with the objective to reduce the incidences of these kinds of crimes. In the last few years, there are some important enactments introduced by the government for combating corruption and fraud in the banking sector. In this series, *Fugitive Economic Offenders Act, 2018* and *Prevention of Corruption (Amendment) Act, 2018* has been proved as the mile stone in combating corruption and fraud. The Supreme court of India has rejected the anticipatory bail of the accused in a corruption case by making an important distinction between economic offences and other offences¹⁸.

Prevetion of Corruption (Amendment) Act, 2018

The Banking sector has been suffering extreme screening for their allotment of loan decisions because of which non-performing assets increasing day by day. The Bankers have contended for many years that they should not be litigated for approval of loans they made fairly. In order to diminish these types of fears in the banking sector, the Indian Parliament amended the principal act ‘The Prevention of Corruption Act, 1988’ known as “Prevention of Corruption (Amendment) Act, 2018” which inspires to strengthen accountability and transparency in the baking sector. Let’s see what are important changes introduced in the Prevention of Corruption (Amendment) Act, 2018

16 Brand S, Price R., “The Economic and Social Costs of Crime”, Home Office Research Study 217. London, 2000, [https://doi.org/Home Office Research Study 217](https://doi.org/Home%20Office%20Research%20Study%20217).

17 Vousinas GL., “The critical role of Internal Auditing in addressing bank fraud/ : A conceptual framework”, *Journal of Economics Literature* M42. 2016; 5(3):67-81

18 P. Chidambaram vs Directorate Of Enforcement, (2019) 9 SCC 1549.

Bribery as Gratification

Before 2018, there have been no exclusive provisions regarding bribe other than abetment but after the amendment 'Undue Advantage' interpreted as 'Gratification' other than lawful remuneration and now giving a bribe is a crime, prosecutable by 7 years imprisonment period or fine, or both. However, it should have complained within 7 days¹⁹. The principal Act expresses that undue gain is any gratification (not restricted to being commercial in nature or costly in money) other than the legal remuneration that a 'public servant' is authorized to gain from the Government or any other Institutes executed by the public servant. Previously, the definition of the term 'Public Servent' has been described extensively and consists of any individual in the employment or salary of any government, statutory corporation, local authority, company, institutes or body controlled and managed by any government, in addition, includes the judges, arbitrators and staff of establishments taking financial assistance from State. The Supreme Court held that according to somewhat provisions of Banking Law in India, the employees of the public or private bank also presumed 'Public Servants' under the Prevention of Corruption Act, 1988²⁰.

The scope of Criminal Misconduct in Present Scenario

Prior to the amendment, the scope of criminal misconduct was extending upon the offences such as accepting bribe habitually, obtaining something at concession or free of cost, acquiring the monetary benefit for oneself or for anyone without public interest. But after the recent amendment, restrict the scope of criminal misconduct on only two categories of offences²¹:

1. Abusing of the wealth endowed to the banker.
2. Accumulating assets incommensurate to fair sources of income.

The intention of the amended provision seems to provide the shield to public officials from being illegally prosecuted for official decisions taken in good faith. Under this provision, the officials can not be prosecuted under the Corruption Law except if they have acquired the assets excess than what they might have gotten from their lawful income or have misusing resources assigned to them.

Approval for Pre-Investigation

Presently, the police officer is needed prior approval of concerned authority or government to initiate the inquiry against the accused except when he is caught red-handed. People are not extremely happy about the substitution of Section 17-A inserted in structure book through amendment. This is presuming that it may be prompting the misleading and confusing of evidence because of which it will put forth the prosecution case feeble. The Supreme Court in *Dr. Subramanian Swamy Vs. Director*,

19 Substituted Section 7(C) in The Prevention of Corruption Act, 1988

20 CBI Vs. Ramesh Gelli and Ors. 2016 (3) SCC 788.

21 Substituted Sector 13(1) in The Prevention of Corruption Act, 1988

*CBI and Anr.*²² was effectively struck down the comparative provision which cherished in u/s 6(A) of the Delhi Special Police Establishment Act, 1946. But recently the Supreme Court in *Manohar Lal Sharma v. Narendra Damodardas Modi*²³ quite notably stated that the Rafale judgment would not interrupt the process of investigating authorities should they decided to enquiry the complaint.

Sanction is needed for Formar Officials

A sanction is required for litigating retired officials for those offenses done by them during their office tenure. The decision on prior sanction demand should be made within 3 months, it may be enhanced by 1 month²⁴ in special circumstances. The Centre Government may notify the guidelines in the official gazzate. Before the amendment, the sanction was needed under the principal Act (1988) serving officials only but presently it cover both resigned and retired officials. The Karnataka High Court in the case *T. N. Bettaswamaiah v. State of Karnataka*²⁵ has observed that "the amendments made to the Prevention of Corruption Act, 1988, making it mandatory to take prior sanctions, both to conduct an investigation as well as prosecution, of even retired public servants is prospective in nature. But the Supreme Court in *Station House Officer, CBI/ACB/Bangalore v. B.A. Srinivasan and Anr.*²⁶ held that "There is no need to seek sanction before prosecuting a retired government employee in a corruption case, holding that such protection is available to a public servant only during service".

Attachment & Forfeiture of property

The new provision²⁷ in the amendment act also presents the provision for the establishment of a special court to impound and attached the property gained through corruption which was prior to amendment done under 1944 ordinance via civil courts²⁸. Regarding this provision, it is pre-assuming to help debar a fresh proceeding to seize property gotten by corrupt practices and empower the court leading trial to do so itself.

Fugitive Economic Offenders Act, 2018

To uphold the nobility of the rule of law in the country and affairs related therewith or connected thereto, recently Fugitive Offenders Act 2018 has also been introduced. This act endeavor to impound the wealth belongings of economic fugitive accused who leave the nation to stave off facing criminal prosecution or forbid to come

22 (2014) 8 SCC 682.

23 WP(Cri.) 225/2018; RP(Cri) 46/2019.

24 Section 19, Prevention of Corruption (Amendment) Act, 2018.

25 (W.P.No. 29176/2019 (GM-RES)) dated 20.12.2019

26 Criminal Appeal No. 1837 of 2019 (@ SLP(crl.)No.6106 of 2019)

27 Section, 18A, Prevention of Corruption (Amendment) Act, 2018.

28 Criminal Law Amendment Ordinance, 1944 (Ord. 38 of 1944).

back to the home country to confront prosecution. The fugitive law give the power to the government for acquiring all the assets of the accused including benami assets and also the foregin assets with the support of international cooperative mechanism²⁹. The important provisions introduced in the Fugitive Economic Offenders Act, 2018 as follow:

Confiscate and attach the properties of culprit

The main objective of this Act is to prevent the economic offenders as fugitives from avoiding the legal proceedings by absconding from law courts in India. Recently, a special session of United Nations General Assembly held on 28 May, 2021 on corruption “Challenges and Measures to Prevent and Combat Corruption and Strengthen International Cooperation” in which India has strongly called for greater international cooperation to combat economic delinquent fugitive from India. India’s FEOA, 2018 authorizes the authorities for non-conviction-based attachment and seizure of prosecutes of crime and assets and properties of such economic criminals against whom any court in India has issued an arrest warrant regarding a Scheduled Offence and who flee away the nation for avoiding judicial proceedings³⁰.

Declaration as Fugitive Economic Offender

Anyone against whom a warrant for arrest has been issued by any court of India for committing a crime listed in the Act and the money involved in crime relates to minimum 100 crore rupees and more³¹. A Director or authorised officer not below the rank of Dy. Director from ‘Enforcement Director’ a specialized economic crime investigation department³² can file an application before the special Court established under PMLA, 2002. After the satisfication, the special court may decalare a person as “Fugitive Economic Offender”³³.

Disentitlement of civil claim

This FEOA, 2018 empowered the Special Court to determine the proceedings under this Act. The other courts and tribunals are not entitled to entertain any suit or proceeding regarding the offenses and matter connected with this Act from a person who declared as Fugitive Economic Offender. The act also debar the company or

29 Sheenam Kaushik, Ashima Garg (2019), “Econmic Crimes in India”, Indian Journal of Law and Human Behavior, Vol. 5, No. 2 (Special Issue); May-August 2019.

30 Union Minister Jitender Singh addressing the Special Session of UN General Assembly on Corruption “Challenges and Measures to Prevent and Combat Corruption and Strengthen International Cooperation” held on 28 May, 2021.

31 Section 2(1)(f) of Fugitive Economic Offenders Act, 2018.

32 The ‘Enforcement Unit’ was established under the Department of Economic Affairs for control Exchange Laws violations under FERA, 1947 and renamed as ‘Enforcement Directorate’ in 1957.

33 Section-4 of Fugitive Economic Offenders Act, 2018.

partnership firms trying forward or protecting any civil claim of an individual³⁴. The Authorities empowered under this act to seize the properties of such offenders provisionally while the application for delaring “Fugitive Economic Offender” is under consideration before the Special Court.

Special provisions for Administrator

After the confiscation of properties (In India or abroad) of ‘Fugitive Economic Offender’ all the ownership and rights belong to such properties shall vest to the Centre Government without any encumbrance. The Act empowered the Centre Government to appoint an administrator for manage, receive and dispose of such properties³⁵. The empowerment of seize the property under this act is not limited to the ‘Proceeds of the Crime’ under PMLA, 2002 but it also covers to any properties gotten by such offender.

Appellate Right

The offender who declared as a Fugitive Economic Offender under the FEOA, 2018, if unsatisfied with the order of Special Court, May file an appeal before the High Court against the impugned order within thirty days of such pronouncement of order³⁶. The Bombay High Court in case of *Mehul Choksi vs The State Of Maharashtra And Anr.*³⁷, reject the appeal of FEO which soliciting the demand to cross-examine certain persons.

DRAWBACKS AND EMERGING ISSUES

Although, enough laws exist to combat corruption and frauds in the banking sector, it remains one of the greatest threats facing by the Indian banking sector. The both acts i.e. Prevention of Corruption (Amendment) act, 2018 and Fugitive Economic Act, 2018 have various adequate provisions for combating with corruption and frauds and recovery of bad debts from offenders as well as they have many shortcoming and issues some of which are highlighted below:

1. The Prevention of Corruption (Amendment) Act, 2018 has now enlarged the scope of the principal act, 1988 to litigates companies institutes and their staff as well as bribe renders. Despite this, the amendment act (2018) did not include the illegal contentment of foreign officials, the interests of private bodies and corrupt practices. However, the Supreme Court of India has held that comprised even the private sector bank’s employees within the scope of the Principal Act (1988).

The Fugitive Economic Offenders Act, 2018 enlarge the scope of seizure and

34 Section-14 of Fugitive Economic Offenders Act, 2018.

35 Section-15 of Fugitive Economic Offenders Act, 2018.

36 Section-17 of Fugitive Economic Offenders Act, 2018.

37 Criminal Appeal No.681 of 2019 decided on 04.12.2019

attach the properties during the pendency of the case prior to the announcement of a person as 'Fugitive Economic Offender' subject to certain conditions. Whereas, in the Prevention of Money Laundering Act, 2002 attachment of properties of offenders subject to after the prosecution proceeding is over.

2. The people have some presumption of Delay in Justice because of Section 19 of the prevention of Amendment Act, 2018. Under this section the prior permission from competent authority is essential to remove a public official from his/her post before initiate prosecution in law court. For such approval, concerned authorities many time takes a long period to allow such approval, in addition, the approval is sometimes disallowed because of political pressure and on other grounds.

Section 14 of the Fugitive Economic Offenders Act, 2018 stipulates that civil claims subject to the attachment of fugitive economic offender's properties can not be brought to any civil court or tribunal. This may lead to the violation of Article 21³⁸.

3. In the Prevention of Corruption (Amendment) 2018, there is a lack of a scheme for witness protection. Generally, it has been observed that the witnesses do not vindication the prosecution's litigation because of intimidation, greediness and undue influence of the opposite party. There is also a lack of an effective and quick action plan against the witnesses who become bitter. As Resultant, the witnesses generally not supporting and trying to destroy the prosecution's case.

During the proceeding of a company's insolvency and bankruptcy settlement, the seizure and attach the property of the company's debtor (FEO) under FEOA, 2018 will reduce the net value of the assets. The provision of the Fugitive Economic Offender Act, 2018 excluded the same properties from insolvency resolution settlement. Therefore, the provisions of Act may have a significant adverse impact on the recovery of bad loans because it may prohibit the ability of creditors to repay the loan from such assets.

4. Under the provisions of the present Anti-Corruption Act, there is a lack of effective and timely asset recovery. The provision for seizure and attach the property essential as 'Proceeds of Crime', such recuperation is not so simple. Generally, corrupt officials use the culpable earnings to hold the properties in the name of their family members, close friends and other relatives. Therefore, many times, it is too difficult to prove in a court of law that such assets and properties are the 'Proceeds of Crime'. These properties are usually held overseas under strict privacy laws and are not easy to track and retrieve, especially in the absence of the required international cooperation.

The above position has seemed under the Fugitive Economic Offenders Act, 2018. Although, the provisions of this act provides the seizure and attach the

38 The Constitution of India, 1950.

properties in overseas and properties is located in a Contracting State³⁹. The Special Court may release a 'Letter of Request' to the competent court and concerned authorities of the contracting state to enforce such orders. But in reality, there are many pending cases for the enforcement of such orders before the authorities of contracting states for a long period.

Viewpoints and Conclusions

Recently, the Enforcement Directorate transfers a huge amount of Rs. 9,000 crore out of Rs. 18,000 crore worth seized and attached the properties of culprits to the Banks and Centre Government. Corruption is to be one of the most drastic of poor governance characterised by lack of both transparency and accountability. Corruption lowers investment and hinders economic growth and human development by limiting access to basic social services as well as increasing the cost of their delivery. The banking institutes should, therefore, make certain that the reporting mechanism regarding corruption and frauds is certainly sharp in order that frauds and corruption are reported timely. The master circular on 'Frauds- Classification and Reporting' bearing no. RBI/DBS/2016-17/28 DBS.CO.CFMC.BC.No.1/23.04.001/2016-17 and updated as on 03 July, 2017 released by the Reserve Bank of India should be strictly implemented for fixing the responsibilities of banks official and staff for delays in reporting the instances of fraud and corruption. There is a necessity to implement the policies strictly on the part of government and higher authorities in order to ensure the safety of public money. Banking institution must provide sufficient focus on the awareness programme regarding "Corruption and Frauds Prevention in banking sector" for fruitful investigation of corruption cases. Banks should be enabled to supply the correct and promptly reporting of corruption and frauds to competent regulatory and law enforcement agencies consisting of Reserve Bank of India. The functioning regarding corruption and frauds management i.e. screening and investigation should be supervised by CEO, Audit Committee and Special Committee of the concerned banking Institution where the cases of corruption and frauds involved a huge of money. Banking Institutes should also draft the internal framework for combating fraud and corruption, based on the good governance parameters regarding the responsibility of the function and accountability for malpractices of the corruption and fraud regime process in their institutes.

³⁹ Section 2(c) of Fugitive Economic Offenders Act, 2018 defined the term 'contracting state' "means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise".

Wildlife (Protection) Act of India Successfully Scan for Quahog at Lakshadweep

Dr. Kaushik Banerjee & Ms. Sudipta Adhikary***

ABSTRACT

*Lakshadweep's coastal waters are home to 19 of the 24 species of marine quahog that are conserved through India's Wildlife (Protection) Act. These quahogs may be found in the seas off the islands of Lakshadweep. The study revealed that Lakshadweep is a home to 14 different types of quahog that are included under the purview of vanishing species list. New records have been found in Lakshadweep of the scheduled species *Placuna placenta* and *Tudicla spirillus*. Both of these species were found on Kavaratti and Kalpeni, respectively. In this study, the taxonomic identification of scheduled quahog of Lakshadweep is broken down in depth, and this research also addresses several conservation methods for scheduled quahog of Lakshadweep.*

Keywords: *Wildlife Protection Act, Quahog, Lakshadweep, Taxonomic Identification, Conservation.*

INTRODUCTION

Taxonomically distinctness, endemism, and specialised habitat consistently contribute to the one-of-a-kind nature of island biodiversity. Islands are viewed as a legacy of enhanced biotic organism (da Fonseca et al. 2006). On the contrary, the possibility that a species would become extinct is significantly increased on islands due to the fact that the populations are fairly confined, limited, and exclusive to certain ecosystems. As a result of the cataclysmic impacts that anthropogenic interventions have on the biodiversity of islands, environmentalists and policy makers need to give this issue immediate attention. In the case of the Lakshadweep islands, the robust biodiversity continues to maintain a strong relationship with the whole economic system of the islands as well as the significant cultural ethos of the people who live there. The main causes of the deterioration of biodiversity include things like unsustainable

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forms of economic growth, rising human populations, excessive resource extraction, and the effects of climate change (KSCSTE 2013). Mollusca are a very diversified phylum of invertebrates. There are anywhere from 50,000 to a maximum of 1,20,000 which are known extant species of quahog. Mollusca are the biggest marine phylum, including around 23% of all the listed marine creatures (Chapman 2009). They may be found at every trophic level in tropical oceans, from the level of primary producers all the way up to the level of top carnivores (Mohamed 2012). Venkataraman and Wafar (2005) believed that there were 3,370 different species of marine quahog in India. When it comes to the quahog scan of fauna, the island ecosystems in India have a very high level of biological diversity. This paper provides documentation of 19 species of marine quahog that have been noted within the purview of Lakshadweep.

METHODOLOGY

Lakshadweep is an archipelago that consists of 36 islands which comprises the total area of 32 km² and is India's least populous Union Territory. It is a single-district Union Territory that is made up of a total of 12 atolls, three reefs, five submerged banks, and ten inhabited islands (Fig.1.0). It contains a massive lagoon that spans 4,200 km², regional waterbody that span exactly 20,000 km², an exclusive economic zone (EEZ) that spans 400,000 km², and a coastline that is approximately 132 kilometres in length. In the course of this investigation, polls and surveys were executed.

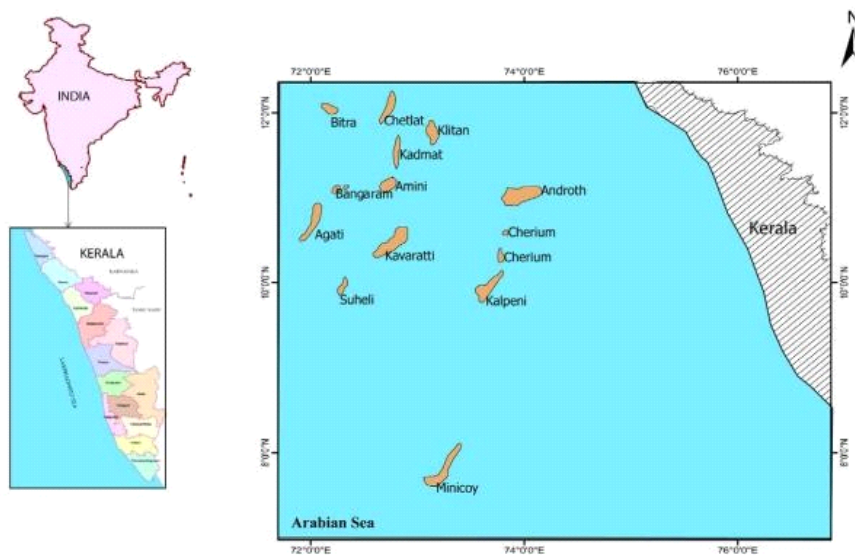


Fig. 1.0: Geographical Location of Lakshadweep Island

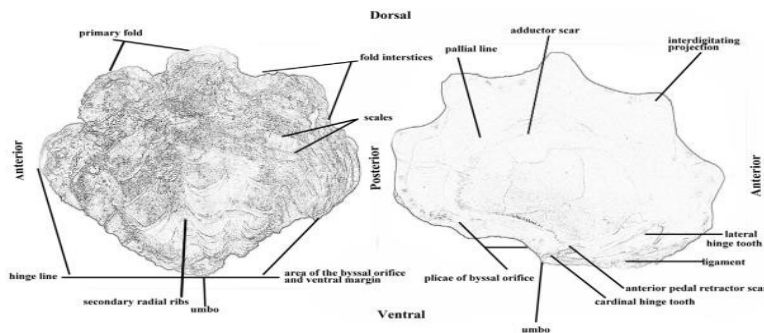


Fig. 1.2: Mollusc (Bivalve)

The specimens that were shot in the field or otherwise described were used to create the images of the life cycle phases of the scheduled quahog. The figures labelled 1.2 and 1.3 include schematic representations of gastropod and bivalve quahog, respectively. An annexure of quahog included in the different agendas of India's Wild life protection Act has been compiled with their names and classifications brought up to date.

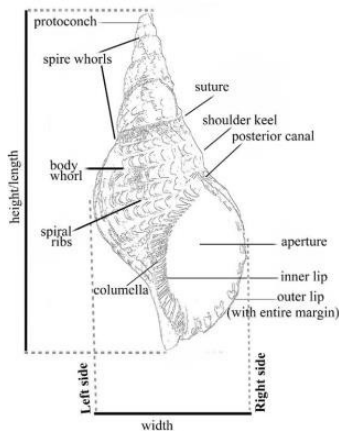


Fig. 1.3: Mollusc (Gastropod)

RESULTS AND DISCUSSION

The current investigation uncovered the existence of 14 different classes of quahog, all of which belong to different schedules under India's Wildlife Protection Act. New records have been found for the islands of Lakshadweep for the classes *Placuna placenta*, which was documented from Kavaratti, and *Tudicla spirillus* (Linnaeus, 1767).

1. *Harpago Chiragra* (Linnaeus, 1758) (Images 1a-k)

Description: A shell that is very sturdy, oval in shape, and hefty, with a noticeable notch located anteriorly. A significant stromboid notch may be seen between the

fourth and fifth labial digitations. Whorls 9–11; the four whorls located at the very top of the spire are depressed, which gives the spire the impression of being truncated, and each of the remaining whorls has a row of robust rounded knobs. Inner lip serrated. Aperture may be rose pink or orange on the inside, with the outside being white with brown spots and specks. Columella and the aperture are liriate, which means that they are sculpted with tiny lines or grooves. Chitinous operculum that is fusiform in shape and dark brown in colour; it has fine striations on one side. The outer lips get thicker, more expanded, and produce fingers as the animal continues to mature (Images 1 e–h). 280–320 millimetres in length, with a maximum length of 320 millimetres.

Remarks: It is common to find it connected with sandy bottoms and reefs covered in algae in the waters around the inhabited islands of the Lakshadweep archipelago where it may be found. Exists in littoral and sublittoral zones, as well as tidal pools and low tide levels, and may be found down to a depth of around 20 metres. Lakshadweep is home to a variety of strombids, including this one. The local people used to harvest the meat from this species in the past so that they could make pickles out of it

2. The arthritic Harpago (Roding, 1798) (Images 2 a–c)

Description: The shell is strong, oval in shape, thick, and hefty, and it has five labial digitations. Leftward bending of the siphonal canal was observed. It seems to be *H. chiragra*, however it varies from that species in that the aperture has a wide, rounded arching on the end of it that is somewhat depressed.

Remarks: In the Lakshadweep archipelago, it was only observed from Kalpeni (Apte 1998, 2014), and it is quite uncommon. Incorporated into the WILD LIFE PROTECTION ACT's schedule IV and still not included in CITES's database.



3. *Lambis crocata* (Link, 1807) (Images 3 a-c)

Described as having an uneven shape with siphonal digitations that are long, thin, and curled. The whorls have three rows of tiny knobs and several spiral threads around them all the way around. The spines on the outer lip are tubular in construction, including the one that envelops the posterior canal.

Remarks: Apte was the one who brought this species back from Lakshadweep (2014). For the purpose of this research, specimens were collected from the islands of Minicoy, Kalpeni, and Kavaratti. Specimens were found in lagoons and small tidal pools at a depth range of around 5–10 metres. Included in the WORLD LIFE PROTECTION ACT's Schedule IV of Activities. Not included on the CITES list. There is no assessment of this species on the IUCN Red List of threatened Species.

CONSERVATION

Due to the fact that this ecosystem is comprised entirely of corals, the whole of the island's biological variety is reliant on corals. The strain that is now being placed on the environment as well as the biodiversity is mostly the result of human activity. In spite of the fact that Lakshadweep does not have a formalised shell trade at this time, many of the species are harvested for culinary purposes. This plan should give the species that are scheduled for protection and other species that are heavily exploited the importance that they deserve. The involvement of the community members Communities need to be taken into consideration at the planning and decision-making stages of biodiversity conservation.

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Appendix 1

Poster of Sea shells of Lakshadweep under wild life protection Act



Legal Regulation of ott Platforms in India: A Quest into the Operational Nightmares of a Content-Based Digital Ecosystem

Dr. Meenakumary S*

ABSTRACT

India, being a democratic country is built up on the fundamental principles of freedom of speech and expression and other cherished values, guaranteed by the fundamental law of the land. The artistic freedom and digital expression is quintessential for a healthy democracy. However, with the advent of technological revolution, people are transgressing the limits set by the constitution, in a manner, which is in contrary to the cultural and social ethos of the country. The greater use of the digital media, viz., Over The Top Platform (OTT), have brought up new challenges; demanded the need for censorship of the content and thereby a regulatory mechanism to govern the digital ecosystem. As a result in 2021, new guidelines¹ have been issued by the Government, for the regulation of OTT platforms via grievance-redressal mechanism and self-regulation. The article is an attempt to find out whether this mode of regulation is a viable method; while drawing a comparison to the OTT platform regulations around the world. In short, a jurisprudential analysis of the fundamental freedoms and content-based regulation, form the limelight.

Keywords: Democracy, Digital Media, Freedom of Speech & Expression, IT Rules, OTT Platform, Self-Regulation.

CONTENT-BASED DIGITAL ECOSYSTEM: THE BACKDROP

The *Digital Revolution*, in the surge of a global pandemic, had accelerated the production and consumption of virtual content across various platforms, which in turn have challenged the social, cultural and legal norms. Digital media had taken over the print form in 2020 and had contributed approximately \$ 3.2 billion to the overall media

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1 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules, 2021) Ministry of Electronics & IT, Press Information Bureau, Government of India, which had replaced the Information Technology (Intermediaries Guidelines) Rules, 2011.

and entertainment market. This segment is expecting to grow at a rate of 22% and contribute nearly to a quarter of the entire media and entertainment industry by the end of fiscal year of the 2023². The year 2016 is marked as the swapping year in the content consumption history of India due to the large-scale flourishing and marketing of the OTT platforms in India³.

An *OTT provider* can be defined as a service provider offering ICT (Information Communication Technology) services, but neither operates a *network nor leases network capacity from a network operator*. Instead, OTT providers rely on the global internet and access network speeds (ranging from 256 Kilobits for messaging to speeds in the range of Megabits (0.5 to 3) for the video streaming) to reach the user, thereby going “over-the-top” of a telecom service provider’s (TSP’s) Network. Moreover, services provided under the OTT umbrella typically relate to media and communications and are, generally, free or lower in cost as compared to traditional methods of delivery⁴. Even though, OTT has become the new buzzword, it might be hard to believe that OTTs in India are over a decade old platform. Reliance Entertainment had launched the first OTT platform in the year 2008, in India.

Now-a-days, India enjoys services from over 40 OTT providers including various domestic and international players such as Netflix, Amazon Prime, Disney+ Hot star, Zee5 and Eros Now⁵, etc. OTT subscribers more than doubled between August 2019 and August 2020, with screen time increasing to threefold⁶. Disney+ had reached 60.5million in early August 2020, and Netflix, which had 167million subscribers at the end of 2019, saw global subscriptions surge to almost 183 million in April 2020 and reach nearly 193 million by July 2020 as per a PwC report⁷.

Direct-to-digital release and pricing strategies enabled OTT platforms to increase their customers. Major OTT platforms invest real local content to engage their subscribers. OTT platforms test live video content as well as interactive activities that appeal to viewers. An example of this is the launch of the *Disney+ Hotstar’s*

2 FICCI-EY Report 2021, *New rules of Engagement*, PICKLE MEDIA ENTERTAINMENT (Jan 18, 2022, 11:00 AM), <https://pickle.co.in/medias/ficci-ey-report-2021-new-rules-of-engagement/html>.

3 Jus Corpus, *Different Ways of Regulating the OTT Platforms*, JUS CORPUS LAW JOURNAL (Jan 16, 2022, 10:00 AM), <https://www.juscorpus.com/different-ways-of-regulating-the-ott-platforms/>.

4 Telecom Regulatory Authority of India, *Consultation Paper on Over-the-top (OTT) Services*, 2 CONSULTATION PAPER, 8 (2015) (Jan 15, 2022, 10:00 AM), <https://www.trai.gov.in/sites/default/files/OTT-CP-27032015.pdf>.

5 Raghavi, *Impact of OTT on The Traditional Mode Of Entertainment*, TOI (Jan 22, 2022, 11:00 AM), <https://timesofindia.indiatimes.com/readersblog/raghavi/impact-of-ott-on-traditional-mode-of-entertainment-39292/>

6 Id.

7 Verma Ambwani, Meenakshi, *India set to become the 6th largest OTT market by 2024: PwC*, BL, (Jan 21, 2022, 8:00 PM), <https://www.thehindubusinessline.com/info-tech/india-set-to-become-the-sixth-largest-ott-market-by-2024-pwc/article32919127.ece>

'Watch N Play' during the 2019 IPL season, whereby spectators can predict scores in a live competition and win prizes. OTT platforms are therefore, expected to become highly competitive in the next 4-5 years⁸. This growth has no doubt been accelerated by the rollout of 4G, the relative increase in broad band penetration and the technological ease of access for the OTT platforms in particular⁹. Currently, India is the world's fastest growing OTT market and is all set to emerge as the world's sixth-largest by 2024¹⁰. However, the content and language of OTT platforms have been posing a serious threat to the cultural and ethical values of the country. And it has been a matter of concern that various crimes which took place recently were under the influence of the digital streaming, whereas the accused got encouraged to commit crimes after watching the web series aired on OTT platforms¹¹.

There are certain distinctive characteristics unique to OTT, which ought to be borne in mind while dealing with the OTT platforms. Unlike cinema theatre which is a public exhibition i.e. exhibition in a public place along with other members of the public, OTT is *distinctly private viewing*. Suffice to say that exhibition of content in public places and viewing in one's own private space is different and ought to carry a distinct legal application especially when active informed choices are being involved¹². In addition with, users rarely understand that the so-called OTT apps are likely to share their personal information with various third party developers, and that this can lead to serious threats. In most situations, during the installation of such OTT apps, agreement to certain terms and conditions are usually obtained; but, these normally run into many pages and are rarely read by a user during installation of such apps. The question thus arises is that, *whether such OTT apps should take the explicit consent of the user every time information is shared with different third party developers*¹³?

Hence, the increasing instances of misuse of social media have brought forth new challenges for the law enforcement mechanisms. And these include inducement for recruitment of terrorists, circulation of obscene materials, spread of disharmony, financial frauds, incitement of violence, disturbance of public order, publishing the morphed images of women to threaten their dignity, etc., In addition to this, use of abusive language, defamatory contents and blatant disrespect to religious sentiments through digital platforms are also growing at an alarmed rate. Lack of transparency and

8 IBEF, Knowledge Centre - IBEF, *India's OTT Market: Witnessing A Rise In Number Of Paid Subscribers*, IBEF, (Jan 17,2022, 11.00 PM), <https://www.ibef.org/blogs/india-s-ott-market-witnessing-a-rise-in-number-of-paid-subscribers>

9 Mihir Rale, *Regulating OTT: Between Freedom and Responsibility*, CREATIVE FIRST, (Jan 18, 2022, 8:00 AM), <https://creativefirst.film/regulating-ott-between-freedom-and-responsibility/>

10 Lata Jha, *India is the World's Fastest Growing OTT Market: PwC Report*, MINT, (Jan 20, 2022, 10: 00 AM), <https://www.livemint.com/news/india/india-is-the-world-s-fastest-growing-ott-market-pwc-report-11603355739242.html>

11 Dr. Subhash Kumar, *Impact of OTT Platforms on Youth*, UDAY INDIA (Jan 20,2022, 12:00 PM), <https://udayindia.in/impact-of-ott-platforms-on-youth>

12 CREATIVE FIRST, *supra* note at 9.

13 TRAI, *supra* note at 4.

absence of an effective redressed mechanism thereby left the users totally dependent on the whims and fancies of social media platforms. Often it has been seen that a user who has spent his time and energy in developing a social media profile is left with no remedies in case, that profile is restricted or removed by a particular platform without giving him an opportunity to be heard¹⁴.

Digital Adherence also increased the aggressive and violent behaviour, since the shows are portraying vague images of good and evil, consequently, those who consume such shows become immune to such acts and are forced to imitate them. The youths are the major consumer of such contents, prolific users of technologies and majority are unaware of being differentiating well from bad, real from reel and thus they tend to take the presentations quite seriously, and will become a threat to their community generally¹⁵. There have been various cases where the youth are suffering from insomnia, depression, obesity and other health crisis. The excessive usage, filming and broadcasting of explicit, obscene and sexually violent scenes, foul or abusive languages, belittling of particular caste or religion, should not be encouraged at any stage. Portrayal of such content may lead to increase in various crimes such as, rape, riots, ill-treatment or discrimination in various strata, etc. Such massive outrage wears out the social fabric of the country as a whole. On an individual level, it affects the psychological and physiological well-being of the persons, mostly in a negative manner.

Given, there are no effective means to measure the appropriateness of these threats, it is essential to address them through a fair process which not only addresses these issues but also reinforces citizens' confidence in democratic values¹⁶. These challenges have been raised from time to time in various forums including, the Parliament and its committees, judicial orders and in civil society deliberations, etc., in different parts of the country as well as at the international level. Till 2021, there was not any robust redressed mechanism, wherein the ordinary users of social media and OTT platforms can lodge their complaint and get it redressed within stipulated time. In response to calls for independent censorship laws on over-the-top (OTT) services that filter material, the government announced new guidelines under section 87 of the Information Technology Act that will protect the fundamental right to freedom of expression and impose appropriate limits. The constitutional provisions on freedom of speech and expression that constitute the foundation for OTT regulations in India are being examined here.

14 Aparna Banarjea, *Social Media will be asked to reveal the first originator of mischievous tweet or message: Govt Releases Guidelines*, MINT, (Jan 18, 2022, 10:00 AM), <https://www.livemint.com/news/india/social-media-will-be-asked-to-reveal-the-first-originator-of-mischievous-tweet-or-message-it-minister-11614241834843.html>

15 Sephali Svati, *Classification of Content, Content Regulation and Ethics - OTT platforms in India*, 3, INTL.J of LEGAL, SCIENCE and INNOVATION, 515, 515-517, (2021), <https://www.ijlsi.com/wp-content/uploads/Classification-of-Content-Content-Regulation-and-Ethics-OTT-platforms-in-India.pdf>.

16 Brijesh Singh, Khusbu Jain, *Does Regulating Digital Content Hurt Freedom of Speech?*, THE DAILY GUARDIAN, (Jan 22, 2022, 10:00 AM), <https://theguardian.com/does-regulating-digital-content-hurt-freedom-of-speech>

THE NEED FOR REGULATING THE OTT PLATFORMS VIS-À-VIS THE RIGHT TO FREEDOM OF SPEECH & EXPRESSION

The Preamble to the Indian Constitution declares that its citizens have the right to freedom of thought, expression, and belief. In other words, the right to free speech and expression is critical in shaping public opinion on social, political, and economic issues; a fundamental and inherent right¹⁷ has been described as the mother of all liberties¹⁸. It encompasses the freedom of expression and the right to propagate or publish one's opinions through any medium, including newspapers, magazines, and films, as well as electronic and audio-visual media¹⁹. *Digital Expression* is henceforth an extension of rights guaranteed under Article 19(1) (a) of the Constitution of India, the right to freedom of speech and expression and is restricted by reasonable means as per Article 19 (2)²⁰.

RIGHTS OF THE OTT PLATFORMS & THE VIEWERS

The right of citizens to watch films on OTT platforms are being protected under Article 19(1) (a). The Supreme Court in *Odyssey Communications v. Lokvidayan Sanghatana*²¹ held that; the freedom guaranteed was comparable to a citizen's right to broadcast his views in any other medium, including newspapers, magazines, advertisements, hoardings, and so on. A healthy democracy clearly provides; *the right to criticise* the government through movies and web series. Similarly, in *Directorate General of Doordarshan v Anand Patwardhan*, Hon'ble SC held that the government cannot suppress open debate, no matter how divisive its policies are²². In another instance the Delhi High Court dismissed the petition in *Nikhil Bhalla v. Union of India*²³, in which the petitioner sought a grievance redressal mechanism to handle complaints about certain online content, OTT services, and the censorship of certain dialogue in the Netflix series 'Sacred Games', which portrayed the former Prime Minister on a negative light. Whereas, while quashing a judgement of forfeiture under Section 95(1) of the Criminal Procedure Code, 1973 in relation to a play called *Me Nathuram Godse Boltoy*, the Bombay High Court affirmed the right of critique²⁴.

17 INDIA CONST, preamble.

18 Ramlila Maidan Incident, re, (2012) 5 SCC 1

19 S. Rangarajan v P. Jagjivan Ram (1989) 2 SCC 574

20 It states that ; *nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*

21 Odyssey Communications (P) Ltd v. LokvidayanSanghatanaAIR1988 SC 1642.

22 Directorate General of Doordarshan v Anand Patwardhan (2006) 8 SCC 433

23 Nikhil Bhalla v. Union of India, W.P. (C) No. 7123/2018(Indian).

24 Anand Chintamani Dighe v State of Maharashtra (2002) 2 Mah LJ 14

The Bombay High Court remarked that *dissent is the quintessence of democracy* in the context of cinema regulation. Rape, violence, dowry, prostitution, human trafficking, slavery, immorality, caste system, child labour, child marriage, poverty, corruption, gender inequality, untouchability, substance addiction, sati, drug usage, and other social evils are clearly depicted with artistic element of freedom of speech and expression. The petitioner, in *Bobby Art International v. Om Pal Singh Hoon*²⁵ sought the censorship for scenes of nudity depicting Phoolan Devi; a rape victim who ultimately became India's most feared dacoit. The Supreme Court however dismissed the petition, ruling that the rape scenario explains why Phoolan Devi became the way she did. The Supreme Court however, had affirmed the *filmmaker's right to have his film aired* in *Anand Patwardhan v. Union of India*²⁶, in which Doordarshan declined to telecast an award-winning film due to communal violence.

The right to receive information is included in the freedom of speech and expression. The Supreme Court ruled in *Ministry of Information and Broadcasting v. Cricket Association of Bengal* that the freedom to receive and impart information is included in the right to free speech and expression. On all public matters, citizens must have access to a diversity of viewpoints and a range of belief. Diverse perspectives, ideas, and ideologies are necessary for citizens to make educated decisions on all topics that affect them. This is being implied in the command of Article 19(1)(a)²⁷.

Henceforth, the right of an individual to be amused on OTTs also includes the right of the audience to be entertained as a watcher. The Supreme Court supported the right of adult citizens to entertainment in *Ajay Goswami v. Union of India*²⁸, ruling that adults could not be denied entertainment within acceptable decency standards because it was deemed improper for children. The Supreme Court in *Puttaswamy v. Union of India*²⁹ held that the right to privacy is a fundamental right that is intrinsic to life and liberty under Article 21 of the Indian Constitution. The viewer thus have a fundamental right to have their personal information, interests, and viewing history etc., get protected by the OTT platforms.

REGULATING THE RIGHTS: A CRITICAL APPROACH

As we know, OTT platforms encompass a wider range of contents including that of entertainment, sports, depiction of factual content, socio-economic condition of countries, different lifestyles, cultures, perspectives and various other shows. Unfortunately, many a times, they stream shows which are offensive, violent, and obscene, that not only has an adverse effect on the growth of society but also contributing in commission of various crimes against women, children, nation, etc.. There are true incidents when such shows have hurted the moral sentiments of the public and thereby caused

25 *Bobby Art International v. Om Pal Singh Hoon* (1996) 4 SCC 1

26 *Anand Patwardhan v. Union of India* (2006) 8 SCC 433

27 *Ministry of Information and Broadcasting v. Cricket Association of Bengal* (1995) 2 SCC 161

28 *Ajay Goswami v. Union of India* (2007) 1 SCC 143

29 *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1

a major threat to the nation. The shows dealing with sensitive issues like Nationalism must be approved by a regulatory body, so as to protect the nationality and security of the country. Apart from this, broadcast contents that are legally restricted, indecent, and unverified, which aids various crimes against women viz, rape, abduction, also need to be regulated. Therefore, it's the need of the hour that; the Government should come up with measures to regulate the content on such platforms; so as to protect the life and dignity of the people and thereby the security of the Nation.

Many people have asserted that OTT platforms are filled with content that are not at all reliable and digestible. According to a survey, conducted by You-Gov, a virtual market research firm, nine out of ten people in the country have voiced that some sort of censorship is required on OTT platforms such as Voot, Netflix, and Hotstar and so on. Majority who have asserted for censorship to curb, 'what they see as unsuitable content for public viewing'³⁰ have derived their voices from the right to freedom of speech and expression, which is available to them constitutionally. Thus, the actual problem is that OTT platforms is just showcasing social ills and not at all providing amicable solutions in most of the cases, thus breaking the true spirit of artistic expression. And majority of the viewers are unable to comprehend the causes and effects of such crimes, as well as how they ought to prevent such tragedies in their real life too. This was the pioneer element that assisted to bring in censorship regulations into visual media system.

The Supreme Court in its various judgments held that *censorship is essential due to its wide ambit of expression*. The way a film is portrayed truly leaves an impact on the minds of the masses regardless of their ages. Films, therefore act as a platform to express one's idea as he likes, which is normally permissible under Article 19 (1) (a) of the Constitution. This platform whereas, cannot be treated in the same way as we read a magazine, a book or a newspaper, which in turn make the films unique; as the medium involved here is vast and comprehensive. Hence, for the interest of the larger society and to protect the national security etc., restrictions need to be imposed under Article 19(2). The framers of our Constitution thereby deemed, it essential to permit *such reasonable restriction as they have intended to strike a proper balance between the liberty guaranteed and the social interests as envisaged under the Constitution*"³¹. As held by the Supreme Court³², the importance of safeguarding this right is sine qua non for the free flow of opinions and ideas and to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, we must also promote a culture of openness, when it comes to social norms.

The Supreme Court had further asserted in Shreya Singhal's case³³ that Indian Courts have moved towards the contemporary *community standards test* while dealing with

30 Deepa Bhatia, *More Than Half of Indians Think Online Streaming Platforms Require Content Censorship*, YUGOV, (Jan 21, 2022, 09:02), <https://in.yougov.com/en-hi/news/2019/10/30/morehalf-indians-think-online-streaming-platforms-require-content-censorship/html>

31 INDIA CONST., art.19 (2).

32 S. Khushboo v. Kanniamal & Anr. (2010) 5 SCC 600

33 Shreya Singhal v. Union of India (2015) 5 SCC 1

subjective matters, used to define “public order”, “decency” or “morality” i.e. in *Directorate General of Doordarshan v. Anand Patwardhan*³⁴ this Court noticed, the law in the United States and have said that a material may be regarded, as obscene *if the average person applying contemporary community standards would find that the subject-matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary, artistic, political, educational or scientific value*. Being embedded into, these observations is the tacit acknowledgement that, ideas and opinions expressed through any form of creative speech must be free flowing and without hindrance save for any valid exercise under the specific limitations to Article 19(1) (a) of the Constitution. *However, these limitations have been permitted to curtail free speech by the Courts only by way of a valid law passed by parliament prescribing the least intrusive measure into the freedom*³⁵. And with the recognition of the right to the internet as a fundamental right by the judiciary in the case of *Faheema Shirin R.K. v State of Kerala*³⁶, technology have advanced to the point where people now have multiplicity of platforms to view content from their private gadgets such as, smart TVs, roku, computers, tablets, mobile phones, and gaming consoles. Over-the-Top platform is a method of delivering television, film, and entertainment content over the internet at the request of and in accordance with the needs of individual consumers. It suggests that a content provider is providing more services on top of those already available on the internet.

Hence, the need for regulation was felt, because there was no specific law to govern the OTT platform until recent times. However, certain regulations relating to censorship were present, in consonance with certain provisions of Indian Penal Code, 1860, Information Technology Act, 2000 apart from the Constitutional regulations. For instance, under S.293³⁷ of Indian Penal Code, anybody who has been indulged in the selling or distribution of work of literature, which is obscene would be sentenced to imprisonment up to seven years. Outraging religious sentiments which are intentional and done maliciously was punishable under section 295A. One could also be held liable for defamation under section 499 of the Act³⁸.

Apart from protection under IPC, sections 67A, 67B and 67C of the Information Technology Act, 2000 also provides for the penalty, which may include imprisonment to be imposed, on anybody who has transmitted or published any kind of obscene material, any sexually explicit material including those where children are depicted in sexual acts; or the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary³⁹. Any expression on social media of opinions, positions or facts is

34 Supra note at 22.

35 Supra note at 16.

36 Faheema Shirin RK v. State of Kerala and Others (WP (C) No 19716 of 2019 (L)

37 The Indian Penal Code, 1860, S.293

38 Ibid, S. 499

39 Supra note at 16.

essentially an aspect of free speech. And the artistic freedom of creation and expression includes reflections on various aspects of life, culture, society, policy and public life. Such kinds of artistic expression are usually regarded to be as protected speech and enjoy protections of freedom of expression available under the Constitution. The first issue of Censorship in films have been asserted by the Supreme Court under Article 19(1) (a) in *K.A. Abbas v. Union of India*⁴⁰. The apex court stated, that a motion picture has the ability to stir up more emotions deeply than any other product of art. A film therefore, can be censored on the grounds mentioned under Article 19(2)⁴¹ of the Constitution of India.

The Supreme Court has consistently held that censorship of films, their classification according to the age groups and their suitability for unrestricted exhibition with or without excisions to be regarded as a valid exercise of power in the interest of public morality, decency etc. However, this is not to be construed as necessarily offending the freedom of speech and expression.⁴² Netflix's web series 'Sacred Games' was also criticized on the grounds of shaming the political history of India. This political history included Gandhi's involvement in purchasing Swedish ammunition for the Indian army causing a major political scandal and accusing Gandhi of appeasing Muslims in a legal case of divorce. The second season of the same was also pointed out where Saif Ali Khan was throwing away the religious 'Kada' of Sikhs. 'A Suitable Boy' from Netflix had also witnessed several protests regarding a kissing scene in the background of a temple, portrayed in the series⁴³.

The Bombay High Court had postponed, the exhibition of the film *Black Friday*, which is based on the 1993 Bombay blast, until the TADA court rendered its judgement, and the Supreme Court maintained the order of interim injunction. Similarly, in the case of *Navjot Sandhu*⁴⁴, the Delhi High Court issued an ex parte injunction prohibiting the broadcast of a video on the Parliament terrorist assault. In a very recent case, *Gurdeepinder Singh Dhillon v. Union of India*⁴⁵, a notice was issued in the High Court of Punjab and Haryana to censor the web series *Paatal Lok*. This petition was not a mere plea for censor cuts, but it had requested the judiciary to bring in a regulation for the content available on OTT platforms. The fear that engulfed all the content creators and viewers was the fear of censorship, as censorship is not new to India and viewers and have been earlier deprived of many movies because the censor board did not deem it as fit⁴⁶. The Censor Board had still banned 793 films in the 16

40 *K.A. Abbas v. Union of India*, (1970) 2 SCC 780

41 (1970) 2 SCC 780

42 *Id.*

43 Anubhooti Shaw, *Censorship and OTT Platforms: Critical Analysis*, LATESTLAWS.COM, (Jan 22, 2022, 18:06), <https://www.latestlaws.com/articles/censorship-and-ott-platforms-critical-analysis>

44 *NCT of Delhi v. Navjot Sandhu* AIR (2005) SC 3820

45 *Gurdeepinder Singh Dhillon v. Union of India*, CWP-8089-2020

46 Anupam Sanghi, *Moral Policing of OTT Platforms Is Only the Latest Episode in India's Saga of Censorship*, THE WIRE, (Jan 18, 2022, 12:09 PM), <https://thewire.in/media/moral-policing-netflix-amazon-prime-latest-episode-censorship-india/>

years, considering certain criteria⁴⁷. *Water, Udda Punjab and Lipstick Under My Burkha*, are some of the films that were restrained by Censor Board, citing the reason of 'public interest' and security concerns.⁴⁸

Hence, it is inevitable that the reception of such content will be perceived as violative of the social norms, decency or religious beliefs. This should be addressed through regular legal processes, given utilising the available remedies. Being OTT, an unregulated space, it gave rise to experimental content that created a niche for itself. It also gave rise to *content that have widely exploited the freedom of creativity, by violating the norms of our culture and not setting the right example*. Therefore, in February 2021, the Government of India had released the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021⁴⁹.

LEGAL FRAMEWORK: NATIONAL & INTERNATIONAL LEVEL

Into the Constitutionality of the it Rules, 2021.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules, 2021) envisages a new regime for governing the internet ecosystem. Though the rules have been framed under the Information Technology Act, 2000, Part III of these Intermediary Rules, which is mainly concerned with the regulation of digital news media and OTT Platforms, would be administered by the Ministry of Information and Broadcasting⁵⁰.

The IT rules, 2021 envisages a three-tier regulatory framework. The first level, will be self-governing by the company. To this end, each company will appoint a grievance redressal officer and publish their details on their websites. Social media companies need to appoint a Chief Compliance Officer, a Nodal Contact Officer and a Grievance Officer. The *second level*, is referred to by the government as self-regulatory bodies of applicable institutions, as such, industrial enterprises will consider complaints against organizations under them. However, when the term, self-regulation is used, the law stipulates that the grievance redressal mechanism of an enterprise must be headed by a retired judge empaneled by the government and must have experts. The self-governing body referred to in sub-rule (1) shall be headed by a retired judge of the Supreme Court or the High Court, who shall be appointed from a panel constituted by the Ministry, with no other members exceeding six, and *shall specialize in the fields*

47 IANS, *Censor Board banned 793 films in 16 years, MohallaAssi and Parzania are in the list*, INDIA TODAY, (Jan 16, 2022, 18:02), <https://www.indiatoday.in/movies/bollywood/story/censor-board-banned-793-films-in-16-years-mohalla-assi-and-parzania-are-in-the-list-1460281-2019-02-20>

48 Supra note at 46.

49 Guest Times, *Digital Governance: The impact of regulation on OTT and digital content*, (Jan 18, 2022, 14:08) <https://bestmediainfo.com/2021/08/digital-governance-the-impact-of-regulation-on-ott-and-digital-content/>

50 Manshi Sinha, *Regulation of Content on OTT Platforms : Pros and Cons*, IRALR, (Jan 22, 2022, 10:04 AM), <https://www.iralr.in/post/regulation-of-content-on-ott-platforms-pros-and-cons/>

of media, broadcasting, technology and entertainment. And third level, is governmental control through an inter-departmental level government committee appointed by the Ministry of Information and Broadcasting. According to the new rules, complaints against OTT content must first be made to the OTT platform complaint officers. They must resolve the complaint within 15 days. The complainant is not satisfied this solution, can go to the grievance committee of the industry body, which will give him 15 days. If the complainant is still dissatisfied with the decision, he can go directly to the Ministry. Content removal, apology, warning, and content rating are all actions that can be performed under each level. The final decision rests with the Level III that is, Inter-Ministerial Government Body.⁵¹

Apart from this, the IT Rules, 2021 has also laid down a certain code of ethics which other intermediaries including OTT Platforms have to strictly adhere. It is now mandatory for the OTTs to classify their content based on its type as 'U', 'U/A 7+', 'U/A 13+', 'U/A 16+' and 'A'. It is the responsibility of OTTs to ensure that the content classified as 'U/A 13+' has an access control measure and any content that is classified as 'A' has a reliable age verification mechanism for viewership apart from the access control mechanism for restricting the minors from accessing such content. Besides all these, the OTT Platforms now need to exercise due caution and precaution while streaming any show concerning beliefs, practices or views of any racial or religious groups⁵².

OTT platforms and certain digital news media also need to provide the details of their entity and their accounts on intermediaries to the Ministry of Information and Broadcasting. This content classification is in fact not new, exists as part of the Cinematograph Act 1952, and is similar to the rating criteria prescribed under *the Internet and the Self-Control Codes issued by the Mobile Association of India*. While viewers are encouraged to make informed selections of content ratings in advance, can a viewer who continues to watch a movie, series, or show, despite warnings and ratings, register complaints with the grievance redressal system. *While appropriate regulation is critical for preserving rule of law in the digital realm, such actions need to be cautiously scrutinised owing to their ability to impinge upon the fundamental right to free speech, privacy and anonymity of the users especially women and other marginalised groups*⁵³. Laws do not provide specific reasons for which complaints can be made, and given the subjective nature of the content and the diverse sensitivity of the viewers, there are likely to be numerous complaints.

However, the IT Rules, 2021 *have been criticized on many grounds; firstly, is the excessive delegation of power by the government*. The rules have prescribed the establishment of a

51 Oommen Paul, Karthikeyan Ragamalika, *Explained: Union Govt's New IT Rules for Social Media, OTT Platforms & Digital News*, THE NEWS MINUTE, (Jan 16,2022, 18:02), <https://www.thenewsminute.com/article/explained-union-govt-s-new-it-rules-social-media-ott-platforms-digital-news-14418/>

52 Paragraph II (A) cl. (c) of Appendix of the IT Rules, 2021

53 Bhumika Indulia, *Internet Freedom for an Inclusive Global Future*, SCC ONLINE, (Jan 20,2022, 10:04), <https://www.sconline.com/blog/post/tag/ott-rules>

non-judicial adjudicatory process in order to resolve the grievances arising out of the contents published by the digital news media and OTT platforms and also mandate creation of an adjudicatory body under the nomenclature “oversight committee” to keep a check on the actions of such intermediaries. The Information Technology Act, 2000 does not empower the government to do so and hence such measures suffer from the vice of excessive delegation of power.

The challenge for OTT platforms is to balance the complaints from different audiences with different social sensitivities and the demand for different types of content in their own demand- service models from a wider audience perspective⁵⁴.

The new rules ought to introduce harsh obligations, such as requiring intermediaries that provide messaging services to identify the first originator of certain messages [Rule 4(2)]; social media platforms to use active content filtering algorithms to identify and remove certain kinds of illegal content [Rule 4(4)]. For these reasons, the Rules compatibility with India’s Constitutional law framework was immediately challenged before the Delhi & Kerala HC. The requirement for limitations regarding freedom of information and expression to be ‘*provided by law*’ is an important guarantee of the rule of law. The United Nations Special Rapporteur on Right to Freedom of Speech and Expression addressed a strongly-worded letter to the Indian government criticizing certain provisions of the IT rules.

However, India’s response highlighted the protection of freedom of speech and expression as a fundamental right in the Indian Constitution, *as a defense to the scathing criticism of newly enacted IT Rules*.⁵⁵ Another criticism of the new IT Rules is that it empowers the union government to ask the private companies to take down content under ambiguous categories and that too without adequate independent oversight.

Since the introduction of the IT Rules, numerous petitions challenging the same have been filed and are currently pending before the High Courts of Delhi, Kerala, Karnataka etc. Recently, two petitions have been filed before the Bombay High Court that mounted a challenge to the Rules on the ground that they are ultra vires the IT Act and the provisions of articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India.⁵⁶ In addition several legal experts, academicians also have raised issues regarding these provisions.

The new IT Rules propose a range of effective and practical solutions to regulate online platforms. However, legal experts, raise the issue of insufficient deliberation

54 Banerjee Tanu, Johrilshan, Kedia Garima, *New Rules for OTT Platforms: Regulation or restriction?* FE (Jan 22,2022,10:02 AM), <https://www.financialexpress.com/opinion/new-rules-for-ott-platforms-regulation-or-restriction/2207205>,

55 <https://www.legalserviceindia.com/legal/article-7050-is-it-rules-2021-restrict-the-freedom-of-speech-and-expression>.

56 See, *Agij Promotion of Nineteenonea Media Private Limited and Ors. v. Union of India and Anr* 57, filed by ‘The Leaflet’, a digital news web portal which has published articles, opinion pieces and reportage pertaining to various social and political issues. See also, *Nikhil Mangesh Wagle vs. Union of India*⁵⁶

held before framing these rules as there was almost no participation of experts from the field of digital platforms regarding the same. And when the draft was presented in 2018, by the Ministry of Electronics & Information Technology before the public and invited comments on the same, only 181 comments were received by the ministry. They argue that no notification or information was provided or broadcasted by the ministry upon the presented draft and that's why there were only a few comments and reviews were being received. Therefore, these rules only represent the idea of the government and not of the public. And they empower the government to order the intermediaries to remove or take down any post or content that the government think is inappropriate and can hinder the peace and security of the nation. This provision may hinder and limits the freedom of expression of the users. As it is upon the discretion of the government that which content, they seem fits the criteria of the inappropriate post. This provision also restricts the free flow of information on social media platforms to certain extent.

The decision of the Central Government to bring the OTT platforms under the purview of the Information and Broadcasting Ministry has sparked off a serious debate. The contours of this discussion *centred on constitutional protections for free speech in a democracy, the boundaries of artistic exploration, business competitiveness and innovation, and the overall role of state in a boundary-less, connected world*⁵⁷. Further, it is of significant concern that the purview of the IT Act, 2000, has been expanded to bring digital news media under its regulatory ambit without legislative action, in which digital liberties organisations such as the Internet Freedom Foundation have flagged.

Part III of the Rules has serious implications on freedom of speech and expression of Digital News Media and OTT Platforms, and the right of citizens to have access to information. The Rules established a Code of Ethics which is enforced by an Inter-Departmental Committee which consists only of officers of the Government. The Inter-Departmental Committee may recommend the Ministry of Information and Broadcasting to block, delete or modify content published by Digital News Media and OTT platforms. Thus, the Central Government is now the sole arbiter of permissible speech and expression under the purview of the Rules. This in turn, affects the publisher's fundamental Right to artistic expression and the citizen's right to access differing viewpoints, because publishers will be compelled to only produce content which is palatable to the guidelines specified by the Central Government. Notably, Rule 14(1) (b) r/w Rule 14(1) (6) permits the Ministry of Information and Broadcasting to refer complaints to an Inter-Departmental Committee and also decide upon those complaints after taking into consideration the recommendations of the Inter-Departmental Committee. This is arbitrary as the Ministry of Information and Broadcasting becomes a 'judge in its own cause', and thus keeps a chilling effect on speech of the publishers. The Code of Ethics mandates OTT Platforms to "take into consideration India's multi-racial and multi-religious context" and exercise "due caution" when portraying any racial or religious group. If they fails to exercise, "due caution" their content may be blocked by the Inter-Departmental Committee. As stated, this obligation on OTT Platforms is

57 Supra Note 16.

vague and has a “chilling effect” because vague laws by their very nature, are overbroad and cover within their ambit both unlawful and legitimate speech⁵⁸. Moreover, there is a plethora of vague terms in the Rules; “insulting”, “libellous” or “inconsistent”. It is a fundamental rule in legal jurisprudence that the governed must be given an opportunity to understand and comprehend what is prohibited. These vague terms, will lead to an overly broad law that leads to a chilling effect on these rights.

Though the intention of the Rules were to provide regulation on contents of OTT platforms, the clauses are quite disputable and gives rise to many concerns including that of privacy, freedom of speech and expression. The mechanism created is *without any clear legislative backing* as a consequence of which its functions would majorly resemble to those of the Ministry of Information and Broadcasting for TV regulations. Such restrictive regulations might lead to a boom and incentivising of the black market.

The laws are highly ambiguous and prohibitive for the OTT players and consumers. India is no more being a consumer market but it has also become a prominent player in the field of releasing quality original contents. The implementation of these rules is therefore a challenge. *The rules states that; in order to curb online harassment and fake news, the platforms must track original creator of any messages; this will directly impact those organisations, which works on the value of encryption.* Hence, there are chances of compromise with privacy, threat of cyber-crimes, hacks, illegal surveillance.⁵⁹ These rules, under the pretence of promoting self-regulation, seem to have attempted to compromise the freedom of speech of the digital media. Furthermore, the rules are ultra vires of the objective laid down in their parent statute viz, IT Act, 2000. Sec 79 of the Act, exempts the intermediary of the liability, made available to a third party. In the case of *Google India Pvt. Ltd. v. Vishakha Industries and Anr*⁶⁰, the court upheld this safe harbour provision. However, these rules reversed the same, when they put the liability on the intermediaries to conduct due diligence on third- party information. The lack of a competent authority, deviates from legislative process mentioned under the due process of law⁶¹, subsequently raising constitutional validity questions under Art. 13 of the Constitution. The rules are also not in consonance with the Universal Self-Regulation Code (2019) as proposed by the Internet and Mobile Association of India. The present Rules notified by the Ministry of Electronics and Information Technology (MEITY) are an arbitrary and over-regulating legislation, with the potential of state censorship⁶², contrary to the principles of Art.14 of the Constitution of

58 *Constitutional Questions Against Unconstitutional Rules*, Internet Freedom Foundation, (Jan 22,2022, 10:09 AM), <https://internetfreedom.in/constitutional-questions-against-unconstitutional-rules/>

59 Supra note at 15.

60 *Google India Pvt Ltd. v. Vishaka Industries*, AIR 2020 SC 350 (Indian).

61 INDIA CONST, art. 21.

62 Ritvika D.S, Lolita Delma Crasta, *An Analysis Into The Vires of the IT Rules*, 2021, THE LAW BLOG, (Jan 21,2022,10:02 PM), <https://thelawblog.in/2021/06/17/an-analysis-into-the-vires-of-it-rules-2021/>

India. Likewise, OTT platforms must prioritise the user's right to free speech and expression by ensuring that their terms of service and community guidelines align with their obligations under Pillar II of the UN Guiding Principles on Business and Human Rights.⁶³ Aligning the content moderation policies with the Manila Principles on Intermediary Liability⁶⁴ and the Santa Clara Principles on Transparency and Accountability in Content Moderation⁶⁵ which are the global standards on progressive platform regulation is also crucial⁶⁶ in this regard.

REGULATIONS AT THE INTERNATIONAL LEVEL

In countries like the US, EU, Singapore, Malaysia, South Korea and Australia they are keen on following the 'self-regulation' concept. Whereas, in UAE any foreign online platforms have to work with licensed telecom companies. Singapore had made it obligatory to take an issued license before providing services on their land. Australia wherefore has an authority body called "*eSafety Commissioner*" which deals with electronic media's matters and it also includes restrictions on certain kinds of content. While, European Union is thinking about tracing illegal digital content especially, the content related to nation safety, minors, hate, and so on. The United States of America owes to pass a regulatory framework to take action against online content which are causing harm the society at large. Different countries are using different means to regulate the conduct of these online streamed contents. But the motive of all the countries including India is to regulate their conduct for the well-being of the society⁶⁷. Let's examine the rules followed in certain countries for a comparative approach.

The laws on the regulation of OTT content in Singapore are direct. The Infocomm Media Development Authority (IMDA), the media regulatory body of Singapore issued a code of practices for OTT and video-on-demand services since March, 2018⁶⁸. The code further requires service providers to display the ratings and the elements in the content, including theme, violence, nudity, sex, language, drug use and horror⁶⁹ which

63 Pillar II, UN Guiding Principles on Business and Human Rights, OHCHR ,(Jan 21,2022,10:02 AM), <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr-en.pdf/>.

64 MANILA PRINCIPLES ON INTERMEDIARY LIABILITY, (Jan 21,2022,11:02 AM),<https://manilaprinciples.org/>

65 *The Santa Clara Principles: On Transparency and Accountability in Content Moderation*, (Jan 21,2022,12:02 pm), <https://santaclaraprinciples.org/>.

66 Id.

67 Jus Corpus, Different Ways Of Regulating the OTT Platforms, JUS CORPUS LAW JOURNAL,(Jan 20,2022, 10:04), <https://www.juscorpus.com/different-ways-of-regulating-the-ott-platforms/>

68 IMDA, Content Code For OTT, VOD & NICHE SERVICES, <https://www2.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/OTT-VOD-Niche-Services-Content-Code-updated-29-April-2019.pdf?>

69 *Ibid*, part 5, classifiable content elements, (Singapore).

led to the rating, to be displayed visually and prominently to the viewer before such viewer chooses to consume the content.⁷⁰

The code also prescribes certain dos and don'ts for the service providers. They must ensure ; that the programs hosted by them comply with the prevailing laws of Singapore, do not undermine national or public interest and national or public security and do not undermine racial or religious harmony among others⁷¹, ensure a balance between the viewpoints expressed in news, current affairs and educational programs including factual programs, make reasonable efforts to ensure accuracy of facts, correct any significant errors in factual programs at the earliest opportunity, and prohibit flashing and repetitive images and programs with subliminal messaging from their platforms⁷² and so on.

The Broadcasting Services Act, 1992 (BSA) is the principal legislation governing the OTT sector⁷³ in Australia. It is regulated through a complaints-based mechanism introduced on 1 January 2000⁷⁴ known as the online content co-regulatory scheme. The BSA covers both content which has been classified and also content which has not been classified⁷⁵. Content which has not been classified is being treated at par with the rating, it is most likely to get if classified. The scheme specifically deals with content which has been classified as ; RC (or refused classification) which is given to content which cannot be sold, advertised or imported in Australia, X 18+ which is given to content that is restricted to adults due to its sexually explicit nature, R 18+ which is given to content that is restricted to adults as it is considered high in impact for the audience and may be offensive to some sections of the adult community, or MA 15+ which is given to content that is restricted to the people over the age of 15 as it is considered high in impact for the audience below that age⁷⁶. Apart from content classification, the scheme also appears to restrict access to certain kinds of content⁷⁷. The scheme whilst prohibits hosting of and the access to RC content. Further, it restricts access to content which has been classified as X 18+, R 18+ or MA 15+.

Whereas in United Kingdom, in September 2018, the Director General of the British Broadcasting Corporation (BBC) called for a regulation on video streaming services

70 *Ibid*, part 2, display of classification rating and consumer advice.

71 *Ibid*, part 4, general principles.

72 *Ibid*, part 6, additional consent considerations.

73 Department of Communication and the Arts, Online Content regulation,, (Jan 10,2022, 10:09), <https://www.communications.gov.au/policy/policy-listing/online-content-regulation>

74 Department of Communications, Information Technology and the Arts, Review of the operation of schedule 5 to the Broadcasting Services Act 1992, May 2004,, (Jan 10,2022,10:09), <https://www.communications.gov.au/file/37616/download?token=EQxMbk1y/>

75 Schedule 7, Part 2, Division 1, Section 20, the BSA (Australia).

76 Australian Classification, *What We Classify*, (Jan 10,2022,10:09), <https://www.classification.gov.au/classification-ratings/what-we-classify/html/>

77 Australian Classification, *Australia Leading the Way With Netflix on Classification*, (Jan 10,2022,10:09), <https://www.classification.gov.au/about-us/media-and-news/news/australia-leading-way-netflix-classification/html/>

such as Netflix and Amazon. Following this, the UK cultural secretary hinted that video streaming services should face the same scrutiny as other public service broadcasters. Despite an absence of any specific regulations covering the online streaming videos, the British Board of Film Certification announced a partnership with Netflix under which it allowed the streaming giant to set its own ratings for film and television programs. Thereafter, the UK government released a white paper on the threat that unregulated online content posed and sought closed consultation on how it could be dealt with. It proposed a new regulator and a regulatory framework to ensure online safety of British citizens. The Regulatory Framework thereby included; a duty of care on the companies to take reasonable steps to keep their users safe, a mandate on the companies to tackle illegal and harmful activity on their service, a requirement of releasing an annual transparency report by the company, and a mandate on the company to have an effective and easy to access user complaints function among others.

Kenya's film certification body Kenya Film Classification Board (KBFC) banned Netflix 2 weeks after its launch in the country citing the service to be a threat to moral values and national security. KBFC thereafter had planned to release a law under which anybody uploading and broadcasting any videos on the internet would be required to have a filming license. After huge public uproar, the KBFC went back on its plan. Although not much is known on the licensing front, but Kenya seems to be in the final stages of developing a framework to tax foreign OTT services such as YouTube and Netflix. This suggested that the country may not let the services carry on their business without some form of regulatory mechanisms.

Saudi Arabia's Anti-Cyber Crime Law (ACCL) appears to be a sweeping law on all-things-internet. The seemingly short legislation however, uses wide language to give overarching powers to the country to censor internet activity. While it is unclear, if the country has any laws dealing specifically with OTT content, it recently used the ACCL and invited international criticism. The Communications and Information Technology Commission cited Article 6 of the ACCL and requested Netflix to remove an episode of 'Patriot Act' which was critical of the government, from its domestic catalogue. Though Netflix complied with the request, it attracted criticism for giving-in to the country's severe restriction on freedom of expression. Thus when compared to other countries in this study, India along with Singapore, promotes self-regulation aspect. Whereas, other countries had relied mostly on the government regulation for the censorship of OTT platforms and are at a nascent stage only.

CONCLUDING REMARKS: THE WAY FORWARD

The greatest visionary, Dr B.R. Ambedkar, while discussing the Draft Constitution of India, on the lines of freedom of speech, quoted a judgement of the US Supreme Court, *Gitlow v New York*⁷⁸ in justification of the limitation on the right of free speech contained in Article 13 that: *It is a fundamental principle, which is long established, that the freedom of speech and of the press, which is secured by the Constitution, does not*

⁷⁸ *Gitlow v New York* 268 U.S. 652 (1925).

confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. It is time for a healthy debate, on the transposition of our rights and freedoms in a contested digital space. This will be a process of evolution, where multiple interests will clash, time-honoured maxims, traditions and precedences will be questioned, and almost everything that we hold dear will be put to test. The answers will lie in the Constitution and its interpretation by honourable judges, learned legislators, thinkers and academicians. And the people will watch this reality show, unfolding on their myriad screens as we debate, question and develop our own perspectives⁷⁹. The Hon'ble Court asserted in *K.A. Abbas v. Union of India*⁸⁰ that the standards set for censoring, must make a substantial allowance in favour of freedom. Any attempt to regulate the most viewed and expressed form of free media infringes upon the free speech, expression, and artistic freedom of creators as well as the audience's right to consume a wide variety of digital content. Even if the room reserved for reasonable restriction on speech is surpassed by the current rules, as it equates television telecast and internet content, and deprives the targeted audience from consumption of content freely; dictating the content to watch on the internet, similar to television telecast, is unfair and restricting. It discourages diverse opinions and poses a threat to the publisher's right under Article 19(1)(a) of the Constitution. Additional arbitrary censorship on the internet via the present rules, restricts free opinion.

In the case of *Union of India v. Association for Democratic Reforms*⁸¹, the Supreme Court stated that *one-sided information, or disinformation, equally creates an uninformed citizenry which makes democracy a farce*. The Apex Court upheld the freedom of speech and expression including *the right to impart and receive information which also includes freedom to hold opinions*. Any step that tries to curb this fundamental right would be a backward step in a democracy. Even though enacted with the purpose of creating a more inclusive ecosystem, the overarching nature of these mandates pose concerns like a chilling effect on free speech, unreasonable restrictions on privacy and disproportionate censorship⁸². Therefore, Governments should ensure that social media companies continue to benefit from the safe harbour protections⁸³ unless they have an actual knowledge regarding the illegality of any content, which they aired on the streaming platforms. Regulations must be there and it must be reasonable. Government must ensure the effective implementation of existing laws to combat any unlawful content. The appetite for criticism, essential in a democracy, should be safeguarded. And

79 Supra note 16.

80 Supra note 40.

81 *Union of India v. Association For Democratic Reforms*, (2002) 5 SCC 294, JT (2002) (4) SC 501, 2002 (3) ALD 90 (Indian).

82 Supra note 53.

83 Shreya and Tiwari, *Analysing the American Safe Harbour Regime: Takeaways for India*, THE DIALOGUE, <https://thedialogue.co/wp-content/uploads/2020/12/analysing-the-american-safe-harbour-regime-takeaways-for-india-the-dialogue.pdf/>

given an environment where people are sensitive to contents, the regulatory mechanism could become an operational nightmare, affecting the creativity and freedom of expression at times. The government, normally *presumes as the watchdog of the digital content in the larger public interest, but it comes across actually as a predator*⁸⁴. Overarching regulations around content takedown, proactive monitoring, originator traceability and personal liability of platform's employees, *should be resisted and implementable and standard operating procedures should be developed, with the help of legal and technical experts, so as to ensure the feasibility of the norms governing the digital space.*⁸⁵

Considering the present situation, there must be an independent and unbiased regulatory body to govern the OTT platforms despite the provisions of self-governance, prescribed under the current laws. There is also a pressing demand for global internet governance, awakening a joint action plan among the countries at the international sphere. The *constitutionality of content-based regulation* is determined by a compelling- interest test derived from equal protection analysis: which means that, *the government must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end*⁸⁶. The government must take care that the regulatory measures do not override the rights of people at any cost⁸⁷. And, it is the *collective duty of civil society as well as the Central Government to nourish and support the constitutionally preferred right of speech and expression thereby to strike the right balance of regulations and protections.*

The provisions of the rules need to be revised so that; invocation of the stringent provisions should be done only in the rarest of rare cases, with intelligible criteria to minimize the misuse by the delegators body and envisaging the contemporary community standards as the test for determining all those subjective decisions relating to the publication or the classification of any content. Else, it could prove counterproductive in a country where the citizens still *do not have a data privacy law to guard themselves against any excesses committed by any authority.*

As we know that, regulation of OTT content will bring in some uniformity and level playing field among the creators and publishers. But, at the same time, the authorities must assure that in the garb of regulation, the viewers are not being deprived of relevant information and the content creators' right to artistic expression is not curtailed⁸⁸. Article 10 of the Human Rights Act envisages that restrictions imposed⁸⁹

84 Ed, *A Wolf in Watchdog's Clothing*, THE HINDU, (Jan 21, 2022, 10:24), <http://the-hindu-digital-01032021/>

85 Supra note 9

86 US CONSTITUTION, FIRST AMENDMENT, *Government Restraint of Content of Expression*, Justia.

87 Supra note 50.

88 Madhura Mohan Nikalje, *Is Regulation of OTT Platforms A Threat To Free Speech*, (Jan 22, 2021, 10:18 AM), <https://www.brainboosterarticles.com/post/is-regulation-of-ott-platforms-a-threat-to-free-speech/>

89 Article 10, Freedom of Speech and Expression, EQUALITY AND HUMAN RIGHTS COMMISSION, (Jan 22, 2021, 10:18 AM), <https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression>.

is appropriate and no more than necessary to address the issue whichever is to be concerned. *An overabundance of restrictions can limit content creators' creative freedom*, in turn affecting OTT site viewership in the process.⁹⁰

The IT Rules 2021 therefore posits, a watershed moment, which owes a huge momentum to transform the digital ecosystem in India. They had brought both relief and concerns at the same time. Clearly speaking, even if the rules have brought a clear picture on the governance of OTT platforms, it also raises certain concerns, related to the basic rights of the users. It would be crucial, to see how the government will respond to these pertinent issues. Considering all the above stated aspects, it is of utmost importance that these *constitutionally challenging rules need to be re-examined and an expert committee ought to be set up with public consultation so as to establish a reasonable framework for regulations*. As George Washington had stated⁹¹:

if Men are to be precluded from offering their Sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of Mankind, reason is of no use to us; *the freedom of Speech may be taken away, and, dumb and silent we may be led, like sheep, to the Slaughter*.

It is very well asserted that free expression forms the base of human rights, the root of human nature and the mother of truth. To kill free speech is to throttle human nature and to suppress truth. The freedom of speech and the freedom of the press are safeguarded under the Constitution of India. Therefore, it is impendent on the State to uphold these rights, even while implementing any sort of regulation. The current rules are in rife with the fundamental rights guaranteed under Part III of the Constitution, and fails to follow the reasonable scale of regulations⁹². Hence striking a balance between the protection of freedom of speech and expression and the regulation of OTT platforms is the need of the hour.⁹³

90 Adarsh Swarnakar, Apoorv Sharma, Shuvendu Swain, Government's Over the Top Regulations: IT Rules, 2021, (Jan 22, 2021, 10:18 AM), <https://mondaymorning.nitrkl.ac.in/article/2021/03/22/2939-governments-over-the-top-regulations-it-rules/html/>

91 George Washington, GOOD READS, (Jan 22, 2021, 10:18 AM), <https://www.goodreads.com/author/quotes/4356.George-Washington/>

92 *Constitutional Issues Arising From India's New IT Rules, 2021*, LEXLIFE INDIA, (Jan 22, 2021, 10:18 AM), <https://lexlife.in/2021/07/04/constitutional-issues-arising-from-indias-new-it-rules-2021>; Prakhar Raghuvanshi, *Digital Media Rules Violate India's Democracy and Constitution*, ARTICLE 14, (Jan 22, 2021, 10:18 AM), <https://www.article-14.com/post/digital-media-rules-violate-india-s-democracy-constitution/>

93 Forum IAS, *New IT Rules for Social Media and Its Challenges -Explained, Point wise* (Jan 22, 2021, 10:18 AM), <https://blog.forumias.com/new-it-rules-for-social-media-and-ott-platforms-explained/>

Mob Lynching and Significance of Democracy: Empirical Study

Dr. Neelam Seam*

INTRODUCTION

"It may be true that the law cannot change the heart, but it can restrain the heartless. Similarly law can't make a man love me, but it can restrain him from lynching me, and I think that's pretty important also. So while the law may not change the hearts of men, it does change the habits of men. And when you change the habits of men, pretty soon the attitudes and the hearts will be changed. And so there is a need for strong legislation constantly to grapple with the problems we face".¹

The Bureau of National Crime Records (NCRB) aired its most recent data on crime incidents across the country and officials said data collected under the new sub-heads of death due to mob lynching and other incidents.²

MEANING OF MOB LYNCHING

According to the Cambridge dictionary the term 'vigilance' for law enforcement which is carried out unlawful by a self-appointed group of people and the incidents of lynching involve people who wish to enforce illegal authority without any lawful justification.³

Merriam Webster defined the term Mob Lynching as "A crowd of people who kill or try to kill (someone) illegally as a punishment".⁴

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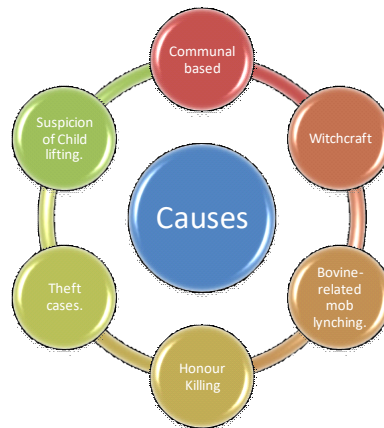
- 1 Martin Luther King's speech ((Transcript) SMU, March 17, 1966, <https://www.smu.edu/News/2014/mlk-at-smu-transcript-17march1966>, (Last visited on May 22, 2022)
- 2 <https://indianexpress.com/article/india/ncrb-leaves-out-data-on-lynchings-khap-and-religious-killings-6081188/> (Last visited on May 1, 2022)
- 3 All About Mob Lynching in India, <https://www.lawinsider.in/columns/all-about-mob-lynching-in-india>
- 4 Lynch mob Definition and meaning, available at Webster <https://www.merriam-webster.com/dictionary/lynch>. (Last visited on May 1, 2022)

The word lynching in fact originated in the United States in the mid-18th century. Historians believe that the term was first used by planter Charles Lynch to describe extra-judicial authority assumed by private individuals like him. It came to be applied over time to extra-judicial killings by crowds, most commonly of African-Americans in the late 19th century.

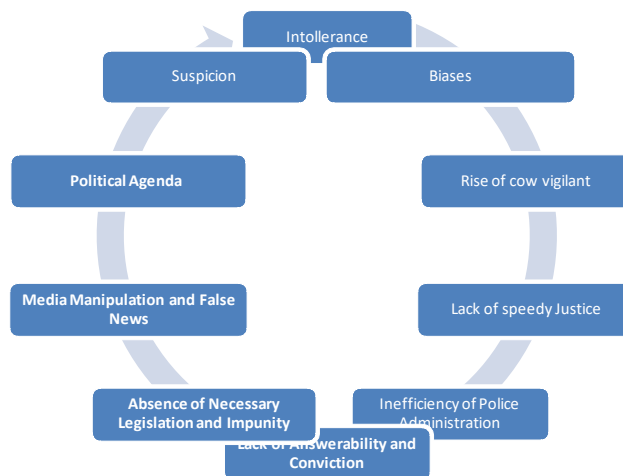
The regular meaning of lynching by N.A.A.C.P in the U.S is that:

- (i). There must be proof that an individual was murdered.
- (ii) The individual more likely than not met passing unlawfully.
- (iii) A gathering of at least three people more likely than not partook in the killings.
- (iv) The murdering is done openly.

Kinds of Mob-lynching



Causes of Mob Lynching



Provision against the mob lynching in India

Provisions of Indian Penal Code

1. **Section 302**– This section deal with the offence of murder. Imprisonment for life or with punishment for death.⁵
2. **Section 325**– This section states that if a person, except in case of provocation (as provided for by section 335), voluntarily causing grievous hurt, is likely to be punished with imprisonment of either for a term of up to seven years and also payment of fine.⁶
3. **Section 34**–. It states that when a criminal act is done by several persons in regard to a common intention, each of such persons is liable for that act in the same manner as if it were done by him alone.⁷
4. **Section 120 B**⁸– This section defines the punishment regarding parties who are participating in a criminal conspiracy together. It states that:
Conspiracy when done for an offence which is punishable with life imprisonment or death or with punishment for imprisonment for 2 years or more, the offender is to be punished in the same manner as in case of abetment while committing the offence. In the case of conspiracy for an offence that is not punishable with death, life imprisonment or imprisonment for 2 years or above, the offender is liable to be punished with imprisonment for up to six months or maybe with fine or both.
5. **Section 141**– It stated that an assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—
 - i. To intimidate by criminal force, or show of criminal force, or
 - ii. To resist the execution of any law, or of any legal process; or
 - iii. To commit any mischief or criminal trespass, or other offence; or
 - iv. By means of criminal force, or show of criminal force, to any person, to take or
 - v. obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
 - vi. By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

5 Indian Penal Code. sec. 302

6 Ibid. sec 325

7 Ibid. Sec 34

8 Ibid. sec 120(B)

6. **Section 153 A**⁹ – police should also register the First Information Report in accordance or any other relevant provisions of Indian Law which have broadcasted such irresponsible and explosive messages and violence in various social media platforms, which could have a possible element to inspire lynching or mob violence.

PROVISIONS OF CRIMINAL PROCEDURE CODE

1. **Section 223(a)**¹⁰ – It contains the relevant provision for persons being charged for an offence jointly when they are alleged of the same offence committed in the course of the same transaction which is applicable to two or more people.
2. **Section 357A**¹¹ – After the decision has been in favour of the victims by any court, the state government must prepare a compensation plan for the victims of mob lynching or mob violence in accordance with, and also such compensation should be provided to the victim or to his family members within 1 month of the decision.
3. **Section 129**- The police officer who has been appointed in the district will have a duty to disperse the mob which has a tendency to commit the offence of mob lynching by applying the powers given to him.¹²

DIFFERENT METHODS FOR LYNCHING



The Bureau of National Crime Records (NCRB) collected data on cases of mob lynching and hate crime in 2017, but the exercise was withdrawn as the data was “unpredictable”¹³

In a country like India, people taking law into their own hands is an offense since citizens of the country have been granted with the fundamental right to Life and such mob lynching are exploiting their right to life, right to a fair trial, etc.

INTERNATIONAL PERSPECTIVE

USA – The origin of the Lynching’s started from the Southern part of the United States where there was a racial conflict between the slaves and whites in the 19th Century. It happened when the slaves were freed and whites blamed them for the financial crisis in the country. Almost 3446 of the 4743 lynchings have occurred in America. The whites believed that giving too much freedom to the blacks is not fair, thus the instances of mob violence took place in America.

9 Ibid sec 152a

10 Code of Criminal Procedure, 1973 s 223

11 Ibid. sec 357A

12 Ibid. sec 129

13 <https://theprint.in/india/governance/ncrb-stopped-collecting-data-on-lynching-hate-crime-as-it-was-unreliable-govt-tells-ls/785201/> visited at 5/3/22

United Kingdom – Pertinently, the United Kingdom which ruled countries like India and America faced the crime of vigilant mob lynching when Stephen Lawrence was lynched by a mob, back in the year 1993 when racial disturbances were prevalent in the country. Furthermore, in the absence of stringent laws for mob lynching, the police officials were unable to catch the offenders. This was considered as a failure of justice and law of the land along with the failure of relevant administrative authorities. Yet again there was another incident when 4 white men set fire to a person named Michael due to racial conflicts. However, it is worth mentioning that the United Kingdom since 1998 has no official reported crime of mob lynching.

African Countries – The failure of various law enforcement agencies, as well as the police, have contributed towards vigilantes to punish who are accused of crimes like theft, robbery, kidnapping, housebreakings, etc. Such instances have been seen in some of the African countries where crime is prevalent at a high rate due to poverty, lack of education, and job opportunities.

Brundai – Another country which is affected by mob violence is Brundai. According to the reports released by Human Rights Watch and Association for Protection of Human Rights and Detained Persons (APRODHI) have released a report pertaining to issues of mob justice in the country. The report stated that Mob justice in the country has at times found direct involvement of the public authorities and people involved in the administration in public killings or beating up of suspected criminals. The report made a contention that due to lack of faith in the police force and Judicial system of the country, inadequate resources, incompetence, and corruption practices by the authorities have led many Brudians to believe that the Judicial system of the country is not appropriate to secure their rights.

VARIOUS EFFORTS TO STOP MOB LYNCHING

Efforts of the Supreme Court of India

- In the case of *Tehseen S. Ponawalla*, parliament was suggested to devise and pass separate legislation for mob lynching as an offence and also mentioned the specific punishment so that it can restraint lynching cases.¹⁴ Further, the bench challenged that no individual or a group can take the law of land into his/their hands and give punishment which they are not bound to give. Moreover, the Chief Justice of India himself mentioned the need to issue directions to take punitive, remedial, and preventive measures.
- In the case of *Nandini Sundar* the Supreme Court observed that it is the duty of the State to Strive, incessantly and consistently, in order to promote fraternity among all the citizens such that dignity of every citizen can be protected, promoted, and nourished. Therefore, it is the duty of the state to prevent crime in the state in order to maintain absolute harmony among the people.¹⁵

14 *Tehseen S. Ponawalla v. Union of India & others*, (2018) 9 SCC 501

15 *Nandini Sundar and Ors v, State of Chattisgarh*, (2011) 7 SCC 547

- In the case of Mohd. Haroon¹⁶ another a writ petition was filed in the Supreme court in relation to the riots happening around District Muzaffarnagar, Uttar Pradesh. The Supreme Court stated that it is the duty of the State Administration in the association of relevant intelligence agencies belonging to both Center and State to prevent the communal violence happening in every part of the State. If at all any officer responsible for maintaining law and order in the state is found negligent, he shall be punished in accordance with the law.
- In the case of Archbishop Raphael Cheenath¹⁷, In this case, the court observed that the government of the State must inquire into and find relevant causes or such communal riots and also strengthen the police infrastructure so that communal unrest can be curbed. The court emphasized the peace-building measures in the State.

MANAV SURAKSHA KANOON

In 2017, a bill was drafted by *National Campaign Against Mob Lynching*. The name of the bill is Manav Suraksha Kanoon (MASUKA). Prakash Ambedkar, a grandson of B.R. Ambedkar, and an activist Tehseen Poonawlla have drafted a law in order to accommodate new law with respect to Mob violence by amending Article 21 of the Indian Constitution.

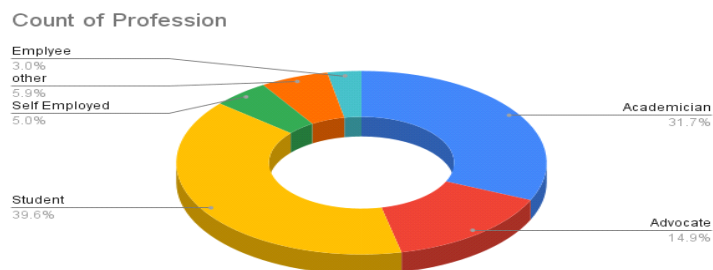
This Bill has given the following recommendations-

1. The concerned SHO (State House Officer) of the area shall be suspended until a time-bound judicial probe absolves him of all his charges.
2. This particular bill will also work in providing relief to the affected people and will also help in the rehabilitation of the families of the victim.

EMPIRICAL STUDY ABOUT THE MOB LYNCHING

I have used the empirical method and prepared the questionnaire to collect the data from the people to know their discernment about the mob lynching.

Chat 1.1



¹⁶ Mohd. Haroon and Ors v. Union of India (2014) 5 SCC 252

¹⁷ (1992) 1 SCC 558

It is being observed and reflected in the chart 1.1 that out of 100 respondent approx 40% students and 32% academicians have expressed their views on mob lynching. Only 15% advocates have given responses on this questionnaire.

Chart 1.2

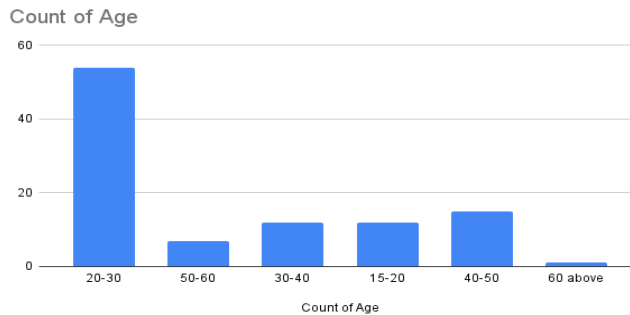
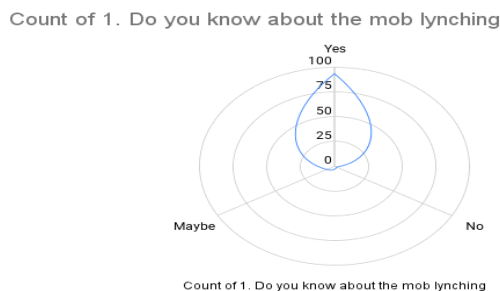


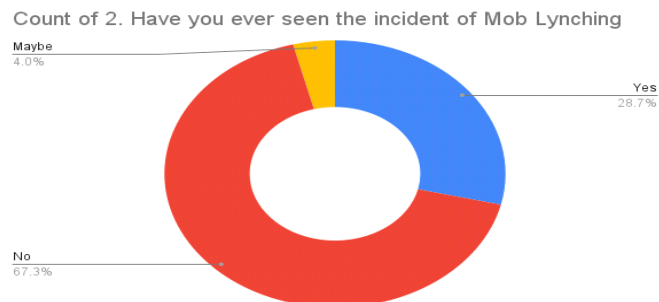
Chart 1.2 represent the age of the respondent and it is being observed that mostly youth between the age of 20-30 are more aware and vigilant towards this mob lynching. Only 12% respondent belongs to age from 30-40 participated in this survey.

Chart 1.3



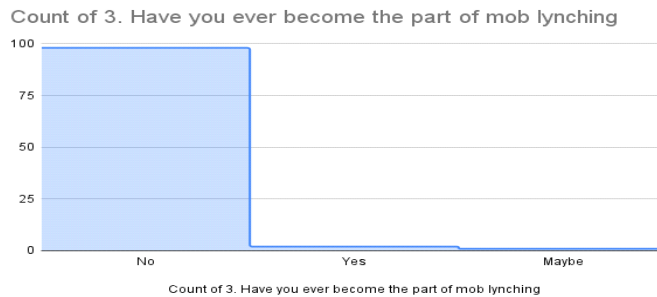
92% respondent agreed that they are aware about the mob lynching and only 2% respondents are not aware about the same. It means most of the public are well verse with this brutal crime and know the consequence of the same.

Chart 1.4



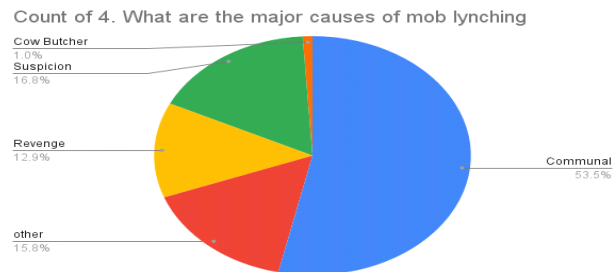
When it was asked from the respondent that they have ever seen the incident of mob lynching than 67% respondent denied that they have ever witnessed the mob lynching anywhere. 30% respondents have observed the mob lynching in the streets.

Chart 1.5



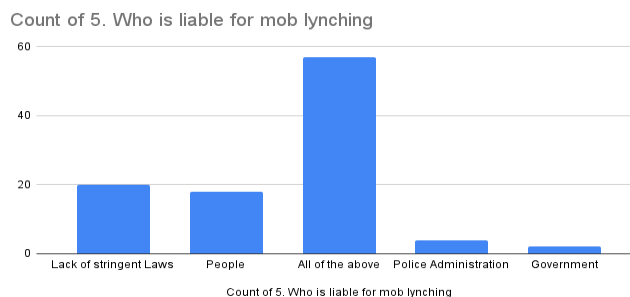
When it was asked to the respondent that have they ever become the part of mob lynching, 97% respondent denied the fact and only 2% people were courageous enough to accept that they had become the part of mob lynching.

Chart 1.6



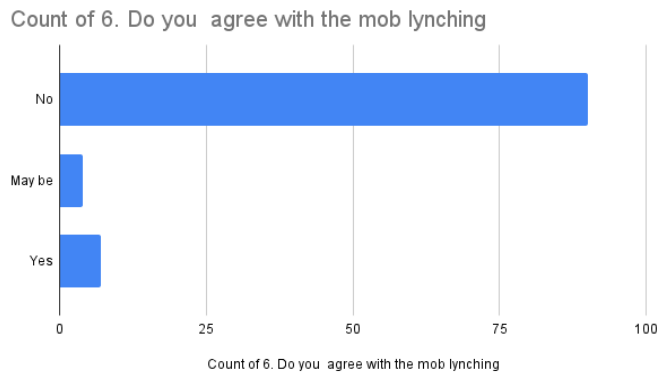
We know that there are various reasons of mob lynching but when it was asked from the respondent to know the major cause of mob lynching 53% respondent were in the agreed on communalism. Only 1% supported the reason of cow butcher. It means as per the data mob lynching takes place to achieve the communal objectives.

Chart 1.7



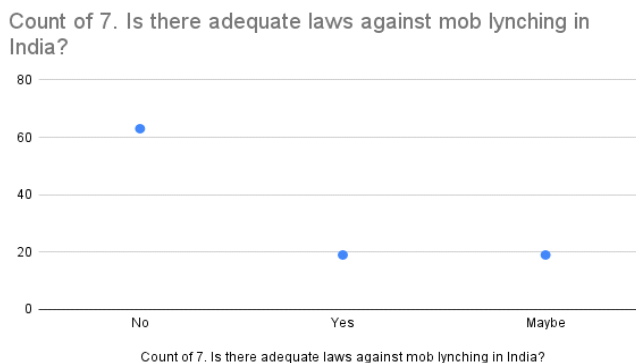
It is found that when it is being asked from the respondent to whom they feel responsible for the mob lynching, the responses of the people were unexpected. 4% respondent believes that Police administration is responsible for this heinous crime. 17% respondent considers people accountable for the same. Only 2% make government responsible for this illegal act. Approx 20% respondent think that lack of stringent laws is the main cause of mob lynching. People do not have any fear of legal system especially when we do not have any specific stringent laws for mob lynching exclusively. 56% respondent think that be it Government, Police administration, People or the lack of stringent laws, all are accountable for the mob lynching. Whenever any incident occurred in the society, every section is responsible to secure the society or raise their voice against this type of unlawful acts.

Chart 1.8



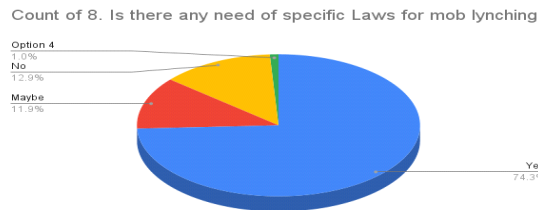
Our 89% respondent are not in the favour of mob lynching whereas 7% are in the support of mob lynching and 4% are not very sure about it. It means 11% people are not opposing the mob lynching and directly or indirectly they encourage and promote such an inhuman unlawful acts which should be criticise and condemn by all the members of the society.

Chart 1.9



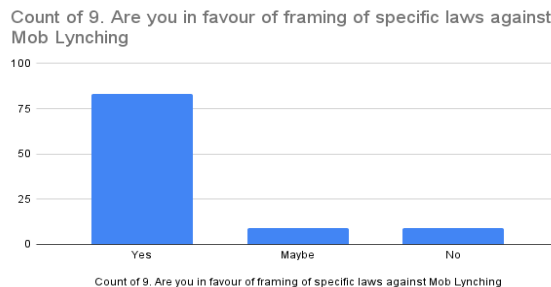
Our 62% respondent strongly agreed the fact that laws of the Country are not ample enough to deal with mob lynching whereas 18% are satisfy with the current available laws. 18% respondent did not express their opinion and are not sure about the laws of the country.

Chart 1.10



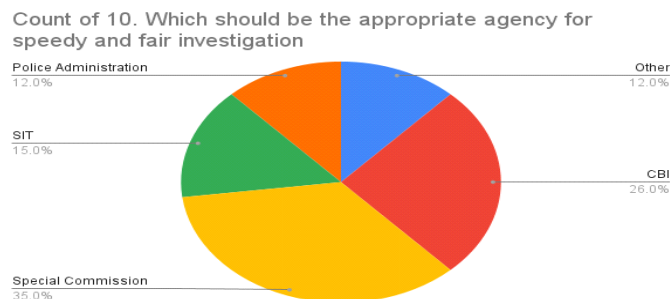
74% Respondent clearly stated that they there is a dire need of specific laws deals with this heinous crime of mob lynching. Whereas 13% respondent are not in the favour of framing the news laws because there are various section in IPC and CRPC deals with the crime of murder, provocation, conspiracy and grievous hurt etc. It is shocking that 12% respondent is not aware and is not sure about the need of framing the new legislation for the same.

Chart 1.11



When I asked from the respondent repeatedly the same question in different manner than 82% respondent are in favour of framing the specific laws for the mob lynching.

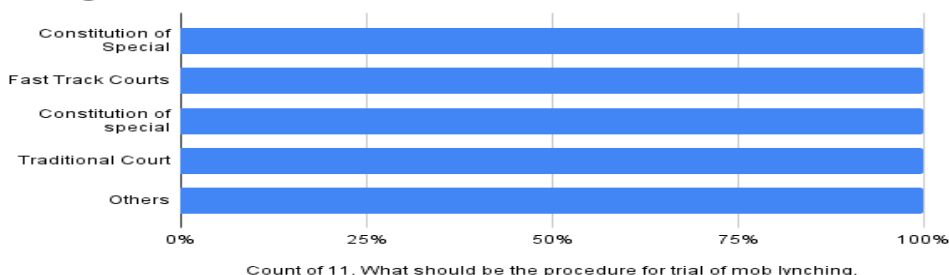
Chart 1.12



As we have seen that Mob Lynching are rampant and there is no authority to check and control this crime. So, it was asked from the respondent that which agency should be appropriate for speedy and fair investigation. Respondent have very different opinion on the same. 26% respondents are in the favour of CBI. They feel that this is the only agency who can handle the cases of mob lynching efficiently and will be pertinent for speedy and fair investigation. 35% respondents have an opinion to constitute Commission to achieve the objective of speedy and fair investigation. 15% respondent are in the favour of special Investigation Teams of the State concerned and only 12% think that Police administration should be accountable for speedy and fair investigation.

Chart 1.13

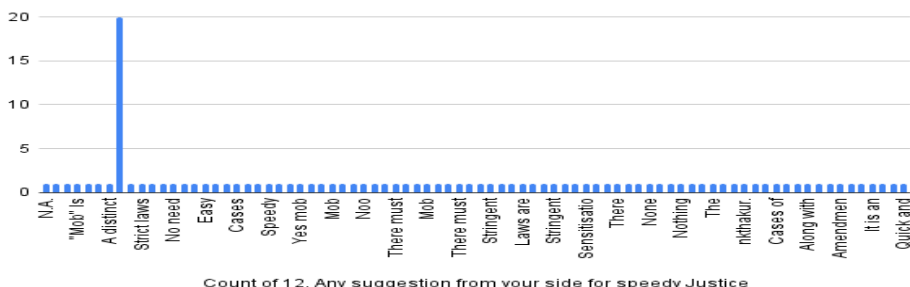
Count of 11. What should be the procedure for trial of mob lynching.



67% respondents are in the favour of fast track courts. They think that this procedure will help the victim to get justice speedily whereas 22% respondents believe that there should be constitute the special commission or committee to trial the case within the time frame. Only 5% respondents think that traditional courts are sufficient to deal with the cases of mob lynching and 5% are going for the other options.

Chart 1.14

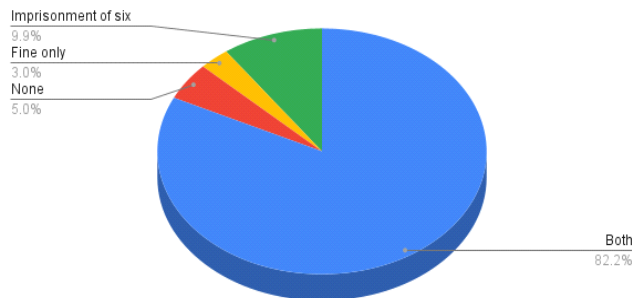
Count of 12. Any suggestion from your side for speedy Justice



Respondents have given the various opinions for providing the speedy justice to the victim. All the suggestions given by the respondents are included in the recommendations.

Chart 1.15

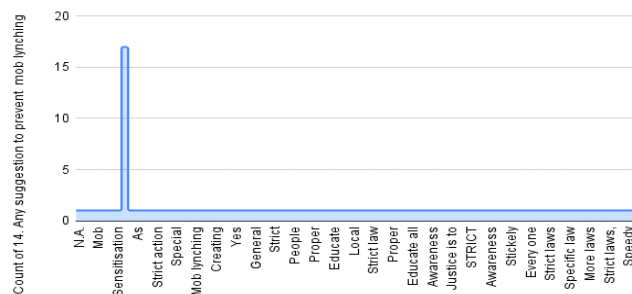
Count of 13. What should be the nature of punishment



82% respondent stated that imprisonment and fine both should be imposed in the case of mob lynching. 10% were in the favour of imprisonment only and 3% are in favour to impose fine to mob for lynching. 5% respondents did not support the imprisonment and fine. It means we could assume that they want the other forms of punishment.

Chart 1.16

Count of 14. Any suggestion to prevent mob lynching



To see the perspective of the people towards mob lynching when it was asked that how we can prevent from mob lynching, numerous suggestions we received from the respondents.

RECOMMENDATIONS

After collecting the data and examine the same there are certain suggestions of the respondent through which we could prevent mob lynching or can provide the speedy justice to the victim. These suggestions are divided in the various categories because only one section cannot secure the society from the mob lynching, it is the role and responsibility of all the various sections of the state to fulfil their responsibility and make their society free from the mob lynching.

ROLE OF CIVIL SOCIETY

Avery first responsibility lies upon the shoulders of the people. If they will not allowed or adopt any illegal method to punish the people, eventually this illegal practice will disappear from the society eventually. To achieve this objective it is important for the people to frame their responsibilities themselves and fulfil it without any hindrances.

1. Social groups and society should be more active and alert.
2. Local eminent personalities can solve and stop mob lynching.
3. "Sensitisation of the police forces and people.
4. Justice is to be provided by judge, none other has powers to decide so the people shall not provide justice by mob lynching.
5. Awareness about how to prevent mob lynching in school/college students. Discouragement of public trial of offenders.
6. Avoid TV/ Social media post which are communal and political. Try to analyze our self not just forward the post." "Awareness of the crime, punishment, detrimental emotional after effects should be there."
7. Local eminent personalities can solve and stop mob lynching." "Public should be sensitized about the bad consequences of the mob lynching.
8. Counselling sessions should be there. Strict punishment should be there so that one would think 10 times before doing it.
9. Give proper knowledge to the youth.

ROLE OF POLICE

In case the situation arises of mob lynching than before or after the incident, the police must ensure the following steps-

1. More power should be given to local police so that Police can take the suo motto action before the event occurs.
2. Need more surveillance, Proper investigation, Proper Administration, CCTV cameras on streets" "Strict penal provision and speedy trial.
3. Police should Register FIR without any delay, repeal the cases which may add further persecution upon the weak and poor, nullify the bail applications as it may pose a serious threat to the victims and their family because of the attached hate crime.
4. One of the respondent stated that "Mob" is well catered in the IPC under chapter related to offences against public peace and tranquillity; it is advisable that police should focus more on Preventive role, than institution of prosecution.
5. Witness protection scheme should be strong.
6. There should be easy processor for filing suit against mob lynching.

7. Mob lynching's are a result of common intentions, working together, it is per say not a problem but result of something that a particular group of people are affected or believe that are affected by. In case of cattle theft/ kidnap/ theft it is a usual reaction. Thus, a swift handling of the cause for example recovery of stolen animal, or kidnapped person, or other such stolen property and trial and proper punishment to the perpetrators of offence, which may lead to such violence, will instil confidence of the people in police administration, and these events will eventually end.

ROLE OF JUDICIARY

Once the police have done their role, simultaneously it is role of Judiciary to provide speedy justice to the victim and their families.

1. A mechanism should be set up to determine the quantum of compensation to be paid to the victims or their family for the loss suffered by them and also for better access to justice, schemes such as free legal aid should be made part of the system.
2. Speedy delivery via due process and the enhancement of the punishment under the law.
3. As we all know that Justice delayed-Justice denied, most of the Respondents believe that there should be fast track courts and time should be specified with the limited duration so that victim and their family could get the justice.
4. There should be distinct tribunal, committee or commissions which can understand the petty issues and matters at hand from both parties.
5. Some respondents are in the favour of Separate court and separate legislations for the speedy trial.
6. The investigation should be circumstantial basis and laws should be strictly against the offenders without any justification in defence.
7. Hearing for maximum 2-3 hearings should be there.
8. Special courts like mcoca and CBI courts shall be formed for such cases.

ROLE OF THE GOVERNMENT

In the democratic form, the role of the government has enlarged to protect and provide the security to their people is the foremost responsibility. Our respondents have given the various responsibilities to the government to prevent mob lynching.

1. Creating harmony and brotherhood via mass campaigns can be achieved.
2. Awareness should spread regarding the commission, causes and impact of mob lynching.
3. Spreading of Fake news should be regulated specially which is done on the media's part.
4. There should be no interference of politics.

5. Mob Lynching occur because people haven't specific platform to convey or protest against laws made by govt. govt must give platform to people or chance to convey their views we have indirect democracy but lack of interest of local govt executive in people views and their interest govt must make a platform for normal people they can share their feelings ,because govt policy effect our life not life of ministers their one step change entire journey of life of a single individual, I don't think I think there is major fault of govt. Because they make policies for people and they don't think before do sometime people have to do that things we can take many examples from history. Switzerland have direct democracy we have democracy but I don't think it's useful for us.
6. Unbiased administration, strict and fast decision making power.
7. Govt should take action against mob lynching and punished those people who create this.
8. People should not take laws into their own hands, public administration should be more vigilant and legislature should draft strict and effective laws regarding the same.
9. Every person should be controlled on spreading hate speech and there should be fast track courts in every district to deal with such issues.
10. There should be mediators for the issue redressed.
11. Proper Implementation of laws and quick action from government side is required without observing / considering the religion of person who so ever is the part of mob lynching.
12. Mostly specific religion group involve in this they haven't specific purpose to protest they take advantage of angry groups so must punishment them.
13. General awareness should be done. Government should educate the common people in order to prevent such sad incidents.
14. Government should stop discrimination against caste (caste bases schemes) and should stop to creating dispute among religion to get votes.
15. Sensitisation of people for matter outraging them and strengthening of Police administration.
16. Special commission for mob lynching in every state and fast track court.
17. Regular Public speech by Administrative personnel's and timely flag March by police personnel.
18. Mob lynching prevents only if government agencies work properly.
19. Check mass media and social media content. Discover the source of misinformation and take the strictest action against that particular person. Educate people on how not everything that one reads on social media is true through media and other sources.
20. Ensure that justice has been delivered to the victims of mob violence, the government should take appropriate steps to pass law demanded by Civil

Society, Manav Suraksha Kanoon (MaSuka) which provides that stringent laws should be made for mob violence, and also laws related to mob lynching must be non-bailable, cognizable and non-compoundable and also invite life imprisonment along with a time-bound trial of the culprit. Moreover, compensation to the families of victims and the police action must be considered to ensure the protection of the witnesses.

21. The parliament can also play an important role in framing the laws related to mob lynching. The parliament should act in accordance to the guidelines specified by the Supreme Courts, and accordingly draft and pass a new law to deal cases related to mob violence which would aim to provide maximum punishment to the lynchers along with the officials who are directly or indirectly part of the mob lynching instances. Further, the new law must define the term 'mob lynching' which is not defined in any of the current statutes.
22. The centre has a responsibility to draft explicit laws on mob-lynching, and states need to adhere to it as per its situations because every region is different and has its own requirements. The laws once made should responsibly be a public message that lynching is a crime.
23. A special investigation team must be set up, which investigates only the cases of mob lynching and does not have the burden of any other issues. It should be ensured that these departments are free from any political pressure.
24. Hence, while enacting new legislation, it should be ensured that investigations are not stalled, there is no ignorance of procedures, and no one plays a complicit role in the killings and cover-up of crimes.
25. Recommendations for a separate department for mob lynching

ROLE OF SOCIAL MEDIA

1. Today, People relying upon social media for all kind of information these days, such as entertainment, data analysis, facts, other related information, communication, etc. However, social media also the way of disseminate fake news or fake rumours, which triggers a community, which can be the root cause of lynching. Although, Whatsapp has end to end encryption which respects the privacy of its users. But there should be joint efforts of public and social media to stop for spreading fake rumours.
2. The news should be thoroughly verify with reputed news channels or on Google Search engine. Along with the relevance and supporting evidences.
3. Need to find the intention of the news that is it for spreading hate, or to outrage or target a community or to hurt sentiments of the society? If yes, then the message should be discard immediately and should be reported to the concerned authority.
4. The system of Forwarding the messages should be regulated by the social media platforms in a way, to make it an exception and to be able to encrypt the forwarded message and so that the source can be easily found.

5. An online platform should be created by government which will help in checking the credibility of news and simultaneously report the same if it turns out to be a fake one.

ROLE OF PRESS MEDIA

1. The way of news channels to propagate any news is awful. Regulations for accurate news and proper manner should be done properly so that people of any community should not be get annoyed or blast out on any fake or exaggerated news.
2. In some of the instance, lynching case do not get enough media coverage due to their association with higher or upper class. This is the responsibility of the media to do cover each news in justified manner without any discrimination on any ground.
3. India is a country of diversity which is one of the uniqueness but sometimes we need to pay to maintain this uniqueness. These diverse groups and communities have contained number of grievances and grudges about each other over thousands of years. This is one of the reasons for lynching. It is the main responsibility of the media to propagate the stories of ancient India and Medieval India, where all the communities were living together and shared and celebrated their values and festive. Media should depict the stories of Freedom fight for Independence where all the communities came together to fought for the independence. Media should portray and highlight their scarifies and contribution towards the society.
4. Lynching is not limited to a particular religion or any strata of society. Mob lynching is a crime which needs to rise above a particular pointer. There have been incidents of other kinds of hate crime which includes the infamous Mangalore Pub attack and also, in 2012 in Guwahati where a mob molested a girl in public after she had an altercation outside a pub.¹⁸ Media plays a vital role in shaping someone's perspective.
5. Not only the identification of culprits but also the identification of the evidence on the crime spot should be made with utmost the news on the channels. They believe what they see, hear, and the age of technology has made care and responsibility. For the identification purpose, a special team should be set up and be tasked with creating an extraordinary force which will identify people repeatedly taking part in incidents of lynching. They should immediately gather information and coordinate with the investigation department to prevent these incidents.

6. CONCLUSION

The people of India are learning to endure justice with an intense sense of apprehension which has amounted to-a lurking, unidentified, unspoken fear. Due to its extreme

nature, it has led to fear in the minds of people of being attacked by mobs and also being vulnerable in the situation.

India has unfortunately witnessed the numerous mob lynching and mob violence cases reported from various parts of the country. The present situation of mob attacks in the country is miserable and there is a need for separate legislation to be enacted in order to protect the victims of mob violence and also to implement strict procedures to curb the attacks and punish the wrongdoers involved in the mob violence.

To see the magnitude of the crime, two high-level committees are planned by the central government to recommend ways of legal framework to take care of incidents of mob violence and murder effectively. The move came every week when the supreme court asked the central government to enact a law to take care of incidents of murder and take action on mob violence. The govt has started a high-level committee chaired by union secretary of state for the home department gauba to deliberate upon the matter and create recommendations. The committee has given the certain guidelines which needs to be implement on urgent basis.

1. Enactment of new law on this topic is the fundamental need to curb this problem
2. Dimensions of Freedom of speech are required to be fixed.
3. Grounds of restrictions are required to be reframed and restructured.
4. Censorship on mass & social media is required to be imposed strictly.
5. Policy should be framed to make social media accounts on verification of Aadhar or like identity proof documents.
6. Messaging should be made as a paid service.
7. In short, opening social media account should be made parallel to a postpaid/prepaidmobile connection.

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A Reformatory Approach Towards Juvenile Justice System

Dr. Ritu Dhirania & Dr. Kaveri Sharma***

ABSTRACT

Juvenile Justice System was incorporated in Criminal Justice System to improve a juvenile offender's chances for reintegration into society.

Involvement of juveniles in various serious offences like rape, murder, robbery, theft, dacoity etc. has led to various amendments in the juvenile laws from time to time such as reduction of age of juvenile from 18 to 16 years. But the Juvenile Justice System still needs amendments as it takes into account only the physical maturity i.e. the age of the juvenile instead of judging the mental maturity as the puberty amongst the children comes earlier in today's age and it is now believed that mental maturity of juveniles must be taken into account for a just decision of a criminal case against juveniles.

The Juvenile Justice Act aims to rehabilitate and reintegrate juveniles by providing positive means for their development, treatment, education etc. so that they can also effectively add to the development of the society in future. But still there are various problems that have been faced while implementing the provisions of the Act which are being discussed in this paper and the author has tried to suggest some measures to resolve the problems.

Both quantitative and qualitative data have been used in this study.

Following are the objectives which this research attempts to achieve:-

- To examine whether the age of the juvenile should be decided according to physical maturity or the mental maturity as the latest trends show that the children attain the age of puberty earlier due to various biological factors.

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- To suggest measures to solve the problems faced while implementing the provisions of the JJ Act
- To study the role played by the society in reforming the juveniles

I. INTRODUCTION

In India or any other country, children/juveniles are not subjected to harsh punishments for any wrongdoing despite the act being of serious in nature. However, it is tried that instead of subjecting the juveniles to the adult Criminal Justice System by sending them to jail with other accused, efforts are being made to rehabilitate and reintegrate them to the mainstream society by way of guidance/reprimand, counselling etc. The underlying principle behind the belief that the children should not be subjected to the criminal justice system is the presumption of *doli incapax* which says that children are innocent and are incapable to understand the gravity of their acts as they do not have sufficient maturity at this tender age.

In almost all the countries, the criteria to judge the mental growth of a child/juvenile is his physical maturity which can be assessed through his or her age, however, nothing is provided to assess the mental maturity of the juveniles. Juveniles, nowadays are getting involved in various heinous offences such as rape, murder etc. Due to various biological and psychological factors, juveniles nowadays have become quite mature that they know what is good or bad and are well aware of the consequences of their wrongdoings.

The Juvenile Justice System aims to rehabilitate and reintegrate the juvenile offenders into the society by providing proper education, treatment and protection so that the juveniles can be reformed into a civilized person and add to the development of the nation. After ratifying the United Nations Convention on the Rights of Children, the Juvenile Justice Act, 1986 was passed with a view to reform the juveniles by providing care and protection. From time to time, various amendments have been made in the Act to meet the requirements of the society.

Due to increasing crime rate amongst the juveniles as was evident in a frightful incident that happened on 16th December, 2012, where a female physiotherapy intern was gangraped by six persons, including a juvenile who was about 17 years old, the issue of lowering the age of juvenile has been raised. Since the juvenile as per the Act cannot be awarded punishment of more than 3 years despite the act being such a heinous crime as rape, the Legislature was compelled to make suitable amendments in the Act keeping in mind the primary objective of the Act which is reformation of the juveniles and at the same time focusses on the deterrent aspect. After much debates on the social front and various decisions of the Courts, the Juvenile Justice (Care and Protection of Children) Act, 2015 came to be enacted which provides for the trial of juveniles in case of their involvement in heinous crimes such as murder, rape etc. maintaining at the same time, a friendly approach towards the juveniles so that they can be reformed, rehabilitated and reintegrated into the society.

II. OBJECTIVE

- To examine whether the age of the juvenile should be decided according to physical maturity or the mental maturity as the latest trends show that the children attain the age of puberty earlier due to various biological factors.
- To suggest measures to solve the problems faced while implementing the provisions of the JJ Act
- To study the role played by the society in reforming the juveniles

III. METHODOLOGY

Both quantitative and qualitative data have been used in the study. Since the study is descriptive in nature, secondary data from the NCRB reports has also been used.

DEFINITION OF CHILD/JUVENILE

Under Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'JJ Act, 2015'), a "child" is defined as a person who has not completed eighteen years of age. Section 2(13) of the Act defines the "child in conflict with law" as a child who is alleged to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. Another category of children i.e. "child in need of care and protection" has also been elaborately defined in Section 2(14) of the JJ Act, 2015.

The preamble of the JJ Act, 2015 itself provides that it is, *"An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto."*

Under the JJ Act, 2015, the offences have been categorised into three categories i.e. heinous, serious and petty offences. It is believed that due to various biological factors, the Juveniles nowadays attain their age of puberty earlier and between the age of 16 to 18 years, they are mature enough to understand the consequences of their wrongdoings. They know what is right or wrong and if they are committing a crime at this age, they must be tried as an adult after judging their mental maturity. Before ratifying the United Nations Convention on the Rights of Children, in India, the person at the age of 16 years was considered to be an adult.

Section 15 of the JJ Act, 2015, empowers the Juvenile Justice Board to make an assessment of the physical capability of the juvenile to commit an offence, as well as his mental ability to understand the consequences of the act committed by him keeping in mind the overall circumstances and on such assessment, if the Board finds that juvenile who commits a heinous crime may be tried as an adult. For such assessment, the Juvenile Justice Board may take help of psychologists or other experts in the field.

The Juvenile Law has been amended from time to time for meeting the changing needs of society but still some more reformation can be made in the law which the researcher has tried to suggest in this study.

The JJ Act, 2015 provides a punishment of only 3 years in a remand home for the juveniles without taking into account the gravity of the offence committed by him. The punishment of 3 years is quite disproportionate to the gravity of the offences that are being committed by the juveniles nowadays. The Legislature has taken a liberal approach towards juveniles so that they can be reformed and rehabilitated into the mainstream society but the juveniles are misusing this, and therefore, the law relating to juveniles should be so made as to restrict the juveniles from committing the crime. Juveniles are being hired by criminals for committing heinous offences as they know that the juveniles would not get harsher punishment.

Even after being mentally mature to understand the consequences of their acts, juveniles are indulging in criminal activities just because the punishment is disproportionate. Therefore, it has become essential to take into account the mental maturity of the juveniles into account while judging the offence committed by them. Only because in some cases, the age as per the birth record of the juvenile is lower, the Court decides in favour of the juvenile even after it is evident from the behaviour of the juvenile that he understands what is good or bad, therefore, an assessment about the mental maturity of the juvenile has to be made by the Court so that the Act cannot be misused by the juveniles like what happened in Nirbhaya Delhi Gang Rape case where a heinous offence was committed by a juvenile who was judged only by taking into consideration the birth record not by his mental capacity as to whether he understands the consequences of his act or not.

With advancement of technology, social media has become a part of today's life and it has become easily accessible to all. Children/juveniles also are spending lot of time over internet and are accessing all types of contents on the internet, including sexual contents. In modern times, due to various reasons, the children are not getting proper attention and guidance in their childhood, which has led to an increase in their involvement in illegal activities. The society including parents, teachers, friends, relatives, etc. plays an important part in the life of a juvenile. Juveniles should be brought up with proper education and guidance by the society making him understand the difference between good or bad. They all contribute to giving proper guidance and education to the juveniles.

Juvenile Justice System in India aims at reformation and rehabilitation of the juveniles but since the liberal approach of the law towards juveniles is being misused, it is the time that the law should also change its approach from being liberal to a deterrent one so that the juvenile offenders also have a fear in their mind that their wrongdoings will not be excused by any Court of law only because of their age.

Children in today's time are exposed to various modes of technologies due to which they have gained much more maturity both mentally and biologically as compared to ancient times. Age of puberty has also shifted earlier as compared to what it was

a few decades ago. With changing times and exposure to various modes of technologies, the level of maturity of a juvenile at the age of 16 years has also changed and he is capable of judging what is good or bad. Therefore, mental maturity of the juveniles cannot be ignored.

In some countries, the age to be considered an adult is 16 years. Even in India, a person of 16 years was considered to be an adult before ratifying the United Nations Convention on the Rights of Child but after ratification the age of the boy was increased to 18 years in the JJ Act of 2000, which, according to some socialists/activists, has also led to an increase in the crimes committed by the juveniles.

After the frightful incident of 'Nirbhaya Delhi Gang Rape', several debates were raised to lower the age of juveniles as at the age of 16 years, in today's world, a juvenile has sufficient maturity to understand the consequences of his acts and the new JJ Act 2015 was passed lowering the age of juveniles from 18 to 16 years. It cannot be said that by reducing the age of juvenile, the crimes committed by juveniles will also go down. However, the school and college students may get adversely affected due to lowering of age as at their tender age, they use to indulge in small fights and disputes which may lead to the juveniles being implicated in false cases.

The legislature should also take into account the other juveniles who are not involved in such heinous crimes and have committed petty offences due to their circumstances. They must be given a change to reform as the primary objective of the JJ Act is the rehabilitation and reintegration of the juvenile offenders by reforming them.

To punish any accused, the Court has to look into various circumstances including the intent of the accused, behind the act committed. In case of a juvenile, apart from judging their physical and mental maturity, the overall circumstances have to be looked into including whether the act involved '*mens rea*' i.e. criminal intent. A juvenile, who is between 16 to 18 years of age, while committing the crime may have sufficient maturity to understand what he is doing, but still the act may lack '*mens rea*'. Therefore, the juvenile must be given a chance to reform.

In his report, Mr. J.S. Verma, former Chief Justice of India, who headed a Judicial Committee formed after the Nirbhaya Delhi Gang Rape, submitted that a juvenile who was sentenced to life imprisonment at a young age of 16 to 18 years will be released when he must be around 35-40 years, at which age there are lesser chances of reformation in any individual. He suggested that efforts should be made to reform the criminals in Jail only. Ms. Kiran Bedi has made an attempt in this regard where she successfully transformed the prisoners in Tihar Jail. In India also like other countries such as United Kingdom, Thailand and South Africa, rehabilitative and restorative approach should be taken towards justice.

IV. CONCLUSION & SUGGESTIONS

Reduction of age of juvenile or considering the juvenile as adult do not guarantee reduction in crime rate by juveniles nor do the reformation or rehabilitation of the juvenile accused. The juvenile law has not been implemented properly due to various

insufficiencies on the part of the Government Departments due to which the reformation and re-integration of juveniles could not be achieved. The juveniles should be given an atmosphere, even in their early days of childhood, that they don't commit crime.

As the primary objective of the JJ Act is the rehabilitation and reintegration of juveniles into the society, every possible effort should be made to provide proper care and protection to children in need of care and protection and the juveniles in conflict with law. Practically, the juveniles do not get the treatment specially provided to them through Statute instead they are victimised by procedural and legal entanglements.

By providing proper care, guidance and timely help to the juveniles, they can be prevented from entering into criminal life and can be estopped from committing heinous crimes like murder, rape etc.

The Juvenile Justice System needs improvement at various levels as the State Agencies lacks trained staff and other infrastructural requirements. Government as well as non-Government organisations can collectively make efforts to devise new remedial measures to educate the juveniles either through training programs or interactions etc. The Society including the parents, teachers, friends and relatives also play an important role in the upbringing of a child where from the early days of childhood, the child can be given an atmosphere which prevents him or her from becoming a criminal. The family of the juvenile also plays a vital role, therefore, the parents should also be held liable for the criminal acts of their children because if the families of the children also have a fear of punishment, they would take all possible care to prevent the juvenile to get involved in any criminal activity and in case, some wrongdoing still happens on the part of the juvenile, they can still be prevented from becoming hardened criminal by providing proper care, guidance and protection.

As far as heinous offences like murder and rape are concerned, the juveniles committing such crimes, cannot be said to have done it without knowing its consequences. Such crimes can be decided after taking into account the overall circumstances of the juvenile including his physical and mental maturity and after proper assessment, a decision should be made by the JJ Court to transfer the juvenile to an adult Court. In case of heinous crimes, the immunity of age can only be given after proper assessment by the JJ Court but the other juveniles who have committed petty offences that too because of their compelling circumstances, should be not be deprived of the immunity given by the Statute. Therefore, we can have different age limits for different types of offences.

Proper care and guidance in the early childhood days by the parents, teachers, schools and community is very important to reduce the chances of a child indulging in delinquent activities. Therefore, it is important to identify and prevent the factors which pushes a child to adopt behaviour which is harmful to the society at large. Any child in need of care and protection or the juvenile in conflict with law must be given a chance to rehabilitate and reform himself or herself so that he or she can add to the development of the nation as a whole.

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A Critical Analysis of Jasvir Singh V. State of Punjab, a Judgment which Paved Way for Conjugal Rights of Prisoners

Dr. Rupam Jagota & Ms. Harmanjit Kaur***

“It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”

~Nelson Mandela

ABSTRACT

Human rights are the inherent rights of an individual including the restitution of Conjugal rights for prisoners. There is a dire need for reformatory measures to be evolved structurally, administratively to bring about effective enforcement so that the prisoner can be enter into a normal life after his release. This judgement has reopened the debate on the rights available to the prisoners and possible chances of their implementation. The prayer for artificial insemination has been denied due to the gravity of offences and the High Court consciously directed the State in view of present reforms to evolve for conjugal visits and open prisons.

INTRODUCTION

Crime is an existing reality of the society and punishment is methodology of reforming the criminal so as to make him eligible to once again join the society and continue his performance of his duty. crime does not turn a person into a non-human being therefore he is entitled to the same rights as non-prisoners. A prison is defined as a place where offenders are physically imprisoned and have some personal freedom taken away from them. Whenever a person commits a crime, punishment is the natural consequence. The main objective of punishment is two-fold. Firstly, to punish the offender for committing the crime and secondly to provide deterrence among other people in society in order to check the further commission of the crime. Whenever

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the person is arrested, his movement gets restricted, he is devoid of his normal daily routine. With the passage of time, prison administration has also undergone a transformation by converting them into correctional homes or reform homes. In India, with the catena of cases in the form of Public Interest litigations, numerous prison reforms have been introduced. Article 21 of the Constitution of India provides the Right to Life, which means Right to Live with human dignity. Therefore, even if the person is incarcerated, he has right to live in the prison with dignity. Right to life cannot be confined to water tight compartments as with judicial activism, it has been emerged with new dimensions. Recently, right to procreate, right to have conjugal visits and right to artificial insemination for convicts during incarceration has also been covered under Article 21 being the part of right to life by the judgments of few High Courts.

The current judgement focuses on the right to procreate during imprisonment. It is the question of utmost importance that while the Article 21 provides the Right to Life, whether the right to bear the child is to be granted to the incarcerated persons, to what extent the right of conjugal visits is allowed. Prisons are the instrument of punishing an offender and if such rights are available without any reasonable restrictions, then prisons would no longer fulfill the objective of the State i.e., deterrence and it would be tun into a place of luxury to the delinquents. Therefore, there must be some policies required to be designed by the State in order to safeguard the interest of the prisoners as well as the State itself.

This case primarily focuses on the act and conduct of husband wife who were charged with a crime under Section 302/364-A/201/120-B of the Indian Penal Code. The complainant who was also the father of the child victim, has joined the proceedings to oppose the petitioners' request. The State of Punjab is the respondent in this petition. Sh. Anupam Gupta, Ld. Senior Advocate was requested to assist this Court as an *amicus curiae*.

FACTS OF THE CASE

The petitioners were charged with kidnapping and brutally murdering a 16-year-old minor girl for ransom. The trial court sentenced them to death, which was upheld by High Court of Punjab and Haryana. The death sentence of wife was converted to life imprisonment by the Hon'ble Supreme Court. The petitioners were seeking to avail their right to conjugal life and procreate within jail premises. They had raised issues that are of utmost public importance. Further, the concept of "reasonable restrictions" or "the extent of suspension of some fundamental rights during incarceration," "radical jail reforms," "the status of prisoners as protected citizens" within the Constitutional framework, and the "international perspective on the right to conjugal life in the precincts of jail" were also going to be considered.

The petitioners were imprisoned in different cells at Central Jail, Patiala. They wanted the Jail authorities to issue an order allowing them to be together and restart their conjugal life for the sake of progeny, and they wanted to make all the necessary arrangements. The husband was the only son of his parents, and he and his wife

were arrested in a criminal case soon after their marriage. The petitioners contended that they were not seeking personal sexual enjoyment. They were also agreeing for “artificial insemination”.

CONTENTION OF THE PETITIONER

The petitioners’ principal argument was Article 21 of the Constitution. They contended that the ‘right to life’ has two key components: (i) cell preservation; and (ii) species propagation, of which sex life is an important part. They further urged that all prisoners, whether convicted, on trial, or detained, should be allowed to exercise their fundamental rights, including the right to life, which is one of the most fundamental human rights. The petitioners also mentioned the name of the countries where the concept of conjugal visitations has been effectively adopted.

CONTENTION OF THE RESPONDENT

The State of Punjab objected to the petitioners’ request, claiming that the Prisons Act of 1894 does not allow for “conjugal visitation”, and that Section 27 instead requires sufficient separation of male and female convicts. The other option of “artificial insemination” was also not accepted by the State. The complainant was also against the request of the petitioners.

LEGAL ISSUES INVOLVED

- Firstly, whether right to procreation in custody is existing within the framework of Constitution under Article 21?
- Secondly, whether State is responsible for creating of facilities for incarcerated persons?
- Thirdly, whether ‘right to life’ guaranteed under Article 21 of the Constitution also includes the right of the convicts to have conjugal visits or artificial insemination?
- And lastly, whether this right is to be given to all convicts undergoing life imprisonment?

BACKDROP OF THE CASE

India’s prisons were in appalling condition during the reign of East India Company. The first Jail Committee was formed in 1836 to improve the conditions in jails, followed by the second in 1864 and the third in 1877. The second Committee proposed certain improvements, including a minimum amount of room for each prisoner, improved clothing and food, and regular medical examinations. Jail Committees were formed in 1889 and 1892, resulting in the passage of The Prison Act of 1894. This Act was the first step towards the prison reforms in India which provided the various policies regarding the accommodation in prisons, separation of prisoners, proper healthy and safe shelter with medical facilities, appointment of medical officers and their responsibilities etc. Prisoners are not to be held in irons unless it is absolutely necessary,

according to the Act. State governments can make rules in compliance with the Act under Section 59 of the Act. The Jail Committee's Report, 1919 reflected a truly reform-oriented attitude to prison administration. It recommended reformation in place of deterrence. The report recognized that the Indian Prison Administration was lagging behind in reformatory measures. It suggested vocational trainings and education for prisoners along with aftercare programs so that after their release they can easily re-integrate into society.

Dr. W.C. Reckless, a UN Expert on Correctional Work, visited India during the year 1951-52 and studied the prison administration in the country. He suggested ways and means for improving the conditions of the prisons. His report "Jail Administration in India" is a landmark in the history of Prison reforms in India. In 1983, the All-India Jail Reforms Committee, led by A. Mulla, J. recommended a National Policy on Prisons, as well as other significant changes in jail structure and management.

ROLE OF JUDICIARY

As mentioned above, the Judiciary widened the scope of Article 21 through various judgments pronounced in PILs with regard to Prison conditions. The Hon'ble Court¹ declared the convicts cannot be denied the protection of fundamental rights which they otherwise possess, merely because of their conviction. In his one of the many salutary and historical decision, Krishna Iyer, J. stated that the courts that sign persons into jails have an onerous obligation to ensure that the detainees have the right to be free from torture while in custody, subject to the Constitution. In emphasizing re-humanization of the prisoners, this case was well ahead of its time, emphasizing that

*"Positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration. Social justice, in the prison context, has a functional versatility hardly explored."*²

Sunil Batra-II³, remarkably put an end to the atrocities inflicted upon prisoners and many good changes were introduced in prison administration. This case further provided a welcoming step in the prison reform while talking about the family bonds,

"Visits to prisoners by family and friends are a solace in insulation; and only a dehumanized system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Art. 19 and its sweep."

1 D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh, [1975] 3 SCC 185 (Supreme Court of India).

2 Sunil Batra v. Delhi Administration, [1978] 4 SCC 494 (Supreme Court of India).

3 Sunil Batra v. Delhi Administration, [1980] 3 SCC 488 (Supreme Court of India).

Furthermore, it convincingly held,

"We see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected."

State of Maharashtra v. Prabhakar Pandurant Sanzgiri AIR 1966 SC 424, *Sheela Barse v. State of Maharashtra*, [1983] 2 SCC 96, *Ramamurthy v. State of Karnataka*, [1997] 2 SCC 642, *Francis Coralie Mulin v. The Administrator, Union Territory of Delhi*, [1981] 1 SCC 608 were also stated the same.

The State in case of *Ms. G Bhargava v. State of Andhra Pradesh*⁴, dealt with a similar problem, in which an order was sought to take urgent action and enable conjugal visits to wives of convicts in Andhra Pradesh jails. The Court dismissed the suit, stating that if conjugal visits are permitted based on the prisoners' good conduct, "chances of the environment being disturbed cannot be ruled out as it will have a negative impact on the other inmates of the prison who have not been selected and granted such advantage." Further, In *R D Upadhyay v. State of Andhra Pradesh*⁵, 'best interests of unborn child of the petitioners' were raised. In this case the issues were the welfare of the women prisoners as well as the negative effects of prison environment on them. The Hon'ble Supreme Court then gave its recommendations to provide facilities in cases where the children are accompanying the women prisoners.

WORLDWIDE VIEWPOINT ON RIGHTS OF PRISONERS

It has been emphasized in the judgment that all over the world, the problems related to prisoners are common. The denial of basic human rights in the jail premises poses a severe threat to the Global justice delivery system and humanity as a whole. Various International Covenants as well as judgments are there which show that nations as well as judiciary are very well concerned about the inhumane conditions of prisoners. The United Nations' Basic Principles for the Treatment of Prisoners, 1990, also provides that the basic human rights as well as the fundamental freedoms mentioned under Universal Covenants cannot be infringed subject to reasonable restrictions. The US Supreme Court⁶ ruled that the regulations directing mail censorship were unjustified, and that inmates had a right to utilize their mail as a medium of free speech and such right could not be infringed by prison authorities. A class action⁷ was brought by inmates of a federally run Short-Term Custodial Facility in the Southern District of New York, which was meant primarily to accommodate pre-trial detainees. They challenged a variety of prison conditions and management of the Facility pertaining to study material provided, food and other articles and search of rooms during the

4 *Ms. G Bhargava v. State of Andhra Pradesh*, PIL No.251 of 2012 (Supreme Court of India).

5 *R D Upadhyay v. State of Andhra Pradesh*, [2007] 15 SCC 337(Supreme Court of India).

6 *Raymond K Procnier v. Robert Martinez*, 16 US 397, 40 L Ed 2d 224 (US Supreme Court).

7 *Griffin B Bell v. Louis Wolfish*, 441 US 520 (US Supreme Court).

absence of inmates etc. The District Courts and the Court of Appeals declared impositions were illegal and unreasonable in the case of pre-trial detainees although the decision was reversed on an appeal by the US Supreme Court. But Powell and Marshall, JJ. in *Bell* expressed their dissenting views. Further, when in another case⁸ in which family visits were prayed by pre-trial detainees along with challenging the practice of conducting irregularly-scheduled shake-down searches of individual prison cell in the absence of the occupants, The US Supreme Court held that a blanket ban on contact visits with pre-trial detainees in jail premises is a fair non-punitive measure for a valid security concern. The Court reaffirmed that pre-trial inmates do not have a constitutional right to be present while the prison officials conduct the shake-down searches of their cells. Marshall, Brennan and Stevens, JJ. in their dissented view saying that the family visits are very much important when an accused is confined waiting for his trial.

It was very notable decision of the US Supreme Court⁹ in which approximately 46000 jail inmates were released prematurely. In this case California's Prison system was in question due to the poor administration like overcrowding, poor mental and physical health of inmates and poor hygiene and unsafe conditions. The District Court directed the California prison authorities to de-crowd the prison population to 137.5% of designed capacity within two years.

It has been observed that Judicial viewpoint is always in favour of prisoners when the basic rights are in question. In the series of cases, the courts always leaned towards the fundamental rights to be provided to persons confined into prisons in order to safeguard their dignity and self-respect.

CONJUGAL VISITS IN PRISONS AND ARTIFICIAL INSEMINATION: FOREIGN COURTS' VIEW

American courts

The Courts were not in much favour of conjugal visits or artificial insemination. Marriage is a basic civil right comprising of cohabitation, sexual intercourse, giving birth and bringing up the children but it is eclipsed by the fact of confinement. The prisoners have no constitutional right to have conjugal visits.¹⁰ The court concluded that the right to procreate is inconsistent with confinement, therefore, artificial insemination could not be granted. But it has also been emphasized that there is no such rule book which prohibits the state to grant these rights to incarcerated persons. Furthermore, if the prayers of conjugal visits or for inseminating the spouse would be granted then it would be disastrous effect on other inmates who are not eligible as well as the security and penological interest of the state would be at stake.¹¹

8 *Sherman Block v. Dennis Rutherford*, 468 US 576 (US Supreme Court).

9 *Edmund G Brown, Governor of California v. Marciano Plata*, 563 US (US Supreme Court).

10 *William Gerber v. Rodney Hickmen*, [2002] 291 F.3d 617 (United States Court of Appeals, Ninth Circuit).

11 *Steven J Goodwin v. CA Turner*, [1990] 908 F.2d 1395 (United States Court of Appeals, Eighth Circuit).

European courts

More than half of European countries allow conjugal visits to prisoners subject to reasonable restrictions but in the matter of artificial insemination, in the year 2007¹², the Secretary of the State and then High Court rejected the prayer of the applicants.

RIGHT TO CONJUGAL VISITS

Learned Amicus Curiae very efficiently laid out the importance of fundamental rights being introduced in our Constitution by the great framers. He elucidated the fact that it was very much desired by them that these rights must be interpreted liberally so that with the changing needs of time, new dimensions and features could be appended to these rights. He further said that if the right of procreation has not been provided under codified law, then it was wrongful to deny the prayer of the petitioners and a sheer violation of Right to life. He submitted that under writ jurisdiction, the Court has power to grant any fundamental right and urged to the Court to direct the Prison Authorities to allow Conjugal visit specifically for progeny and if it is not possible then the artificial insemination could be granted on petitioners own expenses. For the 'best interest of the child', the parents of petitioner No.1 had taken the responsibility. Stating that right to 'create life' and 'procreate' are also ingrained into right to life then this right cannot be denied only that the person has been punished and sentenced to jail. This right exists till the offender is alive and it can only be taken away with due process of law.

Ms. GK Mann, learned counsel for the petitioners, brilliantly took up their cause and got successful in keeping this petition detached from the fact and circumstances of the criminal case in which petitioners were sentenced. She beautifully presented her arguments based on the fundamental rights still available to the petitioners. Ms. GK Mann, learned counsel for the petitioners, brilliantly took up their cause and got successful in keeping this petition detached from the fact and circumstances of the criminal case in which petitioners were sentenced. She beautifully presented her arguments based on the fundamental rights still available to the petitioners. However, the learned counsel for complainant opposed the prayer of the petitioners while he was referring to the dissenting opinion of the judges in Dickson case. He further weighted his arguments by referring another case of European Courts, *R v. Secretary of State for Home Department*, [2001] EWCA Civ 472, where the artificial insemination of the wife of a convicted was denied based on the violation of Articles 8 & 12 of European Convention on Human Rights. It was stated that it would be of serious public concern if the prayer was allowed and disadvantage to single parent families.

In addition, the learned counsel for complainant also referred the policies for conjugal/family visits implemented in various jurisdictions across Canada where these rights are allowed subject to reasonable restrictions like only family members are allowed for family meet, the member who has tendency to act violently will not be allowed

12 Dickson v. The United Kingdom, Application No.44362/04 (The European Court of Human Rights).

in family meetings etc. He also added that “Corrections Management (Private Family Visits) Policy 2009” of Australia provides that “prisoners are not eligible to participate in private family visits with other prisoners.”

ACADEMIC RESEARCH AND OPINION ON CONJUGAL VISITS

Many intellectual writings, books and research papers were referred by the Learned amicus curie which had thrown light upon the Marital Rights of the Jail Inmates and their human rights as well. Prof. Ruth Shonle Cavan and Prof. Eugene S. Zemans¹³ in their article ‘*Marital Relationships of Prisoners in Twenty-Eight Countries*’ discussed that only a few countries have procedures for conjugal meetings that apply to all types of prisoners. The restriction could be due to the criminal’s unreliability or risk, or it could be because marital connections are seen as a privilege reserved for cooperative and conforming inmates. In either instance, home leave or family housing in a correctional colony is done considering the overall jail regime. ...it’s worth mentioning that, with the exception of Mexico, most of the countries from which we got responses do not favour private or conjugal visits within prison. In 1964, Joseph K. Balogh¹⁴, in his research paper titled ‘*Conjugal Visitations in Prisons - A Sociological Perspective*’ wrote about the changing views of the prison administration authorities about the concept of conjugal meetings in USA. He concluded that the Conjugal visits have a tendency to amplify and accentuate issues regarding rehabilitation. Where other countries are adopting this vary idea of conjugal visits, it appears that prison administrators are against the idea of conjugal visits. In the research paper ‘*Attitudes toward Conjugal Visits for Prisoners*’, the author Norman S. Hayner¹⁵ highlighted the conjugal visiting practices followed in various Latin American Countries. He found that when the husband was imprisoned wives and children showed hatred towards husbands and father respectively, the family ties were broken and there was irreversible loss of love and affection. He appreciated California Prison Administration for its attempt to initiate Family Visiting in order to keep the family ties intact. Further, Learned Amicus curie mentioned Professor Baroness Deech’s article ‘*Human Rights and Welfare*’ written in 2009 which shed light on the case of Yigal Amir, who murdered Israel’s Prime Minister in 1955. Although prisoners in Israel are allowed to marry and have children, due to the heinous nature of the crime, the convict was denied this opportunity. The couple petitioned for the opportunity to consummate their marriage after marrying by proxy, and the wife was granted a conjugal visit in late 2006. Procreation/consummation rights are considered as “human rights” and the

13 R.S. Cavan *et al*, *Marital Relationships of Prisoners in Twenty-Eight Countries*, 49(2) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 133 (1958-1959). available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4692&context=jclc> (Last visited on December 10, 2021).

14 J.K. Balogh, *Conjugal Visitations in Prisons - A Sociological Perspective*, 28(3) FEDERAL PROBATION 52 (1964).

15 N.S. Hayner, *Attitudes toward Conjugal Visits for Prisoners*, 36(1) FEDERAL PROBATION 43 (1972).

gravity of the crime is not a bar to provide such rights. The courts ruled that the prisoners are entitled to these basic human rights. In 2006, Brenda V. Smith carried her research among various jurisdictions in the area of human rights and sexual visits and provided her insight in academic paper titled '*Analyzing Prison Sex: Reconciling Self- Expression with Safety, Humans Rights Brief*'. The information provided by this article is remarkable. It stated that many countries are providing sexual expression in their correctional institutions either under the name of intimate or conjugal visits with spouses and allows meeting with other family members as well. Brazil has established a "conjugal visit", which allows convicts to meet with family and friends without being physically restrained, as well as an "intimate visit", allowing him to meet his spouse or partner in separate prison cells. In the Czech Republic, the Director of prison has the authority to allow married couples to visit in rooms particularly designed for intimate contact. In Spain, convicts who are unable to leave the facility are allowed one to three hour conjugal/intimate visits once a month. For inmates serving terms of more than five months, Denmark has adopted a "prison leave" system in which the leave can be extended from one day to one week. Denmark is of the view that with such family visits given through prison leave would help to maintain a pleasant atmosphere in the prison and there would less chances of the prisoners to escape.

Furthermore, Nelson Mandela in his autobiography '*Long Walk to Freedom*' penned that the imprisonment snatches away the freedom as well as identity of the person being wearing same clothes, eating same food and obeying same routine. '*Prisons in the Pillory*', the chapter written under '*The Growth of Crime: The International Experience*' by Sir Leon Radzinowicz and Joan King, emphasized that to resolve the conflict of sexual tension and homosexual behavior of convicts, there is strong need of conjugal visits from wives and live-in relationship partners for long-term prisoners. The writer also opined that there should be periodical home-leave for prisoners in order to grant them with conjugal rights in their natural family settings if they are not top security prisoners. The writer also recommended a prototype model solution for top-security convicts where some selected ones could be granted leave to stay with their families for a certain time in some special kind of setup outside the prison walls so that there would also be a hope for them to embrace their loved ones.

THE STATE POLICY, INSTRUCTIONS FOR THE RELEASE OF CONVICTS ON PAROLE, FURLOUGH ETC. AND THE PUNJAB GOOD CONDUCT PRISONERS (TEMPORARY RELEASE) ACT, 1962

The first Act enacted for the benefit of prisoners was in the year 1926. The objective of the Punjab Good Conduct Prisoners' Probationary Release Act, 1926 was to release the prisoners while observing their good behavior and on certain conditions imposed by the Government. The privileged prisoners were so released if the government was sure that the released prisoners would be able to earn their livelihood and reintegrate into their families. After India won freedom, on the recommendations of Jail Reforms Committee, the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962 was enacted for granting the provision of 'leave' or 'furlough' as well as

'parole' to the prisoners who would have been imprisoned for long term. The prisoner can be released temporarily when there would be any urgency relating either death in his family or marriage of his children or any operation relating to farming if nobody is there to help or for any other sufficient reason (Section 3). While considering the good conduct and the quantum of punishment, the prisoner can be released temporarily granting him 'furlough'. The provisions were also laid down if the prisoner violates the conditions upon which he has been released (Section 4). The 1962 Act and Rules read with Punjab Government Policy, it is clear that these benefits are available to all categories of prisoners, subject to their good behavior while in custody, except to those who have committed heinous crimes or whose temporary release would jeopardize the security of the State, public peace and order. The State of Haryana also passed the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 with similar provisions.

Irrefutable, it has been seen that there is neither any statute, law or rule is existing regarding the very aspect of Conjugal right nor any decision of Supreme Court while pronouncing any landmark judgment extending the rights of prisoners under Article 21 of the Constitution has delineated it. Even this issue has not been raised in any of the petitions under Public Interest Litigation. Various foreign judgments of the Courts worldwide have been referred to espouse the far-reaching objectives of providing the Conjugal rights to the prisoners. From U.S. to Europe, the rights to conjugal visits, procreation or artificial insemination facilities have been recognized on certain conditions being these rights are ingrained in the 'European Convention on Human Rights'.

Looking into the matter in hand, it is justified to say that the Right of Conjugal visits, Right to Procreate as well as the procedure to get artificial insemination are the fundamental rights embedded under Article 21 of the Constitution and likewise these rights are also subject to reasonable restrictions, public order, moral and ethical issues relating to the welfare of the State under law of the land. Imprisonment results into the suspension of certain fundamental rights and the Right to conjugal visits or Procreation are also affected. Many other legal impediments are creating hindrance against these rights of the prisoners. Further, many conflicting views are big constraints for granting such rights like whether eligible inmates should be allowed to conduct conjugal visits within the four walls of the jail or they should be allowed to avail temporary leave or parole for getting this right fulfilled. Another crucial issue is whether these rights should be provided to the hardcore criminals and if yes what would be the place i.e., jail precincts or outside the jail precincts.

India has unity in diversity and being developing country and dynamic nature of the society, it is the need of the hour to re-visit the legislative and executive policies and make them amended as the changing needs of the same. The crime leads to the punishment inflicted upon the offender by the state. There are various theories of punishment such as Retributive Theory, Deterrence Theory, Preventive Theory and Reformatory theory. With the passage of time, as the nation progressed, the techniques for reforming the offenders while in incarceration has been introduced that is the reformatory theory of punishment. When the reformatory measures are applied, the

ultimate goal is the re-socialization of the criminal after his release. This reformatory aspect of penal Jurisprudence has been globally accepted. The provisions of temporary release, parole or furlough are the techniques of reformatory measures and the right of conjugal visits can be granted under the rubric of these techniques.

In a progressive society the laws and the administrative policies must adhere the contemporary issues otherwise these policies would remain the dead letters. Although there were many Jail Reform Committees were formed and their recommendations were put into statute books and various decisions of Supreme Court addressed the prison Conditions and guidelines were issued, still the prison conditions are worst and there are no ears to the situations of prisoners in the jails. Moreover, prisoners are not aware of their basic human rights and Right to Life as well. There is nothing like rehabilitation or re-integration of the prisoner after his release in real.

The legislature is responsible for formulating the rule and regulation regarding the conjugal visits of offenders for procreation and the administration should carry out these policies consciously. The Courts are the adjudication authority for pronouncing the liability as well as the punishment being incarceration to the convicts, therefore, it is also duty of the Courts to take care the measures of reformation and rehabilitation of the prisoners and their residential conditions as the prisons or Correctional Institutions are the off-shoots of the Justice Delivery System.

It may not be feasible to provide space for conjugal visits within current jails due to neglected and inadequate infrastructure, resulting in congestion, a lack of specialized services, and, most all, present social conditions. But a prototype Model Jails or Open Air-Free Jails can be created for families where prisoners with good conduct can reside like living in a small village. The prison authorities can recognize such places and setup such facility. Many social actors like criminologists, Prison administrators, Judges are involved, there will be constraint of financial aspect on this policy and the State has to bear it, so Court must direct this experiment to be implemented in a stipulated period of time. The State Government shall in consultation with the High Court form Jail Reforms Committee and this committee within one year of its formation shall prepare a report regarding the reforms required within jails and other matters and the State after submitting such report to the High Court, shall specify the time for carry out such reforms.

Lacking any statutory provision for providing Conjugal Visits for a married and eligible prisoner, the expression "any other sufficient cause" provided under Section 3(1)(d) of the 1962 Act shall cover Conjugal Visits as one of the valid and sufficient ground for the purpose of his/her temporary release on 'parole' or 'furlough' subject to conditions provided under the Act.

CONCLUSION

Considering the worldwide approach towards the conjugal rights or artificial insemination, it seems that globally this right appealed every court of law but our Indian roots being distinguishable from western society and the vox populi does not favour it so the claim of the petitioner cannot be satisfied by this Court.

Further, the case in hand is totally different where the one of the spouses is innocent and aggrieved as well as victim and the other is behind the bar, being the both husband and wife are offenders and has been convicted. The crimes for which the couple was charged were monstrous and has alarmed the common people. The claim of the petitioner is not justifiable even if utmost generous decision of any foreign court would have been considered. Moreover, looking into the contemporary conditions of prisons, it is obvious that prison environment is not affable for the budding needs of prisoners. The Hon'ble Judge declined the claim of the petitioner for granting him the right of procreation.

No doubt, this petition raised an important aspect of human rights of prisoners and considering each and every aspect of Right to Life being fundamental rights enshrined under Part III of the Constitution, it can be said that the Right to Procreation is existing during the incarceration period of the convict. The fundamental Rights are open ended and these cannot be kept in water tight compartments as intended by the framers of the Constitution. Therefore, the Right to Procreate falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights. Secondly, it is the sole responsibility of the State for providing its citizens their basic human rights. As there is no inherent conflict between the Right to Procreate and Incarceration, keeping into consideration the reasonable restrictions, the Procreation Right ought to be granted by the State. Thirdly, the Right to Life guaranteed under Article 21 of the Constitution also includes the Right of the convicts to have Conjugal visits or artificial insemination. As this is the State which could provide this right so it must be regulated by the procedure established by law. Lastly, all convicts are entitled to the Right to Procreation during incarceration unless they are specifically excepted. But this right is not absolute right and it must be checked against the yardsticks of the reasonable retractions as well as the interest of the State.

SUGGESTIONS

This judgment is a humble attempt at re visiting Article 21 to Right to Life emphasizing on Right to Privacy within the matrimonial relations. Particularly securing the conjugal rights of the convicts. Few suggestions have been laid down which if adopted can bring about a reformation in the society and change the perspective of looking at the criminal from treating him as a perpetrator of crime to accidental happening of the act or in self-defense or analyzing the regates what he has done and is willing to undergo punishment for his acts and omissions. These suggestions are:

- I. It is suggested that Punjab Government would establish a Jail Reforms Committee, which would be commanded by a former High Court judge. A Social Scientist, as well as an expert in prison reform and management, will be among the other members.
- II. The Jail Reforms Committee shall devise a plan to create an environment conducive to conjugal and family visits for prisoners, as well as the categories of prisoners who are eligible for such visits, while keeping in mind the advantages and reformatory goals of such facilities.

- III. The Committee shall also consider ways to broaden the breadth and reach of “open jail”, where certain types of prisoners and their families can stay together for stipulated periods of time, and make recommendations for the required infrastructure to make this a reality.
- IV. The Jail Reforms Committee shall also consider the best tools and techniques among jail reforms for simplifying the process of visitations keeping into mind the reformation and rehabilitation of prisoners and requirements of their families.
- V. The Jail Reforms Committee shall recommend strategies to improve the family ties and communication between the prisoner and their family members.
- VI. The Jail Reforms Committee shall formulate a long-term strategy for modernizing the jail infrastructure in consonance with the reforms mandated by this order, as well as other required reforms;
- VII. The Jail Reforms Committee shall also make recommendations for required amendments in existing rules and policies that would assure the grant of parole, furlough for conjugal visits, and the eligibility criteria for such relief.
- VIII. The Jail Reforms Committee shall also classify the convicts not eligible for conjugal visits and determine whether the husband and wife who are both convicted should be included in such a list as a matter of policy, taking into account the risk and danger to law and security, as well as the undesirable social impact and numerous hitches to their child.
- IX. After visiting the major jail facilities, the Jail Reforms shall make its recommendations within a year, and it will continue to observe the infrastructure and other changes that will be implemented in the existing jails and the Prison Administration System in consonance with its recommendations.
- X. The Jail Reforms Committee shall be permitted to use the services of State of Punjab employees and officers, who are further directed to provide the necessary funds and infrastructure, including proper office facilities, secretarial services, travel allowances, and all other amenities and facilities as demanded by the Jail Reforms Committee.

In view of the larger public interest beyond the relief sought by the petitioners and the issues raised and replied are substantial in nature as per the policies of the government, the above guidelines are applicable equally to the State of Haryana and Union Territory of Chandigarh as well. The prayer by the petitioners in this writ-petition was declined owing to the prevailing prison conditions, lack of infrastructure as well as keeping into consideration the gravity of offence they committed. Though the prayer was rejected yet it has opened a jurisprudential platform of revisiting the rights and interests of the prisoners. Since it is an accepted fact that the prisoner is to be incarcerated for the offence he has committed, he cannot be denied a human existence his Right to Life has to be secured by the State and necessary facilities including conjugal rights has to be protected. Lack of infrastructure cannot be a reasonable excuse on this scale of protecting and promoting human rights of the prisoners.

Causes and Resolutions for Marital Rape: A Human Rights Approach

Dr. Sajisivan. S*

ABSTRACT

The impact of unconsented physical relationship between husband and wife has been a discreetly dealt with issue over several years. The topic is under constant discussion for centuries. Even today, though developed countries have taken a clear stand on the nature of the act of marital rape constituting an offence, our 75 year old nation is still dilly-dallying on to be or not to be. While the significance of existence and self-respect of a wife as a free-thinking citizen is not weighing heavy enough to balance her rights to freedom of choices or expression. An attempt is made here to glide through the past years and learn how social value systems need to change more for the basic rights of a wife as a human being.

Keywords: Rape -Marital Rape-Victim -Marriages-Consent-Doctrine of Coverture-Divorce-criminalization- Indian Penal Code - Chattel- Sadist-machoistic attitude-Equality-Right to life-Dignity-Bodily integrity-Bodily autonomy-Self-determination-sexual privacy-Emotional crisis-Reasonability test-Victorian era

As written by Simone de Beauvoir in her book, *The Second Sex*:

*"No one is more arrogant towards women, more aggressive or scornful, than the man who is anxious about his virility."*¹

INTRODUCTION

We have come long way down to the lane, and much water has flown down river Ganga from the concept of *Na Sthree swaanthatryamarhati* by the famed Manu (Swayambhuva) between the second and third century BCE in one of the first ancient texts of India.²

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1 SIMONE DE BEAUVOIR, *THE SECOND SEX*, 1949.

2 Manusmrithi by manu

The gradual development of the human civilization has endowed the female with freedom of choices and rights to decide for herself. We are already two decades into the 21st century wherein the globe is now on our fingertips. But there is an irony in the situation today that even now we are discussing what the limit of a woman's right is. In the present scenario, time is not far off when we may have to address the same issue in the third gender category too.

This write up is a humble attempt at a study on Marital Rape on the light of a recent Judgment pronounced by High Court of Kerala, which made a historic statement that merely for the reason that the law does not recognize marital rape under our penal law, it is not inhibit the courts to recognizing marital rape as a form of cruelty to grant divorce. Thus, 'marital rape' has now been declared to be a good ground for divorce. Truly, a big stride ahead....

VIOLATION OF MARRIED WOMEN'S RIGHTS BY THE PERSON

The act of "rape" is an offence and it itself based on the issues of consent, irrespective of the relationship shared by the perpetrator and the victim. When the persons involved are "spouses" to each other, the dimensions change: whether, by virtue of relationship, it becomes a right to force one partner to the other's carnal whims and urges; in other words, whether a 'wife' is only a property owned and possessed by a husband, or each one still enjoys the right to privacy and the consequent strength to keep his/her physical person un-interfered with.

There we used to impose a limitation through the State in the personal and private family relationship and intimate behaviour between husband and wife. Basically, it is in general public interest to respect the privacy between spouses and promote harmony in such relationships. When the State has intervened in matters like dowry, domestic violence, cruelty, etc., it in fact it has been already entered the sphere of one's home. But it is important to bear once mind that it is ultimately for the well-being of individual.

According to the National Family Health Survey report of 2019-2020,³ the overall percentage of married women experiencing spousal physical or sexual violence from their husbands is alarming. When Nagaland ticks at 60%, Karnataka, Bihar and Manipur have 40%, followed by Telangana (37%), Assam (32%), Andhra Pradesh (30%), West Bengal (27%), Maharashtra (25%), and so on. The lowest tally can be seen in figures of Nagaland (6%).

MARITAL RAPE AND THE ENGLISH LAW

The genesis of marital rape found a place under English law it is interesting that, marital rape is consider as an offence and penal consequences attract the offence. Because, the state gives much more concern over individuals physical freedoms.

3 National Family Health Survey, India, (April 17, 2022, 1:30 PM), National Family Health Survey (NFHS-5) rchiips.org.

Under English law, husband and wife were considered as one person. As Sir Mathew Hale stated:

*"the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial contract and consent, the wife had given herself up in this kind unto her husband which she cannot abandoned."*⁴

This concept was taken by many Judges while dealing with similar cases of marital rape. That is why, the wife upon marriage submits legal person to her husband and her consent to all his sexual whims cannot be ignored. This can be clarified by giving one of the insights that Hale put forward the idea of 'implied consent' in marriages – women cannot retract such a consent implied to have been given at the time marriage.

Amongst the other traditional ideology-based justification to marital rape exemptions can trace under the Victorian doctrines, were women treated as a property of her husband and her legal existence being 'consolidated and incorporated into that of a husband'. Back then, a married woman was not recognize equal status of males and females, denied a married woman's right to own property, and the like.

But once the modern philosophy began to play its part, the fore began to transform. The marital rapes are recognized as an offence continued in the present scenario and it's a threat to the matrimonial society. In *R v. R*⁵, where in the court observed that the wife had already left her matrimonial home in 1989, but she not initiated the divorce proceedings. In November 1989, the respondent went to the house of his wife's parents and made an attempted to have sexual intercourse with her against her will and assaulted her. Later he was charged with two counts, rape and assault causing bodily harm and injury to wife. He was convicted on both the charges. L. Keith confirming the conviction and commenting upon Hale's proposition stated:

*" the position is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principles there is no good reason why the whole proposition should not be held inapplicable in modern times."*⁶

The exemption under marital rape was abolished in England and Wales in 1991 by the Appellate Committee of House of Lords observed in the case of *R. v. R*, that the status of married women had changed beyond recognition since Hale set out his proposition. Lord Keith, speaking for the Court, declared:

4 Nimeshbhai Bharatbhai Desai vs. State of Gujarat, 2018 SCC Guj. 732,. where the notion of marital rape has been normalized and converted into automatic consent. Because, the law itself recognize under marital tie the status of a woman as chattel. Actually no one should given any right to violate another person's autonomy, mental and bodily dignity.

5 1991 UKHL 12.

6 *Supra n. 5*

*"marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband"*⁷

This has to be taken into account as an important development in the upliftment of and safeguarding the rights of women.

In the United States of America, rape is defined as any non-consensual sexual intercourse between non-spouses and it has always been illegal. Since 1993, all the 50 states have laws enacted against marital rape and categorized it as a crime, where the perpetrators are charged in the same manner in which rape by strangers would be charged. The only marital exemption that exists in some states is for statutory rape. The evolution of marital rape as a crime in U.S.A. is quite a long and complex one.⁸

The Declaration on the Elimination of Violence against Women published by the United Nations High Commissioner for Human Rights in December 13, 1993, established marital rape as a human rights violation. But all the UN member states have not recognized it as such. Countries like Poland (1932), Czechoslovakia (1950), and the Soviet Union (1960) are first countries take initiation to criminalize marital rape. Here, it is worth a mention about the countries like Finland which criminalized it in 1954, Italy (1976), Belgium (1989), Netherlands (1991), Cyprus (1994), Macedonia (1996), Hungary (1997), Germany (1997), Namibia (2000), Serbia (2002) and Greece (2006). Here, most of the countries have criminalized marital rape in the late 90's and the early 2000's, yet the Indian scene looms.⁹

MARITAL RAPE UNDER INDIAN LAW

Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large number of women have faced the brunt of the non-criminalization of the practice. Marital rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force or physical violence, or when she is in a position wherein, she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually¹⁰

According to the UN Population Fund, more than two-third of the married women in India, belonging to the age group of 15 and 49, evidences shows that they are severely beaten, or forced into sexual incite. In 2011, the International Men and Gender Equality Survey revealed that one in five had forced their wives or partner to have sex. The UN published a report stipulating that 69% of Indian women believe that occasional violence is resorted when a meal has not been prepared in time or on refusal of sex. Further statistical research reveals that 9 to 15% of the married women

7 *Supra n. 5*

8 Krishnadas Rajagopal, *Courts continue to differ in views on marital rape*, The Hindu. <https://www.thehindu.com/news/national/courts-continue-to-differ-in-views-on-marital-rape/article35909828.ece>

9 *Id*

10 *Supra n.6*

are subjected to brutally rape by their husbands. This is a moment of shame and a blot in the constant trial of development for a country with a high potential to be a superpower.¹¹

The Report of Justice J.S. Verma Committee on Amendments to Criminal Law refers to a study related to marital rape in 2010, the outcome of this study suggesting that 18.8% of the women are raped by their partners on one or more occasions.¹² Quoting data would be largely inadequate so as to convince one about the prevalence of marital rape in India, as there would be discrepancies. That is because of the under-reportage of cases due to the prevalent beliefs that marital rape is acceptable and is less serious. This was pointed out by the Verma Committee.¹³

I would like to bring to your attention once again in *Nimeshbhai Bharatbhai Desai v. State of Gujarat*¹⁴ the Court discussed about the types of marital rape prevalent in the society.

1. "Sexual coercion by non-physical means – this form of coercion involves social coercion in which the wife is compelled to enter into sexual intercourse by reminding her of her duties as a wife", entails applying non-physical techniques and tactics like verbal pleasure in order to get into sexual contact with a non-consenting female. Most commonly used techniques are making false promises, threatening to end the marital relationship, cruelty over children etc.,
2. Forced sex- this involves the use of physical force to enter into sexual intercourse with an unwilling woman. It can be further classified into three categories;
 - (a) Battering rape: this form of rape involves the use of aggression and force against the wife. The women are either battered during the sexual act itself or face a violent aggression after the coerced sexual intercourse. The beating may also occur before the sexual assault so as to compel her into sexual intercourse.
 - (b) Force only Rape- in this form of rape, the husband does not necessarily batter the wife, but uses as much force as is necessary to enter into sexual intercourse with the unwilling wife.
 - (c) Obsessive rape: this form of rape involves the use of force in sexual assault compiled with the perverse acts against the wife. It involves a kind of sexual sadistic pleasure enjoyed by the husband."¹⁵

But is there a concept of marital rape? This question arises when women look into the legislations to meet with their needs in terms of forced sex that would amount to

11 *Supra* n.10

12 Report on J.S.Verma Committee.

13 J.S. Verma Committee, (2013) recommended Amendments in Criminal Law so as to provide quicker trial and enhancement of punishment for accused who committing sexual assault against women.

14 (2018) SCC Guj. 732

15 *Id*

rape if not married “in India”. Well, the question is whether the Indian Penal Code recognizes marital rape as an offence. A reading of S.375 makes it clear that it does not. If a complaint is launched by a legally wedded wife of the accused, the sexual intercourse with her or any sexual acts by accused husband would not constitute an offence of rape even if it is by force, violence or against her whim and wishes. The second exception of S.375 states:

“Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.”

It has to be reminded it seems that marital rape is a heinous crime that is well-secured within the sacrosanct institution of marriage. However, S. 376-B makes it clear that sexual intercourse by husband upon wife during separation, primarily without her consent, whether under a decree of separation or otherwise, is an offence, punishable with imprisonment of not less than two years, but which may extend to seven years and shall be also liable to fine. The explanation of S.376-B clarifies that “sexual intercourse” means any of the acts mentioned in clauses (a) to (d) of S.375.¹⁶

The legislative immunity given to marital exemptions under Indian law dates back to the outdated Victorian notion that a wife is no more than a subservient chattel of her husband. This was pointed out in the Justice J.S. Verma Committee on Amendments to Criminal Law, Reports which was referred to by the Supreme Court in *Independent Thought v. Union of India*.¹⁷

“According to the common law of coverture, a wife is deemed to have consented at the time of marriage to have intercourse with her husband at his whim.”

However, the Apex Court refused to go into the question of marital rape while examining an exception to Section 375, which allows a man to force sex on his wife if she is above 15 years of age. This consent cannot be revoked as is clarified in Hale’s proposition¹⁸. In this case, the Supreme Court of India struck down the exception in so far as it relates to girl below 18 years.

This notion has since been grow up in United Kingdom. A reference made to a decision of the European Commission of Human Rights endorsed the conclusion that “a rapist remains a rapist regardless of his relationship with the victim.”¹⁹ This point carries weight as it is to be remembered that marital rapist got some exemptions and exists in India, because to protecting the husbands who are the perpetrators.

The Verma Committee Report brought to the fore the fact that marital rape immunity exercised by the husband has been withdrawn in most of the foreign jurisdictions.²⁰

16 V.N. PARANJAPE, INDIAN PENAL CODE, 4th Edn.2019, Central Law Publication.

17 AIR 2017 SC 4904.

18 *R v.R*, (1992)94 Cr App R 216.

19 *Id*

20 *Supra* n.13

As mentioned above, in England and Wales, the House of Lords had held in 1991 that in modern times marriage is a partnership of equals and no longer one in which wife is a subservient chattel of the husband.²¹

In *Eisenstadt v. Baird*,²² the US Supreme Court observed:

“Married couples are not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”

While many of the judgments safeguard the interests of women, when it comes to issues pertaining to marital rape, the legislator's do not bother to make appropriate legislative interventions to prevent such inhuman acts. One thing is clear that our judiciary still awake and take appropriate steps to prevent such acts and protect the basic human rights of women through their judgments' as told in case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*,²³ where the Gujarat high court clearly remarked that:

“a law which does not give married and unmarried women equal protection, it creates conditions that lead to marital rape. It allows the men and women to believe that forceful sex over wife is acceptable. While making wife rape is illegal or an offence it will remove the destructive attitudes of men that restrain marital rape. Such an action raises a moral boundary that informs the society that if a punishment results in restriction of an act, then the boundary is transgressed.”

Marital rape is a perversion exhibited by men to prove his manhood or to satisfy his pleasure. The divine, or rather the iron doors of marriage have succeeded in keeping within it, the woes of women struggling under the sadist-machoistic attitude of men exhibited in the form of subduing women to their sexual whims. And, marriage is certainly not a justification that can be resorted by men, to assume consent and raping his wife in the name of having sex. It has to be understood that there is a difference between consent and non-consent and this is fundamental.

Often, women are subjected to marital rape give consent, not due to the 'implied consent' aspect, but because of fear or threat. They fear that if they refuse to give consent, their marital life would be parted with; safety of the children; if unemployed, they fear that their husband would cut short finances and the support given to her. Moreover, here, we also need to accept the fact that a wife is, by physiological nature, far less strong compared to her husband; physical might gives another upper hand to the male in a legalized relationship till the time they live under one roof. Hence, the large under-reportage of marital rape occurrences.

21 *Supra n.* 19

22 (1972) US 405.

23 *Supra n.* 15, see also Pradeep Tomar and Another v. State of U.P. and Another, No. 4804 of 2020.

MARITAL RAPE V. FUNDAMENTAL RIGHTS OF WOMEN

It is a startling fact that, marital exemption violates the fundamental rights of women which they were lucky enough to enjoy until being married off. Where Constitution guarantees equality before law and equal protection of law²⁴, the real apprehension is that whether all married women rejoicing about this basic right guaranteed to them by the Constitution of India? The State which cared about women's rights, and focused on dispensing justice to her especially when she was subjected to rape, by punishing the perpetrator, seems to have waned its interest, and the will and vigor in protecting her.

'Marital exemption' blatantly takes away the protection of women's rights solely because of her marital status. Marital rape violates her bodily autonomy, integrity and privacy. This is grossly against the essence of Articles 14 and 21.²⁵ Moving to Article 21 which embodies the right to life and personal liberty²⁶, the right to life alone gives entirety to all the other rights drawn from it, which are equally important. The meaning of the term 'life' which was discussed in *Munn v. Illinois*²⁷, where Field J., observed that life means "*something more than mere animal existence*", was referred in *Olga Tellis & Ors. v. Bombay Municipal Corporation*²⁸, where the court clarify that, Right to life includes right to privacy and the right to privacy contain many other aspects and rights such as bodily self-determination and the right to good health of women are at stake as long as exception 2 of S. 375 exists²⁹. All these rights are recognized to have been derived from Art.21, so it is affirmed in many other cases. The Supreme Court had upheld in many cases that, rape is an offence that violates the right to life and the right to live with human dignity.

In *Bodhisattwa Gautam v. Subhra Chakraborty*,³⁰ where the Court pointed out that, rape is a crime not only against a woman but against society.

"It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level."

The right of bodily integrity or autonomy or self-determination, is the right that gives one the soul power or right to decide matters pertaining to one's body, i.e., the most intimate matters. Bodily integrity includes women's intrinsic right to have control

24 Art. 14, V.N SHUKLA'S, CONSTITUTION OF INDIA, 2020, Eastern book company.

25 V.N SHUKLA'S, CONSTITUTION OF INDIA, 2020, Eastern book company

26 *Id*

27 1877 94 US 113, see also *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295.

28 (1985)3 SCC 545.

29 Sec. 375 (2) of Indian penal code, sexual intercourse by a man with his wife is not rape, unless she is below fifteen years of age.

30 AIR 1996 SC 922.

and autonomy over her bodies. Among them many facets of this right is the right to a life which guarantees free from fear of violence and living in safe environments. This includes women's right not to be subjected to physical, sexual or emotional violence inside the home by intimate partners or outside by people including those acting on the part of the state.³¹ So, giving consent to sex is such matter that is intimate to her and is her personal choice.

The right to bodily integrity was initially recognized in the context of privacy in *State of Maharashtra v. Madhukar Narayan Mardikar*,³² where it was observed that no one has any right to violate the person of anyone else, which including that of an 'unchaste' woman. It was held that every woman is entitled to sexual privacy and it is not open for any person to violate her privacy as and when he wished or pleased.

In *Kharak Singh v. The State of U.P. & Others*,³³ stated about the essentiality of the right to privacy to every individual. It was held:

"It is true that our Constitution does not expressly declare a right to privacy as a fundamental right, but the above said right is an essential ingredient of personal liberty. In every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security"

In *Suchita Srivastava v. Chandigarh Administration*,³⁴ the Apex Court upheld the right to make a reproductive choice which was equated with personal liberty privacy, bodily privacy and dignity which guaranteed under Article 21 of the Constitution. It includes the right to abstain from procreating. It was stated:

"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. That means there should be no restriction 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."

Marital exemption takes away the right to bodily self-determination in respect of the privilege everyone has the right to decide about bodily matters.

The important aspect of the health of the victim was discussed in *State of Punjab v. Gurmit Singh*,³⁵ wherein it was observed that:

"a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. A murderer

31 Kanchan Mathur, *Body as Space, Body as Site: Bodily Integrity and Women's Empowerment in India*, Economic and Political Weekly, vol. 43, 54 (2008).

32 AIR 1991 SC 207.

33 AIR 1963 SC 1295.

34 (2009) 14 SCR 989.

35 AIR 1996 SC 1393.

destroys the physical body of his victim; a rapist degrades the very soul of the helpless female."

In *Pradeep Tomar and Another v. State of U.P.*,³⁶ the Court held:

"Marital rape could degrade and humiliate her and can destroy her entire psyche pushing her into a deep emotional crisis, stunt and destroy her whole personality and degrade her very soul"

This proves that the extent of damage caused to a victim of rape is very large. Hence, it violates the right to good health. Since, marital rape exemption violates Arts.14 and 21, it is right to say, that it is in absolute contravention to the human rights regulations.

Insights

It is essential to cite here that in the Report of the Verma Committee, it was recommended that the exception to S.375 be removed. According to the Report, the law ought to specify as follows:

*"a marital or other relationship between the perpetrator or victim is not a valid defense against the crimes of rape or sexual violation. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape."*³⁷

Though India has not had such a modern philosophy through an amendment to abolish exception 2 of S.375 of IPC, through the recent judgment Kerala High Court declared that marital rape a good ground for divorce, is certainly a ray of sunshine into the Indian Penal Code. It had stated that a spouse in a marriage had choices, a choice not to suffer, a choice not to compromise her individuality, freedom, whims and wishes after marriage, which was fundamental to the autonomy guaranteed under natural law and the Constitution of India.³⁸ The Bench also observed that any disrespect of bodily integrity was a violation of individual autonomy and that in matrimony; the spouse possesses privacy as an invaluable right inherent in him or her as an individual.³⁹

Though the Report of the Law Commission on Review of Rape Laws recommended rising the age of the 'wife' from 15 to 16 years, it did not recommend the deletion of

36 No. 4804 of 2020.

37 Krishnadas Rajagopal, *Courts continue to differ in views on marital rape*, <https://www.thehindu.com/news/national/courts-continue-to-differ-in-views-on-marital-rape/article35909828.ece>

38 Hannah M. Varghese, *Secular Law for Marriage and Divorce is the Need of the Hour: Kerala High Court*, Livelaw.

39 Ashok Kini, *Unconstitutionality of Marital Rape Exception in Indian Penal Code*, Livelaw.

the exception to Section 375.⁴⁰ However, it did mention that under the Indian Evidence Act, 1872, when it is alleged that a victim consented to a sexual act and then it is denied, the court shall presume it to be denied. This is provided in Sec.114-A⁴¹ of the Act. On analyzing the Indian scenario, it is largely patriarchal since yesteryears, though at times shades of feminist culture have begun to sprout up here and there in the fabric of Indianans. So, changes had occurred in the Indian legal system by virtue of the brave needs of women but, not to the right mark.

In this Platinum Jubilee year of free India, where the right to privacy, health, dignity, safe living conditions and environment are recognized as the law of the land by virtue of the modern social engineering mindset of the Indian Judiciary, clearly two classes of women are created depending on their marital status, and their societal position as a wife is exploited as a matter of right by the husband.

When those marital exemptions are violative of constitutional principles, in order to declare them as unconstitutional, it should pass the test of 'just, fair and reasonable' law, i.e., the reasonability test, as that is the criteria that decides if a law is *ultravires* the Constitution if it is tested to be violative of Arts.14 and 21 Indian constitution.

The matter is to be set to rest once and for all with a deterrent punishment at par with unconsented rapes, and also declaring marital rape to be a punishable crime once the victim dares to voice her protest. Until the legislature becomes proactive, contradictory decisions would continue to be given as has happened now with the latest decision from the High Court of Chattisgarh which declared that sexual intercourse or any sexual act by husband with legally wedded wife does not attract the offence of rape, even if such act was by force or against her wish.

CONCLUSION

Marital rape exemption is the manifestation of the archaic sentiments of the Victorian era and it is high time this provision is discarded in this century of millennial. Marital rape is not a privilege of husbands; rather it is a perversion and a ghastly offence. The 'marital exemptions' in the Indian Penal Code has to be done away with and then, awareness has to be given in the society that marital rape is a heinous crime, an offence that is punishable just like rape between unmarried people. It should instill in the minds of the people an image of how violent an act it is and also about the consequences of committing the same.

Moreover, the significance of consent should be understood. There is a difference between consent and non-consent, and men have to respect the decisions of women, their wives. They should be aware of the trauma women go through and the feeling of insecurity and fear they survive with, when the perpetrator is their spouse. In addition to this, women should be made conscious about the rights they have been vested with by the Constitution of India. It is crucial they know the modes of obtaining redressal measures also.

40 172nd Law Commission Report.

41 Sec.114-A of Indian Evidence Act, 1872.

Having said this, the primary step that is to be taken is the immediate statutory abolition of exceptions under sub. Sec. 2 of Sec.375. By abolishing it, the well-being and rights of married women would be protected and safeguarded. It would be a step in educating societies that inhuman treatment of women would no longer be tolerated, and perpetrators of such acts would be criminals in the eye of law.

Till date, the approach of the Government of India towards the legal immunity given to 'marital rape' has been oxymoronic. The Government is reluctant to do away with marital exemptions stating that it would destabilize the institution of marriage and can be misused to harass husbands. However, a balance has to be found between the idealistic societal notions and individual rights.

Right to Mental Health Care of Prisoners in India

Dr. Shikha Mishra & Dr. Uday Veer Singh**

ABSTRACT

Human rights are endowed to every human being. All human being deserve common basic human rights. If someone is suffering from any disability or he is a mentally disabled person then in such a situation taking into considerations his requirements he should be enriched with such additional rights and privilege which would depend upon his status. Natural rights as right to life and liberty are given to everyone without any discrimination. If a person is mentally disturbed then law grants him special protection. Physically handicapped and mentally challenged persons or persons with disabilities (Equal Opportunities, Protection Rights and Full Participation) Act, 1955 have to be treated at par with all human beings. A person of unsound mind should be treated as patient of law and society. The positive obligations require states to make regulations, compelling hospitals, whether private or public to adopt appropriate measures for the protection of patients' lives. The Constitution of India guarantees the protection of fundamental rights to every citizen or to any person when the protection is extended up to human being.

INTRODUCTION

When the society develops or grows with the passage of time, law has to match its rhythm with the requirements of the society so that law would not be obsolete and can easily sort out the miseries and pains of the public. If we look towards laws and rights of the prisoners there is a well-planned chain. The every linkage of that chain narrates with the separate issues related to the prisoners which try to protect the prisoner from unnecessary torture and bondage. The rights to the prisoners are not provided to protect them from the isolation, sufferings of imprisonment but to protect from inhumane sufferings which are not necessarily part of imprisonment. The observation of the rights shows that wherever the laws are not available to cover up any problem those loopholes are covered through judicial decisions and are applied in forthcoming similar situations as precedent. In British regime various Law Committees were established to observe and analyze the prison situations and The Prisons

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Act, 1894, Reformatory School Act, 1897, Prisoners Act, 1900, Identification of Prisoners' Act, 1920 etc. were framed as well as thereafter the protection available to prisoners and their rights are expanded after independence and the process is still continue. In exploring the prisoner's rights, the role of the judiciary is also commendable.

CLASSIFICATION OF PRISONERS

The prisoners can be classified into civil prisoners and criminal prisoners, then criminal prisoners can be sub-categorized into convicted prisoners and under trial prisoners, the categorization among prisoners can be made also on the ground of gender or sex as female prisoners, male prisoners, these prisoners may be adult or juveniles. The prisoner is civil prisoner when he has not obeyed the order of the court under civil proceedings, meant by because of his disobedient attitude. All the detainees/prisoners cannot claim the similar protection of rights, though basic rights are common for all but some additional protections can be claimed according to the specific circumstances of the prisoner in question. For example, a right which is possessed by a prisoner having convicted for a crime cannot be claimed by the preventive detainee. The detention may be punitive or preventive in nature.

The detention is punitive in nature when he is convicted for a crime which he has committed and from which he has been charged as well as prosecuted, and afterwards convicted by the judicial authority through following judicial process while the detention is preventive when the person detained have not committed a crime till the date of his arrest but he is arrested in precautionary measures upon strong probability that he may cause endanger to the society. The object of preventive detention is to prevent him from doing something which comes within entries 9 of List I and 3 of List III. The rights of prisoners can be examined under various heads. In the case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice expects that an action should be taken to prevent objectionable activities. A criminal proceeding and preventive detention are not parallel to each other.¹ The object of criminal proceeding is to punish a person for an offence committed by him, while preventive detention is an anticipatory measure and may not relate to an offence.

INTERNATIONAL APPROACH

In 1948, the United Nations through its Declaration Universal Declaration of Human Rights, 1948 affirmed the basic principle that a mentally ill person should at all times be treated with humanity and respect for the inherent dignity of the person. Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966 also provides "that the state parties to the present Covenant recognize the rights of everyone to the enjoyment of highest attainable standards of physical and mental health. The Declaration of the Rights of the disable, which includes person with mental illness was adopted by the United Nations in 1975.

1 Hardhan Saha vs. State of West Bengal, AIR 1974 SC 2154.

The “Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care” adopted by the United Nations General Assembly Resolution 46/119 of 17th December 1991 says that every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights,² the International Covenant on Civil and Political Rights, and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.³ As far as women mentally ill patients are concerned, Article 12 of the Convention on the Elimination of all forms of Discrimination against Women, 1979 provides that state parties shall take all appropriate measures to eliminate discrimination against women in the field of health. The Convention on Rights of Persons with Disabilities and its Optional Protocol was adopted on the 13th December, 2006 at United Nations Headquarters in New York and came into force on the 3rd May, 2008.

NATIONAL LEGAL SYSTEM REGARDING MENTAL HEALTH CARE:

Right to Mental Health Care and the Constitution of India

As Citizens of India, prisoners are also entitled according to their status those human and fundamental rights which are guaranteed to each and every citizen by the Constitution of India. Their criminal history does not prevent them from enjoying those rights or their enjoyment, which are expressly or impliedly guaranteed by the Constitution or by any other statutory law. The fundamental right to life and liberty as interpreted by the Supreme Court of India in number of landmark cases includes the right to live with human dignity and the right to health. Constitution is the supreme law of the land. The subject of health falls under the concurrent list in the Indian Constitution empowering both the centre and states to introduce measures including the authority to legislate. Part III of the Constitution ensures to citizens as well as to some extent individuals also with the protection of fundamental rights. If any of the fundamental right is infringed then the victim can approach directly to the Supreme Court through the Article 32 of the Constitution of India and in High Court under Article 226 of The Constitution.

Part III of the Constitution covers beneath its umbrella the protection to the rights of prisoners to sort out the problems of illegal detention, custodial torture, congestion, inhumane treatment and other untold stories of jail inmates. Article 14, 20, 21 & 22 are the aspects under which the protection to prisoners are provided. The Supreme Court has also laid down that the maintenance and improvement of public health is

2 <https://frontline.thehindu.com/other/article30225887.ece> accessed on 17/08/2022 at 2:35pm Moradabad, UP, India

3 https://www.equalrightstrust.org/sites/default/files/ertdocs//UN_Resolution_on_protection_of_persons_with_mental_illness.pdf accessed on 17/8/2022 at 2:40 pm Moradabad, UP, India

one of the obligations upon the government that flows from Article 21 of the Constitution. Article 21 of the Constitution is held the *Magna Carta* of the human rights under Indian Constitution. Its expanded aspect has affected fruitfully the criminal administration and prisoners' rights jurisprudence. The new horizons of prisoner's rights are established through the interpretation given by judiciary in various cases before court. The right to life in Article 21 of the Constitution means something more than survival of animal existence. It would include within its ambit the right to live with human dignity, right to health, right to potable water, right to pollution free environment and right to education etc., which have been held to be part of right to live with dignity.

The Hon'ble Supreme Court held that imprisonment does not spellfarewell to fundamental rights. The Supreme Court held that conditions of detention cannot be extended to deprivation of fundamental rights.⁴ Prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. The Hon'ble Supreme Court has adopted annotation of Article 21 and expanded connotation of "life" given by Field J. that "life means more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye or the destruction, of any other organ of the body through which the soul communicates with the other world."⁵

INDIAN PENAL CODE, 1860

Section 84 of the IPC immunises the criminal liability and manifests as a defence the legal insanity against the criminal prosecution.⁶ Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."⁷ Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' in IPC. A court is concerned with legal insanity.⁸ This defence is restricted in its application and is made relatable to the moment when the crime is committed.

CODE OF CRIMINAL PROCEDURE, 1973

The Criminal Procedure prescribes a separate procedure for mentally ill persons. According to section 328 when a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by

4 State of Maharashtra vs. Prabhakar Pandurang Sanzgir, AIR 1966 SC 424.

5 Kharak Singh vs. State of UP: AIR 1963 SC 1295.

6 Surendra Mishra vs. State of Jharkhand, (2011) 3 SCC (Cri.) 232

7 Section 84 of IPC, 1860

8 Hari Singh Gond vs. State of Madhya Pradesh, (2008) 16 SCC 109, AIR 2009 SC 31

the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness and shall reduce the examination to writing. If the civil surgeon finds the accused to be of unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation.⁹

If Magistrate during trial finds that the accused is of unsound mind or incapable of making defence then he will inquire into the fact and after satisfying with evidence postpone further proceedings and shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind.¹⁰ Whenever a person is found under section 328 or section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be shall, whether the case is one in which bail may be taken or not, order release of such person on bail¹¹ if the Magistrate or Court, as the case may be, is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training.¹² When the accused will cease his unsoundness of mind the court shall resume his enquiry or trial and will be required to appear before the court.¹³

Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.¹⁴

MENTAL HEALTH CARE ACT, 2017

The subject of health falls under the concurrent list in the Indian Constitution, thus empowering both the centre and states to introduce measures including the authority to legislate. The Mental Health Act, 1987 is repealed by the Mental Health Care Act, 2017. The Act is to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto. The Convention on Rights of Persons with Disabilities and its

9 Section 328 1(A) of Criminal Procedure Code, 1973

10 Section 329 of Criminal Procedure Code, 1973

11 Section 330 of *ibid*

12 Section 330 (3) proviso of Criminal Procedure Code, 1973 (in short Cr.P.C.)

13 Section 331 of Cr.P.C.

14 Section 334 of Criminal Procedure Code, 1973

Optional Protocol was adopted on the 13th December, 2006 at United Nations Headquarters in New York and came into force on the 3rd May, 2008; and India has signed and ratified the said Convention on the 1st day of October, 2007; it is necessary to align and harmonise the existing laws with the said Convention.¹⁵

Mental illness shall be determined in accordance with such nationally or internationally accepted medical standards as may be notified by the Central Government. The Act does not differentiate between the persons as persons regarding their mental illness except their treatment regarding their illness. A medical practitioner or a mental health professional shall not be held liable for any unforeseen consequences on following a valid advance directive.¹⁶ The Central Government may, in any part of India, or the State Government may, within the limits of its jurisdiction, establish or maintain mental health establishments for the admission, treatment and care of mentally ill persons at such places as it thinks fit. It shall be the duty of every medical officer in charge of a mental health establishment and the psychiatrist in charge of a person's treatment to propose or give treatment to a person with mental illness, in accordance with his valid advance directive, subject to section 11.¹⁷

The Act ensures that every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government. The right to access mental healthcare and treatment shall mean mental health services of affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.¹⁸ The Act ensures that long term care in a mental health establishment for treatment of mental illness shall be used only in exceptional circumstances, for as short a duration as possible, and only as a last resort when appropriate community based treatment has been tried and shown to have failed; ensure that no person with mental illness (including children and older persons) shall be required to travel long distances to access mental health services and such services shall be available close to a place where a person with mental illness resides; and that as a minimum, mental health services run or funded by Government shall be available in each district. The appropriate Government shall have a duty to plan, design and implement programmes for the promotion of mental health and prevention of mental illness in the country.¹⁹

Any mentally ill prisoner according to the provision of section 30, Prisoners' Act, 1900 and sections 330 and 335 Code of Criminal Procedure shall be transferred into any psychiatric hospital or psychiatric nursing home. The Mental Health Care Act,

15 Preamble to Mental Health Care Act, 2017

16 Section 13, Mental Health Care Act, 2017

17 Section 10, Mental Health Care Act, 2017

18 Section 18, Mental Health Care Act, 2017

19 Section 29, Mental Health Care Act, 2017

2017 secures various human rights of mentally ill persons. The Act ensures that every person having mental illness and is subjected to treatment will have the right to live with dignity, he will not be separated from the society.²⁰ The Act secures that no mentally ill persons shall be subjected during treatment to any indignity whether physical or mental or cruelty. The Act requires persons having mental illness (a) to live in safe and hygienic environment; (b) to have adequate sanitary conditions; (c) to have reasonable facilities for leisure, recreation, education and religious practices; (d) to privacy; (e) for proper clothing so as to protect such person from exposure of his body to maintain his dignity; (f) not to be forced to undertake work in a mental health establishment and to receive appropriate remuneration for work when undertaken; (g) to have adequate provision for preparing for living in the community; (h) to have adequate provision for wholesome food, sanitation, space and access to articles of personal hygiene, in particular, women's personal hygiene be adequately addressed by providing access to items that may be required during menstruation; (i) not to be subject to compulsory tonsuring (shaving of head hair); (j) to wear own personal clothes if so wished and not to be forced to wear uniforms provided by the establishment; and right to community living, right to protection from cruel, inhuman and degrading treatment, (k) to be protected from all forms of physical, verbal, emotional and sexual abuse.²¹ The persons of mental illness shall have the right to equality and will be treated equally as physically ill persons.

A child under the age of three years of a woman, who is receiving care, treatment or rehabilitation at a mental health establishment shall ordinarily not be separated from her during her stay in such establishment. If psychiatrist is of the opinion that there is risk of harm to the child from the woman due to her mental illness or it is in the interest and safety of the child, the child shall be temporarily separated from the woman during her stay at the mental health establishment. The decision to separate the woman from her child shall be reviewed every fifteen days during the woman's stay in the mental health establishment and separation shall be terminated as soon as conditions which required the separation no longer exist.²² The person with mental illness have the right to receive certain information also such as his admission, criteria of admission and about treatment.²³ He will also have the access to his medical records.²⁴

A person who is mentally ill can refuse to meet the visitor and also can refuse to receive or make telephone calls.²⁵ When a mentally ill patient is detained as an inpatient and does not have adequate means to bear the cost of treatment, in such cases his expenses shall be borne by the Government of the State.²⁶ The person shall

20 Section 19, Mental Health Care Act, 2017

21 Section 20, Mental Health Care Act, 2017

22 Section 21, Mental Health Care Act, 2017

23 Section 22, Mental Health Care Act, 2017

24 Section 25, Mental Health Care Act, 2017

25 Section 26, Mental Health Care Act, 2017

26 Section 27, Mental Health Act, 1987

be entitled to receive legal service at State's cost to exercise his rights.²⁷ It shall be the duty of magistrate, police officer, person in charge of such custodial institution as may be prescribed or medical officer or mental health professional in charge of a mental health establishment to inform the person with mental illness that he is entitled to free legal services under the Legal Services Authorities Act, 1987 or other relevant laws or under any order of the court if so ordered and provide the contact details of the availability of services.²⁸

THE PRISONS ACT, 1894

The Prisons Act, 1894 and corresponding Jail Rules states that a prisoner while admitting into jail will be examined under the order of the medical officer and the record of his health with all details of his medical examination will be kept by the jailor in his record. When any person who is imprisoned has been of unsound mind then the state government can order his removal to lunatic asylum for the purpose of safe custody. When he will become fit he will be sent to prison. The provisions of *section 9 of the Lunatic Asylums Act, 1959*, shall apply to every person confined in a lunatic asylum after the expiration of the term for which he was ordered or sentenced to be detained or imprisoned; and the time during which a prisoner is confined in a lunatic asylum under that sub-section shall be reckoned as part of the term of detention or imprisonment which he may have been ordered or sentenced by the Court to undergo.

No criminal prisoners sentenced to labour or employed on labour at his own desire, except on an emergency with the sanction in writing of the Superintendent, be kept to labour for more than nine hours on any one day.²⁹ The Hon'ble Supreme Court held that it is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do or not. The Medical Officer shall from time to time examine the labouring prisoners while they are employed. When the Medical Officer is of opinion that the health of any prisoner suffers from employment on any kind or class of labour, such prisoner shall not be employed on that labour but shall be placed on such other kind or class of labour as the Medical Officer may consider suited for him. Thus right to health and getting the medical care are secured under the Act. Provisions shall be made by the Superintendent for the employment (as long as they so desire) of all criminal prisoners sentenced to simple imprisonment; but no prisoner not sentenced to rigorous imprisonment shall be punished for neglect of work excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such a prisoner.³⁰ When any prisoner is sick or feeling bad in health by body or mental and he wants to meet the medical officer then the jailor will call the medical subordinate without any delay.³¹

²⁷ Section 27, Mental Health Care Act, 2017

²⁸ Section 27(2), Mental Health Care Act, 2017

²⁹ Section 35 of Prisons Act, 1894

³⁰ Section 36 of Prisons Act, 1894

³¹ Section 37 of Prisons Act, 1894

National Human Rights Commission of India (NHRC) constituted under Protection of Human Right Act, 1993 is mandated under section 12 of the protection of Human Rights Act 1993 to visit government running mental hospitals to study the living conditions of inmates and make recommendation thereon. In *Chiranjit Singh and National Human Rights Commission vs. State and others*.³² The prisoner, Chiranjeet, was an accused of murdering Ashok Malhotra, was a 55-years-old man, suffering from Schizophrenia. He was put in Judicial Custody, however, no steps towards the case took place as he was not of sound mind. After a period of fifteen years, the court finally decided of granting him a bail. However, since he did not appear for the bail hearing on the affixed date, the court mercilessly cancelled his bail. Again, for four and a half months, he weakened in the Jail. He could not come out of the jail as neither he was in position to furnish a personal bond nor he had someone who can furnish a security on his behalf. His case caught the attention of the National Human Rights Commission.

A writ of mandamus, against the Tihar Jail authorities, to transfer him to a suitable mental asylum and make necessary arrangements regarding his treatment were made. He was shifted to the Institute of Human Behaviour and Allied Science in Delhi. It was analyzed, that the primary reason for the problems that triggered his deteriorating mental conditions was the poor environment and the sight of the jail. His criminal charges were quashed. However, the damages made to his mental conditions were permanent. He was close to his death. NHRC was requested to find a suitable place for him. NGOs agreed to keep and to take care of him. Different guidelines were issued to government and NHRC for taking care of such prisoners who are of unsound mind and languished to jail.

JUDICIAL RESPONSE TOWARDS PRISONERS IN CASES OF MENTAL ILLNESS

Judiciary holds the fatherly figure in the democratic country. An active and responsible judiciary can protect the rights of citizens, if the judiciary is independent in its' working and in performance of responsibilities. The court has given very remarkable directions in the interest of mentally ill persons. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.³³ In the case of *Muniappan vs. State of Tamil Nadu*³⁴, the Supreme Court noted that the trial court had sentenced the accused to death stating that when the accused was asked to speak on the question of sentence, he did not say anything. In such a case the Supreme Court noted that the requirement of Section 235(2) was not discharged by merely putting a formal question to the accused, and the court should undertake genuine efforts. The Court observed therein that, "it is the bounden duty of the judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological

32 Criminal Writ Petition : 729 of 2002

33 *Suchita Srivastava v. Chandigarh Administration* AIR 2010 SC 235

34 (1981) 3 SCC 11

point of view".³⁵ From time to time, the Court had issued directions and made specific orders regarding provision of better food, clothing, medical treatment, housing and improvement of sanitation, etc.³⁶

In the case of Ramesh Chandra Narayan³⁷ the Supreme Court appointed a judicial official on receiving a letter considered as PIL under Article 32 to make a report about conditions of mentally ill persons and treatment with them in a mental hospital, Ranchi runned by health department of Bihar government. In a welfare State it is the obligation of the State to provide medical attention to every citizen. The State has to realise its obligation and the Government of the day has got to perform its duties. In *VeenaSethi vs State of Bihar*,³⁸ the Legal Aid Committee, Jamshedpur, through its lawyer VeenaSethi, directed that all charges be dropped against 16 prisoners kept in the Hazaribagh jail for over 25 years because they were of "unsound mind". The court did not release at once their release orders because nobody was there to look after them and mental hospital had no place to admit them.

The Supreme Court said that there must be an adequate number of institutions for looking after mentally sick prisoners and that the practice of sending persons of unsound mind to jail for safe custody was not a healthy or desirable one because jail was not an appropriate place for treating those who were mentally ill. The court directed the jail superintendent to have such mentally ill undertrials examined by psychiatrists every six months and submit a report to the District Judge. It said that if, as a result of such examination, it is found at any stage that the prisoner concerned had become sane, the District Judge should immediately order his or her release from the jail. The State government would provide the necessary funds for meeting the expenses of the journey to his or her native place and his or her maintenance for a period of one week, the court said. The state has to provide legal aid in such cases.

CONCLUSION & SUGGESTION

A person who is incapable to lead a normal life that person should be given additional protection. Rule of law does not fight only for them who have means to fight for themselves but it also exists for the poor, ignorant, down-trodden, and illiterate who need a large bulk of humanity in their favour. If the mental health of the prisoner is not in fit state and he is not in position to defend himself properly. Right to make representation, right to have an opportunity, right to defense, proper medical care, all these opportunities should be taken care by the system itself, if there is no one to take care of him. If the accused is not able to present himself, he has no idea of circumstances around him then at first he should be sent under medical treatment afterwards the trial and procedure should be commenced. Prisoners logged into jails should be treated by psychiatrist at a definite proper interval. It will helpful in

35 Muniappan vs. State of Tamil Nadu, *ibid*

36 Rakesh Chandra Narayan vs State of Bihar: 1989 Supp (1) SCC 644, AIR 1989 SC 348

37 Supra noted at 28.

38 AIR 1983 SC 339

adjudging the mental status of all prisoners. These type of initiatives will also curtail the suicide rate in prisons.

Prisoners suffer majorly from substance abuse and depression. Prisoners get affected by these issues after entering the prisons too. Their mental health is affected due to various factors present in the prisons and system. Moreover, to deal with such situations, the number of psychologists and psychiatrists are also low. The access of medical facilities should be more effective and faster. It is the need of the hour to have a strong mental health infrastructure in our prison system. There is a need to adopt a reformative approach in order to turn the prisoners into law abiding citizens because punishment, of any manner, should not be a tool to disable criminals and deprive them of their right to live with dignity.

Issues and Challenges in Achieving Zero Hunger in India: Vis-a-vis Judicial Intervention

*Dr. Sunaina**

INTRODUCTION

Zero hunger is the second out of the seventeen United Nations Sustainable Development Goals. These goals are the global challenges that nations face including poverty, inequality, climate change, environmental degradation, peace and justice etc.¹ The problem of hunger is serious in India. The data released by the Global Hunger Index 2022 is not only an indicator but also a clear warning to take appropriate timely steps to mitigate hunger. Food is the basic requirement for any human being for survival. The prevalence of undernourishment, as a share of the population, is the main hunger indicator used by the United Nation's Food and Agriculture Organization.² It measures the share of the population which has a caloric (dietary energy) intake which is insufficient to meet the minimum energy requirements defined as necessary for a given population.³ Current estimates show that nearly 690 million people are hungry, or 8.9 per cent of the world population - up by 10 million people in one year and by nearly 60 million in five years.⁴ According to the World Food Programme, 135 million suffer from acute hunger largely due to man-made conflicts, climate change and economic downturns⁵. The COVID-19 pandemic has doubled that number.⁶ With more than a quarter of a billion people potentially at the brink of starvation, swift action needs to be taken to provide food and humanitarian relief to the most at-risk regions.⁷ At the same time, a profound change of the global food and agriculture system is needed if the more than 690 million people who are hungry

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1 <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

2 <https://ourworldindata.org/hunger-and-undernourishment>

3 Ibid

4 <https://www.un.org/sustainabledevelopment/hunger/>

5 Ibid

6 Ibid

7 Ibid

today are to be nourished- and the additional two billion people the world will have by 2050.⁸ Increasing agricultural productivity and sustainable food production are crucial to help alleviate the perils of hunger.⁹ Despite phenomenal industrial and economic growth and while India produces sufficient food to feed its population, it is unable to provide access to food to a large number of people, especially women and children.¹⁰

GLOBAL HUNGER INDEX

The Global Hunger Index aims to track hunger at the international and local and regional levels. It is an annual report published by Concern Worldwide of Ireland and Welthungerhilfe (a German non-profit organization). The world is not on track to achieve Zero Hunger by 2030.¹¹

GLOBAL HUNGER INDEX SCORING

GHI ranks countries on a 100 point scale, 0 representing zero/no hunger. The GHI scores are based on four indicators. The component indicators reflect deficiencies in calories as well as in micronutrients. Thus, the GHI reflects both under nutrition and malnutrition aspects of hunger.¹²

1. Undernourishment: The share of the population whose caloric intake is insufficient.
2. Child stunting: The share of children under the age of five who have low height for their age.
3. Child wasting: The share of children under the age of five who have low weight for their height.
4. Child mortality: The mortality rate of children under the age of five (a reflection of the fatal mix of inadequate nutrition and unhealthy environments).

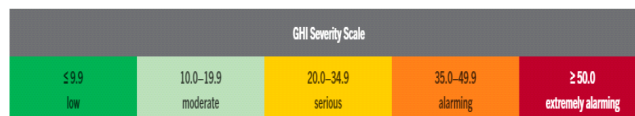


Image source: <https://www.globalhungerindex.org/>

GLOBAL HUNGER INDEX 2022

In the 2022 Global Hunger Index, India ranks 107th out of the 121 countries with sufficient data to calculate 2022 GHI scores.¹³ With a score of 29.1, India has a level of hunger

8 Ibid

9 Ibid

10 Ibid

11 Ibid

12 Ibid

13 <https://www.globalhungerindex.org/india.html>

that is serious.¹⁴ India's child wasting rate, at 19.3 per cent, is the highest of any country in the world and drives up the region's average owing to India's large population.¹⁵ India has child stunting rate between 35 and 38 percent¹⁶ Researchers investigated the factors that contributed to a decline in stunting in four Indian states between 2006 and 2016: Chhattisgarh, Gujarat, Odisha, and Tamil Nadu.¹⁷ It was found that stunting fell mainly in response to improvements in the coverage of health and nutrition interventions, household conditions such as socio-economic status and food security, and maternal factors such as mothers' health and education. While improvements in household conditions were the most important factor for each of the four states, the second most important factor varies by State.¹⁸ This variability across states indicates the need for contextualized policy and programmatic initiatives to help focus the efforts in the sectors that need the most attention for continued decline in stunting.¹⁹

Global Hunger Index Scores By 2022 GHI Rank					
Rank	Country	2000	2007	2014	2022
107	India	38.8	36.3	28.2	29.1

Image source: <https://www.globalhungerindex.org/>

GOVERNMENT OF INDIA'S RESPONSE TO INDIA'S GHI 2022 RANKING

The Indian government has sharply criticised the Global Hunger Index 2022 and has claimed that the annual report was "biased and disconnected from ground reality".²⁰ India ranks behind neighbours Sri Lanka(64), Nepal(81), Bangladesh(84) and Pakistan(99). Afghanistan is the only Asian country behind India, with a rank of 109. Union government stated that data collected by GHI from a "minuscule sample for a country of India's size" through a telephonic opinion poll by Gallup, a US survey firm, and using the FIES to compute the proportion of undernourished is not only "wrong and unethical", but it also "reeks of obvious bias".²¹ It also alleges that prevalence of undernourishment (PoU) is calculated on the basis of an opinion poll with a very small sample size of 3,000.²² On the contrary, Congress leader P Chidambaram said, "When will the honourable PM address real issues like malnutrition, hunger, and stunting and wasting among children? 22.4 crore people in India are

14 Ibid

15 Ibid

16 Ibid

17 <https://www.globalhungerindex.org/pdf/en/2022.pdf>

18 Ibid

19 Ibid

20 <https://www.hindustantimes.com/india-news/biased-erroneous-centre-rejects-hunger-index-report-101665857781912.html>

21 Ibid

22 <https://frontline.thehindu.com/the-nation/public-health/india-slips-in-global-hunger-index-ranking-narendra-modi-government-cries-foul/article66056086.ece>

considered undernourished.”²³ According to the Union government, stunting, wasting and under-five mortality are related to the health of children rather than that of the entire population. In a statement, the ministry of Women and Child Development said, “A consistent effort is yet again visible to taint India’s image as a nation that does not fulfil the food security and nutritional requirements of its population. Misinformation seems to be the hallmark of the annually released index.”²⁴

GLOBAL HUNGER INDEX 2021

India ranked 101st out of 116 countries in the GHI 2021 rankings. With a score of 27.5, India has a level of hunger that is ‘serious’.²⁵ India has slipped seven positions from its 2020 rank of 94. India ranked behind most of its neighbouring countries. Pakistan (92), Sri Lanka (65), Nepal (76). There were only 15 countries that ranked below India in the 2021 index. As per the data, India had the highest rate of child wasting among all the countries in the index. However, India showed improvement in other indicators such as the under-five mortality rate, prevalence of stunting among children and prevalence of undernourishment owing to inadequate food.²⁶

GOVERNMENT OF INDIA’S RESPONSE TO INDIA’S GHI 2021 RANKING

The Union Ministry of Women and Child Development issued a criticism of the ranking stating that the agencies did not do their due diligence before releasing the report.²⁷ The government argued that the estimates by the Food and Agriculture Organization regarding the proportion of the undernourished population were devoid of ground reality and facts. It also called the methodology used by FAO unscientific and alleged there was no methodology to measure undernourishment.²⁸

GLOBAL HUNGER INDEX 2020

According to Food and Agricultural Organisation estimates in The State of Food Security and Nutrition in the World, 2020 report, 189.2 million people are undernourished in India.²⁹ By this measure 14 per cent of the population is undernourished in India. Also, 51.4% of women in reproductive age between 15 to 49 years are anaemic.³⁰ Further according to the report 34.7per cent of the children aged under-five in India are stunted (too short for their age), while 20per cent suffer

23 <https://www.deccanherald.com/national/global-hunger-index-indias-ranking-slips-to-107-of-121-countries-1153784.html>

24 <https://indianexpress.com/article/india/global-hunger-index-erroneous-suffers-serious-methodological-issues-centre-8210880/>

25 <https://www.globalhungerindex.org/pdf/en/2022.pdf>

26 Ibid

27 <https://www.thehindu.com/news/national/global-hunger-index-india-slams-methodology-after-countrys-position-tanks/article37007672.ece>

28 <https://www.fao.org/hunger/en/>

29 <https://www.globalhungerindex.org/>

30 Ibid

from wasting, meaning their weight is too low for their height.³¹ Malnourished children have a higher risk of death from common childhood illnesses such as diarrhoea, pneumonia, and malaria.³²

Since 2000, India has made substantial progress, but there are still areas of concern, particularly regarding child nutrition. GHI score of 38.8 points-considered *alarming*-to a 2022 GHI score of 29.1-considered *serious*. India's proportion of undernourished in the population is considered to be at a medium level, and its under-five child mortality rate is considered low. While child stunting has seen a significant decrease-from 54.2 per cent in 1998-1999 to 35.5 per cent in 2019-2021, it is still considered very high. At 19.3 per cent, India has the highest child wasting rate of all countries covered in the GHI. This rate is higher than it was in 1998-1999, when it was 17.1 per cent. The 2022 Global Hunger Index assesses the hunger situation on a global and regional level as well as the situation in 136 countries, of which 121 had sufficient data to calculate 2022 GHI scores.³³

KEY FACTS ABOUT HUNGER IN INDIA

- India is home to the largest undernourished population in the world³⁴
- 189.2 million people i.e. 14 per cent of the population is undernourished³⁵
- 20 per cent of children under-five are underweight³⁶
- 34.7 per cent of children under-five years of age are stunted³⁷
- 51.4 per cent women in the reproductive age (15-49 years) are anaemic³⁸
- India houses 195.9 million of the 821 million undernourished people in the world, accounting for approximately 24 per cent of the world's hungry.³⁹
- Prevalence of undernourishment in India is 14.8 per cent, higher than both the global and Asian average.⁴⁰
- 23 million people left the agriculture sector between 2000 and 2019 in India.⁴¹

31 Ibid

32 Ibid

33 <https://www.globalhungerindex.org/india.html>

34 <https://www.indiafoodbanking.org/hunger>

35 Ibid

36 Ibid

37 Ibid

38 Ibid

39 Food and Agriculture report, 2018. Available at <https://www.fao.org/publications/card/en/c/CA1554EN/>

40 Ibid

41 FAO. 2021. World Food and Agriculture - Statistical Yearbook 2021. Rome. Available at <https://www.fao.org/documents/card/en/c/cb4477en>

- India is on course to meet three targets for maternal, infant and young child nutrition. India has made no progress towards achieving the target for wasting, with 17.3 per cent of children under-five years of age affected, which is higher than the average for the Asia region (8.9%).⁴²
- India has shown improvement in reducing child stunting but with 46.6 million stunted children, the country is home to over 30.9% of all stunted children under-five, the highest in the world.⁴³
- Deaths in children and adults are available in the country, but there are no official data on deaths from starvation.⁴⁴
- Indian famine India's malnutrition is two to seven times higher than other BRICS member countries, according to a 2015 World Bank report.⁴⁵
- Approximately 19 crore people in the country are compelled to sleep on an empty stomach every night.⁴⁶ The United Nations World Food Programme states that malnourishment has an intergenerational impact.
- Mothers who are undernourished are more likely to give birth to children who are stunted or underweight.⁴⁷
- Growing levels of food insecurity have pernicious long-term effects on health outcomes of children in India. The National Food Security Act, 2013 is in place to ensure food security for the most vulnerable communities. Ration distribution through fair price shops, mid-day meal programmes at schools, nutrition and maternity benefit programmes for children and pregnant mothers at anganwadis fall within the Act.⁴⁸

CAUSES OF HUNGER

- Due to soil fertility, land fragmentation, and fluctuations in market prices of agricultural products the agricultural production is diminishing especially on small farms.
- Due to low income of some of the population ability to buy the right food gets affected, especially when food prices rise.
- The State's Public Distribution System is not accessible to the certain needy due to ignorance, poverty, lack of awareness or illiteracy.
- Due to poor condition of non-agricultural income, rural unemployment is increasing.

42 Global Nutrition Report 2021. Available at <https://globalnutritionreport.org/resources/nutrition-profiles/asia/southern-asia/india/>

43 Ibid

44 <https://www.iasgyan.in/daily-current-affairs/death-of-starvation>

45 Ibid

46 National Health Survey Report 2017 available at <http://rchiips.org/nfhs/>

47 <https://scroll.in/article/1008089/why-does-india-struggle-to-battle-hunger>

48 <https://www.downtoearth.org.in/blog/food/global-hunger-index-why-is-india-trailing-73920>

- In addition to above causes malnutrition is also responsible for hunger. There are multiple factors that contribute to this such as calorific deficiency, protein hunger, micronutrient deficiency such as poor diet, disease, Poor access to safe drinking water and sanitation, low levels of immunisation, illiteracy of women.

GOVERNMENT OF INDIA INITIATIVES

India has set a target to end all forms of malnutrition by 2030. To this end, in the Union Budget 2021-22, Mission Poshan 2.0 was announced to improve nutritional outcomes in 112 districts. Poshan 2.0 is just a new name for existing schemes like ICDS, Anganwadi services, Poshan Abhiyan, Scheme for Adolescent Girls and National Creche Scheme.⁴⁹ With a five-fold increase in food grain production from 50 million tonnes in 1950-51 to about 250 million tonnes in 2014-15, India has moved away from dependence on food aid to become a net food exporter.⁵⁰ In 2016, the government launched a number of programmes to double farmers' incomes by 2022.⁵¹ The government has also taken significant steps to combat under and malnutrition over the past two decades, such as through the introduction of mid-day meals at schools, *anganwadi* systems to provide rations to pregnant and lactating mothers, and subsidised grain for those living below the poverty line through a public distribution system.⁵² The National Food Security Act 2013, aims to ensure food and nutrition security for the most vulnerable through its associated schemes and programmes, making access to food a legal right.⁵³ In addition following are the initiatives:

- Eat Right India Movement: An outreach activity organised by the Food Safety and Standards Authority of India for citizens to nudge them towards eating right.⁵⁴
- POSHAN Abhiyan: Launched by the Ministry of Women and Child Development in 2018, it targets to reduce stunting, under nutrition, anaemia among young children, women and adolescent girls.⁵⁵
- Pradhan Mantri Matra Vandana Yojana: A centrally sponsored scheme executed by the Ministry of Women and Child Development, is a maternity benefit programme being implemented in all districts of the country with effect from 1st January, 2017.⁵⁶

49 <https://theprint.in/opinion/not-just-global-hunger-index-indias-own-govt-data-worrying/760232/>

50 <https://in.one.un.org/un-priority-areas-in-india/nutrition-and-food-security/>

51 Ibid

52 <https://india.un.org/index.php/en/171969-nutrition-and-food-security>

53 <https://in.one.un.org/un-priority-areas-in-india/nutrition-and-food-security/>

54 <https://eatrightindia.gov.in/>

55 <https://wcdhry.gov.in/schemes-for-children/poshan-abhiyan/#:~:text=Poshan%20Abhiyaan%20was%20launched%20by,from%200%2D6%20years%20age.>

56 <https://web.umang.gov.in/landing/departement/pmmvy.html>

- **Food Fortification:** Food Fortification or Food Enrichment is the **addition of key vitamins** and minerals such as iron, iodine, zinc, Vitamin A and D to staple foods such as rice, milk and salt to improve their nutritional content.⁵⁷
- **National Food Security Act, 2013:** It legally **entitled up to 75% of the rural population and 50% of the urban population** to receive subsidized food grains under the **Targeted Public Distribution System**.⁵⁸
- **Mission Indradhanush:** It targets **children under-two years of age and pregnant women** for immunization against **twelve Vaccine-Preventable Diseases**.⁵⁹
- **Integrated Child Development Services Scheme:** Launched on **2nd October, 1975**, the scheme offers a **package of six services** to children in the age group of 0-6 years, pregnant women and lactating mothers.⁶⁰

JUDICIAL INTERVENTION

The case of *Anun Dhawan and others Vs Union of India and others*⁶¹ highlights how starvation deaths continue to eat into the right to life and dignity of social fabric and a radical new measure like community kitchens need to be set up across the country to feed the poor and the hungry. The Supreme Court asked the Centre to explore the possibility of a model community kitchen scheme by which it could support the States to ensure food security for the poor. It asked the Centre to make a model scheme and leave it to the States to follow the guidelines depending on their individual food habits. The court also called for the creation of a national food grid by the Centre which is beyond the scope of the Public Distribution Scheme. However, the court expressed its dissatisfaction with the central government's affidavit regarding a scheme to set up community kitchens throughout the country to tackle hunger and malnutrition in the wake of the COVID-19 pandemic and lockdown.

In Court on its own motion on its own basis of news item titled "School shut, no mid-day meal, children in Bihar village back to work selling scrap" published in the Indian Express, dated July 6, 2020 Vs The State of Bihar⁶²- The court passed following directions pertaining to nutrition:

- a. Continue schemes like the Mid Day Meal Scheme and the Sarwa Shiksha Scheme to provide meals or ration as feasible along with textbooks and notebooks to government school students.
- b. Ensure that statutory benefits under the Food Security Act are disbursed in a timely manner, and updated records are maintained for the same.

57 <https://www.narayanahealth.org/blog/fortified-foods-and-its-benefits/>

58 https://nfsa.gov.in/portal/Salient_Features_NFSA_AA

59 <https://nhm.gov.in/index1.php?lang=1&level=2&sublinkid=824&lid=220>

60 <https://chdsw.gov.in/index.php/scheme/ICDS>

61 Writ Petition(Civil) No.1103/2019 decided on 18 Jan 2022

62 Civil Writ Jurisdiction Case No.7124 of 2020 decided by Patna High Court on 18 September, 2020

- c. Monitor the nutritional health of children by leveraging the reach of Anganwadi workers, who can keep track of children's growth by recording the weight and height of children at regular intervals.
- d. Further, workshops and training for teachers ought to be provided to ensure that they are well equipped in dealing with post-pandemic psychosocial needs of children.

In *Dipika Jagatram Sahani vs. Union of India and others*⁶³ a Public Interest Litigation under Article 32 of the Constitution of India questioning the closure of the Anganwadi centres across the country during the lockdown due to pandemic Covid-19, was filed. The Supreme Court held that it is the statutory obligation of the Centre and the State to provide nutritional support to those who suffer from malnutrition.

In *People's Union for Civil Liberties Vs Union of India & Others*⁶⁴ a Public Interest Litigation was filed under Article 32 for violation of Articles 21 and 47. Various interim orders were passed directing the authorities to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. While considering the ICDS scheme (Integrated Child Development Scheme) that intends to provide supplementary food to children of the age group 0-6 years and to the pregnant woman, the Court held that a lot more deserves to be done in the field to ensure that nutritious food reaches those who are undernourished or malnourished or others covered under the scheme.

ISSUES AND CHALLENGES

With nearly 195 million undernourished people, India shares a quarter of the global hunger burden.⁶⁵ Nearly 47 million or 4 out of 10 children in India are not meeting their full human potential because of chronic under nutrition or stunting. Stunting has consequences such as diminished learning capacity, poor school performance, reduced earnings and increased risks of chronic diseases.⁶⁶ The impacts are multi-generational as malnourished girls and women often give birth to low birth-weight infants.⁶⁷ There has also been an increase in the prevalence of overweight and obesity in children and adolescents in India, which has life-long consequences of non-communicable diseases in adulthood.⁶⁸ The government has large food security and anti-poverty programmes but there are critical gaps in terms of inclusion and exclusion errors.⁶⁹ Women and girls are particularly disadvantaged. Despite the achievement

63 Writ petition (Civil) no. 1039 of 2020

64 (2004; 12 SCC 108), Writ Petition (Civil) No. 196 of 2001

65 <https://in.one.un.org/un-priority-areas-in-india/nutrition-and-food-security/>

66 Ibid

67 Ibid

68 Ibid

69 Ibid

of national food self-sufficiency, new challenges have emerged: Slowing agriculture growth, climate change, land degradation and shrinking bio-diversity.⁷⁰ Large tracts of farmlands in India have become barren due to imbalanced fertiliser use and excessive use of a single fertiliser, urea.⁷¹

The Zero Hunger Challenge was launched by United Nations Secretary-General Ban Ki-moon in 2012.⁷² The Zero Hunger vision reflects five elements from within the Sustainable Development Goals, which taken together, can end hunger, eliminate all forms of malnutrition, and build inclusive and sustainable food systems. The Zero Hunger Challenge has contributed to a changed narrative. It has inspired action at country level and contributed to ensuring that food and nutrition security and sustainable agriculture have remained high on the global development agenda. It has encouraged all to work together towards ending hunger.⁷³ The Zero Hunger Challenge recognises that eradicating hunger is multi-dimensional and that countries need to move beyond an approach that focuses on food production, to work towards achieving progress on five specific pillars.⁷⁴

The National Family Health Survey 2019-21(series-5), provides information on population, health, and nutrition for India and each state/union territory.⁷⁵

Infant and Child Mortality Rates (per 1,000 live births) NFHS-5 (2019-21)	Urban	Rural	Total
Neonatal mortality rate (NNMR)	18.0	27.5	24.9
Infant mortality rate (IMR)	26.6	38.4	35.2
Under-five mortality rate (U5MR)	31.5	45.7	41.9

India slipped to 101st position in the Global Hunger Index 2021 of 116 countries, from its 2020 position of 94th. With a score of 27.5, India has a level of hunger that is in the serious category.⁷⁶ This has brought to fore the urgency and the need to bring changes in India's nutritional policy.⁷⁷

SUGGESTIONS

- The government needs to put in more efforts to ensure early disbursement of funds and maximum utilisation of funds in nutrition schemes.

70 Ibid

71 Ibid

72 <https://www.un.org/youthenvoy/2016/09/pathways-zero-hunger-challenge-unga71/#:~:text=The%20Zero%20Hunger%20Challenge%20was,inclusive%20and%20sustainable%20food%20systems>

73 <https://www.un.org/zerohunger/content/challenge-hunger-can-be-eliminated-our-lifetimes>

74 Ibid

75 National Family Health Survey Series 5, 2019-2021 available at http://rchiips.org/nfhs/NFHS-5_FCTS/India.pdf

76 <https://in.one.un.org/un-priority-areas-in-india/nutrition-and-food-security/>

77 Ibid

- Strict implementation of the nutrition-based schemes is required as it can contribute to better nutrition. The confluence of **Swachh Bharat Abhiyan**, Jal Jeevan Mission with nutrition related schemes can bring holistic changes to India's nutrition scenario.
- There is need for regional, national and international stakeholders' partnership. The diverse knowledge of all the stakeholders can be fruitful.
- Inclusion of milk and eggs in each State's Poshan Scheme menu, preparing a menu based on climatic conditions, local foods etc. can help in providing the right nutrition to children in different States.
- States need to be entrusted with time bound activities to implement the nutrition based schemes and failure to comply with the same should result in personal liability of the concerned officials.

CONCLUSION

Since a large number of undernourished people exist in the world, there is a dire need to achieve Sustainable Development Goal second of 'Zero Hunger' by 2030. According to the World Food Programme and World Bank, malnutrition affects cognitive ability, workdays and health. In that sense, fixing the nutrition problem of India can make a difference not just to better nutrition but to build a wealthier nation too.⁷⁸ The GHI ranking is a warning for us to introspect our policies and focus on the nutrition concerns, especially in the post COVID scenario.

⁷⁸ <https://www.drishtiias.com/printpdf/india-s-nutrition-problem>

Criminalization of Marital Rape in India: Need of the Hour

Dr. Vijay Pal Singh*

ABSTRACT

Rape is an act of sexual assault against a woman without her consent. The act may be carried out by force, abuse or against someone who is incapable of giving consent, such as a woman in an unconscious or intoxicated state. For a very long time, the contract of marriage was viewed through an archaic approach in the sense that the wife promises or consents to give herself to the husband unconditionally to never retract. This paper deals with the reasons why the Marital Rape should be criminalized.

Keywords: Rape, Marriage, Social institution, Required etc.

INTRODUCTION

There is a mentality that marital rape does not happen in Indian society as marriage is sacred¹ in India but if we look at the data, it demonstrates an opposite picture. According to the National Family Health Survey², nearly one-third of all the married women in the age group of 15-49 years have suffered physical, sexual and emotional violence by their husband. Out of them 83% women said that their current husband is the perpetrator, and 7% women named their former spouse as the offender³. Nearly 36.5% of the married women have suffered injuries like bruises etc. because of being raped by their husbands⁴. Also, out of all the married women in the age group 15-49 years who have been victims of sexual violence by their husband, nearly 78.6% women have never complained of sexual violence and only 12.3% women have sought help from someone⁵. Further, among those, only 0.9% women have contacted the police

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1 Should marital rape be criminalised in India? <https://www.career2nextorbit.com/article/700/should-marital-rape-be-criminalised-in-india> (Last visited March 20, 2022)

2 Urvashi Prasad, National Family Health Survey underscores need for serious discussion on marital rape, (June 15, 2021),

3 Supra note 1

4 Ibid

5 Kumar Rajesh, Data On Sexual Violence in Marriages Shows Why India Should Progress Towards Criminalising Marital Rape, (February 24, 2022).

and 0.5% women have sought help from a lawyer⁶. What is actually happening in India is not that there are no instances of marital rape but the woman hesitates to complain about the same because of the absence of marital rape provisions. Women are aware that marital rape is not a crime and is lawful in India, and neither the judiciary nor the legislature is going to protect them from being sexually harassed by their husband⁷. Also, we can see that only 1.4% of all the victims of marital rape have some faith in the legal system. The number is so low because of lack of any legal provision on marital rape. During the National Family Health Survey, the husbands were questioned if they have a right to force their partner for sex if they refuse to engage in sexual activity and 9 out of 100 men said that they do have a right to force their partner for sex⁸. Also, 18 out of 100 men stated that they have a right to reprimand the wife if she refuses for sexual intercourse. There is the need to change the mind-set of the husbands and the society by criminalizing marital rape.

Marital rape also deprives women of their basic fundamental rights like right to privacy, right to bodily integrity, and right to live with dignity. Further, due to regular sexual abuse women are unable to keep their sexual and reproductive health in control. The physical violence that is associated with marital rape can lead to complications during pregnancy and this can result in serious health problems both for the mother and the child born out of the rape.⁹

With the criminalization of marital rape women can enjoy the basic human rights and criminalization will also give them a sense of security and satisfaction against the most heinous crime which can happen inside of a marriage. They will get the right to say “no” when they do not want to indulge in sexual intercourse and most importantly criminalizing marital rape will provide legal remedies for seeking justice¹⁰. It will also be a positive move towards having a society equal for both men and women in terms of granting them basic human rights. With a nation talking so much about women empowerment, criminalizing marital rape could possibly be one of the major factors contributing towards the actual ‘women empowerment’.

THE RELATIONSHIP OF SOCIAL CULTURE AND MARITAL RAPE

Throughout history, the relationship between culture and law has been scrutinized. Law and culture share a symbiotic relationship with each influencing and being influenced by the other. This relationship has been studied extensively on a jurisprudential level. However, within the scope of this paper, we argue that this debate is irrelevant. First, because we have established that the matter of criminalization

6 *Ibid*

7 Why marital rape should be criminalised, (September 12, 2020), <https://www.rediff.com/news/interview/why-marital-rape-should-be-criminalised/20170912.html>

8 *Supra* note 5

9 Marital Rape and its Impacts, African Population and No.13, 2010 Health Research Centre, (2010)

10 *Supra* note 1

of marital rape is a matter relating to fundamental rights enshrined in the Constitution. Second, because having a law that moves against established cultural ideas is not unknown in our legislative history. This is because most gender specific laws or laws for marginalized communities are not in consonance with our understood ideas of society and its structure.

With regard to the demand for criminalization of marital rape being one based on the Constitution and not on culture, we draw an analogy with the debate between the freedom of speech and the laws on obscenity in India. Article 19(2) mentions 'morality' as one of the grounds for restricting freedom of speech. The Supreme Court has interpreted 'morality' to mean 'public morality'.¹¹ This would imply that cases wherein the public at large viewed certain speech as immoral, the Court would deem this speech to be immoral. This perception of what the public might consider moral might be in conflict with that the Constitution envisages being moral.¹² The morality of the Constitution is called 'constitutional morality'.¹³ The morality of the Constitution espouses concepts of equality between sexes and the right to bodily autonomy.¹⁴ These might exist in direct contrast to public morality.¹⁵ The argument that public morality will be relevant for adjudging constitutional morality is a dangerous one to take. For example, the public morality might largely agree with the caste system, which statistics depict it does. In such a situation, to adjudge a law prohibiting the lower castes from the benefit of any law might be in accordance with public morality and thereby constitutional is dangerous. Public morality is adjudged on the morals of the public, which is a part of their culture and their cultural beliefs. In our case of marital rape, it is true that this term is an oxymoron when adjudged in light of the societal background. However, this does not undermine the unconstitutionality of the marital rape exception. This is more so in countries such as India in which the societal structure is starkly different from the constitutional moralities envisaged. For example, the Dowry Prohibition Act, 1961 was brought in because of the cultural practice of *dowry* that was prevalent in India.¹⁶ Historically, *sati* was an accepted cultural practice and even that was criminalised. The argument that a crime is culturally acceptable is not a reason to not criminalise it. If anything, it should act as a catalyst to the criminalisation since it indicates a culture which is accepting toward a crime.

11 Ranjit D. Udeshi v. State of Maharashtra, (1965) 1 SCR 65.

12 Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148.

13 Oxford Scholarships Online, Democracy and Its Institutions, available at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198080961.001.0001/acprof-9780198080961-chapter-4> (Last visited on December 25, 2017).

14 See the Constitution of India, 1950, Art. 21.

15 Rohit Sharma, The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgement, 2 NUJS L. REV. 445 (2009).

16 See Dowry Prohibition Act, 1961. The object of the Act is to prohibit the giving or taking of dowry

17 Lisa R. Eskow, The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution, 48 STANFORD L. REV. 677 (1996).

This argument is especially relevant while discussing matters of rape simply because of the 'rape culture' that exists in society, more so, in cases of spousal rape.¹⁷ For these reasons, we argue that because our 'culture might not permit rape', does not undermine the unconstitutionality of not doing so. If anything, this should only motivate both the judiciary and the legislature to take prompt action.

Rebuttal of Arguments against Criminalization of Marital Rape

Some of the most common arguments given by the Indian government against the idea of criminalization of marital rape are:

I. Marital Rape is uncommon in Indian society¹⁸.

Counter: Marital rape exists de facto in India but not de jure. Marital rape is not an uncommon crime rather it is an unreported crime¹⁹. According to the National Family Health Survey, only 1.4% of the marital rape victims had resorted to police or lawyers²⁰. Also, according to the study done by an NGO Joint Women Programme, one out of seven married women has at least once been subjected to marital rape²¹. Most of the women do not report being raped by their husband because there is no provision in the law to support them. They know that they do not have a right to protest against marital rape. Also, even if a single woman is subjected to such a heinous crime then also law should be there to protect her as numbers do not matter in crime. "A crime is a crime no matter the number". So, we can say that the data shows a completely different picture about the extent of marital rape in India.

II. It is difficult to prove marital rape and criminalizing it will only burden the overburdened judiciary²².

Counter: Firstly, the argument that marital rape is difficult to prove is no reason not to criminalize it²³. Even rape is difficult to prove but there is medical jurisprudence²⁴ to prove it. In cases of marital rape, there might also be a history of sexual abuse or physical violence which can be proved through

18 Saurabh Mishra & Sarvesh Singh, Marital Rape - Myth, Reality and Need for Criminalization, (2003) PL WebJour 12

19 Rukmini S. Marital and other rapes grossly under-reported, The Hindu, (OCTOBER 22, 2014 03:52 IST), <https://www.thehindu.com/news/national/marital-and-other-rapes-grossly-underreported/article6524794.ece>

20 Supra note 5

21 Shweta Trivedi, Marital Rape: Challenges and Concerns, International Journal of Innovative Social Science & Humanities Research, http://www.csirs.org.in/downloads/ijisshr/vol_2_issue_3/marital-rape-challenges-and-concerns.pdf

22 Supra note 2

23 Supra note 11

24 Durba Mitra; Mrinal Satish, Testing Chastity, Evidencing Rape, Impact of Medical Jurisprudence on Rape Adjudication in India <https://nludelhi.ac.in/UploadedImages/96d63f5d-9c23-4cb7-aeb6-43774da81992.pdf>

forensic evidence²⁵. Witnesses could also be taken into account if the woman has shared such an incident or if she has previously reported any such abuse. There are crimes like dowry death²⁶ and cruelty²⁷ which also happens within the domain of marriage and is difficult to prove but there are proper legal remedies against those crime. Also, just because marital rape is difficult to prove, it does not mean that it should be completely ignored.

- ***Potential misuse by woman by filing false rape cases***²⁸.

Counter: Every law has some potential to be misused²⁹. It is the duty of the police to do a proper investigation of a case and the duty of the judge to determine the veracity of the claims. There are false cases reported for other crimes as well and various other laws have been misused, but then it is the duty of the criminal justice system to catch the false cases. Also, given the societal stigma related to rape trials the chance that a woman would want to go through this experience is pretty less³⁰. Apart from this, our justice system already provides safeguard measures like requirement of proof 'beyond any reasonable doubt'. Thus, it not a proper reason to deny protection to the actual victim just because someone else might utilize this provision with wrong motive. Further, if proving marital rape is a difficult task then proving a false marital rape charge will be even more difficult. Various countries have already criminalized marital rape and we can look into their investigation procedure and try to improve our system. Abuse of marital rape right now is just a speculation, without any actual legislation to punish marital rape³¹.

III. *The consent to have sexual intercourse is implied in a marriage.*

Counter: The very assumption that there is an implied consent to have sexual intercourse after marriage is very old concept when woman was considered the property of her husband. This implied consent theory was made on Hale's notion that after marriage the wife gives irrevocable consent for sexual intercourse. With the development and change in society the status of woman has also changed. Even justice Chandrachud has stated that "there is a right to say no after marriage."³² Even if the woman consents to sexual intercourse after marriage she did not consent for forceful intercourse. It cannot be assumed that a woman consents to violence or cruelty after marriage and neither the Indian law permits anyone to give such consent which will harm her³³.

25 Supra note 2

26 The Indian Penal Code, 1860, section 304B

27 The Indian Penal Code, 1860, section 498A

28 Supra note 2

29 Ibid

30 Supra note 11

31 Marital Rape: Should it be made an Alternate Ground for Divorce? Lawteacher

32 Joseph Shine v. Union of India, 2018 SCC Online SC 1676

33 Supra note 11

IV. *Criminalizing marital rape has a potential to destroy marriages by preventing any possible reconciliation.*

Counter: A marriage in which a wife is raped by her own husband is already destroyed. Attempt to protect marriages may be one of the objectives of matrimonial laws, but non-criminalization of marital rape overrides the fundamental objective of law and the judicial system, which is to provide justice to the victim and penalize the offender³⁴. Thus, denying justice to the victim just to preserve a marriage is not a proper function of law. Moreover, the law should not promote forced cohabitation and leave the victim to stay with the person who has raped her in the past.

V. *It is culturally impossible for a woman to be 'raped' by her husband as marital rape is not a part of Indian culture*³⁵.

Counter: This is a very poor argument because other crimes such as theft, burglary or murder etc. are also not there in our culture, but we do not completely deny their existence by stating that they are not in our culture. Rather, we tackle those problems by making laws against them. Marital rape should also be tackled in the same way and law must be made for providing justice to victims of marital rape.

CONCLUSION

Rape is a heinous crime and the reasons given by the government for not criminalizing marital rape are not very strong. Also, the data provided by the National Family Health Survey³⁶ clearly depicts the extent of marital rape in India. It's important for the government and the judiciary to understand the impact or consequences of marital rape on the victims³⁷ and help them in getting justice. As already discussed that there are various crimes which are difficult to prove and there are laws which have been misused but this cannot be a reason for not recognizing a wrongful conduct as an offence. The government is elected "by the people and for the people"³⁸, and the people expect the government to work for their welfare. By not recognizing marital rape as an offence the Indian government is largely ignoring the voice of the women. It is high time that marital rape should be recognized as an offence because of the reasons already discussed in this paper.

³⁴ Ibid.

³⁵ Are We Justifying Marital Rape Just to Protect the Institution Of Marriage? <https://www.youthkiawaaz.com/2017/10/why-are-we-protecting-the-institution-of-marriage-by-justifying-marital-rape/>

³⁶ Supra note 5

³⁷ Jennifer A. Bennice; Patricia A. Resick; Mindy Mechanic; and Millie Astin, The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology, *Violence Vict.* 18(1): 87-94 (2003)

³⁸ Garry Wills, *Lincoln at Gettysburg*, (2012)

Exploring the Dimensions of Work Life Balance and Right to Disconnect: An Urgent Need of the Hour

Dr. Vishal Guleria & Dr. Mamta Rana***

ABSTRACT

Technology has brought with itself immense benefits which were unheard of and unimaginable till a few decades back. But it has also brought with it problems and complications which were unthinkable before. In the times that we live in today, technology has played its role wherein the employee is in the 'always on' mode and as such vulnerable to receiving office related mails and texts and messages much beyond the stipulated work hours and well into his home hours. Resultantly, this has blurred the boundaries between work hours and home hours which in turn has started showing its adverse impact on employee health and productivity. It is high time that this issue was taken seriously and corrective measures put in place. This paper examines how this trend has caught up off late in the pandemic at break neck speed and how it is negatively impacting the work life balance of employees. The paper also brings forth the necessity to work on bringing in a legislation on the concept of 'right to disconnect' thereby providing an umbrella legislation to provide a legal cover to the employees spread across all sectors thereby providing much needed relief and succour from the ever invading and tightening grip of technology on our lives.

Keywords: *Technology, Pandemic, Disconnect, Work-life balance, Productivity*

"We think, mistakenly, that success is the result of the amount of time we put in at work, instead of the quality of time we put in."

Arianna Huffington, Co-founder and Editor-In-Chief of The Huffington Post

INTRODUCTION

It is rightly said that 'times don't remain the same forever'. Times change and the change may be good or for worse. And the good times that the world at large was witnessing were destined for a change when the first case of the Covid 19 infection

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struck, somewhere in China.¹ The world has not been the same ever since. It has now been almost more two years since this Pandemic² started spreading and there is still no discernibility of light at the end of the tunnel. The ongoing pandemic has led to the disruption of economic and other activities at an unprecedented scale bringing untold miseries to millions of people, especially those who were daily wage earners and those linked with the hospitality industry. This turn of events which was never anticipated and thought over. It forced those in the corporate setup and those in other sectors as well to devise new ways and methods to continue working productively. The arrival of the pandemic meant that the bosses in the corporate setup had to switch over to the 'online mode' so that their businesses continued, similarly in the education field also, the transition had to be made to the 'online mode' so that the studies of the students, be it in Schools or Colleges or the Universities did not take the back seat. This transition was not easy, especially for the education sector in India³ which had to face, and is still facing a lot of hardships in continuing with this mode of Teaching and Learning.

THE WORK PRESSURES OF THE MODERN TIMES ESPECIALLY DURING THE PANDEMIC

Work plays a significant part in all our lives but so does a good and healthy work environment.⁴ Our earnings ensure that the lights stay on, there is food on the table and the saving is there for the rainy day. So, every human being strives for not only being able to be in a well-paid job but also of exceling in it to the best of his/her capabilities. And the struggle to achieve this is an arduous and never-ending process which leads to him/her acquiring numerous stress related diseases on the way and in some case work related death as well, Japan being the best case on the point⁵

1 The virus was first identified in Wuhan province of China from where it began spreading in the city, then in the whole province and subsequently in the rest of the world.

2 Pandemic essentially refers to the widespread and extensive prevalence of a disease essentially covering a very large area of a Country, Continent or the Globe. In the present Pandemic, the prevalence of this disease is essentially global in nature and there is hardly any country which has been able to escape its wrath.

3 The transition was difficult because of a plethora of reasons, the primary being the lack of available infrastructure in these educational institutions to cater to the necessity which arose as a result of the requirement of this transition. Teachers and students alike, especially in the rural setup faced a lot of issues of internet connectivity along with other issues such as arranging electronic gadgets like mobiles, laptops etc. which was beyond the reach for majority of the rural students.

4 Infact, it has been rightly said that a healthy work environment is one in which there is not only an absence of harmful conditions but an abundance of health promoting ones.

5 The Japanese are known as a people whose commitment to work is unparalleled. It's perhaps unsurprising that the words 'Japan' and 'holiday' rarely feature in the same sentence. The nation has long been famed for an intense work culture defined by arduously long hours – it's normal for workers to take the last train home every night. But things as they

followed by China⁶ which is not far behind. The businesses are being operated in terms of volume and not in terms of values. This disturbs the balance between work and life in employees' lives. The organizations are too exacting in their demands and because of the very high competition, they are able to dictate terms upon the individuals. The first occurrence of 'overwork' or 'Karoshi' death was documented in 1969. In truth, Karoshi was responsible for the passing away of Japan's Prime Minister, Keydzo Obuti, in the year 2000. He had taken only three days off in the past twenty months and was working at least twelve hours a day before he died.⁷ The sorry state of affairs in the most industrialized country of the world which is known for its highly efficient and dedicated work force should ring alarm bells not only in that Nation itself but also serve a perfect example for other countries that the intense version of the 'work culture' norm as prevalent in Japan and many other countries around the world needs 'rethinking'. The situation as highlighted above has only got exacerbated during the present covid Pandemic.

TECHNOLOGY'S CONTRIBUTION IN DISTURBING THE WORK LIFE BALANCE

Technological advances have transformed the work-life balance dramatically in multifarious ways. As discussed above, the increasing process of digitalization and the evolution of information and communication technologies has led to a slow and gradual transformation in the world of work thus representing a real paradigm shift in how work is conceived. To the more traditional ways of work consisting of fixed working hours and schedules are added the modalities where the performance of work can be done remotely by using a smartphone, tablet, notebook or other technological devices from anywhere and anytime in the world. However, this possibility of immediate connectivity can sometimes create a false expectation that an employee is 'constantly available' which leads to the employers getting in touch with workers outside their work hours, thus making them feel in a state of being permanently alert and available.⁸ The line between an employees work life and his personal life have become blurred to the point that this 'on call' culture seems normal; technologies

stand today do not reflect a good picture of this work culture on the Japanese employees. Japan is infact known as the birthplace of karoshi - 'death from overwork' - a word invented in the 1970s to describe deaths caused by work-related stresses and pressures. Unfortunately, it is still a regular fixture in Japan's lexicon today. Employees in Japan refrain from taking holiday because their bosses do not take holiday, or they are afraid that it will disrupt the group harmony.

6 In China, many organisations use the '996' working time schedule, which effectively implies that employees work from 9 a.m. to 9 p.m. six days a week, for a total of about 72 hours each week.

7 M.V. Chudnovskih, *The Right to Disconnect in Digital Economics*, Advances in Business, Economics and Management Research, Vol. 105, p.799, (2019)

8 F.M. Chiuoffo, *The Right to Disconnect or How to Pull the Plug on Work*, available at <http://ssrn.com/abstract/=3422283> (accessed on 02/05/2022)

such as mobiles and laptops make it impossible for the employees to truly disconnect.⁹ The concept of “always on” culture describes a society which is permanently hyperconnected, through digital tools and means of communication resulting in difficulties for the individuals to escape and disconnect from work. Research on the action of disconnection from the means of communication showed that the users’ definition and relationship regarding disconnect shifted over time. In fact, it evolved “from a binary notion of connects and disconnects to a more fluid notion of connectivity” This testifies to the permanent link that users keep with the rest of the world by means of digital communication. Hence, the “always-on” culture results in a new way of living which obviously redefines the way we engage with work. Individuals are living in a frenetic world where instantaneous communication is expected and defines new organisational practices.¹⁰

A noteworthy example of how highly ambitious bosses of companies promote this culture of always being ‘on work’ is of the CEO of the American electric car maker Tesla.¹¹ As discussed in the introductory part of this research paper, there has been a transition from the offline mode to the online mode during the pandemic forcing the corporate world as well as the education sector to go online for the sake of ensuring continuity and survival. This transition has had a stellar role to play in hastening the process of blurring the lines between ‘work’ and ‘work-life’ balance. As a matter of fact, stress at work place has also been primarily responsible to increased workplace suicides in the economies of the industrialized countries in the recent years.

Talking about India, though this phenomenon was observable for more than a decade, it became wide spread and ingrained as a result of the ongoing COVID-19 pandemic. The scenario in India is no different from the rest of the world. The corporate world in today’s India is exceedingly demanding. The deadlines are getting tighter and an individual’s job is not only to match that deadline but also to give quality output. Mails are sent well beyond office hours and employees are expected to respond. WhatsApp groups are created and they are always buzzing with some or the other activity being dictated by the bosses to the employees. The scenario is no different

9 Paul M. Secunda, *Hybrid Federalism and the Employee Right to Disconnect*, Pepperdine Law Review, Vol. 46, P. 876, 2019, see also Jon Messenger, *Working Anytime Anywhere: The Effects on the World of Work*, Research Report by Eurofound, p.3, (2017)

10 Quoted from Luc Pansu, *Evaluation of ‘Right to Disconnect’ Legislation and Its Impact on Employee’s Productivity*, International Journal of Management and Applied Research, p. 103, (2018)

11 As per reports in New York Times, Elon Musk, the CEO of Tesla was working around 120 hours per week with his last known vacation being in 2001 due to illness. Musk was known not to leave his factory for three to four days in a week which in essence meant that he was not meeting his Family nor having any leisure activity during that period. Employees of this company are pressured to meet their production goals which in turn requires working upto twelve hours a day and six days a week. As a result of this overwork, ambulances have been called for Tesla employees more than 100 times in 4 years. (See, The Guardian, May 18, 2017 and June 14, 2018)

for the teaching fraternity, whether it be School Teachers, or College Teachers or University Teachers in the Private or the Government set up. This was one area wherein the whole focus shifted online and all the offline Teaching and other related academic activities had to be shifted to the online mode. Online meeting apps like Zoom and Cisco webex which were literally unheard of in the pre lockdown era, became a household name. But Covid or no Covid, we certainly were moving in the wrong direction and were ourselves responsible for meddling with the delicate work life balance.

THE RESULTANT IMPACT OF THE WORK AND TECHNOLOGY INDUCED STRESS AND PRESSURES

According to several studies, if an employee is expected to be accessible around the clock, he or she is more likely to suffer from overwork symptoms such as sleep deprivation, stress, and emotional exhaustion. This incessant impulse to reply to calls and e-mails (dubbed “telepressure”), as well as constant monitoring of e-mails throughout the day and even on weekends and holidays, is said to have damaged employees’ work-life balance. As people have been increasingly working from home, there is a blurring of lines between what is professional and personal life. Rising levels of anxiety, depression, and burnout¹² are often associated with a continually connected world of work. Constant integration of social networks, whatsapp, viber, and emails into the working process causes overstrain, which has a negative impact on health and labour productivity.¹³ Work-life imbalance is also linked to greater stress in marriage, difficulty in child-parent relationships, and issues in child development. The resolution of the work-life conflict is also important for employers, as it can have negative repercussions for the well-being¹⁴ and employee performance in their respective work places.¹⁵

Stress is a condition of mental pressure for particular individual facing problems from environmental and social well-being which leads to so many diseases.¹⁶ According

12 The results of India’s first Pan India survey on mental health, conducted in 28 states in 2015-16, shed light on the incidence of anxiety disorders. According to the poll, 3.1 percent of Indians suffer from anxiety problems. According to the UBS analysis which analysed 77 cities around the world on a variety of parameters, including average yearly working hours, Mumbai came at the top of the list with an average of 3,314 working hours.

13 Supra note 7 at 800

14 Thousands of people have died as a result of overwork, according to the World Health Organization. This organization estimates that working late kills thousands of people each year. Employees were surveyed till late at night. It revealed that 7.45 million working-age people died of cardiac disease in 2018, up from 30% in 2000. According to WHO and International Labor Organization studies, the vast majority of casualties were males in their forties or older.

15 C.W. Von Bergen and Martin S. Bressler, *Work, Non-Work Boundaries and the Right to Disconnect*, Journal of Applied Business and Economics Vol. 21(2), p. 52, (2019)

16 Deepti Bhargava & Hemant Trivedi, A Study of Causes of Stress and Stress Management among Youth, International Journal of Management & Social Sciences, 109, (2018)

to a poll performed by Aptam, more than half of all employees in India are stressed in some way. The survey was done among 8 lakh employees who participated in this study. At the same time, according to a research published in the Economic Times, 89 percent of Indians feel stressed, and 75 percent are hesitant to see a doctor because of the high prices. According to the survey, India ranks first among developing and growing countries in terms of stress.¹⁷

DECIPHERING THE CONCEPT OF 'RIGHT TO DISCONNECT'

Does the workday for a tech savvy employee in India, be it from corporate setup or Institutional set up, really come to an end? If this is to be framed in other words, does a non-mortar brick employee in India stop working when he is back from work and in the confines of his home? Unfortunately, the answers to the above questions ultimately end up in the answer, 'no'. As the research paper has continuously pointed out till now, technology, pandemic and expectations of the employers from their employees that they are 'available' at all times has led us to the presently prevalent scenario wherein the employees' homes have in essence become extensions of their offices with no respite in sight. It would not be wrong to say that the workplace in the modern context is no more confined to the four walls of the office.¹⁸

It is in this background that we need to understand and then realise the importance of the 'right to disconnect'. This right is essentially being put in the category of a human right wherein it empowers the employees to disconnect or switch off from work and not to be under any obligation¹⁹ to reply to work related mails or messages during their non-work hours.²⁰ In essence, the 'right to disconnect' philosophy is premised on the thinking that there needs to be a clear cut demarcating line between office hours and non-office hours (leisure or family time) and the employees should be legally empowered (by way of a legislation in this regard) not to respond to any form of communication which they may receive from their employer and which pertains to office work. It essentially empowers the workers/employees to step back

17 Quoted from Vinay R. Sakharkar, *Work from Home in the Corona Pandemic and Need of the Right to Disconnect Act*, Social Issues and Problems, Vol. 10, p.109, June (2021)

18 Until the late 1900s, the typical professional and technical employee came to their office and worked Monday through Friday for eight or nine hours. Both the workplace and the working hours were clearly stated. In many businesses, there is a rising independence of labour from location, and duties are done not only from home but also in transportation and on vacation. The office is no longer defined by four walls, but rather by where people take their smartphone, pager, laptop, or smartwatch and where they may continue to work after the regular workweek. The notion that people must work within a traditional paradigm of set 9 to 5 working hours and physical workplaces is no longer valid. (See, C.W.V. Bergen, *Work, on-work boundaries and Right to Disconnect*),

19 The pandemic has left workers especially burnt out, so addressing the problem has never been more critical

20 The concept of right to disconnect would not make it illegal for an employer or manager to send communications outside of work hours; it simply attempts to ensure that an employee cannot be penalized for ignoring them.

from their work without penalties. As stated beforehand, the need for this new concept has developed because of the emergence of new technologies which have blurred the previously existing domains of work environment as distinguished from the home environment. Answering the question as to why this issue needs serious consideration, the likely response would be that it is adversely affecting the health of the employees as they are not getting ample rest and recreation time, moreover it is bad for the companies also as worn-out employees are known to be less productive than well rested and motivated employees.²¹ The idea of disconnecting from work after the office hours has gathered steam off late because of the ensuing pandemic and its necessitated conditions wherein large chunks of the work force has been forced to work from the confines of their homes.

INTERNATIONAL ENDEAVOURS IN CONCRETIZING THE RIGHT TO DISCONNECT LEGISLATION

It is interesting to note that the question of permanent availability of workers through mobile work and Information and communication technology has hardly been addressed.²² But things started to look different when the French Government²³ initiated designing a legal framework to protect the digitally victimized employees who were bearing the brunt of 'persistent digital connectivity'. The interest concerning a better protection of the digitized employees was expressed by the French Government during the preliminary studies concerning the reform of labour law then approved in 2016.²⁴ The French government adopted the legislation regarding after-hour electronic communication through its enactment *Droit a la Deconnexion*. This law²⁵

21 There is ample literature available which points out in this direction that productivity goes down in an organization if its employees are worn out, jaded and exhausted because of the 'carry your work home' culture.

22 Though there were some conventions at the international level like the Workers with Family Responsibilities Convention, 1981, which highlighted the necessity of enabling the workers to engage in employment without conflicting employment with family responsibilities. This was supplemented with the Workers with Family Responsibilities Recommendation, 1981, which recommended that particular attention should be given to general measures for improving working conditions and the quality of working life. Needless to say, these efforts of the 80's were ineffective in filling in the gaps created by the technological revolution of the 21st century.

23 France was, as a matter of fact the first European country to enact a Bill concerning the Right to Disconnect as a consequence of the debate which had started way back in the year 2000. The French Supreme Court determined in 2001 that employees are not required to carry work home, and as technology advanced, the court continued to update its judgement. The Supreme Court ruled in 2004 that it was not misconduct if an employee could not be reached on a smartphone outside of business hours.

24 Matteo Avogaro, *Right to Disconnect, French and Italian Proposals for a Global Issue*, RDRST Brasilia, Vol. 3, p. 110, (2018)

25 Also known as the El Khomri Law, after French Labour Secretary Myriam El Khomri.

mandates²⁶ that employers reach an agreement with their employees or introduce a charter to address the employees' ability to not respond to work related digital communication.²⁷ This French law attempts to minimise professional burnout and to keep family relationships intact. It requires companies with more than fifty workers to mention the topic of the right to disconnect in their employee handbooks²⁸ into collective bargaining, determine and capture in the local Act in what hours employees are excused from reply to business letters to avoid intervention to their personal lives.²⁹

The right to disconnect is likewise recognised under Italian law. Senate Bill 2233-B, titled 'Measures to safeguard non-entrepreneurial self-employment and measures to facilitate flexible articulation in times and places of subordinate employment,' states that the labour contract must capture in writing the employees' leisure and rest time, as well as the technical and organisational measures required for employee disconnection from process equipment.³⁰ The right to disconnect in Germany is not yet established by law, although it is endorsed by major corporations. The German concept is known as the "corporate self-regulation" model. It is based on the social partnership Principles. Despite the absence of the Uniform Act, many large German employers³¹ attach the 'right to disconnect' at the enterprise level.³²

Talking about Asia, it is South Korea who has made the most progress in this regard. Over the previous decade, South Korea has taken seriously the concerns related to work-life balance. South Korea debated laws in 2016 that would prohibit businesses from contacting employees at home.³³ The bill aims to prohibit companies from

26 More specifically this law states that modalities by which employees exercise their right do to disconnect, and the setting up of company regulations on digital devices and tools, will be completed with a view to ensuring respect for rest, personal life, and family leave periods. In the absence of agreement, the employer shall draw up a charter, after advice from the enterprise committee, or alternatively, from the staff delegates. The charter will define the modalities by which employees may exercise the right to disconnect, and also provide for the implementation of training and awareness tools for the benefit of employees, management and personnel.

27 Paul M. Secunda, *The Employee Right to Disconnect*, Notre Dam Journal of International & Comparative Law, Vol. 9, Issue 1, pp.27-28, (2019)

28 After the passage of this law, the French Supreme Court issued the first substantive ruling in 2018, ordering a British subsidiary company in France, Rentokil, to pay a former employee 60000 Euros because the court found it unfair that the former South West Regional Director in France had to leave his phone on all the time and respond to requests from his subordinates or customers in case of any problems while not at work.

29 Supra note 7 at 800

30 Ibid

31 The big German car maker Volkswagen is a case on the point. This company backed out of sending emails to its employees after business hours.

32 Ibid

33 Supra note 13 at 59

delivering work-related messages to workers via social media, SMS, or mobile messaging applications after office hours.

NATIONAL EFFORTS IN THE DIRECTION OF RIGHT TO DISCONNECT

The Indian legislative front has nothing much to offer as of now on the front of 'right to disconnect'. The effects of the pandemic which have been felt worldwide have not left India untouched. Here as well, all the corporate businesses and educational institutions had to go online with the onset of the pandemic and the ensuing lockdowns and various other restrictions. Though the Indian labour legislation is relatively strong and provides a fair level of protection to the workers but when it comes to technology and interference by the employers in the beyond office hours, it is relatively silent. The first step in this direction was made by Ms. Supriya Sule³⁴, a sitting MP then, by introducing a Private Member's Bill³⁵ named as the 'Right to Disconnect' Bill. This Bill is inspired by the international scenario and primarily proposes to give the employees the right not to respond to any communication beyond the office hours. Some salient features of the Bill are:

- a. It will largely apply to businesses with more than ten employees. Such businesses are required to form an Employee Welfare Committee to guarantee compliance, which would comprise the Ministers of Information Technology, Communication, and Labour.
- b. The Authority would publish a research on the influence of digital technologies outside of work hours, as well as yearly reports, and would create a charter for employee-employer agreements.
- c. The bill also states that if an employee does not answer to his employer outside his scheduled work hours, no disciplinary action may be taken against him.
- d. According to the Bill's provisions, if an employee works outside of the agreed-upon circumstances, he or she is entitled to overtime pay.
- e. Furthermore, the government would be required to give staff counselling, digital detox centres, and other comparable services "to free an employee from digital distractions and enable him to truly connect with the people around him"³⁶

³⁴ She was a sitting NCP Member of Parliament then.

³⁵ A member of parliament (MP) who is not a minister is a private member. The Bills introduced by private members are referred to as Private Member's Bills. The Bills introduced by ministers are called government Bills. The government bills have the backing of the government and reflect its legislative agenda. Whether the Private Bill has to be admitted or not is decided by the Speaker of the Lok Sabha or Chairperson of the Rajya Sabha.

³⁶ Available at <https://www.opindia.com/2019/12/supriya-sule-right-to-disconnect-bill-lok-sabha-experts-say-not-viable/> (accessed on 21/05/2022)

The Bill seems to be a good attempt to at least make the concept of 'Right to Disconnect' a reality in Indian scenario. Though the possibility of this Bill taking a concrete shape of law remains low for the historical reason that no Private Member's Bill has ever become a law in India since 1970. Still, it is heartening to see that a legislative endeavour in this direction has been made and it makes the people in power realise that this is a grey area and a legislation devoid zone which needs to be filled up by enacting a suitable legislation in the foreseeable future.

CONCLUDING OBSERVATIONS

The study thus clearly reflects the reality of a digitized and technology driven world (more so during the pandemic) that the dividing lines between the office hours and leisure/non-office hours are getting blurred. As the world moves on its daily march towards even more digitalization and as technology grows stronger and its penetrative power in the lives of employees increases, it becomes even more necessary to move towards a legal regime which tries to give an umbrella protection to all the stakeholders whose number in India would be in crores. As such, it is now time that our policy makers gave a serious thought about bringing in a legislation which provides a semblance of protection to the millions of employees from unnecessary and unwarranted interference in their lives beyond their working hours. This becomes all the more important in India because as of now the supply of labour/employees is more than the demand and that gives sufficient leverage to the employer to keep sending mails and messages asking for work beyond the stipulated office hours. The employees also, even if they do not want to respond, are forced to respond, as a non-responsive employee would fear losing his job to someone else. Bringing in such a legislation (with a few exceptions)³⁷ would also have a positive impact on the millions of Men and women employees as well who would be better able to focus on their Children and the institution of parenthood would stand to benefit. If steps are not taken to ensure that workers remain insulated beyond their working hours, then the concept of eight or ten 'working hours' becomes redundant. It is sincerely hoped that such a legislation would see the light of the day in the days and months to come.

³⁷ The exceptions could cover situations which are in the form of emergencies at the work place (which would require urgent and immediate human intervention)

The Law and Economics of Liquor Prohibition: Perspectives from Bihar, India

Mr. Achintya Arora

ABSTRACT

A key motive behind introducing liquor prohibition in Bihar was to reduce the incidences of domestic violence against women. After almost six years of liquor prohibition, it is feared that the situation has not improved much. Although crime statistics of Bihar show a decline in number of reported cases of domestic violence, there has been an increase in number of reported cases of crimes against women. Liquor prohibition also has an impact on industry, revenue, employment, etc. This research analyses some of thereported direct and indirecteffects of liquor prohibition from a law and economics perspective.

Keywords: Liquor, Prohibition, Criminal, Revenue, Violence.

INTRODUCTION

“An act should be declared criminal if doing so and seeking to deter it increases social welfare.”¹

In July 2015, the Bihar Chief Minister promised to impose a ban on sale, consumption, etc. of liquor in the state if he is again voted back to power in the then upcoming state assembly elections.² Such a ban is commonly known as “prohibition”.

The Chief Minister mentioned 3 major reasons why it was important to impose prohibition³:

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1 Robert Cooter & Thomas Ulen, Law & Economics 447 (Pearson Education 2004).

2 Bihar: Nitish Kumar promises to ban liquor if he is re-elected as chief minister, FIRSTPOST (July 10, 2015, 11:31 AM), <https://www.firstpost.com/politics/bihar-nitish-kumar-promises-to-ban-liquor-if-he-is-re-elected-as-chief-minister-2336034.html>.

3 Amarnath Tewary, Bihar to impose prohibition from April 2016, THE HINDU (Nov. 26, 2015, 02:47 PM), <https://www.thehindu.com/news/national/other-states/bihar-cm-nitish-kumar-announces-liquor-ban-from-april-1/article7919152.ece>.

1. To eliminate domestic violence against women
2. To improve the depleting family income
3. To improve conditions for children's education

In 2016, Bihar Prohibition and Excise Act came into effect in the Indian state of Bihar – country's third-most populous state. This Act not only prohibited the sale and consumption of liquor in Bihar but it also criminalized such activities. Prior to the enforcement of prohibition law, liquor for human consumption was a legal commodity that handsomely contributed to the state's coffers.

Prohibition's payout in Bihar has brought to light some unique insights which are of considerable importance in the discipline of law and economics. There can be a variety of factors that have an impact on social welfare. It has to be seen whether liquor prohibition has positively contributed to social welfare.

There can be two types of social costs of crime⁴:

1. The net harm that is caused by crime
2. The resources spent on preventing that crime

Minimization of the social costs of crime – which is the sum of above two – is criminal law's ideal. Considering the objectives behind imposition of alcohol prohibition and criminalisation of alcohol sale and consumption in Bihar, it is important to study the economic effects and social costs associated with prohibition. It is pertinent to note that Bihar is the third most populous state of India.⁵ Thus, any state law is bound to have an impact on a significant part of the country's and of the world's population.

One aim of this research is to highlight certain aspects of Bihar's liquor prohibition law that have significant economic impact on various stakeholders. With an eye on this reality, an attempt can then be made to assess how much distance has been covered and what still remains desirable in the quest to achieve the intended objectives of prohibition.

THE PLAY OUT OF LIQUOR PROHIBITION

1. LOSS OF REVENUE

1.1 FOR THE STATE GOVERNMENT

A major economic impact of prohibition is the state government's loss of potential revenue. It implies that the state government has lesser money of its own to spend on welfare activities. Earlier, the Bihar state government had liberalised liquor trade in 2005 to boost revenue.⁶

4 ROBERT COOTER & THOMAS ULEN, *supra* note 1, at 470.

5 *Indian states with highest population*, INDIA TODAY (Oct. 08, 2018, 03:12 PM), <https://www.indiatoday.in/education-today/gk-current-affairs/story/indian-states-with-highest-population-1358414-2018-10-08>.

6 Zumbish, *For Bihar's women, benefits of prohibition wane as alcoholism persists in their villages*, THE CARAVAN (Mar. 20, 2019), <https://caravanmagazine.in/gender/bihar-women-prohibition-benefits-wane-alcoholism-persists>.

*Excerpt from Economic Survey 2016-17***Government of Bihar
Finance Department****Table 2.19: Tax Revenues under Different Heads (Rs. crore)**

Sources of Revenue	2011-12	2012-13	2013-14	2014-15	2015-16
State Excise	1981	2430	3168	3217	3142

*Excerpt from Economic Survey 2021-22***Government of Bihar
Finance Department****Table 2.16 : Tax Revenues under Different Heads (2016-17 to 2020-21)**

Sources of Revenue (Rs crore)	2016-17	2017-18	2018-19	2019-20	2020-21
State Excise	30	-3	-10	-4	-4

Before prohibition was imposed, the revenue from excise duty (imposed on sales of alcoholic beverages) increased by about 58% in a short span of 5 years - from 2011-12 to 2015-16. In the past few years, that source of revenue has turned negative. In other words, the government is instead incurring expenditure under this head. It is submitted that this maybe the situation because of enforcement costs that the government has to incur whereas the revenue that it was generating through a particular source has completely stopped coming in. These have been discussed in detail under the sub-heading “Enforcement Costs and Policing Costs”.

On the other hand, it has been claimed by the state government that even though it is losing on revenue to the tune of INR 5,000 crores approximately, savings with people of the state have gone up by about INR 10,000 crores.⁷ Average weekly expenditure on food and health in rural Bihar have increased more than 30% while expenditure on education and cloth have increased by about 70%.⁸ These may contribute towards state government’s revenue. Also, fewer women and children now suffer from economic deprivation.⁹

7 *Prohibition – say no to liquor*, GOVERNMENT OF BIHAR, https://state.bihar.gov.in/main/Content.html?links&page=leading_prohibition (last visited June 28, 2022).

8 *Impact Assessment of Total Prohibition On Lives Of Women And Girls In Rural Bihar*, GOVERNMENT OF BIHAR, <https://state.bihar.gov.in/main/Content.html?links&page=Prohibition> (last visited June 28, 2022).

9 *Id.*

1.2 FOR BUSINESSES

Taking account of the pre-prohibition era situation in Bihar, it may not be only the state that bears the cost of foregone revenue. The businesses related to liquor production and supply, which were running legitimately till before prohibition, also got affected. Here, it is vital to weigh the state's authority to impose prohibition against the right to gainful employment of certain persons who were legitimately employed or were working in the liquor industry. The cost of resulting unemployment and loss of future income are also to be considered.

It has been stated that in the beginning when 17 private factories of country liquor were sealed, about 10,000 factory workers were estimated to lose their jobs.¹⁰ Adding to this, about 30,000 sales persons working at 6,000 liquor shops were expected to become jobless. It can also be perceived that prohibition had an impact on the demand of certain complementary goods and on the economic health of allied industries. Under such circumstances, when the state suddenly declares prohibition on a legally traded product, an important aspect that ought to be considered is the meaning and implications of 'ease of doing business' for the liquor business owners and economic stakeholders.

Although made in the context of prohibition in Kerala, this statement is quite relevant to this research: *"The government abetted drinking and profited from it for years by setting up state-run liquor shops and allowing the mushrooming of bars."*¹¹ Same is true in the context of Bihar as is evident through the above cited excerpts from the Economic Surveys that show data from both pre-prohibition and post-prohibition times.

2. VIOLENCE

One of the main objectives of prohibition was to eliminate violence against women. Looking at the data on crimes against women in Bihar (National Crime Records Bureau 'Crime in India', 2015 (Table 5.1) & 2020 (Table 3A.1)), cases reported have increased from 13891 in the year 2015, the year when liquor prohibition was imposed, to 15359 in the year 2020 showing an increase of about 10.5%. It must be noted that this number had even gone up to 18587 in 2019. The decline in number of cases reported may be attributed to the onset of COVID-19 pandemic during which crime reporting had expectedly gone down because of accessibility related issues.

10 Manuwant Choudhary, *As Nitish imposes prohibition in Bihar, residents fret at the costs it will extract*, SCROLL.IN (Apr. 02, 2016, 12:30 PM), <https://scroll.in/article/805904/as-nitish-imposes-prohibition-in-bihar-anger-mounts-at-the-imminent-economic-losses>.

11 *Supra* note 2.

*Excerpt from Crime in India***National Crime Records Bureau****Table 5.1 : Cases Reported & Rate of Crime
Committed Against Women During 2015**

	Cases Reported	Percentage contribution to all India total
Bihar	13891	4.2

*Excerpt from Crime in India***National Crime Records Bureau****Table 3A.1 : Crime Against Women (IPC + SLL) – 2018-2020**

	2018	2019	2020
Bihar	16920	18587	15359

This stands in sharp contrast to data for cases reported, victims of crime and rate of crime committed under Section 498A of the Indian Penal Code – all 3 have gone down from 2015 to 2020 (NCRB Crime in India, 2015 (Table 5.2) & 2020 (Table 1A.4)).

*Excerpt from Crime in India***National Crime Records Bureau****Table 5.2 : Cases/Incidences Reported, Victims & Rate of Crimes
Committed Against Women During 2015**

Data on Cruelty By Husband or His Relatives (Section 498-A IPC)			
	Incidences	Victims	Rate
Bihar	3792	3835	7.6

*Excerpt from Crime in India***National Crime Records Bureau****Table 1A.4 : IPC Crimes (Crime Head-wise & State/UT-wise) – 2020**

Data on Cruelty By Husband or His Relatives (Section 498-A IPC)			
	Incidences	Victims	Rate
Bihar	1935	1936	3.3

Based on the above statistics of crime under Section 498-A of the Indian Penal Code, the criminal provision under which cases of domestic violence are generally reported, it may be concluded that domestic violence has gone down with implementation of prohibition and the state of Bihar is actually on its way to achieve the main objective behind imposing such a policy. But, this too has to be read with caution bearing in

mind the patriarchal nature of rural Indian society and also because a large number of cases go unreported due to lethargy of police, family pressure to 'settle', etc.

According to the National Family Health Survey-5 (2019-20), the proportion of ever-married women in the age group of 18-49 years who ever experienced "spousal violence" (defined as physical and/or sexual violence) slightly decreased from about 43% as reported in the National Family Health Survey-4 (2015-16) to 40%.¹² This indicates that so far there has not been a major impact of prohibition in terms of reduction in domestic violence.

Another research concluded that liquor prohibition has led to an increase in crime.¹³ In the same vein, data from the USA has showed that a strong positive correlation between reduction in violence by reducing alcohol consumption could not be established.¹⁴ On the other hand, there is a potential in prohibition to increase violence as black markets get created and subsequently violence may be used for settling disputes even of a commercial, albeit illegal, nature. In fact, such data shows that crime increased in the prohibition era.¹⁵

However, data provided by the Bihar government shows drastic reduction in violence against women and children. Mental and verbal violence reduced from more than 70% to around 10-15%.¹⁶ Physical violence also reduced drastically from more than 50% to only 5%.¹⁷

3. BLACK MARKETING

The intention behind imposition of prohibition is to completely eliminate the market of a product.¹⁸ One drawback of imposing prohibition can be that it criminalises the marketplace and its participants. A major concern is that even if strict enforcement eliminates the legal market, a black market will get established as a result.

Research studies¹⁹ have found that prohibition in the USA failed to curb alcohol consumption. Same fact is established in the context of Bihar. According to the National

12 *State Fact Sheet Bihar*, NATIONAL FAMILY HEALTH SURVEY-5 (2019-20), http://rchiips.org/nfhs/NFHS-5_FCTS/Bihar.pdf (last visited June 28, 2022).

13 Aaditya Dar & Abhilasha Sahay, *Designing Policy in Weak States: Unintended Consequences of Alcohol Prohibition in Bihar* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165159 (last visited June 28, 2022).

14 Jeffrey A. Miron, *Violence and U.S. Prohibitions of Drugs and Alcohol*, NBER WORKING PAPER SERIES (1999), http://www.antonioacasella.eu/archila/MIRON_1999.pdf (last visited June 28, 2022).

15 ROBERT COOTER & THOMAS ULEN, *supra* note 1, at 511.

16 *Supra* note 8.

17 *Id.*

18 CHARLES ROWLEY & FRIEDRICH SCHNEIDER, *THE ENCYCLOPEDIA OF PUBLIC CHOICE* 437 (Springer 2004).

19 Jeffrey A. Miron and Jeffrey Zweibel, *Alcohol Consumption during Prohibition*, NBER WORKING PAPER SERIES (1991), https://www.nber.org/system/files/working_papers/w3675/

Family Health Survey-5 (2019-20), in Bihar more than 15% of men aged 15 years and above consume alcohol.²⁰ It is submitted that enforcement of prohibition in its true spirit has not been achieved as bootlegging and sale of illicit liquor have, in their limited sense, become the 'new normal' in Bihar.

Reports suggest that black marketing of liquor is a common phenomenon in Bihar. In the year 2020, about 29 lakh litres of liquor was seized by Bihar police.²¹ In the period when Bihar last went for state assembly elections, it was reported that the Election Commission had managed to seize about 8 lakh litres of liquor.²² Further, since the black markets cannot resolve disputes through the formal judicial process, they may encourage use of violence to "settle" or "resolve" such disputes. This can aggravate problems encountered in maintaining law and order.

4. ENFORCEMENT COSTS AND POLICING COSTS

Enforcement costs and policing costs must remain low for any economic justification. An increase in these costs diverts the limited resources of law enforcement agencies.

In December 2019, Patna High Court had directed the Bihar government to assess prohibition policy's impact in the light of pendency of more than 2 lakh prohibition-related cases.²³ The Supreme Court of India too made an observation regarding the burden on Bihar's judiciary because of prohibition.²⁴

In February 2020, almost 4 years after prohibition had come into force, it was reported that over 2 lakh prohibition-related cases have been registered in different police stations and about 8,000 persons accused of committing crimes related to prohibition are behind the bars.²⁵ This has also led to extreme overcrowding in correctional facilities. Maintenance and upkeep of such facilities is the responsibility of state. If

w3675.pdf (last visited June 28, 2022). See also Jeffrey A. Miron, *The Effect of Alcohol Prohibition on Alcohol Consumption*, NBER WORKING PAPER SERIES (1999), https://www.nber.org/system/files/working_papers/w7130/w7130.pdf (last visited June 28, 2022).

20 *Supra* note 15.

21 *Properties used for liquor storage in Bihar will be seized and auctioned*, THE TIMES OF INDIA (Feb. 05, 2021, 7:56 PM), <https://timesofindia.indiatimes.com/city/patna/properties-used-for-liquor-storage-in-bihar-will-be-seized-and-auctioned/articleshow/80710241.cms>.

22 Rajesh Kumar, *EC seizes 7.79 litre liquor in dry Bihar*, THE PIONEER (Nov. 04, 2020), <https://www.dailypioneer.com/2020/pioneer-exclusive/ec-seizes-7-79l-litre-liquor-in-dry-bihar.html>.

23 Debashish Karmakar, *Patna HC to Bihar government: Assess impact of prohibition*, THE TIMES OF INDIA (Dec. 06, 2019, 09:28 AM), <https://timesofindia.indiatimes.com/city/patna/hc-to-bihar-government-assess-impact-of-prohibition/articleshow/72390209.cms>.

24 *Enact law for additional courts to deal with pendency of cheque bounce cases: SC suggests Centre*, OUTLOOK (Mar. 04, 2021, 07:33 PM), <https://www.outlookindia.com/newscroll/enact-law-for-additional-courts-to-deal-with-pendency-of-cheque-bounce-cases-sc-suggests-centre/2040639>.

25 Ramashankar & Saeed Khan, *The Social Cost of Prohibition in Bihar and Gujarat*, TOI+ (Feb. 12, 2020, 02:31 PM), <https://timesofindia.indiatimes.com/india/the-social-cost-of-prohibition-in-bihar-and-gujarat/articleshow/72304617.cms>.

the social costs associated with imprisonment²⁶ are considered, one can instantly think of costs related to land allotment, setting up permanent infrastructure, human resources, security, daily expenditure on food, medicines, etc. More than 3 lakh people in total have faced arrest under prohibition laws.²⁷ In such a scenario, one can consider whether this can be termed as efficient utilisation of taxpayer's money. The agencies responsible for maintenance of law and order haven't been able to deliver on the enforcement front. Otherwise, there would not have been registration of lakhs of cases and arrests of more than 48,000 people.²⁸

Prohibition has also led to an increase in corruption.²⁹ It was reported in February 2021 that since the time prohibition was imposed in Bihar, more than 600 government officers and personnel had faced departmental action because of prohibition's improper implementation and more than 180 cops were dismissed from service.³⁰ Police personnel have also lost their lives during enforcement action.³¹

Facts and figures mentioned that prohibition has resulted in creation of difficult circumstances for agencies of the state and for the general public. Conducting recruitment exercises for staff and providing them training are additional costs that may create substantial burden on the state exchequer.

5. LABOUR SAFETY, SECURITY AND WELFARE

When the production and supply of liquor goes "underground" in an illegal market, the safety and security of workers and others employed in the liquor industry gets exposed to a higher degree of risk without any kind of insurance or protection.³²

At one point of time, the top leadership had to ask for help in keeping a check on bootlegging by children.³³ This is a serious issue and can have significant repercussions on future development of the young population.

26 ROBERT COOTER & THOMAS ULEN, *supra* note 1, at 495.

27 *Amid criticism, Nitish Kumar vows to continue liquor ban in Bihar*, MONEYCONTROL (Mar. 02, 2021, 03:03 PM), <https://www.moneycontrol.com/news/politics/amid-criticism-nitish-kumar-vows-to-continue-liquor-ban-in-bihar-6593881.html>.

28 Avinash Kumar, *For the fourth time, Bihar policemen take oath against alcohol consumption*, HINDUSTAN TIMES (Dec. 21, 2020, 09:07 PM), <https://www.hindustantimes.com/patna/for-the-fourth-time-bihar-policemen-take-oath-against-alcohol-consumption/story-zl8hPIQ7ngX4Fvulhj42YI.html>.

29 Dev Raj, *Leaked letter bares booze warts in Bihar*, THE TELEGRAPH ONLINE (Jan. 22, 2021, 12:56 AM), <https://www.telegraphindia.com/india/leaked-letter-bares-booze-warts-in-bihar/cid/1804399>.

30 *Questioned About Liquor Prohibition In Bihar, Nitish Kumar Hits Back*, NDTV (Feb. 27, 2021, 08:37 AM), <https://www.ndtv.com/india-news/questioned-about-liquor-prohibition-in-bihar-nitish-kumar-hits-back-2379727>.

31 *Supra* note 22.

32 JOHN MEADOWCROFT, PROHIBITIONS 260 (Institute of Economic Affairs 2008).

33 Anil Kumar Ojha, *Play watchdog to check bootlegging by kids, Nitish tells women*, HINDUSTAN TIMES (Jan. 30, 2017, 12:05 PM), <https://www.hindustantimes.com/india-news/play-watchdog-to-check-bootlegging-by-kids-nitish-tells-women/story-FzP2P86qixLyCNgcE21CL.html>.

6. INTRODUCTION OF LOWER QUALITY OR MORE DANGEROUS SUBSTITUTES

While analysing prohibition, certain differences in the markets for legal and illegal products such as lack of product information, product potency, etc. have been pointed out.³⁴ Similarly in the context of prohibition in Bihar, it is not hard to fathom that the supply and sale of illicit liquor will fail to ensure delivery of a product which is reasonably safe and fit for human consumption. Consumption of narcotics and illegal drugs has significantly increased after imposition of prohibition.³⁵ This has also led to an increase in the number of drug addicts in the state.³⁶ Hooch tragedies are also not uncommon.

In the American context, it has been concluded that prohibition failed to curb alcohol consumption.³⁷ Prohibition also introduced lower quality or spurious products³⁸ in the market that were neither checked or certified for maintenance of standards nor was there much information available about the product that is up for sale in the market.³⁹

7. INCREASED GOVERNMENT EXPENDITURE

Introducing a 'big-bang' reform calls for pre-planned development of infrastructure that can tolerate the implications. In the case of prohibition, this would have meant large-scale public awareness campaigns, setting up de-addiction centres, availing services of trained medical professionals, psychologists and establishment of other necessary support systems.

Although officially it is claimed that de-addiction centres were set up, awareness was created at the level of schools and village organizations and other activities like formation of human-chain, slogan writing, etc. were taken up, it has been reported

³⁴ *Id.* at 45.

³⁵ Sanjay Kumar, *Bihar drug menace: Amid liquor ban, state seeks spike in substance abuse*, DNA (Sept. 15, 2019, 05:50 AM), <https://www.dnaindia.com/india/report-bihar-drug-menace-amid-liquor-ban-state-sees-spike-in-substance-abuse-2789858>.

³⁶ Megha, *Drug Addiction up in Bihar after liquor ban*, HINDUSTAN TIMES (June 26, 2019, 11:18 AM), <https://www.hindustantimes.com/patna/drug-addiction-up-in-bihar-after-liquor-ban/story-DR0KFSs1MnkPzhuRXXvVSJ.html>.

³⁷ Jeffrey A. Miron, *The Effect of Alcohol Prohibition on Alcohol Consumption*, NBER WORKING PAPER SERIES (1999), https://www.nber.org/system/files/working_papers/w7130/w7130.pdf (last visited June 28, 2022).

³⁸ Vinod Giri, *No to prohibition: Evidence from Indian experiments show that liquor ban does not lead to desired changes*, FINANCIAL EXPRESS (Feb. 20, 2020, 05:00 AM), <https://www.financialexpress.com/opinion/no-to-prohibition-evidence-from-indian-experiments-show-that-liquor-ban-does-not-lead-to-desired-changes/1873450/>.

³⁹ Mark Thornton, *Prices or Markets? The Case of Prohibition*, 5 THE JOUR. OF PRI. & MAR. 45, 48 (2016).

that this wasn't done in a timely manner.⁴⁰ It is submitted that for a state which is lagging behind in industrial growth and participation, these activities create more burden on the limited capacities of the state exchequer.

8. FINANCIAL BURDEN

In case imprisonment proves inefficient in crime reduction, fines can be seen as an alternative.⁴¹ The Bihar Prohibition and Excise (Amendment) Act, 2018 imposed a minimum penalty of fifty thousand rupees on first-time offenders for consumption of liquor. The Bihar Prohibition and Excise (Amendment) Act, 2022 has very recently amended the related provision. Subsequently, the penalty amount is to be notified by the State Government.

It is argued that a major proportion of the population will not be able to pay any hefty amount of fine. According to the Bihar Economic Survey 2020-21, the per capita income at current prices in 2020-21 was INR 46,300. Whether the government was actually hopeful of extracting a first-time fine of fifty thousand rupees or it hoped to create deterrence through the Bihar Prohibition and Excise (Amendment) Act, 2018 can be perceived as one of the main points of contention. It is submitted that given the socio-economic reality of Bihar, neither of these options have yielded so far.

For those who were meaningfully employed or engaged in any productive activity including liquor industry, prohibition will mean loss of workdays and probable loss of livelihood. While implementing a policy like prohibition, the government should have ideally considered the situation of such persons and should have provided alternate jobs. Prohibition also leaves the farmers and suppliers of ingredients and raw materials such as barley, etc. in a deplorable state.⁴² A significant part of the state's population depends on agriculture as the major source of their income. It is submitted that the decision of prohibition may have created certain challenges and hurdles for farmers who were a part of liquor industry's supply chain.

Most undertrials who have been arrested in prohibition-related cases are unable to furnish bail conditions and thus continue to languish behind the bars.⁴³ It reinforces the notion that law serves the powerful while it exploits the powerless, including those lacking financial power.

CONCLUSION

Given the economic effects of prohibition, this research has tried to analyse whether the law and policy of prohibition have led the state of Bihar towards the economic

40 Parth MN, *Prohibition in Bihar has pushed its poor towards cheap drugs and hooch*, SCROLL.IN (Oct. 28, 2020, 01:30 PM), <https://scroll.in/article/976919/prohibition-in-bihar-has-pushed-its-poor-towards-cheap-drugs-and-hooch>.

41 ROBERT COOTER & THOMAS ULEN, *supra* note 1, at 498.

42 JOHN MEADOWCROFT, *supra* note 34, at 262.

43 Praveen Kumar & Vijay Raghavan, *Undertrial Prisoners in Bihar A Study of Liquor Ban Arrests*, 55 ECO. & POL. WEEK. (2020), <https://www.epw.in/journal/2020/7/insight/undertrial-prisoners-bihar.html>.

goal of criminal law that is minimization of social cost of crime⁴⁴ and whether it has helped the government and the society in accomplishing what they had intended to achieve under the heads of criminal and social justice. Although it is difficult to precisely estimate such costs, the points discussed throughout this research should be seen as operating in tandem.

Two hypotheses can be utilized to deter criminals:

1. Deterrence hypothesis – If a society increases the resources that it devotes towards ensuring punishment for criminals⁴⁵, the social costs of harm caused by crime will decrease. In other words, an increase in expected punishment will lead to a decline in crime.⁴⁶
2. Another hypothesis is that for minimizing crime's social costs, socio-economic programs should be taken up in such a way that the quality of life improves. For instance, creating jobs, providing counseling facilities, etc.⁴⁷

Taking both of them as true, optimal crime reduction can probably be achieved by deploying both criminal justice measures and socio-economic programs.⁴⁸ For effective deterrence, punishment should be imposed in such a way that the expected net benefit of crime for the criminal turns out to be negative.⁴⁹

Laws that are not observed and administered efficiently have two-fold consequences – they lead to an increase in the social costs while people lose respect for the legal system.⁵⁰ It is believed that such consequences will not be desirable to any rational person. It has been suggested that rather than completely prohibiting alcohol sale and consumption, tough laws should be made against irresponsible or dangerous behaviour that can be attributed to alcohol consumption.⁵¹ Further, the government should invest in setting up and operationalizing de-addiction centers and for creating awareness.⁵² If need is felt to send wrongdoers to correctional facilities, such facilities must aim at benefitting criminals by rehabilitating them.⁵³

Alternatively, if policymakers wish to reverse their decision on complete prohibition, putting alcohol back in the legal market can be done in numerous ways. This can be

44 ROBERT COOTER & THOMAS ULEN, *supra* note 1, at 470.

45 *Id.* at 488.

46 ROBERT COOTER & THOMAS ULEN, *supra* note 1, at 484.

47 *Id.*

48 *Id.*

49 *Id.* at 453.

50 Upendra Baxi, "The Little Done, the Vast Undone"—Some Reflections on Reading Granville Austin's *the Indian Constitution*, 9 JOUR. OF THE INDIAN LAW INS. 323, 356 (1967).

51 *Supra* note 37.

52 Shivam Vij, *Everything that's wrong with Nitish Kumar comes together in the failure of prohibition*, THE PRINT (Feb. 24, 2020, 05:12 PM), <https://theprint.in/opinion/everything-thats-wrong-with-nitish-kumar-comes-together-in-the-failure-of-prohibition/370072/>.

53 ROBERT COOTER & THOMAS ULEN, *supra* note 1, at 493.

done in different ways – having an industry without any governmental control or having a licensing regime; by prescribing minimum legal drinking age, by creating a regulated environment for consumption or by complete government control on the liquor industry.⁵⁴

This research is an humble attempt made in the direction of understanding the effects of Bihar's liquor prohibition law from an economic viewpoint. It is by no means exhaustive. The aim is to initiate rational discussions on liquor prohibition, its desirability and feasibility in today's time.

⁵⁴ *Id.* at 510.

A Comparative Analysis of the Admissibility of the DNA Evidence in India and the United States of America

Mr. Akshay Jain*

ABSTRACT

DNA is a powerful investigative tool with the potential to transform the criminal justice system. However, the absence of specific legislation in India to regulate DNA technology creates a hindrance for the investigative agencies and the Courts to appreciate it as evidence. Many attempts have been made by parliament to draft a law, but the same has gone in vain due to many legal concerns. The researcher, therefore, critically examines the legal conundrum in India dealing with the admissibility of DNA evidence and compares them with the legal system of the United States.

INTRODUCTION

DNA or deoxyribonucleic acid is the permanent genetic makeup of an individual. Although 99.9% of the individuals have the same genome, the remaining 0.1% show variations¹. This genomic variability also known as polymorphic marker makes the individual identification unique². Forensic scientist uses this genomic variability to distinguish or correlate individuals. Due to this peculiar feature, DNA fingerprinting becomes a powerful tool in criminal investigations to identify suspects at the crime scene. It also aids the Court in identifying the guilty and exonerating the wrongly convicted persons. DNA can be extracted from a wide range of sources like hair strands, saliva, nails, sperm, blood, etc. and even a minuscule amount of DNA can be magnified with the help of modern forensic techniques like Polymerase Chain Reaction (PCR) which makes billions of clones of the DNA sufficient for testing³. This will help the investigative authorities to solve mysterious decades-old rape and

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1 <https://www.genome.gov/about-genomics/fact-sheets/Genetics-vs-Genomics> (last visited on November 11, 2022)

2 <https://www.intechopen.com/chapters/62578> (last visited on November 11, 2022)

3 <https://www.ncbi.nlm.nih.gov/books/NBK26837/> ((last visited on December 1, 2022)

murder cases. Further, the DNA marker can be retained digitally which also helps in the creation of a DNA database which allows the comparative match of the DNA profiles with that of the crime scene DNA samples. However, to regulate the magnificent DNA technology, there must be a law governing it to avoid its misuse by the government and to uphold the rule of law which will go smoothly with the Constitutional rights of the people.

LANDMARK JUDGEMENTS DEALING WITH THE DNA EVIDENCE

The question is whether the DNA test, which requires the collection of a biological sample from any individual, is regarded as an infringement of their fundamental rights. The DNA test has been squarely criticized by many human rights activists for violating the right to privacy which is now recognized as a fundamental right under Article 21, as well as considered to be against the concept of self-incrimination enshrined in Article 20(3) of the Constitution.

DNA TEST AND RIGHT AGAINST SELF INCRIMINATION

Based on the right to silence, the maxim "*nemo tenetur prodre accusare seipsum*" provides immunity against self-incrimination. The expression is explicitly manifest under Article 20(3) of the Constitution, which states that "no person accused of any offence shall be compelled to be a witness against himself"⁴. Therefore, the compulsory taking of testimonial evidence by the accused would be an infringement of his right enshrined under Article 20(3). The following are the landmark cases that govern the admissibility of DNA evidence concerning the right against self-incrimination.

State of Bombay v. Kathi Kalu Oghad⁵

The Supreme Court observed that there is a difference between 'to be a witness' and 'furnishing evidence'. The former includes statements, oral or written, of relevant facts which are based on the personal knowledge of the accused, whereas in the latter case, it involves the production of materials, though relevant, but not dependent on the personal knowledge of the accused. The evidence which comes under the ambit of the latter case is not barred under Article 20 (3) of the Constitution. It follows that evidence such as handwriting and fingerprint impression is allowed under Article 20(3) as it does not depend on the knowledge of the accused. Similarly, DNA fingerprinting evidence is permitted and does not violate Article 20 (3) of the Constitution.

Selvi v. State of Karnataka⁶

The ratio has been reiterated by the Supreme Court wherein the Court held that DNA is a vital tool for linking a suspect with a crime. Hence, furnishing evidence such as DNA and fingerprint impression does not tantamount to a testimonial act under Article 20(3) and therefore, is allowed to be given in evidence.

4 State of U. P. vs. Deoman Upadhyaya, AIR (1960) SC 1125

5 AIR 1961 SC 1808

6 Criminal Appeal No. 1267 Of 2004

DNA TEST AND RIGHT TO PRIVACY

Privacy is now elevated to the fundamental right and therefore, it is important to understand whether the DNA test violates the fundamental right to privacy. Following are the leading cases wherein the Court has critically analysed the issue of DNA testing concerning the fundamental right to privacy.

Sharda v. Dharampal⁷

The question arose before the Supreme Court in divorce proceedings is that whether a medical examination ordered by the Court would be an infringement on the right to privacy. In this case, the appellant's wife challenged the order of the Rajasthan High Court wherein the Court had directed her to undergo a medical test to determine her sanity.

The Supreme Court while upholding the order of the High Court observed that the Court under Section 151 of the Civil Procedure Code has the inherent powers to pass all such orders which are necessary for the ends of justice. The Court held that privacy is not an absolute right and is subjected to reasonable restrictions. In a case when the Court is faced with the competing interests of the parties, such as when one party requests a medical test to seek a divorce based on the unsoundness of mind of the other party and the other party asserts her right to privacy, then it is the duty of the Court to balance these conflicting interests. The Court, therefore, can order medical tests only if the party can prove the strong *prima facie* case in his favour. If a person who has been ordered to undergo a medical test refuses, then an adverse inference might be formed against such a person.

Concerning DNA testing for the administration of justice, the Supreme Court in *Bhabani Prasad Jena v. Convener Secretary, Orissa State Commission for women*⁸ observed that in the cases where the Court faces the conflicting position wherein the person claiming his right to privacy by not submitting himself to DNA testing is directly in conflict with the societal interest in reaching the truth, the Court in such cases must balance these conflicting interest and order such DNA testing only if it is eminently needed.

Justice K.S Puttaswamy (Retd.) v. UOI⁹

In the most celebrated case, the Supreme Court upheld the right to privacy as a fundamental Right. Privacy encompasses all personal intimacies of life including the sanctity of family life, marriage, procreation, home, and sexual orientation. It is an integral part of dignity and therefore, needs to be protected under Article 21 of the Constitution. The Supreme Court further elaborates privacy into negative and positive content wherein the negative content restraint the state from interfering with the life and personal liberty of an individual, the positive content imposes an obligation on the state to protect the privacy not only from the state actors but also from the non-

7 AIR 2003 SC 3450

8 Civil Appeal Nos. 6222-6223 of 2010

9 (2017) 10 SCC 1

state actors. Privacy, therefore, must be protected by creating a robust regime of data protection. The Court also emphasizes that the state should also take into consideration the sensitive balance between individual interests and legitimate state concerns. National security, investigating and preventing crimes, encouraging innovation, etc. are such a few legitimate concerns upon which the state should contemplate while enacting any law.

Like other fundamental Rights, the right to privacy is also not absolute and is subjected to reasonable restrictions. Therefore, any law which impinges upon the right to privacy has to be justified on the test of reasonable restrictions. A triple test has been formulated by the Supreme Court which needs to be satisfied by any law seeking to violate privacy. The three prongs are:

- a) Legality, which postulates the existence of law
- b) Need, is defined in terms of legitimate state aims; which means that the proposed action is necessary to achieve the legitimate aim for the welfare of the people in the democratic setup.
- c) Proportionality ensures a rational nexus between the objects and the means adopted to achieve them.

While considering the proportionality test laid down in Puttaswamy judgment, the supreme Court in the case of Ashok Kumar vs. Raj Kumar¹⁰ observed that the DNA test cannot be ordered in a routine manner, rather, the Court must satisfy the test of proportionality in pursuing the legitimate aim which encompasses the examination of actions which should not be arbitrary and should not have an adverse impact on the person concerned and there should be a reasonable justification for the encroachment over the personal autonomy and privacy. The Supreme Court in the instant case observed that when there is sufficient evidence available to prove the legitimate paternity of the appellant with his late parents in the declaration suit, the ordering of a compulsive DNA test would not only infringe his right to privacy and personal liberty guaranteed by the Constitution but also would not be justified on the test of proportionality.

Though the case of puttaswamy does not directly mention the right to privacy in the context of DNA tests. However, the impact of the case will also be up on the Bill of 2019 as the same makes the provision for retaining the DNA Information in the DNA Database. Hence, the legislation governing DNA technology must satisfy the litmus test provided by the Apex Court.

ADMISSIBILITY OF DNA EVIDENCE IN INDIA

After examining the Constitutional status of the admissibility of DNA evidence, it would be easier to appreciate the legal conundrum in India dealing with DNA testing and evidence. Even though DNA fingerprinting has proven to be an almost infallible technique for identifying individuals throughout the world but colonial-era laws

10 CIVIL APPEAL NO. 6153 OF 2021

limit the use of this technique in criminal and civil cases. The lack of specific legal provisions dealing with the DNA in the Evidence Act and the Code of criminal procedure makes it difficult for investigative agencies to use the technique in criminal cases. The same is the case with the Court where the Court even though bestowed high reliability over the DNA evidence failed to admit it due to many legal and Constitutional concerns. To address this lacuna, the parliament has brought up a Bill¹¹ that provides regulations for the use of DNA profiling in criminal as well as civil cases but the same has not yet been passed due to several human rights concerns. The parliament has also enacted The Criminal Procedure (Identification) Act, 2022 which authorises the taking of measurements for the purpose of identification but this Act is also not free from legal issues, violating several fundamental rights. Therefore, at this juncture, it is important to analyse the various laws that deal with the admissibility of DNA evidence.

CODE OF CRIMINAL PROCEDURE

There are not many provisions in the code of criminal procedure which make specific reference to DNA testing; nonetheless, there are a few provisions in which DNA testing may legitimately be directed. Section 53 of the Code authorizes the police officer of the rank of sub-inspector or above to direct the medical examination of the accused person for the purpose of obtaining any evidence as to the commission of the offence and to use force for the same. Also under section 53A, the medical practitioner acting on the direction of the police officer can examine the person of the accused including the conducting of DNA profiling and prepare the report of such examination which will afford evidence regarding the commission of the offence of rape by the accused. Further, section 54 of the Code authorizes the magistrate to direct the medical examination of the accused on his request which will afford evidence of his innocence.

INDIAN EVIDENCE ACT

The DNA evidence can only be appreciated as an expert opinion under Section 45 of the Indian Evidence Act which makes expert opinion relevant, and if any such opinion is relevant, the grounds on which such opinions are based are also relevant under section 51 of the Evidence Act. Further, the reports of certain experts mentioned under section 293 of the Code of Criminal Procedure are directly admissible without the bar of section 162 of the same Code which provides for the inadmissibility of certain statements made to a police officer in the course of the investigation. However, it is pertinent here to examine who are an expert and also the evidentiary value of their opinion.

Generally, the opinion of any person is inadmissible as it comes into the category of hearsay evidence. However, the Indian Evidence Act has carved out an exception in cases of expert evidence where the opinion of such a person is relevant on account of their special knowledge on the subject. Though it is generally said that the judges

11 DNA technology (use and Application) Regulation Bill, 2019

are expert of all experts but still there are some matters which owing to their technicalities, the Court cannot form an opinion over it. Therefore, the opinion of such persons who have competence in the subject owing to their skills, knowledge, and experience is recognized and admissible in a Court of law. It is not important that the expert must have acquired his knowledge by profession, rather for the evidence to be admissible, it is sufficient to show that he has made a special study over the subject or has acquired the experience therein¹².

The Evidence Act under section 45 only provides the subjects on which the opinions of the experts are relevant. It neither defines who is an expert nor lays down any standard or qualification for the same. The only requirement is that the person should be especially skilled in the subject upon which the Court has to form an opinion. Therefore, in India, it is the judge who decides upon the competency of the expert as a witness¹³.

However, in the United States, the concept of “voir Dire” has been followed wherein the party calling the expert has to prove that the expert is capable to depose by bolstering his educational qualifications and work experiences. In such preliminary inquiry, the opposite counsel can also cross-examine to impeach the credibility of the expert. It is only after examination and cross-examination that the judge decides whether the expert is a competent witness to testify before the judge. The process of voir dire occurs during the trial and the judge is the ultimate authority to decide upon the competency of such an expert¹⁴.

In India, the system of voir dire has not been followed and it is the judge who has to decide upon the credibility of the expert. The Supreme Court observed that “an expert must have adequate knowledge and experience in the field of his subject. The Court must decide on the credibility of the expert by dwelling upon the reasons and materials furnished by the expert in reaching his conclusions¹⁵. The Court must take into consideration the testimony of the expert only when it is convincing, tested and made intelligible to the Courts¹⁶. Generally, the testimony of the factual witness is considered to be more reliable and often supersedes the expert opinion but there are cases such as paternity disputes where the DNA report offered by the medical expert is almost arduous to challenge and is highly reliable in the Court.

In the case of disputed paternity, the Indian Evidence Act provides for conclusive proof under section 112, once it is proved that the marriage is a valid marriage and a child is born out of wedlock during the such marriage or within 280 days of its dissolution along with the proving of access by the husband. In cases where all such conditions are satisfied, the Court would not allow the rebutting of conclusive proof of paternity even by proving the infallible DNA test. However, it is only in 2014

12 Ramesh Chandra Agrawal vs Regency Hospital Ltd., (2009) 9 SCC 709

13 Malay Kumar Ganguly vs Sukumar Mukherjee, (2009) 9 SCC 221

14 <https://ncpro.sog.unc.edu/manual/602-1> (last visited on December 10, 2022)

15 Supra note 12

16 Supra note 13

when the Supreme Court in the case of *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik*¹⁷ allowed the most accurate test of DNA to rebut the conclusive proof of paternity in reaching the truth.

THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022

Repealing the identification of prisoners Act, 1920, the parliament has enacted the Act of 2022 to replace same. The Act not only widens the term “measurement” but also allows forceful collection and storage of the same in the NCRB Database. The inclusive definition of measurements allows the taking of biometric information which not only includes retina and iris scans but also allowed the taking of impressions of fingers, palms and feet along with the taking of photographs of the persons concerned. It also authorizes the police and prison officers to collect and analyse the physical and biological sample, behavioural attributes and also include the examination conducted under section 53 or 53A of the Criminal Procedure Code¹⁸.

Though this Act is considered to be a significant step in criminal justice administration, however, the same is criticized for the violation of the right to privacy included under Article 21 and also for the infringement of the right against self-incrimination embodied under Article 20(3) of the Constitution. The undefined “biological sample and their analysis” not only includes the DNA test within its ambit but also on an expansive interpretation allow the compulsive psychiatrist test including narco-analysis and brain mapping test which is against the verdict of *Selvi vs. the state of Karnataka*¹⁹, thereby violating Article 20(3) of the Constitution. Further, the storing of DNA data in the database makes the data vulnerable to misuse in the absence of Data protection law as there is no accountability for the protection of such data. Moreover, the purpose of digital retaining and sharing of the measurements with other agencies is also not clear. Also, the absence of regulations as provided by the impending DNA technology (use and Application) Regulation Bill, 2019 regarding the accreditation and maintenance of the quality control measures in respect of forensic laboratories may lead to the contamination of the sample and thereby raises concerns over the efficacy of digital DNA data.

DNA TECHNOLOGY (USE AND APPLICATION) REGULATION BILL, 2019

The impending Bill of 2019 seeks to regulate the use and application of DNA profiling for the purpose of identification of persons in civil and criminal matters. The schedule appended to the Bill provides an extensive list of the matters in which DNA profiling can be conducted. The Bill also makes the consent of the person concerned mandatory for the collection of biological samples if the offence is punishable with seven years or less²⁰. The sample so collected will be utilized to extract the DNA information,

17 2014 (5) CTC 680

18 The Criminal Procedure (Identification) Act, 2022, S. 2(1)(b)

19 AIR 2010 SC 1974, (2010) 7 SCC 263

20 The DNA Technology (Use And Application) Regulation Bill, 2019, Clause 21

which will be stored in the regional and national DNA Data Bank under various indices viz. Crime Scene index, a suspects or under-trials index, an offender index, a missing person index and an unknown deceased person index²¹, of which the information stored in the crime scene index will be retained permanently²². The Bill also provides for the establishment of a DNA Regulatory Board, which not only accredits the DNA laboratories to ensure the following of stringent quality control measures while dealing with DNA samples but also supervises the DNA Data Bank to maintain the security and confidentiality of DNA data. The Bill also provides for the punishment of up to three years and a fine of up to one lakh rupees in the cases of (i) unlawful disclosure of DNA information²³, or (ii) unauthorized use of DNA data²⁴, or (iii) unauthorized access to DNA data bank²⁵. Further, the penalty for the unlawful destruction or tampering with biological evidence may extend up to five years and a fine of up to two lakh rupees²⁶.

If enacted by the parliament, this Act will empower the investigating authorities and the Courts to legitimately use the DNA data in civil and criminal matters. Also, the creation of a DNA Data Bank will further add value to the efficiency of criminal investigation by allowing the comparative match of crime scene samples against the information stored in the Database which facilitates easy identification of the suspect. However, the use of DNA Data is criticized on the ground of violating the fundamental right to privacy. As we know that the DNA is the permanent genetic marker which not only facilitates identification but also exposes critical information about the person. As stated above, the Supreme Court in the puttaswamy judgment²⁷ set forth a litmus test of proportionality which is to be adhered to by any law violating the right to privacy. The Bill, however, impinges upon privacy in many respect and therefore, requires modification. For example, under clause 31, the permanent retention of the information in the crime scene index without any objective violates the privacy. Similarly, the failure to incorporate the period of retention up to which the Board is authorized to retain the profile leads to the indefinite retaining of the profiles in other indices which also infringes Article 8 of the European Convention of Human Rights²⁸. The ambiguity also revolves around the retention of witness information in the database under clause 22(1) of the Bill, as in the absence of a witness index, it is not clear in which indices the witness data will be retained because if it is retained in a crime scene index, the witness will not only be at a disadvantage in terms of

21 The DNA Technology (Use And Application) Regulation Bill, 2019, Clause 26

22 The DNA Technology (Use And Application) Regulation Bill, 2019, Clause 31

23 The DNA Technology (Use And Application) Regulation Bill, 2019, Clause 45

24 The DNA Technology (Use And Application) Regulation Bill, 2019, Clause 47

25 The DNA Technology (Use And Application) Regulation Bill, 2019, Clause 48

26 The DNA Technology (Use And Application) Regulation Bill, 2019, Clause 49

27 (2017) 10 SCC 1

28 European Convention On Human Rights, Available at: https://www.echr.coe.int/Documents/Convention_Eng.Pdf (last visited on December 15, 2022)

permanently retaining his data but also he will be subjected to unnecessary crime investigation searches. Additionally, the purpose for which the witness data will be recorded is not specified. Further, not adhering to the 13 Codis loci system as recommended by the law commission of India in its 271 report²⁹ which facilitates the identification only, allows the accessing of more information than mere identification. Though clause 33 provides for identification only, but the breach of the provision attracts no penalty in the Bill. The absence of Data protection law makes the retention of digital data susceptible to misuse, especially when there is no recourse available to the individual in case of grievances. Also, the punishment for the offences provided in the Act is not commensurate to the devastating impact that it may have on the breach and misuse of Data.

ADMISSIBILITY OF DNA EVIDENCE IN THE UNITED STATES

Concerning the admissibility of DNA evidence in the United States, there has always been a debate regarding its relevancy. Though initially, the Court doubts the utilization of forensic techniques in solving cases but later on, the Court after a series of landmark judgments establishes a legal precedent to accept forensic techniques, particularly DNA fingerprinting in solving cases. Following are the landmark cases which sanctioned the using of DNA evidence in Court cases.

Frye v. United States³⁰ (1923)

In 1923, a question was posed before the Supreme Court of the District of Columbia as to whether a lie detector test can be admissible in evidence. In this case, James Alphonzo Frye was convicted of second-degree murder by the District Court. In an appeal before the Supreme Court, he wanted to prove his innocence by proving the result of a lie detector test which he had passed. Lie detector test uses the systolic blood pressure which increases when the subject has the fear of being detected. The Supreme Court doubts the credibility of the lie detector test and argued whether this technique was generally accepted by the scientific community and whether there are sufficient scientific studies available to support Frye's argument that the lie detector test is accurate when it comes to proving the innocence of the accused. The Supreme Court rejected the argument of the accused and observed that the lie detector test is a novel technique that has not been generally accepted within the scientific community. The Court explained:

"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognized, and while Courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the

29 https://lawcommissionofindia.nic.in/report_twentyfirst/ (last visited on December 17, 2022)

30 293 Fed. 1013 (1923)

deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs”³¹.

However, three years later after his conviction by the Supreme Court, he was eventually released as some other person had confessed his guilt. Consequently, the criterion of “General Acceptance” is used for several decades by the Courts as a benchmark for admitting forensic evidence and is popularly known as the Frye standard or Frye test.

For determining the “general acceptance”, the Frye test has laid down a two-step procedure:

1. Recognize in which particular field the scientific principle or discovery falls and also its appropriate scientific community; and
2. Ascertaining whether that particular scientific community has generally accepted that principle or discovery and technology used.

Initially, the majority of Courts followed the Frye test or “general acceptance” principle to determine the admissibility of any forensic evidence but practically, this test was very conservative, limited, and difficult to observe. Even the DNA test was not been able to pass the Frye test until the case of *U.S. v Two Bulls*, 1990³². Therefore, subsequently, the state develops a more lenient Rule, Rule 702 of the Federal Rule of Evidence, for determining the admission of scientific evidence. The rule is given below:

Federal Rule of Evidence 702, 1975³³

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

1. The testimony is based upon sufficient facts or data,
2. The testimony is the product of reliable principles and methods, and
3. The witness has applied the principles and methods reliably to the facts of the case.

Federal Rule of Evidence 702 is more flexible in approach as the strictness of “general acceptance” laid down by the Frye test has been relaxed and for determining the admissibility of scientific evidence, the Court adheres to the standards of reliability and helpfulness, which leads to easy admissibility of scientific evidence in the Court.

U.S. v. Downing³⁴ (1985)

In this case, the District Court based its decision on the testimony of twelve eyewitnesses

31 293 Fed. 1013 (1923)

32 918 F.2d 56 (8th Cir. 1990)

33 https://www.law.cornell.edu/rules/fre/rule_702 (last visited on October 12, 2022)

34 753 F.2d 1224 (1985)

who claimed that John W. Downing had defrauded them. The defence raised the plea of using a psychologist expert to prove that the witnesses are not reliable. However, the Court rejected his plea and found him guilty of mail fraud and wire fraud. In appeal, the U.S. Court of Appeals for the Third Circuit remanded the case back to the District Court and instructed to conduct the evidentiary hearings on the admissibility of expert testimony with the direction that if the Court during the hearing finds that the expert testimony should have been admitted, then the Court should grant a new trial. If not, then the judgment would be reinstated.

In this case, the Court also identified several factors that might help in determining the question of reliability. These factors are:

1. The relationship of the new technique to the established mode of scientific analysis
2. The presence of extensive literature dealing with the new technique
3. The qualification and experience of an expert witness
4. The other uses to which novel techniques can be applied
5. The frequency of erroneous results that may lead to while using the technique

After the hearing, the District Court concludes that expert testimony should not be admissible on the following grounds:

1. The testimony of the psychologist is not sufficiently reliable to aid the jury to come up with an accurate conclusion;
2. If the expert testimony is admitted, then it would lead to confusion and mislead the jury;
3. The eyewitnesses are numerous and their testimonies are corroborated with each other, therefore, the expert testimony would not be of any value.

This case provides for the pre-trial evidentiary hearing in cases where serious doubt is cast over the reliability of evidence. This is an effective and efficient procedure that overrides the strict Frye general acceptance standard to determine reliability.

Andrews v. State of Florida³⁵ (1988)

Tommie Lee Andrews was accused of several serial rape and assaults in the Orlando area. His semen was recovered from one of the crime scenes and the sample was connected to the accused through the DNA fingerprinting. At that time, DNA fingerprinting had not gained much popularity. The Court conducted an evidentiary hearing before admitting the DNA as evidence. The Court while subjected it to the strict Frye test observed that the DNA fingerprinting is reliable in theory, method, and interpretation and is positively reviewed by peers. Though the Court admitted the DNA evidence in the trial but declined the admission of impressive statistical data. However, the trial Court was not able to conclude the hearing and ends up in a hung trial.

35 533 So. 2d 841 (Fla. Dist. Ct. App. 1988)

At the retrial, the Court applied the Downing Relevancy test and Reliability test mentioned under Federal Rule 702 and admitted not only the DNA evidence but also its statistical data. Further, this time the Court concluded the trial in a short span of time by corroborating the DNA evidence with Andrew's fingerprints and identification by photo line-up by a recent victim and convicted him on the basis of DNA Evidence. The accused went on an appeal but the Court affirmed the original conviction. This is the first case in the United States where DNA fingerprinting was used to convict the accused and set up a legal precedent for future cases in the United States to convict the accused on the basis of DNA evidence.

People of the State of New York v. Joseph Castro³⁶ (1989)

In this case, Joseph Castro was accused of the murder of his pregnant neighbour Vilma Ponce and her daughter. Lifecodes Corp. analyzed the blood sample found on Castro's watch and after examination, testified that the DNA obtained from the blood stains found on his watch matched with the DNA of the victim Pounce. The New York Supreme Court after applying the rigorous Frye standard decides on the admissibility of the DNA Test.

The Supreme Court developed a three-prong test to check whether a DNA test is admissible in evidence:

1. Whether the theory that DNA test produces reliable results is generally accepted by the scientific community?
2. Whether there are any techniques available that are capable of producing reliable results and which one of those techniques is generally accepted by the scientific community?
3. Whether the laboratory performs the DNA test by applying accepted scientific techniques in this particular case?

The New York Supreme Court after examining the DNA tests on the benchmark of these three prongs test observed that the DNA fingerprinting techniques and experiments are not novel and are generally accepted by the scientific community in theory as well as in practice. DNA test, therefore, meets the Frye test. As far as the third prong test is considered, it was not met by the Laboratory as the Lifecodes laboratory did not apply the generally accepted scientific techniques in reaching out the DNA test results and therefore, the DNA test in this case ruled inadmissible. Castro's case was never tried but he confessed his guilt in 1989.

The third prong test provides for the stringent experimental standards that must be followed by the laboratory while performing the DNA tests. This prompted the FBI to create its own "Technical Working Group on DNA Analysis Methods" or TWGDAM which provides for the universal recommendation which is now being followed to date.

36 144 Misc. 2d 956 (N.Y. Sup. Ct. 1989)

U.S. v. Matthew Sylvester Two Bulls³⁷ (1990)

In this case, the accused Two Bulls appealed to the U.S. Court of Appeals 8th Circuit from the decision of the U.S. District Court which on the basis of single testimony decides on the general acceptance of DNA Evidence by the scientific community. The Bulls argued that the more stringent Frye test should have been applied by the district Court instead of Rule 702. Also, Bulls disputed the reliability and performance of the DNA test. The appellate Court held that District Court was wrong in admitting the DNA test without having it questioned on the basis of the Frye test. The Court ordered a new pre-trial based on 5 prong standard which consists of the Frye test, Rule 702, and Castro, and also two prong tests which were added by the Court in this particular case to determine the admissibility of DNA evidence. The five-prong tests provided by the Court are:

1. Whether DNA evidence is generally accepted by the scientific community?
2. Whether the testing techniques are performed properly and such techniques are accepted generally by the scientific community?
3. Whether the test is properly performed by the laboratory?
4. Whether the evidence is more prejudicial than probative in this case?
5. Whether the statistics used to determine the probability of someone else having the same genetic characteristics more probative than prejudicial under Rule 403³⁸?

After applying the five-prong tests, the Court admitted the DNA evidence and convicted the accused. The Extensive guidelines provided by the Court in the instant case demonstrate that the DNA evidence is generally accepted in the Courts

People of the State of Illinois v. Reggie E. Miles³⁹ (1991)

In this case, DNA found at the crime scene matched with the DNA of the accused. The test was conducted by the scientists of Cellmark Diagnostics according to newly established guidelines issued by FBI "TWIGDAM". Reggie Miles was convicted by the District Court. On appeal, the accused questioned the technique used by Cellmark Diagnostics claiming that the State did not provide any evidence to support that the technique produced reliable results. The Court dismissed the appeal and validates the DNA evidence which was tested according to "TWIGDAM" guidelines. This case validates the reliability of DNA evidence in the Courts and also bestowed faith on the "TWIGDAM" guidelines for producing reliable DNA results.

37 918 F.2d56 (8th Cir. 1990)

38 Rule 403. Exclusion of relevant evidence; reasons.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Available at: <https://law.justia.com/codes/nebraska/2009/Chapter27/27-403.html> (last visited on December 22, 2022)

39 577 N.E.2d 477 (1991)

Daubert v. Merrell Dow Pharmaceuticals⁴⁰ (1993)

The question involved in this case was whether the Court should give priority to the Frye test over the Federal Rule of Evidence 702 in accepting the testimonies of scientific experts. In this case, the plaintiff claimed that the medicine Bendectin, developed by Merrell Dow Pharmaceuticals, Inc. to treat nausea during pregnancy, was responsible for the abnormalities in the fetuses. In response, Merrell Dow based its claim on several expert testimonies, which testified that in more than thirty published studies involving one hundred and thirty patients, there is no single proof that the medicine caused any birth deformities or abnormality in fetuses. The plaintiff also based his claim on the testimony of experts to prove that the drug indeed cause congenital defects. However, applying the Frye test the District Court rejected the claim of the plaintiff.

The plaintiff appealed to the U.S. Court of Appeals for the Ninth Circuit which also affirmed the application of the Frye Test and dismissed the appeal. The plaintiff then appealed to the U.S. Supreme Court wherein he pleaded that after the enactment of Rule 702 of Federal Rules of Evidence, the Court should have applied Federal Rules and not the Frye test. While concurring with the plaintiff's plea, the Court observed that the purpose of amending the Federal Rules of Evidence was to provide the Court with a wide range of admissible evidence to evaluate the admissibility of scientific tests which mandated that the expert's testimony should be based on the touchstone of reliability and simultaneously relevant to the case. The Supreme Court ruling became known as the "Daubert Standard".

The Court provides five criteria to judge the reliability of any scientific evidence after considering the details of the Frye test and the Federal Rules of Evidence:

1. Has the theory or technique been put to the test?
2. Has the theory or technique undergone peer review and been published?
3. Whether there is any known or potential rate of error for such theory or technique.
4. Whether the theory or technique contains guidelines for regulating the technique's operation.
5. The level of acceptance of the theory or technique within the relevant scientific community.

The Supreme Court remands the case back to the appellate Court to determine whether the trial Court's decision to exclude the expert testimony on which the plaintiff relied was correct under the Daubert standard. The Appellate Circuit Court observed that the trial Court's reasoning for excluding the expert testimony under the Frye test provides adequate justification for exclusion even under the Daubert Standard. Therefore, the appellate Court reinstated the decision of the Trial Court of barring the expert evidence.

The new Daubert Rule lays down extensive guidelines for the admissibility of scientific

40 509 U.S. 579 (1993)

evidence in the Court. The trial judge will determine whether the expert will be testifying "to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue". Post-1993, the Court has been applying the Daubert test to determine the admissibility of DNA evidence. The Daubert case finally demonstrated that the Frye criterion for the inclusion of scientific evidence is superseded by the Federal Rules of Evidence (Rule 702) and ended its exclusive application.

CONCLUSION

DNA evidence, a powerful tool in criminal cases, covers within the ambit of expert evidence. In the United States, the concept of *voir dire* has been followed for the admission of expert testimony where the party calling the expert has to prove that the expert is well qualified and competent to depose before the Court. The expert, thereafter, has to go through examination and cross-examination before the judge, and only if he survives this procedure, his testimony is admitted in evidence. Considering the guidelines for the regulation of DNA evidence, the Courts in the United States through the legal precedents provide extensive guidelines for its admission. The Court initially developed a very stringent test in which the party has to show that the technique is generally accepted within the scientific community. The test is popularly known as the "Frye test" but since the test is difficult to follow, therefore, to relax the guidelines set up by the Frye test, the federal Rule 702 was enacted wherein the party has to prove the reliability of the technique used in the case. Even after the enactment of the federal Rule 702, many Courts were still observing the Frye test which led to confusion about the guidelines to be followed. This ambiguity was subsequently resolved with the Daubert decision, in which the Court established five prongs to determine the admissibility of the expert testimony. Therefore, in the United States "a trial within a trial" is conducted before admitting the expert testimony. However, in India, the concept of *voir dire* has not been followed and the admissibility of the expert opinion rests solely at the discretion of the judge. Further, there is no law in India that regulates the use and application of DNA technology. The absence of guidelines for the admission of DNA evidence leads to widespread confusion among the Courts, resulting in conflicting judgements. Also, investigative agencies feel handicapped when dealing with DNA samples. The parliament has drafted a Bill to create guidelines to manage the DNA fingerprinting technique, but the same has not been enacted owing to many legal and Constitutional concerns. As a result, investigative agencies and Courts are facing enormous legal challenges when dealing with DNA evidence, resulting not only in sluggish trials but also in the improper acquittal of accused persons. Therefore, to empower the criminal justice system, it is imperative to enact the DNA technologies Act which will facilitate easy identification of individuals and helps investigative agencies to detect the suspects by comparing their profile with the profiles retained in the database. Also, the DNA Regulatory Board will supervise the DNA laboratories and DNA Data Bank which will further ensure the security and confidentiality of the information of the individuals. The DNA Bill, if properly drafted and executed, has an improved outcome and expedites the efficiency of the criminal justice system by eliminating the time wasted in following the traditional techniques of investigation and trial.

Mediation in India: Past, Present and Prospects

Mr. Harshit Goel* & Dr. A. Marisport**

ABSTRACT

Mediation is an interest-based dispute resolution mechanism through which the disputing parties may resolve their disputes amicably and without harming their relationship. There are many kinds of medication processes which may be adopted by the parties to the dispute and mediator depending upon the role of the mediator to be played and nature of dispute. Mediation is used in India since ancient period. There have been many legislations where Mediation has been referred for the resolution of the disputes. After Independence, considerable steps have been taken by the legislature and judiciary for encouraging people to take-up mediation as a preferred means of dispute resolution. Considering the significance of mediation in dispute resolution, Indian government has included mediation as one among the dispute resolution under section 89 of CPC. Recently, to codify the mediation in one legislation, Mediation Bill, 2021 has been presented in Rajya Sabha. In this article the author is going to analyse interest based and right based resolution mechanisms, definition of mediation and its characteristics, different types of mediation processes, difference between mediation and conciliation, evolution of mediation in India, legal framework and government policies on mediation and how Indian judiciary facilitates and monitor mediation settlement and a critical analysis has been made of the Mediation Bill, 2021. At the end, authors suggest ways to make mediation as a most preferred method of dispute resolution.

Keywords: Mediation in India, interest-based resolution mechanism, conciliation, Mediation Bill, 2021.

INTRODUCTION

Abraham Lincoln said “Discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time”.

After Independence, with the focus on developing the economy as well as making India a welfare state, it is most important that the people among themselves resolve

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the disputes amicably. Further with the increasing population and globalization, the burden on traditional judicial system has increased manifold. While the development of infrastructure and manpower for the judicial system is not in pace with the increasing burden on the judicial system. Therefore, it was felt to resort to the Alternative Dispute Resolution Mechanisms and Mediation is one among them.

Mediation is a one of the most frequently used Alternative Dispute Resolution Mechanism. In Mediation, mediator tries to mediate the dispute between the disputing parties by bringing them to the negotiation table, assisting them to arrive on a settlement and if the parties agrees, draws a settlement agreement or mediation award. It is interest-based dispute resolution mechanism wherein dispute between the disputants is resolved amicably and at the same time interest of both the parties is also protected.

In this Article, a distinction has been made between Interest Based and Right Based Dispute Resolution Mechanisms specially highlighting the importance of interest-based dispute resolution mechanisms since mediation is one of it. Then different types of mediation namely, Facilitative Mediation, Evaluative Mediation and Transformative Mediation have been discussed to understand the difference in the role played by the mediator. After this, the history and evolution of Mediation in India has been discussed. Legal provisions with regards to the Mediation has been discussed elaborately. The recent Mediation Bill, 2021 which is presented in Rajya Sabha has been critically analysed. A discussion has been made with regards to the disputes which can be referred for Mediation and which cannot be. At the end conclusion and suggestions has been made for adopting Mediation as a means of dispute resolution.

INTEREST BASED AND RIGHT BASED DISPUTE RESOLUTION MECHANISMS

Dispute resolution mechanisms are broadly classified into two types,

- 1) Right based dispute resolution
- 2) Interest based dispute resolution.

In right based dispute resolution, the dispute shall be resolved on the basis of who is right and who is wrong. In right based dispute resolution, the disputants can seek certain remedies as specified in the law. In this approach, rights of the individual is the basis of resolution of the disputes. In this approach, everyone is treated equally in terms of their rights and their treatment. However, in this approach emotional issues and interests of the parties are not taken care. This approach is generally adopted in the adversarial ways of dispute resolution wherein disputants try to prove their rights above others. It results in one party getting succeed while other one failing and end-up with anger and frustration.¹

1 SUZANNE MCCORKLE, MELANIE J. REESE, *MEDIATION THEORY AND PRACTICE* 9 (3rd ed. 2018) (Available at: https://in.sagepub.com/sites/default/files/upm-assets/61746_book_item_61746.pdf).

Whereas, in interest-based dispute resolution, the dispute shall be resolved through the interest of respective parties in which, all disputants will satisfy on the resolution outcome. In interest-based dispute resolution, the parties come up with new solutions/option which is legal and ensure the benefits of both parties. In this approach, the needs of the parties are focused upon wherein their feelings and concerns is also given importance. In this approach, parties themselves resolve their dispute keeping in mind the interests of the other and may seek help of third neutral person.²

Mediation is known as third-party facilitated negotiation and interest-based dispute resolution mechanism. A neutral third person called as mediator plays a pivotal but passive role during the whole process of mediation by facilitating the disputants to arrive on a settlement. Parties to the dispute resolve their dispute keeping interest of each other in mind and mediator helping them to reach a resolution.

MEDIATION: DEFINITION

Mediation is a method of alternative dispute resolution wherein a third neutral person known as mediator helps the disputants to arrive on a mutually acceptable resolution taking care of the interests of the parties. It has been defined by different authors in many ways. Renowned author Shriram Panchu defines Mediation in following words: "Mediation is a process in which the mediator, an external person who is neutral to the dispute, works with the parties to find a solution which is acceptable to all of them."

Henry J. Brown and Arthur L. Mariot in their book "ADR Principles and Practice", defines mediation as a facilitative process in which "disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication."³

In "Dispute Resolution: Negotiation, Mediation and other processes" by Stephen B. Goldberg, Frank E.A. Sander and Nancy H. Rogers, it is stated as follows: "Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties. Despite the lack of 'teeth' in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others' views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to

² *Id.* 11

³ HENRY J. BROWN, ARTHUR L. MARIOT, ADR PRINCIPLES AND PRACTICE 127 (2nd Ed. 1997)

settlement, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.”⁴

KEY CHARACTERISTICS OF MEDIATION:

i) Creates Win-Win situation of both parties:

Since, Mediation is an interest-based dispute resolution mechanism, the parties can go for common solution which will benefit both parties. Through the expansion of various options the parties will be in win-win situation which is not possible in adjudicatory dispute resolution mechanism. Mediation given autonomy to the disputants. The result of the mediation is not binding on them. If the parties feels that their interests are not taken care of then they are not bound by the settlement arrived at. The win-win situation arrived at both the parties helps them to settle the dispute.

ii) Preservation of the future relationship:

Mediation will help the parties to understand the interest of each other. Interest may be common or conflicting. Hence, the Mediator facilitates to find the common interest of the parties and highlight the importance the common interest all the time and ensure that the settlement of conflicting interest so that the future relationship would not be hampered. However, in the adjudicatory process, parties end-up developing feeling of enmity towards each other which is not fruitful for anyone.

iii) Voluntary process

Mediation is a process which is generally adopted by the parties to the dispute voluntarily by themselves. Further the entire process is based upon the voluntary participation by the disputants. Even in court referred mediation, court takes consent of the disputants and then refer them for the mediation. The voluntary nature of the process makes it convenient for the disputants to reach on a mutually acceptable settlement.

iv) Cost and time effective

Disputes get settled with the help of mediation in a very short period of time. And since the dispute is resolved with a win-win situation, it does not go in further litigation and the dispute comes to an end. If compared with regular litigation, dispute takes years in courts to get settled. Resulting in heavy cost incurred as well as time spent.

v) Confidentiality:

Commercial disputants want their disputes and settlement outcome should be kept confidential for preserving their business stability. Likewise, matrimonial

⁴ Stephen B. Goldberg, Frank E.a. Sander, Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation And Other Processes* 123 (3rd Ed., 1999).

disputants want their private matters should not be known to the public. the entire mediation proceedings including the outcome of the mediation must be kept confidential by the disputing parties as well as mediator. The mediator has further duty of not disclose the information given by one party to the other party during caucus. This confidentiality must be followed in court annexed mediation by the mediator and parties in the mediation.

The Hon'ble Supreme Court of India has elaborated the confidentiality in the Mediation process in *Moti Ram tr. LRs v. Ashok Kumar*⁵. Court observed that the happenings in the mediation proceedings must not be disclosed as it will lead to breach of confidentiality. On a successful settlement of the dispute through mediation, what has transpired to reach on the settlement agreement is not disclosed and only the settlement agreement is provided to the court. Similarly, in case mediation is unsuccessful, mediator must not disclose the happenings of the mediation room in his report.

In *Mrsrama Aggarwal v. Department of Legal Affairs* case,⁶ the RTI petitioner had asked the authorities to furnish the status of the mediation proceedings including the exchange of documents between herself and her husband. In her RTI petition she had highlighted that this information is very much required for her divorce and domestic violence cases filed in various courts. The national commission held that Information regarding negotiation, mediation, conciliation and counselling will fall under exempted clause of information given in fiduciary capacity and also private/personal information of another spouse and hence shall not be disclosed.

The National Information Commission emphasised the importance of confidentiality of mediation and stated that

“in the interest of conciliation in general as an alternative dispute proceedings there is a need to protect the confidentiality. The moment the proceedings of the mediation are allowed to be disclosed in the form of certified copies under RTI Act, or evidence in other proceedings or publicized openly, the parties will not prefer mediation or conciliation, which will increase pendency, stress and burden on the courts. Further delay in the disposal of marital dispute resolutions could affect several families. Even the parties would lose possibility of resolving the disputes. Mediation is best alternative dispute resolution process for domestic disputes, only because the parties cannot use this proceeding for obtaining the material to use in litigation.”⁷

The National Information commission further held that the mechanism of RTI cannot be allowed to be used as source to get information of other spouse and

5 *Moti Ram Tr. LRs and Anr. v. Ashok Kumar and Anr.*, (2011) 1 SCC 466.

6 Central Information Commission, *Mrsrama Aggarwal vs Department Of Legal Affairs* (Aug 8, 2015) (Available at: <https://indiankanoon.org/doc/3176933/>)

7 *Id.*

harass the other spouse in courts. Maintaining the confidentiality and privacy of mediation proceedings serves a greater public interest than its disclosure.⁸

TYPES OF MEDIATION

Mediation is a method of resolving the dispute among the people keeping in mind the interests of them. Based upon the role to be played by the mediator and the nature of dispute, mediation is of mainly three types on the basis of method to be followed during mediation i.e., Facilitative Mediation, Evaluative Mediation and Transformative Mediation.

Facilitative mediation is the traditional mediation wherein the mediator helps the parties to negotiate the dispute. Mediator encourages the parties to settle the dispute amicably by communication. In this mediation, mediator avoids suggesting his views on solutions, rather asks parties to reach a solution voluntarily which is mutually beneficial for the parties. Under this method, parties are at freedom to create their own solutions that helps them to resolve their dispute.⁹

In Evaluative Mediation, mediator evaluates the position and cases of the disputants and suggesting a resolution to the parties by explaining the practical implications of the same. This type of mediation is generally used in court mandated mediation wherein he explains the implications of legal provisions and procedures and suggest outcome. Overall, the mediator has to play a very active role on the whole process¹⁰

In Transformative Mediation, mediator tries to transform the views of the parties towards each other's interest and needs. In this method, the relationship of the parties is given importance and tried to being restored to a collaborative relationship. Mediator gives direction to bring the attention of the parties to the needs, interest, values and points of view of the disputants.¹¹

Apart from these, Mediation can be court annexed mediation, Private Mediation and community mediation. In the Court annexed mediation, the mediation service is provided by the Court. It is considered as a part and parcel of the judicial system. The mediators may be a judicial officer or an advocate and may be appointed by court. There is requirement of compulsory MCPC training for the mediator. While in private mediation, private persons or private mediation institute provides mediation services. Parties or disputants are free to choose the mediator of their own choice. It is not a part of formal judicial system.

8 *Id.*

9 Ananya Patwardhan, *A-Z of ADR: Mediation – Understanding Mediation*, BIMACC.ORG (Sep 18, 2020) (Available at: <https://www.bimacc.org/a-z-of-adr-mediation-understanding-mediation/>)

10 Katie Shonk, *Types of Mediation: Choose the type Best suited to your conflict*, PON Daily Blog(Dec 6, 2021) (Available at:<https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/>)

11 *Types of Mediation: Evaluative, Facilitative and Transformative*, ADR Times (Mar 25, 2021) (Available at: <https://www.adrtimes.com/types-of-mediation/>)

Advantage of court annexed mediation centres has been highlighted in the Mediation manual by noting the role played by the judges, lawyers and litigants in justice delivery system. In court annexed mediation centres, the settlement agreement is arrived at by mutual participation of the actors of the justice delivery system. When a case is referred to the mediation centre by the Court, it is not abandoned by the court but is referred to mediation within the judicial system. Generally, the lawyers representing the clients in the court represents them during the mediation proceedings. And the litigants also get to play active role in the whole mediation process. It results in building the confidence in the system as all the actors plays active role and similar acceptance and confidence is posed in the mediation proceedings as posed in judicial system.¹²

Community Mediation is a concept which is being used in India since ages in different forms specially in panchayats. It is a process for resolving the disputes and differences between individuals, groups and organization. It is a localized dispute resolution mechanism to maintain peace and harmony among individuals. It gives chance to groups to address their differences and address them.¹³ Community Mediation has got recognition in Mediation Bill, 2021.¹⁴ It provides for community mediation to be attempted to resolve disputes in community to maintain peace and harmony.

DIFFERENCE BETWEEN CONCILIATION AND MEDIATION

Mediation and Conciliation has not been differentiated uniformly across the globe. Both the terms have been used interchangeably by jurists, practitioners, academicians as well as in various legislations. For example the Industrial Disputes Act states that Conciliation officers are "charged with the duty of mediating and promoting settlement of industrial disputes."¹⁵

Henry J. Brown explained that "Mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques, and skills to help them to negotiate an agreed resolution of their dispute without adjudication."¹⁶

One of the renowned textbooks on ADR stated that "Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties."¹⁷

12 Mediation Training Manual of India, Medaiton and Conciliation Project Committee, Supreme Court of India, Delhi (Available at: <https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>)

13 *Community Mediation Basics*, Aboutrsi.org (Available at: <https://www.aboutrsi.org/special-topics/community-mediation-basics>).

14 The Mediation Bill, 2021 Chapter 10, No. XLIII of 2021 (India).

15 The Industrial Disputes Act, 1947 § 4(1), No. 14, Acts of Parliament, 1947 (India).

16 HENRY, *supra* note 3.

17 STEPHEN, *Supra* note 4.

Justice M. Jagannadha Rao highlighted that in India Conciliator has wider powers than a mediator. "The conciliator can make a proposal for settlement and he can formulate and reformulate the terms of settlement of the dispute whereas, the mediator facilitates the parties to come with settlement."¹⁸ He compared the practices followed and meaning given to both the terms worldwide and compared with UNCITRAL Conciliation Rules and held that both Mediation and Conciliation differs in process.¹⁹ However, its pertinent to highlight the recent UNCITRAL model Law on Mediation and Mediation Convention have stipulated that Mediation and Conciliation terms are interchangeable.

Sriram Panchu in his book "Mediation Practice & Law" opines that there is no difference between mediation and conciliation and both are synonymous and interchangeable.²⁰ He refers to the Salem Bar Association judgment and Ravi Aggarwal v. Anil Jagota²¹ to point out the anomalies of referring two terms differently.

The authors are of the opinion that there is no difference between the two terms. The process of mediation covers the process of conciliation i.e. both are same specially in the evaluative mediation. Further the question of difference between conciliation and mediation would become only of academic importance because the Mediation Bill of 2021 answers the question by negating the difference between the two.

HISTORY AND DEVELOPMENT OF MEDIATION IN INDIA

Consensual dispute resolution mechanisms are in use in India for resolution of disputes since ancient and medieval period. Smritis mentions about different forums of dispute forums including Puga or Gana, Sereni and Kula which were conciliatory and non-adversarial bodies.²² Panchayats were very commonly deciding the disputes among the villagers by promoting mutual settlement.

However, during British regime in India, conciliatory dispute resolution bodies were replaced by courts. Formal uniform court system was established all over India to adjudicate upon cases based on adversarial system. With the passage of time, entire system of dispute resolution was dominated by litigation and courts. Courts were adjudicating disputes on the basis of English Law, Common Law Principles and codified law.²³ This adjudication system was continued even after independence.

But over time, with the development of economy and increasing population, the pressure on judicial system increased manifold. It resulted in increase in pendency

18 Justice M. Jagannadha Rao, Concepts of Conciliation and Mediation and Their Differences (https://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf)

19 *Id.*

20 SHRIRAM PANCHU, *MEDIATION PRACTICE AND LAW: THE PATH TO SUCCESSFUL DISPUTE RESOLUTION* 304, (3rd ed. 2021).

21 Ravi Aggarwal v. Anil Jagota, (2009) SCC Online Del 14759

22 PM Bakshi, *Arbitration Law – An Introduction* 2, (1sted. 1986).

23 Anirban Chakraborty, *Law & Practice of Alternative Dispute Resolution in India-a Detailed Analysis* 16, (2016).

of cases in courts, lack of sufficient resources, decreasing faith of the people in the judicial system.

Therefore, to address the above issues, Alternative Dispute Resolution Mechanisms were focused upon. There are many Alternative Dispute Resolution Mechanisms, however, for the purpose of current Article, only Mediation has been discussed.

After realising that the court system has become infective, expensive and inaccessible for the citizens, “the International Centre for Alternative Dispute Resolution” (ICADR) was established in 1995. Shri P.V. Narasimha Rao, then Prime Minister of India had observed that there is need of increasing the speed of resolving the disputes in the judiciary. At the same time he also noted that only judiciary cannot reduce the burden of cases. Litigants are required to be encouraged to adopt ADR mechanisms for settlement of their disputes.

In 1996, Arbitration and Conciliation Act was enacted. It gave statutory recognition to Conciliation. That time conciliation and Mediation was used interchangeably. However, the act created a minute difference between the two by only recognising conciliation and not mediation for resolving the disputes amicably.

Mediation Movement in India started in late nineties. The Hon’ble Supreme Court of India undertook a study on “Delay in Indian Justice system” in 1995-96 along with “the Institute for Study and Development of Legal Systems”(ISDLS). The study was undertaken to find out the solutions of addressing the delays in justice system. Data was collected from all across the nation and a detailed review of the situation was done. Various suggestions were made including promotion of Mediation for settlement of disputes. Post the study, ISDLS supported mediation movement in India by sending its trainers for providing training and many training sessions were conducted and mediation centres were established.

Amendment brought by Civil Procedure Code (Amendment) Act, 1999 gave statutory recognition to mediation. Section 89 was inserted in Civil Procedure Code. It provides for referring the disputing parties for mediation for resolving the dispute amicably and arrive at a settlement agreement.²⁴ The amendment was upheld by the Hon’ble Supreme Court in landmark case of Salem Advocate Bar Association²⁵ wherein the court held that it is mandatory for civil courts to try to settle the disputes by referring to alternative dispute resolution mechanisms. This judgment played crucial role in making mediation as an important part of dispute resolution mechanisms.

“In 2002, the Chief Justice of India had called a meeting of all High Court judges for emphasizing the importance of mediation and the requirement of implementation of section 89 of CPC. In January 2003, AMLEAD and Gujarat Law Society have developed 32 hours certificate course on mediation. The U.S. Educational Foundation in India (USEFI) had conducted training workshops at Jodhpur, Hyderabad, and Bombay in June 2003. The first court-annexed mediation center got established at Chennai High

24 Code of Civil Procedure, 1908, § 89, No. 5, Acts of Parliament, 1908 (India).

25 Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC 344.

Court on April 1, 2005. After this, many courts annexed mediation centers got established in various High Courts. Delhi District Courts asked ISDLS to trained their judges as mediators and established court-annexed mediation centers in Trial Courts. Karnataka High Court also established a court-annexed mediationcenter with the help of ISDLS.

On 2005 Justice Mr R.C. Lahoti, then Chief Justice of India had constituted The Mediation and Conciliation Project Committee (MCPC) for the promotion of mediation. This committee consists of Supreme Court judges, High Court judges, advocates, government secretaries and members from NLSA. It had proposed a pilot project of judicial mediation in Tis Hazari Courts. Based on the success of this project, the committee had extended the same project in other courts in Delhi and across the country. Now court-annexed mediation centers are functioning in many trial courts across the country including Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat.

MCPC has been entrusted the task of providing training to the mediators, trainees, judges. MCPC has proposed 40 hours of training program coupled with 10 actual mediations as a requirement for a person to get mediation accreditation from MCPC. It had conducted 52 mediation training program across the country till 2010. MCPC has framed a special 20 hours training program for trainers. A person who is an accredited mediator by MCPC and he has conducted at least 50 mediation is eligible to attend this training program."²⁶

Law Commission in its 222nd Report recommended that "Justice in all its facets – Social, economic and political – is required to be rendered to the masses of this country without any further loss of time – the need of the hour..... the legislature, the executive and the judiciary join together to find ways and means for providing to the Indian poor equal access to the State's justice system."

LEGAL PROVISIONS ON MEDIATION

The concept of mediation got first time recognition by the legislature in India under Industrial Disputes Act, 1947. Section 4 of the of the Act provides for the mediating the disputes and settlement of industrial disputes by the conciliator. However, it is to be noted that there is no specific legislation which provides for the process to be followed for mediation. Part III of the "Arbitration and Conciliation Act, 1996" provides for Conciliation. It lays down the entire conciliation process, safeguards, recognition to be given to the settlement agreement arrived at etc. Similar kind of detailed legislation is even required for Mediation as well.

Mediation is always been a preferred means of settlement of disputes related with family issues. Section 14 of Hindu Marriage Act, 1955 provides for the court to try to reconcile the dispute between the spouses. Similar provision has been provided under Special Marriage Act, 1954 under Section 29 of that Act. Similar provision has

²⁶ Dr. A. Marisport, *Resolving Pending Cases Through Alternative Dispute Resolution under Section 89 of Civil Procedure Code: A Case Study*, Department of Justice, Ministry of Law and Justice, Government of India (2019) (Available at: <https://doj.gov.in/sites/default/files/GNLU.pdf>)

been inserted by the legislature in the year 1976 in CPC by inserting Order XXXIIA. Rule 4 of Order XXXIIA provides for the court to try for settlement of dispute between the parties for the matter concerning the family dispute.

Section 89 of Civil Procedure code, 1908 was inserted in CPC by an amendment in 1999 which provides for settlement of disputes amicably outside the Court. It empowers the Court to refer the disputes to different mechanisms of alternate dispute resolution including mediation. It empowers the court to effect a compromise between the parties as per the prescribed procedure. This amendment played a very important role in encouraging citizens to settle their disputes with the help of mediation. The amendment was upheld by the Supreme Court in Salem Bar Association Case.²⁷

With regards to commercial disputes, a very important provision was made in Companies Act, 2013. Section 442 of the Act provides for maintaining a panel of experts in Mediation and Conciliation. And the parties to the dispute may apply for referring the same to the panel at any stage for mediating the dispute. Empowered by the above Section, the Central Government framed the “Companies (Mediation and Conciliation) Rules, 2016” which provides for the qualifications of mediators and the detailed procedure to be followed for the settlement of the dispute.

Another amendment made in 2018 to encourage mediation was by inserting Chapter IIIA providing for Pre-Institution Mediation and Settlement in the “Commercial Courts Act, 2015”. It provides for mandatory mediation in case a suit does not require urgent interim relief. The Central Government framed Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 wherein the Mediation process has been laid down.

United Nation General Assembly adopted the “United Nations Convention on International Settlement Agreements resulting from Mediation” in 2018.²⁸ India has also signed the same in 2019.²⁹ The convention provides a framework for the enforcement of the international settlement agreements resulting from the mediation between the international parties. The convention shall make it easier for international parties to invoke mediation settlement agreement in the signatory country. Resultantly, mediation shall become a preferred means of settlement of disputes among international corporate parties.

A laudable step was taken by the Legislature by enacting a separate chapter under Consumer Protection Act, 2019 for Mediation. It provides for establishment of Consumer Mediation Cell with each District Commissions, State Commissions and National Commission. It also provides for the detailed procedure to be followed in relation to

²⁷ Salem *supra* note 25

²⁸ United Nations Convention on International Settlement Agreements Resulting from Mediation, (2019) (Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf)

²⁹ Cabinet approves signing of the UN Convention on International Settlement Agreements resulting from mediation by India, PIB Delhi, (Jul 31 2019) (Available at: <https://pib.gov.in/PressReleaseframePage.aspx?PRID=1580824>).

mediation proceedings, settlement agreement, disclosures to me made by mediators etc.

The Hon'ble Supreme Court in the case of *MR Krishna Murthi v. New India Assurance Co. Ltd.*³⁰ has asked the central government "to also consider the feasibility of enacting Indian Mediation Act to take care of various aspects of mediation in general". The Court referred to the mediation in general and its importance in resolving the disputes amicably. It further recommended for the establishment of Motor Accidents Mediation Authority for mediating the disputes relating to accident claims.

Chief Justice of India, Hon'ble Justice NV Ramana, in his address at the inaugural session of the "Singapore-India Mediation Summit, 2021" stressed upon the need of requirement of framing a law for mediation. He also pointed out the need of making mediation as a mandatory step for dispute resolution process.³¹

With the increasing demand of a legislation with regard to Mediation, the Ministry of Law and Justice came up with a draft Mediation Bill on October 29, 2021. Ministry issued a circular dated November 05, 2021 inviting comments and suggestions on the draft Bill from all the interested stakeholders.³² The Mediation Bill, 2021 was introduced in Rajya Sabha on December 20, 2021. And the same day it was referred to the Standing Committee. The Bill basically aims for promotion of use of mediation for resolving the disputes amicably. The Bill has been discussed critically in the next section.

THE MEDIATION BILL, 2021

By drafting the Mediation Bill, 2021 and presenting it in the Rajya Sabha, Government has taken a great initiative to promote and facilitate mediation as means of settlement of the disputes. The Bill provides for the Mediation, Mediation Agreements, defines jurisdiction of the court, makes provisions regarding mediators and conflict of interest, lays down detailed provisions regarding the mediation proceedings and process as well as enforceability of settlement agreement arrived at. These provisions are similar to the provisions for arbitration provided in the Arbitration and Conciliation Act, 1996. Further the Bill recognises Online Mediation and Community Mediation. The Bill also has provisions for establishing the Mediation Council of India whose primary duty is to promote and facilitate mediation as an effective means of resolution of the disputes. The Bill makes the provisions of the Bill having overriding effect to other legislations providing for mediation and conciliation except few legislations provided in the second schedule of the Bill. Another important aspect of the Bill is to give recognition to Mediation Centres or institutions to promote institutional mediation.

30 2019 SCC Online SC 315

31 Shriram Panchu, Nandini Gore, *Understanding the Mediation Bill*, Hindustan Times (Jan 03, 2022) (Available at: <https://www.hindustantimes.com/opinion/understanding-the-mediation-bill-101641230985397.html>).

32 *Draft Mediation Bill issued for Public Consultation*, PIB Delhi (Nov 05, 2021) (Available at: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1769531>).

Further the Bill makes amendments in various other statutes like Consumer protection Act, 2019, Companies Act, 2013 wherein mediation is referred and incorporates the provisions of Bill to be referred for the settlement of the disputes.

The Mediation Bill is important towards promotion of mediation to be preferred for resolution of the disputes. However, there are few shortcomings of the Bill that are required to be addressed:

- (a) Section 3(f) of the Bill defines international mediation wherein if one of the party is from outside India, it qualifies to be an international mediation. There is no special recognition given to international mediation with respect to the procedure to be followed in it as well as for the enforcement of the settlement agreement arrived at. Section 28 of the Bill provides for the Enforcement of mediated settlement agreement wherein the agreement is considered as a decree or judgement passed by a civil court.³³ With regards to enforcement of International Settlement Agreement, reference is required to be made to United Nations Convention on International Settlement Agreements resulting from Mediation to which India is a signatory. Article 1 (3) of the Convention excludes its applicability to the settlement agreements which are enforceable as a judgement in the Courts.³⁴

Here, is the contradiction between Mediation Bill, 2021 and the UN Convention as the Bill provides for enforcement of the settlement agreement in the similar manner as of an enforcement of the judgment of civil court and the same agreement shall not be enforced under the provisions of the UN Convention as per the Article 1 (3). This would result in discouraging foreign nationals to settle the dispute through mediation in India as the benefits of the UN convention will not be available to them. Since, India is a signatory to the convention, it is an obligation towards international community to honour the convention. For making mediation a preferred means of settlement of dispute by the international corporates, it is necessary that the UN Convention be given a statutory recognition in the same manner as "New York Convention" and "Geneva Convention" been recognized under Part II of the "Arbitration and Conciliation Act, 1996". However, the Mediation Bill, 2021 fails to do the same.

- (b) Section 26 of the Bill provides for Court annexed mediation. It provides that the mediation conducted at the Court annexed mediation centres shall be conducted in accordance with the rules framed by the Supreme Court or the High Courts and not under the procedure prescribed under this proposed Bill. One of the purposes of the Bill is to bring uniformity in the mediation procedure. However, by creating exception for court annexed mediation, the same purpose has not been fulfilled.

³³ *Supra* note 14, § 28(2)

³⁴ *Supra* note 28, art 1(3)

- (c) Section 29 of the Bill provides four grounds for challenging the mediation settlement agreement namely, fraud, corruption, impersonation and dispute not fit for mediation. However, considering the wide interpretations given to the above terms by various judgments of the courts, it should have been defined by the legislature so that challenge to the agreement may have been limited.
- (d) A separate part may have been made for the enforcement of the International settlement agreement arrived by mediation held outside India. The said part would be in the form of application of United Nations Convention on International Settlement Agreements resulting from Mediation. Similar provisions are there for the enforcement of international arbitral awards the under Part II of the Arbitration and Conciliation Act, 1996.

DISPUTES WHICH CAN BE REFERRED TO MEDIATION

The capability of mediation referral of a dispute depends on the nature the dispute. The Mediation Manual of India has cited the verdict of the Supreme Court in *Afcons Infrastructure case*³⁵ and reaffirmed that certain disputes are capable of resolution under ADR mechanisms including Mediation. And there are some disputes which are not capable of resolution through Mediation.

The following disputes can be settled through ADR mechanisms including mediation-

1. "All cases relating to trade, commerce and contracts,
 - i. disputes arising out of contracts (including all money suits)
 - ii. disputes relating to specific performance
 - iii. disputes between suppliers and customers
 - iv. disputes between bankers and customers
 - v. disputes between developers/builders and customers
 - vi. disputes between landlords and tenants/licensor and licensees
 - vii. disputes between insurer and insured
2. All cases arising from strained or soured relationships, including
 - a. disputes relating to matrimonial causes, maintenance, custody of children
 - b. disputes relating to partition/division among family members/coparceners/co-owners
 - c. disputes relating to partnership among partners
3. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
 - i. disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.)

³⁵ *Afcons infrastructure and Ors. v. Cherian Verkay Construction and Ors.*, 2010 (8) SCC 24

- ii. disputes between employers and employees
- iii. disputes among members of societies/associations/apartment owners' associations
- 4. All cases relating to tortious liability, including
 - i. claims for compensation in motor accidents/other accidents
 - ii. All consumer disputes"³⁶

Lot of commercial disputes are resolved through mediation in India. These disputes include complex construction claims and intellectual property claims. In a newspaper statement, Roche and Glenmark stated that they have arrived on a settlement agreement regarding cancer medicine Erlotinib Hydrochloride and disposed litigation on the product.³⁷ Based on this out of court mediation settlement, Delhi High Court in December, 2015, Justice Hima Kohli disposed of the suit between by Roche and Glenmark related to the patent dispute.

The following disputes are not capable of settle through any form of ADR mechanism including mediation:

- 1) Representative suits involving public interest
- 2) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.
- 3) Election disputes
- 4) Criminal cases
- 5) Cases requiring protection of courts

The author would like to highlight that the above lists are indicative one and there are some additional aspects to be considered while referring the dispute to mediation. Time of referral of dispute to mediation also plays a vital for the outcome of a dispute. In commercial disputes, the dispute can be referred at any point in time; whereas, matrimonial disputes cannot be referred every time; it is advisable to refer the dispute before the filing of the pleadings of both sides. Similarly, non-compoundable criminal cases are not permitted to resolve through mediation.

Apart from this general understanding of the disputes which can be referred to Mediation for resolution, there are some legislatures which mandates for mediation to be adopted at first for resolution of the disputes. The Hindu marriage Act mandates the trial court must try for the reconciliation of the disputants to resolve their dispute amicably before proceeding for its hearings. It can adjourn the proceedings about 15 days for the parties to conciliate the dispute.³⁸ However, the court shall not refer to the following matrimonial disputes for conciliation.

³⁶ *Supra* note 26

³⁷ *Roche, Glenmark Settle Patent Litigation Over Cancer Drug*, NDTV, (Jan 01, 2016) (Available at: <https://www.ndtv.com/business/roche-glenmark-settle-patent-litigation-over-cancer-drug-1261349>)

³⁸ The Hindu Marriage Act 1955, § 23(2), No. 25, Acts of Parliament, 1955 (India)

- a. "Either of the spouses ceased to be a Hindu
- b. Either of the spouses has been incurable of unsound mind
- c. Either of the spouses has been suffering from a virulent and incurable form of leprosy
- d. Either of the spouses has been suffering from the general disease in a communicable form;
- e. Either of the spouses has renounced the world by entering any religious order;
- f. Either of the spouses has not been heard of as being alive for a period of seven years."³⁹

Similarly, The Family Courts Act also provides for adoption of mediation and conciliation for settlement of family disputes.⁴⁰In *K. Srinivas Rao vs D.A. Deepa*⁴¹, Supreme Court held that at the earliest stage that is when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation. The Apex Court further held that "though offence punishable under Section 498- A of the IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation."

The recently amended Commercial Courts Act contains a chapter on Pre-Institution Mediation and Settlement which make it mandatory to the disputants to refer their dispute to mediation, prior to the initiation of the suit except there is a requirement of urgent relief from the court.⁴²Detailed provisions regarding the timelines and enforcement of the settlement agreement arrived at are provided in it and Central Government has been empowered to make rules regarding the same.⁴³

With regards to the recent development in reference of disputes to mediation, Section 7 and the First Schedule to the Mediation Bill, 2021 provides a list of Disputes or matters which cannot be referred to mediation. It mainly includes those matters which are not allowed to be settled by negotiations or agreements.

CONCLUSION AND SUGGESTIONS

Mediation is interest-based resolution mechanism which helps the disputants to resolve the disputes without any ill feelings towards each other. Also with the ever increasing

³⁹ *Id*, proviso to Section 23(2)

⁴⁰ The preamble of Family Courts Act, 1984 states that the purpose of establishing family courts for promoting conciliation in matrimonial disputes and ensuring the speedy disposal of the matrimonial disputes.

⁴¹ (2013) 5 SCC 226.

⁴² The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018, § 12 A (1), No. 28, Acts of Parliament, 2018 (India)

⁴³ *Id*, § 12 A (2)

work load on the regular court system in India, it is necessary that the disputes among them be resolved through alternative dispute resolution mechanisms. Since mediation keeps the interests of the parties high, it should be preferred for resolving the disputes.

However, for the better utilisation and making mediation a preferred means of resolving the disputes, author would like to suggest that there must be a regular audit of court-annexed Mediation Centers with regards to the number of cases referred and resolved in a particular centre. Based on this information dispute centric mediation process can be developed. Further, there must be concrete information about the number of mediation conducted by the MCPC mediation trainees. With regards to the court annexed mediation provided in the Mediation Bill, 2021, instead of following a separate procedure laid down in the Rules, the procedure provided in the Bill should be preferred. However, the difference made for the enforcement of those settlement agreement may be kept since there is involvement of the court in the same.

Further legislations must provide for compulsory mediation of disputes wherein relationship of parties plays an important role. It should be made compulsory in matrimonial disputes and commercial disputes wherein the relationship among the people plays a pivotal role in the development and growth of each other.

To make India, an international hub for alternative dispute resolution mechanism and specially mediation, it is necessary that the UN Convention be approved by the domestic legislations. The anomaly created by defining international mediation in the Mediation Bill and enforcement of settlement agreement arrived at be addressed in line with the UN Convention of 2018. Only then India may become internationally preferred destination for mediation.

It is necessary that mediation is preferred by the parties for resolution of disputes in place of being imposed by the Court. However, the courts should explain the importance of mediation and encourage them to take-up mediation for addressing their dispute. Pre-litigation mediation is an important creation of legislature for making mediation a first step in the resolution of the dispute. However, the exception created in the form of requirement of urgent relief be tightened and only when urgent relief is actually required, parties be allowed to directly approach the Court.

At the end, for the speedy development of the country, it is necessary that the disputes among the people be resolved speedily and amicably and for that Mediation is the way forward.

Lokpal and Lokayukta - Whether a Key to Ethical Governance?

K.M. Aiswarya*

ABSTRACT

Ethics, governance, and accountability in public administration or government are all complicated topics. Ethical Administration is something a common person expects from authorities. For a harmonious social growth, the common good must be encouraged which necessitates governance ethics. Modernising public service and welfare approach has increased the need for grievance redress mechanism. A fear ridden and slow moving administrative machinery is significant impediment to the country's prosperity and development which lead to the growing demand for accountability in government institutions thus shifting the attention on the ethical aspect of governance. Nowadays lokpal and lokayukta institutions occupy a unique role at the interface between individuals and public services. This article briefly analyse role of these institutions in achieving ethical governance.

INTRODUCTION

Governance has become a hot topic as it plays critical role in determining societal well-being. The former secretary General of the United Nations, Kofi Annan, has pointed out a growing consensus when he stated that "good governance is perhaps the single most important factor in eradicating poverty and promoting development"¹

Ethics, governance, and accountability in public administration or government are all complicated topics. Fair-minded people can have considerable disagreements about what defines ethical behaviour and how ethical decisions should be made. Ethics predominantly refers to principles by which to evaluate behaviour as right or wrong, good or bad.² Ethics in the public sector refers to well-founded rules of right and

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1 John Graham, Policy Brief No. 15: Principles for Good Governance in the 21st Century, (August 2003) <http://unpan1.un.org/intradoc/groups/public/documents/UNPAN/UNPAN011842.pdf>. See also Kofi Annan, Partnerships for Global Community, Annual Report on the Work of the Organisation (UN, 1998) <http://archive.unu.edu/p&g/wga/publications/Policy-note.pdf>

wrong that dictate what public officials should do.

There is likely to be a quick and vigorous response to what is wrong with public administration, or what is public maladministration, with the recollection of incidents of abuse that they have personally experienced or happened to someone else. Things going wrong, mistakes being made, and legitimate objections are often overlooked in every administrative system, no matter how well-performing it is. Because administrative methods are ingrained in modern culture, it's natural to assume that blatant errors would be a hot topic among public officials, and that fixing them would be a high priority for everyone.

THEORIES OR APPROACHES TOWARDS PUBLIC SECTOR ETHICS (ETHICAL GOVERNANCE)

Public sector ethics is derived from several different sources ranging from the private ethical character of the individual public servant, internal regulations and culture of the agency, national legislation, to international treaties with established standards and codes of behaviour.³ There are different ethical threads, each of which differs in terms of its ethical issues or considerations. A few relevant theories which could be drawn relevance to public sector include Consequentialism, Utilitarianism, Deontological ethics and Kantianism.

Consequentialism - The moral theories of consequentialism claim that the effects of a given action serve as the foundation for any acceptable moral judgement regarding that action. A morally proper action, according to consequentialists, is one that creates a good result, or consequence.

Utilitarianism- is a kind of consequentialist ethics that focuses on utility. Utilitarianism is the belief that an action's moral worth is completely judged by its contribution to total utility, or happiness or pleasure as measured across all people.

Deontological ethics - "Duty" or "obligation" based ethics. Deontologists think that ethical standards "bond you to your duty," and they focus on the rightness or wrongness of actions rather than the rightness or wrongness of outcomes of the actions. When judging the moral worth of an act, deontological ethics considers our adherence to principles rather than the consequences of that conduct.

Kantianism - Also called Kantian ethical theory is a deontological ethical philosophy that focuses solely on obligation rather than emotions or ultimate goals. The key idea is "duty," or what one should do in specific situations.

WHY ETHICAL GOVERNANCE?

The concept of governance is not new. It is as old as human civilization. Governance simply means the process of decision-making and the process by which decisions

2 Lectures in Ethical Issues in the Public Service, Public Service Academy, Ministry of Public Administration (Spain) on April 30 & May 1, 2019

3 *Supra* note 2

are implemented (or not implemented). Governance is concerned with how power is exercised among the different sectors or interests in society so that traditional freedoms may be enjoyed, and citizens become involved in determining matters related to the public interest.⁴

Public administrations exist to serve the public interest. The public organisations and institutions serve a public purpose. Whatever be the political inclination of the governing party, the objectives of public institutions are to build a better future and to improve the welfare of its citizens. A society's well-being depends on ensuring that all its members have the feel of a stake in it and do not feel excluded from the mainstream of society. This requires all groups, but particularly the most vulnerable to have opportunities to improve or maintain their well-being.⁵

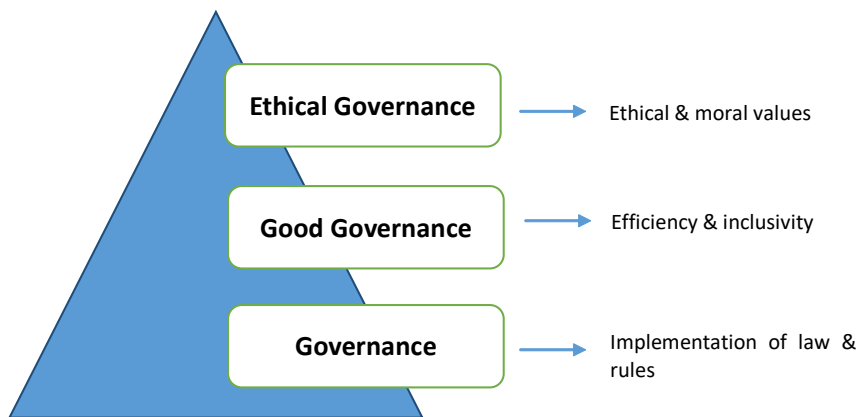


Image 1⁶

Every progressive society strives towards good governance. It is the measure of the efficiency of any administration and in a democracy, citizens elect their representatives upon this assurance of good governance.⁷ Good governance entails the government and its bureaucracy demonstrating utmost concern for the welfare of the people by adhering to policies and performing their duties with a deep sense of commitment, respecting the rule of law in a transparent manner, ensuring human rights and dignity, probity, and public accountability.⁸

It need to be realised that a fear ridden and slow moving administrative machinery is a significant impediment to the country's prosperity and development. The growing demand for accountability in government institutions has focused attention on the

4 Benjamin Ogbebulu, *President Yar'adua "New Wave Of Radical Progressive Governance"*. <http://www.gamji.com/article8000/NEWS8646.htm>

5 Governance according to UN, <http://www.unescap.org/resources/what-good-governance>

6 Image available at https://www.drishtias.com/images/uploads/1570095256_Image1.jpg

7 Dr. Monica Narang & Nitin Sharma, *Strengthening Good Governance Framework: A Key Tool in combating corruption and promoting Human Rights*, 2(2) IJLRS 26 (2017)

8 Jocelyne Bourgon, *Reclaiming Public Administration* (4) ETHOS, 5-9 (2008).

ethical aspect of governance. In the public sector, ethical governance is defined as the creation, recognition, and execution of a framework that ensures the department's or organization's interest in achieving the national objective. As a result, public servants serve as both agents of the ministry as well as servants of the public.

Ethical Administration is exactly what a common person expects from authorities. Ethical governance is the correct and justified conduct of a government's activities in order to promote the greater public good. Some of the principles required for ethical governance include impartiality, accountability, transparency, honesty, integrity, probity, perseverance, truthfulness, citizen centricity, and patriotism, among others. Good governance ensures that an organization's day-to-day administration is always aligned with the organization's goals, ensuring that the organization's future is bright. Accountability is a key principle of good and ethical governance. Accountability is the obligation of a public servant or department to account for its activities, accept responsibility for them, and to disclose the results in a transparent manner.⁹

Accountability is often used synonymously with such concepts as responsibility, answerability, enforcement, blameworthiness, liability etc. Accountability is a key requirement of good or ethical governance. Governmental institutions, as well as the commercial sector and civil society organisations, must be accountable to the public and institutional stakeholders.¹⁰ Who is accountable to whom varies depending on whether decisions or actions taken are internal or external to an organization or institution. In general, an organization or an institution is accountable to those who will be affected by its decisions or actions.

In a nutshell, ethical governance refers to administrative methods, procedures, and policies that meet the criteria for handling public affairs in an ethically good or acceptable manner, such as in public administration, public health care, education, and social security.¹¹ Justice, fairness, equality, and honesty are frequently used in the context of public administration to identify ethically good or acceptable behaviour. As a result, ethical governance is a normative rather than a purely descriptive expression. The concept of ethical governance is value-laden since it entails a value judgement.

The ethical quality of governance might be good or bad. In the first situation, governance is said to be ethical or to follow ethical guidelines. In the latter instance, governance is considered to be unethical or to violate ethical principles. One popular explanation for these categorizations is that in good governance, government officials and authority adhere to the ethical and other norms, mandates, and prohibitions that they are required to follow in their acts.

9 Lectures in Ethical Issues in the Public Service, Public Service Academy, Ministry Of Public Administration (Spain) on April 30 & May 1, 2019

10 Swati Mehta, *Importance Of Disclosure And Transparency For Good Governance*, 4(25) MLJ, 41, (2011)

11 Ari Salminen, *Ethical Governance: A Citizen Perspective*, Dec, 2010 Vaasan yliopisto (University of Vaasa)

Depending on the moral backdrop theory adopted, the citizen's perspective on the ethicality of governance might be emphasised in different ways. Governance is desirable because civil employees operate ethically in so far as they follow the laws of positive law and the universal moral rules of fairness and benevolence, according to universal moral principles in theories such as utilitarianism and deontological ethics. Morality is more closely associated with personal relationships and empathy-based care in the ethics of care.

Because unethical governance cannot lead to good governance, ethics and good governance are complementary to each other. Governance isn't a goal in and of itself. The ultimate goal of effective governance is to create a harmonious society with active citizen engagement. Good governance means that the state's activities are managed in such a way that the material and social well-being of all citizens is effectively protected within a framework of well-organized institutions.¹²

Ethics plays an essential part in this type of society since values are crucial. For a harmonious social growth, the common good must be encouraged. And this necessitates governance ethics. In dealing with the public, the government must be ethical. This ethicality entails, among other things, neutrality and non-discrimination toward citizens. Good governance, on the other hand, is based on people's collective faith in institutions, which is harmed by corruption.¹³

PUBLIC SERVICES AND CONCEPT OF ADMINISTRATIVE JUSTICE

Today, the distinction between public services and private-sector services is blurring. This development is influenced by privatisation and the evolution of the welfare state paradigm. When it comes to public services, the organisation or government have a duty to provide them and the citizens have a right or expectation to receive them. Public services are often monopolistic in nature though it's changing over the time. When the monopolistic nature prevails, there comes inequality of bargaining power in the relationship or we could say that when there is lack of choice in service provision, consumers cannot realistically use the "exit" option if they are dissatisfied with the service.¹⁴ This brings the need for mechanisms to express their dissatisfaction or redress their grievance or make a complaint.

An important aspect of public service is the element of discretion which is inevitable in any system of rules, which might be because of the vagaries of language, diversity of the people and circumstances, and an indeterminacy in official purpose.¹⁵ Moreover

12 Prabhat Kumar Datta, *Combating Corruption for Ethical Governance in India*, 59(3) IJPA (2013) at 493

13 *Ibid.*

14 A Hirschmann *Exit, Voice and Loyalty: responses to decline in firms, organisations and states* (1970). See also S. Paul, *Accountability in Public Services: exit, voice and control*, (1992) 20(7) World Development 1047-1060

15 D. Galligan, *Discretionary Powers* (1986) Oxford University Press, pp 64-65

the trend in modern legal systems is towards greater reliance upon discretion by lower level officials and less reliance on clearly defined rules.

Public sector is a major provider of services to the citizen, many through the medium of discretionary powers. Given the distinctive qualities in the provision of public services, mechanisms are needed to ensure that the rules are properly applied and discretion is not exercised in an arbitrary fashion.¹⁶ There is a need for checks on the use of power so that individuals who are subjected to the decisions of public bodies are safeguarded which is provided in a number of ways.

First the courts provide a check on public bodies by means of judicial review. However it has got certain limitations in providing administrative justice. Another mechanism for the provision of administrative justice was the concept of tribunals which emerged for challenging administrative decisions. These statutory bodies is a primary forum to resolve issues in particular areas of administrative decision making. However like courts, tribunals too have considerable limitations like technicality issues to their effectiveness as a check on administrative decision making.

MODERNISING PUBLIC SERVICES AND OMBUDSMAN

Administrative justice is not only concerned with providing remedies for citizen's grievances but also concerned to improve Administrative practices thereby providing better services. The transformation of public service delivery from convenience of the service provider to meet the needs of the citizens have influenced the whole concept of Administrative justice. With the advent of welfare state concept, the quality and effectiveness of public service gained significance which led to a paradigm shift from convenience of the service provider to the needs of the citizens.¹⁷ The public service are now delivered in a culture of rights-based entitlement.

The welfare approach basically focused on the welfare of the people which involve the element of public satisfaction. In order to achieve this welfare concept in total all issues of maladministration needs to be removed from the public administration and even if there are instances of maladministration of abuse of powers, a redress machinery for the public grievances must be made available without approaching existing courts or tribunal system. Adoption of best practise laws and institutions is the standard recommendation for minimising corruption. The practises are those connected with countries that appear to have low levels of corruption. There comes the need and relevance of Ombudsman.

Nowadays Ombudsman occupy a unique role at the interface between individuals and public services. Ombudsman are a central plank of system of administrative justice.¹⁸ The concept of an ombudsman is intriguing. When you have an issue with

16 Organisational Theory <https://www.essaytown.com/subjects/paper/organizational-theory-overview/3158103>

17 Rafia Nisar, *Governance: With Pro-People Approach* 4 The Indian Journal of Political Science 657 (2012).

18 D Lewis and R. James, *Joined up Justice: review of the Public Sector Ombudsman in England* (2000) 4 International Ombudsman Yearbook 109-140, p 131

your government the Ombudsman is the person who can help you. He serves as a watchdog over the law's watchdogs, protecting citizens' rights from government abuses and malfunctions. Ombudsman is considered as an external, impartial, independent investigator or complaint adjudicator.

INDIAN SCENARIO

India, being a in a democratic type of government, the people's authority is vested in the state and the state manifests itself through a web of institutions and offices tasked with carrying out its responsibilities. The holder of every public office here is entrusted with public power. Officials have a legal obligation to serve the public in a way that "strengthens the integrity and processes of democratic society".¹⁹

According to Upendra Thakur's book *Corruption in Ancient India*, corruption has existed in all civilizations at all times. During the Second World War, the demon of corruption began to rear its head in practically every branch of the Indian government. Even after independence, India's corruption problem appeared to be worsening. The urgent need to act at an early stage in order to successfully combat the growing evil of corruption, which had begun to eat away at the foundations of Indian society and administration.

Our country, has been in the clutches and diabolical jaws of the virus, called corruption. Corruption in India is the main cause of its every failure. Every developmental project and defence requirement are being overshadowed by the corrupt officials. Corruption and maladministration in India is so common in everyday life that every citizen is accustomed to it. Indian society itself should be aware of it and should fight against it. They are the two malafides that affect the efficiency of administration. Corruption and maladministration are two sides of the same coin. These two are among the most unethical, wrong conduct in the public sector. Corruption is a phenomenon with negative consequences whereas the term maladministration is very difficult to define.

It is a well-known truth in medical research that each time a new drug is administered, the virus and bacteria develop resistance and immunity, rendering the medicine worthless, necessitating the development of newer and stronger drugs.²⁰ The same is true in the case of the corruption. Each poor control measure is quickly overturned, and the tactics become more sophisticated and entrenched, leading to ostensibly tougher measures, and the cycle of corruption continues. As far as Indian administration is concerned, public maladministration is a complex issue that necessitates immediate responses while also revealing a slew of roadblocks.

Corruption is defined as dishonest or fraudulent conduct by those in power. Corruption is a behaviour by public officials, which deviates from accepted norms in order to

19 Prabhat Kumar Datta, *Combating Corruption for Ethical Governance in India*, 59(3) IJPA 492 (2013)

20 R.P. Sinha, *Controlling Corruption in India*, 57(3) IJPA, 481 (2011)

serve their private ends.²¹ Corruption takes place when a public servant, in defiance of prescribed norms, breaks the rules to advance his or her personal interest. Corruption is pervasive in the system of governance in India, undermining the effectiveness of all institutions of governance. It is the fundamental problem that undermines the very social fabric and the political and bureaucratic structure of Indian society.²² The high level of corruption in India has been widely perceived as a major obstacle in improving the quality of governance.

Public administration is often, even stereotypically, blamed for its slowness, officialism, and inflexibility. Maladministration may be defined as administrative actions or inactions detrimental to public interest in a welfare state.²³ The administrative authorities should show accountability to the people. However, the administrative authorities armed with various powers may exercise them in an irresponsible manner. They may abuse or misuse their powers resulting in callousness, delay or malafide.²⁴

According to Dicey, wherever there is discretion, there is room for arbitrariness an opinion which is synonymous with Lord Atkin's statement that power corrupts, and absolute power corrupts absolutely. Both these statements reflect the fact that concentration of power in few hands will lead to misuse and maladministration. This brings up the need of appropriate distribution of power among the several organs of government, as proposed by Montesquieu in his theory of Separation of Powers. In India, we have three different governing organs: the legislature, the executive, and the judiciary; wherein the legislature makes laws, the executive implements them, and the judiciary interprets them. Aside from that, our constitution has "checks and balances" safeguards to prevent abuses of power by any state entity.

This system of checks and balances is in place to prevent power from being wielded haphazardly or arbitrarily. Thus the whole system together is expected to work for good governance and to safeguard the rights and lawful interests of the people. Regardless of these provisions, there are still concerns of abuse of power, misuse of discretionary powers, instances of maladministration, corruption, and so on, or we may say that the people's rights and legitimate interests are not protected.²⁵ Corruption is the result of maladministration and sometime it precedes maladministration. The expansion of governmental activity, delegation of power and conferment of discretionary powers etc have increased the grievances of individuals against the administration.

21 Corruption-ESDAW, available at: www.esdaw.eu/corruption.html (last visited on April 26, 2022)

22 C. Rajkumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* 2 (2011)

23 Hilal Wani, "Constraints and Impediments of Good Governance in Africa: Future prospects" 5 *Afro Asian Journal of Social Sciences* 19 (2014)

24 O.P. Minocha, "Good Governance: New Public Management and Perspective" XLIV 3 *IJPA* 272 (1998)

25 U.C. Agarwal, *Role of Lokpal in fostering Ethical Governance and Society* 59(3) *IJPA* (2013) 431.

Although there are various control mechanisms in place in India to prohibit the practise of maladministration and misfeasance, all of them are prone to a number of loopholes that limit their appropriate execution. During this time, Sweden formed a unique institution named “Ombudsman” to supervise and check public authorities exercising state powers, which was later adopted by various other countries, but not totally, due to differences in administrative practises and culture.

In 1966, the Administrative Reform Commission proposed establishing Lokpal and Lokayuktas in India. The recommendation was approved by the Indian government, and the first law to establish a Lokpal in India was introduced in 1968, but it was finally allowed to lapse. Despite eight efforts, the law was not passed.²⁶ The Lokpal bill was finally in India on December 18, 2013, 52 years after it was first introduced; thanks to the efforts of civil society members (Anna Hazare, Arvind Kejriwal, Prashant Bhushan, and others).

Lokpal and Lokayukta, like the Swedish Ombudsman, is intended to be informal and low-cost. It is neither mandatory nor required to hire a lawyer in order to file a complaint and pursue it. This is the easiest and quickest method of dealing with the situation. The need to establish an ombudsman system in India for the efficient working of the administration was felt. These Indian ‘ombudsperson’ armed with the power and independence to investigate and prosecute cases of corruption are purported by these agitators to be the best mechanism for handling growing corruption and maladministration in the country.

For citizens, the ombudsperson provides a less expensive and time-consuming alternative to expensive and time-consuming judicial procedures. Individual issues are frequently resolved in a timely and flexible manner. The ombudsperson is a mechanism in which a citizen can file a complaint against a public official with a functionary who is both independent and empowered to investigate the complaint. The ombudsperson’s principal role is to “redress citizen grievances against the administration,” and in doing so, he or she safeguards or defends human rights, mediates conflicts between people and bureaucracy, and ensures transparency and good governance.

LIMITATIONS OF LOKPAL

Though the Lokpal and Lokayuktas Act of 2013 provided a useful tool for combating the never-ending threat of corruption and preventing maladministration, it still has flaws that must be addressed. Because the appointing committee is made up of politicians, it is not free of political influence. The most serious flaw in the act is the six-year delay in its implementation, according to the Lokpal, which was established in 2019 and is chaired by retired Supreme Court judge Pinaki Chandra Bose. Furthermore, the statute offers no specific protection to whistle-blowers. There is no reliable way of determining whether the Lokpal will be honest throughout his or her tenure.

²⁶ Ekta Gahlawat, *Accountability of Civil Servants under Indian Laws: A Critical Analysis*, 12(2) IJLJ, 123

The largest flaw is the Lokpal's omission of the judiciary from its purview. The act allows the Lokpal to handle complaints against its own officers, which appears to go counter to the whole point of having an independent agency in the first place. The Lokpal is likewise not backed by the constitution. There are no proper procedures for appealing the Lokpal's decisions. There is no indication of Lokayuktas' abilities, composition, or scope in the statute. There is still a long way to go to ensure transparency, and the crusade against corruption is far from over.

CONCLUSION

In spite of these limitations, ombudsman system is usually considered as a citizen friendly i.e, less expensive and time-consuming alternative to expensive and time-consuming judicial procedures. Being an independent, impartial machinery, public have better confidence in this institution and hence is considered as one of the key towards achieving ethical and good governance. Administration in a democracy is a dependent variable. The erosion of ethical values of the civil servants cannot be understood in isolation of the general political atmosphere and social environment.²⁷

Even if Lokpal has ensured that all measures are implemented effectively, a single Lokpal legislation would not cure the problem of maladministration. In truth, no single rule can aid in the eradication of this malice. The institution of the Lokpal should be enhanced to monitor abuse of power in the administrative system in order to stop the threat of corruption and address the problem of corruption. Along with outstanding leadership, more access to information and transparency are essential to achieve good governance concept in full context.

"Corruption will be out one day; however, one may try to conceal it: & the public can as its rights and duties, in every case of justifiable suspicion, call its servants to strict account, dismiss them, sue them in a court of law, appoint an arbitrator to scrutinize their conduct, as it likes".-Mahatma Gandhi

²⁷ Prabhat Kumar Datta, *Combating Corruption for Ethical Governance in India*, 59(3) IJPA 492 (2013)

Mental Health of Prisoners and the Need for Setting up of Mental Health Care Establishments in Prisons

Mr. Kush Kalra & Mr. Bhanu Tanwar***

ABSTRACT

Owing to the challenging conditions prevailing in prisons like overcrowding in prisons, isolated without family members, insufficient mental health care, loss of livelihood etc., prisoners often develop mental illness after their admission into prison. The mental illness either remains unnoticed or is not being treated properly due to lack of infrastructure in the prisons. Placing reliance upon laws operating in both international as well as national arenas, mental illness is an important factor which warrants attention. Mental illness develops suicidal tendencies among prisoners and insufficient mental health establishments in prisons are also leading to deaths in the prisons due to suicide .

Under Mental Healthcare Act (MHCA), 2017, the medical officer of the prison has an obligation to send quarterly reports to Mental Health Review Boards (MHRBs) about the status of prisoners with mental illness. MHRBs have been given the power to visit jails and ensure that prisoners with mental illnesses are transferred to mental health establishments.

It has also been found that people who suffer from mental illnesses have faced exclusion when lawyers represent them in courts. This creates a further problem for the accused to get access to justice. Supreme Court in the case of T.V. Vatheeswaran v. State of Tamil Nadu (1983) 2SCC68, held that fundamental rights under articles 14, 19 and 21 of the constitution of India are available to the prisoners as well as freemen. Also in the case of Re: Inhuman Conditions in 1382 Prisons, Writ Petition (Civil) No. 406 of 2013 court observed that prisoners on death row should be allowed to have meetings and interviews with their lawyers or members of their immediate family or even mental health professionals.

Protection of rights of prisoners who have mental health issues is an obligation of the government under Section 103 of Mental Healthcare Act, 2017. Efforts have been made to improve the state of mental health care of prisoners in the country but a huge gap still remains between the requirement and availability of facilities in the sector¹.

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1 Recently Hon'ble Supreme Court of India issued notice to all states in India regarding establishment of Mental Health Care Establishments in Prisons in the Petition filed by the writer of this Paper Link: <https://www.ndtv.com/india-news/on-mental-health-establishments-in-prisons-supreme-court-issues-notice-to-centre-3310679>

INTRODUCTION

Owing to the challenging conditions prevailing in prisons like overcrowding in prisons, isolated without family members, insufficient mental health care, loss of livelihood etc., prisoners often develop mental illness after their admission into prison. The mental illness either remains unnoticed or is not being treated properly due to lack of infrastructure in the prisons. Placing reliance upon laws operating in both international as well as national arenas, mental illness is an important factor which warrants attention. Mental illness develops suicidal tendencies among prisoners and insufficient mental health establishments in prisons are also leading to deaths in the prisons due to suicide².

Indian jails are grossly overcrowded, possibly making it difficult to keep a close watch on its inmates. According to a study published in the Delhi Psychiatry Journal in April 2012, most prisoners (almost 80 percent) who attempt to kill themselves in Indian jails, try to hang themselves.

It is to be noted that the Delhi ranks third in cases of suicides in jails, according to the National crime Record Bureau (NCRB), which cited right prisoners who ended their lives in the city's jail last year. The NCRB data says that there has been over 10% increase in unnatural deaths across prisons in India in 2019 compared to 2018 data. A total of 165 unnatural deaths, including suicides, have been reported from various prisons across the country.

The World Health Organisation, 2014 report titled "Prisons and Health³" (ISBN: 978 92 890 50593) emphasized that "It is well recognized that admission to prison can create considerable pain and distress. Nearly all prisoners are challenged by their loss of freedom. Prison regimes leave scant room for self-determination. This is one of the greatest challenges in prisons, and one which should be the subject of regular staff development and continuing training. It is assumed that all prisoners with serious mental illness are diverted to specialist care, but there may be periods when such prisoners have to remain in their prison. Staff need to be trained in the management of these patients⁴.

Prison authorities should be aware of the pressure on staff from prisoners with special needs. Support for staff and opportunities to discuss particular issues should be part of the service provided. It is critically important to maintain confidentiality in all prison health work; this poses a particular challenge to prison staff, who often feel they have a right to know.

All prisoners need assistance to cope with and control the effects of imprisonment. They also need better preparation for life after discharge. This latter challenge involves

2 Chrousos, G. P and Gold, P. W (1992), The concepts of stress and stress system disorders: overview of physical and behavioral homeostasis, *Jama*, Vol. 267, No. 9, pp. 1244-1252.

3 https://www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf

4 Hammett TM, Roberts C, Kennedy S (2001), Health-Related Issues in Prisoner Reentry, *Crime and Delinquency*, Vol. 47, No. 3, pp. 390-409.

the whole prison programme, so that educational deficiencies are at least partially met, work experience has been made available and social skills have been greatly enhanced.”

According to the Tata Trusts’ India Justice Report of the year 2020⁵ *“Of particular concern is the shortfalls in medical staff in prisons. This has gone up by 6 percentage points since 2016 to 41 per cent. States continue to show scant desire to increase expenditure on prison, and the stated objective becoming reformatory institutions remains still born”*

Due to lack of recognition of the broad spectrum of mental illness within the criminal justice system, “prisons inevitably become homes for a greater number of mentally ill prisoners of various degrees”. The World Health Organisation defines ‘health’ as a “complete state of physical, mental and social well-being, and not merely the absence of disease or infirmity”. This Hon’ble Court in the case of *State of A.P. v. Challa Ramkrishna Reddy & Ors.*, (2000) 5SCC712, held that the prisoners, whether a convict or undertrial, does not cease to be a human being and, while lodged in jail, he enjoys all his fundamental rights guaranteed by the constitution of India including the right to life guaranteed by the Constitution.

While the patients are admitted in jail, as provided under section 54 of Cr. P.C., the medical examination of the prisoner is done compulsorily. However during this medical examination, no examination is done of the mental health of the prisoners⁶.

REFORMATION AND REHABILITATION OF PRISONERS

In recent times, prisoners have attracted the attention of jurists, Sociologists and Protagonists of human rights all over the world. The truth is that the philosophy of prisoner’s rights appears to have stemmed directly from consideration of human dignity and citizenship. The basic rights can’t be abrogated by the mere fact of imprisonment. There was a time when prisoners were considered to be persons devoid of any rights and even their basic rights were deemed to be confiscated, the moment they were arrested and imprisoned. However, prisoner’s rights gained importance with the passage of time⁷.

It is also pertinent to note that now a day, human rights have become the yardstick for determining the status of a country’s civilization. It is not uncommon that every problem of the day has been infested with some human rights dimensions in one way or others, and prison administrations are no exception to this general rule. Human Rights Jurisprudence demands that while administration of justice balancing

5 <https://vidhilegalpolicy.in/research/the-indian-justice-report-2020/>

6 Jo Nurse, Paul Woodcock, and Jim Ormsby (2003), Influence of environmental factors on mental health within prisons: focus group study, *British Medical Journal*, Vol. 327, pp. 1-5.

7 L.Rojo-Moreno, L. Livianos-Aldana, G. Cervera-Martínez, J. A. Dominguez-Carabantes, M. J.Reig-Cebrian (2002), The role of stress in the onset of depressive disorders: A controlled study in a Spanish clinical sample, *Journal Social Psychiatry and Psychiatric Epidemiology*, Vol. 37, pp. 592-598.

society interest with that of the individual's interest, individual human rights should not be affected. Ignoring accused or prisoners and not making any attempt to provide them solace or restitution would be a challenge to protection of his human rights.

Every human being is entitled to his human rights i.e. those minimal rights which every individual must have against the State by virtue of human being, a member of a human family, irrespective of any other consideration. Human right means individual rights of freedom of thought to be fundamental for a civilized society. They include freedom of expression, movement and association, implementation of due process of law, equality before the law and the right not to be subjected to cruel or degrading punishment. According to Justice Krishna Iyer, the central concern of law and justice must be humanity. Humanity will be meaningful if it is supported by humanism, dignity of a human, as an individual can be respected and maintained by others if they follow human values⁸.

It goes without controversy that every innocent, truthful, law-abiding and non-corrupt person is entitled to fundamental rights. But there is no agreement about the fundamental rights of criminal or prisoner. However, now the Supreme Court has made it clear that with a degree of difference in application, even criminals are entitled to fundamental or human rights. Therefore, all police and jail authorities should now treat the accused and prisoners with human grace and dignity⁹.

These Human Rights provisions are a complex amalgam of Civil and Political Rights, Economic, Social and Cultural Rights, Religious Rights, Minority Rights, Educational Rights etc. The classification of Civil and Political Rights and Economic, Social and Cultural Rights in the name of the Fundamental Rights and Directive Principles of the state policy under the Constitution is probably the first attempt of invoking Human Rights in the world history. The makers of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, 1966 and classification of Human Rights Jurisprudence into two categories connote that they were influenced by the provisions of the Constitution of India. Moreover, Indian constitution was amended from time to time for the better promotion and Protection of Human Rights and Fundamental Freedoms.

Article 10 of the International Covenant on Civil and Political Rights, 1966 enthusiastically proclaims that the persons deprived of their liberty shall be treated with human dignity and with respect for the inherent dignity of human person. The prisoner is not supposed to have left an army of right at the prison gate; the human commodity is precious to all. Frankly speaking, one can hardly afford to reduce prisoners to vegetable by denying fundamental rights to them. Undoubtedly, there has been a shift in emphasis from retribution to reformation. The reformatory strategies

8 Mandeep K. Dhami, Peter Ayton, and George Loewenstein (2007), *Adaptation to imprisonment: Indigenous or Imported?*, *Criminal Justice and Behavior*, Vol. 34, No. 8, pp. 1085-1100.

9 Math SB, Murthy P, Parthasarathy R, Naveen Kumar C, Madhusudhan S (2011), *Mental health and substance use problems in prisons*, *National Institute of Mental Health Neuro Sciences*, Vol.5, pp. 45-47.

and rehabilitative techniques are main stay in modern prison justice system. The European Convention on human Rights is one of the major documents which added fire to the human right movement. It provides and prescribes some important safeguards against the arbitrary and fanciful acts of State¹⁰.

Prisoners and the all rights of the prisoners in India were kept in abeyance till the realization of the new dimension of personal liberty (from Gopalan¹¹ to Maneka Gandhi case¹²) that covers even prisoners and their rights under our Constitution. These aspects were realised very late in our country as compared to the western countries.

The most important legislation for 'better' Protection of Human Rights enacted by the Indian parliament is the Protection of Human Rights Act, 1993. In accordance with the mandate of the Protection of Human Rights Act, 1993, Human Rights enforcement machinery was constituted in the name of National Human Rights Commission, State Human Rights Commissions and Human Rights Courts independently for better protection and promotion of Human Rights. This Act makes the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as a part of Indian Law. The Protection of Human Rights Act, 1993 was amended in the year 2006 for effective enforcement of Human Rights in the context of present International Scenario. The Indian Parliament has enacted various legislations which seek to protect and promote the Human Rights of vulnerable sections of the society like disabled, women, children, minorities, scheduled castes, scheduled tribes and backward classes and many more. In addition to the above machinery, the central government also constituted various commissions for the welfare of the weaker sections of the society namely Women, Minorities, Children, Backward Classes, Scheduled Castes, Schedule Tribe and Safai Karmacharis.

RIGHT TO HEALTHY ENVIRONMENT AND TIMELY MEDICAL SERVICES

The society has an obligation towards prisoner's health for two reasons. Firstly the prisoners do not enjoy the access to medical expertise that free citizens have. Their incarceration places limitations on such access; no physician of choice, and no second opinions. Secondly, because of the conditions of their incarceration, inmates are exposed to more health hazards than free citizens. Article 9 of the Basic Principles for the Treatment of Prisoners¹³ states that prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.¹⁴

10 Pamela M. Diamond, Eugene W. Wang, Charles E. Holzer III, Christopher Thomas, and des Angles Crusier (2001), *The Prevalence of Mental Illness in Prison, Administration and Policy in Mental Health*, Vol. 29, No. 1, pp. 123-127.

11 AIR 1950 SC 27

12 AIR 1978 SC 59

13 Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990

14 Shelley Johnson Listwan, Mark Colvin, Dena Hanley, Daniel Flannery (2010), *Victimization, Social Support, and Psychological Well-Being: A Study of Recently Released Prisoners, Criminal Justice and Behavior*, Vol. 37, No. 10, pp. 1140-1159

Rule 9 of the Standard Minimum Rules for the Treatment of Prisoners mentions that the sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner. Rule 13 specifies that adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.

The provisions of Rule 15 stipulate that the prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

Rule 17 (2) provides that all clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene. Rule 22 (1) makes it mandatory that at every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

Rule 22 (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. In terms of Rule 24 it is the duty of the medical officer to see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work. Rule 25 (1) provides that the medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

Rule 25 (2), the medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment. For a prisoner under sentence, Rule 62 ensures that the medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.

Section 4 of the Prisons Act 1894, ensures that State Government shall provide for the prisoners in the territories under such government, accommodation in prisons constructed and regulated in a manner as to comply with the requisite of this Act in respect of the separation of prisoners. Thus the prisoners cannot be kept in the open exposed to sun, rain or cold or other vagaries of the weather. In addition to this, the prisoners are entitled to accommodation under a roof in some room type habitat. Section 7 of the Prisons Act casts an obligation on the State Government to provide

for temporary accommodation in case of overcrowding and outbreak of epidemic disease. Under section 13, the medical officer is responsible for the sanitary conditions. Section 14 of the Prisons Act 1894 provides that the medical officer is required to submit a report regarding the mental condition of a prisoner whenever it appeared that he is not fit. It provides that whenever the medical officer has reason to believe that the mind of a prisoner is, or is likely to be injuriously affected by the discipline or treatment to which he is subjected; the medical officer shall report the case in writing to the Superintendent together with such observations as he may think proper. The report, with the orders of the Superintendent thereon, shall forthwith be sent to the Inspector General for information.

Regarding the death of the prisoner in prison custody, a complete medical history showing the illness, treatment, diet, labour done by the prisoner and other necessary factors are to be recorded by the medical officer.¹⁵ The medical officer is also required to examine the inmates on admission and shall advise to the jailor regarding the nature of work to be carried by the prisoner depending on the health and other factors of the prisoner.¹⁶

Thus recognizing the right to medical facilities, the National Human Rights Commission in 1999,¹⁷ issued a letter to all Chief Secretaries/Administrators of all States/Union Territories regarding prisoners health care. In a sample study conducted by the Commission it was noticed that 79 per cent of deaths in judicial custody were a result of infection of Tuberculosis. The letter suggested the following remedial measures to be followed¹⁸:

- Initial medical examination of all prison inmates by prison or government doctors.
- Where there is inadequacy of such services, the services of voluntary organizations and professional guilds such as the Indian Medical Association should be taken.
- Periodic medical check-up for all prison inmates, particularly for their susceptibilities to infectious diseases.
- Where health problems are detected, the prison administration should afford timely and effective medical treatment.
- The proforma for health screening of prisoner on admission to jail should be followed, and
- Such medical examination should be taken up forthwith by all State Governments and prison administrators, and monthly reports of the progress to be communicated to the Commission.

15 Ibid Section 15

16 Section 24(2) The Prisons Act 1894

17 D.O. No. 4/3/99 - PRP & P, dated 11 February 1999

18 Woodruff R, (1968), Hysteria: an evaluation of objective diagnostic criteria by the study of women with chronic medical illness, Br J Psychiatry, Vol. 9, pp. 114-115.

A. The Mental Healthcare Act

- I. Section 103(6) of the Mental Healthcare Act mandates that every State Government has to establish a Mental Health Establishment in the medical wing of at least one prison in the state.
- II. According to Section 103(6) of the Act, 2017 State Governments should facilitate the establishment of Mental Healthcare Establishments in the medical wing of at least one State prison.
- III. The Act contains several provisions that deal with prisoners' mental health. Section 31(2) of the Act provides for compulsory training of medical officers in prisons, in primary and emergency mental healthcare.
- IV. Under Mental Healthcare Act (MHCA), 2017, the medical officer of the prison has an obligation to send quarterly reports to Mental Health Review Boards (MHRBs) about the status of prisoners with mental illness. MHRBs have been given the power to visit jails and ensure that prisoners with mental illnesses are transferred to mental health establishments. However, only few states (Tripura, Uttarakhand, and Himachal Pradesh) have constituted MHRBs.

B. Modern Prison Manual, 2016

- V. The Modern Prison Manual, 2016 mandated that prisoners suffering from mental health conditions be admitted to mental health institutions, and Psychiatrists and counsellors be made available to examine the prisoners periodically. It also directs regular mental evolution for death row prisoners.

C. Mental health as provided under Criminal Procedure Code (CrPC)

- VI. Section 54 of the CrPC provides that the medical examination of the arrested person by a medical officer is compulsory. The officer, while examining the arrested person, is only required to make a report about the physical injuries sustained by the latter, but there is nothing in the provision which mandates the medical officer to prepare a report regarding the mental state of the arrested person.
- VII. Sections 328 and 329 of the CrPC provide for the accused to be provided with bail if he/she is found to be a lunatic during the time of the inquiry or during the trial. Also, in case the aforementioned circumstance occurs, Section 330 and Section 331 of the CrPC give the judge the power to order for the detention of the accused in safe custody and continue the trial only when the accused has regained his normal mental state.

D. Mental health issues delay/ deny the access to justice delivery system

- VIII. It has also been found that people who suffer from mental illnesses have faced exclusion when lawyers represent them in courts. This creates a further problem for the accused to get access to justice.
- IX. Supreme Court in the case of *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2SCC68, held that fundamental rights under articles 14, 19 and 21 of the constitution of India are available to the prisoners as well as freemen.

- X. Also in the case of Re: Inhuman Conditions in 1382 Prisons, Writ Petition (Civil) No. 406 of 2013 court observed that prisoners on death row should be allowed to have meetings and interviews with their lawyers or members of their immediate family or even mental health professionals.

The researcher had asked the information whether the States have Mental Health Establishments set up in the prisons in India as mandated in the Mental Health Care Act, 2017. The replies received from different prisons is given below:

S.NO	Prison	Response
1	Kerala Prisons & Correctional Services (Special Sub Jail, Kannur, Pallikkunnu P.O. Kannur-04)	Reply: There are no mental health establishments setup for mentally ill persons in this prison.
2	Lajpore Central Jail, Surat	Reply: There is a full time psychiatrist deputed at the jail hospital and attends the cases as per the requirement.
3	Superintendent of Jail, Central Jail-I, Hisar	Reply: No Mental Health establishments is set up in this jail.
4	Directorate of Prison and Correctional Administration, Itanagar	Reply: There are no such provisions in this prison.
5	Office of the Superintendent, Vadodara Central Jail, Vadodara ,	Reply: There are no mental health establishments set up in Central Jail Vadodara.
6	Office of the Superintendent Ahmedabad Central Prison, Ahmedabad	Reply: (1) Every Wednesday- Psychiatrist Doctor from civil hospital, ahmedabad is visiting central jail, ahmedabad to treat all Psychiatric all patients (2) Every Month: First Monday Psychiatrist Doctor from mental Hospital, Delhi Darwaja, Ahmadabad is visiting Central Jail Ahmedabad to treat all psychiatric patients.
7	Office of the Superintendent Jail, Model Central Jail, Kanda Shimla	Reply: There is no post of Psychiatrist as well as Psychologist and as such no Psychiatrist or Psychologist have been appointed in this Jail. However, Psychiatrist from IGMCH Hospital Shimla & hospital are visiting this jail from time to time to treat the mental illness of prisoners.
8	Kerala Prisons & Correctional Services, Special Sub Jail, Thalassery	Reply: There is no establishment for mental health, but give proper treatment through Government Hospitals like Mental Health Centres.
9	Office of the Superintendent, District Jail Palanpur, Dist Bnaskantha	Reply: One medical officer is appointed in our prison for the mental health of prisoners. He visits the prison once in a week & counselling to prisoners who is suffering mental problem.
10	Prison Department, Government of Andhra Pradesh	Reply: There is no specific setup established in the Jails for the prisoners who are suffering from mental illness. However, those prisoners who are found to be suffering from mental illness are referred by concerned medical officer to the Government Mental Care Hospital, Vishakhapatnam for better treatment and management.
11	Kerala Prisons & Correctional Services, Women Prison & Correctional Home, Viyyur	Reply: NIL

S.NO	Prison	Response
12	Kerala Prisons & Correctional Services, District Jail, Hosdurg	Reply: NIL
13	Kerala Prisons & Correctional Services, Sub Jail, Tirur	Reply: In Sub Jail tirur no mental establishment. While a prisoner who have suffering mental illness then given treatment and transferred to the nearest mental health centre as per the prescription of doctor and the order of the concerned court.
14	Kerala Prisons & Correctional Services, District Jail, Kannur, Pallikkunnu, Kannur	Reply: No mental health establishment set up for prisoners in this Jail.
15	Kerala Prisons & Correctional Services, Sub Jail, Ponnani	Reply: There is no special facility for mental health treatment in this prison. Prisoners in need of mental health treatment are referred to the Government Medical College or Government Mental Health Centre on the advice of the prison medical officer.
16	Kerala Prisons & Correctional Services, Sub Jail, Mattanchery, P.O. Kochi	Reply: No Mental Health Establishment in sub jail Mattanchery.
17	Kerala Prisons & Correctional Services, Sub Jail, Peermade, P.O. Idukki	Reply: There are no special facilities for the treatment of mental illness in this prison. However, mentally ill prisoners are being sent to mental health centres for treatment.
18	Kerala Prisons & Correctional Services, Special Sub Jail, Manjeri	Reply: Prisoners suffering from mental illness are examined by Jail Medical officer and refer to medical college, Manjeri or Mental Health Centre, Kozhikode for expert consultation if it is necessary. Both in and out patients treatments are provided from here.
19	Kerala Prisons & Correctional Services, Special Sub Jail, Devikulam	Reply: No
20	Kerala Prisons & Correctional Services, Special Sub Jail, Muvattupuzha	Reply: There are currently no mental health institutions in this prison.
21	Department of the Superintendent of Prison, Central Jail No.5, Tihar, New Delhi	Reply: Jail Visiting SR Psychiatrist consultation is done for inmates suffering from mental illness.
22	Office of the Superintendent of Prison, Central Jail No. 13, Mandoli, Delhi	Reply: There is no mental health establishment in central jail no. 13 only OPD services are available.
23	Kerala Prisons & Correctional Services, Sub Jail, Vatakara, Kozhikode	Reply: NO
24	Kerala Prisons & Correctional Services, Women Prison & Correctional Home, Kannur	Reply: There is no mental health establishment set up in women prison & correctional Home, Kannur.
25	Kerala Prisons & Correctional Services, Open Prison & Correctional Home, Cheemeni, Pettikundu PO, Kasaragod	Reply: NIL
26	Kerala Prisons & Correctional Services, District Jail, Kozhikode	Reply: Kozhikode district jail does not have a mental health establishment set up at present.

S.NO	Prison	Response
27	Office of the Superintendent, Central Jail No.16, Mandoli, Delhi	Reply: No, there is no mental health establishment set up in prisons. For mental illness visiting Psychiatrist come regularly and review the psychiatrist patient.
28	Office of the Superintendent of Prisons, Central Jail No.12, Mandoli, Delhi	Reply: Availability of Jail Visiting Psychiatrist for prisoners suffering mental illness.
29	Superintendent Jail, District Jail, Sonepat	Reply: No
30	Kerala Prisons & Correctional Services, Sub Jail, Alathur PO	Reply: No Mental Health centres have been set up in sub jail Alatur
31	Kerala Prisons & Correctional Services, Special Sub Jail, Chittur	Reply: There is nothing in the Chittur Special Sub Jail at present
32	Kerala Prisons & Correctional Services, Sub Jail, Perinthalmanna	Reply: There is no special facility for mental health treatment in this prison.
33	Superintendent of Prison, District Prison, Sirsa, Haryana	Reply: If there is no prisoners admitted in jail the patient is sent to civil hospital for treatment.
34	Superintendent District Jail, Faridabad, Haryana	Reply: There is no such mental health establishment set up in fardabad prison. Psychiatrist consultant visti in jail on every satruday from civil hospital Faridabad.
35	Superintendent of Prison, District Prison, Narnaul, Haryana	Reply: There are no mental health establishments set up in this prison.
36	Superintendent Jail, Central Jail, Ambala, Haryana	Reply: There is no any mental health establishment set up in Central Jail Amabala. Information relating to this point to be treated as NIL.
37	Office of the Superintendent, Central Jail No-07, Tihar	Reply: No such mental health establishments in CJ-07 Dispensary, Mentally ill patient are weekly reviewed by jail visiting Psychitric, Specilaist/SR Psychiatry and Psychiatric Counsellor.
38	Superintendent of Prisons, District Prison, Palwal, Haryana	Reply: District Jail Palwal is a small jail and Hospital/mental health centre not established in this jail. Any prisoner of this jail not suffering from mental illness.
39	Superintendent of Prisons, District Jail, Jhajjar, Haryana	Reply: NO
40	Superintendent of Prisons, Central Jail-I, Hisar, Haryana	Reply: No
41	Loknayak Jaiprakash Narayan Central Jail, Hazaribag, Jharkhand	Reply: Yoga classes are conducted on a daily basis in this hospital of this prison.
42	Superintendent District Jail, Rewari, Haryana Annexure-42	Reply: NO
43	Office of the Superintendent Jail, District Jail Solan, Himachal	Reply: NIL
44	Office of the Superintendent Jail, District Jail Kurukshetra	Reply: There is no mental health establishment set up in District Jail Kurukshetra and there is no prisoner suffering from mental illness.

S.NO	Prison	Response
45	Office of the Superintendent Central Jail, Mandoli, Delhi	Reply: All the prisoners who are suffering mental illness are provided necessary treatment from the referral hospitals such as GTB Hospital, IHBAS Hospital, Sahadara Delhi.
46	Office of the Superintendent Jail, District Jail, Shimla (Kaithu), H.P.,	Reply: No.
47	Office of the Superintendent Jail, District Jail, Jind, Haryana	Reply: No such mental establishment is set up in the prison.
48	Office of the Superintendent Jail, Lala Lajpat Rai District & Open Air Correctional Home Dharamshala (HP)	Reply: No, there is no mental health establishment set up in this jail.
49	Office of the Superintendent Jail, Sub Jail, Kalpa at Reckong Peo, District Kinnaru	Reply: N/A
50	Office of the Superintendent Jail, District Jail, Yamunanagar, Haryana	Reply: There are no mental health establishments set up in this prison for the prisoners suffering from mental illness.
51	Office of the Superintendent Jail, District Jail, Rohtak	Reply: There is one separate room for psychiatric patient in jail hospital.
52	Office of the Superintendent Jail, Central Jail-2, Hisar, Haryana Annexure-5	Reply: No
53	Office of the Director General of Police, Prison Department, J&K	Reply: No Mental Health establishments are set up in jails of J&K. However, Psychiatric visits jails on regular basis for treatment of inmates suffering from any mental health issue.
54	Office of the Superintendent of jail, District Jail, Kullu, H.P.	Reply: nil
55	Office of the Superintendent Jail, District & Open Air Jail Bilaspur, H.P.	Reply: If any inmates are suffering from mental health illness, they are being referred to the R.H. Bilaspur and in case if further treatment is required, than they are referred to IGMCS Shimla which is a higher institute.
56	Office of the Resident Medical officer, Central Jail Hospital, Tihar	No regular counselor is appointed in Tihar Prisons by Delhi Government.

It can be seen from the replies provided by prison departments of some of the prisons in India that they do not have mental health establishment as mandated under section 103(6) of Mental Health Act, 2017 and further mental health care facilities to the prisoners are not provided as per Section 103 and other relevant provisions of 'The Mental Health Care act, 2017'.

MENTAL HEALTHCARE ACT (MHCA), 2017 AND PRISONERS

Under Mental Healthcare Act (MHCA), 2017, the medical officer of the prison has an obligation to send quarterly reports to Mental Health Review Boards (MHRBs) about the status of prisoners with mental illness. MHRBs have been given the power to visit jails and ensure that prisoners with mental illnesses are transferred to mental health establishments. However, only few states (Tripura, Uttarakhand, and Himachal

Pradesh) have constituted MHRBs. In *X v. State of Maharashtra*, AIR2019SC3031 this Hon'ble Court Observed "The right to dignity of an Accused does not dry out with the judges' ink, rather, it subsists well beyond the prison gates and operates until his last breath. In the context of mentally ill prisoners it is pertinent to mention that Section 20 (1) of the Mental Health Care Act, 2017, Act No. 10 of 2017, explicitly provides that 'every person with mental illness shall have a right to live with dignity'. Court held that *"The aspiration of the Mental Health Act was to provide mental health care facility for those who are in need including prisoners. The State Governments are obliged Under Section 103 of the Act to setup a mental health establishment in the medical wing of at least one prison in each State and Union Territory, and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment."*¹⁹

Great emphasis has been laid on providing psychological counselling to prisoners to prevent or ensure early detection of mental illness. Supreme Court in the case of *Md. Mannan v. State of Bihar*, AIR2019SC2934 observed that "It is well recognised worldwide, that owing to the difficult circumstances prevailing in prisons, such as, enforced solitude, inadequate health care, loss of livelihood etc., prisoners often develop mental illness after their admission into prison. Article 21 protects such persons from being executed without obtaining further clarification from the competent authority. Placing reliance upon laws operating in both international as well as national arenas, Court concluded that mental illness is a relevant factor which warrants commutation of death sentence to life imprisonment²⁰."

It has also been found that people who suffer from mental illnesses have faced exclusion when lawyers represent them in courts. This creates a further problem for the accused to get access to justice. Supreme Court in the case of *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2SCC68, held that fundamental rights under articles 14, 19 and 21 of the constitution of India are available to the prisoners as well as freemen. Also in the case of *Re: Inhuman Conditions in 1382 Prisons*, Writ Petition (Civil) No. 406 of 2013 court observed that prisoners on death row should be allowed to have meetings and interviews with their lawyers or members of their immediate family or even mental health professionals²¹.

The International Covenant on Civil and Political Rights (ICCPR) remains the core international treaty on the protection of the rights of prisoners. India ratified the Covenant in 1979 and is bound to incorporate these provisions into its domestic laws and state practices. The International Covenant on Economic, Social and Cultural Rights (ICESCR) states that prisoners have a right to the highest attainable standards of physical and mental health. Apart from civil and political rights, the so called

19 Dr. Prateek Rastogi, "Mental Health Act, 1987 - An Analysis" JIAFM 2005; 27 (3): 176-179.

20 David P. Fidler, "Recent Developments: The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", 524 (1989), Articles by Maurer Faculty, Paper 872.

21 Lawrence O. Gostin and Lance Gable, "The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health", 63 Md. L. Rev. 20-121 (2004).

second generation economic, social and human rights as set down in the ICESR also apply to the prisoners.

The UN's Mandela Rules and Model Prison Manual, which highlight the State's responsibility in ensuring the mental health of prisoners through cultural, educational and recreational activities. The Rights of Persons with Mental Illness Rules, 2018, also provides a comprehensive standard for mental healthcare services in prisons, including mental status examinations at the time of entry to prison and questionnaire screening for substance abuse. However, these safeguards remain woefully inadequate due to their non-implementation.

As per Mental Health Act, 2017 section 31 (2) "(2) The appropriate Government shall, at the minimum, train all medical officers in public healthcare establishments and all medical officers in the prisons or jails to provide basic and emergency mental healthcare." Also as per Mental Health Act, 2017 103 (6) The appropriate Government shall setup mental health establishment in the medical wing of at least one prison in each State.

There is an urgent need to implement the existing legal framework for dealing with mental healthcare in prisons. It has been repeatedly said that imprisonment does not bid farewell to fundamental rights. But the probability is high that "a prisoner might emerge from the prison not only without job skills but also incapacitated for future work because of severe and lasting physical and mental health issues"²².

CONCLUSION

In 2014, the NHRC released a report on suicide by prisoners, in which it was stated that a person was 1.5 times more likely to commit suicide while he is in prison. Out of the 4 lakh prisoners, 6000 had odd mental health issues which were ignored. Protection of rights of prisoners who have mental health issues is an obligation of the government under Section 103 of Mental Healthcare Act, 2017. Efforts have been made to improve the state of mental health care of prisoners in the country but a huge gap still remains between the requirement and availability of facilities in the sector.

Section 103 mandates that a prisoner with mental health illness should be admitted only in a mental health establishment and all the necessary arrangements should be made for the person. However, there is no clear mechanism to check and assess the mental health of the prisoner in prison or when he/she is admitted in prison. Chapter 8 of the Prisoners Act also talks about the mental health of the prisoners and how the jailer has to inform the Medical Subordinate about any prisoner whose state of mind or body seems to require attention and thereafter the jailer has to follow the instructions given by the Medical Officer. Further, Article 38 of the Prisoners Act requires the prison authorities to maintain a day to day record of the directions

²² Vijayalakshmi Poreddi, Ramachandra, Konduru Reddemma and Suresh Bada Math "People with Mental Illness and Human Rights: A Developing Countries Perspective" Indian J Psychiatry 2013 Apr-Jun; 55(2): 117-124.

given by the Medical Officer and whether or not those instructions were complied with. Despite these provisions, many such prisoners remain unnoticed and there is hardly any implementation in real life²³.

23 R.R. Pillai, K. K. Sahu, V. Matthew, S. Hazra, P. Chandran and D. Ram, "Rehabilitation Needs of Personswith Major Mental Illness in India", IJPR Vol. 14(2) 95-104.

Exploring Delay in Granting of Patents: An Analysis of Legal Framework in India and USA

Mohd Kaif*

ABSTRACT

The triangle of law, science, and technology is the most important factor in today's technological age for any developing country to join the club of developed nations. The two metrics used to gauge a country's scientific advancement are research and patenting. A long delay in patent granting may deter inventors, and there is also a potential that the identical invention would get patented somewhere else, which would be the worst nightmare for any inventor. Therefore, timeframe is important when it comes to patenting. The research in this study attempted to examine the legal frameworks of developing and developed nations in order to pinpoint the differences between patent regimes of these nations. Second, in this study, the delay in patent grant has been investigated under various intellectual property regimes in order to raise attention of the policy-makers towards the need to reduce patent grant delays.

Keywords: Patent, Delay, Timeframe, Grant, Policy Making.

INTRODUCTION

It is widely accepted that humans can own actual property and tangible objects. Private property is protected from tampering by others under common law and criminal law.¹ The conceptual foundation for private property preservation is deeply ingrained in our culture: When labour is applied to nature, private property results as an incentive for discovery, as a foundational element of individuality, and as the foundation for an orderly economic system.²

Ideas are, by definition, intangible.³ These exist in human thoughts and work. Legal

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1 Indian Penal Code 1860 s.103.

2 Locke, John, 1632-1704. *The Second Treatise of Civil Government and A Letter Concerning Toleration*. Oxford :B. Blackwell, 1948.see also Locke, J. (1980). *Second treatise of government* (C. B. Macpherson, Ed.). Hackett Publishing.

protection for intellectual activity developed much later in human history than protection for tangible property.⁴ The protection of such “intellectual property” poses a number of complex philosophical issues.⁵

The need for worldwide intellectual property agreements was first realised in 1873.⁶ When foreign inventors declined to attend a convention in Vienna, fearing their ideas would be sabotaged by inventors who learned of their inventions at the convention and produced them in other countries.

These concerns were resolved by the Paris Convention 1883.⁷ It was the first accord to grant international status to something akin to patents, which it referred to as “industrial property.”⁸ However, its regulations were weak, as these did not provide technical criteria for international IP claims.⁹

Soon after, the Berne Convention documented protection for artistic and literary works,¹⁰ In 1893, it was combined with the Paris agreement to form the United International Bureau for the Protection of Intellectual Property. Opposition to international IP accords recorded in the 1960s when African and Indian delegates argued that developing-country heritage should be protected by copyright under BIRPI as a source of development funding.¹¹

Representatives of advanced economies¹² rejected these efforts, stating that the Berne Convention was intended to apply exclusively to individual writers, foreshadowing the exclusion of nonbiomedical treatments from patent protection¹³.

The Paris Convention was last amended in 1979 and can be regarded as a more flexible predecessor of the WTO’s intellectual property agreement. Another international instrument, the Patent Cooperation Treaty, was enacted in 1970.¹⁴

3 Napoleon Hill (2015). “Think and grow rich: Brazilian edition”, p.88, CDG Edições e Publicações LTDA

4 Morgan D. Rosenberg, *Patent Application Drafting* (Lexis Nexis, 2015).

5 Mark A. Lemley, Peter S. Menell, et.al., *Intellectual Property in the New Technological Age:20163* (Clause 8 Publishing, 2016).

6 available at: <https://www.wipo.int/about-wipo/en/history.html> (last visited on December 7, 2021).

7 Paris Convention for the Protection of Industrial Property (1883) available at: <http://www.wipo.int/treaties/en/ip/paris> (last visited on December 7, 2021).

8 available at: <http://www.wipo.int/treaties/en/ip/paris> (last visited on December 7, 2021).

9 available at: <https://www.wipo.int/about-wipo/en/history.html> (last visited on December 7, 2021).

10 The Berne Convention for the Protection of Literary and Artistic Works 1886.

11 available at: <https://www.wipo.int/about-wipo/en/history.html> (last visited on December 7, 2021).

12 available at: <https://archive.unescwa.org/advanced-economy> (last visited on December 18, 2021)

13 Suzanne Scotchmer, “Standing on the Shoulders of Giants: Cumulative Research and the Patent Law” 5*The Journal of Economic Perspectives*29-41 (1991).

14 Herbert F. Schwartz, *Patent Law and Practice* (Bureau of National Affairs, 3rd edn., 2001).

However, developing and developed nations, indeed has a gap in delay for granting of patents, which makes a bit difficult for the developing nations to compete with the developed nations. Subsequently, when it comes to the granting of the patent, there is still a lag in the time frame of the Indian patent regime, which may have an impact on the pace of research and development in this age of technological advancement. Furthermore, it seems that the time frame for issuing patents at the institutional and individual levels in India is not uniform, which discourages solo inventors and hence has an impact on individual research.

LEGAL FRAMEWORKS

1. International Frame work

Under these early conventions, the member states had the flexibility to develop their own IP laws. The WTO's TRIPS agreement contains essential flexibilities but at the same time, TRIPS establishes a more uniform global system. Earlier treaties were enacted and implemented through international organisations, such as, The United Nations, IMF and World Bank.¹⁵ Subsequently, the WIPO, was established in 1974, continues to make policy recommendations and requirements, and developing countries preferred this platform due to its more democratic orientation as Article 2 of The TRIPS Agreement is binding on all members of the World Trade Organization.

The WIPO, however, is confined to "exerting moral suasion" on nations and the execution of TRIPS.¹⁶ The WTO's allowed big corporate actors to design a worldwide IP accord in accordance with their concerns and priorities.¹⁷

India passed its first copyright legislation in 1847, and the first patent law was enacted in 1856 in areas of India under direct British control, but not in the princely states that made up the rest of the subcontinent.¹⁸

In post-independence era, the Indian government modified its colonial intellectual property rules to reflect the new nation's interests better. It appointed a commission under the chairpersonship of Justice Rajagopal Ayyangar to head a Commission charged to evaluate Indian patent regime in light of the country's poverty and mortality rate. The Commission proposed that product patents for medicines and food not be allowed since they would infringe on individuals' right to life, which is guaranteed by the

15 available at: https://www.wto.org/english/thewto_e/coher_e/coher_e.htm (last visited on December 18, 2021)

16 available at: <https://www.wipo.int/about-wipo/en/history.html> (last visited on December 7, 2021).

17 The World Trade Organisation, Corporate Interests and Global Opposition: Seattle and After Author(s): DARREN HOAD April 2002, Vol. 87, No. 2 (April 2002), pp. 148-154.

18 Sagar, R. (2020). Patent Policy in India under the British Raj: A Bittersweet Story of Empire and Innovation. In G. Gooday & S. Wilf (Eds.), *Patent Cultures: Diversity and Harmonization in Historical Perspective* (Cambridge Intellectual Property and Information Law, pp. 273-301). Cambridge: Cambridge University Press.

Indian Constitution, in order to lower pharmaceutical prices and reduce India's dependency on imported medicines.¹⁹

To foster the expansion of the local pharmaceutical industry and cut costs through competition, the Commission proposed implementing patents only for the process of making food and medical items. These recommendations resulted in the passage of the Patents Act 1970. It was India's prevailing patent law until the TRIPS-compliant Patents (Amendment) Act 2005.²⁰

Under the 1970 statute, only the process of making a medicine could be patented, not the product itself.²¹ If many producers could find alternative ways to build the same product, a process is known as "reverse engineering" would be possible.²² Indian pharmaceutical businesses grew effective at reassembling chemical compositions developed by foreign companies.

The WTO, while considering the 1970 statute, deemed it be ineffective of its standards, which instead resulted in constant innovation.²³ The TRIPS agreement stipulates that all WTO member nations implement product patent protections and provide exclusive market power to patent holders, as part of the implementation of a new international IP regime.

As a result, the Patents Act 2005 includes a brief statement that could have a significant impact on public health in low-income and middle-income nations worldwide.²⁴ By removing Section 5 from the Patent Act, India's new Patents Act complied with TRIPS by eliminating the product patent exception for medicines and food, and they may, along with enduring poverty, keep important new medications out of the hands of many people living with HIV/AIDS in a number of low- and middle-income countries around the world.²⁵

So, after going over the timeline of international law on patent, from pre-WIPO to post-WIPO, then to TRIPS, and eventually to the incorporation of these international instruments into Indian law. First, it emerges that drafters of the International Patent Regime have made efforts to bridge the gap between law and technology; Second, the Indian Patent regime has also been promising in adopting international accords.

19 N. Rajagopala Ayyangar, "Report on The Revision of The Patents Law" (1959).

20 The Patents (Amendment) Act, 2005.

21 R.A Mashelkar "Report of Technical Expert Group on Patent Law Issues" (2006).

available at: <https://www.merriam-webster.com/dictionary/reverse%20engineer> (last visited on December 05, 2021).

22 *available at:* <https://www.merriam-webster.com/dictionary/reverse%20engineer> (last visited on December 05, 2021).

23 WTO, WHO Secretariat, "WTO Agreements and Public Health" (2002).

24 Murphy Halliburton, *The New Patent Regime: The Activists and Their Allies* (Cornell University Press, 2016).

25 Murphy Halliburton, *The New Patent Regime: The Activists and Their Allies* (Cornell University Press, 2016).

2. India

Historical Development of patent law in India	
Year	Description of Patent Law Amendments
1856	The Act VI of 1856 on protection of inventions based on the British Patent Law of 1852. Certain exclusive privileges granted to inventors of new manufacturers for a period of 14 years.
1859	The Act modified as Act XV; Patent Monopolies called Exclusive Privileges (making, selling and using Inventions in India and authorizing others to do so for 14 years from date of filing specification)
1872	The Patents & Designs Protection Act
1883	The Protection of Inventions Act.
1888	Consolidated as the Inventions & Designs Act.
1911	The Indian Patents & Designs Act.
1972	The Patents Act (Act 39 of 1970) came into force on 20th April 1972.
1999	On March 26, 1999 Patents (Amendment) Act, (1999) came into force from 01-01-1995
2002	The Patents (Amendment) Act 2002 came into force from 20th May 2003
2005	The Patents (Amendment) Act 2005 effective from 1 st January 2005

Source: Development of Patent Law in India Available at www.ipindia.gov.in

The Patents (Amendment) Act 2005 was notified on April 4, 2005, and went into effect on January 1, 2005. The aforementioned Ordinance was replaced by this Patent amendment. The Indian Patent Laws have now been completely TRIPS compliant as a result of this revision. The highlights of the Patents (Amendment) Act, 2005 are listed below.²⁶

The section 5²⁷ of the Indian Patent Act, which only permitted process patents for items related to food, drugs, and medicine, was likewise repealed. The removal of this provision allowed product patents for inventions relating to food, pharmaceuticals, and chemical compositions. Allowing product patents for medications in India has had a massive impact, and numerous public interest litigation groups continue to speak out against product patents for drugs in India. However, with this change, India has also inserted various safeguard clauses to ensure that drug product patents are not misused and that there is no evergreening of patented drugs. The extra provisions have ensured that the common man has access to medications for public health at a fair cost.. Amendment in section 3(d), new grounds for compulsory licensing (section 84)²⁸, working of patents (section 83)²⁹, government use of patent.

(Section 100)³⁰, pre-grant [Section 25(1)]³¹ and post grant opposition [Section 25(2)]

26 Available at www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_69_1_patent_2005.pdf

27 Section 5 of The Patents Act, 1970- Inventions where only methods or processes of manufacture patentable: [Omitted by the Patents (Amendment) Act, 2005]

28 Ibid.

29 Section 83 of The Patents Act, 1970.

30 Section 100 of The Patent Act, 1970.

31 Section 25 (1) of The Patents Act, 1970 Opposition to the patent. – (1) Where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground.

provisions etchave enhanced the legal regulatory structure to prevent unwanted patent abuse. A provision stated that a manufacturer of pharmaceuticals, food products, or chemical compositions would not be liable for infringement if an investment was made, and the producer was producing and marketing the relevant product prior to January 1, 2005. The grant of a patent was subject to certain conditions, particularly for government use (section 47). With effect from January 1, 2005, Chapter IV A, dealing to Exclusive Marketing Rights, was eliminated.

Section 3(d) of the Patents (Amendment) Act, 2005 (Act 15 of 2005) stated that the discovery of a new form, property, or usage of an existing material was not patentable unless it resulted in increased efficacy. The court went on to say that improved efficacy refers to medicinal efficacy. Section 3(d) is peculiar to Indian Patent Laws and assures that no redundant or incremental medicine patents are obtained and that patents are never greened.

To fully utilise international filing under the Patent Cooperation Treaty (PCT), certain provisions concerning filing, processing, and priority considerations were included. The definition of convention country was defined (section 133) for international agreements, and any signatory country that guaranteed equivalence to Indian citizen applicants for patent issuance was defined as a convention country. Various supplementary measures were established to ease the submission of patent applications by applicants from convention nations, whether through the convention route or the PCT route (section 138). The deadline for submitting the application for grant was set at 12 months from the date of the patent office's issuance of the First Examination Report (FER).³²This provision has now been changed, and the time for responding to the First Examination Report has been shortened to six months, with a three-month extension provision.³³The applicant was given the option of requesting early publication of his patent applications. The amendment also stated that, while no suit for infringement can be filed until patents are granted, the applicant shall have the same privileges and rights as if the patent for the invention had been granted on the date of application publication and until the grant of a patent in respect of such application.³⁴The weekly digital publishing of the Indian Patent Journal began on January 1, 2005, assisting in the later searchability of the Indian Patent Office data base. The opposition procedure was changed such that a pre-grant opposition may be submitted within six months of the date of publication until the patent was granted.³⁵With this rule, no patent can be issued within six months of the publication of the patent application, and patent grants are only granted following a six-month pre-grant opposition period. The post grant opposition³⁶ provided formation of opposition boards. Any interested party may file a post-grant opposition to a patent with the Indian Patent Office within 12 months of the patent's award. The provisions in Chapter XVI relating to patent

32 8 [Rule 24 B (4) before The Patent (amendment) Rules, 2016 (16/5/2016).

33 Rule 24 B of Patent Rules (amended), 2016.

34 Section 11 A(7) of The Patent Act, 1970.

35 Section 11 A(7) of The Patent Act, 1970.

36 Section 25 (2) of The Patents Act, 1970.

functioning, forced licences, and revocation were changed. A special provision 92 A was added to allow any country with inadequate or no production capacity in the pharmaceutical sector for the concerned product to address public health issues to obtain a compulsory licence for the production and export of patented pharmaceutical products under certain conditions.

On March 22, 2011, CGPDTM469 (CG) published the Indian Manual of Patent Practice and Procedure in order to improve uniformity in the evaluation of patent applications. This document can be regarded as a practical guide for effective patent application prosecution in India. However, because it does not constitute rulemaking, it lacks the power and effect of law and just gives guidance for introducing uniformity in the processing of patent applications. This guidebook is just another step toward the Indian Patent Office's aim to being more efficient and open. Inventors, patent practitioners, and international applicants have requested that the Indian Patent Office codify its processes in the form of a manual.³⁷

3. USA

The United States has codified its laws into 53 title codes of laws known as United States Codes (abbreviated USC) numbered 1 through 54, with code 34 being repealed. Title 35 of the United States Code governs patent law. Title 35 provisions govern all areas of patent law in the United States. Title 35 now consists of 37 chapters and 376 parts. Section 101 is written as 35 U.S.C. 101. This provision states that anyone who invents or discovers a new or useful process, machine, manufacturing, or composition of matter, as well as any new or useful improvement, is eligible for a patent. In US Patent Law, there is no exclusive list of non-patentable subject matter. If the invention belongs under one of the four categories indicated above, namely machine, manufacturing, composition of matter, or improvement, it is patentable subject matter. Certain topic matter, however, are judicially established exceptions and are not qualified, such as the abstract character of subject matter.

Section 102 describes patentability conditions such as novelty, non-obviousness, inventive step, utility, and so on. Section 112 (35 U.S.C. 112(a)) is about specification and states that the specification must include a written description of the invention as well as the manner and process of manufacture (called enablement of invention) and must also explain the best mode of operation known to the inventor at the time the invention was made. This optimal mode and enablement requirements are fundamental to the patent system in order to assure that the invention's disclosure is full and that anyone can work on the invention without unnecessary experimentation. A textual description of the invention, enablement, and optimum method of carrying out the claimed invention must be included in the specification.

The Patent Act in the United States was last revised in 2011 to include patent changes. After years of debate, public participation, and legislative deliberations, the US Senate enacted the Leahy-Smith America Invents Act on September 16, 2011, and President

³⁷ Manual of Patent Practice and Procedures (MPPP) (Effective March 22, 2011) available at [www.ipindia.nic.in / manual-patents.htm](http://www.ipindia.nic.in/manual-patents.htm).

Obama signed it into law. The new law has resulted in a number of changes to the US Patent System. The United States has long followed a “First to Invent” system of determining priority of invention, in which the “first inventor,” who could demonstrate the early conception of invention with due diligence in reducing the invention to practise, was entitled to first right of patent, even if the “first inventor” was not the first to file an application for grant of patent for that invention. Whereas the rest of the world followed the “First to File” method, which states that whoever filed the first patent application gets the first right to a patent for that innovation. With the America Invents Act, the United States has aligned its patent system with that of other countries and transitioned to the “First to File” system. The earliest date of filing the patent application with the patent office now determines the priority rights of obtaining a patent for the innovation. However, the “First to File” clause was implemented on March 16, 2013, and this approach has avoided costly and time-consuming interference processes to decide whether inventor is entitled to the patent. The AIA established a new Patent Trial and Appeal Board (PTAB), as well as new post-grant proceedings, this is providing quicker alternatives to district court litigation.

The US Government has delegated the job of Patents and Trademarks to the United States Patent and Trademark Office (USPTO). The USPTO is part of the Department of Commerce of the United States, and the Patent Department is led by the Commissioner of Patents. According to the USPTO’s 2014-2018 strategic plan, innovation has become a primary driver of the modern economy, supporting economic growth and creating high-paying jobs. The USPTO’s role is to grant patents to protect inventions and to register designs and federal trademarks. The USPTO also serves as an advisory body, assisting and advising the President of the United States, the Secretary of Commerce, and other government agencies on the domestic and international elements of intellectual property in patents, trademarks, and designs, among other things. The USPTO reviews applications and grants patents on inventions, as well as publishing and disseminating patent information and maintaining a searchable database of US patents granted to date. It educates practitioners on the requirements of patent statutes and regulations, as well as publishes and maintains the Manual of Patent Examining Procedure (MPEP).

At the end of FY 2020, the USPTO workforce³⁸ was composed of 12928 federal employees (including 8434 patent examiners). The quantum of patent applications filed in 2020 in USPTO is 653,311, which is enormously high as compared to India which is 56267.³⁹

Filings and Pendencies	FY 2016	FY 2020
Patent UPR Filings	650,411	653,311
Percentage Change in Patent Filings	5.2%	(2.0)%
Average Patent First Action Pendency (months)	16.2	14.8
Percentage Change in Average Patent First Action Pendency	(6.4)%	0.7%
Average Total Patent Pendency (months)	25.3	23.3
Percentage Change in Total Patent Pendency	(4.9)%	(2.1)%

Source: FY 2020 United States Patent and Trademark Office Performance And Accountability Report

38 FY 2020 United States Patent and Trademark Office Performance and Accountability Report.

39 IPO Annual Report 2019-20 available at www.ipindia.nic.in/annual-reports-ipo.htm

DELAY

The researcher has addressed patent pendency issue of India, USA. The length of time needed to grant a patent, or the patent delay, varies by country. A study found that from the date of filing, patents are issued in USA is about 2-4 years, in India in 2-5 years, and in Brazil in 6-8 years. The comparatively lengthy, seven-year examination deferral mechanism used by the German Patent Office contributes to the extended pendency term.

The average European patent pendency in 2012, according to data from the European Patents Bulletin, was about five years; however, many EPO patent applications were PCT applications, which arrived at the EPO 18 months after filing. The EPO's pendency period was between 3.5 and 4 years if this was taken into account.

Grounds for this pendency in these countries as stated by the researcher, more than 60% of Indian patents were still under review at the time of data collection, which contributed to the comparatively low number of issued patents in countries. This rationale was amply demonstrated by the fictitious number of zero applications that were turned down. In contrast, 20% of German applications and 25% of Chinese applications were now subject to the patent review and inspection process.

According to the distribution of patents issued up until 2011, only 20% of Indian applicants (189) acquired patents there, whereas more than 90% (2808) of Brazilian applications did. Thus, in this article the researcher has highlighted the variable of pendency in different developed and developing nations. And its impact on time frame, with the help of factual data.

FACTORS FOR DELAY

The time of the grant of a patent under the international and Indian patent regimes has been referenced in the aforementioned research. The statistical literature reviewed in this article shows of delay in the granting of patent. Literatures highlight understaffing, lack of manpower, or examiner shortages as a variable for pendency. The researcher identifies pre grant and post grant opposition as a variable that influences how quickly a patent is granted. The relationship between variables with one another is as follows. Pendency has a direct relationship with patent grant, implying that as the pendency increases, so does the time frame for patent grant, thus showing a positive correlation exists between these two variables. The second variable highlighted in the preceding research as influencing the delay is a shortage of manpower; that is, a smaller number of examiners in the country influences the pendency and consequently the time frame of patent grant, thus pointing towards a negative correlation. When pre- and post-grant opposition is rigid in the nations, time frames lengthen.

CONCLUSION

Identifying the above variables and their relationship with the time frame for the grant of patent, the researcher finds a gap in patent regimes and the filing process of developing and developed nations. Post grant and pre grant opposition have been

identified by the researcher as the variables that strongly influence the pendency of patents in India. The majority of the statistical data has emphasised post grant and pre grant opposition as a significant variable that affects pendency and thus the impact of this variable can be felt of the time frame for the granting of patent. The studies demonstrate a significant discrepancy between developing and developed countries in the context of filing and granting, besides certain provisions of compensatory nature like (PTA) and (PTE) have not been incorporated so far, to cope with the other nations in this age of technological advancement. Furthermore, different treatments to individual and institutional applicants make it difficult for individual innovation to thrive. The time frame for issuing patents has an important role in an output of nation in research, innovation and economic prosperity. Therefore, it is vital to narrow down the time frame of the grant of a patent in India under structural and operational aspects of regulatory framework.

Theoretical Analysis of Police Training Mechanism in India Through the Prism of Human Rights

Mr. Mukesh Kumar Dudi*

ABSTRACT

Police reforms in India have been a source of contention. The origins of police reform may be traced back to training. The emphasis on training has historically been on hard skills, while soft skills have been neglected. However, public trust and perception are dependent on soft skills. Human rights education is an essential component of soft skill development. Human rights-oriented or citizen-centric police training is essential for fostering trust in the public. The training method must be examined and designed in response to the comments and suggestions contained in the research. The police training mechanism in India should be in accordance with international norms and benchmarks, which are now lacking. In this paper, the researcher attempted to illustrate the relevance of human rights education in police training by presenting a scenario of human rights education in Indian police training mechanisms. Finally, there are demands and obstacles in police training in terms of human rights which has been identified in this article by the researcher.

Keywords: Police Training, Human Rights, Training Mechanism, Education, Sensitisation.

INTRODUCTION

In order to safeguard its citizens lives, liberty, and property while upholding law and order and maintaining peace and tranquilly, every State maintains an effective police mechanism.¹ If a state cannot maintain law and order, it is referred to as a "failed state," and as a result, police are the State's most prominent face.²

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1 Plato, *The Republic* (Fingerprint Publishing, India, 2015); see also, Government of India, "Report of the Committee on Reforms of Criminal Justice System" 23 (Ministry of Home Affairs, 2003).

2 Common Cause & Lokniti - Centre for the Study Developing Societies, "Status of Policing in India Report 2018: A Study of Performance and Perceptions", available at: <https://commoncause.in/pdf/SPIR2018.pdf> (last visited on December 11, 2022).

According to the 5th report on “Public Order” by the 2nd Administrative Reform Commission (ARC) it is the duty of the State to guarantee the reliable, effective, sensitive, and accountable operation of the police for the entirety of the State.³ The police agency is responsible for defending residents’ significant human rights. When citizens’ rights are infringed or threatened, they turn to the police for aid.⁴ Public support for police behaviour and actions is necessary for the police to be able to carry out their job.

Public confidence in law enforcement can increase their efficiency and the legality of their acts.⁵ Notions of the police can affect how cooperative people and police organisations are, how effective police work can be, and how public safety can be affected.⁶ There are several causes for this mistrust and suspicion of the police. From the outdated laws that police must enforce to the imperial ethos of despotism or superiority of the police force, from inadequate capacity-building mechanisms that reveal gaps in the training of police personnel in tune with changing times to insufficient optimum use of human resource within the system.⁷ Neglect of human rights and ethical training contributes to the public’s low level of trust in the police.⁸

To achieve an increase in the police’s credibility, the law and society must maintain and strengthen their confidence in the police and their competence.⁹ In order to boost public trust in the police, respect for human rights and human dignity is necessary because the erosion of credibility is also linked to obvious contempt for and a lack of human rights awareness.¹⁰

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- 3 2nd Administrative Reforms Commission, “5th Report on Public Order: Justice for each ... Peace for all” (Para 5.2.1.8 a) (2007).
 - 4 Government of India, “Report of the Committee on Reforms of Criminal Justice System” 87 (Ministry of Home Affairs, 2003).
 - 5 Andrew Goldsmith, “Police reform and the problem of trust” 9/4 *Theoretical Criminology* 443-470 (2005).
 - 6 J. Frank, K.J. Novak, *et.al.*, “Exploring the Basis of Citizens’ Attitudes Towards the Police” 8/2 *Police Quarterly* 206-228 (2005).
 - 7 Mahesh K. Nalla and Joseph A. Hamm, “Is Police Integrity an Important Predictor of Citizen Satisfaction in Police in Post-colonial Emerging Democracies? The Case of India” 13 *Asian Criminology* 19-34 (2018); *see also*, Andrew Goldsmith, “Police reform and the problem of trust” 9/4 *Theoretical Criminology* 443-470 (2005).
 - 8 Vineet Kapoor, “Education for Emancipation and Law Enforcement: Critical Pedagogical Examination of the Human Rights Education of the Police” CESI Conference 2015 on Education: Domination, Emancipation and Dignity December 14th to 16th 2015 held at Azim Premji University Bangalore.
 - 9 Government of India, “Report of the Committee on Reforms of Criminal Justice System” 272 (Ministry of Home Affairs, 2003).
 - 10 Angela Sorsby and Lindsey Rice, “Treat Them as a Human Being: Dignity in Police Detention and Its Implications for ‘good’ Police Custody” 60/6 *The British Journal of Criminology* 1667-1688 (2020).

1. Police Training and Education: Meaning and Objectives

Effective performance is promoted by well-trained employees in every area of human activity. A capable police officer should uphold the ideals of the area he protects. He should be aware of the level of prevailing tolerance; he must also understand that upholding individual rights undermines the safety of the community, so he makes an effort to act within the bounds of the legal system. Additionally, he must be prepared to adapt his strategies to the shifting values of the society he lives in to plumb the depths of training.¹¹

The institutional transformation of policing can be delivered in large part through training, which may also have an impact on the institutional reconstruction of society as a whole. Training is crucial because it equips police officers for the rigors of their jobs and serves as a channel for the dissemination of new concepts, rules, and knowledge across the organisation.¹²

The first and most crucial stage in building an effective and professional police department is providing appropriate police training.¹³ One of the significant contributions made by governments in the development of human capital inside a police department is police training. A recruit receives training both at the start of their careers, known as basic training or induction training, and throughout their careers, through mid-career training programmes.

According to research on police training, police officers in democracies must balance safeguarding citizens' rights and maintaining their safety and security with upholding democratic principles. Training results in the development of professional abilities and adherence to the rule of law, due process, and human rights.¹⁴ Through efficient education and training of police officers, the operation of the police can be greatly improved.¹⁵ The first requirement for enabling law enforcement organisations to offer the community a more secure environment is police education and training. It improves the standard of living in our society.¹⁶

Draw a distinction between education and training by recognizing education as the development of the capacity to comprehend and broaden the theoretical and methodical

11 Samuel Haig Jameson, "Quest for Quality Training in Police Work" 57/2 *The Journal of Criminal Law, Criminology, and Police Science* 210 (1966).

12 Mary O'Rawe, "Human Rights and Police Training in Transitional Societies: Exporting the Lessons of Northern Ireland" 27/3 *Human Rights Quarterly* 944-945 (2005).

13 Nevena DiëiæKostiæ, "Human Rights and Police -The Role of Police Training and Education" *Collection of Policy Papers on Police Reform in Serbia* (2014).

14 T. K. Vinod Kumar, "Variation in the perception of desired qualities of police officers among trainees and senior police officers. Insights into the process and efficacy of police training" 43/3 *International Journal of Comparative and Applied Criminal Justice* 242-247 (2019)

15 Rainy John, *Assertiveness at Work: Human Relations Skill Training Among Recruit Police Constables - A Kerala Experience* (2010) (Unpublished Ph.D. thesis, University of Calicut).

16 Paulo Rogério Lino, "Police Education and Training in a Global Society: A Brazilian Overview" 5/2 *Police Practice and Research* 125 (2004).

learning process, and training as the acquisition of skills required to complete the immediate duties and goals of police operations.¹⁷ Although the ideas can seem dissimilar, they are connected and both can influence how people learn. Police training has been used to improve police abilities and has been considered as a means of advancing community policing, human rights, the rule of law, and democratisation in developing and post-Soviet countries on a global scale.¹⁸ The foundation subject of considerable police activity and spending on developing the most crucial resources needed for policing action is training and education.¹⁹

2. Training in Human Rights Perspective

Police training is increasingly being divided into soft and hard components. All behavioural, attitude, value-based, and ethical trainings belong under these categories' "Soft Skills Training," whereas "Hard Skills Training" refers to topics like armament, physical fitness, unarmed fighting, forensics, and investigational concerns.²⁰

The first and most important step in building a future where policing is more efficient and professional is police training. Participants in human rights-based training are better equipped to actively respect and defend their basic rights. It makes sure that the utilization of force adheres to the legality, necessity, and proportionality standards, which are crucial for the growth of just societies.²¹

The UN General Assembly adopted the UN Declaration on Human Rights Education and Training in 2011.²² According to its Article 2 para.1, "Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all

17 P. C. Kratoski, "The challenges of police education and training in a global society", in P. C. Kratoski and D. K. Das (eds.), *Police education and training in a global society* 3-22 (Lexington Books, Plymouth, 2007).

18 Monika Baylisa and Anna Matczakb, "Tracking the evolution of police training and education in Poland: linear developments and exciting prospects" 20/3 *Police Practice and Research* 273 (2019).

19 Available at: <https://www.taylorfrancis.com/books/mono/10.4324/9780203095898/international-perspectives-police-education-training-perry-stanislas> (last visited on December 21, 2022).

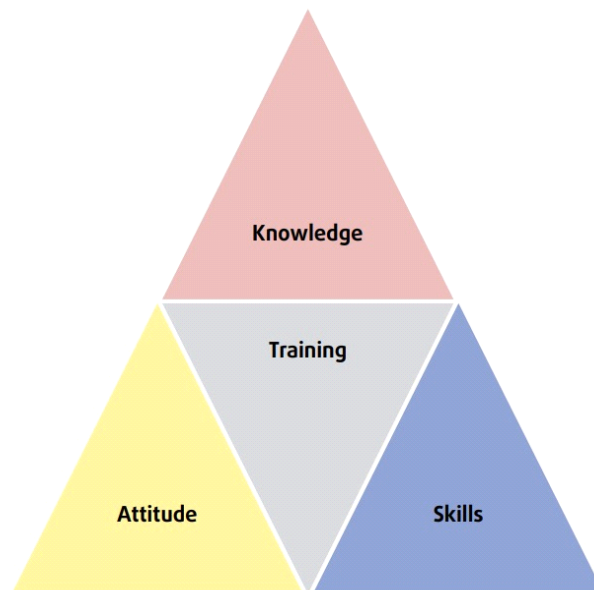
20 Minsitry of Home Affairs, BPR&D, Draft Project Proposal for Soft Skills Training for Police Personnel, prepared by Micro Mission 2, National Police Mission, 2008-9, available at: <http://bprd.nic.in/writereaddata/linkimages/8931736113-Soft%20Skill%20Training%20to%20Police%20Personnel.pdf>

21 Training Manual, Fundamental rights-based police training: A manual for police trainers 3 (European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union, 2019).

22 UN Declaration on *Human Rights Education and Training*, UN Doc. A/RES/66/137 (19 Dec 2011), available at: <http://www2.ohchr.org/english/issues/education/training/UNDHREducationTraining.htm>; see also, P. Gerber, "Education about human rights, Strengths and weaknesses of the UN declaration on human rights education and training" 36/4 *Altern Law J* 245-249 (2021).

human rights and fundamental freedoms and thus contributing to, inter alia, the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights.”

Human rights training thus entails (1) many sorts of educational and training initiatives that are (2) focused at implementing human rights, minimizing human rights violations, and, finally, establishing a human rights culture. (3) by directing cognitive processes at the knowledge, skill, and attitude levels. (4) These actions should be liberating for both duty bearers and right holders.²³



The ‘Human rights education triangle,’ which may be found in numerous human rights education books, is a well-established idea that blends knowledge (theory) with skills and attitudes (practise).²⁴

3. Importance of Human Rights Training in Police Functions

Professional policing rooted in human rights is a necessary foundation for the police’s credibility and efficiency. Only police officers who are capable of protecting citizens’ rights and liberties deserve the public’s faith and respect. The key to establishing

²³ Walter Suntinger, “Police Training and International Human Rights Standards”, in Ralf Alleweldt and Guido Fickenschner (eds.), *The Police and International Human Rights Law* 279-304 (Springer International Publishing AG, Cham, Switzerland, 2018).

²⁴ Human rights, education and global responsibilities (1992); Understanding Human Rights, Manual on human rights education (2006); Guidelines on Human Rights Education for Law Enforcement Officials, (September 2012).

confidence between police and citizens is to respect human rights, that is unthinkable without a thorough understanding of them.

A series of studies done by the European Union Agency for Fundamental Rights revealed the link between trust in the police and respect for human rights. A survey of 23,500 assessed immigrant and ethnic minority populations across all 27 EU Member States, for example, indicated a large proportion of unreported offences. Sixty-five percent (65%) of individuals who had received security threats did not report the episode to the police, and more than half (55%) said they did not report it due to a "loss of faith" in the police.²⁵

Policing and the preservation and promotion of human rights have a direct and crucial link and interdependence, and it is critical that this interplay and dependency be examined and understood to the greatest extent feasible.²⁶ The public's faith in the police is viewed as critical to social order and productive policing.²⁷ Thus, police training is a reasonably popular technique of recycling values and perspectives among recruits who have not experienced the field.²⁸

Respect for human rights, on the other hand, increases the efficacy of law enforcement authorities. Police personnel gain professionalism in their methodology to combating and hindering crime but also preserving public order when human rights are consistently respected. In this way, police respect for human rights is not just a moral, legal, and ethical obligation, but also a practical prerequisite for law enforcement. When the police are seen to respect, uphold, and defend human rights, public trust is created, community collaboration is promoted, legal prosecutions are succeeded in court, and justice is administered fairly.²⁹

A dearth of Capacity Building method for developing Human Rights based ethical policing systems through behavioural, skills, and knowledge-based capacity amongst the police has been identified by major commentators on Policing and Human Rights.³⁰ It is critical to underline during the training sessions that understanding of human rights is a professional need for all individuals functioning in modern law enforcement

25 Nevena DièiæKostiæ, "Human Rights and Police –The Role of Police Training and Education" *Collection of Policy Papers on Police Reform in Serbia* (2014).

26 Ralph Crawshaw, "Human rights and the theory and practice of policing" 1/1 *The International Journal of Human Rights* 1-22 (1997).

27 M. Simon, *et.al.*, "Drivers of public trust and confidence in police in the UK" 14 *International journal of police science and management* 118-135 (2012); *see also*, J. Ken Rotenberg, Amy Harrison, *et.al.*, "Police officers' trust beliefs in the police and their psychological adjustment" 26/6 *Policing and Society* 627-641 (2016).

28 T. K. Vinod Kumar, "Variation in the perception of desired qualities of police officers among trainees and senior police officers. Insights into the process and efficacy of police training" 43/3 *International Journal of Comparative and Applied Criminal Justice* 256 (2019).

29 Police and Human Rights - Manual for Police Training – Republic of Macedonia

30 The Gore Committee Report on Police Training 1971, *available at*: <https://police.py.gov.in/Police%20Commission%20reports/THE%20GORE%20COMMITTEE%20REPORT%20ON.pdf> (last visited on December 15, 2022).

agencies. After all, the primary goal of policing is to enforce the law, and no law has more authority than the law of human rights.³¹

4. Present scenario of Human Rights training in police

When was the last time you received training about human rights					
	Years of experience in police	During last 2-3 years	Before that	At the time of joining	Never
Human rights	less than 5 years (17%)	22	12	49	14
	more than 5 years (83%)	27	18	39	13

Source: Status of Policing in India Report, 2019

Most police officers were found to have undergone the trainings; however, when contrasted to human rights and caste sensitization, more police officers were found to have received crowd control training. Furthermore, the majority of staff received these trainings just when they joined.³²

Out of the typical 9 to 12 months of institutional training for civilian police at the entry level across the rank-divided entry structure of the Indian Police, a general observation of the schedules of police training reveals that a significant portion of the time spent on training in “outdoor” subjects like weapons, combat skills, and drills is proportionately very large when contextualised from the comparative perspective on time spent and effort employed on attitude.³³

There is a noticeable deficit in Indian police capacity building measures. Militaristic training and ‘hard skills’ training are overemphasised at the expense of Human Rights awareness and ‘soft skills’ training inputs.³⁴

The majority of police training institutes lack a research foundation. In order for police training schools to be intellectually vibrant and up to date in their knowledge

31 Gordan Kalajdziev, *Police and Human Rights Manual for Police Training* 9 (Danish Institute for Human Rights, Skopje, 2002).

32 Common Cause & Lokniti - Centre for the Study Developing Societies, “Status of Policing in India Report 2019: A Study of Performance and Perceptions”.

33 The National Police Academy Hyderabad, *Draft Training Syllabus for Constables and Sub Inspectors* (SVP NPA Hyderabad Publication, 2011); see also, BPRD, Ministry of Home Affairs, GOI, Training Division, Syllabus and Materials, available at: www.brpd.nic.in (last visited on December 02, 2022).

34 The Gore Committee Report on Police Training 1971; see also, CHRI Report, “Police Accountability: Too Important to Neglect Too Urgent to Delay” forewardCHRI (2005), available at: www.humanrightsinitiative.org; V. N. Rai, *Police Aur Poorvagriha* (Haryana Police Academy Madhuban Publication, 2008); National Police Academy Hyderabad, *Draft Training Syllabus for Constables and Sub Inspectors* (SVP NPA Hyderabad Publication, 2011); Vineet Kapoor, “The ‘T-2’ of the S.M.A.R.T. Police: A Relook at Police Capacity Building” 24/2 *The Indian Police Journal* 4-19 (2015).

of the problems, research is very important. Without a research cell led by experienced instructors, training institutions cannot keep up with changing conditions and develop realistic training programmes.³⁵

The Status of Policing in India Report (2018) examines budget allocation for police training in India and finds that just 1.38 percent of total budget was provided for training over the last five years, which is inadequate at the national level. Many states have spent less than 1% of overall police spending for training.³⁶

5. Needs

In general, seeing police activity through the lens of human rights is now a prevalent viewpoint. It is founded on the concept of a responsible state whose primary function is to offer services to its citizens. Trust and building confidence are increasingly being recognised as critical prerequisites for effective policing. However, without trust, the public would be unwilling to assist with the police, such as reporting crimes or providing information as requested by the police.

The police attitude regarding human rights has gradually changed, and it is clear that among police decision-makers, there is an increasing readiness to promote human rights respect. Nevertheless, because human rights have been publicly and flagrantly neglected in the recent times, it is now vital to appropriately integrate this concept into police training and instruction curriculum.³⁷ Human rights research enables for the proper transfer and application of skills, knowledge, and perspectives in everyday activities.

United Nations Declaration on Human Rights Education and Training³⁸, Article 11 - The United Nations and international and regional organizations should provide human rights education and training for their civilian personnel, and military and police. Article 2 In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.³⁹

35 Rainy John, *Assertiveness at Work: Human Relations Skill Training Among Recruit Police Constables - A Kerala Experience* (2010) (Unpublished Ph.D. thesis, University of Calicut).

36 Common Cause & Lokniti - Centre for the Study Developing Societies, "Status of Policing in India Report 2018: A Study of Performance and Perceptions", available at: <https://commoncause.in/pdf/SPIR2018.pdf> (last visited on December 12, 2022).

37 Nevena DièiæKostiæ, "Human Rights and Police -The Role of Police Training and Education" *Collection of Policy Papers on Police Reform in Serbia* (2014).

38 UN Declaration on *Human Rights Education and Training*, UN Doc. A/RES/66/137 (19 Dec 2011), available at: <https://www.ohchr.org/en/resources/educators/human-rights-education-training/11-united-nations-declaration-human-rights-education-and-training-2011> (last visited on December 18, 2022).

39 Code of Conduct for Law Enforcement Officials Adopted by General Assembly resolution 34/169 of 17 December 1979, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/code-conduct-law-enforcement-officials> (last visited on December 19, 2022).

According to social science studies, human rights training courses have a limited impact when conducted in isolation. Training must be integrated within a wider structural and organisational framework. Human rights must be explicitly recognised as extremely important in internal decision-making processes such as employee selection, promotion, communication and information strategies, management and leadership roles, and disciplinary procedures. Organizational realities can hinder the goals of human rights training. The impact of training will be substantially stronger if it is utilised in conjunction with other structural changes in the organisational culture.⁴⁰

Elsewhere one sees formal recognition of the importance of human rights education in the Vienna Declaration and Programme of Action (Section 1, para. 33) and the proclamation of the United Nations Decade for Human Rights Education (1995-2004),⁴¹ which was followed by a second phase of the World Programme for Human Rights Education (2010- 2014). These initiatives culminated in the General Assembly's adoption of the Declaration on Human Rights Education and Training, on December 19, 2011, explicitly specifying the need for human rights training and education for the military and police.⁴² Aside from official international institutional developments, we have seen a rapid explosion of nongovernmental organisations focusing on human rights education and training, providing resources, and lobbying for the expansion of educational activities during the previous decade.⁴³

6. Challenges

It is widely assumed that police personnel regard human rights as an impediment rather than the cornerstone of their employment. This negative attitude is unmistakable while understanding about human rights. It is one of the reasons why it is critical to insist on the police having a dual duty, respecting and safeguarding human rights, refraining from activities that unjustifiably violate human rights, and adopting all necessary and reasonable measures to protect these rights. The police should come to accept that the old view of policing goals, including maintaining public order and combating crime, is no longer enough. The fundamental features of human rights-based policing are: the police's specific role given their stranglehold on the use of force, professionalism, rigorous respect to the law, internal and external responsibility, transparency, and the public's trust.

40 OHCHR, *available at*: <https://www.ohchr.org/sites/default/files/Documents/Publications/EvaluatingHRTraining.pdf> (last visited on December 15, 2022).

41 UN General Assembly Resolution 49/184 of 23 December 1994, *available at*: <https://www.ohchr.org/en/resources/educators/human-rights-education-training/1-united-nations-decade-human-rights-education-1994> (last visited on December 22, 2022).

42 UN Declaration on *Human Rights Education and Training*, UN Doc. A/RES/66/137 (19 Dec 2011), *available at*: <https://www.ohchr.org/en/resources/educators/human-rights-education-training/11-united-nations-declaration-human-rights-education-and-training-2011> (last visited on December 18, 2022).

43 Danielle Celermajer, "The ritualization of human rights education and training: The fallacy of the potency of knowing" 16/2 *Journal of Human Rights* 160-177 (2017).

According to the European Union Agency for Fundamental Rights' Fundamental rights-based police training manual, recognition of human rights through teaching is a difficult and varied process.⁴⁴

- Outdated Training Syllabi that are not centered on a training requirement analysis and have not been updated to reflect the modern police employment function for constabulary.
- Indoor training is still very inadequate in terms of orientation, since there is no systematic effort in analysing training needs, setting training objectives, and developing Training Syllabi.
- The training environment and execution were severely harmed by a shortage of good trainers in training centres.
- The trainer lacked training attitude and skills, and the training methodology was heavily slanted toward lecturing, reading from a book, or not teaching at all, negatively influencing the learning environment.
- Training culture is profoundly regressive, with fear instilled in the spirit of discipline, pervasive corruption, the use of abusive language, absolute disrespect for trainee needs and facilities, and the instillation of strict regimentation.
- A shortage of trainees in the in-service training programme.
- Lack of community involvement; large gap between theory and practise; marginalisation of human rights, gender, and cultural awareness training; and limited potential for external critique and social auditing. It is not common for police training institutes to conduct critical assessments and audits. Furthermore, training is generally conducted in a workshop format, with little emphasis on perspective development. Most institutions lack professional and educated faculty for effective educational transactions. The provided training material is not reader-friendly, and little attention is placed on producing high-quality information. There is a significant difference between theory and practise in police training programmes.⁴⁵

CONCLUSION

As a result, the goal of the training programmes is to instil active cognitive views in trainees regarding their work and the individuals with whom they get in touch while performing their duties. It aims to increase involvement and participation at all levels in order to more effectively solve society's mounting concerns. States must connect a cluster of police stations to a specific university or college. This will lead to collaboration with researchers, in order to improve soft skills and influence the behaviour of police officers. Furthermore, professors and researchers who are experts on gender, psychology,

44 Nevena Dièiæ Kostiaè, "Human Rights and Police –The Role of Police Training and Education" *Collection of Policy Papers on Police Reform in Serbia* (2014).

45 Sudhakar Venukapalli, "Police Training to Police Education: A Paradigm Shift in Police Curriculum" 4/3 *Pro Edu. International Journal of Educational Sciences* 71-84(2021).

human rights etc. should be invited to participate and valuable insights in the training curriculum.

Every state has police officers on active duty. Withdrawing an official from active duty for the purpose of training would result in a shortfall in the number of active employees necessary for duty, especially given the significant number of vacant positions in the police force. As a result, most of the time, the officials designated for training are not relieved by the duty official due to personnel shortages. Keeping this in mind, it is desired to establish a Special Reserve Training Pool to replace police personnel selected for training purposes, thereby mitigating the deficit in personnel on active service.

Towards Protection of the Mother Tongue in Modern India: A Study in the Light of the Dominance of English Language

*Mr. Nishit Ranjan Chaki**

ABSTRACT

India is a multilingual country which recognises the importance of the mother tongue. However, given the practical importance of English, this language seems to dominate the educational institutions in the country. The present paper specifically studies the role of language in the context of multiculturalism and the dominance of English in modern India. The paper analytically studies the various constitutional provisions within this context. Section I explores the meaning of multiculturalism and the role of language. Section II studies the role of English in modern Indian society. Finally Section III makes a case for rights-based protection of the mother tongue based on the previous analysis.

INTRODUCTION

The normative foundation¹ of the Constitution was decided by the Constituent Assembly and though the Constitution went through a number of amendments, yet, the normative foundation is not to be changed. With respect to the co-existence of different cultures, the Constitution sought to preserve and promote the cultural heritage of India and the concept of Unity in Diversity. However, on a closer scrutiny, a tension amongst the various provisions of the Constitution may be revealed. Language is one of the most important elements of culture, and the Constitution has made several key provisions related to language. Further, just like language was a sensitive issue in the Assembly, language nationalism continued its presence and reached the height when ultimately the States were reorganised on the primary basis of linguistic affinity.

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1 The term normative foundation is here used to refer to the foundational values that were decided by the Constituent Assembly of India while drafting the Constitution. For example, the decisions and qualities decided for India, like that of Democracy, Republican government, and the goals of Justice (particularly in three different forms), Liberty, etc. These values and qualities once decided were meant to be achieved and perfected in the newly formed Republic.

Language also plays a key role in education and through it to the formation of social resource². Again, another perspective from which education can be evaluated is the impact it creates in *individual enrichment*. One of the constitutionally mandated processes of education targeted to achieve better individual enrichment is that of mother-tongue education. Thus, while there is a fundamental right under Articles 29 and 30 for any group of people to protect their culture and language, yet, specifically, Article 350A states that every State (including every local authority within the State) shall attempt to provide mother tongue education at the primary stage to children belonging to linguistic minority groups. This paper is based on the premise that social enrichment occurs when every culture is cherished and the rich cultural heritage of India is preserved. Individual enrichment is referred to in the paper in this context.

The aim of the present paper is to specifically study the role of the language in the context identified above. An analytical study of the various constitutional provisions will be made in the present paper with this aim in view. The paper is divided into three sections. Section I will specify the meaning of multiculturalism and the role of language in it. Under Section II the role of English language will be looked into in arriving at the above evaluation and to make it more concrete. Finally Section III will analyse the various constitutional provisions and make a case for rights-based protection of the mother tongue.

SECTION I

LANGUAGE IN A MULTICULTURAL SOCIETY

THE MEANING OF MULTICULTURALISM

Various conceptions of justice have always been formulated and discussed throughout the ages based on *what is due* to the individual and the society at large. While Classical liberalism has given priority to the individual, critics of liberalism have always pointed out the limitations of individual led conception of the society. In the latter respect, the conception is based on the identification of the constituent groups on the basis of other factors apart from that of the individual³. Such a conception of society where the various constituent groups differs from each other on various accounts can be broadly referred to as multiculturalism. Here, the stress is on the *existence of difference* and not the characterisation of the difference as linguistic or religious or caste and class based, etc. It is also a principle of justice that the burden of social co-operation should be uniformly distributed in such a multicultural society. On a minimum note, certain legal institutions should be well founded, or, conversely, it can be stated that the legal system should not institutionalise any discrimination between the various constituent groups on the basis of arbitrary differences. Thus, in

2 Literacy and education are meant to be tools of personal development and as such are often characterised as means to a goal. Thus, education or literacy can empower through employable skills, critical thinking, harmonious relations with the other members of the society, etc.

3 With reference to the Indian society, it can be said that such constituent units then will be the various castes, religious groups, linguistic groups, etc.

every multicultural society having a democratic set-up, we find the existence of principles of rule of law, equality of opportunity, substantive equality, etc.

Now, while the Indian society can be characterised on various attributes, yet, language qualifies as one of the primary attributes. This is said because, while attributes like religion, caste, class, gender, etc. may have a national presence and associated meaning, the factor of language is much more local. Further, language was one of the primary tools of division of the body politic into constituent States in the reorganisation of 1956. In addition to this strong regional identity, political and social considerations have led to various other characterisation of the language problem. Thus, there are various forms of classification and protection afforded to Languages like that of Classical Languages⁴ (which is declared from time-to-time, presently 6 in number), Scheduled Languages (included in the Eighth Schedule of the Constitution) and the linguistic minority rights⁵ (protected as 'Cultural and Educational Rights' under the Articles 29 and 30 of Part III of the Constitution). Further, there are the Union and the State Official Languages (including English) and the 'other' categorization under the Census of India.

A careful reading of the Article 29 of the Constitution will reveal that since this right is a community based right, hence the deep association of language and culture can be presumed in every case. In fact, language is the tool through which culture of any community is transmitted from one generation to another⁶. The UNESCO rightly identifies the linguistic crisis by stating that with the loss of each language, there is an irreparable loss of a unique cultural set-up, traditional knowledge and value systems, etc. In the International scenario, the vulnerability of any language is defined on the basis of the number of speakers and the inter-generational transmission of the language. Thus the language and its association with culture are aptly recognised at all levels of the normative order.

4 Tamil (2004), Sanskrit (2005), Kannada (2008), Telegu (2008), Malayalam (2013) and Odia (2014). One of the criteria in the guidelines for declaring a language as 'Classical' is that of "High antiquity of its early/recorded history over a period of 1500-2000 years".

5 The word 'minority' is not defined in the Constitution. However, in the landmark case of *In Re: The Kerala Education Bill... v. Unknown* (1959 1 SCR 995), the Supreme Court held that "minority" means a community which is less than 50% of the total population. It may be noted here that recently in 2019 the Supreme Court has dismissed a plea which sought guidelines to identify and define religious minorities in every State for protection of their cultural and allied interests. This dismissal is because of the fact that the Supreme Court had ruled that languages are restricted State wise but religion is without borders. Thus, linguistic minority rights are considered on a State-wise criteria and the religious minority is considered on a pan-India criteria.

6 Cristina De Rossi, an anthropologist at Barnet and Southgate College in London, states that "*Culture encompasses religion, food, what we wear, how we wear it, our language, marriage, music, what we believe is right or wrong, how we sit at the table, how we greet visitors, how we behave with loved ones, and a million other things,*". See Kim Ann Zimmermann, "What Is Culture", available at <https://www.livescience.com/21478-what-is-culture-definition-of-culture.html> (last visited on August 6, 2021).

On the theoretical plane, although multiculturalism finds its supporters mainly from the stands of the critics of liberalism, yet, within the liberal tradition itself, scholars like Kymlicka⁷ have made a case for the recognition of cultural rights. It is interesting to note here that within this broad spectrum of minority rights itself; Kymlicka makes a difference between the national minorities and that of the ethnic minorities and argues for different conceptions of cultural rights for these groups. However, whatever may be the case; it is argued that cultural rights are in consonance with the liberal conception of justice and also that the various territorially based societal cultures⁸ grounded on a common language “*must be institutionally embodied – in schools, media, economy, government, etc.*”

Again, Bhikhu Parekh⁹ states that the various conflicts and differences of opinions in any society can be within (intra) the specific cultural group and also with (inter) other cultural groups. Further, the author points out the difference that exists between the equality of culture in multicultural society and a mere plurality of cultures in societies that have multiple cultural groups. In case of the latter, the separate cultures are not in a position of equality and neither of the cultures seeks to interact with the dominant culture and change or influence it in any way. Various elements like that of constitutional democracy, presence of a strong civil society, and continuous interactions among different cultural groups, etc. are identified by the author to be the essentials of the present modern multicultural societies.

Now, since the Indian society is to be founded on the various values of the Preamble to the Constitution, hence by virtue of such values it can be said that to characterise the Indian society as multicultural would be the very apt characterisation.

LANGUAGE AND CHARACTERISATION OF INDIAN SOCIETY:

The most important source of data and information with respect to languages in India is the Census of India, 2011¹⁰. Some of the important data that are assessed and published include those relating to the abstract of speakers’ strength of languages and mother tongues, distribution of population by Scheduled and Other Languages and the distribution of 10,000 persons by language in the Indian Union. The survey states that the total number of primary returns on mother tongue was 19569. These

7 Dr. P. Kesava Kumar, “Liberal Democracy and Kymlicka’s Conception of Minority Rights: Towards a Perspective of Dalit Rights”, *available at* https://roundtableindia.co.in/index.php?option=com_content&view=article&id=6582:liberal-democracy-and-kymlicka-s-conception-of-minority-rights-towards-a-perspective-of-dalit-rights&catid=124&Itemid=140 (last visited on August 6, 2021).

8 For Kymlicka, a societal culture is “*a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.*” See *Ibid*.

9 See Bhikhu Parekh, “Composite Culture in Multicultural Society” in Bipan Chandra, Sucheta Mahajan (eds.) *Composite Culture in a Multicultural Society* (Pearson, 2006).

10 Office of the Registrar General, India, “Census of India 2011” (2011), *available at* https://censusindia.gov.in/2011Census/C-16_25062018_NEW.pdf (last visited on August 6, 2021).

returns were then scrutinized in terms of their linguistic affiliation to actual languages and dialects and this exercise resulted in 1369 in total. These languages were treated as 'unclassified' and relegated to 'other' mother tongue category. It is to be noted here that even though for the purposes of the Census, the term 'other' may be apt to use, yet, from a legal perspective this term is not advisable. Legally, languages can be primarily classified as Schedule Languages and Official Languages, and further, pursuing the enactment of Article 350A, any other language should be designated as Mother Tongue.

Further, it is found that 96.71% of the total Indian population have one of the Scheduled Languages as their mother tongue while the other languages account for the remaining 3.29%¹¹. Further, on the criteria of "*Scheduled Languages in descending order of speakers' strength*", the top five languages are Hindi (43.63%), Bengali (8.03%), Marathi (6.86%), Telegu (6.70%) and Tamil (5.70%)¹². Even from these facts, the diversity of the situation can be gauged, for Hindi has strength of 43.63% followed by Bengali with 8.03%. It is very interesting to note that on the criteria of "*Distribution of population by Scheduled and Other Languages*"¹³, some of the North Eastern States have the highest percentage of speakers of 'Other Languages'. For example, the percentage is 26.36% in Sikkim, 41.80% in Manipur, 72.13% in Arunachal Pradesh, 85.35% in Meghalaya, 87.65% in Mizoram, and 88.13% in Nagaland. Outside these States, the then Union Territories of Dadra & Nagar Haveli, Andaman & Nicobar Islands and Lakshadweep have the highest percentages. On the other hand, States with highest percentage of population speaking 'Scheduled Languages' include Uttar Pradesh (99.98%), Haryana (99.94%), Tamil Nadu (99.93%), Punjab (99.86%), Bihar (99.75%), Kerala (99.57%), West Bengal (99.47%), and Andhra Pradesh (99.10%). Outside these States, the Union territories of Puducherry, Chandigarh, and NCT of Delhi has the highest percentage of such population.

In light of the above data, it becomes clear that apart from the presence and usage of various languages, the multi-lingual character of India itself differs from one region to another. Hence, a one-formula-suits-all approach might be of futile consequences, though a minimum formulation of rights may be necessary. Now, since the characterisation of the Indian society changes from one State to other if we use the tool of language, hence, the resultant benefits of learning any particular language will also be different. Thus, social mobility¹⁴ which each of these languages can offer will vary from State to State. With respect to this, it can be said that there is decreasing functional utility with respect to English, Hindi and other languages like Bengali, Assamese, Tamil, etc. Social mobility and resultant social and individual enrichment thus becomes context-specific in India. To take an example, learning of Bengali will

11 *Id.* at 4.

12 *Id.* at 15.

13 *Id.* at 12.

14 Here the term is used to signify positive change in the social status of the individual. However, the nature of the change, that is, whether it is intra-generational or inter-generational is not commented upon.

be beneficial in W.B, Assamese will be beneficial in Assam, while learning of Hindi and English will be beneficial in National context, etc.

Hence, while the democratic set-up clothes the individual with similar rights and liabilities, yet, linguistically, the scope of individual and community development will be an altogether different scenario. Again, linguistic identity being strongly entrenched and connected with the broader concept of cultural identity, hence, the greater number of people means the greater social base and the greater utility of the language. This again, if juxtaposed with the presence of smaller number of people having separate Mother Tongue, can produce a very vulnerable situation as far as the small group is concerned. Thus, it becomes necessary to examine the interplay of the various constitutional provisions to evaluate the role language plays in social and individual enrichment.

SECTION II

UNIQUE POSITION OF ENGLISH IN INDIAN SOCIETY

LANGUAGE AS AN INVISIBLE BARRIER

It is obvious that heterogeneity is an essentiality of every multicultural society and in the Indian scenario, the development of this heterogeneity can be briefly stated to highlight the role of language as an invisible barrier in the social structure. The history of language in India starts from the ancient Indus Valley Civilization (mature phase of the civilization occurring between 2500 B.C. and 1900 B.C. respectively), but the script is yet to be deciphered. The Vedic civilization brought in a new social and thought process into the then social groups. Through the medieval phases of the history, several other social groups came and stayed back in the sub-continent. Later, the Europeans came in 1498 and stayed back as late as 1947 which introduced the sub-continent with the social and cultural practices of the West. Thus, India became home to the Vedic people, the Greeks, Scythians, Parthians, Turks, Mughals and then the various people from the European society. Each of such sections and groups of people had their own language and script, and all these resulted in the heterogeneity of the Indian society with unique languages, script, and culture and education system. It is interesting to note that how the tool of language have been regularly used in the Indian society to regulate the social structure and also to facilitate or limit the access to social mobility. Thus, in the ancient times *Sanskrit* was the predominant language and as widely used while the so called lower sections of the society were prohibited from learning the same. Similarly, during the reformative movements of Buddhism and Jainism, the languages other than *Sanskrit*, that is *Pali* and *Prakrit* became widespread. In the medieval age, the languages like *Arabic*, *Turkish*, and *Persian* became the languages of upward social mobility and enjoyed State patronage. Finally, after the coming of the Europeans, many of the European languages became source of status symbol and also benefitted from State patronage. Thus, in different times different languages have been used to limit or facilitate learning, skill development, social cohesion and upward social mobility.

Post the renaissance of 19th Century India, English has consciously or unconsciously become the predominant language of the urban, modern India and is still perceived widely and used as a tool for personal enrichment and upward social mobility. Today, the role English plays in the International field, and the rise of globalisation (especially in post 1991 India) and MNCs along with the export driven Service sector in India requires a certain command over the language for Indians who wish to prosper in these fields. The India Skill Report published by the CII and Wheebox states that English is among the top 3 skills employers look for¹⁵. Thus, fluency in English is often perceived as a toll for greater potential to communicate with the world at large and thus leading to unhindered communication and expression. In this respect, Kancha Ilaiah¹⁶, a noted social intellectual holds the view that English education is a fundamental requirement of the backward classes and further states that it is because of the absence of a national and common link language that the various downtrodden sections from the different parts of the country cannot connect with each other and are forced to live a life of seclusion. Further, this seclusion is to be seen in the context of the other sections of the population who have had their share of widespread national communication and integration facilitated through common languages in different periods of history outlined above.

ENGLISH AS THE COLONIAL HANGOVER AND THE ENGLISH IN PRACTICE

The impactful role of English in the Indian society and its perception as a tool of so-called more successful life is to be studied with the similarly placed perception of the language as an alien language. The fact that English education system was originally imposed by the colonial masters and had a substantial colonial purpose to serve still dominates the public psyche. This remembrance leads to the popular acceptance and perception of English as essentially an *alien and foreign language*. This perception about English makes the regulation of the language a sensitive issue and leads to the overlooking of the practical considerations of English education and the generation of emotional opposition against the language on the one hand, and championing the cause of one or other of the Native languages vis-à-vis English on the other hand¹⁷. However, improper understanding leads to spirit-less and only on-paper opposition to English.

15 Bhupendra Singh, "Opinion: The language conundrum of National Education Policy 2020", available at <https://government.economictimes.indiatimes.com/news/education/opinion-the-language-conundrum-of-national-education-policy-2020/78567174> (last visited on August 6, 2021).

16 See generally Kanchallaiah, "Shudras never were allowed to Learn a National Language", available at <https://countercurrents.org/2019/04/kancha-ilaiah-shepherd-shudras-never-were-allowed-to-learn-a-national-language/> (last visited on August 6, 2021).

17 For example, the Three Language Formula was introduced in the National Policy on Education 1968 as a solution to the problems of having a link language and for having a common strategy and practice all throughout the country in matters of education. The formula was not implemented in its spirit. Further, the new National Education Policy 2020 has already resurrected the debates over the same.

A reading of a celebrated essay published in 2010 by Ramachandra Guha¹⁸ can reveal this classical stance towards the English language in our country. He states that in 1921 Mahatma Gandhi described English as “*unmitigated evil*” and stated that Indians like Tilak and Raja Rammohan Roy would have “been far greater men had they not the contagion of English learning”. Further, Gandhi went on to compare these individuals with Chaitanya, Kabir, etc. and argued that the greatest superstition that affect India is that the “...English language is necessary for imbibing ideas of liberty, and developing accuracy of thought”. In the above-cited essay, the author further states that Rabindranath Tagore “was dismayed” by these views and by the chastisement of Roy in particular. Especially, on the point of comparison that Gandhi had made, Tagore had stated that there was a common thread amongst all these men and it was their teachings which reflected the spiritual unity of the country. However, the same article records that the practice was quite different from the views held even in that time. Thus, in practice Gandhi wrote in more than one language and “was in fact merely following the footsteps of those he had criticized”. Similarly, Gandhi wrote in Gujarati and English, Tilak in Marathi and English and Raja Rammohan Roy and Tagore in Bengali and English. The point that is made in this essay is that in matters of reading and writing, these great Indians were very open-minded and had overcome the language barrier. The use of the other language, suggests Guha “was a way of simultaneously making themselves less parochial and their work more universal”. This practice of “bilingualism was here a vehicle or something larger and more enduring— namely, multiculturalism”. Other examples cited in this essay are that of Sir Syed Ahmed Khan, B.R. Ambedkar, C. Rajagopalachari, V.D. Savarkar, etc. However, the essayist is of the opinion that at present, polarized camps are in existence between those who think, act and write in any one language and are not (in his words) “...to coin a word-linguistrous”.

On a sphere away from the debates of multiculturalism, and in the practical ground situation, the bureaucracy and the administration of the country also points towards the importance that is afforded to English in India. In the Civil Services (Main) Examination that is conducted by the UPSC, the candidates have the option to write their answers either in English or in any one of the Eighth Schedule languages except the Qualifying Language papers Paper-A and Paper-B. The Qualifying Papers are the papers on English and Indian Languages. Again, the candidates who are exempted from the compulsory Indian Language Paper will have to choose either English or Hindi as medium of Interview or Personality Test¹⁹. Thus, a working knowledge or certain degree of proficiency in the English language is quite necessary if any candidate aims for the coveted civil services.

18 Ramachandra Guha, “The Rise and Fall of the Bilingual Intellectual”, *Economic and Political Weekly*, 23rd January 2010, available at <http://ramachandraguha.in/archives/the-rise-and-fall-of-the-bilingual-intellectual-economic-and-political-weekly.html> (last visited on August 6, 2021).

19 Examination Branch, Frequently Asked Questions, available at https://www.upsc.gov.in/sites/default/files/ExamBrFAQs_03062019_Engl_0_2.pdf (last visited on August 6, 2021).

Further, English language is required for Higher Education, in the Legislative field, for Official communication, etc. The 2011 Census showed English to be the mother tongue of 256,000 people and the second language of 83 million people. Another 46 million people use it as third language²⁰. This is apart from the *peculiar* administrative fact that English without being a Scheduled Language is still one of the Official Language of India. The National Academy of Letters/ SahityaAkademi also have recognised 24 languages which include Rajasthani and English apart from the 22 Scheduled languages for their programme.

Thus, despite the perception of the English language as colonial and foreign to the land, and despite attempts being made ever since 1947 to identify any viable alternative from the Indian languages (read Hindi), the practical situation is in a flux and with the passing time, English have only gained strength and importance. Despite the widespread adoption and use of English for various factors outlined above, the regulation of the language itself seems to be still grounded in the perception of the language as a foreign language. The interpretation of English as the mother tongue of many Indians and the possible protection it might claim have yet to be addressed and legally protected, whereas the use of English as a medium of instruction in educational institutions is so rampant and greatly practised that the former protection seems to be unnecessary and almost like a farce. This can be said to be an imperfection in itself and thus the position of English can be said to be imperfect in the Indian society.

SECTION III

CONSTITUTIONAL AND LEGAL FRAMEWORK RELATED TO LANGUAGE

PART XVII OF THE CONSTITUTION AND ENGLISH:

The very first Article of the Constitution of India describes the country as "*India, that is Bharat, shall be a Union of States*"²¹. After much discussions and deliberations, the federal set-up was re-drawn through the States Reorganisation Act, 1956 by reforming the boundaries of the constituent Indian States and territories. This reorganisation was primarily based on linguistic affinity and ethnic identity, though this criterion was not exclusive. Thus, economic and administrative exigencies were also accounted for in drawing the redistribution of the States. Thus the linguistic groups were given a strong legal foundation in the federal division of the country. A part of this decision was perhaps to undo the wrongful British policies which resulted in imbalanced development of the indigenous Vernacular languages and also make-shift division

20 Rukmini S, "In India, who speaks in English, and where?", available at <https://www.livemint.com/news/india/in-india-who-speaks-in-english-and-where-1557814101428.html> (last visited on August 6, 2021).

21 However, there is a strong centralising tendency in Indian Polity with the Constitution itself empowering the Union as the stronger partner in Indian Federalism. Further, the division of the Union in constituent States is a very sensitive matter in any democratic setup; yet, the Constitution itself establishes the power of the Union in deciding over such matters of reorganisation and division.

of the country as per the British colonial interests. However, language and linguistic rights were made a strong character of the Indian Union and there is no doubt in this fact. This view can be further strengthened if we take note of the fact that in the same year the Constitution (Seventh) Amendment Act inserted Article 350A in Part XVII of the Constitution of India, which mandates adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups within a State. In fact, the entire spectrum of the Constitutional provisions related to language reflects a balance between the various forces of multiculturalism and the practical demands of having a common language for the administration of the country. Granville Austin²² in his famous work on the Indian Constitution thus aptly recognises this issue and labels the language provisions of the Constitution as *"a half-hearted compromise"*. Although this phrase was used primarily in the sense of the Official Language provisions of the Constitution, yet, the basic character of the other constitutional provisions are also suitable for such a description.

The Constitution makes provisions for the language to be used in different respects in various parts respectively. The most substantial provisions are made under the Part XVII of the Constitution, titled as "Official Language"²³ and housing articles 343 to 351. This part is further sub-divided into four chapters, namely "Language of the Union", "Regional Languages", "Language of the Supreme Court, High Courts, etc." and "Special Directives" respectively. Article 343(1) very clearly establishes the official language of the Union and also states the script and the form of the numerals. However, on a closer look, one can identify that the very next clause mandated the use of English for the official purposes of the Union for a period of fifteen years. Then again, the proviso to Article 343(2) empowered the President to authorise the use of Hindi in addition to English for any of the official purposes. Then again, the very next clause that is Article 343(3) empowered the Parliament to provide for the use of the English language even after the aforementioned period for purposes specified in the law. Thus, the tension between the two languages and the claims of both is well established in these provisions and the legal language used in them.

Next, Article 344 makes provision for a Commission and a Committee of Parliament on official language. The Commission is to be composed of persons representing the various languages specified in the Eighth Schedule of the Constitution, which in present form is housing more languages than those it housed in the original Constitution. Amongst the various duties of the Commission is the duty to recommend as to the "progressive use of the Hindi language for the official purposes of the Union" and "restrictions on the use of the English language..." However, clause 3 of Article 344

22 See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, New Delhi, 1996).

23 It is beyond the scope of this paper to discuss the meaning of the term Official Language and to identify its distinctive nature from that of the term National Language. Hence, the paper will limit itself in the analysis of the constitutional provisions as they are and to identify the impact of such provisions.

imposes upon the commission to “have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.” Thus, here again there is tension amongst the two languages mentioned. It is to be further stressed here that, the considerations under clause 3 may very well weigh in favour of the continuance of English and the greater impact of the same. Further, the members of the commission being drawn from the various languages of the Eighth Schedule aptly reflects the position that such recommendations have to be acceptable or at least commented upon by the various representatives of the languages concerned. Clause 4 of Article 344 mandates the formation of a Committee through the system of proportional representation by means of single transferable vote. It is this committee which will examine the recommendations of the commission and report their opinion to the President. Here, stress must be placed on the fact that the system of proportional representation is mandated to be used in the election of this committee which is unique and distinctive in the present constitutional structure and surely identifies the sensibility of the report that the committee is to make.

Then, the Chapter II of Part XVII housing Articles 345 to 347 deals with “Regional Languages”. This is to be taken note that the provisions deal with official language of the State and language for the official communication between the State and other States or the Union. However, the title used for the chapter designates such languages as Regional Languages. This terminology establishes the fact that Hindi is the only candidate to be considered for the purposes of the Union, the rest of the languages being regional languages. Similar to the previous provisions, a reading of the Articles 345 and 346 makes it clear that here too English claims an equal position with other languages, especially for the purposes of official communication between different tiers of the federal structure. Special mention here is to be made of the provision under Article 347 which provides for a possibility for the recognition of any language used in any State as one of the official languages by virtue of a Presidential direction. It is such provisions in the constitutional framework which establishes multiculturalism in India.

The Official Language provisions having been dealt under the previous two chapters, Chapter III of Part XVII is titled as “Language of the Supreme Court, High Courts, etc.” and Articles 348 and 349 are housed. A reading of the provisions of the previous chapters and this chapter of the same Part reveals an interesting mandate. Thus, in the provisions dealing with official language, especially in those of the Union, the primacy is on Hindi, and English is stated in a manner to be a substitute of Hindi (to be completely done away with at some point in the future). However, in Article 348, the primacy is that of English, and “all proceedings in the Supreme Court and in every High Court” and “the authoritative texts” of the various forms of laws are to be in English. Further, the use of any other language (official languages) in the proceedings of the High Court of any State is permitted only if the Governor authorises the same with the previous consent of the President. This provision thus establishes the impact and importance of English in the general scheme of things so far as the Common Law System in India and legal principles are concerned. As late as in 2008,

the Law Commission of India²⁴ has authored its Report No. 216 on the non-feasibility of Hindi as a compulsory language in the Supreme Court. This report, amongst other analysis, contains a chapter titled "Views of Judges, Senior Advocates, High Court Advocates' Associations on the proposal to amend article 348 of the Constitution of India". An author²⁵ states that, previously in 1970 "a Constitution bench of the Supreme Court in 1970 refused to allow Raj Narain to continue as an intervener in a *habeas corpus* case after he insisted on arguing in Hindi".

Apart from the provisions outlined above, the Constitutional provisions under Parts V and VI (Articles 120 and 210 respectively) mandates that special permission of the chair will be required to express oneself even in mother tongue and this is to be allowed only if the speaker cannot adequately express in Hindi or English²⁶. Thus, the presence of English is also there in the Parliament proceedings, and all these with the still dominant perception of the language as a symbol of the colonial imposition.

CONSTITUTION AND MULTICULTURAL SOCIETY

Thus, if we study the composition of Indian society as per the linguistic character, we are to come to certain agreements, which are, *first*, there are various languages in India and none of them is an absolute majority language, *second*, after the State reorganisation, dominant linguistic groups have been allotted specific geographical regions which effectively made these languages the majority languages in these regions, *third*, in these respective States, there are various numbers of minority languages other than the State majority language, *fourth*, similar to the Union, the respective States have their own Official Languages with several minority languages being thus protected at the State level, *fifth*, administrative requirements have given English country-wide relevance, supplemented by Hindi and the respective State languages, *sixth*, English having international relevance and technical usage in today's world is certainly well placed in Indian society despite lack of normative support for English, *seventh*, Hindi is widely perceived²⁷ and also used throughout India as a second or

24 Law Commission of India, "Non-Feasibility of Introduction of Hindi as Compulsory Language in the Supreme Court of India" (December, 2008).

25 Gyanant Singh, "Govt push for Hindi set to fail", *India Today*, June 25, 2014, available at <https://www.indiatoday.in/opinion/gyanant-singh/story/hindi-language-english-jawaharlal-nehru-narendra-modi-hindi-official-language-198138-2014-06-25> (last visited on August 6, 2021).

26 The Official Languages Act, 1963 vide Section 3 mandates the continuance of English, "notwithstanding the expiration of the period of fifteen years from the commencement of the Constitution" for "official purposes of the Union" and "transaction of business in Parliament".

27 The chairman, People's Linguistic Survey of India states that out of the 800 living languages in India, speakers of 799 languages use Hindi in varying degrees of competence. See G.N. Devy, "India's Hindi obsession: Putting the language in its place", *India Today*, September 2, 2017, available at <https://www.indiatoday.in/magazine/up-front/story/20170911-india-hindi-national-language-1035336-2017-09-02> (last visited on August 6, 2021).

third language although only 12 out of total 35 States and Union Territories (considering undivided Andhra Pradesh) regards Hindi as first choice of communication²⁸.

In face of such a complex situation and the continuous tensions between the languages, there is a huge challenge of language extinction in India. While this threat itself is very worrying, yet, legally speaking, this threat will be even more horrifying if we see this as a violation of the constitutional principles of multiculturalism and safeguard of the minority. In this respect, certain provisions are needed to be discussed. Thus, Chapter IV of Part XVII housing Articles 350, 350A, 350B and 351 read with Articles 29 and 30 of Part III tend to protect multiculturalism in India. Article 350 authorises the redress of grievances in any language used in the Union and the State. Article 350A mandates mother tongue education and Article 350B provides for Special Officer for Linguistic Minorities. Again Article 29 and 30 mandates the right to conserve the language of any section of people and prohibits discrimination on the basis of language. The provision of Article 29 while is mainly used by the linguistic minorities, yet, as per the language used in the provision, any section of the population can use the same. Hence, herein also there seems to be a balance between the majority and the minority. However, the most important provision with respect to multiculturalism seems to be Article 351 which provides the directive for the development of Hindi and casts a duty over the Union to promote the spread of and use of Hindi *“as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages”* Thus, this Hindi which has to be developed and used is to have an imprint of the composite culture and the collective richness of other Indian languages.

Thus, it has been revealed how the various constitutional provisions themselves reflect the tension between Hindi and English. In such a situation, given the more pronounced benefit of English education, the latter can be an easy choice not only with respect to the former, but also with respect to the other languages. Further, the provision of the official languages seems to establish one language for the entire country, and yet, the same Constitution champions the cultural diversity and mother tongue education. This aspect when read with the former observation on English, may increase the vulnerability of any Indian language. This is because, without any legal or constitutional protection and necessary institutional framework, owing to the operation of individual liberty, in the long run, only the language with maximum social mobility will be preferred and various languages will be left to go extinct.

Hence, a rights-based mother tongue education system is being argued in order to stem the growth of language defection. While the Three Language formula has been there in the policy documents for long, yet, in spirit, it was not implemented. However,

28 See Sumant Sen, “Hindi the first choice of people in only 12 States”, *The Hindu*, June 4th, 2019, available at <https://www.thehindu.com/news/national/hindi-the-first-choice-of-people-in-only-12-states/article27459774.ece> (last visited on August 6, 2021)

instead of making it optional on the States to provide mother tongue education, a right to such education, howsoever minimal may go a long way to educate younger generations on their own language.

SUMMARY AND WAY FORWARD

The paper has explored the meaning of multiculturalism and the role of language in characterising the Indian society. Further, the use and potential of language as an invisible barrier to individual enrichment have been explored into. The role of English is specifically highlighted, given the present importance of English and the constitutional provisions have been analysed to further validate the view that such an interpretation of the position of English in Indian society is not against the provisions of the Constitution. Finally, the nature of multiculturalism as it is mandated through the language provisions of the Constitution have been enquired into.

Thus the above discussion and the identification of the above points makes it certain that the language problem still persists in the Indian society and have to be dealt with. In addition, it is revealed from the above discussion that, owing to the lack of a common language all throughout the country, English has retained its position and importance, and has gained strength with the ushering of the age of science and technology. Now, considering the relative strength of English as outlined above, it becomes very clear that education system is to be dependent on English as a medium of instruction and knowledge circulation. Thus, English medium schooling is a matter of the present as well as the future. In this respect, the Constitution while championing the cause of Unity in Diversity cannot turn a blind eye when the languages are being exposed to the onslaught of this tension. Hence, a rights-based minimum definition of mother tongue education has to be made available to the people.

A Critical Analysis of Cybercrime: A Big Challenge to the Present Traditional Legal System

Mr. Shailendra Rajput & Mr. Ankit Sharma***

ABSTRACT

Technology has become an essential part of life in present times, change is a normal process in social life, and change itself brings new inventions, which serves as the basis for adapting the present life to the future, to remain the best. The work of creating a better future for us happens through change and change is the mother of invention. Invention is happening in every part of the present life, but the invention of technology has changed both the life and thinking of human beings, even in technology, the day which has changed the most in human life is the invention of computer and internet. , which has completely changed human life, and what will be the life of the future, according to that, necessary changes are being made by people at present and on the basis of information technology people is doing his work, and life is changing, But the dependence on technology along with the superiority of humans in our lives is also causing trouble, the most serious problem currently being considered as one of the consequences of various cybercrimes, one of the problems faced by people around the world, has become a serious challenge.

Keyword: *Cybercrime, Digital Society, Technology Inventions, Criminal Justice System, Technology Need, Human Life.*

STATEMENT OF THE PROBLEM

Cybercrime has stood as a challenge not only in India but people all over the world, people's increasing dependence on technology has led to an increase in the number and methods of committing cybercrime, and presently increasing competition. In which the use of technology has taken an essential form in human life, in such a situation, new cyber crimes are posing a challenge in front of people, and people who lack education, and use of technology is an essential part of their life. In such a situation, people are caught in the clutches of cyber crime somewhere, and due to

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lack of prompt action and proper investigation in such crimes, many criminals get away from such crimes, and a wrong effect on the society. It happens, and in such a situation, the criminals who commit cyber crimes get encouraged, from which they constantly learn new methods of committing cyber crimes, and by this they keep harming the people mentally and financially, in such a situation, there is no proper investigation and current Digital crime comes under trial court process. Due to the lack of necessary changes and due to the lack of digital crime discipline changes in the procedure law, cyber crimes are increasing rapidly, and the victim is not getting proper and speedy justice. The reason for system failure is one of the main reasons for the increase in cyber crimes in India, and lack of knowledge and education in cyber crime is one of the main reasons for the increase in cyber crimes.

THE RESEARCH OBJECTIVES

1. To examine the existing institutional mechanisms for cybercrime prevention and control.
2. Assess the efficacy of the investigation system in dealing with cybercrime.
3. To determine the obstacles that the present traditional legal system has in dealing with cybercrime.
4. To propose an effective model criminal justice system that will lead to cyber crime prevention and control.

RESEARCH METHODOLOGY

Doctoral research has been selected for the study of cybercrime related research topic, and Imperial research has also been included data collection. Ask questions from judges and police officers, advocates, teachers and students, common people and victims total 510 respondents.

1. The nature of this research study shall be –Doctrinal, Empirical, Correlational
2. The research study shall utilize two types of resources for data collection
 - a. Primary sources such as Interview, survey, questionnaire, case studies, and govt. reports.
 - b. Secondary sources such as case books, legal documents, journal articles.

Both **qualitative and quantitative methodologies** will be applied in the research.

DATA COLLECTION QUESTIONNAIRE

Qus 1. Presently, the way cybercrime is increasing and cybercrime is being done through new methods, in such a situation necessary changes should be made in the IT Act and trial law to deal with cybercrime cases in a better way.

Qus 2. The better way to prevent cybercrime is to have knowledge related to this subject, for this cybercrime subject should be compulsorily included in college and school curriculum.

Qus 3. How to avoid cybercrime cases, what precautions should be taken, for this, awareness programs should be run by cybercrime experts from time to time for people so that awareness spread among people and avoid getting caught in such cases.

Qus 4. There should be recruitment of special cyber police in the cyber cell related to cyber crime investigation, which should only do the work of investigation of cybercrime related cases, whose academic qualification is related to information technology and computer, which by understanding this subject well, will be responsible for cyber crime investigation.

Qus 5. There should be a separate establishment and reform of “Cyber crime Court” like Cyber Police only deals with Cyber Crime Investigation. So that the victim person can get speedy and proper justice, such cybercrime courts where special training and technically qualified judges should be appointed on the subject of cyber crimes and from time to time training should be given to the advocates on cyber related crime.

This research, data collection is based on Liker Scale (Strongly Agree, Agree, Neutral, Disagree, and Strongly Disagree) format.

DATA COLLECTION RESPONDENT

Respondent	N
Police	20
Legl fraternity (judicial officers, advocates, students, academicians)	130
Common people	260
Victim	100
Total	510

DATA ANALYSIS RESULT

Data analysis was done, from which opinions of all the respondents were taken in relation to the research questions, out of which mostly 60 to 70 percent completely agree or agree that change is necessary for the current IT Act and police investigation needs to be further improved. And there is a need for updates in the traditional court system and to make people aware and add subjects about cybercrime in school curricula and college-level studies. Overall to reduce cybercrime, the criminal justice system as well as the social level. There is a need to work on which cybercrime can be reduced and it can be prevented from increasing.

REVIEW OF LITERATURE

Gyanvati Dhakad (2017)²- Has highlighted the topic of cybercrime in the book *Cyber Law and Cybercrime*, after studying it, it has been concluded by the researcher, and how cybercrime is currently increasing rapidly not only in India but all over the

2 Gyanvati dhakad, cyber law and cyber crime (2017) India publication, pg.1-11

world. There are many reasons for increasing cybercrime, one of which is the problem of many difficulties in police investigation and problems related to trial court and lack of awareness and lack of education among people. In such a situation, cybercrime can be controlled to a great extent by making necessary improvements.

Santos Kumar (2021)³ “Cyber crime and cyber law” This book sheds light on cybercrime and the IT Act; it describes the different types of cybercrimes, how criminals commit them, and what causes the sharp rise in cybercrime in India. It also identifies the causes and suggests remedies. According to the information in this book, the police are one of the main factors contributing to the rise in cybercrime. Due to the problems highlighted, there is an increase in cybercrime directly or indirectly as a result of numerous difficulties in the investigation and unnecessary problems in the traditional trial court process. Therefore, in the present, appropriate steps should be taken to stop cybercrime as soon as possible.

Akash k.Mishra (2018)⁴- “Fathoming your legal perplex,” the author writes, “that is the internet is being utilized in a digital way to perpetrate cybercrime and from time to time cybercrime is enormous according to that is present reality. The Internet is becoming into a sophisticated system of information sharing, human connectedness, and cybercrime. Lack of information is a major factor in the increase of cybercrime, which is one of the downsides of modern technology and cyber ways of coordination. India is expanding its influence around the world, and thanks to legislation, this crime has been put an end. It is impossible to accomplish that throughout modernization; some important actions should be conducted to stop this crime using modern technology and methods. The author aims to argue that God’s techniques, technology, and cybercrime can be lessened by other contemporary methods by researching all of the facts and methods in this book.

Rohas N. (2008)⁵- There are many types of crimes within cybercrime, such as cyber stalking, cyber bullying, cyber terrorism, or others that constitute cybercrime; it has been explained in detail and in the formation of cybercrime laws that the addition of various laws related to cybercrime, such as the Indian Information Technology Act and its corrective description of 2008 and the Indian Penal Laws and Evidence Act related to cybercrime, form a legal framework that reduces cybercrime to some extent overall. Due to ignorance, a crime would have occurred somewhere.

Nappinai N.S. (2010)⁶- India’s cybercrime is an innovative example of future, pervasive criminality. Due to the creation of specific laws for cybercrime, this circumstance has resulted in some control over cybercrime. As it is put forth before the populace and by enacting separate legal data protection rules, each of which is mentioned in

3 Santosh kumar, cyber law and cyber crimes (2021) whitesmann publication.

4 Akash k mishra, cyber law in india fathoming your lawful (2018) perplex creatspace publication.

5 Rohas.N.investigation for cybercrime (2008) kindles publication.

6 Nappinai, cyber crime law India, has law kept pace with emerging trends, an empirical study (2010) journal of international commercial law technology.

the procedural as not solving the issue, they conduct a single investigation and deliver their findings.

INTRODUCTION

Although many inventions in human life have been made by human beings to make their life better, but the biggest change in human life is what has happened through computer- Internet, mobile, it has played a major role in the biggest change in human life. As it has been, technology which has become an essential part of human life, and computer is used in most of the technology, human beings themselves are presently involved in many tasks to deal with the far-reaching thinking of human beings and the necessary challenges in the future. No one is leaving any stone unturned to do this, new inventions are being made by humans constantly, and while doing various tasks, lack of time is the biggest challenge in front of human beings, whose solution is computer-internet. Due to the fact that many tasks can be done through computers in less time and at the same time, due to which human efficiency has increased manifold, and humans are able to perform various tasks in less time, and how to deal with the challenges in the future, the work of this is currently being taken, is being done by the experiments of technology, now with its help humans are giving birth to various inventions, currently the global pandemic corona which the whole world faced in which life had come to a standstill, All work, transportation, everything had come to a standstill, but in order to run life smoothly, the work continued without stopping, such a challenging task was in front of the people, whose solution to a large extent was solved by computer and internet and can be said, that for the first time the work of making life smoothly in the face of serious challenge at the global level was possible through technology and people used to stay at home and do their office work through computer-internet and students could study while sitting at home. It was very important for people to stay at home at the time of corona and in such a situation, the work of entertainment was made possible through computer-internet, so that people avoid mental trouble, technology has helped human life a lot in this global epidemic. Technology, which can face many such challenging problems in the future, has been proved in the current global pandemic.

CYBERCRIME- MEANING AND DEFINITION

Cybercrime is made up of two words, first cyber and second crime which means, a crime which is done by the combination of computer or computer and internet, it is called cyber crime.

Cyber is called the combination of computer and internet, when it is combined then it becomes a means of communication, and global information can be received, and can be sent, say, using internet and computer, that the work of connecting the whole world is done by the Internet, and its medium is computer and computer related devices such as mobiles, laptops, palmtops, etc., through which information is exchanged.

Offense means such an illegal act by which the legal right of another is harmed by which the person is harmed physically, mentally, financially, in other ways, when such an offense is committed by an offender through electronic means. It's called cybercrime⁷.

GROWTH OF CYBERCRIME

Cyber law refers to the method of communication; the word cyber is the creation of William Gibson⁸, who used to write about science, from the term cyberspace described in *Necromancer*, a book published in 1948⁹. In this, cyberspace means computer-generated three-dimensional diagram, later changing to cyberspace as an interconnected global computer system called the Internet. Cyberspace is an imaginary place where information is exchanged between two computers, today. Scientific discovery is affecting the whole world, the meaning given to it in Hindi is information Raj-path, but today in colloquial language, the Internet is a more understandable word for all this, it is the metropolis and cities, towns and markets. Not in the village but in the village, the World Wide Web has a huge role in the operation of the Internet, due to which people from all over the world are getting information sitting at home, in business from business to business, consumer about any item You can buy and sell by showing information and pictures and are also paying for it through credit card net banking, but more and more use of this internet has also increased the crimes very fast and this is a conceivable negative aspect of this internet world. computer for cyber crimes And internet can also say, cyber crime is that crime, which is a criminal activity against data and copyright, which can be done only by a technical knower, and which against an individual, against an organization or organization as a whole may also be against.

In ancient times people were dependent on their mental reasoning power for all their work and in ancient times only limited amount of work was done by man, but slowly the life of man changed and moved towards modernity, due to which less To do many tasks in time, the need of such a device was felt which is similar to human intelligence and could easily do the most difficult tasks, in such a way that the Abacus was invented, so that a person could edit his work. The first computer as a computing machine became the initial machine which did the work of calculation, with the gradual change in the generation of computer generation from generation to generation and the computers which were of large size, which were used to run It required a large amount of electricity, and maintenance was a difficult task. Gradually, inventions were made and the size of the computer became smaller, but its efficiency kept increasing with the times. In today's time computer is a convenient for most people. Has become a device that can be used for personal use in the form of a laptop. Mobile as a computer has become an essential part of people's life, through

7 <https://www.britannica.com/topic/cybercrime>

8 https://en.wikipedia.org/wiki/William_Gibson

9 [https://en.wikipedia.org/wiki/Necromancer_\(novel\)](https://en.wikipedia.org/wiki/Necromancer_(novel))

which a person can do many tasks in a short time, and the Internet is such a medium to connect with each other, so that a person can sit far away. Can communicate with another person, and can exchange information.

At present, the whole world has adopted a modern lifestyle, in such a way that computers and computer related equipment have become an essential part of human life, earlier computers and computer related equipment were only in big research centers and in big institutions, which was not in the power of common people to run or work on them, but gradually changed with time and computer became an essential part of life for common people, which changed the life of human being completely. Now there is no such field where computers cannot be used, such as robotic surgery in the medical field, in the form of large research centers in military fields and the work of big companies or big- Large space missions, or in the form of mobile can be a better medium to communicate with each other.

TYPES OF CYBER CRIME

MOST COMMON TYPES OF CYBER CRIME¹⁰

Cybercrime includes the utilization of PC and system in assaulting PCs and systems also. Cyber crime is clearly a criminal offense and is punished by the law. Cybercriminals devise different methodologies and projects to assault PCs and frameworks. These are the most well-known sorts of cybercrime.

Banking Related Cyber Crime, Identity Theft, Fraud, Hacking, Scamming, Computer Viruses, Ransomware, Botnets, Spamming, Phishing, Social Engineerin, Malvertising, Software Piracy, Child Pornography, Cyber Terrorism, Etc...

CAUSES AND GROWTH OF CYBER CRIME

Cybercrime is a serious problem not only of India but of the whole world, to deal with which decisions are taken from time to time at many international conferences on what appropriate measures should be taken to prevent cybercrime, India which is currently developing countries. Where the education level has not yet reached the level where developed countries are developing their education system and infrastructure, but if we look at the past time, the progress that India has made in a short time is somewhere in between. India has proved successful in making a different identity on the world from other point of view, from educational point of view, from economic point of view, from other point of view, the increasing global dependence on technology of people and modernity has affected the common people somewhere, now such Whether people live in any country or at any level, the use of technology in which mobile and computer has changed human life, and the whole world has come nearer than the Internet, in such a situation people are dependent on technology. Going technology higher education level It shows that, it is necessary to have the necessary knowledge, but the population of India is second in the whole world, in such a situation there are many villages and towns in India, where the level of

10 <https://www.lepide.com/blog/the-15-most-common-types-of-cyber-attacks/>

education is low, but also to keep up with the times. It is necessary, this has happened in life, in such a situation, people want that technology should also be used in their life, in such a way, mobile which is being used by people of every class by people of every country, at present it is saying Can say, that mobile has become an essential part of people's life, through this people can talk to each other through social media, talk on call, video call, send email, send video and do their banking related work, railways booking tickets, taking education online, doing your work online, etc.

There are many reasons for increasing cybercrime in India, out of which the main problem has been highlighted on the basis of research and on the basis of review literature, which is as follows-

A. PROBLEMS IN CYBER CRIME INVESTIGATION

Cybercrime differs from traditional crimes such as murder, theft, robbery, and other types of crimes, because in cybercrime, crime is committed with the use of computers and the Internet, in which a person sitting in any country commits cybercrime in another country. In such a situation, problems related to jurisdiction and obtaining digital evidence and proper investigation of how and why cybercrime has happened is one of the biggest shortcomings of the police, It was done for getting and investigating crimes, but with the passage of time technology has become an essential part of life, it has become a better medium for people who commit cybercrime, so new crimes are being committed every day. Cyber cells have been set up for cyber crime investigation by the police, but those police officers are appointed in them, who do the work of ordinary police, for they are separate cyber cell have been established. No recruitment as police cadre for cyber police, Those who have expertise on the technical subject, due to unnecessary difficulties in the investigation of cyber crimes by the police, due to lack of sufficient evidence, the victim is not able to get proper and speedy justice. Cyber cell is currently working at the urban level, all types of crime investigation work is done by normal police stations in rural and small towns and small towns, in such a situation, if there is cybercrime, due to lack of sufficient knowledge of F.I.R. If only the register is not registered, and even if it is not done, then the case remains pending due to lack of proper investigation, due to which the victim is facing unnecessary difficulties, so such police officers should be appointed in all the police stations. Due to the lack of those who can do cybercrime investigation, cybercrime is increasing rapidly in rural and small towns, small towns, and criminals are getting stronger.

B. DIFFICULTIES IN THE TRIAL COURT PROCESS

Cybercrime differs from traditional crime due to its technicality, in which the intent of the crime they are medium of crime is computer, mobile, internet and electronic devices, and the purpose of the criminal is to cause mental, financial and other harm to the people, But the Cyber Crime According Trial Courts are facing many difficulties somewhere, in which important evidence is lost due to lack of proper system to collect adequate digital evidence, and the traditional trial process is long due to the

evidence. Nature is changed or destroyed, and due to lack of specific information in cybercrime, it affects the trial court somewhere, in such a situation, if sufficient investigation has been done and there is unnecessary difficulty in the trial process, then in such a situation, Victim has to face unnecessary difficulty in getting proper justice.

C. IMPROVEMENT PROBLEM IN IT ACT

To prevent any offense and if the offense is committed, then such a provision should be given in relation to the offense with the hard punishment, it is necessary in the law made to prevent that crime, because if there is a deficiency in the law then justice will not be received properly, In relation to cybercrime, important decisions were taken by the International Trade Law Commission by the United Nations 1996¹¹, in which it was decided to make necessary rules on the basis of electronic commerce, which are necessary to conduct international trade in an easy and online way. When the IT Act was enacted in the year 2000, computer mobile internet was not used by the people, but the way cybercrime is increasing at present, and new crimes are coming in front of the people, so necessary changes in the law. The reason for not being done is one of the main reasons for increasing cyber crime somewhere.

D. LACK OF EDUCATION AND AWARENESS

There is still a lack of education at the village level and small urban area, in such a situation, people use mobiles, and do other types of work online, but due to lack of necessary information regarding technology, they are caught in the clutches of cyber criminals somewhere, and there are many people who are educated but due to lack of knowledge on cybercrime subject, they do their harm by falling in the clutches of cybercriminals, in such a situation it is often seen that due to lack of cybercrime related subject in school education. Reason, there are many places but in many places cybercrime subject is not taught in schools and related subject is not taught in other academic degrees like engineering, doctor, bachelor of science, bachelor of arts, some. Some of the degrees which are related to computer, such as related to artificial intelligence are taught, due to lack of awareness among people in social approach and lack of education is one of the main reasons for getting caught in cybercrime.

CYBER LAW IN INDIA

India is also a signatory country of the International Trade Law Commission¹² organized by the United Nations in 1996, so it became necessary for us to enact laws related to this, to fulfill this need, in the Parliament of Information Technology Bill 1999. It was established, which was signed by the President on 9 June 2000, in fact, it is based on the model method on electronic commerce law prepared by the United Nations in 1996, adopted by the General Assembly of the United Nations on 30

11 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf

12 <https://uncitral.un.org/>

January 1997. The resolution was passed in which the member states were asked to prepare laws according to this model law; this is also a reason for enacting the present act.

The Information Technology Act of 2000 gives legal status to transactions involving the electronic transmission of data and other forms of electronic communication, as well as transactions involving electronic commerce.

It also covers the use of electronic filing of papers with government entities as an alternative to paper-based communication and information storage.

The Indian Penal Code 1860¹³, the Indian Evidence Act 1872, the Bankers Book Evidence Act 1891¹⁴, and the Reserve Bank of India Act 1934 were also altered by the act. The following are the Act's objectives:

- i. Replace the previous paper-based method of communication with an electronic exchange of data or other electronic means of communication or e-commerce to provide legal recognition to all transactions.
- ii. Legalize digital signatures for the validation of any information or item that requires legal verification.
- iii. Making electronic document submission with government offices and departments easier.
- iv. Electronic storage of data
- v. Give legal approval and make electronic payments transfers between banks and financial organizations easier.
- vi. Give bankers legal permission to keep electronic records of accounts under the Evidence Act of 1891¹⁵ and the Reserve Bank of India Act of 1934¹⁶.

NCRB REPORT CYBERCRIME CRIME IN INDIA

According to the National Crime Record Bureau (NCRB), cyber crime in India increased by 11% in 2020. According to the Ministry of Home Affairs (MHA), the statistics of cyber crimes in the States/UTs was 21,796 in 2017, 27,248 in 2018, 44,735 in 2019, and 50,035 in 2020, according to the NCRB study "Crime in India, 2019."

The statistics for 2020 was taken from the NCRB's report "Crime in India, 2020. In 2020, a total of 50,035 incidents of cybercrime were reported, representing an increase of 11.8 percent over 2019. (44,735 cases). In this category, the crime rate climbed from 3.3 in 2019 to 3.7 in 2020. In 2020, fraud accounted for 60.2 percent of all cyber-crime cases (30,142 out of 50,035 reported), with sexual exploitation accounting for 6.6 percent (3,293 incidents) and extortion accounting for 4.9 percent (2,440 cases).

13 Indian penal code, 1860

14 <https://www.indiacode.nic.in/bitstream/123456789/2322/1/A1891-18.pdf>

15 Evidence act 1872.

16 https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIAM_230609.pdf

Year	No of Cyber crimes registered*
2017	21796
2018	27248
2019	44735
2020	50035

*The data for 2020 has been obtained from the report “Crime in India, 2020 of the National Crime Record Bureau (NCRB)¹⁷.

The Committee was alarmed by the development of a number of instances in cyberspace, with cyber criminals using novel means and modus operandi to perpetrate crimes. According to the committee’s report to the police, certain states, like as Punjab, Rajasthan, Goa, and Assam, do not have a single cybercrime cell, whilst Andhra Pradesh, Karnataka, and Uttar Pradesh only have one or two. MHA may encourage states to establish cyber cells in all districts, according to the Committee’s recommendation.

States should identify cybercrime hotspots to aid in the discovery of crimes and the implementation of preventive measures to combat cybercrime.

The Committee also advises that current cyber cells be upgraded by establishing dark web monitoring cells and social media monitoring cells to combat various forms of cybercrime. In addition to traditional police recruiting, technology professionals should be inducted into the police force. Anand Sharma’s Standing Committee on Home Affairs released a thorough report on police training, modernization, and reforms.¹⁸

CONCLUSION

It has been concluded by research on the related subject, that at present, people’s dependence on technology is becoming a better medium for cybercriminals, due to the difficulties faced in police investigation and cybercrime changes in the current trial process. There is no change in cyber law and lack of awareness among people and less study and teaching work on cybercrime related courses in school curriculum and academic degrees, from time to time to make people aware of cyber crime awareness campaign. Due to not doing widely, it is one of the main reasons for the increase in cybercrime somewhere directly or indirectly, so at present, cybercrime can be controlled by reducing these problems.

SUGGESTION

1. SUGGESTION FOR POLICE SYSTEM

Police Investigation is the primary unit for the criminal related to any crime to be punished for that crime, in such a situation, the better the police investigation, the better will be enough evidence to punish the offender and he can be punished. In

17 <https://ncrb.gov.in/en/Crime-in-India-2020>

18 https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/15/161/237_2022_2_17.pdf

such a situation, it is necessary to change the traditional police investigation system to give the requirement to cyber criminals, in order to make the cyber cell better, such police investigation officers should be appointed in it whose academic background is related to computer and technical subject and They should be given better training and cyber cell should be established in big cities as well as in rural small towns and small towns, because cyber crime is increasing in such places, and a police officer should be appointed in all the police stations. Have expertise in cyber case so that if there are cybercrimes in that area, then the victim can get better justice, such arrangements should be made for him and the way in which investigation of other crimes In order to check the necessary evidence, a forensic lab has been created, similarly a "cyber forensic lab" should be established to collect the necessary digital evidence related to cybercrime investigation can be reduced to.

2. SUGGESTION FOR TRAIL LAW AND COURT SYSTEM

The court system has been created in order to give proper punishment to the offender in relation to any crime, where advocates and judges play an important role in the trial proceedings, and justice is provided on the basis of proper evidence, proper investigation and witnesses. For this, at present the procedure related to criminal offenses, the Code of Criminal Procedure is the law, through this the trial process is done, and different crimes have been made according to the provisions of the punishment given in them, and the victim is punished. Justice is provided to the person, the biggest difference between cybercrime crime and traditional crime is that, traditional crime has been going on since ancient times, and will continue to go on, but cybercrime is such a crime, which is currently facing a new challenge. As has stood before the entire legal system, and when the Code of Criminal Procedure was formed, there were no cyber crimes at all, but the increasing reliance and prevalence of people's technology in front of people in the form of cyber crime as a negative role. is the logo Only saw its good and made it an essential part in life but every good thing has its negative aspects Crime is one of that negative aspects of technology.

Cybercrime was not there 20-30 years ago, but a few decades ago, cyber crime has emerged as a serious problem in the whole world, due to which the IT Act was enacted a few decades ago and the problems being faced in cybercrime investigations were taken care of. Keeping in view the cyber cell was established but somewhere the trial process which is an important link between the investigations and the jail, due to the lack of necessary changes, the cyber criminals are not punished, it is justice at the right time. Due to non-availability, the aggrieved person becomes despondent and in cases again It does not register itself, so in view of digital crime, necessary changes should be made in the Code of Criminal Procedure, because when the criminal process was created, there was no cybercrime nor the use of technology was normal, so there is a need to change the present so that Necessary improvements can be made for cyber crime investigation and trial proceedings.

Cyber cell different from the normal police, which has been constituted to carry out the work of cyber crime investigation, cyber cell which deals with the investigation of cases related to cybercrime crimes so that the criminal can be read and punished

by collecting sufficient evidence. In such a situation, to further improve the normal process, separate arrangements should be made for cyber crime courts, in the manner in which fast track courts, family courts, consumer courts are functioning from side to side through legal infrastructure, similarly at present. Keeping in view the technical matters, cyber cybercrime court should be established where expert judges are appointed on this subject and such expert should be appointed there who is expert in technical subject and can provide necessary information in such cases and remove illiquidity. and necessary changes in the CrPC should be made keeping in view the cybercrime cases, because at the time when the Code of Criminal Procedure was formed, there were no cybercrimes, so it is natural, in view of the present cyber crime, It is absolutely necessary to make the necessary changes, if there is a delay in getting justice to the aggrieved person and proper justice will not be given then justice will fail to achieve its purpose.

Information should be provided to the advocates through seminars on the relevant subject from time to time so that they can better present the side of the aggrieved person in the court and can be trained in the judge training by giving necessary information regarding this subject so that the judge can become a judge. Where the court works in a better way, in such places where the court is currently functioning, such as tehsils, small districts, towns, there should be appointment of judges with necessary knowledge on the subject of cybercrime, and the victim can get justice at the lower level. Cyber subject should be included in the syllabus in Judges Appointment Examination and Cyber Crime should be a subject in Legal Education so that a vision can be established about the subject at the academic level of advocates and judges so that the Bar Bench can function in a better way and that the aggrieved person can get speedy and proper justice.

3. SUGGESTION FOR INFORMATION TECNOLOGY ACT

In order to reduce any crime and to punish the criminals, the law related to that crime has an important role, so if a crime is increasing with time and no rate is being generated among the criminals, then the law It is necessary to make necessary changes in the law, because the criminals may be committing their crimes by taking advantage of the loophole of the law, in such a situation necessary changes should be made from time to time by finding that loophole, which will reduce the crimes.

In relation to cybercrime, the IT Act was enacted in 2000, which came into existence after the meeting of the International Trade Law Commission by the United Nations. Work is being done, such as online business, work related to transfer of essential information is being done online, the whole world is moving towards modernity, in such a situation, cyber crimes are increasing, to stop them in their respective countries. Create your own cyber methods, but the dependence and need of all those people has increased on technology, cyber crime has increased manifold, and technology which has become an essential part of human life, in spite of its negative consequences, people continue to use technology are not able to give up, are not able to reduce its use, in such a situation, the prevalence of technology for cyber criminals has increased cyber crime vary widely, in such a situation, new methods are being invented by

cyber criminals. , and due to lack of sufficient evidence, the trial was not correct. Due to unnecessary delay in the process, the victim does not register the FIR in such cases, due to which the criminals are getting encouraged, and are committing cyber crime in new ways, in such a situation it has become very necessary, that this cyber To reduce crime related cases, necessary changes should be made in the methods and what are the loopholes in them, it should be improved in the way that a better medicine is needed to eliminate a disease, in the same way to eliminate crime. For this a law of medicine is required.

4. SUGGESTION FOR EDUCATION SYSTEM

According to the time, human life has accepted modernity, due to lack of time and excess of work, humans have invented technology to live their life in a better way, of which computer internet mobile is such a technology, which has Has changed human life completely, but due to lack of necessary information on the subject of technology, they do not understand the negative aspect, and as a result, many problems come in human life, the most prominent of which is the negative aspect. Technology is in front of people in the form of cybercrime, people use mobile, computer, internet according to their work, but a big lack of awareness about how to avoid cybercrime is shown in the education system. That is, if the curriculum on cybercrime is added to the school and various academic degrees at the education level, then the students get education, which will generate awareness among the people about the ways to avoid such crimes and people will use technology in limited quantity and This way To avoid criminals and defend themselves from such crimes, and make appropriate and limited use of technology so that cyber crimes can be reduced at the societal level.

5. SUGGESTION FOR COMMON PEOPLE

There are two aspects of any object, one positive one negative, before using any object, it is necessary to pay attention to its positive-negative aspect, so that its ill-effects can be avoided. Man, which is the best machine created by God, which makes him better and better than every natural thing, in ancient times people used to do events related to planets and constellations and other intellectual work on the basis of their intellectual ability and Doing many things on the basis of physical strength and remembering many things in mind was one of the best personality of human being, gradually the electronic gadgets mobile computer internet had taken over human life, through which a person uses many tasks. Due to which the efficiency and capacity of technology is increasing, but the personality development of human being is decreasing, in such a situation, in the life of modernity, most of the work is being done by people through mobile, computer, internet, in human life. Useful functions in such a situation, the negative role of cyber crime technology is in front of the people, through which the criminals committing cyber crime are committing crimes, lack of education among the people, lack of awareness and blind race of technology. By getting involved in crimes like cybercrime and doing their financial and mental harm, it is necessary that people take information on this subject, be

aware, be alert, and use technology as far as possible. Use, so that these crimes can be reduced, because people have so much moral intelligence, that they can understand the difference between good and bad, in such a situation, keeping in mind the negative aspects of technology, they should be used and necessary in their life. Yes it should be used only.

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Indian Constitutional Assurance to Impede the Gender Based Ethnocentric Approach: An Appraisal

Dr. Shamsher Singh & Dr. Ranjit Singh***

INTRODUCTION

Women are momentous part of humanity¹. Improvement in the status of women was a solemn pledge made by founding fathers of Constitution and accepted subsequently by the Government from the very start of independent India². Constitution is very strongly backed by the belief of dignity, justice (social, economic and political) and elementary privileges of every individual. The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental duties and Directive Principles. The Constitution of India not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women³. In this context Dr. Ambedkar has unambiguously acknowledged that⁴:

“there must not be inequalities in the society. There should be no oppressed class in the society. He said that equality is the original notion and respect for

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1 Dr. Kamal Jeet Singh & Kanwar Sasha Chauhan, “Human Rights of Women: A need of Separate Study”, Nyaya Deep, Vol. XII, Issue 1; January 2011, Published by National Legal Services Authority, New Delhi, p. 75.

2 Shilpi Jain & Aggarwal Rahul, “Jusfifying Women Reservation with Reference to India”, Nyaya Deep, Vol. XII, Issue 4; October 2011, Published by National Legal Services Authority, New Delhi, p. 12.

3 Ibid. p.14.

4 Dr. Faizan Mustafa, “Democracy, Social Disparities and Development: Ambedkar’s Vision”, Edited by Nazeer H. Khan, Deep and Deep Publications Pvt. Ltd., New Delhi, P. 51. See; Dr. B.R. Ambedkar, “Philosophy of Hinduism”, Dr. B.R. Ambedkar Writings and Speeches, Vol. III, P. 66.

human personality is a reflection of it. So where equality is denied, everything else may be taken to be denied".

Despite constitutional safeguards the women remain amongst the most oppressed ones and are often denied the basic human rights⁵. The objective of this research paper is to analyze whether the commitments of the Indian Constitution makers in context of Rights of Women had been achieved? Whether the visualization of Indian Constitution had positively accepted by the Parliament and Indian Judiciary?

INDIAN CONSTITUTION AND WOMEN RIGHTS

The *Preamble* begins with the words "WE THE PEOPLE OF INDIA.....", which includes men and women of all the castes, religion etc. It declares in unambiguous terms that it is the people of India who have adopted, enacted and given to themselves the Constitution. The Preamble wishes to render "equality of status and opportunity" to every man and woman⁶. The preamble again assures "dignity of individuals" which includes dignity of women. On the basis of the preamble, several important enactments have been brought into operation, pertaining to every walk of life- family, succession, guardianship and employment- which aim at providing protection of status, rights and dignity of women⁷.

FUNDAMENTAL RIGHTS

Article 14 of the constitution provides equality before the law and equal protection of the laws and protects persons (male as well as females) against arbitrary and unfair State actions. It will not be wrong to say that co-existence of equality and arbitrariness is impossible. *Article 15* of Indian Constitution refers that "*State shall not discriminate against any citizen on the ground of religion, race, caste, sex or place of birth*". Further on the basis of any of these a citizen cannot be denied access to shops, public restaurants or the use of wells, tanks, bathing ghats, roads and places of public resorts maintained wholly or partially out of the State funds or dedicated to the use of general public⁸. To maintain clarity in this Article, Dr. Ambedkar alleged that:

"the term 'shop' used in Article 15(2) is the most generic term. One can think of is to state that 'Shop' is a place, where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. A laundry man therefore would be a man sitting in his shop offering to serve the public in a particular respect, namely wash the dirty clothes of a customer. Similarly,

5 P. Sathasivam, "*Offences relating to women and Children*", Journal Section, 2011 (8) SCC J-3.

6 *Keshwanandan Bharti v. State of Kerala*, AIR 1973 SC 1461. See; Dr. Syed Maswood,, *Law relating to Women*", Orient Law House, New Delhi, 2004, p.2.

7 Justice Deepak Misra, "*Women Empowerment and Gender Justice*", Journal Section, 2011 (6) SCC J-8.

8 Article 15(2) of Indian Constitution: "*No discrimination as to use or access to public places.*"

the owner of a shaving saloon would be sitting there offering his service for any person who enters in his saloon⁹.

In addition to that *Article 15(3)* provides that “*nothing in this article shall prevent the State from making any special provision for women and children*”. However, while prohibiting discrimination against citizens, neither of these Articles, prohibits reasonable classification, an essential content of equality¹⁰. **Dr. Syed Maswood** in his book “*Law relating to Women*” alleged that¹¹

“The main objective of Article 15(3) is based on ‘protective discrimination’ keeping in view the weak physical position of women. The reason is that women physical structure and the performance of maternal functions place her at a disadvantaged position in the struggle for subsistence, and her physical wellbeing becomes an object of public interest and care in order to preserve the strength and vigour of the race”.

This provision has enabled the State to make special statutory provisions for the welfare of women. Though classification and discrimination only on the basis of sex is not permissible; it is permissible when the classification is made on the basis of other grounds, in addition to sex¹².

Further, Article 16 of the Constitution provides for equality of opportunity to all, in matters relating to public employment or appointment to any office and specifically forbids discrimination on the ground of sex.

Above discussed Constitutional provisions are justifiable, therefore for the violation of these articles, women can approach to the Supreme Court or High Court of concerned State under Article 32 or 226.

DIRECTIVE PRINCIPLES OF STATE POLICY:

In addition to above fundamental rights, certain **Directive Principles of State Policy** were also inserted in the Constitution of India like **Article 39** i.e. “*State grants to all the citizens both men and women equal rights to have an adequate means of livelihood*”. Moreover, Constitution also secures “equal pay for equal work both for men and women”¹³. State shall also secure the health and strength of workers, men and women¹⁴. Apart from that State shall make provisions for securing just and humane conditions

9 Constituent Assembly Debates Official Report, Volume VII (4-11-1948 to 08-01-1949) Third Reprint, Reprinted by Lok Sabha Secretariat, New Delhi, (Printed by JAINCO ART INDIA, NEW DELHI) p. 661.

10 Narender Kumar, “*Constitutional Law of India*”, Ed. 2016, Allahabad Law Agency, p. 164.

11 First Edition, 2004, Orient Law House, New Delhi, P. 3-4. (Miller v. Oregon, 52 L.Ed 551, as quoted in J.N. Pandey, Constitutional Law of India, 33rd edition 1998 p. 105).

12 *Air India v. Nargesh Meerza*, AIR 1981 SC 1829 as quoted in Dr. Syed Maswood, “*Law relating to Women*”, Orient Law House, New Delhi, 2004, p. 4.

13 Article 39 (d) of the Indian Constitution.

14 Article 39 (e) of Indian Constitution.

of work and for maternity relief¹⁵. To remove the hindrances of religion, caste, the State shall also make efforts for a Uniform Civil Code throughout the country¹⁶.

Although these principles are strictly not justifiable, but Indian judiciary through their various pronouncements had directed the State to implement them.

FUNDAMENTAL DUTIES

As Hohfeld said, “every right has a corresponding duty. The 42nd Amendment Act inserted Part-IV-A of the Constitution of India. *According to National Commission to Review the Working of the Constitution*, “Fundamental Duties of citizens serve a useful purpose. In particular, no democratic polity can ever succeed if the citizens are not willing to be active participants in the process of governance by assuming responsibilities and discharging citizenship duties and coming forward to give their best to the country”¹⁷. Further, it is recommended that “*the leading duty of the government is to sensitize the masses and to create alertness among citizens regarding the fundamental duties*”.

Article 51-A (e)¹⁸ the duty under this clause is always a reminder to every citizen of India that we must leave the “derogatory practices which are against the dignity of women”.

Legislations like The Equal Remuneration Act, 1976; The Maternity Benefit Act, 1961; The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; The Dowry Prohibition Act, 1961 and The Immoral Traffic (Prevention) Act, 1956 are based on the above discussed constitutional provisions¹⁹.

In addition to above constitutional provisions in context of women upliftment, **Article 326** also contributed a lot to provide equal status to women. Article 326 guarantees right to vote to every citizen of India irrespective of their sex. But this constitutional right is subject to some conditions²⁰.

RESERVATION OF SEATS IN LOCAL GOVERNMENTS AND PANCHAYATS

According to Article 243(3) not less than one-third of the total number of seats to be filled by direct elections in every Panchayat to be reserved for women and such

15 Article 42 of Indian Constitution.

16 Article 44 of Indian Constitution.

17 Vol. 1, Ed. 2002, p.77.

18 Article 51A(e) of Indian Constitution “to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women”.

19 Emphasized supplied by the Reseracher.

20 Article 326 reads as “The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; but is to say, every person who is a citizen of India and who is not less than twenty one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this constitution or any law made by the appropriate Legislature on the ground of non residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election”.

seats to be allotted by rotation to different constituencies in a Panchayat. Apart from this, not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for Women²¹. In addition to above, not less than one-third of the total number of seats to be filled by direct elections in every municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality²².

LEGISLATIVE MEASURES

It is a fact that initial legislative endeavours for the betterment of women was done by Dr. B.R. Ambedkar through the Hindu Code Bill. Most of the provisions of the Hindu Code Bill were inserted in the later passed legislations like the Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; The Hindu Minority and Guardianship Act, 1956; the Adoption and Maintenance Act, 1956. Apart from above legislative measures, there are certain other laws enacted by the Parliament of India for the protection and growth of women which are backed by the vision of Indian Constitutional Makers, which are as follows:

- Indian Penal Code, 1860²³
- The Indian Evidence Act, 1872²⁴
- Criminal Procedure Code, 1973²⁵
- Immoral Traffic (Prevention) Act, 1956²⁶;
- The Dowry Prohibition Act, 1961²⁷;
- Maternity Benefit Act, 1961²⁸;
- The indecent Representation of Women (Prohibition) Act, 1986²⁹;

21 Article 243 D (4) of Indian Constitution.

22 Article 243 T (4) of Indian Constitution.

23 Section 304-B, 312, 354, 376 A to E, 493, 494, 495, 496, 497, 498, 498-A and Section 509 of Indian Penal Code, 1860 are for the protection of women.

24 Section 113-A i.e. 'Presumption as to abetment of suicide by a married woman'.

Section 114-A i.e. 'Presumption as to absence of consent in certain prosecutions for rape.

25 Section 125 of Crpc contains different provisions as to the maintenance of woman.

26 *The Immoral Traffic (Prevention) Act, 1956* was passed with the objective to provide harsh punishments to those who make human trafficking and sexual exploitation of persons for commercial purpose.

27 The objective of the *Dowry Prohibition Act, 1961* is to prohibit the evil of dowry from Indian Society.

28 The aim of the *Maternity Benefit Act, 1961* is to protect the employment of women during the time of her maternity and entitles her of a 'maternity benefit'- i.e. full paid absence from work- to take care for her child. The Act is applicable to all establishments employing 10 or more employees (en.m.wikipedia.org).

29 An Act to prohibit indecent representation of women through advertisements or in publications, writing, painting, figures or any other manner and for matters connected therewith or incidental thereto. (wcd.nic.in)

- The Dowry Prohibition (Amendment) Act, 1986³⁰;
- The Commission of Sati (Prevention) Act, 1987³¹;
- The Pre-Natal Diagnostic Techniques (Regulations and Prevention of Misuse) Act, 1994³²;
- Protection of Women from Domestic Violence Act, 2005³³;
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013³⁴;
- The Criminal Law (Amendment) Act, 2013³⁵ and

30 An Act to prohibit the giving or taking of dowry that is any property or valuable security given or agreed to be given either directly or indirectly by any party or parents of either side at the time of marriage, or before or after the marriage ceremony. It extend to the whole of India except Jammu & Kashmir. The dowry system has been a great social and health problem. So many cases of burns, homicides, and suicides are reporting to the medical casualty in the hospitals. These cases are mainly due to the fact the dowry was not given according to the expectation of bridegroom party. As the value of male child has been fixed much higher as compare to girl and women status is also low, the bride's parent has to offer costly gifts, and spend lot of money on arranging household goods to present even before the marriage which is illegal. If any person violates the Act may be punished with the imprisonment for a term not less than 5 years and with fine which shall not less than Rs. 15000/- or the amount of the value of such dowry, whichever is more. Under the Amended Act of various states many types of prohibitions like advertisement, scope of dowry, gift, presents, and joint accounts are also included. (See; <http://www.nihfw.org/Legislations/THEDOWRYPROHIBITIONACT.html#:~:text=An%20Act%20to%20prohibit%20the,or%20after%20the%20marriage%20ceremony>. Visited on 10-03-2023 at 2.10 pm.)

31 An Act to provide for the more effective prevention of the commission of Sati and its glorification and matters connected therewith or incidental thereto.

32 Objective of the Act is to stop female foeticide and to control the declining sex ratio in India. The Act also banned prenatal sex determination.

33 The Protection of Women from Domestic Violence Act 2005 is an Act of the Parliament of India enacted to protect women from domestic violence. It was brought into force by the Indian government and Ministry of Women and Child Development on 26 October 2006. The Act provides a definition of "domestic violence" for the first time in Indian law, with this definition being broad and including not only physical violence, but also other forms of violence such as emotional, verbal, sexual and psychological abuse. It is a civil law meant primarily for protection orders, rather than criminal enforcement. (Chandra, Bipan; Mukherjee, Aditya; Mukherjee, Mridula (2008). India Since Independence. Penguin Books India. p. 374. ISBN 978-0-14-310409-4) See; https://en.wikipedia.org/wiki/Protection_of_Women_from_Domestic_Violence_Act,_2005 visited on 10-03-2023 at 2.15 pm)

34 This Act was passed by the legislature to provide protection against harassment of Women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith (*The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act 14 of 2013)*).

35 The Criminal Law (Amendment) Act, 2013 provides for amendment of Indian Penal Code, 1860, Indian Evidence Act, 1872 and Code of Criminal Procedure, 1973 on laws related to sexual offences

- Muslim Women (Protection of Right on Marriage) Act, 2019³⁶

JUDICIAL ENDEAVOURS IN CONTEXT OF WOMEN EMPOWERMENT

It is evident fact that the role of Indian Courts in context of women growth is really laudable. I must say that Indian Courts have very actively played their role for uplifting the position of women like equal treatment to women in matter of public employment³⁷; to set aside the arbitrary regulations of Air India with regard to service conditions of Air hostesses³⁸; maternity benefits of female workers on daily wages are at par with regular female workers³⁹; to protect the working women from sexual harassment at workplaces⁴⁰; prohibition of second marriage by husband during the life of wife⁴¹; protection of divorced Muslim wife and her maintenance⁴²; to widen the scope of evil of dowry⁴³; rehabilitation of children of prostitutes⁴⁴ etc.

In context of women right to privacy, in the case of *Justice Puttaswamy (Retd.) v. Union of India*⁴⁵ Hon'ble Supreme Court held that privacy is constitutionally protected right which emerges primarily from guarantee of life and personal liberty in Article 21 of the Constitution⁴⁶. **Justice Chelameswar** alleged that "*Woman's freedom of choice whether to bear child or abort her pregnancy are areas which fall in realm of privacy*"⁴⁷

In addition to above, Apex Court in the case of *Joseph Shine v. Union of India*⁴⁸ alleged that Legal sovereignty of one sex over the other sex is wrong. Then Chief Justice of India, Hon'ble Justice Deepak Mishra held that

"Section 497 of Indian Penal Code violated women right o dignity resulting infringement of Article 21 of the Indian Constitution".

Further, in the case of *The Secretary, Ministry of Defence v. Babita Puniya and Others*⁴⁹, Hon'ble Supreme Court has upheld Delhi High Court's judgment of granting permanent

36 The object of the Act is to protect the rights of married Muslim women and to prohibit divorce by pronouncing Talaq by their husbands and to provide for matters connected therewith or incidental thereto. (Act 20 of 2019) This act criminalizing triple talaq in India.

37 *C.B. Muthamma v. Union of India*, (1979) 4 SCC 260; *Mrs. Neera Mathur v. Life Corporation of india*, AIR 1992 SC 392.

38 *Air India v. Nargesh Meerza and Others*, AIR 1981 SC 1829.

39 *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, AIR 2000 SC 1274.

40 *Vishaka and Others v. State of Rajasthan and Others*, AIR 1997 SC 3011: 1997 (6) SCC 241.

41 *Sarla Mudgal v. Union of India* (1995) 3 SCC 635.

42 *Danial Latif and Others v. Union of India*, 2001 (8) SCC 218.

43 *Rameshwar Dass v. State of Haryana* (1993) 1 Punj. Cr. 265.

44 *Gaurav Jain v. Union of India*, AIR 1997 SC 3021: 1997 (8) SCC 114.

45 AIR 2017 SC 4161.

46 Ibid at p. 4162.

47 Ibid at p. 4170.

48 Writ Petition (Criminal) no. 194 of 2017.

49 Civil Appeal Nos. 9367-9369 of 2011; Civil Appeal No. 1210 of 2020.

commission to women officers in the Indian army⁵⁰. keeping in view the notion of 'right to equality is a right of rationality' Hon'ble Justice D Y Chandrachud alleged that:

"An absolute bar on women seeking criteria or command appointments would not comport with the guarantee of equality under Article 14. Implicit in the guarantee of equality is that where the action of the State does differentiate between two classes of persons, it does not differentiate them in an unreasonable manner. In this sense, even at its bare minimum, the right to equality is right to rationality⁵¹".

CONCLUSION

In the nutshell, it is submitted that if someone compares the status of present day women with Indian Constitution vision, then I must say that numbers of goals of Constitution have been achieved. Plethora of Statutes, judicial decisions concerning women preservation, National Commission for Women (NCW), Ministry of Women and Child Development; missions like Nanni Cha and Beti Bachao, Beti Padhao etc. have proved this fact. Furthermore, in the present time, women with their multitasking skills and empathy are winning many corporate wars and challenges also. Women's like Kinnari Hariyani is one such empowered women who is helping to meet the growing demand of power for electric vehicles⁵².

But if I see the other side of the coin, then the picture is absolutely different, because increasing number of rape cases, female foeticide, forced prostitution, forced labour, domestic violence, sexual harassment at work places, kidnapping of girls, dowry harassment etc. still pose a question mark. Moreover, it is fact that almost 50% of the population in India is covered by the female only, so the full development of the country depends on the half population, means women, who are not empowered and still restricted by many social taboos. In such a condition, we cannot say that our country would be a developed country in the future without empowering its half population, means women⁵³. Last but not the least, it is submitted that we all must make sincere efforts so that dream of Indian Constitution makers to create the gender equal nation can be converted into reality in toto.

50 m.economicstimes.com, accessed on 17-02-2020.

51 The Tribune, "SC okays command role for women" 18th February, 2020, p.1.

52 Economic Times, "When women becomes change makers and Leaders", 8th March, 2023, p. 3.

53 Prof. (Dr.) Samiya Tabasum, "Women and Law", 2018, Central Law Publications, p. 15.

Reproductive Human Right: An Analysis of National and International Legal Framework

Ms. Akanksha Verma*

ABSTRACT

Recent years have highlighted how the reproductive spheres is continuously grabbing the attention of medical and legal experts globally. The availability of technical services to promote reproduction has led to severe concerns over the right to reproduce, which no longer is determined as a private/personal affair. Law-enforced neglect of women's reproductive health is part of a larger, systematic discrimination against women. Women's access to reproductive health treatments is hampered by laws. Furthermore, few laws or policies support women's reproductive health care. Epidemiological facts and feminist legal methodologies shed light on the law's disregard for women's reproductive health and highlight long-held assumptions in the law's neutrality that fundamentally damage women. The expanding technological possibilities raise fundamental concerns about human dignity and social welfare. There has been an increase in demand for determining (a) the rights of prisoners, unmarried people, and homosexuals to such services, (b) concerns about children's information and health needs, (c) wrongful birth and wrongful death claims, (d) the role of donors and physicians, (e) posthumous reproduction, and so on. Furthermore, the need of national and international law for a well-functioning system has been emphasized. This paper is an attempt to explore the pressing claims to reproductive choices coupled with a marked increase in demand for legislative intervention in India.

Keywords: Reproductive Rights, Human Right, Assisted reproductive Techniques, IVF.

I. INTRODUCTION

Recent years have demonstrated how the reproductive sphere is constantly attracting the attention of medical and legal specialists all around the world. The availability of numerous technical services to aid reproduction has raised severe questions about the right to reproduce or give birth, which is no longer seen as a private/personal

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matter. As reproductive technologies gain popularity, it is necessary to consider the legal profession's responsibilities in light of the ever-increasing claims to reproduce using such technology.

In overview, the process of technological or artificial reproduction (AR), commonly with the use of 'Assisted Reproductive Technologies' (ART's), employs various techniques such as In-vitro Fertilisation and Embryo Transfer (IVF- ET), on the assumption that it is a legitimate extension of natural methods of reproduction. But whether this assumption is valid or merely a handy way to dodge jurisprudential and policy difficulties remains a mystery. A well-thought-out agenda based on instinct/nature on the one hand or social welfare policy on the other is at the heart of any policy impacting artificial reproduction. Critics of the welfare principle frequently advance the notions of reproductive autonomy and sexual privacy. The principle stands for a regulatory structure comprising numerous prohibitions as the sole way to avoid difficulties typically linked with the AR process. As the conversation progresses, it becomes clear how artificial reproduction has intrinsic implications for the common good. It is an institutionalized manufacturing process that threatens human existence by interfering with reproduction, parenthood, and identity.¹ The procedure radically transforms how species reproduce, materializing human life and bringing it into the public domain, susceptible to State control. The State has no choice but to be concerned about how its citizens are generated. If boosting the interests of one generation, for example, entails damaging the interests of a later generation, the state is obligated to act in favour of the generation at risk.²

Because the subject is tied to-sexuality and morality-reproductive women's health creates difficult questions for many legal systems. Many people feared that if women could have sexual encounters while avoiding pregnancy and sexually transmitted diseases, sexual morality and family security would be jeopardized. Such traditional morality is mirrored in regulations that limit or deny women's access to reproductive health treatments in an attempt to control their behaviour.³

Many women die or are permanently crippled as a result of pregnancy problems. Maternal deaths are defined as deaths among pregnant or previously pregnant women within the previous 42 days.⁴ According to the World Health Organization, 500,000 women die each year from pregnancy-related causes, and unsafe abortion "causes some 25 to 50 percent of [maternal] deaths simply because women do not have access to family planning services they want and need, or have no access to safe procedures or humane treatment for abortion complications."⁵ These statistics are

1 West R., "Jurisprudence and gender." 55 *University of Chicago Law Review* 1-72 (1988).

2 Jacqueline A. Laing and David S. Odeberg, "Artificial Reproduction, the Welfare Principle, and the Common Good", 13 *Medical Law Review* 328 (2005).

3 Fathalla, Mahmoud., "Reproductive health: A global over- view." 626 *Annals of the New York Academy of Sciences* 1-10(1991).

4 World Health Organization, *Prevention of Maternal Mortality: A Report of a WHO Interregional Meeting. Geneva*, P. 5 (1985).

5 Safe Motherhood Conference Conclusions, 670 *Lancet*(1987).

only one instance of how women's reproductive health and well-being are being neglected.

There are numerous causes of maternal death, and some of them interact with one another to increase the chance of death.⁶ Pregnant women, for example, whose blood is contaminated with the human immunodeficiency virus (HIV), encounter aggravating circumstances that might lead to premature death.⁷ Women's health laws may be lacking; where they exist, they are rarely or inadequately enforced. Adolescent pregnancy is common in countries with no legal marriage age, a low marriage age, or where the law is not enforced. Such pregnancies have a high obstetric risk and a high maternal mortality rate.⁸

The law with each day is a witness to new issues originating from claims of those involved in the process of technology reproduction. As to whether the law will always take a human rights approach when addressing the desire of individuals is still speculative or uncertain. In this regard, cultural values, ethical judgements, and the role of the international community in fostering a concern for rights, as well as keeping the sphere of reproduction safe and ethically feasible for future generations, must be given serious consideration.

II. ARTIFICIAL REPRODUCTIVE TECHNIQUES: PRACTICE

Initially, reproductive technologies were introduced to address infertility. They now serve a variety of other objectives. For example, it is being provided to fertile heterosexual couples as a way to avoid passing on inherited disorders to their children. As more people claim to be using AR services, the process inevitably creates moral and human rights concerns.⁹

Medical Procedure

Assisted reproductive technologies (hereinafter referred to as ART) are a group of technologies which assist in conception and pregnancy. It includes techniques for manipulating eggs and sperm to overcome infertility. It includes:

- i. In vitro fertilization (IVF);
- ii. Gamete intra-fallopian transfer;
- iii. Zygote-intra fallopian transfer;
- iv. Surrogacy;
- v. Posthumous procreation.

6 Fathalla, Mahmoud., "The long road to maternal death."14*People IPPF*8(1987).

7 Melica, F. (ed.), *AIDS and Human Reproduction*, (Basel, Karger,1992).

8 Population Information Program, "Youth in the 1980s: Social and Health Concerns." Population Reports, Series M, No. 9 (1985).

9 Warren Freedman, "Legal Issues in Biotechnology and Human Reproduction: Artificial Conception and Modern Genetics" *Quorum Books* 114 (1991).

and most recent techniques like:

- i. Intra-cytoplasmic sperm injection (ICSI);
- ii. Cryopreservation of donated oocyte/sperm;
- iii. In vitro maturation;
- iv. Pre-implantation genetic diagnosis and micro sorting.

In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or another woman. They do not include treatments in which only sperm are handled (i.e., intrauterine or artificial insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.¹⁰

First, the artificial insemination homologous or husband (hereafter AIH) is that of her spouse, in which the semen is injected into the female body. AIH is less contentious because the sperm that gives birth to the child belongs to the woman's legally wedded spouse.¹¹ In the second type, a third-party donor's sperm is given into a woman on her projected ovulation date to assist her in conceiving. This is referred to as artificial insemination donor (hereinafter AID). Although AIH and AID both boost an infertile couple's chances of having a child, the outcomes and legal difficulties are very different. In AIH, the husband and wife are both genetic parents of the child, whereas in AID, only the mother is genetically connected to the child.¹²

Another kind, known as confused or combination artificial insemination,¹³ is not often utilized and involves mixing the husband's seed with that of a third party. IVF involves surgically removing mature ova from a woman and placing them in a laboratory medium with male sperm. The early embryo is implanted in the uterus of either the ovum donor or another woman after fertilization and numerous cell divisions. The procedure is expected to generate various concerns regarding the legal paternity of IVF-born children, the status (whether person or property) of pre-embryos created during IVF, and the legal parentage of IVF-born children.

In 1978, the first IVF baby was born in England. The Indian Council of Medical Research's research efforts resulted in the birth of India's first scientifically verified IVF baby in 1986. (hereinafter ICMR). ART research and promotion began as a

10 Assisted reproductive technology, available at: <https://www.cdc.gov/art/index.html> (last visited on January 15, 2023).

11 Kusum, "Artificial Insemination and the Law", 19:3 *Journal of the Indian Law Institute* 283 (1977).

12 Marsha Garrison, "Law Making for Baby Making: An Interpretive Approach to the Determination of Legal parentage" 113:835 *Harvard Law Review* 837 (2000).

13 Ateeque Khan, "Artificial Insemination and Surrogate Parenthood: An Indian Socio-Legal Perspective", 31:3 *Journal of the Indian Law Institute* 394 (1989).

14 Sama Team, "Assisted Reproductive Technologies in India: Implications for Women", 42 (23) *Economic and Political Weekly* 2184 (2007).

government project in India, but it quickly filtered into the private health sector and has since prospered as a private company. The ART industry has grown and clinics offering ART operations have proliferated since then.¹⁴ The existence of social pressure to produce children accounted for the quick spread of ART. According to the information obtained from the providers, women face a disproportionate hardship and social shame associated with infertility and childlessness, and they would be willing to undergo any medical intervention in order to carry a child.¹⁵

Rights of Minority Groups: Unmarried, Homosexuals etc.

According to experts, an ethical investigation of reproductive autonomy issues does not lead to definitive findings; rather, it reveals considerations that require or merit attention, balancing, and prioritization.¹⁶ One of the various legal and moral questions is whether those with impaired infertility who use ART should have the same freedom as those with normal fertility or those who can be exempted for policy reasons. Discrimination is ideally prohibited from a human rights perspective.

Countries around the world have also observed a claim to procreation by unmarried individuals, single, lesbian women, and prisoners¹⁷ to use AR to fulfil their desire, which has drawn attention and academic debate. Policy considerations suggest that in order to demonstrate an interest compelling enough to override unmarried couples' procreation rights, or to justify disparate treatment based on marital status, a state should allege differences between married and unmarried people actual differences, not stereotyped assumptions—and show that allowing unmarried people to parent would have identifiable and significant negative consequences.¹⁸

There are also strong recommendations for gay and lesbian couples to have equal reproductive freedom and access to ART. Numerous decisions of the International Covenant on Civil and Political Rights (1966) Human Rights Committee indicate an increase in requests for recognition of gay men's and lesbian women's procreative and parental rights.¹⁹ Much of the case law focuses on the right to start a family, the protection afforded to family and family life, and the rights to non-discrimination and equality. The Committee's Article 23 jurisprudence is limited to marriage-based families.²⁰

¹⁵ Ibid.

¹⁶ M. Ford Norman, "The Prenatal Person- Ethics from Conception to Birth", Blackwell Publishing (2002).

¹⁷ In case of Dickson v. United Kingdom, (2006) the European Court of Human Rights established that where there is a desire for a child, there should be an equal opportunity to realise procreation.

¹⁸ Annas, "Reproductive Technology and the Procreation Rights of the Unmarried", 98 *Harvard Law Review* 669 (1985).

¹⁹ ICCPR Article 23(2): "The Right of men and women of marriageable age to marry and to found a family shall be recognised.

²⁰ In Joslin v. New Zealand, (UN Human Rights Committee, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002).

III. LEGISLATIVE FRAMEWORK IN INDIA AND INTERNATIONAL LAWS

in last few years, there has been a great debate in the Indian medical community about whether there is any need to regulate ART through law. There is a significant effort for regulating this highly complex area by the Indian Council of Medical Research (hereinafter referred to as ICMR) through providing non-binding guidelines from time to time. In India, the Indian Council for Medical Research is the apex authority regulating the practice of artificial reproduction.²¹ The first effort appeared in the form of Ethical Guidelines for Biomedical Research for Human Subjects, 2000²². Subsequently ICMR and the National Academy of Medical Sciences (NAMS) framed the National Guidelines for Accreditation, Supervision, and Regulation of the Assisted Reproductive Technology Clinic, 2005²³ and the Assisted Reproductive Technology Bill and Rules 2008 which were reframed in 2010. Recently, the Assisted Reproductive Technology (Regulation) Act, 2021, was passed. The Act seeks to provide for the regulation of all assisted technology services in India.²⁴

The bill defines Assisted Reproductive Technology and provides that:

- i. every ART clinic and bank must be registered under the National Registry of Banks and Clinics of India;
- ii. screening of gamete donors;
- iii. collection and storage of semen;
- iv. provision of oocyte donor can only be done by a registered ART bank, Conditions for offering ART services.
- v. ART procedures can only be carried out with the written informed consent of both the party seeking ART services as well as the donor.
- vi. A child born through ART will be deemed to be a biological child of the commissioning couple and will be entitled to the rights and privileges available to a natural child of the commissioning couple.

The penalties for different offences such as bank advertising or offering sex-selective, abandoning or exploiting children and selling, purchasing, trading, or importing human embryos or gametes, and many more.

INTERNATIONAL LAWS AND TREATIES

The 1979 Convention on the Elimination of All Forms of Discrimination Against

21 In *B.K. Parthasarathi v. Government of Andhra Pradesh* AIR 2000 A.P. 156, the High Court of Andhra Pradesh upheld the right to reproductive autonomy as a significant aspect of an individual's right to privacy.

22 Available at: [ICMR_National_Ethical_Guidelines.pdf](https://ncdirindia.org/) (ncdirindia.org) (Last visited on December 15, 2022).

23 National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, Indian Council of Medical Research National Academy of Medical Sciences 4 (India), (2005, New Delhi).

24 The Assisted Reproductive Technology (Regulation) Bill, 2020.

Women (the Women's Convention)²⁵ is the principal modern human rights convention. The International Covenant on Civil and Political Rights (the Political Covenant)²⁶ and the International Covenant on Economic, Social, and Cultural Rights (the Economic Covenant) are the two first implementing treaties of the Universal Declaration of Human Rights.²⁷ Regional human rights conventions derived from the Universal Declaration include the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention),²⁸ the American Convention on Human Rights (the American Convention),²⁹ and the African Charter on Human and Peoples' Rights (the African Charter).³⁰ There are also specialized conventions, such as the International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention),³¹ which prohibits discrimination against women of all races, and the Convention on the Rights of the Child (the Children's Convention),³² which protects the rights of girl children.

The Women's Convention mandates countries that have ratified it, known as states parties, to "pursue a policy of eliminating discrimination against women³³ by all appropriate means and without delay," and in particular "to eliminate discrimination against women in the field of health care in order to ensure access to health care services, including those related to family planning."³⁴ States parties agree to assess the hazards to women's reproductive health. National considerations, such as patterns of reproductive health-service delivery and the epidemiology of reproductive disability, will affect the strategies selected by states parties to address threats to reproductive health. The goal is to reduce maternal mortality and morbidity while also enhancing women's dignity and their reproductive self-determination.³⁵

Concern for human well-being has prompted the international community to do study and wisely deliberate on the shared issues confronting ARTs. The United Nations Educational, Social, and Cultural Organization (UNESCO) adopted the Universal Declaration on Bio-Ethics and Human Rights³⁶ in 2005, with the goal of providing a universal framework of principles and procedures to guide states in the formulation

25 18 December 1979, 34 United Nations (UN) GAOR Supplement (No.21) (A/34/46) at 193, UN Doc. A/Res/34/180.

26 9 GA Res. 2200 (XXI), 21 UN GAOR Supplement (No. 16) at 52, UN Doc. A/6316 (1966).

27 GA Res. 217 A (III), UN Doc. A/810 (1948)

28 213 U.N.T.S. 221 (1959).

29 OASTS at 1 (1969).

30 OAU Doc. CAB/Leg/67/3/ Rev. 5 (1981).

31 660 U.N.T.S. 195 (1965).

32 General Assembly Resolution 44/25, 44 UN GAOR, Supplement No. 49, UN Doc. A/ 44/ 736 (1989).

33 Article 2 of the Women's Convention.

34 Article 12 (1) of the Women's Convention.

35 Gary H. Herbert, "A Philosophical History of Rights", Transaction Publishers 197 (2003).

36 Available at <https://unesdoc.unesco.org/ark:/48223/pf0000146180> (last visited on December 16, 2022).

of laws, protecting the interests of future and present generations. The most significant provisions with respect to autonomy and welfare of individuals are: (a) Articles 3 (respect for human rights and the welfare of the individual should have priority interest of science and society, (b) Article 5 (autonomy of persons to take decisions should be respected), (c) Article 6 (medical intervention should be done only with free and willing consent of the person concerned), and (d) Article 9 (respect for privacy and confidential information).

If international human rights law is to be truly universal, it requires states to take effective preventive and curative measures to protect women's reproductive health and to provide women with the capacity for reproductive self-determination. International human rights treaties require international and national law to protect women's rights to: (1) freedom from all forms of discrimination; (2) liberty and security, marriage and the establishment of families, private and family life, formation and education; and (3) access to health care and the benefits of scientific progress.³⁷ The international community has undoubtedly facilitated a process to address the contentious and significant problems of ARTs in a pragmatic and culturally specific manner.

IV. CONCLUSION

Women's reproductive functions have been utilized to exert control over them. States have advanced their preferred social, economic, and population goals by enacting laws and utilizing methods that restrict women's reproduction. To get autonomy, women must achieve reproductive self-determination, which opens up numerous doors in life. International governmental institutions and non-governmental organizations (NGOs) can monitor state behaviour. By establishing general recommendations on standards against which country performance can be compared, the Committee on the Elimination of Discrimination Against Women can serve as a catalyst for the progress of women's reproductive rights. Reducing maternal mortality, establishing minimum legal marriage ages, and promoting optimal birth spacing are examples of such recommendations.

Law and society are interdependent. Today's modern society is standing at the crossroads of law, science, and technology. The constantly evolving society and technology require an advanced legal framework, particularly in penal, to resolve the modern conflicts and determine the fundamental attributes and limitations of human activity over time. The internet and mobile phones are two instances of technical innovations that have been designed to make human existence easier and more secure. On the other hand, technology brings with it a vulnerability that cannot be neglected in society. Invasion of privacy by technology and technological intervention in family, social, and individual life are some illustrations. Reproductive technology is one of the most recent scientific breakthroughs, and it aids in resolving reproductive issues, thus, making it a very private affair. It contains numerous socio-legal and ethical dilemmas that must be resolved, through law.

37 Cook. Rebecca, "International protection of women's reproductive rights." 24 *New York University Journal of International Law and Politics* 645-727(1992).

By utilizing the resources of international law, there is great potential to enforce state responsibility for the observance of women's reproductive rights. Accountability measures under the Women's Convention, the Political and Economic Covenants, and regional human rights accords are among them. The right to reproductive self-determination is commonly cited as a prerequisite to the fulfilment of other human rights that are of particular relevance to women. This right expresses the essential value of respect for "the inherent dignity and the equal and inalienable rights of members of the human family," as stated in the Universal Declaration of Human Rights, as the foundation of freedom, justice, and peace.

The Right to Sanitation in India: A Constitutional Perspective

Ms. Amlanika Bora & Dr. Sanjay Kumar***

ABSTRACT

The right to a safe and healthy life includes the need of sanitary conditions. India has the second-largest population in the world, and thus, it is crucial to maintain the health and safety of everyone who lives there. However, one of the biggest problems in India is the lack of access to good sanitation. Diseases spread due to poor sanitation, which may have disastrous effects on a community. The Indian government has taken a number of actions to guarantee that everyone has access to fundamental sanitation rights in order to preserve the health of its population. The “Swachh Bharat Mission,” which was established by the Indian government in 2014, seeks to eradicate open defecation and enhance sanitation and hygiene across the nation. Although the programme has achieved significant progress, there is still more to be done to improve sanitation throughout India.

Despite the fact that the right to sanitation is not expressly stated in the Constitution, the judiciary in India has consistently emphasised its significance, reflecting on its wide-ranging nature. Thus, the judiciary has taken on the important role of interpreting the scope of the right to sanitation in light of the constitutional provisions, namely fundamental rights and directive principles.

In this backdrop, this article seeks to analyse the constitutional framework pertaining to right to sanitation in India. The paper addresses the questions as to what extent can right to sanitation be enforceable? Whether the state authorities are duty bound to provide sanitation related facilities to the people in India? What need to be done for the proper realisation of this right in India?

Keywords: *Constitution of India, Fundamental Rights, Judiciary, Sanitation, Right to Sanitation.*

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1. INTRODUCTION

Sanitation is an essential part of the right to a safe and healthy life. India is home to the world's second largest population, and with such a large population, it is vitally important to ensure the health and safety of everyone living in the country. However, access to basic sanitation services in the country is still limited even after several decades of economic and social development. Thus, the lack of access to safe and adequate sanitation is a major issue in India. Poor sanitation leads to the spread of diseases, which can have a catastrophic effect on a population. The lack of access to safe and sanitary water, toilets, and sewers leads to the spread of illnesses such as cholera and typhoid, which causes death, disability, and the loss of livelihoods. Poor sanitation also contributes to environmental degradation, as wastewater and sewage that are not properly disposed of can cause water pollution and land contamination. In addition, the lack of access to sanitation also leads to social issues, such as gender inequality and discrimination. In order to protect the health of its citizens, the Indian government has taken various steps in to ensure that everyone has access to basic sanitation rights. In 2014, the Indian government launched the "Swachh Bharat Mission," which aims to end open defecation and improve sanitation and hygiene in the country. The mission has made great strides in improving sanitation in India, but there is still much work to do.

In this backdrop, this article seeks to analyse the constitutional framework pertaining to right to sanitation in India. The paper addresses the questions as to what extent can right to sanitation be enforceable? Whether the state authorities are duty bound to provide sanitation related facilities to the people in India? What need to be done for the proper realisation of this right in India?

2. RIGHT TO SANITATION: CONCEPTUAL UNDERSTANDING

Sanitation is an incredibly broad concept, and definitions of it vary according to context. Thus, sanitation has been defined and understood differently by state and international actors. In a broad sense, 'sanitation' means providing places and methods for people to eliminate their waste in a clean and sanitary manner. Garbage collection and sewage treatment are two examples of how this term is put to use in the context of keeping places clean.¹ It is the "control of all those factors in man's physical environment that exercise or may exercise a deleterious effect on his physical development, health, and survival," according to the World Health Organization's Expert Committee on Environmental Sanitation.²

'Basic sanitation' is defined by Robert Lenton et al. as the least expensive method of guaranteeing long-term access to safe hygiene and convenient facilities and services

1 World Health Organisation regional Office for Africa, *Sanitation* available at <https://www.afro.who.int/node/5691> (Last visited on February 5, 2022).

2 World Health Organisation, *Expert Committee on the Public Health Aspects of Housing*, First Report, 4 (June 1961) available at https://apps.who.int/iris/bitstream/handle/10665/40497/WHO_TRS_225.pdf?sequence=1&isAllowed=y (Last visited on February 5, 2022).

for excreta and sullage disposal, all while protecting users' privacy and dignity and preserving a clean and healthy environment in the home and neighbourhood.³

In her report on sanitation, the Special Rapporteur suggested that 'sanitation' be defined in terms of human rights as [a] system for the collection, transportation, treatment, disposal, or reuse of human excreta and accompanying hygiene.⁴ The report highlights the state's commitment to ensuring that everyone has access to sanitation in all aspects of life that is safe, sanitary, secure, socially and culturally acceptable, offers privacy, and upholds dignity without regard to their financial or physical circumstances. This concept specifies that adequate sanitation goes beyond just having access to and using latrines or toilets. It comprises the proper treatment, disposal, or reuse of connected wastewater, faeces, and urine while avoiding direct touch to reduce health concerns. Such a wide definition of sanitation is necessary since it affects not only one's own right to use a latrine or toilet but also other people's rights, particularly their right to health, which may be jeopardised by improper management of excreta and wastewater.⁵

In the Indian context, a conceptual understanding of 'sanitation' can be developed by referring to several sanitation related programmes, policies, and administrative directions issued by the Government of India. For example, National Urban Sanitation Policy 2008 (NUSP), defines sanitation as the "safe management of human excreta, including its safe confinement, treatment, disposal, and associated hygiene-related practices."⁶ On the other hand, the Total Sanitation Campaign (TSC) Guidelines 2011, refers to sanitation as "a comprehensive concept which includes liquid and solid waste disposal, food hygiene, and personal, domestic as well as environmental hygiene."⁷ In addition, the Swachh Bharat Mission guidelines include sanitation components that encompass various critical features such as access to toilets, privacy and dignity of individuals, and waste management, among others.⁸

Thus, it is clear that sanitation is a broad and multifaceted concept which includes elements related to health, environment, hygiene, social equality and much more

3 UN Millennium Project 2005. Health, Dignity, and Development: What Will it Take? Task Force on Water and Sanitation, 1-228.

4 U.N. Committee on Economic, Social and Cultural Rights (CESCR), *Statement on the Right to Sanitation*, 8, U.N. Doc. E/C.12/2010/1 (Nov. 19, 2010). See also, Amlanika Bora & Sanjay Kumar, *Right to Sanitation in India Through the Lens of Judiciary*, CMR University Journal for Contemporary Legal Affairs 4 (1) (December 2022). 5 *Ibid*.

6 Urban Sanitation Policy, 2008, Background, 1 available at https://mohua.gov.in/upload/uploadfiles/files/NUSP_0.pdf (Last visited on February 5, 2022). See also, Amlanika Bora & Sanjay Kumar, *Right to Sanitation in India Through the Lens of Judiciary*, CMR University Journal for Contemporary Legal Affairs 4 (1) (December 2022).

7 Total Sanitation Campaign Guidelines, 2011, 1.2. See also, Amlanika Bora & Sanjay Kumar, *Right to Sanitation in India Through the Lens of Judiciary*, CMR University Journal for Contemporary Legal Affairs 4 (1) (December 2022).

8 Amlanika Bora & Sanjay Kumar, *Right to Sanitation in India Through the Lens of Judiciary*, CMR University Journal for Contemporary Legal Affairs 4 (1) (December 2022).

other aspects that are essential for achieving health and well-being. Its implementation requires an understanding of the various dimensions and components that must be addressed in order to achieve sustainable outcomes. In other words, the meaning of sanitation has been broadened over time and includes elements that go beyond just the safe management of human excreta.

3. CONSTITUTIONAL FRAMEWORK

Sanitation is not expressly acknowledged as a fundamental right under the Constitution of India (hereinafter "The Constitution"). However, the higher judiciary has frequently construed the right to life guaranteed by Article 21 of the Constitution as include the right to safe and adequate sanitation. Article 21, which serves as the foundation for many other human rights, "embodies a fundamental value of supreme importance in a democratic society"⁹ and protects life and liberty. The Supreme Court of India (hereinafter "The Supreme Court") has given Article 21, a much broader interpretation in a number of cases, expanding its scope to include the right to a livelihood,¹⁰ a better standard of living,¹¹ more than mere animal existence,¹² the right to live a healthy life and make the most of all the faculties of the human body,¹³ as well as the right to food, water, a decent environment, education, medical care, and shelter. One needs to have the most basic amenities for sanitation and hygiene in order to live a life of dignity and enjoy all the privileges that go along with it.

Moreover, since manual scavenging is intimately related to the fundamental right to ban untouchability guaranteed by Article 17 of the Constitution, these right forms a crucial component of the broadly construed right to sanitation. Besides that, the right to sanitation is linked to the right to education, which is protected by Article 21A of the Constitution.

Additionally, sanitation is covered by the 'Directive Principles of State Policy' (hereinafter "The DPSP") in Part IV of the Constitution. In particular, Articles 39(e), 39(f), 42, 47, and 48A, when read in conjunction with Articles 14 and 21, address various facets of a more generalised right to sanitation. The government is obligated by Articles 47 and 48A to "protect and improve the environment" and to 'raise the standard of living of Indian citizens.' Access to fundamental sanitation is necessary to accomplish both of these goals.

It is important to note that the state and local governments in India are in charge of regulating and managing sanitation in India, which is another important aspect of

9 According to Bhagwati, J., Article 21 "embodies a constitutional value of supreme importance in a democratic society."

10 *Olga Tellis v. Bombay Municipal Corporation*, 1986 AIR 180, 1985 SCR

11 *H.P. v. Umed Ram Sharma*, 1986 AIR 847, 1986 SCR (1) 251

12 *Kharak Singh v. State of Uttar Pradesh*, 1980 AIR 1579, *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, and Others*, 1981 AIR 746.

13 *Sunil Batra v. Delhi Administration*, 1978 AIR 1675, 1979 SCR (1) 392.

the Constitution that relates to sanitation.¹⁴ The Constitution gives state governments the authority to enact laws pertaining to public health, sanitation,¹⁵ and water supplies, as well as irrigation, canals, drainage, and embankments, as well as water storage and power.¹⁶

Because of the 73rd¹⁷ and the 74th¹⁸ amendments to the Constitution, local self-governments (panchayats, municipalities, and corporations) are given the responsibility of handling matters relating to sanitation, even though the state government has legislative authority over these issues. Municipalities and panchayats were thus added to the Constitution's provisions for the purpose of providing services related to water and sanitation.¹⁹ For instance, states have the power to pass laws and assign duties to panchayats in relation to the items listed in the Eleventh Schedule, as stated in Article 243G of the Constitution.²⁰ Health and sanitation are among the topics addressed in the Eleventh Schedule.²¹ In accordance with Article 243W, the state may also grant municipalities authority and responsibility for managing solid waste, maintaining public health, and other related matters.²²

4. JUDICIAL INTERPRETATION

The judiciary in India has emphasized the significance of right to sanitation in numerous cases and pointed out its connection with fundamental rights (hereinafter "The FRs") and the DPSP. For example, in *Virendra Gaur*²³ case the SC ruled that the conservation and maintenance of the environment and ecological balance free from pollution are within the purview of the right to life with human dignity. Therefore, the right to a sanitary environment is intrinsic to the right to a healthy existence, and without it, one cannot enjoy the right to life in its true sense. The responsibility for keeping the

14 Constitution of India, 1950, Seventh Schedule: List II—State List, Entry 6, 7. "Seventh Schedule: List II—State List.....6. Public health and sanitation; hospitals and dispensaries 17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and waterpower subject to the provisions of entry 56 of List I."

15 Constitution of India, 1950, Seventh Schedule: List II—State List, Entry 6. "Seventh Schedule: List II—State List.....6. Public health and sanitation; hospitals and dispensaries."

16 Constitution of India, 1950, Seventh Schedule: List II—State List, Entry 17. "Seventh Schedule: List II—State List

17 Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and waterpower subject to the provisions of entry 56 of List I." 17 Added by the Constitution (Seventy-third Amendment) Act, 1992, s. 4 (w.e.f. 24-4-1993)

18 *Ibid.*

19 Amlanika Bora & Sanjay Kumar, *Right to Sanitation in India Through the Lens of Judiciary*, CMR University Journal for Contemporary Legal Affairs 4 (1) (December 2022).

20 *Ibid.*

21 *Supra* note 17.

22 Constitution of India, 1950, Eleventh Schedule, Entry 6. "Eleventh Schedule...6. Public health, sanitation conservancy and solid waste management".

23 *Virendra Gaur and Ors vs State of Haryana and Ors.* (1994) SCC 577.

environment clean falls on the state, but individual citizens share in that obligation as well.

Reiterating the same, the High Court of Rajasthan in *LK Koolwal case*,²⁴ stated that to enjoy right to life under Article 21 of the Constitution, access to sanitation is essential alongside the protection of health and environment.

The Supreme Court of India has emphasised the duty of state authorities to enhance sanitation in its landmark judgement of *Ratlam Municipality case*.²⁵ The court ruled that Article 47 of the Constitution mandates that the state is responsible for ensuring the public's health by providing for its protection and promoting its improvement via the provision of proper sanitary facilities. The State has been ordered to provide funding to the Ratlam Municipality to improve sanitary services in the area. In addition to ordering the Municipality to ensure the cleanliness of the area, the court also mandated that sufficient numbers of toilets and drainage systems be built.

Similarly, the Madhya Pradesh High Court dealt with the issue of the local government's lack of attention to public health in the case of *Dr. K.C. Malhotra v State of M.P.*²⁶ As the right to live with human dignity is a fundamental right, it is the state's primary responsibility to ensure at least the barest minimum conditions for human dignity, one of which is the enhancement of public health, for which sanitation is vital.

In *Ilaben v State*,²⁷ the Gujarat High Court addressed the issue of Ahmedabad Municipal Corporation's negligence in upholding public health, hygiene, and sanitation in the neighbourhood and reaffirmed that the right to life guaranteed by Article 21 of the Constitution also covers other rights like the right to food, clothing, and shelter as well as the right to a decent environment.

In response to the plight of sewage workers, who are forced to work under the most inhumane conditions, primarily due to their low economic status, and thus face threats to their lives, the Supreme Court in *Delhi Jal Board v National Campaign Etc. & Ors*²⁸ issued certain directives, including to provide "free medical examination and medical treatment of sewer workers; no- termination of sewer workers and the payment of wages by the employee during their period of illness; payment of compensation on the death of any worker; providing safe drinking water; washing facilities; latrines and urinals; shelters and crèches to all the workmen etc."²⁹

Similarly, the Supreme Court in *Safai Karamchari Andolan v Union of India*,³⁰ stated that it is the duty of the state to take appropriate measures to eradicate the practice

24 *LK Koolwal v. State of Rajasthan*, AIR 1988 Raj. 2.

25 *Municipal Council, Ratlam v Shri Vardhichand*, 1980 AIR 1622.

26 AIR 1994 MP 48.

27 WPPIL/122/2011.

28 Civil Appeal No 532 of 2011, Judgment of 12 July 2011, 5.9.

29 *Ibid*.

30 (2014) 11 SCC 224.

of manual scavenging in the country, thereby eliminating the age-old practice of untouchability.

The Supreme Court has observed the connection between access to sanitation facilities and right to education in *Environment & Consumer Protection Foundation v Delhi Administration & Ors.*³¹ Thus, the court stated that right to education under Article 21-A can be realised when schools are structured with adequate number of clean toilet facilities separated for boys and girls.

Sanitation related issues faced by women walking on the streets have been dealt elaborately by court in *Milun Suryajani, through its Editor v Pune Municipal Commissioner*.³² The Bombay High Court has directed the state authorities to construct sufficient number of public toilets at public places and pointed out that public toilets need to be maintained properly so that those are safe and clean to use by the public.

Similarly, the Madurai Bench of the Madras High Court emphasised the significance of public toilets in India in *P. Saravanan v. Union of India*,³³ by analysing Articles 21, 47, and 21(A) of the Constitution of India.

Subsequently, in National Highway Projects in the *State of Bihar v The State of Bihar*,³⁴ the Patna High Court stated: "...that right to sanitation has been virtually accepted as fundamental rights like right to water, right to health, right to healthy environment, right to education, and right to life." Hence, the court pointed out that it is the responsibility of the state to provide basic sanitation facilities such as public toilets on the highways to prevent sanitation-related problems.

Thus, as discussed above, by interpreting various provisions of the Constitution, the Indian judiciary has taken a proactive role in recognizing the right to sanitation as a basic right and in directing the state to ensure that all citizens have access to adequate sanitation facilities at home, in schools, and in public places.

5. CONCLUSION

The right to sanitation is not explicitly mentioned in the Constitution, but the Indian judiciary has recognised it as part of Article 21 because it is fundamental to life and dignity. By expanding the ambit of the right to life, the Supreme Court has effectively created a space for other FRs to be subsumed within it. In order to protect and enhance the environment, the judiciary has also placed a strong emphasis on sanitation as a part of the DPSP. As such, the Indian judiciary has taken a revolutionary stance towards the right to life under Article 21 of the Constitution, by recognizing a variety of FRs in conjunction with it. Furthermore, it is noteworthy how the judiciary has interpreted sanitation as a right in specific situations, such as the prohibition of manual scavenging in relation to untouchability, the right to education, environmental

31 (2012) 10 SCC 211.

32 WP (C) PIL No 98/2011.

33 17 August 2021.

34 10 May 2022.

protection etc. The importance of the right to sanitation has thus been strongly emphasised by the judiciary, reflecting on its broad scope. Thus, the Indian judiciary has undertaken the significant task of interpreting the scope of right to sanitation in light of the constitutional provisions viz. FRs and DPSP.

To sum up, the right to sanitation is a fundamental right that flows from the right to life in the Constitution. However, the right to sanitation should be recognised as a separate right under the Constitution because of the scope of sanitation-related problems and their impact on people's lives. Therefore, the authors of the study contend that a formal recognition of the right to sanitation is necessary for the full and meaningful exercise of the right. Such a recognition of the right to sanitation would provide the state an impetus to undertake adequate measures, so that everyone is provided with basic sanitation facilities.

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Sustainable Technology in Protecting Marine Ecosystem: A Desperate Need for Green Transition in Marine Industry

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ABSTRACT

The anthropogenic activities have resulted a great harm to the nature in motely manner. One of such activity is shipping Industry and land based unsustainable activities which has reprehensibly polluting and damaging the life below water. Apodictically, efforts have been and continued to be made in the form of incorporating eco-friendly framework and finding solutions to protect environment. The article intent to reflect major threats to marine life by the shipping industry. Further, article will be accentuating few technologies which have been introduced under green policies at global level for protecting marine life. Also, challenges faced by the shipping companies during the transformation from using traditional technologies to sustainable technologies.

Keywords: Sustainability, Anthropogenic activities, Shipping, Green Technology.

Today, the shipping industry contributes 90 percent of international trade¹. Increasing population, unsustainable consumerism and excessive greed for economic growth are the potential factors leading to imprudent and pervasive demand for goods and services, which in effect creates stress on these shipping companies to provide safe cargo within reasonable time. Some of the characteristics which convince countries to select seaborne trade are as follows: -

- **Carrying Capacity and Cost effective:** Many decades ago, shipping owners used wooden boxes or barrels and sacks to transport their goods and fabrics but the constant technological advancement and innovation it shaped the carrying capacity and designed the standard sized container which is approximately “20 feet long, eight feet and nine feet tall known as 20 foot-equivalent container unit”². Therefore, making it more convenient for shipping companies to customized their freight costs and the carrying capacity of the

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vessel. Also, the transport cost of the seaborne trade is lower as compared to other forms of the transportation system.

- ***Flexibility and reliability:*** Another element of convenience which countries find in opting for the seaborne trade is, ships are designed to carry any goods or products (raw materials, solid products, crude oil or fragile products). Further, few study shows that it is a safer mode of transport and presumed to be protector of goods to be spoiled by the changing atmospheric conditions or fluctuating temperatures and alike.
- ***Impact on Environment:*** Various studies shows that seaborne trading emits low carbon prints against other transportation system like aircrafts and land transportation³. Further, shipping contributes approximately, 2.6% of total greenhouse emission⁴, which attracted global attention in transporting the goods and services by using ships.

Oceans and Seas are the very intrinsic component of our nature. It is not only providing natural resources to human life but also provides shelter, food and energy to non-human lives too. On one hand, every day demand for goods and services are increasing at an alarming rate and covid-19 is one of the externalities which has aggravates this stress on the shipping companies and on the other hand, the number of accidental or negligent oil spill cases are rising due to anthropogenic shipping activities (for instance, mishandling and human error leading to oil spill in the Mauritius coast⁵ or an oil tanker which was fully loaded caught fire at east coast of Sri Lanka, killing several crew members and spreading barrels of oil in the oceans and damaging marine life⁶).

It is undeniable that ships are designed to carry huge tons of goods and are convenient for the countries to transport varied kinds of material through it but there are certain challenges while using this mode of transportation which can have hazardous impact on marine life. Some of those adversely affected areas are briefly discussed below: -

- a) ***Untreated discharge during voyage:*** Mostly, pollutants identified under this category is sourced from either oily pollutant discharged through vessels and anti-fouling paints. One of the oily pollutants spoiling the marine environment is Ballast water, which is excreted where empty vessels collect water from the port where they unload the cargo in order to maintain the balance of the ship. The challenge under this process lies when the water which is collected from the port, is mostly contaminated with toxic chemicals, oil & plastic debris and invasive species and are discharged at the port where ships are loaded again for its voyage, thereby, making the seabed of the ocean contaminated and uninhabitable for the invasive species.

Further, Oil spills either by accident or mistake of the humans are major cause for concern. The impact of such events is devastating and catastrophic for the life below water, either by stifling birds and aquatic animals or contaminating the seabed of the ocean⁷. One such event is the Huntington beach case, where oil spill destroyed huge area in the Pacific Ocean⁸.

- b) Discharge of Black or Grey Water from Vessels:* These pollutants are mostly categorized as the waste water which are produced by the anthropogenic activities during sailing. For instance, Black water is the waste collected from the toilets and Gray water is the waste excreted out of laundry, kitchen or showers used by the seafarers during voyage. Such waste is highly loaded with toxic chemicals, excessive nutrients, micro plastic or food and metal particles⁹ that adversely affect the marine environment.
- c) Air Pollution during Voyage:* Vessels require heavy machines and engines for smooth running of the vessel. Thereby, many lethal pollutants are emerged out from the fuel combustion like Sulphur and nitrogen oxides; GHG's; substances depleting ozone and alike, which not only contributes in human-induced climate change but also ocean acidification. It is important to consider that, these obnoxious gases react differently depending upon various factors like region or temperature. For instance, the process of Ocean acidification is rapid in colder region than tropical regions¹⁰ resulting in vulnerable conditions for marine environment.
- d) Solid waste through Vessel:* United nation environment programme has been raising this concern very often. It has explained the term marine litter as "Marine litter is any persistent, manufactured or processed solid material discarded, disposed of or abandoned in the marine and coastal environment"¹¹. The adverse impact of untreated solid waste like marine litter, paper, plastic, tin or glass which are illegally dumped in the oceans, strangles and suffocates the marine animals, thereby reducing the life span of the aquatic life and creates uninhabitable marine environment.
- e) Pollution sourced from Artificial Light and Noise of the Ships:* Artificial light and Noise pollution which are produced due to heavy machines, sonar or propeller cavitation, vibrations caused due to ship engines, impose a long term-hazardous impact on the genetic and reproductive cycle of marine animals, creates obstruction in their navigation or intimidate their communication capacity. Hence, such pollution deeply and intensively lay an inimical impact not only on the ocean's surface but also underwater marine life.
- f) Pollutants sourced from ports activities (other than ships):* Unsustainable activities at the Ports are also a major contributor of marine pollution. These unsustainable activities can have lethal impact on air, water, soil, generation of waste, inland noise pollution.
- *Air pollution sourced from ports:* Shipping activities conducted at the ports which contributes in polluting air, emerges out from varied sources like- emission of volatile organic compound during loading and unloading of cargo at the ports, evaporation process of VOC; obnoxious gases formed due to combustion through railway traffic, heavy vehicle traffic or dry docks.
 - *Water pollution sourced from ports:* There are certain human-induced activities at the ports which transgress pollutants and damages the marine

environment. Activities like leakage from fuel deposits tankers and pipeline into the sea; dry docks either by mistake or accidental; process of eutrophication; thermal pollution and alike. These kind of dangerous anthropogenic activities leads to serious impact on marine ecosystem.

- *Soil pollution sourced from ports:* The impact of harmful pollutants emerging due to port activities, may cause serious damage to our soil. Such activities are in the form of toxic and oily sludges deposited due to handling of heavy vehicles; oil or chemical spills while process of loading and unloading of cargo or metal waste, asbestos or hydrocarbons, PCB/HFC's and alike that are produced during the process of ship demolition¹². Thereby, reducing the fertility of soil from neighborhood by contaminating it with toxicity and heavy chemicals.

g) *Pollutants sourced from Industrial activities situated at Ports:* Industries at the port are considered to be a very intrinsic part of the port's development. They contribute in making the process at the ports easier and accessible. There are various anthropogenic activities involved, which are beneficial for the shipping industry such as construction of chemical and petrochemical plants, oil refineries, power-plants, metal industries, pulp or paper industries, airports and alike. Mostly, industrial activities at the port consumes high source of energy and requires heavy machinery for smooth functioning of the port activities. Such industrial activities at the port have an intense, lethal and hazardous impact on the local, regional areas and sometimes beyond.

ROLE OF GREEN TECHNOLOGIES IN PROMOTING SUSTAINABILITY IN SHIPS AND SHIPPING INDUSTRY

The global concern over the marine pollution generated through ships and shipping industry has created an urge to have a sustainable shipping in future times. Even, the world maritime theme for 2022 is, "New Technologies for greener shipping"¹³ indicating the urgency for green transition in maritime industry. Astoundingly, shipping industry moves goods worth of billion dollars' each day and contributes more than 90 percent of the global trade¹⁴ and port is the platform providing various facilities like- unloading and loading of goods & services; storage of goods; packaging and transporting goods to the city by inland form of transportation¹⁵.

International Institutions like IMO, UNEP, UNCLOS, UNCTAD and alike are using various techniques and technology in order to promote and incorporate sustainability into their shipping activities. With the integration of eco-friendly machinery; green logistic assistance; environmentally friendly ordinance and guidelines; environment impact assessment methodology; local or regional environmental policies or adopting & transferring the eco-friendly strategies for sustainable future of shipping industry.

In past few decades, words like 'green', 'organic', 'sustainable' or 'environment' has attracted global attention. Few organisations are interpreting these terminologies to create awareness and call for help regarding the adverse health of our only planet.

On the other hand, few industries or commercial establishment are misusing these terminologies for increasing the sale of their products/services or called as 'Green washing'. Thereby, making it more complex and serious issue while drafting any framework or drawing any technology for these ships and shipping industry to protect marine pollution induced due to anthropogenic activities.

The term 'Green technology' is a plethora of innovations which are created to conserve and protect the natural living organisms and acts as an alternate to development. The intention of such innovations is to construct a bridge between economic growth and environment protection. The Impact of such green technologies is presumed to be less harmful than other unsustainable technologies and are often called as 'clean technology or eco-technology'. The concept of green technology has drawn its inspiration from the sustainable development framework (for e.g., SDG-13, 14, 9 & 17) and International conferences like Stockholm or Rio conference etc. The origin of the term 'sustainable development' was proposed by Brundtland commission by a report called as "Our common future" and interpret it as a framework where economic development, social organisation and environment protection can form a cordial and harmonical relationship¹⁶. The official definition is read as "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs"¹⁷. Further, there are general parameters listed in public domain to evaluate the sustainability in technology depending upon country's economic, social and political conditions¹⁸. For instance, a study listed seven criteria to realise and evaluate the effectiveness of technology like technological independence; technological advancement; cost-efficient technology; risk evaluation; purpose of technology (single purpose/ multi-purpose); extent of technological advancement; targeted stakeholders¹⁹.

Some of these technological efforts contributed by different scientists and researchers belonging to various countries, which may contribute in making of sustainable future for the ships and shipping industry are discussed under following heads:

A. Technological Measures- A Transition to Green Technology:

- i. *Technological advancement in fuel consumption by ships:* In ancient times, ships used to run on wind energy and human labour. With the invention of steam engine, coal holds a dominant position until the invention of diesel engines which was introduced in the early 20th century. Whereas, post second world-war, diesel fuel was replaced by a low cost, highly viscous content of sulfur in it commonly known as- heavy fuel oil, which received a huge demand from the shipping companies due to its economical costing and easy accessibility. Other forms of fuel were also been used by the shipping industry, for instance, Marine gas oil, lightest and clean fuel with 0.1% Sulphur, weighing 860kg/m³ and are mostly used by small ships and auxiliary engines in the areas where Sulphur emission are to be curtailed.

There are other forms of green technology which are used in order to subside various obnoxious and lethal emission like Sulphur oxide (SO_x), Nitric oxide (NO_x), Particulate matter (PM) and carbon dioxide through ships and shipping activities. For instance,

scrubbers, one which uses sea water for its process called open-loop scrubber and other process uses fresh water inclusive of sodium hydroxide called as closed loop scrubbers. Under the process of scrubber, Sulphur is suctioned from the exhaust through water and are treated by seeping it into the ocean. These green technologies are comprehensively supported by the International maritime organization (IMO) which is the regulating body for the international shipping industry through its MARPOL policy and its Annexures. For instance, International Maritime Organization developed a system to reduce GHG's emissions called Energy Efficiency Design Index (EEDI) which will consider the fuel consumption of the pre-installed engine with the size of the vessel and its speed²⁰.

- ii. *Artificial Intelligence*: The rampant numbers of innovation or technological advancement has made progress in various areas of development like, speech recognition or translating languages; meta-verse; automated machines or navigation software and alike.

The buzzing word in the Anthropocene is 'Artificial Intelligence', that has grabbed the world's attention. The functioning of artificial intelligence depends on the database created by Machine learning, which can be used in protecting marine environment. The intertwined relationship between artificial intelligence and machine learning can together create and analyze a database addressing diverse problems regarding marine pollution.

To understand the functional part of the artificial technology, there are certain potential circumstances where the role of artificial intelligence act as an aid to marine protection are as following:

- *Oil spill by Human error or Accident*: The problem of oil spill can occur either intentionally or by mistakes of anthropogenic activities but it has a lethal impact on the marine life due to its fluid like tendency combined with ocean waves that can pollute the water in a very short time, therefore under such situation, two kinds of sensors are used remote and fixed in order to monitor the movement of the oil spill. Fixed sensors like side-looking airborne radar or thermal infrared video cameras etc are used when the affected area is known on the other hand where it is difficult to locate the affected area, remote sensors like synthetic aperture radar is used which identify roughness of sea surface occurs due to surface tension of oil film²¹. Sometimes this phenomenon can occur due to natural nutrients and oil therefore with the intervention of artificial intelligence it may differentiate whether the area is affected due to oil spill by human induced activities or by natural phenomenon.
- *Locating and cleaning of marine debris or plastic*: It is an undisputed fact that marine debris is not just produced by the ships alone but also perpetrated by the inland human-induced activities which results in polluting sea-bed and adversely affects marine life. The pollutants produced by humans on land are seeped into rivers or oceans and are collected not only on the surface of the ocean but also underwater. Thereby, making it complex and challenging as these debris consist primarily of plastic of varied shapes and sizes and to

locate and remove these plastic debris from the ocean, most commonly used methods are used-Mapping marine debris and removing the existing garbage, which extensively use Artificial intelligence in their operation.

For instance, when an affected area consisting of plastic and micro plastic is to be mapped in the ocean, various images and videos are been captured either with the help of drones, satellite or even by the local people. Further, these uploaded images and videos are analyzed and tagged according to their size and type with the help of scientists, data analysts and researchers, resulting in machine learning and based on which artificial intelligence may easily locate marine debris affected areas.

- *Locating marine life and protecting coral health:* The importance of ocean and its ecosystem is impeccable. Millions of species are towards extinction and one of them are aquatic species which are rampantly decreasing due to marine pollution. Artificial intelligence with the support of machine learning and Neural network has the potential of recognizing human faces and with the usage of this model, scientist can monitor and identify the species and their region taking image and video for future reference with minimal disturbance to the living beings of the oceans²². Few models runs on such technology are Ecotaxa (captures images of plankton and process data using artificial intelligence); Linne Lens (used for distinguish marine living organism in real time using application on smart phones or Bio-Image Semantic Query User Environment (BISQUE) (for marine image storage, mapping and annotation)²³.
 - *Underwater mapping:* Ocean is home to many living species; it also contributes in natural climate change. Whereas, AI models are used to monitor great depths of seabed which helps us to understand major phenomenon like effects of human-induced climate change, anthropogenic impact on underwater, ocean circulation and alike. First model i.e. Project Natick, which was deployed underwater using Alto collect data from the observations made by the changing marine animals surrounding datacentre, resulting in analysis of the collected data as its is quantifiable and can be used for evaluating the environmental impacts on the surrounding areas²⁴. Another artificial algorithm which may be applied for precise and better mapping of underwater areas is called as sonar process²⁵. Under this project, it provides the potential areas where scientists or researcher can locate the monitoring station for collection of comprehensive data from the seabed.
- B. Operational & Logistic Measures - A Transitioning to Green Ports:** The anthropogenic activities at the port leads to various environmental hazards on land, air soil and at sea which has quiver the world at large, thereby resulting in local and global environmental policies and framework working in establishment of green ports and green shipping policies, etc. One of the global frameworks which has inspired the green transition in shipping industry is Paris Agreement, agenda 2030 and Sustainable Development Framework, the integration of economic, social and environmental concern has mainstreamed

the principle of sustainability in the shipping industry and have transformed the traditional thinking of development.

The development of the Port depends on each country's economic, social and environmental capacity. To extract maximum economic and social benefits of seaborne trade, it is vital that environmental protection should be the paramount concern. Therefore, adopting green strategies for ports construction and renovations is the key to resolution of the issue at hand. One of the models which has prescribed the guidelines for sustainable port development has divided it into two parts: Strategic Consideration and Action Plan. Firstly, Strategic consideration primarily focus to form bridge between development of port and the objectives of the nation and to stipulate green ports the strategy design must be focusing on each dimension such as economic, social, institutional, environment and alike. Each strategy should be reviewed depending upon the parameters leading to sustainable development of the ports. Secondly, Action plan, a long-term strategy that comprehensively study the problem and bring potential solution for better accessibility and sustainability of ports. This strategy is intertwined with the national logistics and try to achieve high quality port management and services; implementing safety and security of stakeholders; maintaining fair competition between different form of transport system, environment protection and alike.

As the environmental issues are surging each day, finding the potential solution has become the herculean task. Various laws, policies, guidelines, rules or norms are in existence and functional but their efficiency can be truly checked when are applied to main problem. For instance, one of the comprehensive reports has been made by United nation economic and social commission for Asia and the Pacific (UNESCAP) for sustainable port development, wherein, current challenges and future benefits are been studied²⁶. For instance, Bangladesh, country which has no absolute model prepared for sustainable port development but is working on its 7th plan investment for maximum utilization of finite resources in the country. Under the seventh plan, sets of areas will be given priorities like- accessibility to efficient form of transportation system for inland port facilities for cargo; transforming Chittagong port into climate resilient port against adverse impacts of climate change; providing yard facilities to store large vessels using clean technology; using share clean technology and PPP model for management of port activities and training staff with environmental management.

As any other country, Bangladesh encounters various challenges while implementing sustainable port development, for instance, high rate of youth unemployment, rampant poverty, absence of affordable and accessibility to power consumption; mismanaged business sector and alike. It has been observed that country economy plays a significant contribution while deciding the fate of the country's environment protection. In response to which, transition to green ports is becoming complex and strenuous.

Another fastest-growing economical country is China, which is responsible for import and export of commodities like, electronics, fabrics, equipment, etc. Further, China ports are possessed with deep water container wharves; thousands of berths accommodating vessels more than 10,000 tons²⁷. China owns 50 busiest container

ports in the world, bring prosperity to the nation but tagging along lethal environmental issues to its ports. The government has formulated its five-year plan to control pollution sourced through ships and related activities and formulating targets in reducing emissions from the shipping industry as well as stipulated varied recommendations for sustainable port development²⁸.

CONCLUSION: A PATHWAY TOWARDS A SUSTAINABLE SHIPPING

It is undeniable that the anthropogenic activities in shipping industry have enormously ill-treated the marine life and its varied components. The issue of marine pollution has gained lot of world's attention and it cannot be ignored for longer. Various studies have highlighted innumerable resolution to curb the marine pollution but which are efficient enough to tackle the current and future problems is still a mystery. The transition to green technology or sustainable technological advancement in shipping industry is to be implemented with the immediate effect but it is vital to understand that any change requires time, constant growth, energy, scientific and sociological acceptance. Marine Industry has been working in its own traditional form since, time immemorial which has trained its stakeholders in a certain way; therefore, any shift or transition will have direct and indirect impact on them as well. Few recommendations include- Need for imbining Ecological consciousness while innovating any technology or logistics for ships and ports. Secondly, Locating Budgeting/Funding for Green & Clean Technology, Thirdly, for efficient implementation of Sustainable Shipping and related activities the active Participation and cooperation of stakeholders is very crucial. Fourthly, Determined will of political powers for accomplishment and acceptance of such sustainable transition in this industry. Fifthly, the indicators of sustainability need to be formulated very precisely and cautiously, for identifying the technology to be green or otherwise. These recommendations are generic in nature but are specific to the issue at hand, therefore, one can say One Size cannot fit all, but at the same time shipping industry has to seriously work to attain sustainability in its true sense.

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Role of Corporate Social Innovations for COVID 19: Special Reference to Public Sector Units and Private Sector Enterprises of India

*Ms. Deepali Rani Sahoo**

ABSTRACT

The term “pandemic” describes both the geographic range of a disease’s dissemination and the disproportionately high proportion of the population that is afflicted. The World Health Organization calls it the “global spread of a new illness.” The UN agency declared the coronavirus to be pandemic on March 11. The World Health Organization designated the coronavirus epidemic as a Public Health Emergency of Worldwide Concern because it was a “extraordinary event” that might necessitate a coordinated international response and present a “public health danger to other States through the international spread of disease.” The coronavirus outbreak, which has spread to 77 nations and infected people, means that no area in the world can claim to be fully secure from it. In India, the situation has altered quite a bit and has affected every state in the nation. In addition to boosting screening at airports and seaports, the Union Health Ministry has pledged to take all necessary precautions against the coronavirus and has released new travel recommendations. In order to assist the government and the people of India in fighting the Covid-19 pandemic, the researcher provides a bird’s-eye view of the role and responsibilities of many enterprises from the public to private sectors. Even smaller businesses have banded together to aid the public and government in combating the illness that is rapidly taking over the nation by providing masks, sanitizers, and other vital goods to avert shortages.

Keywords: *Pandemic, Covid-19, Public and Private Sector, Government, Corporate Social Innovation.*

INTRODUCTION

Restaurants are becoming more conscious of their negative effects on society and the environment (Ferrell et al., 2019). For instance, every year in the United States, 40

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billion pieces of plastic flatware are dumped in landfills (Tenenbaum, 2019). Restaurants are infamous for wasting food during preparation and service, and this waste also ends up in landfills, which has a detrimental effect on the environment (Brownell & Warner, 2009). In 2018, 643 million meals were discarded in the United States alone (Cochran et al., 2018). China produces about 44.1 million tonnes of kitchen trash annually, most of which is disposed of in landfills or burned in incinerators (Liu et al., 2021). These figures show enormous resource wastage and a missed opportunity to feed millions of underprivileged people worldwide. Hospitality companies, especially restaurants, have started investing substantially in social and environmental projects to counteract their negative effects and boost their self-esteem, often at the expense of financial profit (Kim and Zapata Ramos, 2018, Tong et al., 2019). Corporate social responsibility (CSR) initiatives refer to these independent social and environmental projects (Carroll, 1991; European Commission, 2001; Kotler & Lee, 2005). CSR programmes are seen as excellent candidates for ethical behaviour and advantageous to both internal and external stakeholders (Kim & Zapata Ramos, 2018). Without a question, the coronavirus outbreak is a tragic human narrative.

OBJECTIVE AND PURPOSE OF THE STUDY

These four pillars are combined by corporate social innovation into a cohesive approach that benefits both society and the bottom lines of enterprises. There are steps that companies of all shapes and sizes may take to protect themselves from long-term financial harm.

- To study the Corporate social innovation strategies which have the potential to benefit both society and a company's bottom line.
- In order to elaborate on the extent of corporate social responsibility in India, this study will examine the many definitions and descriptions of corporate social responsibility (CSR) as well as how CSR practices have been implemented throughout the past several years.
- This research looks at how certain CSR initiatives from different corporations don't measure up from an ethical, legal, and commercial responsibility perspective.
- The spirit of such acts needs to be examined, even though the language of the law may not have been directly violated.
- Businesses like Starbucks and Microsoft are doing everything they can to support their employees' financial security throughout the outbreak, from promoting mental wellbeing.

SCOPE AND FINDINGS OF THE STUDY

The study's principal findings include the fact that performance concerns and stakeholder pressure are the main drivers of CSR's current positioning as an all-encompassing business strategy. Instead of the previously predetermined planned framework of CSR, the fight against the new coronavirus infection (COVID-19), which

would reap indirect advantages from the operational segment in which enterprises operate, has taken center stage. It has been evident that the focus has been mostly one-sided, with the corporate procedures, objectives, and outcomes of such efforts receiving the majority of attention.

APPROACH AND PRACTICAL IMPLICATIONS OF THE STUDY

It is a cross-sectional study that examines the CSR practises used by India's corporate sectors. The report explains the significance of laws and norms that must be followed by businesses that fall under the purview of CSR. The article will be helpful in understanding pandemic-related challenges and opportunities. Both primary and secondary data might be used by the researcher to gather the information for this study topic. Additionally, the researcher can gather information using the Descriptive Case Study method, Correlation, Theoretical with a Causal-Comparative Research that aims to determine the cause-effect relationships between the variables, or any other type of data using the Questionnaire Method from the Employer, Employees, or any other Person Closer to a Unit or Enterprise.

RESEARCH QUESTIONS

1. How and in what ways can the private sector assist society in resolving COVID 19-related issues?
2. By putting policies and initiatives into place that benefit society as well as its long-term success, how can the business sector create a relationship between the workforce, customers, and the economy at large?
3. How the corporate sector such as pharmaceutical industry etc can implement strategies on health grounds to curve the problem relating to COVID 19?
4. How the corporate sector lay down guidelines and strategies for food, drinking water and sanitization of the environment?
5. How the corporate sector lay down guidelines for migrant workers and laborers to struggle with the problem facing during the lockdown?

CSR HISTORY IN INDIA

In India, close business participation in societal development initiatives has a long and storied history. Social responsibility initiatives' early years were not adequately documented. After Independence, JRD Tata highlighted the point that there are many ways for enterprises and industries to promote the public good in addition to their usual operations. JRD Tata always placed a significant focus on pushing individuals to go beyond merely performing honourably as citizens. Since then, a growing awareness of the need to participate to social activities on a worldwide scale while simultaneously desiring to benefit the immediate surroundings has evolved. The notion that business must pay a portion of the costs related to social overhead slowly gained acceptance, at least in principle. Singh, RG (2010). A trend away from conventional philanthropy and charity and toward more direct business participation in mainstream development

and concern for socially disadvantaged groups was observed in the last decade of the 20th century. Rising governmental and public expectations, as well as internal corporate incentive, have all contributed to this. Particularly in India, where there is a substantial gap in the financial and level of life between various social classes, an ideal CSR incorporates both ethical and intellectual elements.

CSR IN TIME OF COVID 19

Since the introduction of the CSR clause in 2014, corporate India has greatly boosted its CSR investment. According to a poll, businesses contributed \$1 billion (about Rs 7,400 crore) to CSR projects in 2018, which is 47% more than they did in 2014-15. 2020 (Associates DS). A law that was just five years old forced businesses to climb a steep learning curve and leave their comfort zone. In the previous four years, eligible enterprises reported at a rate of 64% on average. Companies spent Rs 52,000 crore, or 68%, of the required CSR contribution over the previous four years. 2020 Ventures SS. 10,000 crore rupees were invested in various programmes by listed firms in India, including ones for skill development, social welfare, healthcare, and environmental preservation. CSR contributions to the Prime Minister's Relief Fund increased by 139% in the previous year (2019-20). The majority of financing (38%) went to the education sector, followed by hunger, poverty, and healthcare (25%) and then environmental sustainability (12%) and rural development (11 per cent). Programs like technological incubators, sports, the military, and inequality alleviation received very little funding. (Partners, 2020). Three areas of practice should normally be broken up by a company's CSR initiatives:

1. Focus on Philanthropy
2. Increasing the efficiency of operations
3. Modifying the business plan

For all businesses to participate in the same CSR activities is neither sensible nor practical. The industry in which businesses operate, the social environment in which they function, and the motives of the people who administer and oversee each firm are just a few of the many variables that influence programmes. *In accordance with Section 135 of the Companies (CSR) Rules and Schedule VII of the 2013 Companies Act. Every company that had a net worth of at least Rs. 500 crore, at least Rs. 1,000 crore in revenue, or at least Rs. 5 crore in net profit in the previous fiscal year was obliged to set up a CSR committee and spend. The Indian government is encouraging businesses to offer social support during the COVID-19 phase. A decree from the Ministry of Corporate Affairs dated March 23, 2020 states that any expenses made for COVID-19-related activities will be included to the list of CSR expenditure channels that are allowed. Various COVID-19-related activities may be funded under the following Schedule VII items:*

- Fighting against hunger, poverty, malnutrition, and promoting preventative healthcare
- Cleanliness, including participation in the Swachh Bharat Kosh initiative started by the Center to promote sanitation and make safe drinking water available.

- *Disaster management, including assistance, recovery, and construction efforts*

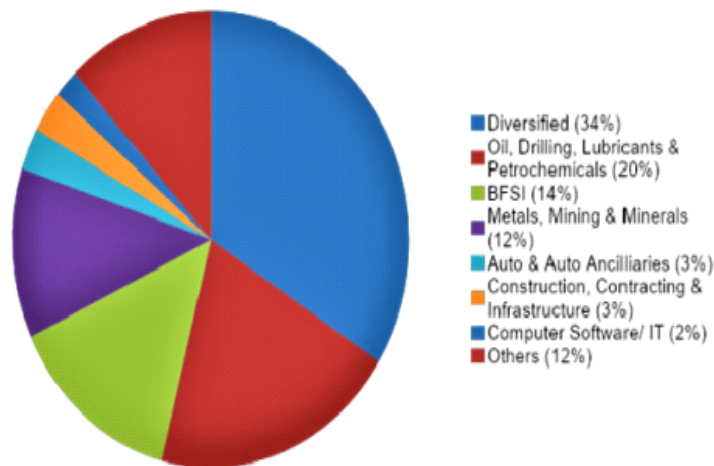
DONATION TO THE PM CARES FUND OR PLEDGES

Source	Amount Donated (in crores)	Amount pledged (in Rs crore)
Government agencies (including salaries)	4,308.3	1,250
Private companies, industry bodies, social organizations (including salaries)	5,369.6	772.4
Foreign donations		22
Individuals		53.77
Total	9,677.9	2,098.2

An economy's main engine is the banking, financial services, and insurance (BFSI) sector. Money is managed by businesses in the financial services sector. However, compared to other industries, particularly the industrial sector, this industry's contribution has traditionally been underappreciated.

Over the years, it has been seen that BFSI corporations engage in CSR activities that go unnoticed. This article therefore concentrates on the efforts of BFSI enterprises in times of COVID-19 in order to highlight the importance, contribution, and presence of the BFSI segment and to bolster its morale.

Industry wise COVIDI-19 response (funds committed)



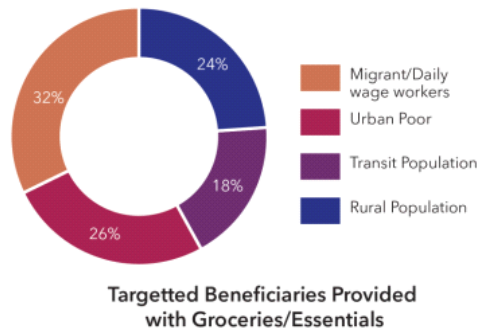
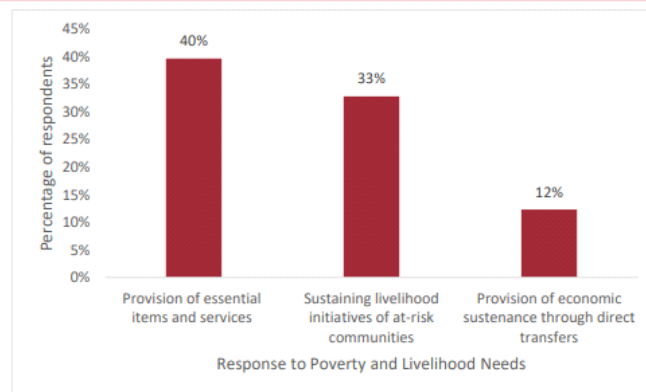
The table below shows the contributions made by various companies in the BFSI sector in India in the COVID-19 times:

Corporate Sectors	Actions Taken
Aadhar Housing Finance Ltd	delivered 28,810 three-ply masks, 10,239 hand sanitizers, 112 hand gloves, and 3 carbide nozzles to front-line staff at hospitals and police stations. To migrant workers and their families, 167,000 meals, 2,140 ration packages, and 1,200 kg of rice were distributed. PM CARES received a donation of 50 lakh rupees. A donation of Rs. 350,000 was donated to the Bandra Holy Family Hospital to assist with the medical expenses of COVID-19 patients.
Arohan Financial Services Ltd	Distribution of ration packs totaled 25,000. organized health clinics to raise awareness of the wellbeing of women promotion of regional handicrafts funded a non-profit organization that provides aid to victims of human trafficking Arohan collaborated with "Friends of Women's World Banking" to provide loans for better sanitation as part of his WASH projects.
JM Financial Home Loans Ltd	made a Rs 15 billion donation to PM CARES made a donation of Rs. 15 crore to boost pandemic-fighting healthcare assistance.
India first Life Insurance Co Ltd	Contributed to PM CARES
IIFL Securities Ltd	made a Rs 5 crore donation to PM CARES. donated Rs 20 lakh to hospitals and nonprofits so they could supply frontline staff with protective gear and migrant workers with meals
DCB Bank Ltd	Set up a Rs 1 crore fund for COVID-19
Bharat Financial Inclusion Ltd	made a Rs 1 billion donation to PM CARES helped the state governments of Jharkhand, Madhya Pradesh, and Karnataka get crucial medical supplies (testing kits, PPEs, and other sanitary necessities), as well as train front-line health workers on virus protection.
Bajaj Finserv	Contributed Rs 10.15 crore to PM CARES
India bulls	Pledged Rs 21 crores to PM CARES Fund
AU Small Finance Bank	a donation of Rs 2 crore to PM CARES, Rs 51 lakh each to the Delhi and Maharashtra Chief Minister Relief Funds, and the provision of a testing facility in Bhilwara to the Rajasthan government)
India Infrastructure Finance Co Ltd	Contributed Rs 25 crore towards PM CARES
General Insurance Corp	Donated Rs 22.69 crore to PM CARES
DBS Bank India	committed to providing 2 million meals to pandemic victims. to support free testing for the underprivileged while also providing ventilators, medical supplies, and equipment.
Kotak Mahindra Bank	Pledged Rs 60 crore (Rs 25 crore to PM CARES; Rs 10 crore to Maharashtra CM Relief Fund)
HDFC Bank	Committed Rs 150 crore to PM CARES
Life Insurance Corp of India	Pledged Rs 105 crore to PM CARES
ICICI Bank	pledged 80 billion rupees to PM CARES committed Rs 20 crore for protective equipment for state governments, hospitals, the CISF, and the police. 20,000 litres of sanitizers, 16,000 gloves, 5,300 PPE suits, 2,600 pieces of protective eyewear, 2.1 lakh surgical masks, 40,000 N95 masks, 50 thermal scanners, and three non-invasive category ventilators were given to states and hospitals.
Max Life India	launched a campaign to collect 100,000 commitments against social isolation donated food, masks, and hand sanitizer contributed Rs 5 billion for the COVID-19 test financed the everyday need of construction workers and other less fortunate people.
Magma Fincorp Ltd	Pledged Rs 5 crore to PM CARES Provided ration and food to 5,600 families
Hero Fincorps Ltd	Pledged Rs 100 crore for COVID-19 relief, half of that to PM CARES

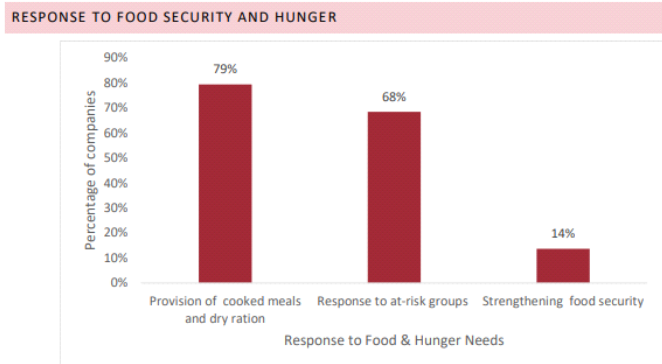
JUSTIFICATION TO THE RESEARCH QUESTIONS:

1. Anywhere they can, businesses of all sizes should strive to support efforts to halt the virus's spread. Coworkers, clients, and the greater business community will benefit from this feeling of purpose, which will be obvious. The Centers for Disease Control and Prevention (CDC) and the WHO update their advice periodically. Businesses must ensure that they are followed and that staff members are aware of them. Limiting communication and pointless travel are also wise decisions. To assure a set of simple but well-managed practices that optimize the health and safety of employees and clients, businesses should put together a professional team.

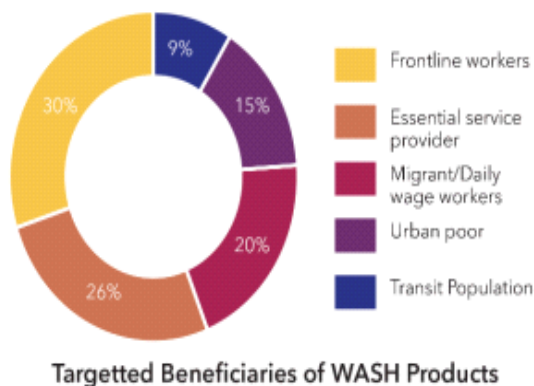
RESPONSE TO POVERTY AND LIVELIHOOD NEEDS

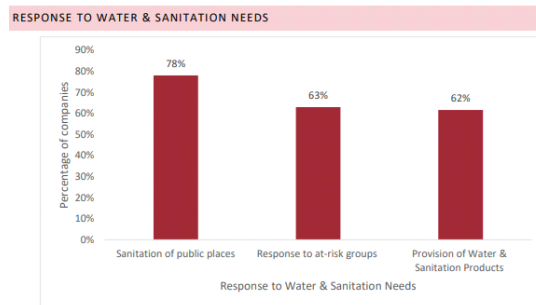


2. Although defining scenarios can be challenging, organizations are recommended to look for trigger factors that will have an impact on revenue and expense. These triggers can then be used with pre-existing scenarios to model balance sheets, cash flow, and profit and loss. On a rolling 48-hour and one-week timetable, specific objectives for each of these work streams should be listed. Establish minimum viable products and create a continuous six-week-ahead calendar of events and milestones. Along with the government, many corporations have stepped forward to help feed the hungry by offering relief packages to deal with food security measures for the underprivileged.



3. The COVID-19 coronavirus epidemic and its consequences have shown how dependent the Indian pharmaceutical sector is on China for the supply of APIs. China's industrial facilities' manpower shortages caused supply chain disruptions and restrictions on product exports from India. If the current COVID-19 pandemic persists for a medium or long period of time, it may have an impact on the supply of active ingredients and components (which are primarily from China) as well as the import and export of medicines. Also possible are delays on projects and programmes unrelated to the primary supply chain and data management activities, as well as short- and long-term detrimental effects on R&D and manufacturing operations. Although the worldwide pandemic's full impacts are not yet apparent, pharmaceutical businesses must nonetheless take action. WASH (water, sanitation, and hygiene) services must be handled well during infectious disease outbreaks like the present COVID-19 pandemic in order to protect and preserve human health. One of the most economical methods to improve pandemic preparedness is to invest in crucial public health infrastructure, like as water and sanitation systems, especially in places with few resources. Good WASH and waste management practises act as barriers to stop the COVID-19 virus from spreading from one person to another in homes, communities, healthcare settings, schools, and other public settings when they are utilised on a regular basis.





4. As a result of the lack of public transportation, 500,000–600,000 workers, according to government estimates, had to walk back to their homes. To get to their villages, they had to walk for miles. While the majority of migrant workers in India are being held in quarantine facilities prior to being allowed to see their families, hundreds of thousands of them are still residing in shelter homes established by various state governments. The corporate sector, such as transporters, should assist the federal and state governments in eliminating the difficult period so that migrant workers can arrive at their destinations securely

CONCLUSION AND SUGGESTIONS

India has a wealth of resources that can be used to control the pandemic scenario there and to comprehend the coronavirus pandemic in order to protect with the aid of global corporations that are uniting in every area to combat coronavirus. Governments across the nation who are struggling to raise money will benefit greatly from the businesses or corporate sectors. The novel coronavirus epidemic will undoubtedly cause a global financial crisis, but contributions from major corporations may lessen the effects on lower-income people. Due to the COVID-19 pandemic, it is now more crucial than ever for businesses to be accountable and responsive. The contemporary era has brought corporate and global leadership to the fore, especially in terms of being attentive to employee safety, successfully managing key functions, and adapting to change. It is clear that businesses have made attempts to solve national problems in addition to serving the targeted benefit. Companies work hard to protect and

safeguard their workers. This has also been reflected in CSR initiatives. As a result, it is crucial that CSR invest in promoting and facilitating access to health insurance programmes as well as other equality measures. In terms of the areas where healthcare has received the most attention and effort. To address the present scope of health emergencies, practices involving volunteerism and employee engagement are becoming more crucial. In order to more accurately evaluate, comprehend, and measure the effects of both short-term and long-term initiatives, it is necessary to comprehend and evaluate the CSR response from a preparedness, response, recovery, and risk mitigation & resilience viewpoint. The COVID-19 consequences have given corporate social responsibility a stress test like no other. Risks and possibilities exist in any crisis, and this is what our preliminary research has shown. All types of businesses have seized the chance to further ingrain themselves in the social fabric of the localities in which they operate. In this situation, CSR offers a mechanism to preserve investor confidence, employee loyalty, and consumer trust.

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Key Features of Consumer Protection Act 2019 and Consumers' Awareness on IT

Ms. Harshita Bisht*

ABSTRACT

With the passage of time, technological advancement and the changing dynamics of the consumer market have created opportunities for sellers and increased chances of exploitation of consumers which even Consumer Protection Act(COPRA)1986, (once considered a landmark initiative) could not defend. Though many amendments were made in COPRA 1986 there was still a need to reframe the whole act, widen its scope and augment its powers. Hence after over 3 decades COPRA 1986 was repealed and CPA 2019 came into existence with rejuvenating provisions. Consumer protection act 2019 which came into force on 20th July 2020 is acting as a sword and shield. The sword is used to threaten and punish the rapacious and carefree sellers, distributors, mediators and service providers, etc. The shield is used to protect consumers from exploitations like underweight and spurious products, misleading advertisements, sub-standard quality, sub-standard goods, high prices, duplicate articles and impurity, false claims, unsatisfied after-sale services, and misleading information about the product, etc. The purpose of this research is to look into the new features of CPA 2019 and ascertain consumers' awareness.

Keywords: COPRA 1986, Consumer Protection Act 2019, Mediators, Exploitation, Consumers.

INTRODUCTION

A Customer is any person who purchases goods from a seller or demands services from the service provider, for exchange of money or a promise to pay money in the future. The consumer is the one who actually consumes or uses the products or utilizes the services. Consumers constitute the largest economic group in any country (Dr. G. Nedumaran and Mrs. D. Mehala, 2019). The consumer is the spinning wheel of the economy. Although the task of buying and consuming goods or availing services is not a tough row to hoe, even then it should be done sensibly and prudently. Just

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a minor act of buying a product can decide the fate of a company. A petty decision of a consumer to choose one product over another can turn the companies into rivals. Each penny spent by the consumer on a product takes the company one step ahead of its competitors. Past is the witness of the fact that consumers were the victim of the rapacity of the sellers. There was still a need of establishing judicial machinery specifically and primarily for the consumers. An act was required that could play the role of a regulator for gluttonous sellers and a liberator for the endured consumers.

After 1850, with the introduction of the industrial revolution and the expansion of international trade, the industrial sector of the country started to develop. This resulted in an increase in the supply and demand of goods and services in the Indian market. With the increase in business opportunities for sellers, the threat of scarcity of resources and the urge to earn more increased, and this led to the adoption of unethical business activities by the sellers, manufacturers, service providers, and middlemen. Hence an urgent need for a consumer law was felt. There were abounding laws like the sale of goods act 1930, the agriculture produces act 1937, the trade practices act of 1947, the essential commodities act 1955, the monopolies and restrictive trade practices act 1969, etc., but none of the acts was directly meant for consumer's protection. Consumer Protection Bill 1986 was introduced in the Lok Sabha on 5th December 1986. The laws of the United Kingdom, United States of America, Australia, and New Zealand were closely studied, analysed, and considered while drafting the bill (Visivanathan, 2008). It became an act on 24th December 1986 after being passed by both the houses of parliament, which was considered a landmark act for consumers and empowered consumers to a great extent. Consumer protection as discussed above was exercised even before independence but a formal consumer protection law that purely focuses on consumer protection was enacted in the year 1986 (Rajanikanth Makala 02 MAY 2019)

JOURNEY OF CONSUMER PROTECTION ACT 2019

With the introduction of commercial internet services in August 1955, many innovations took place in the Indian market. With the increasing use of technology and online merchandising the risk of events and types of fraud also started to increase. The need for amendments was felt in COPRA 1986 and with time major amendments took place in the act but that was not enough. A need was felt to reframe the whole act with some major new inclusions and few changes in the existing provisions as in the past 30-35 years the Indian economy has changed and developed swiftly. Taking into consideration the new dynamic marketplace, in 2019 August Consumer Protection Act 2019 was introduced in India which was an advanced version of the Consumer Protection Act 1986. Thereafter, vide notification dated 15.07.2019, and declared 20th June 2020 to be the appointed date for the coming into force of CPA 2019 (Waheb Hussaini & Snigdha Singh 2020). 20th July 2020 was declared to be the appointed date for coming into force of CPA 2019 by the Ministry of Consumer Affairs, Food, and Public Distribution. The paper tries to discuss and include all the key changes and inclusions in the new act.

Any initiative taken by the administration is efficacious only if its actual beneficiaries are aware and fully informed about it. If the society for whom the act is made, is ignorant and uninformed about the supremacies of the act and their rights, then the efforts of the government are worthless and hollow.

LITERATURE REVIEW

This is a detailed understanding of the study conducted by a number of different researchers. Here are a few of the existing notable researches from the past.

The study "India: New Consumer Protection Law In India: Broadening the Horizon." Undertaken by (Darren Punnen, Rahul Rishi, Payel Chatterjee, and Gowree Gokhale, 2019), discussed the establishment procedures and aim of CPA 2019 in the introduction. Salient features of CPA 2019 like CCPA, the definition of Consumer, False and Misleading Advertisement, Conditions for UTP, Product Liabilities, etc., were discussed later in the paper and the paper concluded by explaining other provisions of the act in brief.

(Parul Thadani and Anushka Mishra, 2021) in their research work "COMPARATIVE STUDY OF CONSUMER PROTECTION ACT 1986 AND 2019", discussed the basic rights of consumers, consumer redressal forums – the procedure of filing a complaint, appeal, and penalties. The new provisions of CPA 2019 including establishment of authority, consumer disputes redressal commissions, punishments for misleading advertisement, etc., were discussed later in the paper. The paper concluded with a discussion on e-commerce, manufacturer responsibility, the safety of consumers, etc.

(SmitaPaliwal and Rajeev Rambhatla, 2020) in their study "India: An Overview Of The Changes To Be Introduced By The Consumer Protection Act, 2019", discussed 17 points regarding Consumer Commissions including the renaming of the District Consumer Dispute Redressal Forum (DCDRF) to District Consumer Dispute Redressal Commission (DCDRC), its pecuniary limits, its powers, and appeals, etc.

The study "Consumer Protection Act, 2019" was undertaken by (Shrishti Jain, 2020). Unfair Trade Practices, Unfair Contracts, CCPA authorities like Suo-Moto action, imposing penalties, passing directions to recall the products or discontinue the services, providing refunds to customers, etc., were discussed in the paper. It also discussed the term product liability where the responsibility of the product manufacturer, seller, and service provider was discussed. Changes in the Consumer Redressal Forum were also discussed including Territorial Jurisdiction, Pecuniary Jurisdiction other than this Alternative Dispute Resolution, E-complaints, etc., were also discussed in the paper.

A news article written by (Pushpa Girimaji, 2022) in Hindustan Times titled "New consumer law to protect online customers", discussed the defects in COPRA 1986 and the modern concepts of CPA 2019. It also discussed in brief, CCPA and how CPA 2019 is suitable for the new market dynamics and rapidly growing advancements of digital technology. The paper also explained the insertion of E-commerce rules and various advancements of CPA 2019 to the consumers.

(Kriti Saxena, 2021) investigated "Jurisdiction Under Consumer Protection Act, 2019". Her intentions were to describe in brief the meaning of Consumer Courts, its composition - District Consumer Redressal Forum, State Consumer Redressal Forum, and National Consumer Redressal Forum and its jurisdiction - Territorial jurisdiction, Pecuniary jurisdiction, Alternate dispute redressal, and E-complaints, etc.

A study on "Unfair Trade Practices" was undertaken by (Raj Karn, 2021). His aim was to analyze the definition of UTP as provided in the CPA 2019, to understand the reasons for the cause of UTP, and to analyze the difference between the law of India with other countries. The paper tried to answer the question, How does the evolution of the concept 'UTP' take place? How the new act has changed and what changes it brought to the definition of 'UTP'? and What are the reasons for the 'UTP'?

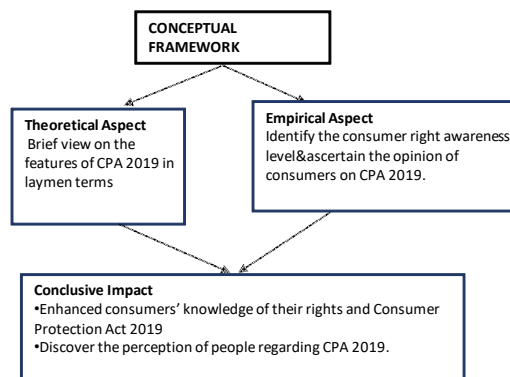
(YashikaSarvaria, 2020) conducted a study "India: Consumer Protection Act, 2019: Key Takeaways". She investigated the definition of a consumer, CCPA, UTP, Unfair Contracts, Misleading Advertisements and their exceptions, Alternate Dispute Redressal mechanisms, E-commerce, etc.

OBJECTIVE

The purpose of this research is to:

1. Determine the awareness level of consumers regarding the new act and its major provisions,
2. Give an insight into key features of CPA 2019 to consumers, so that they could familiarize themselves with the new provisions of the act.

METHODOLOGY OF RESEARCH



Source: Primary

Data Collection: For analysis, a survey was conducted by collecting data from a sample group of 75 consumers. All the responses were collected in 3 days from 27th May to 29th May 2022. Descriptive method was used for the research study. Online survey technique was used to gather primary data. For this purpose, a questionnaire

was prepared through Google Forms and Chain-referral sampling under non-probability technique was used.

Questionnaire Design: The questionnaire was bifurcated into three sections, namely (i) Demographic Characteristics of respondents, (ii) Consumers' awareness regarding their rights (iii) Consumers' opinion on the provisions and success of the new act. The questionnaire consisted of an aggregate of 12 questions with response points on (frequency and agreement based) Likert scale, MCQ's, and long open-ended responses.

KEY FEATURES OF CPA 2019

Broadening the concept of "Consumer" -

A consumer is any person who buys and uses goods or hires and avails services through both online and offline platforms for a consideration fully or partly paid or promised to pay or through any system of deferred payment. It covers transactions through all modes including online through electronic means, teleshopping, multi-level marketing or direct selling, and traditionally through offline mode.

Enhancement of Pecuniary Jurisdiction -

The pecuniary jurisdiction for the commissions and the manner of determining it for filing the complaint has changed significantly. Before the pecuniary limit for District Forum was up to Rupees 20 lakhs which has now become up to Rupees 1 Crore, State Commission was up to Rupees 1 Crore which has now become up to Rupees 10 Crores and National Commission was more than Rupees 1 Crore which has now been increased to over and above Rupees 10 Crores. Also, the District Forum has now become District Commission.

With changing times, the purchasing power of consumers also increased and so it was important to increase the pecuniary jurisdiction of the commissions to avoid burden on State and National Commissions and crowding of cases.

Enhancement of territorial Jurisdiction -

In order to remove the difficulties and problems faced by the consumers in seeking redressal against business, the new CPA 2019 has broadened the scope of territorial jurisdiction for filing complaints. Previously it was mandatory for a consumer to file a complaint only at a place where the opposite party resides or carries business but now consumers can register their complaint at commission near the place of one or all the opposite parties' place of residence or business, the place of cause of action or where the complainant resides or works.

Product Liability -

Chapter VI of the CPA 2019 deals with Product liability and clearly stipulates the cases wherein the liability shall be fastened on the manufacturer that is, in case the product is defective in design or contains a manufacturing defect or deviates from

manufacturing specifications, etc. (Pattnaik and Tyagi, 2020) The product manufacturer, product service provider, and product seller are brought within its scope for any claim for compensation or product liability action against them in case of any harm caused to a consumer by such defective product manufactured or sold or deficient services rendered.

Central Consumer Protection Authority -

CPA 2019 has also introduced a regulatory authority having powers like suo-moto investigation, search and seizure, pass cease and desist orders, recall defective goods, pass orders, etc. CCPA has an overarching jurisdiction over these three categories: (a) Violation of Consumer Rights as a class, (b) Unfair Trade Practices, and, (c) False, and Misleading Advertisements.

Central Authority ensures:

- Protection and promotion of the rights of consumers.
- Crackdown the violation of consumer rights.
- Terminate and cease the unfair Trade practices and their use by people.
- End fabricated and ambiguous promotional activity, especially false and misleading advertisements.
- Make sure that no one is involved in any kind of advertisement that might be false or misleading.

Misleading Advertisements -

Advertisements have been present all over the world for centuries, it is a mode of communication between the manufacturers/businessmen and consumers. It is an age-old method to inform potential consumers about the product but as time passed, the advertisement was used more for persuading and misleading consumers.

Previously ASCI Advertising Standards Council of India, which is a voluntary self-regulatory organization, was used to protect Indian consumers' interests through self-regulation in the advertisement. There was no provision in COPRA 1986 that specifically deals with misleading advertisements. Under CPA 2019, CCPA is empowered to take action against the advertiser, advertising agency, and the endorsers involved in false and misleading advertisements.

Unfair Trade Practices and Unfair Contracts -

Any dishonest, fraudulent trade or business practice prohibited by a statute is referred to as UTP.

"It is not the consumer who is the king, but it is the large corporation who is the king in the economy. Whatever happened is not because the consumer wants it but because large and powerful corporations prefer it that way."

- John K. Galbraith

COPRA 1986 included mainly six types of such Unfair Trade Practices like false representation, misleading advertisements, etc. The new act has widened the definition of UTP by making provisions for online frauds and trade practices through e-commerce and direct selling and the telecom sector also. Many unfair trade practices like failure/reluctance to issue a bill, refusal to accept a defective product or deficient services within 30 days of its buying period, adoption of deceptive practices for providing services, manufacturing, or offering any disclosure of any personal information of the consumer unless required by law in the public interest.

Unfair Contract –

according to it any contract made between a consumer and a manufacturer or trader will be unfair if:

- Any party is demanding extreme and unnecessary security deposits from the other party i.e., the consumer for performing the contractual commitments.
- Imposing an excessive and unnecessary high penalty on the consumer in case of breach of a contract by him.
- Refusing to accept early debt reimbursement along with the applicable penalty.
- Without any realistic or rational cause, entitling a party to terminate the contract.
- Allowing one party to assign the contract to the other party that is, the consumer without his consent.
- Imposing any unreasonable charge, obligation, or condition on a consumer puts him into a disadvantageous position.

Mediation as Alternate Dispute Redressal Mechanism –

The objective of CPA 2019 is to offer a timely and effective settlement of consumer disputes. For this purpose, Mediation was introduced as a duplicate resolution mechanism under the aegis of the concerned consumer dispute commission. (Pattnaik, S. & Tyagi, R.,2020)

Chapter V of CPA 2019, introduces Mediation assisting the consumer to resolve their disputes swiftly without approaching the commissions. On the first hearing of the case or later stages, a consumer commission may refer the dispute for mediation with the consent of the parties if the commission is of the view that there exists an element of the settlement. There are three parties involved in mediation, one is the consumer another is the opposite party and the third one is the negotiator who is also known as Mediator. Mediation cells are attached to each tier of consumer redressal commissions i.e., at the National level – National Consumer Mediation Cell, at the State level – State Consumer Mediation Cell, and at the District level – District Consumer Mediation Cell. The decision once passed by the mediation cell cannot be appealed in any commission.

E-Commerce –

Buying goods and services over a digital platform or electronic network is E-Commerce. E-Commerce is now included in CPA 2019 which deals in internet frauds and looks after the protection of rights of e-consumers. It instructs the entities to provide complete and comprehensive information relating to the return policy, exchange policy, refund policy, guarantee & warranty period, delivery & shipment procedure, modes of payment, country of origin, etc. to the consumers. Many other prohibitions are imposed on companies dealing in online business in order to ensure consumers' safety and welfare.

E-Filing of complaints –

The new act enables the consumers to file complaints electronically and be present virtually through video-conferencing at the time of hearing of the cases. This will be convenient for the consumers. The facility of E-recording is also available to consumers.

DATA ANALYSIS AND INTREPRETATIONS

Section 1: Demographic profile of the respondents is discussed in this section. It shows the Age-group, Gender and Profession of the consumers.

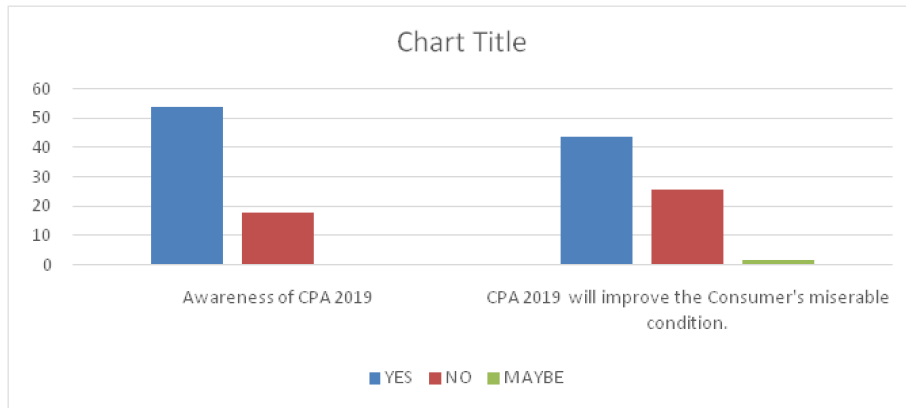
Table 1: Demographic profile of respondents:

Category	Frequency	Percentage
Age		
Below 20 years	18	24
20-30 years	43	57.3
30-40 years	9	12
40 years and above	5	6.7
Gendre		
Male	17	22.7
Female	58	77.3
Transgender	0	0
Profession		
Student	40	53.3
Private job	26	34.7
Government employee	2	2.7
Businessman	3	4
Housewife	2	2.7
Other	2	2.7
Total	75	100

Table 1 depicts that a major share of respondents belongs to the female category with 77.3% and most of the respondents belong to the students and private job category by profession with 53.3% and 34.7% share.

Section 2: Awareness of consumers regarding CPA 2019 and their opinion on it is discussed in this section. It includes the awareness level of males and females regarding

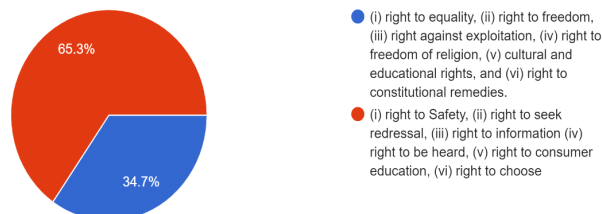
CPA 2019, their opinion on the improvement of consumers' miserable conditions after the enactment of CPA 2019, their awareness of consumer rights, and their awareness of the difference between consumers and customers.



It was found that 75% of the respondents were aware of the CPA 2019 but only 61.1% of them had an opinion that the act is going to improve the current miserable condition of consumers.

1. Awareness of the consumer rights

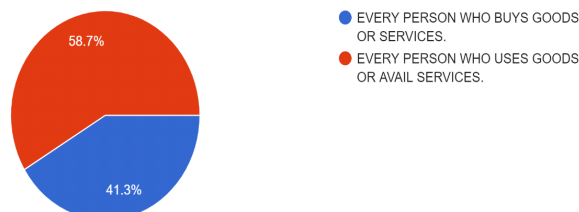
6 fundamental rights of consumers
75 responses



The above pie-chart depicts that 34.7% consumers are unaware of their consumer rights. When asked about the 6 consumer rights, 26 of the respondents opted for blue option that shows the six constitutional rights of citizen of India and 49 opted for the correct red option.

2. Meaning of Consumer according to respondents

WHO IS A CONSUMER
75 responses



As shown in the pie-chart, when asked about the meaning of a consumer, 41.3% of them opted for the incorrect option. This shows that people cannot differentiate between the meaning of a consumer and a customer.

FINDING AND CONCLUSION

The study shows that there is still a need for consumer education and awareness. 57.3% of the respondents were in the age group of 20-30, that is the learning age, and 40% of them purchase goods frequently, still, 25% of the respondents were unaware of the Consumer Protection Act 2019. 30.7% of the respondents blamed the government, 18.7% blamed businessmen and 21.3% blamed the shopkeepers, for the miserable condition of the consumers in India. It was good to see that 96% of the respondents opted for going to consumer courts in the condition of being cheated by the shopkeeper still, 4% of them opted for civil courts.

When asked about their suggestions, respondents recommended the manufacturers and shopkeepers be responsible, honest, and transparent, government impose more strict laws against unscrupulous sellers. It was also suggested that the government should not only ensure the enactment of strict rules and regulations but also ensure its efficient implementation. CPA 2019 can succeed only when its beneficiaries are aware of it and use the powers and rights given to them under this act, for this their awareness and education levels need to be improved.

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India's Tryst with Pharmaceutical Product Patenting: Restricting Evergreening or Impeding Incremental Innovation?

Ms. Kanika Dhingra*

ABSTRACT

The coming into force of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights in 1995 necessitated India to make its laws compliant with the minimum standards of protection prescribed under the Agreement. In light of the same, India amended its Patent Act, 1970 in the years 1999, 2002 and 2005, respectively. Apart from introducing product patent regime for pharmaceuticals in India, an anti-evergreening provision was also incorporated in the form of Section 3(d) which imposes limitations on the new forms, or new uses or new properties of known substances from being patented. The article examines the effect of the provision on ever-greening of patents and how the Supreme Court has interpreted the same in Novartis AG v. Union of India. The paper also discusses the impact of the provision on incremental innovation and whether the provision is a restrictive and narrow approach or is it justified in the light of public health concerns.

INTRODUCTION TO THE PATENT REGIME IN INDIA

The emergence of the patent regime in India was an implication of the law introduced to the Indian territory during the British Rule. The very first patent statute in India, i.e., the Protection of Inventions Act, 1856, was founded on the UK Patent Law of 1852.¹ The law provided for specific exclusive rights to the originators of new manufacture for a period of 14 years.² This legislation's goal was to promote the development of innovative, useful products and to persuade inventors to disclose their inventions.³ As the law of UK progressed, several legislations were repealed and introduced during the British rule in India as well. For instance, the 1856 law

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1 V.K.Ahuja, Law Relating to Intellectual Property Rights, 392 (4th ed., 2011).

2 Karnika Seth, 'History and Evolution of Patent Law-International and National Perspective', <http://www.karnikaseth.com/wp-content/uploads/history-and-evolution-of-patents1.pdf>.

3 DPIIT, Govt. of India, 'History of Indian Patent System', Available at: <https://ipindia.gov.in/history-of-indian-patent-system.htm>.

was repealed and a fresh law was introduced through Act XV of 1859. This law of 1859 was further strengthened to provide for protection for designs as well and was retitled as 'the Patterns and Designs Protection Act' through Act XIII of 1872.⁴ An amendment was further made in 1888 to incorporate the modifications made in patent law in UK in the Indian law. The most comprehensive law introduced in India through the Britishers was the Indian Patents and Designs Act of 1911. The law provided for a refined administrative set-up under the Controller; increased the term of protection from 14 to 16 years; and also provided for several matters such as patent of addition or use of invention by the government that are applicable even under the present-day patent regime.

It was only post-independence that India desired to change its law due to the significant changes in the political and economic environment of the nation. For the same, the Government of India constituted a Committee under the chairmanship of Justice (Dr.) Bakshi Tek Chand to review the patent regime of India. On the basis of the interim recommendations of the Committee, the patent law of 1911 was amended by Act XXXII of 1950 and Act LXX of 1952.⁵ Also, on the basis of the recommendations made by the Committee, a bill was presented in the Parliament in the year 1953. But the proposed bill lapsed.⁶ In 1957, the Indian government constituted another Committee under Justice N. RajagopalaAyyangar (Ayyangar Committee). It was the recommendations made by this Committee that led to radical changes in the Indian patent regime. The 'Report on the Revision of the Patents Law' submitted in 1959 recommended significant changes to the patent law, such as non-patentability of chemical inventions, food products and medicines.⁷ These recommendations shaped the basis of the introduction of the Patents Bill in 1965, which eventually lapsed. An amended bill was again placed in 1967 and was referred to a Joint Parliamentary Committee. On the basis of the final recommendation of the Committee, the Patent Act, 1970 was passed.⁸ The same Act continues to regulate the patent regime in India even today, with necessary amendments made to the same from time to time so as to meet the requirements of the country and to fulfill the international obligations arising out of Agreements, Conventions and Treaties.

It is also pertinent in this regard to mention that the Indian patent system underwent major overhauling post 1994 due to the introduction of the Agreement on Trade Related Aspects of Intellectual Properties along with the inception of the World Trade Organization. India, being a WTO Member, was under an obligation to become compliant with the minimum standards of Intellectual Property protection prescribed under the Agreement. The agreement came into effect on 1st January, 1995 and is

4 *Id.*

5 *Supranote2.*

6 *Supranote3.*

7 Shri Justice N. RajagopalaAyyangar, Report on the Revision of the Patents Law (Sep.,1959) https://ipindia.gov.in/writereaddata/Portal/Images/pdf/1959-Justice_N_R_Ayyangar_committee_report.pdf

8 *Supranote3.*

considered as the most exhaustive multilateral agreement relating to intellectual property till date.⁹ In order to fulfil the obligations, India underwent major transitions through the enactment of the Patent (Amendment) Acts of 1999, 2002 and 2005, respectively. Keeping the country's national interests into consideration, India utilised the TRIPs flexibilities to structure the law best suited to Indian circumstances.

PHARMACEUTICAL PATENTING IN INDIA AND THE IMPACT OF TRIPS AGREEMENT

India is the largest supplier of generic pharmaceuticals across the globe. Access to affordable medicines, low-cost high-quality generic drugs and vaccines as well as export to several nations makes India the 'pharmacy of the world'.¹⁰ At present, the Indian pharmaceutical industry stands as world's 3rd largest in terms of volume and 14th largest in terms of value and contributes significantly to the country's GDP.¹¹ Some of the key sectors of the Indian pharmaceutical business include generic drugs, over-the-counter medicines, bulk meds, vaccines, contract research & manufacturing, biosimilars, and biologics. The majority of pharmaceutical production facilities that are compliant with the US Food and Drug Administration are in India (USFDA).¹²

Patenting of pharmaceutical compositions and substances was permitted under the Indian Law only until 1970, where after the Indian Patent Act, 1970 was brought in force.¹³ Prior to the 1970 legislation, the relating to grant of patents was regulated by the Indian Patents and Designs Act of 1911 introduced to the Indian territory by the British, which enabled a product patent regime for all fields of inventions. Rather, all versions of the patent legislations enacted by the British permitted a possibility of patenting pharmaceutical products in India.¹⁴ However, as suggested by the Ayyangar Committee, Section 5 of the Patent Act, 1970 provided for a specific exclusionary provision disentitling the pharmaceuticals, agrochemical and food products from being patentable.¹⁵ Thus, one could only enjoy process patents in respect of food, drugs and pharmaceuticals in India.¹⁶ Also, the duration of protection accorded to

9 'Overview: The TRIPs Agreement' (WTO) https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

10 Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers, Govt. of India, 'Annual Report 2020-21', <https://pharmaceuticals.gov.in/sites/default/files/english%20Annual%20Report%202020-21.pdf>.

11 *Id.*

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14 See Srividhya Ragavan, *Of the Inequals of the Uruguay Round*, 10 MARQ. INTELL. PROF. L. REV. 273, 284 (2006).

15 See Omitted Section 5 of the Patent Act, 1970.

16 *Supranote* 1 at 399.

such processes was shorter than other patents granted under the Act, i.e., five years from the date of sealing of the patent, or seven years from the date of the patent whichever period is shorter.¹⁷ This exclusion was put in place to reduce India's reliance on foreign imports for pharmaceuticals and formulations and to foster the growth of a locally based pharmaceutical industry.¹⁸ The provision allowed Indian pharmaceutical companies to make lower priced versions of drugs patented in other jurisdictions by way of reverse engineering and entering the global markets through significant exports. This was a result of the finding of the Ayyangar Committee that global corporations owned between 80 and 90 percent of Indian patents, but only utilized/worked fewer than 10 percent of those patents in India.¹⁹ By implementing the 1970 law, the Indian government made the strategic choice to stimulate domestic drug production in an attempt to boost the nation's struggling economy.²⁰

It was the introduction of the WTO Agreement on Trade related Aspects of Intellectual Property Rights of 1995 that necessitated significant changes to the Indian Patent Act, 1970. The agreement was the fruit of an eight yearlong negotiation and discussion called as the Uruguay Round of negotiations which began at Punta del Este, Uruguay on 20th September, 1986 and was concluded at Marrakesh, Morocco on 15th April, 1994.²¹ Despite continuous attempts to resist the agreement and regulation on intellectual property concerns by WTO, India – left with an unfeasible alternative of staying outside the WTO system – was compelled to sign the Agreement and join WTO in 1995.²² This joining to the WTO system and also the changing economic policies of the country led to considerable changes to the patent regime. In order to become a TRIPs compliant member state, India (as a developing nation) was given a period of five years to bring about the necessary changes in its patent law.²³ Also, for introducing product patent regime for the fields of invention for which no such protection was given earlier, another period of 5 years was given.²⁴

In order to fulfill its International commitments flowing through the Agreement, India introduced the following significant changes to the patent regime:

17 The Patents Act, No. 39 of 1970, INDIA CODE sec. 53. The provision was later substituted in 2002 and 2005, respectively.

18 *Supranote*13.

19 Linda L. Lee, '*Trials and TRIPS-ulations: Indian Patent Law and Novartis AG v. Union of Indi'a*', 23 BERKELEY TECH. L.J. 281, 290 (2008).

20 V. K. Unni, Indian Patent Law and TRIPS: Redrawing the Flexibility Framework in the Context of Public Policy and Health, 25 Pac. McGeorge Global Bus. & Dev. L.J. 323 (2012), <https://scholarlycommons.pacific.edu/globe/vol25/iss1/12>.

21 WTO, '*Understanding the WTO: Basics – The Uruguay Round*', https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

22 See Amy Kapczynski, '*Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*', 97 CAL. L. REV. 1571, 1579 (2009).

23 Article 65 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights: Transitional Arrangements, https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

24 *Id.*

- **The Patent (Amendment) Act, 1999:**

The amendment was brought into force retrospectively from 1st January, 1995.²⁵ It was only after US initiated a complaint under the WTO Dispute Settlement Understanding by requesting for consultations on 2nd July, 1996 alleging that India failed at providing the necessary mechanism of Mailbox Application and Exclusive Marketing Rights (EMRs).²⁶ The amended Act provided for provisions concerning mailbox applications which allowed filing of patent applications for product patents on inventions concerning drugs, pharmaceuticals and agro-chemicals. These applications were to be examined only after product patent regime was finally introduced later. Meanwhile, the applicants were allowed to enjoy EMRs to sell and distribute these inventions in the Indian territory, on meeting certain conditions for a period of five years.²⁷

• **The Patent (Amendment) Act, 2002:**

The Patent (Amendment) Act, 2002 introduced changes to provide procedural simplification. Also, new Patent Rules of 2003 were introduced to replace the earlier applicable Patent Rules of 1972.²⁸ The most significant change made through the amendment was increase of the term of patent protection from 14 to 20 years from the date of filing, in compliance with Article 33 of the TRIPs Agreement. It also introduced amendments to provisions concerning non-patentable inventions, grounds of compulsory licensing, acts that do not amount to infringement, defining the rights of a patentee, reversing the burden of proof for process patents, etc.²⁹

• **The Patent (Amendment) Act, 2005:**

The Patent (Amendment) Act, 2005 was brought into force on 1st January, 2005, being the final and the most significant amendment made the Act to make it TRIPs compliant. In reference to pharmaceuticals specially, the Act made the most sought after change to the patent regime by introducing product patent regime for technological fields such as food, drugs, chemicals, etc. for which no patents were granted in India since 1970. This was done by omitting Section 5 of the Patent Act, 1970. Also, a major provision that witnessed change was Section 3(d) of the Act which restricts certain inventions from patentability. It does not treat "*the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere*

25 The Patent (Amendment) Act, 1999, No. 17 of 1999 (India), https://ipindia.gov.in/writereaddata/Portal/IPOAct/1_34_1_patents-amendment-act-1999.PDF.

26 See DS50, US v. India, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm.

27 *Supranote3*.

28 Nishith Desai Associates, *Patents Amendment Act, 2002 and Patent Rules, 2003 come into Force*, <https://www.nishithdesai.com/SectionCategory/33/IP-Hotline/12/66/IPHotline/5793/3.html>.

29 See The Patent (Amendment) Act, 2002, No. 38 of 2002 (India), https://ipindia.gov.in/writereaddata/Portal/IPOAct/1_39_1_patent-amendment-act-2002.pdf.

use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant" as an invention.³⁰ This provision has turned out to be a relevant concern in the field of pharmaceuticals where the same is claimed to be an anti-evergreening provision.

India made a significant effort to fulfil its duties under the Agreement's stipulations by passing these three revisions. It is important to note, too, that India also made an effort to take advantage of a number of TRIPs flexibilities that were built into the Agreement's rules. These enabled India to make a few provisions that suited its commitment to public health and access to medicine.

THE ANTI-EVERGREENING PROVISION: SECTION 3(D) OF PATENT ACT, 1970

The generic pharmaceutical sector keeps growing and becoming a crucial supporter of India's booming economy. The United States Food and Drug Administration (USFDA) approved 304 abbreviated new drug applications from Indian companies in 2017, making it the largest generics supplier in the world and contributing to 40% of the generic demand in the United States. Additionally, the sector exports to practically every country and has a sizable presence in all of the established markets with strict regulations.³¹ Despite consisting primarily of generic manufacturers, big pharmaceutical conglomerates like Dr. Reddy's, Sun Pharma, and others are now investing as much in R&D as other major pharmaceutical firms like Pfizer and Glaxo Smith Kline.³²

Post-2005 amendment, the Indian Patent Offices have also been granting patents over the product patents relating to drugs and medicines.³³ This has led to increased filing of patent application for pharmaceutical product patents in India by national as well as international pharmaceutical companies and innovator research institutions.³⁴ Also the duration for which a patent lasts is a term of twenty years from the date of filing.³⁵

The innovators of new drugs and medicines enjoy the granted patent rights for twenty years, once a patent is granted to them. This benefits them by being able to enjoy a monopoly-like position in the market with several rights to the exclusion of others.³⁶

30 The Patent Act, 1970, s. 3(d).

31 Julian Issa, *'The World's Pharmacy: India's Generic Drug Industry'* (Global Business Reports, Feb. 12, 2020), gbreports.com/article/the-worlds-pharmacy-indias-generic-drug-industry

32 White & Case LLP & Dua Consultancy, *'The Value of Incremental Pharmaceutical Innovation: Benefits for Indian Patients and Indian Business'* (US India Business Council, Coalition for Healthy India, June, 2009), <http://www.indiaenvironmentportal.org.in/files/USIBCIncrementalInnovationReportFinal.pdf>

33 See Omitted Section 5 of the Patent Act, 1970.

34 See *'Pharma Companies file 15% of patents in India: Report'* (May 5, 2017), <https://www.moneycontrol.com/news/trends/health-trends/india-pharma-companies-lead-in-patent-filing-report-2272395.html>

35 Patent Act, 1970, s. 53.

36 Patent Act, 1970, s. 48; also see Article 28 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights.

However, a common trend seen amongst such patentees is the desire to continue to enjoy the exclusive position for several years, even beyond the granted term of protection. Instances where the same pharmaceutical companies would make minor adjustments and modifications to the current compositions and attempt to secure another patent on essentially the same product were one such recurring behavior that was identified.³⁷ In other words, the innovators try to restart the 20-year clock by later submitting secondary patents, which are slight variations of the original substance. This practice is referred to as the practice of 'ever-greening' as the same product would continue to be protected for several years, by making a mere minor alteration/modification to the same.³⁸ This would not only excessively incentivize and benefit the innovator for the same invention, but would have a greater impact on the pharmaceutical industry, particularly generics. The term for which a product remains protected under a patent, no other manufacturer in the market would be able to sell the generic low-priced versions of the same.

In India, The Patents Act, 1970's Section 3(d) serves as a criterion to discern genuine invention from superfluous modifications.³⁹ Like in any other country, an invention must meet the requirements of novelty, inventive step, and industrial applicability in order to be patentable in India. But in addition to the aforementioned requirements, Section 3 of the Indian Patents Act defines non-patentable subject matter, which adds another barrier to an invention's ability to be protected by a patent. Therefore, in order for an invention to be patentable in India, it must not only be new, innovative, and industrially useful, but it must also not fall within any of the exclusions from patentability listed in Section 3 of the Patents Act.⁴⁰ The Indian patent regime is unique in that Section 3(d) is intended to provide further review of patent applications. To stop chemical compounds from evergreening, the aforementioned provision has been put in place to serve as an additional check.⁴¹

The Patent Act, 1970 provides that the following shall not be treated as an invention within the meaning of the Act:

37 Burcu Kilic, *Boosting Pharmaceutical Innovation in The Post Trips Era: Real Lessons for the Developing World*, (Edward Elgar Pub., 2014) 42-43.

38 Sadhvi Sood & Aditya Ayachit, 'Taking patentability requirement a Notch Higher: A Law and Economics Perspective of 'Therapeutic Efficacy' 6 NUJSLR 481, 481-502 (2013).

39 Feroz Ali & Sudarsan Rajagopal, 'Rampant Evergreening in Indian Pharma Industry' (MINT, Apr. 30, 2018), <https://www.livemint.com/Opinion/aIqAgfMWLYel1uPEfEcEtI/Rampant-evergreening-in-Indian-pharma-industry.html>.

40 L.S.Davar & Co., 'Implications of Section 3(d) of the Patents Act' (MONDAQ, June 18, 2022), [https://www.mondaq.com/india/patent/1202884/implications-of-section-3d-of-the-patents-act#:~:text=Section%203\(d\)%20of%20the%20Patents%20Act%20bars%2C%20%E2%80%9Cmachine%20or%20apparatus%20unless%20such](https://www.mondaq.com/india/patent/1202884/implications-of-section-3d-of-the-patents-act#:~:text=Section%203(d)%20of%20the%20Patents%20Act%20bars%2C%20%E2%80%9Cmachine%20or%20apparatus%20unless%20such).

41 *Ibid.*

*"the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant."*⁴²

The provision is further supplemented with an explanation:

*"For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy."*⁴³

For the purposes of this Article, it is pertinent to note that - in effect, the provision restricts the following pharmaceutical products from patentability:

- New form of a known substance with no enhanced efficacy;
- Mere discovery of a new property of a known substance; and
- New use of known substance.

Even though India began to grant product patents for drugs and medicines, it did not do so without installing certain checks and limitations. The provision has been designed to be able to restrict certain chemical compounds from patentability by placing them under Section 3 of the Act. The intention behind the provision was aimed to restrict practices that would lead to the granting of patent rights for trivial and insignificant technological advancements. It was directed to compel innovators to create novel drugs and not to keep experimenting and modifying on the existing ones. Hence, at many levels, the provision was viewed as both favorable and unfavorable. However, it was met with unrelenting criticism and was heavily criticized by several jurisdictions for being a barrier to incremental innovation overall rather than merely limiting ever-greening.⁴⁴ Due to Section 3(d) of the Patents Act's restrictive approach, pharmaceutical companies in both domestic and foreign jurisdictions frequently assume that section will prevent their products from being patented if they fall under the category of new forms / new uses/ new properties of known substances.⁴⁵ This was perceived as a threat to innovation in respect of known drugs.

This necessitates that one fundamentally distinguishes between incremental innovation and evergreening. While incremental innovations are focused on developing new

⁴² The Patent Act, 1970, s. 3(d).

⁴³ The Patent Act, 1970, s. 3(d) - Explanation.

⁴⁴ Bhaven N. Sampat & Kenneth C. Shadlen, 'Indian pharmaceutical patent prosecution: The changing role of Section 3(d)' (PLOS ONE, 2 April, 2018) <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0194714>

⁴⁵ L.S.Davar & Co., 'Implications of Section 3(d) of the Patents Act' (MONDAQ, June 18, 2022), [https://www.mondaq.com/india/patent/1202884/implications-of-section-3d-of-the-patents-act#:~:text=Section%203\(d\)%20of%20the%20Patents%20Act%20bars%2C%20%E2%80%9Cmachine%20or%20apparatus%20unless%20such](https://www.mondaq.com/india/patent/1202884/implications-of-section-3d-of-the-patents-act#:~:text=Section%203(d)%20of%20the%20Patents%20Act%20bars%2C%20%E2%80%9Cmachine%20or%20apparatus%20unless%20such)

drugs over existing drugs and knowledge, i.e., the discovery of new therapeutic uses or new formulations characterized by improved/ enhanced efficacy and safety so as to serve medicinal needs, evergreening is intended to breathe life into an almost expiring patent by making minor improvements and obtaining fresh patents. Incremental Innovation is not just a minor modification; it's an improvement to better meet the demands of the patient.⁴⁶

THE INTERPRETATION OF SECTION 3(D) AND THE NOVARTIS DECISION

The Supreme Court's judgment in the case of *Novartis AG v. Union of India*⁴⁷ is a landmark judgment in context of the relevance and implications of Section 3(d) for the pharmaceutical drug innovation in India. The court passed the judgment on 1st April, 2013, upholding the rejection of the disputed patent on grounds of Section 3(d).

The issue revolved around the grant of patent for an anti-cancer drug 'Glivec' claimed to have been invented by Swiss drug maker Novartis. The alleged drug was a specific variation of a known original drug 'imatinib', for which past patents was enjoyed by Novartis in countries like US since 1992. However, the present invention related to 'imatinib mesylate in its beta crystalline form' enabling oral administration of the drug and making it soluble in human body. For the same, patent application was filed in US in 1997 and was later granted a patent by the US Patent and Trademark Office. The applicant Novartis also approached the Indian Patent Office at Chennai in 1998 and filed for a product patent protection for the beta crystalline form of the said drug. However, the application was not considered until 2005, as India was then undergoing the transition phrase to become TRIPs Compliant and had not introduced the product patent regime for drugs and medicine until the implementation of the Patent (Amendment) Act, 2005.

Upon consideration of the application in 2006, the Indian Patent Office (IPO) denied the grant of patent to Novartis and rejected the application on the basis of Section 3(d) suggesting that the subject matter of the application was 'a new form of a known substance' and that the required 'enhancement of efficacy' was not established by Novartis for the grant of patent as required under Section 3(d). On the contrary, Novartis pleaded that the drug was novel due to its increased bioavailability and enhanced properties such as its flow properties, better thermodynamic stability and lower hygroscopicity, etc. In the appeal preferred by Novartis before the Intellectual Property Appellate Board (IPAB), the board confirmed the findings of the IPO.⁴⁸ Aggrieved by the decision of the Board as well, Novartis initiated proceedings before the Madras High Court as well as before the Supreme Court challenging the validity

46 Nina Yin, 'Pharmaceuticals, Incremental innovation and Market Exclusivity' (CHLR, Central University of Finance and Economics, May, 2017), https://www.ninayin.org/uploads/8/7/8/6/8786548/phar_incre_inno_market_exclusivity_may_3_2017.pdf.

47 *Novartis AG v. Union of India*, (2013) 6 SCC 1.

48 *Novartis AG v. Union of India and Ors.* in TA1-5/2007/PT/CH dated 26.6.2009.

of Section 3(d) as being violative of the TRIPs Agreement provisions as well as Article 14 of the Indian Constitution.

In the Special Leave Petition filed by Novartis in 2009 before the Supreme Court, the matter was finally disposed of by the two Judge Bench which rejected Novartis' plea and upheld the findings of the IPAB that the claimed drug was a new form of a known substance and no patent could be granted over the same due to the existence of Section 3(d) of the Patents Act, 1970. The relevant findings of the Court include:

The concept of substance's known efficacy

The term 'known efficacy' was discussed in the judgment and the Court suggested that the substance 'imatinib mesylate' and the efficacy of 'imatinib mesylate' were well known before the priority date of the application for the grant of patent in India. The substance was known through an earlier existing patent (referred to as the Zimmerman patent) and through two articles referred and examined by the court.⁴⁹

New Form of a Known Substance

The court found the subject product, i.e., the beta crystalline form of Imatinib Mesylate to be a new form of an already existing and known compound Imatinib Mesylate⁵⁰. Thus, the court further went on to examine whether the new form meets the criteria of 'enhanced efficacy' as required under Section 3(d) or not. It, therefore, fully attracts section 3(d) and must be shown to satisfy the substantive provision and the explanation appended to it in order to be patentable.

Meaning of the term 'efficacy'

The court suggested the meaning of the term efficacy to imply 'therapeutic efficacy' in case the subject matter is a medicine/ drug. Thus, as per the court, the only valid efficacy criterion for a drug with a therapeutic claim to cure a disease is "therapeutic efficacy." The court also held that the "therapeutic efficacy" of a medicine must be judged strictly and narrowly.⁵¹ It is also pertinent to note an important observation of the court here which indicates what is to be considered and what is not to be considered as a parameter of efficacy. The court explained: "*that the physio-chemical properties of beta crystalline form of Imatinib Mesylate, namely (i) more beneficial flow properties, (ii) better thermodynamic stability, and (iii) lower hygroscopicity, may be otherwise beneficial but these properties cannot even be taken into account for the purpose of the test of section 3(d) of the Act, since these properties have nothing to do with therapeutic efficacy.*"⁵² In light of the same observation, the court held that Novartis' claim that beta crystalline form of imatinib mesylate has 30% increased bioavailability as compared to free

49 See Judgment in *Novartis AG v. Union of India*, (2013) 6 SCC 1, Para 160 and 164.

50 See *Id.* Para 161.

51 See *Id.* Para 180.

52 See *Id.* Para 187.

base form imatinib fails. The feature 'bioavailability' falls outside the purview of efficacy in case of medicines.⁵³ As per the Court, the therapy/ treatment and its efficacy is to be looked into and not just the physio-chemical properties of the drug.

Establishing enhanced efficacy

The Court stated that Novartis was required to demonstrate the beta crystalline form's increased therapeutic efficacy over the drug that came before it, imatinib mesylate. Instead, Novartis merely contrasted the beta crystalline form with imatinib in its free base form. Thus, there was no material placed before the patent office or the court to make any comparison of efficacy, or even solubility, between the beta crystalline form of Imatinib Mesylate and Imatinib Mesylate (non-crystalline).⁵⁴

Also, in order to meet the requirements and pass the test of Section 3(d), the applicant needs to show, through the submission of clinical trials data, that there is an actual enhancement of efficacy. Even if it was to be accepted that there is an increased bioavailability, higher bioavailability does not always and necessarily result in increased therapeutic efficacy. This could be explained by the idea that bioavailability as a whole simply describes how far a drug travels to exhibit its effects. This does not necessarily indicate what the drug's actual impact on the body is. In this instance, the Court underlined that Novartis had failed to provide any proof that the beta crystalline form's improved bioavailability had really increased the substance's therapeutic effect on the human body. The Patent Office's finding was accurate, and the Court ruled that the patent application had failed to overcome Section 3(d) hurdle.⁵⁵

Granting Product Patents for pharmaceuticals while balancing public health concerns

The intention behind the incorporation and the wordings of Section 3(d) were discussed by the Court. The court stated that grant of product patents on pharmaceuticals was to be done with great caution such that the patents do not impede access to medicine. Several flexibilities and measures have therefore been included under the Act. As stated by the Supreme Court in Para 103, in order to keep the door open for real and genuine inventions while also preventing any attempt at repetitive patenting or extending the patent period on fictitious grounds, the modified section 3(d) clearly establishes a second tier of qualifying conditions for chemicals and pharmaceutical items.

These findings and the decision of the Court paved way for the appropriate disposal of patent applications by the Indian Patent Office. The court provided some clarity on the means of using Section 3(d). However, some ambiguity still existed. Apart from Section 3(d), another provision which has the anti-evergreening impact is Section 3(e) which suggests that *"a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such*

⁵³ See *Id.* Para 188.

⁵⁴ See *Id.* Para 171.

⁵⁵ See *Id.* Para 189.

substance” shall not be a subject matter of patents.⁵⁶ The same was also mentioned in the judgment.

POST-NOVARTIS DEVELOPMENT

With India becoming “the pharmacy of the world,” pharmaceutical patenting in India has been of paramount concern to both the Indian people and the global community. The decision of the Supreme Court in the *Novartis case*⁵⁷ attracted all eyes towards the Indian pharmaceutical patenting regime. It was the very next year in 2014, that the Indian Patent Office introduced the Guidelines for Examination of patent Applications in the Field of Pharmaceuticals.⁵⁸ The objective of the guidelines was to improve the examination standard and introduce harmonious practice amongst the Technical Officers in the system.⁵⁹

The Guidelines are relevant for the discussion as they also provide for application of Section 3(d) of the Patent Act, 1970 under Guideline No. 10. However, the Guidelines provided in respect of application of Section 3(d) provide largely for a reproduction of the observations and findings of the Hon’ble Supreme Court from the *Novartis Judgment*⁶⁰ to the extent that paragraphs from the Judgment have been cited therein.⁶¹ This highlights how the Court’s decision has actually become a manner of practice by way of such explicit incorporation of the Court’s interpretation into the examination guidelines.

Some of the later decisions reflect on how the provision has been used to grant or reject patent applications concerning pharmaceutical products:

In *Fresenius Kabi Oncology Limited v. Glaxo Group Limited*⁶² the IPAB determined the issue of Section 3(d). - the Board found that Glaxo failed to prove that the claimed ditosylate salts exhibited enhanced therapeutic efficacy. The Board held that while the improved properties of the claimed invention might provide certain advantages over the prior art di-HCl compounds, these advantages did not result in greater therapeutic efficacy. According to the Board, the improvement in thermodynamically stability and moisture absorption properties of the claimed compounds did not constitute sufficient evidence to demonstrate that the claimed compounds exhibited greater therapeutic efficacy.

⁵⁶ The Patents Act, 1970, s. 3(e).

⁵⁷ *Supranote 47*.

⁵⁸ See Office of Controller General of Patents, Designs and Trademarks, ‘Guidelines for Examination of Patent Applications in the Field of Pharmaceuticals’, IP India (October, 2014), https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_37_1_3-guidelines-for-examination-of-patent-applications-pharmaceutical.pdf.

⁵⁹ *Id.*

⁶⁰ *Supranote 47*.

⁶¹ See *Supranote 58* - Guidelines 10.5, 10.6, 10.7, 10.8 and 10.9 .

⁶² No.162 of 2013.

Further, in *Gilead Pharmasset, LLC. v. Union Of India & Anr.*⁶³, in furtherance of the rejection of the patent application 6087/DELNP/2005 during a pre-grant opposition, the applicants approached the Delhi High Court. The relevant concern was discussed in the order of rejection wherein the Controller observed that though changes described in Gilead's application make the compound "novel and inventive," the application does not prove the compound's enhanced "therapeutic efficacy" compared to its "closest prior art".

Also, in *F. Hoffmann-La Roche Ltd. & Anr. v. Cipla Ltd.*⁶⁴, Cipla challenged the validity of Roche's patent on grounds of Section 3(d). Initially, the Controller had ordered the rejection of the Patent by holding that increased thermodynamic stability of Polymorph B fell below the Section 3(d) standard of enhanced therapeutic efficacy as compared to its own earlier drug.

IMPACT OF SECTION 3(D) ON INCREMENTAL INNOVATION IN INDIA

According to the provisions of the legislative enactment, the Indian patent regime is currently strictly anti-evergreening. The question that needs to be answered, though, is if this strategy is promoting innovation and R&D in the pharmaceutical industry, or would compromise efforts to solve public health issues.

However, in spite of there being clear restrictive provision in the Act and also after the detailed clarification by the Apex Court, there have been instances pointed out where the Patent office has erred in granting patents and as good as 72% of the patents granted in India between 2009-16 have been patents on secondary inventions, i.e., marginal improvements over the existing patents.⁶⁵ This has been done by manipulating the patent applications by various means such as attempting to prove the patent to not be a case of Section 3(d), but Section 3(e), or by submitting data to establish enhanced therapeutic efficacy (which has at times not been probed into), or by amending claims to not form a part of debate under Section 3(d) and the like justifications.⁶⁶ Several patents were initially granted and later challenged and revoked as well. Thus, it would not be incorrect to suggest that there is a major contradiction in the matters of legislative policy and the actual practices adopted by the Patent Offices in India.

On the other hand, as per a Report, the number of patent application rejections concerning pharmaceuticals increased in the period immediately after the Novartis

63 WP(C) 687/2015.

64 RFA (OS) 92/ 2012.

65 Dr.Feroz Ali, Dr.Sudarsan Rajagopal, Dr. Venkata S. Raman & Roshan John, *Pharmaceutical Patent Grants in India: How Our Safeguards Against Evergreening Have Failed And Why The System Must Be Reformed*, AZIM PREMJI UNIVERSITY, SHUTTLEWORTH FOUNDATION PROJECT (Apr, 2018), <https://www.accessibsa.org/media/2018/04/Pharmaceutical-Patent-Grants-in-India.pdf>

66 *Id.*

decision, i.e., 2013-2016.⁶⁷ Also, several applications were either abandoned or withdrawn when a Section 3(d) objection was raised. Since this important ruling, patent applications including new formulations of well-known drugs have been required to include information on the compound's improved therapeutic efficacy. This interpretation of 3(d) provided by the Supreme Court may be the cause of the rise in section 3(d) denials following the Novartis Case.⁶⁸ This reflects on how Section 3(d) came to be used as a tool by the patent offices in rejecting patent applications.

CONCLUSION

The ever-greening provision has been incorporated in the Act to safeguard the patent system against a possible abuse of extending patent monopoly. The intention was to prevent the pharma giants from tweaking their existing drugs and trying to obtain fresh patents over essentially the same subject matter. For the same, new forms, new uses and new properties of known substances were made unpatentable. This was also necessary to be done for a country like India that played a significant role in making low priced generic drugs available for the world. Thus, the domestic interest of protecting the generic pharmaceutical companies and the public health concerns led to the incorporation of this provision. Section 3(d) has been used to serve as an additional qualifier for obtaining patents over new forms/uses/properties of known substances, apart from the traditional triple test of patentability, i.e., novelty, inventive step and industrial applicability. This is an additional test to be passed such that there is no ever-greening.

The provision has been interpreted in the Novartis case by the supreme Court and interpreted certain expressions and concepts such as efficacy; enhancement; the need to submit data to establish enhancement; difference between therapeutic effects and physio-chemical properties, etc. On the same lines, the IPO also issued Guidelines for examination of patent applications concerning pharmaceuticals. However, the guidelines did not provide any additional clarity. Also, the statute has not yet been amended to import the necessary interpretation drawn by the court. Over the years, the Novartis understanding of Section 3(d) has become the standard threshold and the only interpretation drawn and further applied by courts in subsequent decisions.

It is also necessary to note that the provision and its interpretation have been perceived as restrictive and narrow by the larger world community. It is alleged that the provision has the potential to curb and impede incremental innovation over the existing patents and their related knowledge. Countries like EU have taken a more liberal approach by permitting new forms and new uses of known substances to be patentable. Thus, there is a need to revisit the provision and import more clarity through elaborate guidelines from IPO and judgments from the apex court.

⁶⁷ Dr. Feroz Ali, Dr. Sudarshan Rajagopal, Mohamed Mustafa & Chinnasamy Prabhu, '*Rejected in India: What the Indian Patent Office got Right on Pharmaceuticals Patent Applications(2009-2016)*', (Dec., 2017), <https://accessibsa.org/media/2017/12/Rejected-in-India.pdf>

⁶⁸ *Id.*

An Analysis of Adoption Laws in Same Sex Marriages

Ms. Khushboo Natholia* & Dr. Apeksha S. Agrawal**

ABSTRACT

The purpose of this study is to examine the social and political debate surrounding adoption laws for same-sex couples in various countries, across the globe. The researcher has studied the impact of adoption laws in India on same-sex couples. The researcher has argued that the historical discrimination and stereotype thinking of the society creates impediments in the adoption laws for same-sex couples. It is further argued that decriminalization of the draconian sections should result in the amendment of the adoption laws because the existing laws violate the fundamental rights of same-sex couples in India. The researcher concludes that judiciary and legislature should take aid from foreign judgments and legislations to interpret the existing adoption laws in India and recognize the adoption rights for same-sex couples.

Keywords: Adoption, Same-sex marriage, Legislation, Same sex couple, Fundamental Rights.

Adoption has long been a service that connects parents and children who wish to form a family. The battle against the old draconian law of “section 377 Indian Penal Code”¹, which prohibits carnal intercourse between same-sex couples and violates their fundamental rights, is not yet over, as the “landmark judgment of the supreme court in Navtej Singh Johar v Union of India”² declared it unconstitutional but did not consider and pay attention to the civil rights of same-sex couples who want to live a family life and enjoy parenthood by adopting children. The same-sex couples are those who are attracted to the same sex, such as lesbians (women and women) and gays (men and men), and it can take many forms, from romantic to the homosocial-close relationship. As “Chief Justice of India Dipak Mishra stated in the Navtej judgment”³, it’s not only sexuality, as society believes, but love or emotional affection

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1 Parjanya Sen and Kaustav Bakshi, ‘India’s Queer Expressions on-Screen: The Aftermath of the Reading down of Section 377 of the Indian Penal Code’ [2012] New Cinemas.

2 (2018) 10 SCC 1

3 Pratik Dixit, ‘Navtej Singh Johar v Union of India: Decriminalising India’s Sodomy Law’ [2020] International Journal of Human Rights.

that creates a bond between them. They have equal rights as citizens. In this paper, the researcher will first discuss the stigma and discrimination faced by same-sex couples in the mainstream society in every aspect of their lives, as well as how the society views them as couples, with a particular emphasis on family laws such as adoption and marriage, and how if the law permitted them to adopt, social stigma would be an impediment. By analyzing the “Hindu Adoption and Maintenance Act⁴, Juvenile Justice Act”⁵, and the government’s rules, the researcher will highlight the legal obstacles they confront, such as the fact that certain laws are discriminatory towards same-sex couples and are intended only for heterosexual couples. These restrictions impede the citizens’ ability to exercise their rights as Indian citizens and are therefore unconstitutional. Thirdly, researcher will conduct a comparison analysis with international jurisdictions, including the “United States, the United Kingdom, and South Africa”, to determine how other nations have established laws pertaining to the same sex-couples. In conclusion, the researcher will discuss how same-sex couples are discriminated against by the law and why they should be permitted to adopt children.

SAME-SEX COUPLES: A SOCIAL TABOO

‘India’ is a heterogeneous society in which many communities have diverse ideas and norms yet remain bonded by the unique thread of Indian society’s cohesion. But because of rotten apples in society, they taint the entire society and influence the beliefs of others, which are primarily skewed toward a religious or political aura, so creating taboos or feelings of hatred in people’s minds. In ancient India, there is evidence of erotic scriptures on the temples of Konark, Khajuraho, and the 2,000-year-old Kamasutra⁶, which demonstrates that homosexuality was deeply rooted in Indian culture. During the Mughal rule in India, it is believed that the Ras Khan in the court of the Mughal emperor Akbar was a homosexual⁷. People rarely mention same-sex couples and view them as inappropriate, and even if the courts have decriminalized same-sex relationships, society is unlikely to embrace them. They are robbed of their political, economic, and social rights, never participate in the operation of society, and believe they are secure from harm because of their isolation.

Same-sex marriage, commonly known as gay marriage, is the union of two individuals of the same sex, who have gone through the ceremonies of marriage. As of 2022, marriage between same-sex couples is legally recognized and performed in 30 nations

4 Siya Shruti, ‘Adoption Laws in India: Reviews and Recommendation Needed’ [2012] SSRN Electronic Journal.

5 Vijay Sudharshan and Darshan V, ‘Juvenile Justice Act - An Overview’ [2018] International Journal of Trend in Scientific Research and Development.

6 Meena Maillart-Garg and Michael Winkelman, ‘The “Kamasutra” Temples of India: A Case for the Encoding of Psychedelically Induced Spirituality’ [2019] Journal of Psychedelic Studies.

7 Lim S.H. and others, ‘A Qualitative Study of Hiv “Test-and-Treat” Experience among Men Who Have Sex with Men in Malaysia’ [2019] AIDS Education and Prevention.

(nationwide or in particular jurisdictions), with Chile on March 10, 2022 and Switzerland on July 1, 2022 being the most recent⁸.

In many nations, the acceptance of same-sex couples is well-established. "Denmark was the first nation to introduce legal recognition of same-sex unions in 1989". Several additional nations granted some legal rights to same-sex couples in the form of civil partnership, civil union, or domestic partnership, with legal privileges varying from nation to nation. "In eight jurisdictions, including the Netherlands, Belgium, Spain, Canada, South Africa, Massachusetts, California, and Connecticut, civil marriage rights are now recognized". In these jurisdictions, same-sex couples and heterosexual couples have the same access to marriage, parental, and adoption rights⁹.

ADOPTION WITHIN SAME-SEX COUPLE IN INDIA

Adoption permits children whose biological parents are unable to care for them to be placed in a family setting. Adoption is the legal procedure through which the biological parent's parent-child relationship is terminated and a new legal parent-child relationship between the adoptive parents and adopted child is established. As a result of an adoption order, the child's legal rights are the same as if he or she had been born to the adoptive parents, and the child's legal rights with respect to the biological parents are terminated. In the adoption process, the child's well-being and best interests are of paramount importance.

"Section 2(2) of Juvenile Justice (Care and Protection of Children) Act, 2015¹⁰" defines adoption as the process by which the adopted child is permanently separated from his biological parents and becomes the lawful child of the adoptive parents with all the rights, privileges, and responsibilities associated with a biological child." Juvenile Justice (Care and Protection of Children) Act, 2015" Act makes adoption available to anyone, regardless of faith, as long as they meet the conditions established by the Central Adoption Resource Authority. The "Hindu Adoptions and Maintenance Act, 1956¹¹ and Juvenile Justice (Care and Protection of Children) Act, 2015" Act govern adoption procedure in India. Adoption is permitted under Hindu Adoption and Maintenance Act for Hindus, Buddhists, Jains, Sikhs, and other faiths controlled by Hindu Law. Sections 7 and 8 of Hindu Adoption and Maintenance Act utilize the terms 'spouse' and 'wife' to describe the capacity for adoption, implying that the legislation does not recognize adoption by same-sex couples. In addition, adoption

8 Evan Wolfson, '20 Years of Marriage Equality: A Mountain of Evidence, Expertise, and Experience' [2021] European Human Rights Law Review.

9 Dario Sansone, 'Pink Work: Same-Sex Marriage, Employment and Discrimination' [2019] Journal of Public Economics.

10 Asha Bajpai, 'The Juvenile Justice (Care and Protection of Children) Act 2015: An Analysis' [2018] Indian Law Review.

11 Sonali Abhang, 'Right of Hindu Wife to Maintenance under Section 18 of Hindu Adoptions and Maintenance Act, 1956-Suggested Reform' [2015] IOSR Journal Of Humanities And Social Science Ver. II.

eligibility is described for Hindu males and Hindu females; hence, the application of these regulations to third-gender couples is unclear.

ANALYSIS OF ADOPTION LAWS FOR SAME-SEX COUPLES IN FOREIGN LEGAL SYSTEMS

In foreign jurisdictions, same-sex couples are deprived of their rights of adoption in some countries, and on the other hand, some most countries have legalized joint adoption by same-sex couples, including the “United States, South Africa, and the United Kingdom, which enacted draconian law in India”. However, we are still on a snail’s pace and have not amended or recognized the rights of same-sex couples as equal citizens of the country. Current adoption laws, such as the “The Hindu Adoption and Maintenance Act and Juvenile Justice (Care and Protection of Children) Act 2015”. Act do not recognize the adoption rights of same-sex couples in India. However, in these Acts, there is no reference that a single homosexual cannot adopt a child; these Acts enable a single person to adopt regardless of his sexual orientation or gender. And both Acts also permitted couples to adopt a child, but only legally married couples and not covers within ambit the same-sex couples, similar to the UK’s The Hindu Adoption and Maintenance Act, which first discriminated against couples in terms of adoption by prescribing adoption for married or single couples but not same-sex couples.

“England and Wales pass the Adoption and Children Statute of 2000”¹², which allows same-sex unmarried couples to adopt children. This Act is supported by the Labour Party, which subsequently passes regulations criminalizing discrimination based on sexual orientation, resulting in the Equality Act of 2010.

“The United States was the first country to adopt constitution values of individual liberty, but same-sex couples still face stigma in society”. According to a general social survey, 77 percent of people viewed same-sex relationships as morally wrong in 1988 and 1991, but that number dropped to 40 percent in 2014, and the number of same-sex couples has doubled in recent years. This is the result of the judiciary’s active participation in filling gaps caused by societal shame and legislative inactivity. Numerous states in the United States have amended their constitutions to define marriage as the union of a man and a woman”. In 2004, “George W. Bush” proposed a constitutional amendment prohibiting same-sex marriage. “He referred to the union between a man and a woman as the only legitimate form of marriage, describing it as one of the most essential and permanent institutions of our civilization” (The White House, 2004). In response, the “Executive Board of the American Anthropological Association” issued a statement stating that it did not support the view that civilization or viable social orders depend upon marriage as an exclusively heterosexual institution and that same-sex partnerships can contribute to stable and humane societies (American Anthropological Association, 2004). Under the “Massachusetts Constitution, the Supreme

12 E Wayne Carp and others, ‘Adoption and Confidentiality.’, *Families by law: An adoption reader*. (2004).

Court of Commonwealth determined in November 2003 that same-sex couples are constitutionally eligible for civil marriage"¹³.

Civil partnership legislation went into effect in the "United Kingdom in December 2005, granting same-sex couples the same rights as married couples, including adoption rights". In 2007, the leader of the "Roman Catholic Church in England and Wales"¹⁴, Cardinal Cormac Murphy O'Connor, described the legislation as a new form of morality (BBC News, 30/01/2007)". He argued in a letter to Cabinet Ministers that the Church's teaching prevented its adoption agencies from placing children with gay and lesbian parents on the grounds that Catholic adoption agencies would be acting against the teaching of the Church and their own consciences (BBC News, 23 January 2007). "The British Association of Adoption and Fostering (BAAF)" replied that same-sex couples made a significant contribution to the pool of adopters, which nevertheless required expansion (British Association of Adoption and Fostering, 2007)¹⁵.

In recent years, Ireland has made considerable strides in terms of lesbian and gay equality. Initiatives such as the "Employment Equality Acts of 1998"¹⁶ and 2004 and the "Equal Status Acts of 2000 to 2004" were implemented to criminalize discrimination and ensure greater equality and involvement for gay and lesbian individuals in Ireland. In 2002, the Equality Authority's study on partnership rights suggested the introduction of laws granting equal rights to individuals, same-sex couples, married and non-married heterosexual couples in the areas of adoption, parenting, and fostering.

"In 2005, Spain legalized same-sex marriage". In the first case, the "Spanish government" opted to provide full marriage rights to same-sex couples by adding just one language to existing law¹⁷: Marriage will have the same conditions and outcomes regardless of whether the parties are of the same or different sexes (McLean, 2005). Spain is a mainly Catholic nation, and criticism from the Roman Catholic Church was intense. The Spanish Bishops stated that they did not believe homosexual rights should be discriminated against, but that social institutions must be safeguarded. The Vatican also rejected the bill, describing it as profoundly unjust (BBC News, 18 June 2005).

Analysing the Adoption Laws in India through the Lens of Constitution of India Adoption-related statutes violate "Articles 14, 15, and 21 of the Indian Constitution"¹⁸.

13 Wendy E Parmet, Lauren Guth Barnes and Lorianne Sainsbury-Wong, 'Commonwealth of Massachusetts Supreme Judicial Court Brief and Record Appendix for the Plaintiff on Reserve and Report from the Single Justice, Finch, et Al. v. Commonwealth Health Insurance Connector Authority, et Al., No. SJC-10748 (Filed September 2010' [2012] SSRN Electronic Journal.

14 Norman Bonney, 'The Monarchy, the State and Religion: Modernising the Relationships' [2010] Political Quarterly.

15 John Simmonds, 'Holding Children in Mind or Holding Therapy: Developing an Ethical Position' [2007] Clinical Child Psychology and Psychiatry.

16 Maeve Regan and Ailbhe Murphy, 'Employment Equality Act 1998' [2017] Employment Law.

17 Anna C Forgie, 'El Derecho A Amar (The Right to Love): Same-Sex Relationships in Spain and El Salvador' [2011] Northwestern Journal of International Human Rights.

18 Marvin A Solberg, Michael K Gridley and Rosalind M Peters, 'The Factor Structure of the Brief Cope: A Systematic Review'.

“Article 14 gives every Indian citizen the right to equality before the law and equal protection of the law”. It is a fundamental right that is part of the Constitution’s essential foundation. Article 14 seeks to eliminate arbitrariness from state action, as all acts of arbitrariness entail the antithesis of equality¹⁹. The adoption discrimination between married and unmarried couples fails the classification test and is arbitrary since classification is inherently unjust, unfair, and illogical. Furthermore, there is no rational foundation for discriminating between same-sex and different-sex couples on the basis of their sexual orientation, as there is no evidence to suggest that same-sex couples are inferior in any way to different-sex couples in terms of parenting. According to research, having LBTQIA+ parents has no effect on a child, and in fact, children raised by same-sex parents perform better in both primary and secondary education.

Article 15 forbids discrimination based on sex, which includes discrimination based on sexual orientation, as stated in “National Legal Services Authority v. Union of India”²⁰. Therefore, the adoption rights of same-sex couples are protected under Article 15 since they cannot be subject to discrimination based on their sexual orientation, and they must be provided the same adoption rights as couples of other sexes.

As stated in “K.S. Puttaswamy v. Union of India”²¹, Article 21 safeguards life and individual liberty, which includes the right to live with dignity. In “Navtej Singh v. Union of India”, the court cited a Canadian decision in which it was determined that human dignity is violated when unfair treatment is administered based on personal characteristics or circumstances unrelated to an individual’s needs, capacities, or qualities²². It was also determined that the LGBT community has the same human, fundamental, and constitutional rights as other citizens, as these rights are intrinsic natural and human rights, and the members of the community should not be subjected to socially moralistic treatment. The ineligibility of same-sex couples to adopt hurts the community’s dignity because it is based on their sexual orientation, which is unrelated to their capacity or quality as potential parents.

COMPARATIVE ANALYSIS OF ADOPTION LAWS FOR SAME SEX COUPLES ACROSS THE GLOBE

As we have discussed above in India, we do not have any law which can regulate the law relating to the adoption of same sex couple like it does not recognize their marriage but there are few countries that have not just recognized their rights of marriage but also the adoption. The logic behind this recognition is that everyone has the right to enjoy marriage, adoption and with that most importantly parenthood and it should not be discriminated on the basis of same sex of the parents. Laws

19 Romi Jain, ‘Education for the Hijras: Transgender Persons of India’ [2018] Knowledge Cultures.

20 Manjeet Kumar Sahu, ‘National Legal Services Authority v. Union of India & Ors. (AIR 2014 SC 1863): A Ray of Hope for the LG BT Community’ [2016] BRICS Law Journal.

21 Menaka Guruswamy, ‘Justice K.S. Puttaswamy (Ret’d) and ANR V. Union of India Andors’.

22 Dixit (n 2).

related to adoption by same sex couple is still the area where the development is going on and soon, we will see that all the countries will adopt this no matter what is the gender of the couples.

Members of the LGBTQ+ community are also Indian citizens with equal socioeconomic, political, and cultural rights. Because our culture is secular, democratic, and republican, every person, regardless of sexual orientation, gender, or other criteria, is treated equally. The case *Navtej Singh Johar v. Union of India*²³ decriminalised the consensual sexual conduct of same-sex couples. The elimination of the pariah provisions of harsh Section 377 of the Indian Penal Code, 1860²⁴, places LGBTQ+ couples on an equal footing with other couples and helped them to overcome their fear of being prosecuted for their sexual activities. In enabling only heterosexual couples and single persons to exercise adoption rights, the Juvenile Justice Act and Adoption Regulations enacted in 2015 and 2017 failed to adapt to the jurisprudential and sociological evolution. These laws contradict Articles 14 and 15 of Indian Constitution, which prohibit discrimination based on race, gender, and sexual orientation, respectively. It also violates Article 19 of our Indian Constitution which guarantees freedom of speech and expression.

In nations such as Spain, Belgium, etc., same-sex adoption is already permitted. India is a nation that decriminalised homosexuality in 2018, and LGBTQIA+ rights have just recently been acknowledged. Legislation controlling adoption came into effect during a period in which homosexuality was criminalised. Now that the status has been legally altered, it is necessary to realise the community's rights and provide them with equal treatment to the heterosexual segment of society. Governments must promote sensitization efforts to eliminate the misconceptions and social stigma associated with the lifestyle and relationships of community members.

Not only should the state permit same-sex weddings, but it should also amend current laws to enable same-sex couples to adopt. If governments allowed same-sex marriages and parenting, it would be of great help to children who are victims of this pervasive ambivalence.

CONCLUSION

Couples of the same gender are citizens of India and have equal rights in the social, economic, and political arenas. As our nation is "Secular, Socialist, Democratic, and a Republic, all citizens are treated equally with regard to sexual orientation, gender," etc. It is evident from the "Supreme Court of India's ruling in *Navtej Singh v. Union of India* that section 377 violates Article 14 of the Indian constitution by being wholly arbitrary, vague, and having an unlawful objective". Section 377 has been decriminalized, and the same applies to adoption laws that are discriminatory against same-sex couples. "Article 21" and the Yogyakarta principle guarantee the right to self-identity.

²³ Ibid.

²⁴ Parul Yadav and Komal Vig, 'Pruning of Section 377, Indian Penal Code, 1860 and Changed Dynamics of Morality in Indian Society' [2019] *Humanities and Social Sciences Reviews*.

In the judgment, “Justice Nariman sheds light on parliamentary legislative comprehension by enacting the Mental Healthcare Act of 2017”, which defines mental illness and dispels all misconceptions about same-sex couples in the society, as the majority of people believe that the adoption of a child by a same-sex couple will result in the unhealthy development of the mind and body. As in the “K.S. Puttaswamy case”, it was determined that the constitution protects the right of every Indian citizen to live in dignity and to privacy, including the right to make their own decisions regarding intimacy and lifestyle. “J. Chandrachud” argues that legislation should not be based on moral principles that are antithetical to the constitution, and that the rights of same-sex couples are limited by factors such as caste, gender, class, religion, and community. The adoption laws are discriminatory because they do not meet the classification test of “Article 14 of the constitution” because the laws for adoption specifically mention capacity only for the married couples and single person as married couples can adopt than why not unmarried or same-sex couples, marriage is a social norm, not all citizens follow these norms, it may not be normed for someone, and “Article 21” supports the right to live one’s life in a way that he or she chooses rather than what is expected of them. Our constitution is based on the vision of an inclusive society and supports the individual’s pluralistic way of life, not on majoritarian principles. The nations that are peaceful and advancing have eliminated rules that discriminate against same-sex couples and have made it possible for both partners to adopt a child through judicial declarations or legislation. It is then up to the individuals to marry or not. The laws should be non-discriminatory for all so that the LGBT community has equal rights in every aspect. The government should amend the laws of adoption in India for a same-sex couple, or the judiciary may do so because our constitution is progressive, as in the case of the “Sabarimala temple”, where the laws are discriminatory and in violation of the constitution. Some states are modernizing while others stubbornly adhere to antiquated beliefs. It will be a lifeline for them and gays, as their countless children reside in the foster care system. Therefore, “India” should take this progressive step for their rights through either judicial or legislative action.

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The Economics of ADR: Analyzing the Importance of Effective ADR Regime from the Lens of the Economic Factors

Ms. Latika Choudhary*

ABSTRACT

The term Alternative dispute resolution “ADR” refers to multiple private mechanisms for resolving conflicts, which are independent of trial in a court of law. ADR around the world have gained prominence in the past and are often attempted to be resolved by way of ADR mechanisms for many a benefit. While the available mechanisms have proven to be cost and time effective when compared to the litigation process, economists are particularly interested in it for other reasons. First, from an ex-post perspective, the way the dispute resolution occurs affects the operation of the legal system. Second, from an ex-ante perspective, vindication of rights affects the primary behavior and investments as well, in prospective dispute avoidance. The available literature on economics of ADR is bifurcated into two heads, one dedicated to the interests of the parties litigating for utilizing ADR and the other emphasizing on the social interest in ADR. This paper will dwell into the economic analysis of ADR from both the above-mentioned perspectives, beginning with identification of conditions which incentivize ADR and the consequent social implications of the same.

Keywords: ADR, economics of ADR, effective ADR, Dispute resolution, social implications of ADR.

INTRODUCTION

Alternative dispute resolution has today gathered the understanding, to be perceived as a set of techniques for dispute resolving, alternative to the long, tedious and costly court procedures. While the hallmark of an effective justice delivery system is speedy redressal of disputes, the litigation process more often than not becomes unavoidably lengthy and time consuming. ADR mechanism gained popularity back in the 1990s whereby it was seen as a weapon for reducing the backlogs of the court

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and it is primarily for this very reason, in the current times, that ADR gained immense popularity. In India specifically, the inception of ADR for administration of justice has progressed significantly as a means to ensure effective settlement of dispute. The parties have multiple options to choose from for resolution of dispute. More importantly, this mechanism of dispute resolution has been acknowledged both at the domestic and global level as they make good business sense considering the disputes are resolved timely and, in a cost effective manner.¹

EVOLUTION

ADR may have gained prominence in the recent past but it is not a new practice. People all over the world have resorted to non-judicial methods to resolve conflicts. In fact mediation is one of the oldest, and the most popular of ADR methods which has been utilized since decades.² The Hawaiian highlanders of Polynesian ancestry devised their own unique indigenous system for amicable settlement of conflicts whereby families at dispute would come together to discuss the issues under the guidance of a leader.³ Similarly, China had embraced mediation mechanism very early owing to its conservative opinions about dispute resolution, which have evolved from Confucian ethics. Confucius has preached harmonious balance in the society and thus Chinese mediation focusses on going beyond mediating, to guiding the parties to have a more harmonious relationship with one another.

Traces of presence of ADR has also been witnessed and evidenced in the more recent past around the globe. In the United States, the ADR movement was launched in 1970s, which commenced as one of social nature to resolve civil rights disputes and tackle the issue of delayed & expensive litigation.⁴ In India, various ADR tools have been in use from ancient times ensuring no intervention of formal legal methods. Infact in the ancient and medieval period, conflicts were resolved by a neutral third party, often an elder or village chief. India has been deemed as a pioneer for achieving the social goal of speedy justice, since the Vedic period, through informal resolution mechanisms. Adoption of adversarial system of justice later in the 19th and 20th century proved inadequate for being costly and time consuming. There were different arbitral bodies in existence which led to the emergence of the panchayat raj system, particularly in the rural areas of India. Further in the year 1980, the Government of India took the initiative by establishing a committee under the chairmanship of Justice P. N. Bhagwati, former chief justice of India. Upon its recommendations, the Parliament of India enacted the Legal Services Authorities Act, 1987 in consonance with Article 39A of the Indian Constitution. The implementation of this Act ensured adherence

1 Qadri, Shayiq. (2021). Evolution of Alternative Dispute Resolution in India: Laws and Practices Introduction.

2 Wall and Dunne, 2012

3 <https://viamediationcentre.org/readnews/MjY3/Origin-of-ADR-across-the-globe>

4 Alternative Dispute Resolution Practitioners Guide p5 <https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf>

to the true spirit and utility of Look Adalat for speedy redressal of disputes concurring to the adage 'justice delayed is justice denied'.⁵

ADR received exposure in India with the coming of the Trade Dispute Act, 1929 which was meant to allow conciliation process for settlement of industrial disputes by creating Board of Conciliation and Court of Inquiry. While initially the Board did not have the authority to bind the parties with its decision, the scenario changes with the enactment of Rule 81A of the Defense of India Rules, empowering the Central Government to compulsorily refer disputes to adjudication and enforce the award. This rule was later embodied in the Industrial Disputes Act, 1947.

While ADR is steadily being explored, it is yet in its infancy stage in India. The first arbitration enactment in India was the Arbitration Act 1940 which was deemed to be ineffective for various reasons and contributed to the litigation load as a result of challenge to the awards.⁶ To rectify the issue of efficacy, the Government of India enacted the Arbitration & Conciliation Act of 1996, which lays down the provision of challenging the award on limited grounds and in the manner prescribed only. While this was a step in the right direction, the Act only regards civil disputes. Also, there does not exist a specific Act which pertains to the entire country i.e. India thereby representing the need for improvement.

PARTIES' INCENTIVE TO TURN TO ADR

ADR mechanism have been designed to meet a variety of objectives, some of which are directly focused on improving administration of justice and efficient settlement of disputes. Some objectives are concerning the economic restructuring or management of conflict in communities. While these are the advantages in terms of the outcome of ADR methods, parties also have a varied set of incentives to opt for ADR methods over choosing litigation.

The incentives for a party to choose ADR mechanism stems from the assumption that the same would prove beneficial in increasing their welfare by reducing transaction costs of dispute resolution as well as paving the way for enhanced quality of outcome. With the intent to better define the increased welfare aspect, identification of benchmarks for assessing ADR proceedings is imperative. Two available primary alternatives to ADR are public adjudication in a court of law and direct negotiation.⁷ While trying to understand the conditions due to which parties may be more interested in opting for ADR mechanism, it is necessary to differentiate between ex post ADR agreements, which are entered into after the dispute arises and ex ante ADR agreements, which are resorted and employed before the dispute arises. Since logically the party interests arise before dispute eruption and are not equivalent to the post dispute interests of the party, the implications of agreements to opt for ADR during the above mentioned

5 Tripathi, the Arbitration and Conciliation Act, 1996, 301, 4th Edn, Central law publications.

6 Malikul S Muhamad, ADR in Indian the USA, https://svym.org/viis_publications last visited on (25-08-2022)

7 Talia Fisher law and economics of alternative dispute resolution ch 14 p 314

two stages may be fundamentally distinct. Also, the scope and range of eventual consequences faced by parties may also be equally distinct in both stages. Another factor or incentive responsible for parties opting for ADR pertains to the difference between various ADR processes, most notably between binding and non-binding ADR methods.

ANALYZING EX POST ADR AGREEMENTS

When a dispute arises, parties may opt for ADR settlement mechanisms, as opposed to choosing litigation in a court of law. On comparison of the two available options, the market-oriented ADR proceedings allow the flexibility to parties to economize on the costs as well as risks of a trial. Additionally, ADR also offers unique benefit to the parties at disputes which are rooted in the fundamental distinction between ADR and courtroom trial.⁸ ADR allows the parties to choose an adjudicator for the dispute settlement while in a court of trial this option is not available with the parties. While choosing the adjudicator, a person expert in the field of the dispute is a key criterion, which ensures appropriate assessment of the technicalities of the dispute as well as alleviates the need to invest resources in educating the adjudicator on the subject matter of the dispute.

It is imperative to understand that the costs associated with ADR methods stem not only from the control parties are able to exercise while choosing the adjudicator but also from the fact that ADR methods such as arbitration allows parties to govern the procedural structure of the proceedings thus in essence permitting custom made characteristics as per personal preference. Similarly, the substantive norms utilized can assure that lesser time and resources are consumed in the adjudication process.

Assuming that the parties in a dispute are risk averse and a trial is to take place, immediate settlement of dispute becomes a lucrative factor which attracts the parties to resort to ADR. The risk can altogether relieve the risk through immediate settlement. While it is true that even ADR involves some amount of risk if it is binding, non-binding ADR which has some predictive value about trial also involves risk even though there may be settlement after ADR, but the settlement amount is likely to get affected by the ADR outcome. If parties do not settle, then aversion of risk as a factor may make the binding ADR methods more attractive than it would ever otherwise be. If the damage amount is uncertain, yet less subject to varying under ADR proceedings than under court proceedings, binding ADR will aid in reduction of risk for the parties. Thus, risk aversion makes immediate settlement as well as binding ADR more preferable than otherwise and decreases the frequency of trials.⁹

Another benefit of confidentiality of the proceedings makes ADR a more lucrative option for parties who may be tied in a very sensitive dispute. The parties also have the freedom to choose the outcome of their dispute as per their mutual preferences

8 Ibid at 315

9 Steven Shavell, *Alternative Dispute Resolution: an economic analysis*, discussion paper, Harvard law school

and are under no obligation to achieve a principled outcome as per a pre-existing norm.¹⁰ Widened zone of possible agreements, allowing extraction of reputational benefits and paving way for enhanced ex-post compliance are all few of the many advantages a party considers and is attracted to while choosing ADR proceedings.¹¹

Proponents of ADR have also claimed that ADR proceedings may prove to be superior to direct negotiations in terms of the capability to reach the point of resolution and also with regard to the content of resolution. While it may appear that these claims are purely intuitive, for instance in arbitration, it is easy to envision cases wherein disputing parties may fail to reach agreement due to conflicting expectations and assessments of the merits of the case¹², but at the same time agreeing on the procedure for adjudication, such as arbitrator or the procedural framework, may prove feasible. Similarly for the process of mediation, engaging in facilitated negotiations can aid the parties in reaching a negotiated and mutually acceptable agreement. Brown and Ayres¹³ have demonstrated that mediators have the ability to mitigate adverse situations to create value in negotiations through the process of chronological caucusing i.e. controlling flow of confidential information between the parties. Therefore, adverse selection entails confidential pre-contractual information while moral hazard implies hidden post contractual conduct, both of which are the result of parties' ability to keep the information hidden.

EX ANTE ADR AGREEMENTS

Benefits reaped from ex post ADR agreements can also be achieved via ex ante ADR agreements. Hypothetically, two parties are in a contract before any adverse scenario arises. The parties herein might be in a contractual relationship and even considering the issue of inadequate performance or breach of contract, or may not be in a contractual relationship yet recognize the likelihood of outcomes which may give rise to legal disputes. Parties herein are likely to adopt ADR methods if the same leads to mutual advantages¹⁴. EX ante ADR agreements stimulate amendments in pre-dispute conduct which consequently enhances the mutual benefits of the parties.

Another route by which ADR may yield gains for the parties is by changing the frequency of disputes. With the laws in place in any jurisdiction, multiple actions would be brought, arising from the dispute, which will utilize resources but will not produce much benefit. In this case, the parties will choose ADR mechanism which will be helpful in reducing the frequency of disputes and will be a one stop shop for the redressal of these multiple issues.

10 Mnookin, R.H.(1998) "Alternative Dispute Resolution," in *The New Palgrave Dictionary of Economics and the Law*. New York: Grove Dictionaries.

11 Ibid.

12 Landes, W. (1971) "An Economic Analysis of the Courts," *Journal of Law and Economics*, 14 (1): 61-107

13 Brown, J and Ayres, I. (2003) "Economic Rationales for Mediation," *Virginia Law Review*, 80: 323-402.

14 Supra note 9

Ex ante ADR agreements may also allow parties to the dispute in overcoming information or strategic hurdles so as to reach a mutually advantageous ADR agreements post dispute.¹⁵ Enhanced zone of possible agreements is also an advantage provided by the Ex-ante ADR agreements.¹⁶

Parties would be interested in ex ante ADR agreements if it would lead to reduction in cost of the dispute resolution. For instance, if the costs to be borne by each party were reduced by one third in each dispute, it would create a favorable condition for them to resort to ADR, even though in principle, the parties do not need to make an ex-ante agreement to achieve the reduction in cost. They are free to wait until the dispute actually arises to adopt ADR and still manage to cut up to one third costs. Therefore, while cost reduction is a huge advantage of ex ante ADR agreements, it is equally an advantage for ex post ADR agreements as well.

A distinct manner in which ADR aids the parties is that it may provoke a mutually beneficial change by enhancing the joint value which the relationship between them is producing.

All these benefits can only be experienced against the background of a pre-existent relationship between the disputing parties however in these situations the transaction costs may be high. In totality there are multiple ways in which ADR proceedings create the path for a more cost- efficient dispute resolution mechanism for the parties.¹⁷

SOCIAL IMPLICATIONS OF ADR IN CONTRACTUAL ORDERING OF DISPUTE RESOLUTION

The normative support for ADR proceedings is secured in the considerations of efficiency which generally underlies the contract enforcement.¹⁸ ADR agreement's efficiency is premised on the enhanced welfare of the parties, as is deduced from the choice they make to into ADR agreement. In addition to the intrinsic social value for improvement of welfare of parties, in many situations the mutual interest of parties positively aligns with the social utility function, make ADR agreements a more lucrative option. Thus, for instance, the mutual interest of parties to economize on resources specifically costs, runs in consonance with the public interest of resolving societal conflicts in a cost-effective manner.

Even so, the very fact that social welfare and interests of parties go hand in hand does not in any way assure or imply synchrony between these interests. Parties litigating do not absolutely bear the trial cost thus externalizing the costs pertaining

15 Kapeliuk, D. and klement, A. (2013) "Changing the Litigation Game: An Ex Ante perspective on Contractualized Procedures," *Texas Law Review*, 91(6) 1475-98.

16 Ibid.

17 Shavell, S (1995) "Alternative Dispute Resolution: An Economic Analysis," *Journal of Legal Studies*, 24: 1- 28.

18 Paulson, C.L. (2013) "Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure," *Arizona State law Journal*, 45:471-533.

to judicial salaries, court's time and infrastructural expenses, onto the taxpayer. Considering the subsidized costs of trial, the parties tend to save less from ADR methods than does the society at large and therefore end up facing suboptimal incentives to avoid trial.¹⁹ The discrepancy between the social interest and the parties' interests is caused by both the mirror-image phenomenon of the parties' failure to internalize the social benefits of holding trials in courts as well as the partial externalization of trial costs.

ADVERSE SOCIAL IMPACT OF ADR

While ADR mechanism has achieved many objectives it was meant to towards serving as a more efficient mechanism for dispute settlement, there are many underlying issues which erupt or cause hindrance in the process ultimately impacting the society at large. Adjudicating disputes especially civil assumes significant private characteristics in that the redressal of a dispute creates private utility for the disputing parties. In addition to the private utility is public goods linked to the channeling of disputes to the court, may be risked when ADR is opted for. A central public good provided by juridical process is in the form of legal precedent.²⁰ Many examples of judicial precedents for regulation of social behavior comprise of precedents on sexual harassment and the development of realm of domestic violence, in the courts.²¹ Legal precedents also feature characteristics such as of nonrivalry in the sense that from the very moment a body of precedent is formed in a court of law, unlimited number of individuals can use the same and also benefit from the entire diversity of attendant utilities. The marginal cost of providing legal precedent to a new or additional consumer is next to zilch. One agent shaping one's behavior as per the legal precedent does not diminish the ability of others to act in a similar manner. In addition to the characteristic of nonrivalry, the public good quality of in- excludability also exists in the framework of legal precedent. For instance, it is not feasible to grant copyright protection in a legal precedent or to prevent anyone without authorization to act in accordance with what is prescribed.

In reference to the public good nature, the market for ADR will be undersupplied with legal precedent. Private arbitrators, as well as the disputing parties, are not required to internalize the social benefits of precedent-setting in their utility functions, and they may therefore choose not to devote the maximum number of resources to the advancement of the law. Disputing parties will be encouraged to invest in the resolution of their own disagreement and freeride on others' efforts to create laws rather than making unpaid contributions to future parties through norm formation.

19 Shavell, S. (1999) "The Level of Litigation: private versus Social Optimality of Suit and of Settlement," *International Review of Law and Economics*, 19: 99-115.

20 Landes, W. M. and Posner, R.A. (1979) "Adjudication as a Private Good", *Journal of Legal Studies*, 8: 235- 84.

21 Resnik, J. (2006) " Secrecy in Litigation: Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk," *Chicago-Kent Law Review*, 81: 521-36.

Likewise, private arbitrators also will lack the incentive to produce precedent. Lands and Posner²² observe in this regard that since the establishment of property rights in precedents is next to impossible, the arbitrators will lack the required incentive to explain the consequences or result of their case. In addition to this, private arbitrator may also on purpose avoid explaining the results as the demand for their services may decrease due to rules which decrease the incidence of disputes and in such a situation maintaining ambiguity would permit them to entice a larger spectrum of future clients.²³ Therefore, only public provision of legal norms and absence of non-market motivations and incentives that exist within the scope of the public adjudication system would allow for the best possible growth of the law.

Even in situations where the legal concerns at stake are insignificant and where the trial is essentially revolving around the ascertainment of facts, adjudication performs central public role. Because, like in the prior case of legal precedent, court fact discovery serves the public interest and affects subsequent litigation. The trial acts as a public epistemic realm, providing the public with knowledge. For instance, the liability in a sexual harassment case as per the judicial finding acts as caution for the public against the defendant. ADR also limits the access to information, for instance, one of the main benefits that parties typically identify with arbitration is the ability to keep information confidential, that forms the factual foundation for liability in non-disclosure agreements. Non-binding ADR proceedings like mediation are frequently not founded on any fact finding, which undermines the aforementioned epistemic tasks. Therefore, the public may not receive enough information as a result of using ADR procedures, both binding and non-binding.

To sum up, the establishment of legal precedents, the dissemination of information to the public, and other public goods underlying adjudication may not be sufficiently provided in the settlement arena because disputing parties and private arbitrators will not internalize this range of social utilities in their utility functions. Due to freeriding tendencies, each person in the market will depend on others to provide standards of conduct and information—and will not be prepared to shoulder the costs of providing these public components of the judicial process—and will therefore depend on others. ADR will experience a less than ideal supply of these public goods as a result.

Network characteristics are a different set of issues connected to ADR and the privatization of adjudication. The phrase “network industry” refers to a broad range of businesses and products for which there are demand-side economies of scale: the utility that a solitary consumer obtains from consuming a network good positively correlates with the number of additional consumers of the commodity. A network good’s pricing and network size both influence how popular it is with users. Network industries can be broadly characterized as those whose aim is to act as a platform

22 Landes, W. M. and Posner, R.A. (1979) “Adjudication as a Private Good”, *Journal of Legal Studies*, 8: 235-84.

23 *Ibid* at 238

for consumer contact and which possess features that allow their users to share information, electronic signals, and standards. Systems of law and adjudication make up a network industry since they serve as hubs for communication and collaboration between people. The ability of the legal system to regulate social conduct and resolve conflicts depends on how many people use its services. The range of potential legal contacts between network members will increase with network size and membership, respectively.²⁴

Network competition has traits that qualitatively set it apart from competition involving traditional goods. Due to the decentralized market's structure and these competition features, it becomes challenging to supply network commodities due to two different types of legal norms and dispute resolution processes. The first issue is related to over-diversification: by increasing the network's effective size, each new member of the network increases the utility enjoyed by the other consumers of the good or service. The other network users benefit from his actual usage in a beneficial way. However, this social utility is independent of his personal utility function. A suboptimal set of legal and adjudicative networks with limited reach is likely to be the result. To put it another way, privatization of the adjudicative system through ADR opens the door to the establishment of numerous conflict resolution systems within a certain geopolitical unit as well as the rapid development of differential legal standards that go above and beyond the social optimum. According to Landes and Posner, having multiple arbitrators will probably result in "a bewildering profusion of precedents and no obvious method of harmonizing them. An individual contemplating some activity will have difficulty discovering its legal consequences because they will depend on who decides any dispute arising out of the activity."²⁵

CONCLUSION

ADR may result in market failures; undersupply of public goods associated with trial and network failures. In order to make a definitive statement with regard to the supply of the dispute resolution function in society, however, it is not sufficient to merely point to the existence of such market failures. Rather it is necessary to compare between the flaws entailed in private supply of these services and the problems that arise in the framework of its public supply, via state courts.

One cannot automatically assume that public adjudication systems will perform better when the private ADR market fails or that the government can resolve problems for free. The same inability to become efficient failures that define all public-sector bodies are thus inherent in the state adjudicative system. In the public adjudication model, judges' salaries and opportunities for advancement are not directly correlated with the level of utility that is produced by the adjudicative products they produce, so the incentive system may not be strong enough to encourage judges to make efficient

24 Gillette, C.P. (1998) "Lock-In Effects in Law and Norma," Boston University Law Review, 78: 813-33.

25 Supra note 22 at 239

decisions or to write high-quality rulings. Judges may lack the motivation to adjudicate effectively since they are not immediately impacted by market pressures, despite being subject to public and other sorts of scrutiny. The incentive structure and actual capacity to adjudicate effectively are both hampered by non-exposure to market forces. The signals sent by market forces and the price mechanism in the private sector are immensely clear and more comprehensive than the process for information transfer between public judges and the state's citizens. Judges might not be able to draw these conclusions outside of the market setting due to the dispersed nature of the information, which is required for creating effective precedents and adjudicative procedures. In other words, after taking into account the potential benefits and drawbacks of both systems, an evaluation of ADR and of the appropriate social posture towards it must be conducted.

Public Awareness and Public Participation Under Right to Information Act, 2005: An Appraisal

Ms. Prabhjot Kumari & Dr. Amandeep Kaur***

"Information is a basic human right and the fundamental foundation for the formation of democratic institution."

-Nelson Mandela

INTRODUCTION

In a democratic country it is the government's responsibility to establish a transparent connection with their people in order to maintain a harmonious relationship between the sovereign and masses. Right to information emerges as such statutory agenda which encompasses a nexus between government and common people. Often we come across such issues, matters or problems which require the cooperation of the concerned departments and absence of the same will create a disruption in the concerned person's life. India, world's largest democracy is not free from such issues where the common people are so aggrieved by the system that they often take steps to grasp out the situation by tackling with the government itself. Right to Information is often used as a tool to tackle various problems. Democracy is where government is *of the people, for the people and by the people*; so the participation of the people is a very important aspect and that is not possible if they don't have a proper information. Good governance is consists of legitimacy, participation and transparency. *Accountability* forms the basis of all this because at the end of the day there should be some authority which is to be held accountable for all the affairs concerned. Administration works efficiently as a result of proper checks and balances. and this is possible only when we have common people equipped with proper knowledge and awareness regarding their rights and about the consequences of every step which is to be taken by the government in this democratic country.

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CONCEPT OF RIGHT TO INFORMATION

Right to Information is a very important aspect of a democratic nation. Indian democracy is dynamic in nature where time to time various concepts come into existence as a result of judicial activism, public actions, public policies etc. Right to Information provides access to information held with public authorities to every Indian citizen. Right to Information as a fundamental right is intrinsic part of Right to Know under Article 19 of Indian Constitution and was recognized through the Right to Information Act 2005. It was observed by Madras High Court that right to information or the right to freedom of information refers to an individual's right or freedom to seek public information where information means any material relating to the affairs, administrative or decision of a public authority. It is mandatory that the flow of the information must be free.¹ There are three fold objects of Right to Information Act, namely to secure access to public information; to promote transparency and accountability and to establish a remedial structure to access information. The very objective of the Act is to disseminate the information rather than withholding so that the citizens would not be deprived of their right to know that is the fundamental right interpreted under Article 19 of the Indian Constitution. Recognition of the above said right totally depends upon the public awareness and their participation in order to exercise their fundamental right in a fruitful way which is only possible in a democracy and India is the world's largest democracy.

PUBLIC PARTICIPATION

*"Life is a perennial search for the truth. The restless swan (soul) is on the journey Infinite to find the truth."*²

Savoir est pouvoir is a french saying which means knowledge is power. James Madison very rightly said, "The knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives." Indeed knowledge is a most powerful weapon which empowers the citizens to question the government for do's and don'ts by exercising their right to get information for the same from public authorities. It is possible only when the citizens are well aware of their rights and familiar with the ways to exercise such rights through a proper channel as established by the statute concerned. Public awareness and public participation is very important aspect in the field of right to information. Public participation is important but that should be meaningful also so that the effective results are attained in consequence to it. While talking about the welfare state it often strikes in mind as in current scenario that where are we heading towards because no signs are to be seen for economic, social, financial and political growth in a fruitful manner. The reasons behind all this is weakening of our system, loopholes in governance, dearth in the proper administration which fails to establish a control mechanism for the good governance.

1 *Diamond Jubilee Higher Secondary School, Erode District v. Union of India*, 2007 (3) MLJ 77; *Thalapalam Service Co-Operative v. Union of India*, 2009 (3) KLT 1001.

2 Rigveda 10.8.18

As the governance in any democratic country implies the effective participation of the people of the country in the process of the government but for that the citizens must have the necessary information that exactly shows how things are being done and also participate in planning processes, besides this the judgment of whether certain plans and schemes are useful for them or not. The concept of Right to Information not only helps in improving the quality of the decision-making process by removing unnecessary provisions of the secrecy but also facilitate the process of the policy formulation on the issues of their concern.³

The essence of RTI lies in the participation of the people in the democratic process. *Madabhushi Sridhar Acharyulu*, Information Commissioner in the Central Information Commission, noted that making people aware about the Right to Information (RTI) and creating awareness on the subject goes a long way in promoting integrity and promoting public participation in eradicating corruption. As per *Bhagavad Gita, Chapter IV, Verse 17*: "The truth about action must be known and the truth of inaction also must be known; even so, the truth about prohibited action must be known. For mysterious are the ways of action." In present scenario secrecy in the system breeds corruption. Voters have every right to know which candidate they choose to represent in the election. Political corruption has a serious impact on democratic governance. Therefore, by questioning the system, attention should be paid to strengthen public participation. Further, public participation in RTIs can be achieved in the following manner, as in the case of *Bennett Coleman v Union of India*, in which the Hon'ble Chief Justice observed that, "It is indisputable that the freedom of press embodies the right of the people to read." From the analysis of this statement it can be inferred that the right of the people to read is called the right of the readers to receive information'. It makes this as a way of public participation to obtain information that they expect without being asked.

PUBLIC PARTICIPATION AND EMPOWERMENT

Active public participation is the soul of the democratic form of governance. In developed countries the development of opinion is essential before making laws. Participation in political and economic processes and the ability to make informed choices are important in a democracy. Enlisting the support and participation of citizens is considered mandatory. We can't have anything like "full participation" as a whole. But participation in various parts of the decision-making process and creating a platform for genuine debate and dialogue for a deeper understanding of the issues should be a part of the decision-making process of the government. Participation arises from the process of gaining space by people to express the necessary bottom-line of development, rights, or any other matter in a systematic and logical manner. This information will eventually be used to build tools of governance, along with

3 Rajvir S Dhaka, "Right to Information and Good Governance", *Indian Journal of Public Administration*, Vol. IV, No.3 (July-September, 2009) 536 retrieved from https://shodhganga.inflibnet.ac.in/bitstream/10603/182340/9/09_chapter%201.pdf, visited on August 11, 2022.

understanding, with knowledge. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to civic oversight bodies. They are created for various purposes, for example for profit, public, education, health, to comment on draft policies or laws etc. An effective participation depends on information that is very certain. The development of a vast and diverse country like India is not possible unless participatory management in governance is made practical. For this there is a need to provide the right kind of information to the people which is lying in the files of the government. People should be involved and informed at every level. They should know exactly how things are being done. Meaningful participation of people in major issues affecting their lives is now an important component of democratic governance and such participation can hardly be effective unless people are aware of how the government conducts its business. This can be done by increasing public access to official information.⁴

The Participation of people is no longer perceived as periodical exercise of right to franchise. Democracy means making informed choices, having freedom to know the conduct and working of the government, to address the grievances of public, to find solutions to the arrogance of officials, it requires efficient and accountable working which is very vital for the very effective functioning of democratic society.⁵

The Freedom of information must lift the veil of secrecy if social justice is to be achieved. Efforts of Non-Governmental Organization's and activists through informational system alone can empower the person in the street. When Non - Governmental Organizations and other social action groups, coupled with investigative journalists of the fourth estate, supported by the socio-economic information groups bring class-actions, representative suits, public interest litigations or social-action litigations, then only effective justice is possible for the poor. Sometimes the need for a vital document is discovered in the course of proceedings and parties may not be able to secure such materials. Such information, if allowed to remain beyond the reach of the court or suitors, will impair their right to justice. Withholding off acts by public authorities or corporate managers, can make social justice a casualty.⁶

Another example of People participation can be seen in the demand for the Lokpal Bill in the year 2011.⁷ It seems that the anger-volcano has, finally, erupted in the hearts of Indians. The People of the nation have been exhausted with the overdose of corruption and callousness on the part of Government bodies. Corruption allegations against most of the political leaders and the inaction from the government's side compelled the "aam admi" to join the protest of the anti-graft crusader Anna Hazare.

4 Retrieved from https://shodhganga.inflibnet.ac.in/bitstream/10603/88152/5/05_chapter%201.pdf visited on August 11, 2022

5 Sebastian Paul, "Let the veil be removed" *Niyama Sameeksha, Legal Literacy magazine*, Niyama Sameeksha trust (2000)85.

6 Id.

7 India Against Corruption, Retrieved from www.indiaagainstcorruption.org/ Nov2011 New Delhi, Visited on August 11, 2022

With innumerable scandals the country is facing now, social activist Anna Hazare has decided to take things in his hand and take on the corrupt “babus” by fasting unto death against corruption. Hazare’s decision for holding the indefinite fast came over his demand to introduce a new Lokpal bill in the Parliament to tackle corruption that has hollowed the roots of Indian political scenario. Anna Hazare has led a number of anti-corruption movements in India over the last four decades, which have resulted in legislation such as the Right to Information (RTI) Act and the creation of a Lokpal (ombudsman).⁸

RTI Act as A Tool Of Empowerment For Common People

Under RTI Act, citizens and citizen groups are empowered to approach the concerned department and check the planning and development permissions in detail as to whether they were given after giving due consideration to all factors or any undue compromise is made to favor some groups.⁹ They are also empowered to approach the department to arrange inspection of buildings or trade premises to find out whether the building activity or trade activity is in accordance with the permissions and conditions. They can make appeals to the authorities based on their actual monitoring of actual development and its deviation from sanctions. Citizen/ citizen groups can also seek information on environmental protection data from the public authority using the RTI Act. Citizens can invoke RTI Act and seek information on the maintenance of the sites and regulation of development around the structures/ areas and even perform social audits to bring about any major differences between the allowed and actual development. The citizens and citizen groups can make effective use of the RTI Act to ensure that the self-employment benefits reach the appropriate target groups laid down under the programme and that they are effectively utilized for the employment generation of the unemployed. The RTI Act can be used as an effective tool in ensuring that the unemployed and under-employed have got livelihood and acquire employment through improved skills. The RTI Act can be used as an effective tool in ensuring that the incentives proposed for organized women groups are properly provided and the women groups are empowered and benefited socially and economically. So, undoubtedly RTI Act serves as a great tool of empowerment for the common people.¹⁰

People’s Participation and Democracy

Right to Information being a right vested amongst the citizens of India, should be known to them so as to be exercised effectively. Democracy thus in real terms requires

8 Retrieved from <https://eprints.whiterose.ac.uk/123708/1/Anna%20Hazare%20-%20A%20Corruption%20Crusader%20and%20his%20Grassroots%20%20Wisdom%20-%20edited%20v2.pdf>, visited on August 11, 2022

9 The Right to Information Act, 2005- A Guide for Urban Local Bodies (ULBs), Retrieved from <https://www.cgg.gov.in/publicationdownloads2a/RTI-ULBs.pdf>, visited on August 11, 2022

10 Ibid, p-8.

public to act as a sovereign force. As per the Section 26 of the Act¹¹, it states that the ruling Government may develop and organize educational programmes to advance the understanding of the public, regarding how to exercise the rights conferred to them under this Act. This could thus be achieved to numerous people by way of use of television channels and various multimedia platforms like newspapers, radio's etc. which have a reach to a large number of people in the society.

When we talk about democracy, it needs some democratic rules to execute in real manner. A form or system of government, which rule for the welfare of the people and by the people, is known as democracy. *Anthony Arblaster* stated, "Democracy refers to a situation where power and authority ultimately rest with the people. Democracy ensures the accountability of those holding power to the people who are the ultimate source of that power."¹² *David Held* explains different 'models of democracy'¹³ i.e. *classical democracy, republicanism, liberal democracy, competitive elitism, democratic autonomy* and many more. *Liberal democracy* is an indirect and representative form of democracy and the inherent democratic elements reflects the belief that government should in some way be accountable or sensitive to the people.¹⁴ Indian democracy is a combination of liberal and representative democracy. It is the consent of the people, which makes government authority legitimate. It is an ethos, a social value, national commitment and lastly a way of life. Democracy entails a system of governance and keeps the rule of law, a free press, energetic civil society organizations and effective and independent public bodies.¹⁵

Participatory democracy and Right to Information Law

Transparency and accountability in administration is the *sine qua non* of participatory democracy. Information is the oxygen that any citizen needs to live in the social structure of the society and maintain its democratic balance. RTI thus became a tool for promoting participatory development, strengthening democratic governance and facilitating effective delivery of socio-economic services. Right to Information (RTI) in India was developed through Judicial pronouncements thereby distinguishing itself as a Fundamental Right under Article 19 (1) (a). After a gradual period of time, realizing the importance of this right to know, this right was established in 2005 as a full-fledged statute in the name of "The Right to Information Act, 2005".¹⁶ This RTI

11 Right to Information Act 2005.

12 Janaki Srinivasan, Rajeev Bhargava and Ashok Acharya "Democracy in Political Theory: An Introduction", (Noida: **Dorling** Kindersley, Pearson , 2010) 108 Retrieved from <https://shodhganga.inflibnet.ac.in/handle/10603/103556/simplesearch?> visited on August 12, 2022.

13 David Held, "Models of Democracy", 2nd ed.(Stanford, C.A. : Stanford University Press, 1996)

14 Andrew Heywood, "Political Ideologies" (London: Macmillan Press 1998), 46, Retrieved from <https://shodhganga.inflibnet.ac.in/handle/10603/140197>, visited on August 12, 2022.

15 S.N. Yadav and Indu Baghel, "Good Governance and Human Development" (New Delhi: Jananda Prakashan, 2009, p- 46.

Act became a pioneer tool to the citizens of India for promoting, protecting and defending their Right to know. Good Governance may be termed as a synonym for the work carried out by a Government where the maximum benefit is given to the maximum number of people. India being a huge democracy needs participation from every front to implement the objective of good governance. The scenario often turns that laws of public interest and benefit is mostly used by the elite section of the society. However, this piece of legislation stands as an exception as it has reached its extent to the remote corner of the country. The paper will study the implementation and extent of this prominent law to the grass root level of India through the participation and activeness of common people who thrive to promote good governance through their extra ordinary works.¹⁷

With the growing consciousness of participatory democracy, the inbuilt desire to know and participate in the matters concerning the country or own self, reached a new height that paved the way in which it could be ascertained and ensured was through bringing the objective of transparency and accountability in the administration. In the International arena, the need to disseminate information was hugely felt and the first ever RTI law was enacted by Sweden in 1766, largely motivated by the parliament's interest in access to information held by the King. The Swedish example was later followed by the US, which enacted its first law in 1966 and then by Norway in 1970. Similarly, several western democracies enacted their own laws (France and Netherlands 1978, Australia, New Zealand and Canada 1982, Denmark 1985, Greece 1986, Austria 1987, Italy 1990).¹⁸ In India, though Article 19(1) (a) of the Constitution indirectly guaranteed the right to know but this right was overshadowed by the Official Secrets Act, 1923. Thus the entire process of Government functioning was shielded in secrecy. In such circumstances, the Indian judiciary played a vital role to strengthen the spirit of democracy. The Supreme Court in *S.P. Gupta v. Union of India*¹⁹ endorsed the view that under a democratic set up, the people have right to know about the functioning of the Government. Again in *Prabhu Dutt v. Union of India*²⁰, the Supreme Court held that the right to know news and information regarding administration of the Government is included in the freedom of press. There were many more such decisions that reiterated the fundamental right to know and access information.

The Right to Information (RTI) is the incarnation of prosperous democracy which

16 Sahina Mumtaz Laskar, "Importance Of Right To Information For Good Governance In India" , *Bharati Law Review*, (Oct-Dec, 2016), Retrieved from <http://docs.manupatra.in/newslines/articles/Upload/AC9CD2C7-B8AD-4C5A-B910-3751BFE5CB28.pdf>, visited on August 12, 2022.

17 Id.

18 Retrieved from <http://docs.manupatra.in/newslines/articles/Upload/AC9CD2C7-B8AD-4C5A-B910-3751BFE5CB28.pdf>, visited on August 12, 2022.

19 (1993) 4 SCC 441.

20 AIR 1982 SC 6.

indicates promotion of human-rights and dignity. United Nations General Assembly proclaimed September 28 as the 'International Day for Universal Access to Information' so as to raise the awareness about people's right to access government information while promoting freedom of information as essential to both democracy and good governance. Information is the currency that citizens require to contribute in the existence and governance of society. RTI offers an invaluable tool to find out information that can make their lives better.²¹

"It is the first responsibility of every citizen to question authority" said Benjamin Franklin. RTI symbolizes advancement of human civilization and harmonizes the public interest. Its basic object is to empower the citizens by promoting transparency and thus eliminating corruption and making system responsive for the cause of people. It goes without saying that an informed citizen is better equipped to keep necessary vigil on the instruments of governance and RTI is a channel to transform the civil society into a force that ensures accountability from the government and thereby increasing the trust of people.²²

Since its inception in 2005, exactly 17 years have passed and one can safely say that RTI has made its impact felt in the functioning of Government bodies and the larger governance discourse, as the staff has become active, conscious, regular, punctual, accountable and responsible. The corruption in the division has reduced to an extent. Big scams have been averted by the use of RTI. People do feel more empowered. Their bargaining power vis-a-vis public officials has increased manifold. A great change has come in India in the last decade in the power equation between the sovereign citizens and those in power, as RTI Act has lent voice to the aspirations of ordinary citizens in issues of governance. It has given the common people, a defining power to shape the government schemes and policies. It has empowered the people to question, audit, review, examine, and assess government acts and decisions in order to ensure that these are consistent with the principles of public interests, good governance and justice thus making the system of government transparent to an extent. It has also empowered the people to seek definite and direct answer from the officials of their works or lack of it, thus facilitating and encouraging the participation of common people in the process of good governance. It is thus repairing and metamorphosing our defective elective democracy to become participatory democracy and is playing an important role in bringing good governance in Indian government system.²³

THE NEED OF RTI FOR GOOD GOVERNANCE

21 The Tribune, Retrieved from <https://www.tribuneindia.com/news/schools/right-to-information-law-a-tool-for-good-governance-150522>, visited on August 12, 2022.

22 Id.

23 Retrieved from <https://journal.rostrumlegal.com/right-to-information-act-a-tool-for-good-governance/>, visited on August 12, 2022.

The enactment of the Right to Information (RTI) Act, 2005 was a landmark in the history of public administration in India. The new legislation brought sensitivity, responsibility and accountability to the development process especially in the rural areas. RTI Act is path breaking in controlling corruption and delays in the implementation of Government-sponsored programs and in the functioning of public authorities. Information and knowledge are critical for realizing all the human aspirations, such as, improvement in quality of life. Before this Act, the accountability of public authority was practically minimal.²⁴ The people who voted for the formation of democratically elected Governments and paid taxes to finance public activities had no legal rights to know as to what process has been followed in framing the policies affecting them, how the programs have been implemented, who are the concerned officials associated with the decision making process and execution of the schemes and why the promises made for delivery of essential goods and services to the poor have not been fulfilled. Not surprisingly, the culture of secrecy beginning from the colonial rule till the first six decades of independence fuelled rampant corruption. Lack of openness and accountability in the functioning of the Government not only bred inefficiency but perpetuated all forms of poverty.²⁵ Good governance basically has four elements: Transparency, Accountability, Predictability and Participation. These criterions refer to the availability of information to the general public and clarity about functioning of Governmental institutions. Right to information helps in fulfilling these objectives. Good governance and right to information are complimentary to each other. Good governance is characterized by- political accountability, availability of freedom, bureaucratic accountability, availability of information, effectiveness, efficiency, law abiding citizen and cooperation between Government and society. Therefore, we can say that the Right to information is a natural corollary of good governance.²⁶

CONCLUSION AND SUGGESTIONS

A true democracy lies in the active participation of the citizens of the country and this is possible only when there will be awareness regarding the same. The information empowers the people and enables them to properly exercise their rights - legal, political, social and economic. Keeping in view all these, almost every society has made endeavour by way of putting in place the mechanisms for free flow of information and ideas so that people can access them whenever it is required. In this manner they are empowered to participate in the development process and enjoy the fruits of development. There are a number of factors which emphasize the need and necessity of this right in a country like India, which unfortunately carries the dubious tag of being one of the most corrupt nations.²⁷ The right to information is thus a potent

24 Smita Srivastava, "The Right to Information in India: Implementation and Impact", *Afro Asian Journal of Social Sciences*, Volume 1, No. 1 Quarter I(2010).

25 Id.

26 Dr. Abhe Singh Yadav, "Right to Information Act, 2005-An Analysis", (Allahabad: Central Law Publications, 2012), pp-3-4.

tool for countering corruption and for exposing corrupt officials. It also helps in limiting abuse of power and discretion by officials for various political or other vested interests, for instance, in the recent scandals relating to 2G scam, Common wealth games a huge amount of money has been misappropriated by the corrupt politicians and officials. The power given to Collectors to allocate tribal land to non-tribal people or to convert agricultural land to non agricultural land has been seriously misused all over the country.²⁸ The acquisition of land for public purpose and the subsequent sale of it to private individuals for commercial exploitation in various states is a glaring example of misuse of official authority for private gains. The Lack of information about land entitlements and records is a major problem in rural areas, especially when nearly two-third of the population is dependent on agriculture. These are administrative matters, where there is a tendency to withhold disclosure, which in turn leads to the abuse of power. The right to information is therefore important to check abuse of administrative power and discretion and to ensure fair governance. From the above discussion we can draw the conclusion that, the free flow of information is a must in a democratic society as it helps the society for growth and development by sustaining a continuous debate and discussion among the people on various issues. The access to information held by various departments and authorities was not effectively possible before 2005. It was indeed ironical that people who voted the Government into power and made them responsible for policy formation and the people who contributed in the financing of public activities incurring huge costs were denied the access to relevant information on various schemes & decisions of the Government.²⁹

India is a Democratic country therefore free flow of information is a must, because it helps the society to grow and flourish and also ensures people's participation in decision making, transparency and accountability in governance. One of the major objectives of the Indian Constitution according to the Preamble is to secure liberty of thought and expression to the citizens of India which is incorporated in the Fundamental Right of the freedom of Speech and Expression under Article 19(1) (a) of the Constitution.³⁰ The Right to freedom of Speech and Expression means the freedom to communicate one's ideas, opinion, views or feelings through any medium. However the fundamental Right to Speech and Expression can never be exercised until and unless the information regarding public matters is being circulated freely.³¹ The importance of this right is being time and again emphasized by various judicial

27 Madhavi Divan, "From Secrecy to the Freedom of Information -A Reluctant Transition" *Supreme Court Cases Journal* (2003)p-60.

28 Retrieved from <https://www.educationworld.in/most-infamous-corruption-scandals-of-india/>, visited on August 12, 2022.

29 Dr Madhukhushi Sridhar, "The Right to information Law and Practice" , (Nagpur: Wadhwa company law publishers,2006),p- 347.

30 Retrieved from <https://www.drishtiias.com/to-the-points/Paper2/preamble-to-the-indian-constitution>, visited on August 12, 2022

pronouncements from time to time. In *S. P. Gupta vs Union of India*³², Bhagwati, J. has observed that “The concept of an open government is 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). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception “ In *State of U.P. vs Raj Narain*³³, it was observed by Mathew, J. that: ‘The right to know’, “which is derived from the concept of freedom of speech, though not absolute is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security”.³⁴

The main objectives of the law of the Right to Information are to operationalise the Right to information, to set up systems and mechanisms that facilitate people’s easy access to information, to promote transparency and accountability in governance, to minimize corruption and inefficiency in public offices and to ensure people’s participation in governance and decision making. The Right to Information Act promises to make the right to information more progressive, participatory and meaningful, as it encourages the common citizen to enthusiastically participate in the whole process of governance. The citizens are not only free to ask for information from the Government, but also have the right to get it. The Act extends to all authorities and bodies under the Constitution or any other law, and inter alia includes all authorities under the Central Government, State Governments and Local Bodies. The Right to Information Act paves the way for an empowered citizen, as well as an alert, efficient, responsive, transparent and accountable Government.

With the enactment of the Right to Information Act, India has taken a small step towards achieving real Swaraj. Active and participatory citizens would be able to make full use of this instrument being given to them. It is a welcome step in the right direction. Windows have been thrown open once and for all. The Fragrance is bound to spread slowly but surely. But the stink of secrecy & misuse of power should not be too strong as to totally absorb the fragrance of Right to Information & transparency. Its territorial jurisdiction should not be limited India only, it must spread to Bharat. That will ensure that the Government in this democratic Country is not only ‘of the people and by the people’, but is also ‘for the people’.

Aim of the legislation is very clear that is to create a transparent and accountable environment but besides this it should also be kept in mind that this transparency and accountability should be in a manner that it is within the reach of the common man. One should not have to wait for too long that the purpose to acquire such information got expired. The main objective of the Act should be rightfully fulfilled in order to achieve the democratic vision.

31 Retrieved from <https://www.legalserviceindia.com/legal/article-77-freedom-of-speech-and-expression.html>, visited on August 12, 2022

32 1981 Suppl. SCC 87

33 (1975) 4 SCC 428

34 Id.

Depression in a New Light - An Understanding of Mental Health Laws & Societal Views

Ms. Purbita Das* & Dr. Ishita Chatterjee**

ABSTRACT

The mind of a man is not that of a mindless beast but that of a complex animal, & as such, needs to be contemplated in the same light – societally as well as legally. The umbrellas of “incompetence” or “insanity” extend as far as they can be thrown but at the same time the extension is more often than naught fraught with misconceptions, confusions, loopholes & stigma while the individual suffers to great ends. The ambits of such umbrella terms being wide are not enough for evidencing certain issues to be of grave danger & significance. This research paper seeks a doctrinal approach in endeavoring to exhibit depression/clinical depression as a mental issue qualifying of being considered as a legal incompetence, & not something to be viewed under the garb of stigma or taboo or utter disbelief. Comparisons shall be drawn between persons of unsound mind, persons who are intoxicated & persons suffering from depression with ample scientific evidence to facilitate the inference that all of the aforementioned deserve legal excusal in civil as well as criminal matters, obviously after being thoroughly subjected to scrutinization & inquiry & effective tests. Subsequently, conclusions & consequent recommendations shall be made.

Keywords: Depression, Stigma, Taboo, Mental Health Laws, Legal-reforms, Societal-reforms.

INTRODUCTION

“The snake which cannot cast its skin has to die, as well as the minds which are prevented from changing their opinions; they cease to be minds.” (Goodreads, n.d.)¹ These words, as wisely uttered by Friedrich Nietzsche, have come full circle in talking about certain happenings abhorred by the multitudes of human beings, especially in a societal form of coordination such as certain mental conditions that imply the

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1 Nietzsche Quotes. (n.d.). Retrieved from <https://www.goodreads.com/quotes/tag/nietzsche>. Last seen on 26/12/2019.

impairment of everyday functions of the human body of the afflicted individual. Certain imbalances causing such are, at times, looked upon in the domain of taboo. And as such individuals afflicted with such impairments fail to be re-instituted or rehabilitated and thus suffer from far worse fates than what was originally expected, referring to the much-needed maneuvers in the ideologies of the human society at large without which threats are persistent to all individuals who are victims of said mental afflictions. This paper shall discuss with intricate detailing such a topic which is almost most of the times considered as one such 'taboo' and at times even deemed to be in-existent, and the science behind it which is often confused as being a pseudoscience, despite their being a great name for the ailment itself as well as the study and understanding of the mind which possesses such ailment.

That is, this paper discusses facts and inferences on the topic of 'depression' as suffered by the common folk, which at times become intolerable, unbearable and which at times even causes the sufferer to go to such dire extents as to cause death of their own self. This paper shall also shed light on suicidal tendencies that oftentimes exhibit itself in the avenues of a mentally ill, somewhat diseased, disabled, depressed person, who although devastated keeps on struggling mentally - bearing a smile, day in and day out without anyone batting an eye to his or her deteriorating mental state, and the menacing icy-cold fingers of the grim reaper closing in on the person without the slightest knowledge of the person's kinsmen or fraternity. The primary focus being illumination of the concept of 'depression' and the extent to which a victim of it should be considered threatened, and the impairments it causes, in lieu of which such necessary suggestions for provisions are to be made as to cause alleviation of the said inhibition. The paper shall also bear in mind and put forth the duties that are demanded of the civilians around the affected person in order to further provide for the much-needed relief that the person needs direly.

Emphasis will also be laid upon the adverse effects that are exerted upon a person's brain by ailments of the mind. The brain which is the whole enchilada in the governing of a human and any and all living - breathing creatures and the vile mutations in one's mentality and brain physiology that cause a person to become as pessimistic as the person could ever become. And inflict upon one's own self, harms of rage, self-hatred, loathing, and in the end succumb to the all-encompassing darkness if the outrage of the ailment is not stopped. Depression as widely known is a mental health condition branded by an untiringly miserable disposition or a sudden or gradual loss of curiosity in activities, damningly impacting daily life.

Primarily, this paper is being presented with conclusive evidence to show the toxicity that builds up in the psyche of a person suffering from depression, with secondary aim being a societal approach to depression, as to what causes such a state of an individual at a core level, to better understand the roots, and to suggest measures that can be taken to inhibit the phenomena at a universal, social level and to understand it better in order to not let it merely be considered as a phase rather than a disability or disease. As well as the tertiary aim of suggesting certain legal reforms that can be made to further support the well-being of depressed persons. And to apprehend the

frailties that a depressed person has in terms of procuring of justice in eyes of the law, referring to attacks on a persons' being in courts of law, who is not in their right senses owing to being depressed, and who is unable to retain his innocence and is liable to be convicted owing to the person's inability to plead insanity, to loosen himself or herself from the hooks of professional misconduct. A person's innocence is butchered, due to no consideration being given to depression in terms of it being an ailment causing mental impairment.

THE THREAT THAT DEPRESSION POSES TO HUMANKIND.

"The grey drizzle of horror," as termed by author William Styron. (Psychology today [PT], n.d.)² Depression is known to descend seemingly suddenly, or it might succeed a defeat or a individual forfeiture, facilitating insistent feelings of worthlessness, sadness, pessimism, helplessness, hopelessness, or guilt. Depression as well ends up interfering with motivation and concentration, as well as other aspects of day-to-day functioning. (PT, n.d.)³

Depression is one of the foremost causes of disabilities across the world. Globally, above 300 million individuals from every age group suffer from the ailment. It presents in variants ranging from seasonal affective disorder to major depression and even dysthymia. Depressive incidents are commonplace in bipolar disorder. (PT, n.d.)⁴

Thus, depression is a huge issue that is to be addressed at large. For not only old people, and middle-aged men and women, but teenagers of today suffer from it as well. And it's known to all, that- the children of today are the citizens of tomorrow. And when the mental states of the citizens of tomorrow are about to topple and fall like a house of cards, no citizen of tomorrow can lead the country into or towards progress and development. The issue of depression has to be taken into account if the well- being of the natives of a country is to be considered as an objective by any government.

SOCIETAL OUTLOOK TOWARDS DEPRESSED INDIVIDUALS

While, we fail to recognize the symptoms of depression, we also fail to behave responsibly, societal cultures look down upon a person with depression as a person who is insane, or is suffering from some form of lunacy, the mere psychological therapy sessions that a person tries to indulge in , in order to alleviate their sufferings is frowned upon by many as being stunts showing that the person is of an unstable mind, and insults and abuses are incessantly hurled towards that person in a tone suggestive of that person being insane. Mental ailments such as this are still in today's world looked upon as something which is a phase of sadness and hurt rather than a disease. And people believe that it shall pass, which it inevitably doesn't.

2 Psychology Today. (n.d.). Depression. Retrieved from <https://www.psychologytoday.com/intl/basics/depression> Last seen on 26/12/2019.

3 Ibid.

4 Ibid.

And the victim suffers unimaginable horrors. Owing to the societal outlook being narrow mindedness.

In December 2017, the Indian President Hon'ble Mr. R. N. Kovind cautioned about a burgeoning "mental health epidemic", shedding light upon one of India's foremost issues, which happens to be one of the most ignored public health apprehensions. Notwithstanding, such health issues remain oft stigmatized in the Indian sub-continent, consequently inducing people to avoid seeking help. (Health Issues India [HII], n.d.)⁵

The National Mental Health Survey of 2016 observed that in fact, approximately 14 out of hundred of India's population were in need of immediate interference by mental health authorities, while roughly two percent were agonized by severe mental health conditions. (HII, n.d.)⁶ Kovind concluded, that despite precautions & planning, multitudes of individuals suffering from mental health conditions remain undiagnosed and very few receive treatments. (HII, n.d.)⁷ A study reported by WHO (World Health Organization) for the NCMH (National Care of Medical Health), opined - no less than 6.5% of the Indian populace grieves of some form of serious mental disorder. (HII, n.d.)⁸ The World Economic Forum mentioned India to be ridden with mental ailments where upwards of ten million children are afflicted by autism, above ten million people are ailed by epilepsy and upwards of 150 million people have psychological illnesses which will undoubtedly necessitate the intercession of psychotherapists or other therapeutic professionals. This figure aggregates to an average of 10% of the population. Nevertheless, the "invisible illnesses" remain stigmatized by the commonwealth of the Indian sub-continent. (HII, n.d.)⁹

INSTANCES OF NEGLIGENCE OF SOCIETY TOWARDS MENTAL DISORDERS

The universal figure for Parkinson's syndrome is approximately one out of a hundred in those people who are 65+. Found frequently in the ageing, although early inception of Parkinson's Syndrome is often seen, Republic of India writhes from a rich downside in gauging the degree to which the population is affected by this ailment; There exist no official figures in the Indian nation declared by the Indian Government(s). This is a recurrent context for numerous psychological afflictions. This holds factual more so in the case of rarer conditions, this detail itself refutes many individuals of the treatments they need albeit deserve. Research found a rate of 14.1 per 100,000 amongst a population of 63,645 in rural Kashmir to have fallen prey to the said disease. The rate of prevalence over the age of sixty was 247 out of 100,000. And people who are aware of Parkinson's still believe that it occurs only to elderly people, and is inexistent at younger ages. (HII, n.d.)¹⁰

5 *Health Issues India*. (n.d.). Retrieved from <https://www.healthissuesindia.com/mental-health/> last seen on 26/12/2019.

6 Ibid.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid.

Current cures in India comprise the oral treatments, alongside the shortcoming of exhibiting waning returns when the said disease begins critical progressions. While after a time, oral treatments fail to be effective any longer. (HII, n.d.)¹¹ Subsequently an unpleasant procedure termed Deep Brain Stimulation (DBS) is used. The possible availability of Apomorphine has thrilled numerous Indian neurologists in the past. (HII, n.d.)¹²

Dr. Girish Soni, of the Department of Neurology at Sir JJ hospital said that a single dose of Apomorphine will potentially present considerable respite to the patients, especially in India, the drug would be immensely successful, owing to bad economic conditions of the natives of a third- world country like India and the expensive nature of DBS procedures, which can seldom be afforded by patients of the middle class or the lower classes.

Drawing inference from the scenario regarding such a critical ailment like Parkinson's syndrome, it can be conclusively stated that the precipice for Parkinson's serves as an illustration of current states of mental healthcare infrastructure in India, inclusive of healthcare towards issues like depression. I.e., The dearth of nationwide data is a nod towards the fact - the disease is uninhibited and left unresearched. For the people of lesser developed regions of the nation, this implies that they remain undiagnosed as the disease itself is often unheard of or according to them, inexistant. Medicinal access is often inadequate, while the ones available are far less effective than what the conditional and temporal requisite is. (HII, n.d.)¹³

THE PERSPECTIVES OF INDIANS TOWARDS MENTAL ILLNESSES

The WHO reports inform that, a low 27 percent would be supportive of someone suffering from a mental ailment. Almost 26 percent stated that they antagonistically are terrified of the psychologically afflicted. Approximately 40-47% claimed that all they knew of the mentally ill narrowed down to stigmatized adjectives akin to "retard" and "mad". 44% of individuals held that individuals with mental afflictions are believed to be permanently of a violent nature, while 41% believed intermingling with mentally afflicted can exacerbate the psychological health of fine fettled individuals. (HII, n.d.).

With views like these in existence, it is not astonishing that victims of mental illnesses seek help but rarely. The necessity of the hour is a total shift in public attitude, and the only way to cause it is the spreading of awareness over this issue, and imparting proper education.

DEPRESSION – DISCUSSED IN A DETAILED MANNER

Depression is a complex issue, enveloping various bodily systems, inclusive of the immune system, either in the form of effect or cause. It disrupts the sleep cycles and

11 Ibid.

12 Ibid.

13 Ibid.

affects the appetite of the victim. In certain cases, it facilitates loss of weight. In other cases, gains in weight have been seen. Depression has been oftentimes conveyed by unease. Researches have proposed - the two conditions do not just occur simultaneously but also intersect in genomic susceptibility patterns. (PT, n.d.)¹⁴

A full understanding of this particular disorder has forever stayed out of reach. Researchers possess considerable evidence that susceptibility to depression is somewhat accentuated by diet - both directly - through insufficient intake of nutrients such as omega-3 fats - as well as indirectly, through the vast multitudes of microorganisms that occur in the gut. Notwithstanding, depression comprises thoughts and moods as well as the physical body, and it facilitates pain in both the arenas. Depression happens to have become increasingly common in children. (PT, n.d.)¹⁵

The most severe of cases as well are remediable however. The ailment is often recurrent and early treatment can prohibit or anticipate recurring incidents. Various researches indicate - the most operative treatment happens to be Cognitive Behavioral Therapy (CBT), which talks of challenging thought patterns, utilizing or without the utilization of antidepressants. Supplementarily, evidence is piling up that regular mindfulness meditation in and of itself or coupled with cognitive therapy, can constrain depression pre-onset through the effective uncoupling of attention from repetitive negative thoughts initiate a downward helical spiral of mood. (PT, n.d.)¹⁶

Research with brain-mapping machineries like Magnetic Resonance Imaging (MRI) exhibits that the brains of individuals exhibiting depression are distinguishable from other people. Especially, the fragments of the brain accountable for regulation of moods, thoughts, appetite, behavior, and sleep often work uncharacteristically. It is yet unclear which changes seen in the brain may be the effect or which may be the cause. Some characteristic vulnerabilities of a person towards depression predominates the persons' DNA and the onset is thus possible owing to fallibilities in genetic traits. (PT, n.d.)¹⁷

Depression usually assumes one major form of two -

Unipolar depression - what most people refer to, while speaking of depression - an unrelenting state of sadness, apathy, hopelessness, and loss of energy. A.K.A- major depression.

Bipolar depression or bipolar disorder - condition marked by phases of depression and periods of high-energy mania; victims tumble between these two extremities of mood states, sometimes over the course of days, and sometimes over years, oftentimes with periods of stability betwixt.

14 Supra 2.

15 Supra 2.

16 Supra 2.

17 Supra 2.

COMPARISON BETWEEN THE MENTAL STATES OF A DEPRESSED PERSON, PERSON WITH UNSOUND MIND AND AN INTOXICATED PERSON

In retrospect to major findings, a comparison can be drawn between the delinquency of an intoxicated person, the devastated mental state of a depressed person or an idiot or a lunatic or a person suffering from recurrent attacks of insanity, opine numerous researchers in study of the characteristic properties of alcohol & effect of abuse of the same upon the brain with assistance from cutting-edge technologies like, Diffusion Tensor Imaging (DTI), Magnetic Resonance Imaging (MRI), electrophysiological brain mapping, and Positron Emission Tomography (PET).

Long-term heavy drinking has been proven to cause shrinkage of amygdala as well as deficits in fibers - white matter carrying informational synapse from one brain cell (gray matter) to another. Memory retrieval and formation are negatively prejudiced by such influences, while PET imaging allows researchers to envisage in real-time the damage that is consequent to heavy consumption of alcohol. Studies have detected lacks of fibers in frontal lobes accountable for plentiful functions concomitant with memory and learning, and some chemical imbalances in the cerebellum - the center for movement and coordination.

A psychological ailment can be referred to as a health condition that alters a person's thought processes, feelings, or behavior (or all three), in turn causing the individual to be distressed and to face difficulties in functioning.

Numerous massively different psychological issues and conditions, ranging from schizophrenia to depression, originate in the exactly same brain expanses. (Livescience[LS], 04/02/2015)¹⁸. Surveys have been piloted, filtering through approximately 200 constructional brain images that encompassed over 7,000 persons afflicted with bipolar disorder, schizophrenia, addiction, depression, anxiety or obsessive-compulsive disorder (OCD) along with approximately 8,500 healthy individuals. (LS, 04/02/2015)¹⁹. Comparing the inferences from different psychiatric ailments, the researchers found that all of them exhibited curtailments in gray matter in three regions which are deep-seated in the brain: the Dorsal Anterior Cingulate Cortex (DACC), the right insula and the left insula. These networks of expanses are associated with executive functioning, which researchers have defined as the functioning system which allows a person to function in life, for instance, by holding down a job, maintenance of a relationship, not acting on impulses, resisting distractions and so on. I.e., The more complex of an individuals' daily functioning. Which require some careful thoughts to be put into them. Computer cognitive training has proved to be useful in the treatment of schizophrenia, and might as well prove to be useful in the treatments of other disorders. Schizophrenia was found to differ from other mental-health ailments in terms of the expanse of gray-matter loss, and depression also

18 Livescience. (04/02/2015). *Many Mental Disorders Affect Same Brain Regions*. Retrieved from <https://www.livescience.com/49694-mental-illness-brain-similarities.html> last seen on 28/12/2019.

19 Ibid.

tangled shrinkage of the amygdala and hippocampus - the brain regions involved in emotion and memory. (LS, 04/02/2015)²⁰.

Based on findings of this sort and especially these findings, it can be clearly inferred that a person who is intoxicated and is excused in a court of law from appearing as a witness as well as from certain offenses from time to time, as well as a person of unsound mind who is excused from being convicted from time to time owing to that person's ability to plead insanity, an individual who is depressed suffers from the same chemical and physical imbalances and deterioration in terms of his or her physiological changes of the brain.

STATUTORY DEFINITIONS OF MENTAL CONDITIONS

Mental Illness as per the Mental Healthcare Act, 2017 – Section 2(s) refers to a disorder in mood, thinking, perception, memory or orientation that unacceptably spoils the capability to judge, behavior and the ability to distinguish between what's real and what's not. It also refers to the psychological circumstances partially or wholly caused due to the misuse of alcohol and drugs, nonetheless does not comprise psychological impedance which happens to be a status quo of arrested or incomplete progress of an individual's mind. (The Mental Healthcare Act 2017, 2017)²¹.

The expression- mental disorder as per the Hindu Marriage Act, 1955²² – Section 13(1) refers to mental illnesses, arrested or incomplete development of the mind, psychopathic ailment or any other disorder or disability of the mind and includes schizophrenia as well. The word 'Mental illness' as per the Persons' with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1955, refers to any psychological ailment except mental retardation. (The Hindu Marriage Act 1955, 2019)

Under the Mental Health Act, 1987²³ – Section 2(1) a mentally ill person is a one needing treatment by reason of any mental disorder excepting mental retardation. (The Mental Health Act 1987, 2017.)

A person with disability per the Rights of Persons with Disabilities Act, 2016²⁴ – Section 2(s) is someone with long term physical, mental, intellectual or sensory impairment. Which, when inhibited, further inhibits his or her effective participation in society. (The Rights of Persons with Disabilities Act 2016, 2017.)

So is a lunatic defined under the Indian Lunacy Act, 1912²⁵ which was later repealed by the Mental Health Act, 1987. Especially in *Smt. Anima Roy v. Probodh Mohan Roy*²⁶,

20 Ibid.

21 Mental Healthcare Act, 2017

22 Hindu Marriage Act, 1955.

23 The Mental Health Act, 1987.

24 Rights of Persons with Disabilities Act, 2016.

25 India Lunacy Act, 1912.

26 AIR 1969 Cal. 304.

Section 3(5) of the Indian Lunacy Act, 1912 flatly refers to lunacy as a condition of idiocy, and/or an unsound mind. And there's no other hard and fast meaning as such. (The Indian Lunacy Act, 1912, 1912.)

While mental infirmity and mental unsoundness has been discussed in the case of *Jai Prakash Goel v. State*²⁷. In which it was observed that a person adjudged as of being of unsound mind can be appointed a guardian ad litem, however may not be convicted wholly while the court is compelled to prefer a rigorous or formal enquiry of competency of the individual by the Lunacy Act, and thus is compelled to pass an order upon satisfaction as to the party's competence, and also it was noted that, there exists a huge distinction between mental unsoundness and incapability to reason, whereas the latter is of a much lesser degree relative to the former.

A point to be made, in reference to the above context is that, depressive episodes and a man or woman suffering from depression should be granted the status of mental unsoundness and not merely infirmity, based on complete and admissible evidence of such status of the individual.

THE DEPRIVATION OF JUSTICE TO DEPRESSED INDIVIDUALS

From all the information that we've been furnished with, and based on a collective view of cases acting as precedents in the past, with regards to the mentally ill or intoxicated individuals, it can be wisely stated that, a depressed individual is deprived of exercising his or her right that should be. I.e., Right to a fair trial, the individual should be allowed a pleading of insanity, in order to justify his or her conduct as to which he or she has been brought before the Court as a consequence of.

In disallowing an individual from pleading insanity or unsoundness of mind, the law deprives the individual of his or her fundamental rights. And executes his or her soul, and sends it scurrying down into the deepest depths of the fiery pits of inferno raging inside of the said person, unbeknownst of us being on our guards. The individual - lives on for the rest of his or her life, atoning, repenting, cursing, and dying for a crime he or she did not commit, or was not in the right sense to have committed knowingly.

Due recognition of depression as a disease, i.e., an unsoundness of mind is not given. And hence, people fail to be recognized as so in a court of law, and end up suffering forever. Whereas, there's ample number of statutory provisions to get the person out of the death trap that lay ahead of him or her, the persons' defense being proving imbalances of the mind, impairment, caused by depression as a disease. Where, if officially given recognition to the ailment in a court of law as well as in the social foreground, the disease would be very easily and smoothly eradicated from the face of our nation.

The brains of depressed individuals, unsound individuals, as well as intoxicated people are almost identical in terms of the circumstantial brain physiology that was

27 AIR 2005 Delhi 83; AIR 2005 Delhi 87.

in effect when the crime took place. I.e., The brain activity status and chemical compositional conditions of the brain of the said individual under trial.

THE DEATH TOLLS

Depression is a common ailment worldwide, with upwards of 264 million people becoming victimized. Depression ranges from usual mood fluctuations and short-lived emotional responses to challenges in everyday life. Expressly when ongoing and with moderate or severe concentration, depression ends up becoming a serious health condition. It causes the afflicted individual to agonize significantly and function out of the ordinary at work, at school and inside of the family. At its worst, depression does lead to suicide. Close to 800,000 people succumb to death owing to the clutches of suicidal tendencies every year. Killing of one's own self has become one of the principal causes of death among 15- to 29-year-olds. (World Health Organization, n.d.)²⁸.

The psychological well-being of the citizens of India, if taken into consideration, depression has to be given its deserved status of that of a mental ailment, and must be recognized socially, as well as in courts of law. The most efficient way to decrease the number of deaths by suicide would thus be acceptance of depressed individuals without any stigmatization, be that in society, or courts of law or anywhere, while providing them with the care and respect that they deserve, in order to make them free of the pain that they are suffering through, they should be talked to, and interacted with. So that they can feel lighter by sharing their pains or at least have people to socialize with and not feel alone. This can prove to be a step towards reduction of numbers of suicides per year.

INTERNATIONAL PERSPECTIVE TOWARDS MENTAL AILMENTS

No country expressly associates itself or its laws with the acceptance of depression as a viable impairment or unsoundness, there are certain guidelines and rules mentioned and inculcated into the statutes of certain countries which deal with the issues of mental unsoundness and impairments of judgment of an afflicted individual, bodily functions and inhibitions in the persons' day to day activities. On international standards, the American laws – especially the (EEOC) Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities details on impairments. Section 8 details on whether chronic disorders prove to be substantially limiting which is answered in the affirmative, provided they are considerably restraining while active or have tall likelihoods of repetition. Section 10 details on when an impairment bounds an individuals' ability to concentrate, i.e. if, due to the weakening, s/he is expressively constrained as compared to the regular person in the over-all populace. E.g. an individual would be considerably restricted if s/he was effortlessly and regularly unfocussed, signifying that his or her attention is often drawn to immaterial sights or sounds or to disturbing views; or if he or she experiences his/

²⁸ World Health Organization. (04/12/2019). Depression. <https://www.who.int/news-room/fact-sheets/detail/depression> Last seen on 02/01/2020 .

her inattentiveness and a blank mind. Section 11 refers to when an impairment is the cause of an individuals' inadequate amount of sleep. Where it is said that an impairment substantially confines an individual's sleep if, owing to the impairment, his or her sleep is significantly shackled or reduced in comparison to the average population. Section 12 deals with the impairment causing an individual's inability to care of themselves, which happens when owing to the impairment, an individual is expressively constrained in comparison to the average population in performance of rudimentary actions like waking in the morning, dressing, bathing, and procuring or preparing food. (EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities[EGADAPD], 25/03/1997)²⁹

Inferentially, it can be stated that disabilities can be caused in the form of infirmities of mind or unsoundness, which are duly looked upon as valid impairments in American standards. Especially Section 8(EGADAPD,25/03/1997)³⁰ of the aforementioned document details effectively on whether chronic or episodic disorders can be substantially limiting whereby the mention of 'depression' is made along with other diseases of the mind or psyche in the likes of Schizophrenia, bipolar disorder. Based on the implication of major depression to be a substantially impairing disorder, certain laws and regulations could be put in place in order to better facilitate the mental well-being of individuals afflicted with disabilities of the psyche.

The acceptance of depression from a societal point of view along with a legal and humanitarian perspective is a must, and shall undoubtedly originate from the initial sowing of the seeds of legal acceptance of depression as a viable disease in Courts of law, and the provision and option to plead depression just the same way as a man might plead insanity owing to the nearly same mental states associated with both the conditions. Alike American legal provisions, India does not accept depression as a disability, although implications are made in a few documents, no such legal acceptance is given to the disease.

CONCLUSION & SUGGESTIONS

The world of a depressed person is a persistent monochrome of humane despair and dilapidations. A person's being falls into a state of decay which seems to worsen with time although the person hears and believes time and again that time is the healer of all mortal wounds. The individual loses all interest in life, and begins to fumble through his or her walks of life, with no real interests and diminishing fervor. And there comes a time when the person – tired of their everlasting endeavors, overwhelmed with efforts towards perfecting the art of appearing less miserable than they actually are. Become increasingly violent towards their own being, they lose faith in their own selves and all their self- sufficiency and self- dependence go

29 EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities. (1997, March 25). Retrieved from <https://www.eeoc.gov/policy/docs/psych.html> . Last seen on 04/01/2020.

30 Ibid.

down the gutter, until all that remains of their own selves is naught but sorrow and the grimmest of thoughts they can conjure up about themselves. Marked with many other symptoms of a failing health, and a failing mind, the victims end up discriminating themselves and suffer a total absence of confidence over themselves. In the end resorting to the vilest of procedures they can in order to make themselves happier, in order to obtain the self- satisfaction that they direly need in order to survive in a world of physiological needs. Such as escapism in the forms of drug abuse, and other forms of intoxication, a growing want to relieve stress – causing desperate measures such as relying heavily on sexual relief in the form of chronic masturbation, sometimes considering themselves to be somewhat not in their sanest or cleanest of minds and believing they are insane or even criminally so. This causes a certain increase in behavioral violence. Victims resort to excessive indulgence in pornographic content, violent video games, and at times might even resort to hurting others purposefully in order to satisfy their own visions of being powerful, and feeling so, in the face of adversity that has struck them and the wrath exhibited in other forms over other people who are innocent. Be the hurt in the form of sexual encounters, or physical quarrels, or verbal hurling of abuses, the victim will not leave a single stone unturned in order to feel superior to others. This toxicity in the behavior of a depressed person causes them to become social recluses and consequently results in their trying to live in complete isolation, which further affects the mental state of the said person. And they feel disturbed beyond all measurable extents. And ultimately the only way they can fathom to relieve themselves of the ailment and the suffering they incur – happens to be suicide. It all starts up as mere episodes of anxiety and unprecedented sadness owing to unfortunate events occurring to the depressed person. And finally if not inhibited, although not in most cases, ends up becoming the grim-reaper to the victim, resulting in the victims' taking his or her own life.

No country in the world accepts a depressed individual as a man or woman possessing an infirmity of the mind. Although certain documents have the mention of 'depression' as a disease which can cause impairment, no such thought is given to it in terms of a substantial impairment that can save a man or a woman from being convicted, owing to the instability of the persons' psyche.

Notwithstanding the acknowledgement by the government, about an existent issue that so far remains unaddressed, factual progress shall rest until and unless there is a widespread variation in public behavior & a large investment of funds by the government. The belvedere of the community may take multitudinous epochs to be altered. Awareness drives might alter the views of some but many may be engrained in their views. It's thus vital that children be educated in mental health issues. Schooling since a fledgling stage of life in regards to the rights of the mentally ill and the challenges faced by them will undoubtedly spread and develop sentience and will make the future generations much more open-minded and acceptable of mental conditions without them fumbling for light in the dark avenues of "tabooism".

SUGGESTIVE REFORMS

1. The assigning of psychologists by the government to individuals suffering from depression. Free of any charges. Provided, the individual is a party to a court case.
2. In such cases as in which the afflicted individual is a petitioner, plaintiff or appellant, the individual should be subjected to thorough psychological examinations.
3. In such cases as in which the afflicted individual is a respondent or defendant, the individual should be treated with the utmost of care and respect in courts of law, and personal attacks on the said person should be strictly abhorred by the presiding judge in a court of law. As well as it should be made sure that, the advocates when questioning the said individual, should bear the facts of the individuals' mental state in mind.
4. In such cases as in which the afflicted individual is a witness in a case, the advocates cross- questioning the individual should be duly respectful. And the judge presiding over the session should make sure that the advocates do not resort to misleading of the witness or making wild speculations, which might play with the already disturbed psyche of the witness to favor the said advocates pleadings and prayers.
5. Depression should be made an acceptable mental disease or an unsoundness of mind. Provisions should be made in all the statutes of law dealing with unsoundness of mind and mental infirmity, stating the acceptance of 'depression' as a valid mental unsoundness.
6. It should be seen to and made certain that, people appearing in Court cases are not afraid of pleading depression owing to the fears of social stigmatization.
7. Social awareness should be spread, in all of India, especially in urban and rural areas as well as in metropolitan cities, about the issue of depression. To end any and all stigmatization.
8. It should be seen to that door-to-door campaigns and marketing take place to undoubtedly draw as much attention as possible to such campaigns to spread awareness about the issue of depression.
9. Any and all depressed individuals should be screened regularly every month, and their IQs should be evaluated and they should be provided with talk-therapy and medicinal therapies free of charges.
10. All afflicted individuals should be assigned psychologists over helpline numbers, whom they can interact with 24x7.
11. Any and all depressed individuals should be screened for suicidal tendencies.
12. People who are regular abusers of drugs or alcohol, should be screened for such suicidal tendencies as well, along with for symptoms of depression.

13. Increased endeavors towards understanding such diseases as depression should be made compulsory in research institutes.
14. Children should be given proper education on such topics as this, for them to be able to better differentiate from their elders, what is bad and what is good, and that a disease like this does not mean that the affected individual is 'crazy' or such other harsh term.
15. Efforts to improve quality of the lives of citizens in all aspects should be increased to avoid the issue of depression once and for all.
16. Improved quality of life and minimization of traumatic experiences in children and proper and extensive treatment of the children who have already been traumatized should be made one of the primary goals.
17. Depressed individuals should get immunity from convictions, based on their production of admissible evidence in the said Court of Law. And the individuals as and when found guilty should be stripped of any and all objects and utensils that can be used by the individual to harm himself or herself, or inflict injury upon any and all individuals including that of self.

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Forensic Translation: An Approach on Redefining Legal Translation and Interpretation

Sruthi T.S.*

ABSTRACT

*Legal translation has a vital role to render in the society as it concerned with ensuring fair trial and justice to the people. As an emerging area in legal translation, the **Forensic Translation** need to be introduced with its potential and possibilities amid our nation's multilingual situation. The entitled research paper attempts to deliberate on the existing issues of linguistic leakage occur in translation and interpretation of legal documents in the first phase and how the forensic translation approach viably contribute in reducing the gap of communication and ensure the fair and smooth functioning of court trial and proceedings in the second phase.*

Keywords: Legal Documents, Legal translation, Legal Register, Interpreter, Forensic Translation.

1. INTRODUCTION

The Article 348(1)a states “that unless parliament by law provides otherwise all proceedings before the Supreme Court and in every high court shall be conducted in English”. In the Indian legal system, regional languages are permitted to use at the lower courts only. The higher courts of judiciary Indian High Courts and Supreme Court have English as the language of legal proceedings. Therefore, the need to avail the assistance of translators and interpreters became inevitable to fulfill the legal requirements of diverse speech communities of our nation. The attempt of the entitled research paper is to draw the attention on the importance to have the right choice of translator and interpreter for legal purposes with reference to Indian legal context.

The aim of the research paper is threefold; the researcher would like to discuss about two modes of translation possibility prevailing in legal domain.

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- i. Translating documents for legal purpose.
- ii. The role of translator and interpreter at court trial.

And the third is to introduce an advanced area, (3) **Forensic Translation and the viable role forensic linguist could render as translators and interpreters amid the multilingual situation of our country.** The paper contains two phases of deliberations: The first part gives a detailed view on the various aspects of legal translation, Interpretation and linguistic issues prevailing in the domain with few examples of biased cases. The second phase is meant for introducing Forensic Translation and the linguistic feature set that need to give utmost importance while carrying out the meaning from source to target text as translator or interpreter of legal document.

2. TRANSLATING FOR LEGAL PURPOSES

Legal translation has been in great demand in the last few decades around the world owing to globalization and increased contact and exchange between people and States (Gotti&Šarèevia.2006). Legal translation could be viewed as a specific purpose translation. Legal translation refers to the process of translating the documents of legal importance for the purpose of court. Translating text from the source language to target language requires high skill and proficiency. The task of translating a piece of literature isn't as much complicated or vigilant as translating a document of legal importance. *"Accuracy is no doubt an important aim in translation, but it is also important to bear in mind that the use of common target language patterns which are familiar to the target reader plays an important role in keeping the communication channels open (Baker.2011)".*

It is an accepted fact that the level of equivalence and cultural harmony attained in the target text decides the accuracy and faithfulness of translation. If the translator couldn't bring the faithful equivalent, it may distort the meaning or aesthetic pleasure as in the case of literary works. But the consequence might be high when it comes to legal context. *The slight change in the meaning, sentence structure or an error of punctuation may lead severe legal consequences. Therefore, legal translation requires high precision and linguistic knowledge.* Let's begun the discussion with the commonly found legal documents demanding translation:

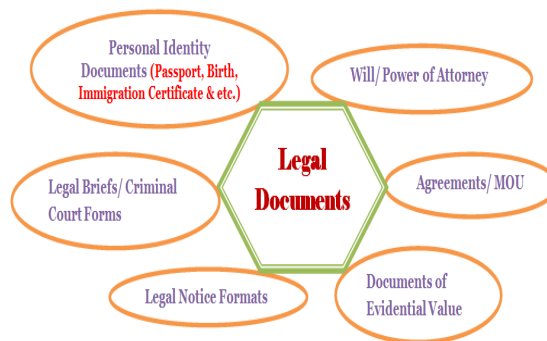


Figure 1: Documents of legal translation

The translation of court proceedings, briefings, verdict, summons and personal identity documents etc. are quite common practices within the judicial system. But the translation of documents of evidential value (Documents related to legal offences) is stated in the section 162 of Indian Evidence Act that “**court could permit the translation if it thinks fit to do that and direct the translator to keep the content secret**”. The translation of most of the above legal text requires a thorough understanding of the legal language”. The job of legal translator starts with understanding the legal register or legal language.

2.1. Legal Language: A Tough Job for Legal Translators

Legal text can be obscure and incomprehensible, because legal language has a tendency to present even simple ideas in complex, archaic language (Williams, 2011). Legal language is far away from the understanding of lay man. The language peculiar to legal fraternity is linguistically refereed using the term legal register. Therefore, the task of translator and interpreter primarily is to gain a deep acquaintance with these special terms and vocabularies. The common vocabularies may have different meaning in legal readings for instance, the legal register **aforesaid** in ordinary terms **said**, **De facto** (in fact) **forthwith** (immediately), **whereby** (by which) **therein** (here) etc. The major features of legal register Mellinkoff (1963) and Williams (2005) are:

- i. Archaic or rarely used words or expressions
- ii. Foreign words and expressions, especially Latinisms
- iii. Frequent repetition of particular words, expressions and syntactic structures
- iv. Long, complex sentence, with intricate patterns of coordination and subordination
- v. Highly impersonal style of writing etc. All these features turn the job of a translator tough and rigorous.

In our nation to the legal English used in legal proceedings often raised criticism, now days the attempts were initiated to adopt plain English for legal purpose. The multilingual nature of the Indian society demands utmost vigilance in translating the legal documents due to the socio-cultural sensitivity of the language. The terms which are socially acceptable in one part of region might be cultural taboo in other part of the region. The proper understanding of the socio-cultural meaning of the legal register in the source and target text is essential to engage individuals as translators and interpreters of legal documents.

2.2. Legal Interpreter

The help of interpreters may seek at various stages of legal process such as interrogation stage, court trial stage etc. Legal interpreter acts as the verbal mediator between the source and target language. They verbally translate evidences provided by witness, defendant, accused on demand. Here meaning reproduction take place in real time and demands spontaneous linguistic competency and accuracy from the interpreter. The most commonly seen types of interpretation at court are:

2.2.1. Simultaneous Interpretation

The commonly preferred mode of interpretation at court trial is simultaneous interpretation. Here the interpreter gives the equivalent target utterance instantly. Therefore, high listening, comprehension, reproduction capacity is expected from the part of interpreters.

2.2.2. Consecutive Interpretation

The interpreter in many instances take down notes of actual utterance then recalls it into the preferred language. The consecutive interpreter may get time to produce the utterance after the delivery in source language.

2.2.3. Whispered Interpretation

The interpretation process continues along with the actual utterance. The interpreter will communicate the utterance in preferred language in a quiet voice. This mode adopted in police interrogation of non- native tongue.

2.3. Why to Translate and Interpret Legal Documents?

There are ample legal situations where we sought the help of translator or interpreter. The people go in search of their fate in different parts of the world, there is high risk to get cheated, misused, and misunderstood without knowing the language of the country. When it comes to police and court cases the situation turns more severe, while court trial, if a document or statement incorrectly translated or interpreted then it could distort the whole argument put forward and the case may end in deadly aftereffects on the life of people involved. Therefore, the need to seek the assistance of translator or interpreter is many folds as stated below in a multilingual society like India:

- i. **Monolingual Situation:** Translating the documents in the language of court procedure. Indian legal system required the documents written in regional languages to translate into English for moving to further procedures at High Court or Supreme Court on demand.
- ii. **Difficulties faced by Aborigines and Illiterate:** India houses a number of tribal communities they are linguistically marginalized due to their own variety of languages. The interference of a good translator/interpreter may help them to express their innocence and pains, worries before the court of law overcoming the linguistic barriers when involved in law-and-order issues. Thereby, ensure their right to have fair trial.
- iii. **Bilingual Situation:** When parties of different culture and language get involved in legal battle. Therefore, it is the right of a non- native to have a translator, who understands the legal and cultural values of the country.
- iv. **Negotiation Settlement:** the translators act as a mediator when it comes to international negotiation talk when there is no common language etc.

There is ample number of instances of cases ended in bias due to poor or ineffective translation or interpretation. One of the articles occurred in Hindu (21-03-2015) details the plight of non-Hindi speaking tribal population of Chhattisgarh. They spoke Gondi or Halbi (their peculiar language variety) therefore they fail to express their innocence before the court unless the help of an interpreter. The language barriers are one of the many factors that marginalize tribal in our judicial system. Aboriginals under trials were unable to communicate directly with the officers of the court or present the real facts and circumstances to the judicial officers. The Supreme Court expressed concern over these issues recently. This could be avoided only with the help of competent translator or interpreter. The researcher had listed a few examples of sensitive cases which ended in bias due to poor legal translation and interpretation across the globe to overemphasize the importance to have the apt persons as legal translators.

In 2014 South Africa the court trial of Oscar Pistorius (former Olympian) on the murder of his girlfriend aroused severe criticism on the reliability of interpretation. In South African legal system, an accused has the right to be tried in their native language. Therefore, Oscar Pistorius trial conducted in his native language English but the language of key witness were Afrikaans. The interpreters hired were found incompatible and inaccurate. They have struggled for correct words or just use similar words that come to mind and this changed the feeling and intent of their testimony.

In 1986 Santiago Morale was Mexican social worker in the state of Oregon, and he was falsely convicted for the murder 19-year-old migrant. Santiago was provided a Spanish interpreter, despite the fact that Spanish was not his mother tongue. Further resulted in deadly consequences he couldn't prove innocence due to the interpreter issues and convicted for ten years. In 1991 he released from jail after he could put forward his argument in English without ambiguity. The injustice done to Morale led the court to adopt changes in the way language issues are dealt with to avoid future problems.

Another instance of the Case, the man called Joshua Pithang allegedly harmed few people and went on trial at Elizabeth Magistrate. But during the trial the police couldn't find a faithful interpreter for one of the victims who spoke Mis-Chin dialect of Burmese language. Therefore, the accused escaped from legal consequences (Australia Feb-2014).

These above-mentioned examples of cases are leaving few questions which need to address in order to ensure a fair treatment of linguistic right at court. The issues of translation and interpretation are manifold, sometimes the interpreter may end in bias due to his incompetency in language otherwise he or she fails to communicate the indented meaning due to poor understanding of the truth bearing potential of language such as paying less attention to linguistic gaps and cues, idiosyncratic peculiarities, pragmatics of utterances etc. The forensic linguistics' advanced modes of forensic translation addresses all these issues and give the equivalence in the target text without any linguistic leakage.

3. FORENSIC TRANSLATION AND INTERPRETATION FOR FAIR TRIAL

Forensic Translation developed as a subgenre of Forensic linguistics in the late 21st century. Forensic Linguistics is the science of examining the linguistic documents of evidential viability and thereby supplements the investigation of law enforcement agency. It encompasses a number of areas of examination like authorship profiling (Anonymous letters/ verification of suicide notes/ ransom notes) statement analysis (confession, suspect, witness, victim), Cyber Crime (fake Face book post/ messages/ e-mails etc.). Trade mark Infringement, Translation and Interpretation of documents of legal vitality.

It is the common notion for years that legal translation bestowed upon a certified language expert of legal knowledge. The emerging trend of forensic translation could offer another view in this regard. The forensic translation developed as an area of research and application addressing the limitations of traditional notion of legal translation and interpretation. The forensic translation main concern revolves around the following questions over the limitation of traditional approach of translation of legal documents:

- i. Do the translations or interpretation of all legal documents demand same approach or needs to be treated differently according to the purpose it serves?
- ii. The translation-based evidences (toxicology reports, witness statements etc.) need to be verified and cross checked with a forensic linguist expert for the reliability?
- iii. How the source text style features got reflected in the translation of target text?
- iv. Do the individual linguistic traits gone unrecognized while interpretation at court trial?
- v. The pragmatic features, pauses and breaks between the utterances etc. are left unnoticed by the verbal mediator?

Forensic Translation (Darwish.2012) upholds the view that, evidentiary clues are not sacrificed for the sake of naturalness. The author strongly argues that, there may be levels at which the translator makes compromises to attain the equivalence. In such cases the possibility that evidence being intentionally distorted. Therefore, the meaning should be preserved to avoid unjustifiable intervention or inference by the translator. He continues that, in most situation translated documentation presented as evidence is translated by those who have significant biases or simply incompetent this adversely affects forensic analysis and may contribute to miscarriage of justice.

The translation of legal documents of personal identity nature such as birth certificate, immigration etc. demands a word-to-word equivalent reproduction in the target language. But the translation and interpretation of legal documents of evidential value such as trial statements of the persons involved in offences, documentary evidence in foreign languages etc. demands faithful reproduction of equivalence adhering to the idiosyncratic peculiarity, linguistic gaps and cues which are viable in tracing the

fact. The forensic translation proposes a set of linguistic features that need to be given ample emphasis in translation and interpretation of legal text. These features could be helpful in conducting a fair trial and bringing out faithful translation.

The core concern of forensic translation is to give utmost accuracy in the idiosyncratic features of utterance or text while reproducing it in the target language. The individual specific linguistic peculiarities require more attention in matters of interpreting the statements while court trial. The following set of features occupies vital space in forensic translation:

3.1. Idiosyncratic Features

The individual specific linguistics features are often got ignored in legal interpretation of statements at trial. The stylometric features of individuals are viable source of information and reflect the hidden meanings. The silence, pause, break in between the utterance, peculiar phrase, diction, sentence structure or unusual sentence construction might have different stories to convey. Therefore, the Forensic translation urges the legal interpreters or translators to have high attention on such features while carrying out the target text translation.

3.2. Turn taking/ Shift

Turn taking or shift refers to the way people switch over from one utterance to another in conversation and this vary from different cultural groups. Shift and turn taking in utterance are reliable linguistic cues to identify the connotative meaning. Therefore, the interpreter at court trial should be given equal attention to turn taking to bring out the actual intention of the utterances.

3.3. Maxims of Conversations

The maxims of conversation refer to a set of code of conduct while carrying out a conversation and violation of these often distort the truthfulness and purpose of the communication. The important four maxims **quality, quantity, relevance, manner** have a vital role to play according to the forensic linguistics methods of evidence analysis. The maxim of quality refers to give the factual or truthful utterances while conversation. The maxim of quantity about providing the information as required. Maxim of relation refers to the information one should provide must be relevant and manner about the way utterances are made. It requires high listening skill in the part of court interpreters to identify the violation of the above-mentioned maxims in the source language utterance and produce the faithful equivalence in the target text.

3.4. Pragmatics of Utterance

According to the U.S. the National Association for Judiciary Interpreters and Translators guidelines, the contextual information may assist the translator in comprehending distorted sound or clarifying ambiguous utterances. Therefore, the interpreter or

translators have a thorough understanding of these features. The context of utterances often plays the role of a silent witness and the words gain meaning not in isolation but in the context, forensic translation lies emphasis on this aspect too. Interpreter has to give ample emphasize on the context of what they hear in the source language.

4. DISCUSSION AND CONCLUSION

The traditional practices of translation and interpretation of legal documents often aroused criticism and ended in unfair treatment. The core of these criticism lies around the accuracy or reliability of the equivalent target text document and how far the legal interpreters may communicate the meanings of each utterance without losing its evidential value. The instances of cases mentioned above tells the same story of linguistic leakages occur while translating and interpreting legal text. The forensic linguist intervention to legal translation turned vital in bringing out more accurate and equivalent target text.

The forensic linguistics aim is to give a systematic and heedful analysis of language. This analysis proved to be reliable and useful in assisting investigation agencies to solve crimes. The translators and interpreters can use this research to communicate with greater accuracy. The forensic translation model developed by forensic linguist bestowed upon the goal to enable translators and interpreters to identify manage and remove the linguistic constrains in order to unlock possible alternatives to ensure optimal approximation. And ensure optimal approximation between an original document and translation without losing vital evidentiary facts and clues. The western countries are fully utilizing the potential of forensic translation. Dr.Olsson involvement in solving translation of rap and gang slang languages is remarkable in pioneering the field.

When comes to the practice in our country, the possibility to avail the assistance of forensic linguist or forensic translation is multifaceted due to the multilingual stature. The role of interpreters and translators may be high in delivering justice when comes to Indian legal scenario. Our nation houses variety of language communities and their legal battles won't restricted to their regional courts, therefore, when the offences come to the high court or supreme court, they need to translate the documents into English and when it comes to court trial, they need to have an interpreter.

The legal proceedings of Indian high court and Supreme Court have English as their official medium. **The article (141) law declared by the Supreme Court, binding on all courts in the territory of India, documents in the local language has to be translated into English to be filed before the Supreme Court."** Therefore, the legal requirement to translate or interpret the legal text of various language communities into English poses the following challenges particularly.

4.1. The Typological Difference of the Languages

The proper linguistic knowledge is required to handle the structural issues of translation and interpretation. The structure of English is quite different from the Indian languages belonging to Dravidian and Indio- Aryan family etc.

4.2. Cultural Differences

Like the linguistic diversity India houses multi-cultural speech community, the meaning of utterances is intrinsically connected with the culture of people. Therefore, to communicate the meaning of source text to target text without hurting the sentiments demands foremost importance.

4.3. Linguistic Rights

Every accused has the fundamental rights to know information's regarding his legal proceedings in the language which he or she understands. To ensure this basic right in multilingual country like India ample emphasis must be given in matters of legal translation and interpretation.

The intervention of forensic linguist as translators and interpreter became significant here. They are the linguistic expert of legal text and the services can seek in two ways: they may directly call upon to translate the text or cross examine the translated text to bring out the faithful equivalence adhering to the linguistic and extra linguistic features. The second is to train and alert the translators and interpreters on the importance of paying attention to truth bearing potential of language and linguistic leakages which may bring out legal consequences. To conclude, it is high time to adopt the research and developments in forensic translation to the existing legal translation and interpretation practices of our nation.

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Custodial Torture: A Critical Analysis of the Legal Structure for Protection of the Imprisoned

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ABSTRACT

Despite the growth of education and remarkable changes that have taken place in the society, prisoners, more particularly women are still in darkness. Their rights which are supposed to be inherent for all citizens are violated in one way or the other. The inalienable rights and inviolable rights are always violated by the authority which ought to protect them i.e. custodian (police, judiciary, jailers, care homes, or other detaining authorities authorized to arrest detain and interrogate against any offence in question). Women being a weaker section in the society become a soft target for the destroyers (violators) when in custody. The prison conditions blatantly infringe upon the basic human rights of those in custody. The above mentioned bodies commit custodial crimes against prisoners in various ways. These include physical and mental torture inflicted on accused persons by the custodians during and following arrest, incidents of torture or virtual abuse of women in custody, incidents of atrocities committed in person by the police staff and above mentioned forces. There are also incidents of torture, ill-treatment harassment, assault, teasing, cruel inhuman or degrading treatment and degrading punishments like sexual abuse of women victims in care homes.¹ Custodial torture is inflicted upon individual regardless of sex, age, ill-health. From already established records economically poor and socially deprived sections of our society form the majority, like tribes, tribal women, migrant workers, landless labours and others. They are among the most tortured classes. Custodial torture (atrocities) has become so common these days that not only the police and bureaucracy but also people take it for granted as a routine police practice of interrogation.

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1 Siddique E.F. and Sarala Ranganathan (2001)- Handbook on Women and Human Rights (Book) Kanishka Publishers. p. 110. Premshanker v. Delhi Administration (wp No. 1079 of 1879) and Sunil Batra v. Delhi Administration AIR 1978 reaffirmed that "person in custody should be treated with dignity and respect of human personally" on Shah Girij and N.K.Gupta

INTRODUCTION

"Torture is wound in the soul so painful that sometimes you can almost touch it, but it is so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture and fear and rage and hate. It is a desire to kill and destroy including yourself".

-Adriana P. Bartow

Torture is one of the worst possible crimes. A wall of silence and denial protects it. It is not admitted by perpetrators and they may take steps to avoid proof such as injuries or to stop victims from speaking, which ultimately ends with their denials and silence. Victims are often left hesitant to both i.e., talk about their experience as well lodge complaints against their torture. They are left so much traumatized, ashamed and scared that they are sometimes unable to face themselves also.

When this torture is done by the hands of the country's protectors i.e., police themselves it is called custodial torture. Torture in custody ranging from attack by various forms to murder by police for confessional extortion and evidence imputation is not unusual. Such a system of investigating and detecting a crime "not only disregards the human rights of an individual and thereby violates his integrity but also exposes him to unjustified abuse and torture by those who are supposed to 'protect' him."

Torture in detention is generally regarded as an unavoidable aspect of investigation. Investigators maintain the misconception "that if sufficient pressure is exerted then the accused will confess."²

The former Justice of Supreme Court, V.R. Krishna Iyer, has said that, "Custodial Torture is worse than terrorism because the authority of the State is behind it."³

Whereas when we look up to the legal structure for the protection of prisoners, we see that in India, the idea of prisoners' rights under colonial rule has long been suppressed and it came to light only recently in public discourse.

In India prisoners have been given rights since independence as we could refer our constitution where some fundamental rights of prisoners are mentioned and with the sands of time scope of these rights have been widened by judiciary. And after seeing the condition of the prison system and overcrowded prison the government felt the need to make special laws for the rights and protection of the prisoners. Committees were made to see what reforms were needed in the prison system, schemes were started to reform the prison system and now problems of women prisoners are

2 Asian Human Rights Commission, INDIA: Government of Kerala must criminalise torture to prevent custodial deaths, <http://www.ahrchk.net/statements/mainfile.php/2006statements/688/>

3 The Hindu, Custodial Torture Worse than Terrorism, <http://www.thehindujobs.com/thehindu/2003/07/27/stories/2003072703510500.htm>

in limelight so focus has also been shifted to the protection and rights of women prisoners now a days. India is also signatory of UN and other international conventions which bound India to provide humane treatment to the prisoners.

Complaints of excessive torture of suspects have long been witnessed, including women by police. Such complaints eventually developed wider dimensions such as torture, abuse, rape and death cases, although they rose in startling proportions in detention. Around 180 people die in police custody on average. Custody has become a protected place for torture inflicting. True, an active attitude emerges from the "media, human rights activists, NGOs" in promoting awareness of human rights and community concern.

But still a lot has to be done for the protection of prisoners. Condition of prisoners in Indian prison is not good at all specially women prisoner. Prisons are overcrowded, conditions of the jails are not good, lack in the system is there, new jails are needed, system have to be reformed and other basic necessities are also missing. The government and prison staff are under duty to take care of all the problems arising in the prisons and also of the convicts and under trials living in the prison and also to make them safe inside from any other danger. Legal structure for the protection of imprisoned must be shown more concern because of the emerging crimes against the imprisoned including most importantly custodial torture.

In recent years, custodial violations have drawn criticism from the "Public, the Media, the Legislature, the Judiciary and even the Human Rights Commission. Nevertheless, judicial advocacy, extensive media reporting, National Human Rights Commission programs as well as civil society participation have shown support for the fight against torture and the preservation of human dignity."

CUSTODIAL TORTURE

Custody means "care or care of someone or something"⁴ Legitimate dialect defines, "custody as a point where a person loses his / her freedom of movement when deprived by law enforcement agencies", e.g. while carrying before booking, or by arresting, charging and jailing. Torture primarily by police officers in detention conducts a direct assault on basic human dignity, and this is what is known as torture in detention.

Torture in detention is widely held as one of the most cruel forms of human rights abuses. It is forbidden by Indian constitution, the "Supreme Court", the "National Human Rights Commission (NHRC)" and the UN. But those institutions are being defied by the police across the country. Therefore, by using a realistic approach, it is necessary "to strike a balance between the individual human rights and societal interests", to combat crime.⁵

4 <http://www.oxforddictionariesom/definition/english/custody>

5 Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 260

Custodial torture, often referred to as “extra-judicial executions”, was on the rise in India particularly “between 2002 and 2007.” According to the Asian Center for Human Rights, the national figures are “four deaths” in custody per day.⁶ In this five year period, there were 7468 deaths reported. But the severity of India’s torture is far worse than statistics suggest. This is because, “victims report cases against police rarely for fear of reprisals.” There are not even more than half cases of custodial torture.⁷

The dark reality is that the Torture in detention at the hands of law protectors, i.e. police, is considered to be the most brutal type of abuse of human rights. Human rights perseverance can only be assured by curbing the needless evil. An anathema to human life is the mere notion of a human being in captivity, except for safety and nurture. The term custody means treatment and guardianship. This does not bear any mysterious signs of aggression during imprisonment, except when applied to suggest detention or incarceration. Problem of custodial torture is an international community issue and a common subject matter. Police authorities are a custodial authority, suffering and violence a widespread phenomenon.⁸

It is a widespread perception that torture has become a part of Indian Police force. Police torture videos, often horrific and disturbing, from different parts of the world are received with monotonous regularity. These provide an impression that a significant number of policemen are sadists in this country, who enjoy torturing people. That is an incorrect interpretation. In the Indian Police force, as in security forces in the different countries of the world, there are some violence prone personnel, and it is genuinely felt that indulgence in torture is giving police a bad name and alienating the force from the public.

As early as 1850, Torture Commission, while attempting to define torture, “quoted Dr. Johnson”, who said that, “torture is the time-honoured means by which guilt is punished and confession extorted.” Unfortunately it is the police tradition to resort to torture for its’ work and this prevailed in different police stations of the then Madras Presidency and same was mentioned in Torture Commission’s report. In 1902 Police Commission was formed and it stated in its’ report the continuance of torture in different parts of the country and the adoption of different methods of torture by police station officers (darogas) to extort confession. While in the Second Police Commission (1978-1981), better known as Dharma Vira Commission, strongly condemned torture, and misuse of force by the police. It recommended mandatory judicial enquiries into all cases of death in police custody.

6 Merinews.com, Indian jails cause rise in custodial deaths, <http://www.merinews.com>

7 ibha Sharma, Human Rights: 7,468 custodial deaths in 5 yrs, <http://www.tribuneindia.com/2008/20080628/nation.htm#3>.

8 Dayal, Keshav, Custodial Crimes And Human Rights Violation, 2010, P.80.

Yet continuation of torture and the practices of third-degree police operations has continued unabated. Following its' establishment in 1993,⁹ the National Human Rights Commission (NHRC) provided a directive to District Magistrates and Police Superintendents in all districts of the country to record all cases of custodial death and custodial rape within 24 hours, under which the commission would draw an adverse inference of 'covering up'. Several states have confirmed to the commission a total of 2,516 deaths in Police Custody (PCD) and 23,695 deaths in Judicial Custody (JCD) since the Commission's establishment in October 1993 through March 2013. The total for each year was 147 Police and 1,126 Judicial deaths in the trails. Such satisfied figure clearly demonstrates how much violence police officers have perpetrated against the ones in custody. The abuse or brutality inflicted is so severe it leads to the victims' death. So it is appropriate to conclude that slavery under detention is a crime against humanity and a human rights violation by all accounts.

CUSTODIAL TORTURE IN INDIA

What is more reprehensible and lamentable is the move to legitimize and justify custodial torture than torture itself. Torture in custody has become a "systematic and state-controlled" phenomenon. According to one study¹⁰, an expert from a "super power intelligence force" was called upon to train the policemen in the "latest methods of torture during 1970-71". It is justified to be a "necessary evil". Though there are some enlightened police officers such as Vijay Karan, Delhi's former Police Commissioner who not only openly "condemned but made every effort to curb torture in custody." Police forces generally laugh at giving up third degree methods of torture. Its' use is justified and supported on the following grounds:¹¹

- i. As compared to the augmenting rate of crimes, the "police force is facing the problem of inadequate strength." Their task is devastating which goes far beyond the obligations to enforce the law and to control the crimes. They hardly find sufficient time to properly investigate and detect crime, thus making the adoption of third-degree methods unavoidable.
- ii. The language of violence is the only language which is understood by hardened and professional criminals. "Third degree method is their only possible method of obtaining truth from them, because otherwise they would not reveal it."
- iii. Violence against criminals doesn't harm such as terrorists, dacoits and incendiaries, as they use the same against society.

⁹ The National Human Rights Commission (NHRC) of India is a Statutory public body constituted on 12 October 1993 under the Protection of Human Rights Ordinance of 28 September 1993. It was given a statutory basis by the Protection of Human Rights Act, 1993 (PHRA)

¹⁰ *Violation of Democratic Rights in India*, vol. I (1986). Sudip Majumdar, "Death in Police Custody" in A.R. Desai (ed.).

¹¹ Based on interviews with some senior police officials on the condition of anonymity

- iv. The question that comes up is, "do they have any rights"? If so, "why should the police respect their rights", when they disregard innocent people's rights.
- v. The legal procedure is very complicated. Under heavy legal odds the police have to work. "There's no doubt they have to establish the crime in court", that leads in any way to the "solving" of the case.
- vi. Most of the police stations have virtually no facility for "scientific investigation and crime detection." So the police have left no other option than to rely on methods of third degree.
- vii. Detection of "crime and conviction" at court is seen by society as proof of the effectiveness of a police officer.
- viii. People want the police to prevent and control crime but are unwilling to cooperate. They rarely give testimony against the criminals. So the police have to get information from the criminals concerned about the crime which is rarely voluntary.

The public also "very often expects the police to give the so-called *goondas* and bad characters a sound thrashing." In the cases of "pick-pocketing and property theft, the victims urge the police to adopt third degree methods on the suspect and when this not done, the police is accused of bribery, corruption and incompetence¹²." The "Bhagalpur blinding episode of 1980" when the police punctured the suspects' eyeballs in their custody with a "sharp edge instrument and poured acid resulting in their complete blindness", is the most blatant and horrendous example of custodial torture with the support of the local public.

Another factor which leads to the custodial torture is pressure from various quarters under which the police works. When some ghoulish or brutal crime takes place, there is constant pressure from the seniors to apprehend the criminals quickly. The good confidential report and promotion of a policeman is influenced by the number of cases he "solves". Beside this, there is combined pressure of the government, media and the public, under such pressure the policemen often tend to use the third degree methods to get the quick result at the risk of magisterial enquiry, transfer, dismissal from the service and even criminal prosecution.

The display of this inconsistent attitude towards custodial torture leads to the dangerous tendency of its' institutionalization. Not only it is being justified as lesser or necessary evil for the so-called larger social good but it seems to assume international dimension as one study¹³ reveals:

"Torture is not simply an indigenous activity: it is international";

"Foreign experts are sent from one country to another: schools of torture explain and demonstrate methods; and Modern torture equipments used in torture are imported from one country to another."

12 The National Police Commtsstion: Fifth Report (NPO. p. 53 (1988). Government of India

13 Ann Dolan and Van Den Assum "Torture and the 5th UN Congress on Crime Prevention *International Commission of Jurist*, no. 14, (June 1975).

If this dangerous tendency is to be fended off, custodial torture should be eliminated completely. It cannot be justified even as “necessary or lesser evil” because it’s constant use instead of bringing down the crime rate, brutalizes those who inflict it and victimizes and terrorises the million innocents.

NATIONAL SECURITY VERSUS HUMAN RIGHTS

Apart from the plea to tackle the hardened and professional criminals, denial to the basic human rights like freedom from torture is sometimes justified on the ground of national security. It is argued that the government is duty-bound to defeat the terrorists, insurgents and arsonists who put innocent lives at risk and endanger the national security by their violent and antinational activities. So it is entrusted with wide-ranging powers to tackle such extraordinary situations. The deviation from some rights and liberties is inevitable in such a situation.

However, freedoms and rights are not absolute, completely free of any restraint, because “that would lead to anarchy and disorder.” Man can only enjoy his rights in a State where “civil and social order” exists. In a state of anarchy, he can not enjoy its rights. Therefore, “the possession and enjoyment of all rights are subject to reasonable conditions, such as public health, peace and order, community moral, decency and national security.” Such reasonable grounds for restricting the fundamental rights of individuals can be found in almost all of the world’s constitutions, including the Indian Constitution.¹⁴ No one would displease such reasonable restrictions on human rights. However, there have been numerous assaults on the “rights and freedoms of the individual” by the state in the name of national security, such as the confiscation or nationalization of private property; wiretaping and mail opening surveillance; arbitrary search and seizure; arbitrary arrest and detention for an indefinite period; suspension of habeas corpus; summary trials and execution; denial of appeal to the judiciary; resort to torture; political internment; concentration camps and even liquidation of suspects/accused persons in custody, and etc.

Thus animosity appears between human rights and the concept of national security. But in fact they are interconnected. The two have a close relationship. For those persons who are constantly living in anarchy and disorder a charter of rights has no meaning. The rights of people may not last long, when either external attack or serious internal disorder puts the country at risk. In a word, without national security human rights can’t last long. On the other hand, long-term deprivation of the fundamental rights of the individual by the authoritarian or dictatorial regimes creates anger, frustration and disillusionment which ultimately leads to rebellion and internal disturbances shaking the very foundation of national security. So the hundred dollar question is-how far and how much to sacrifice the individual’s rights to promote national security. This question can not be properly answered unless the concept of national security is properly understood and distinguished from that of regime / individual security.

¹⁴ See, art. 19 (2-6).

Every State, like individuals, has the right of self-defence. In any situation that threatens its existence, that right is available to the State. Accordingly, during an emergency the State may exercise abnormal powers and deviate from its normal obligation to protect and enforce its citizens' human rights. This right of derogation of the state is acknowledged under many international instruments of Human rights.¹⁵ But since "human rights and fundamental freedoms are not absolute", the "State's right of derogation is not absolute either." There are certain rights that must be left untouched even during the public emergency. These rights can not be suspended in an emergency, or no emergency. These "non-derogable" rights, "right to life and freedom from torture" being two of them, find place in international human rights instruments.¹⁶

The state can exercise the, "right of derogation" to meet the threat to national security. But quite often national security is identical either with an "individual's or regime's security" and states often deviate from their obligations *vis-à-vis* human rights to ensure the individual's/regime's security. The, "International Commission of Jurists (ICJ)" rightly notes:¹⁷

"The (individuals/regimes) frequently allow their security forces to abuse the 'non-derogable' rights, including the right to life and freedom from torture or other cruel, inhuman or degrading treatment or punishment, having dismantled the legal machinery to protect the citizens. Resulting in inhumane practices like anonymous arrests, secret detentions, disappearances, extrajudicial killings and systematic torture practices."

Thus what is needed is to distinguish between national security and the security of the individual / regime. Under international law, the rights are allowed to be derogated in order to defend and safeguard the national security but not the security of individuals / regime. What is further needed is a proper balance between human rights and national security requirements.

It is important to keep in mind that national security should not be an excuse for denying basic and non-derogable rights such as the right to life and freedom from torture. Under no circumstances, however, serious it may appear, should the derogation of these "non-derogable" rights be allowed. "Because once there is derogation for an apparently justifiable cause, there is always a tendency among the wielders of power to continue the derogation of human rights", in the name of either national interest or state security, in order to perpetuate their power. History is filled with examples of the devastating consequences of such derogation

15 See, e.g. International Covenant on Civil and Political Rights 1978, art. 4(1); The European Convention on Human Rights 1953, art. 15(1); and American Convention on Human Rights 1978, art. 27(1). For texts, see, A.H. Robertson, *Human Rights in the World* 202-4 (Manchester, 1972).

16 See. e.g., International Covenant on Civil and Political Rights, art. 4(2); the European Convention on Human Rights, art. 15(2); and American Convention on Human Rights, art. 27(2). See. Robertson, *supra* note 9 at 204, 229 and 253.

17 International Commission of Jurists. *State of Emergency: Their Impact on Human Rights* (1983).

JUSTICE RENDERED TO THE IMPRISONED PERSONS BY JUDICIARY

In a string of judgments it was held that “just because a person is in police custody or detained or under arrest, that does not deprive him of his fundamental rights and his violation empowers the person to move to the Supreme Court under Article 32 of the Indian Constitution.” In the landmark case of *Sunil Batra vs. Delhi Administration*¹⁸, Justice V.R. Krishna Iyer itemize, “basic human rights” of the prisoners by quoting that “detention does not deprive one of his fundamental rights”.

The judgement held that: *“No prisoner can be personally subjected to deprivation not necessitated by the fact of incarceration and the sentence of the court. All other freedoms belong to him to read and write, to exercise and recreation, to meditation and chant, to comforts like protection from extreme cold and heat, to freedom from indignities such as compulsory nudity, forced sodomy and other such unbearable vulgarity, to movement within the prison campus subject to requirements of discipline and security, to the minimal joys of self-expression, to acquire skills and techniques. A corollary of this ruling is the Right to Basic Minimum Needs necessary for the healthy maintenance of the body and development of the human mind. This umbrella of rights would include: Right to proper Accommodation, Hygienic living conditions, Wholesome diet, Clothing, Bedding, timely Medical Services, Rehabilitative and Treatment programmes”.*

The judgment upheld by the judiciary on land marks is the “right to compensation in cases of unlawful deprivation of personal rights.” The case of *Rudul Shah v. State of Bihar*¹⁹, “is an example of breakthrough in the jurisprudence on human rights.” For more than fourteen years the petitioner Rudal Shah has been unlawfully held in prison. He filed for his immediate release before the court with Habeas Corpus, writ. And, inter alia, begged for recovery of costs, medical costs and compensation for misdemeanors. After his release, the question before the court was, If the court should pass an order to pay the money in exercise of jurisdiction under Article 32? Could the Court pass an order to pay the money? Was such an order substantive in the form of justice on deprivation of basic rights?

India’s Constitution contains no explicit provision to “grant liability for violations of a constitutional right to life and personal liberty.” But the judiciary has evolved a “right to compensation”, in cases of illegitimate deprivation of personal liberty. The Court awarded the Bihar Government Rs.35,000 monetary compensation for keeping the individual unlawfully detained for 14 years, even after his acquittal. The Court, while granting compensation, “departed from the conventional method and ignored the technicalities.” The decision in Rudal Shah was significant in two respects. Firstly, it held that, “infringements of a constitutional right could give rise to enforceable civil liability in a civil court” and, secondly, “it developed the basis for a principle of liability under which infringement of the right to personal freedom”, could result in civil liability.²⁰

18 1980 AIR 1579, 1980 SCR (2) 557

19 Art 32 of Constitution Of India, 1983 AIR 1086 198 SCR(3)508

20 Supra 89

The decision based on serious considerations for the security and preservation of a citizen's fundamental right. It also calls for "compensatory jurisprudence" on unlawfully detained inmates.

In the case of *Charles Sobraj vs Supdt. Central Jail, Tihar, New Delhi*²¹ Supreme Court observed that the, "Court must not rush in where the jailor fears to tread. While the country may not make the prison boss the sole sadistic arbiter of incarcerated people, there may be no mood in the community to hand over central prisons to be run by courts. Each instrumentality must function within its province." While Sobraj has dismissed the prison reform litigation service, we have no hesitation in claiming that he simply failed to explain any legal injury. "We therefore reject the petition in writing, making it clear that the petitioner being a foreigner cannot claim rights under Art. 19", but we have been addressing the import of Articles at some length. Art. 14, 19 and 21 as they are interlaced they will refer to the Indian people in every event.

In another case of *Bhim Singh vs. Union of India*²², the respondent was directed to repatriate as soon as possible the Pakistani nationals who served their sentence and whose national status was defined and otherwise are not needed for any offense in the country may be possible but in no case later than one month.

In the case of *Jaswinder Singh and others vs. State of Karnataka*²³, the court observed that Art. 21 The present petitioner-accused submitted a grievance petition to the Hon'ble Chief Justice on 5-12-2001 under the Indian Constitution. Allegations are made against the Special Public Prosecutor in the above lawsuit alleging that he is not conducting the investigation in a reasonable manner and exhibiting an unfair and over-jealous approach. Therefore, sought to replace the Special Public Prosecutor, it is also alleged in the petition that the Supreme Court's guidelines regarding the handcuffing of prisoners are not being followed.

The conduct of the escort workers in handcuffing the accused during their transit from prison to court and back can not be said to be without a judicial order after due consideration of the ratio as set out above from the various judgments of the Apex Court, referring to the case at hand. So no such order is issued during the Committal stage before a Magistrate. Nevertheless, the Sessions Court permitted handcuffing of the accused for a limited degree and for a limited time during the transit by its earlier order of 7-11-2000. On the second application of the accused the Sessions Court rejected their request by order dated 28-1-2002 on the ground that there has been already an earlier order on this issue and that there are no changed circumstances to review or reconsider the request. The present grievance petition is not in the nature of revision or criminal petition invoking inherent jurisdiction. Nevertheless, keeping in view the ends of justice, this broader issue was also taken up for consideration while hearing the petition and after carefully going through the

21 1978 AIR 1514

22 (2010) 5 SCC 538

23 2002 CrL J 2154

earlier order of the Sessions Court, where in detail the Court has passed a considered order on 7-11-2000. In the course of the case for a remedy against the prosecution, appeal is requested to be made almost a year later, not to handcuff the accused during their transfer from jail to trial and back. Since the order has already been completed and at a late stage, the request made does not appear to be tenable, besides, by providing strict guidance, considerable progress has been made in documenting the evidence and instructions for the completion of the trial are currently being given by the end of March 2002.

Therefore, taking into account the essence of the crime against which the accused is convicted, the modus operandi of the commission of the crime and the suspected aggressive and scheming conduct of the accused in the commission of the offence, "I see no reasonable reason to interfere with the order of the Sessions Court" and, however, the Sessions Court passed an order for "handcuffing for a limited purpose and for a limited period between their transit from prison to Court and back." The appeal for guidance against the handcuffing is denied, under the circumstances. The Trial Court is again reminded to comply with the directions laid down for conclusion of evidence and disposal of the case by the end of March 2002.

For the strict compliance of the guidelines and for observation of the proper procedures relating to handcuffing as laid down by the Supreme Court, and by this order, I deem it necessary that the copy of this order should be communicated to the Director General of Police and who shall in turn communicate to all the Police Stations in the State.

In *B.K. Basu*²⁴ case, Court held that:

- The Code empowers police with the power to "arrest, interrogate, and detain." The police who carry out the arrest "must have clear identification and name tags."
- During the time of arrest, the police must have a memo of arrest and the arrested person have a relative or friend informed of the place, time, name in the diary and the arrested person must be examined.
- Arrested persons "must be allowed to meet the lawyer" and must be guaranteed "personal freedom under Article 21 and Article 32(1) of the Constitution, that is a guarantee against torture."

Police are undoubtedly under a legal duty and have a legitimate power to arrest a criminal and interrogate him / her during the investigation, but law does not allow third-degree methods, i.e. torture, to be applied.

In *Anil Jadav and others V State of Bihar*,²⁵ "while passing judgment on the Habeas Corpus petition filed against the Superintendent of Jail by blind persons, Bhagalpur Court declared it to be maintainable." It was held that "pouring acid" into the prisoners'

24 In *Shri B.K. Basu V State of West Bengal* Cr No.535 of 1926.

25 1982 AIR 1008, 1982 SCR (3) 533

eyes was an act of brutality, atrocity as provided for in Article 21. So the judgment brought books of offenders to books.

In *Gauri Shankar Sharma V State of UP*²⁶ with *State of UP V Rafiuddin Khan*²⁷, "three policemen were charged u/s 304, 330, 201, 218, 34 of IPC also u/s 161 and u/s 5(1)(d) 15/2 Prevention of Corruption Act 1947 for demanding Rs.2000 so as to desist from applying third degree punishment who died of homicidal death. The dead body of the deceased as per medical report showed 28 injuries and date of arrest instead of 19.10.1971 was indicated 20.10.1971, court convicted all the police constables."

In *Saheli Women's Resource Centre*²⁸, "Police atrocities toward citizens causing death for which state is liable for tortuous acts by its employees (Police or other detaining authorities empowered to arrest and detain), state is liable to pay compensation to the victim and his family. A police beat up nine-year-old child to death here. The state was ordered to compensate the mother."

In *Sunil Batra's*²⁹ case the court rules that, "any person arrested being subjected to third degree treatment while in custody, resulting into his death amounts to violation of Article 21 of Constitution of India."

In *Joginder Kumar's*³⁰ case the court reinforced, "the principle statues in Cr. P.C. Which empowers police officer to examine orally any person alleged to have been acquainted with facts under section 161, while sec.160 empowers him to be interrogated which doesn't really mean to imply physical assault." Death under police custody means Art.226 gets into the picture immediately.

In *Neelabati's*³¹ Case the Court said that, "arrestee was found hanging in police lock up. There were neither marks physical harassments nor bodily injuries. Hence, police were not held guilty of homicidal death as mere failure on the part of police to render assistance cannot render them accountable hence State was directed to not pay 'exgratia' compensation."

From the above it is inferred that judiciary is one of the main organ of the system, it is levied with the task of interpreting and enforcing the laws made by the legislature, as it is well said, "with more duty comes greater responsibility", so the same is with judiciary it is carrying a great burden on its shoulder, in order to have a check that all the rights which have been guaranteed by the constitution and embodied in various statutes is not violated with the hands of human beings, irrespective of their designation. Thus, even if it is a police officer, he is not entitled to take away from the prisoner any right. Being a prisoner does not make them less human that their basic rights are only snatched from them, but what is to be seen is that prisoners are

26 1990 AIR 709, 1990 SCR (1) 29

27 1990 Supp SCC 656 : AIR 1990 SC 709

28 *Saheli Women's Resource Centre V Commission of Police Delhi* AIR 1990 SCC. 746

29 *Sunil Batra V Delhi Administration* AIR 1978 SC 1975

30 *Joginder kumar V State* AIR 1994 SCC 260

31 *Neelabati Bahera V State of Orissa*, AIR 1993 SCC 746

also protected from being confronted with their rights, in which torture in custody plays a very vital role. Custodial torture is a great mark on human civilization. Furthermore, this graph of torture in custody leading to deaths in custody is growing on a large scale. Consequently, judicial pronouncements as inferred above must aim at protecting human rights and, in particular, at avoiding the use of degrading inhumane treatment of prisoners, and more specific laws must also be legislated against custodial torture and the protection of prisoners' rights.

CONCLUSION AND SUGGESTIONS

Under our legal system, police are undoubtedly under the legal duty as a state law enforcement agency to bring offenders to book and achieve a state's welfare. The law can truncate the rights of a citizen, if situations arise say like "indicated in provisions of Article 356." At the same time constitution has the safeguards against the abuses of such arrest by executives, being offence under Articles 32 and 226 of the Indian Constitution."

The arrest by the police sometimes on a baseless suspicion, oppression and abuse including "custodial torture", all requires, "effective enforcement of rights to life and liberty and proper procedure to be followed while arresting a person." In view of "section 49 of the Criminal Procedure Code (1973), the person arrested shall not be subjected to so much restraint than is necessary at the same time of arrest." Article 22 of the Indian Constitution, r/w Section 50, 54, 56, 57 and 66 of Cr.P.C. 1973 provides that, "wherever a person is arrested he shall be informed of the ground of arrest, and shall be produced before a magistrate within 24 hours of arrest, he shall not be denied to consult a legal practitioner of his/her own choice at the same time arresting officer shall make an entry in the diary which includes time of arrest, police constable who did the arrest and before the presence of inspector." According to *B.K. Subbarao's*³² case the, "police officer can arrest without a warrant of arrest if an offence is cognizable, if reasonable information is contained or if reasonable suspicion exist." Whereas as soon as a person is arrested, "operation of Article 22 of the constitution comes into picture and it is his/her fundamental right to take immediate steps to regain his/her freedom", as held in *Maheshwar's*³³ case.

Regardless of such safeguards from the statutes i.e. "Constitution of India being supreme law of the land and Criminal Procedure Code 1973, state agencies like police force, directorate of revenue intelligence, intelligence Bureau, R.A.W., CBI, CID which have power to arrest and detain in connection with the investigation of a related offence sometime forget to make necessary entries in their records". Police decide to produce the accused before a magistrate and enter the accused's name in the diary to show that they complied with the 24-hour provision in, "Cr. P.C. Section 57 r/w Article 22 of the Constitution". They "arrest without informing an accused of the reason for the arrest, they deny an accused chance to meet family members,

32 State of Maharashtra V. Dr. B.K. Subbarao and another 1993 Cr LJ 2984, Abdul Azees V. State of Mysore 1975 Cr. LJ. 335, Shivappa V. State of Karnataka 1995 (I) Cr. 138

33 State V. Maheshwar : 1946 47 Cr LJ 831 AIR 1946 PC 123

relatives and counsel of their own choice, sometimes by using third-degree methods during the person's investigation." They dispose of the body to cover up their crimes, when the police intend to torture a person. There is no doubt that the police have a legal obligation to arrest a criminal, but they are not permitted by law to apply third-degree methods or torture on an accused in custody during the investigation to solve the problem. "Police believe more on fists than wits or torture more than culture". There is nothing more spineless and reprehensible than being beaten up by a person in police custody and there is nothing that "inflicts a deeper wound on our constitutional culture than a state official running haywire whatever human rights may be." So there is also no provision in the statutes i.e. Constitution (1950), Code of Criminal Procedure (1973) or the Indian Penal Code (1860) which may "prevent police torture during the investigation", but in Cr. P.C. there is "provision for police to conduct investigations."

Since, "innocent people are arrested, it is not possible for them to be charged sheeted meaning that the accused will remain in police custody or judicial custody for years, indicating that the legal process will remain dormant as the accused will not be represented by a lawyer in the court."

The research study undertaken figured that, "there is no speedy trial of cases, there is no fair trial, as in cases where an accused has a right to bail he / she is refused or not granted bail, in trials he / she is mixed with detained persons and due to lack of due process of law accused rights are violated, the accused women, men, children are not segregated and therefore the principle of natural justice is defeated."

SUGGESTIONS

1. Human rights education and training

A compulsory education course for "law enforcement and security personnel" at all levels should be provided in the Constitution and human rights. Mere knowledge of the different sections of the "Penal Code, 1860 and Code of Criminal Procedure" is not enough. They should be familiar with the basic tenants of the Indian Constitution, in particular citizens' fundamental rights, the International Bill of Human Rights and other instruments relating to prisoners'/suspects'/accused rights. A simplified version of such instruments should be translated into and made available in regional languages. Every police and prison staff should be taught that his primary loyalty is to the Constitution and laws, and that he is not bound to carry out his seniors' illegal orders leading to torture for which he and he alone would be held responsible and punished. No training of any kind is given to our Constabulary. It is one of the factors which lead to torture in custody. It is not from the senior level that we should start our police staff training, but instead we have to train them directly from the junior level. Because it is the junior staff who has to deal more frequently with the common man than the senior officer. Our police and prison staff should necessarily receive initial training and training from time to time during the service

2. Use of scientific aid investigation

During the investigation, third-degree methods are resorted either because of the non-availability of the scientific aids or because the investigating officers are unable or unwilling to use them. Most of the rural police stations don't even have a separate room where an investigation officer can talk to a suspect on his own. Overburdened by the increasing number of cases, when he attends other cases, he hands a suspect / accused over to a sub-inspector or a head constable. Having no training or aptitude for scientific interrogation, these people constantly work under the pressure from above to "solve" the case at any cost. Moreover, more cases solved mean better chances of promotion for them. So they're desperately trying to "solve" as many cases as possible in the shortest time possible. The result is different types of torture, and often death by custody.

Here, the supervisory rank can help to a large extent by avoiding the subordinate police officers' hasty criticism of investigation and by desisting from pressuring them to "solve" the cases somehow or the other. They should try to convince their subordinate staff that the detention and interrogation methods are more effective than the outdated, third-degree-based methods.

In investigations including the use of forensic science laboratories, lie detectors, computers, etc., the police should be encouraged to use scientific aids. The interrogation techniques should be based on the criminals' psychology and the psychologists' services should be hired to do what is needed. It is essential to set up "lie detection centers and forensic science laboratories in every nook and corner of the country in order to assist the police in obtaining and analyzing the information evidence in the modernization of our police force." In this regard also the, "computer can play an important role."

Though police are, "a state subject under the Constitution", a scheme for modernizing state police forces has been implemented by the central government for the last 20 years. The scheme provides, "financial assistance from the State Government to meet expenditure on communication, computers, forensic science equipment, and other scientific research aids." The annual allocation for the period 1991-92 was Rs.15 crores, according to the Ministry of Home Affairs report. Annual allocation would be for the period 1992-95, Rs.30 crores.³⁴ This funding allocation isn't sufficient. The government should apportion more money for police modernization.

3. Court role at the time of police remand

As recommended by "the National Police Commission",³⁵ "Any complaint of torture or ill-treatment by the police and his reply should be recorded by the magistrate, before whom the accused person is submitted for further custody under administrative rules of criminal practice." The Magistrate should refuse to grant additional remand

³⁴ Government of India, *Ministry of Home Affairs, Annual Report 1991-92*. 15-16 (1992)

³⁵ NPC, *Fourth Report* 8

for police custody in the event of torture, and send the accused / suspect person to die in judicial custody. In addition, in the event of torture, the magistrate should send him for "medical examination under section 54 of the Code of Criminal Procedure." If the Medical Report substantiates the charge of torture, a criminal case against," the custodial authority should be filed before the main charge is taken up."

4. Change the law of state immunity

Current law grants the "public servants immunity from prosecution", for any offense while performing their duties. Under "sections 132 and 197(1) of the Code of Criminal Procedure", where a public servant is accused of any offense, "alleged to have been committed by him while acting or purporting to act in discharge of his official duty, no court shall acknowledge such an offense except with the government's prior sanction." It gives protection to members of the police guilty of torture. Similarly, "section 6 of the 1983, Armed Forces Special Powers act", gives the security forces similar immunity for the alleged crime. This 'sovereign immunity' concept should be abolished and the police and security forces should be held "accountable for the acts of torture." The NPC made a similar recommendation for police in its "eighth and concluding report".³⁶

5. Change the law of evidence

The law of evidence needs to be changed, as recommended by the Law Commission. "The burden of providing the evidence and witnesses falls on the plaintiff's shoulders in the case of custodial torture or death." The eye witnesses of torture or deaths in jail lock-ups are generally co-prisoners who remain "tight-lipped" and for fear of reprisals do not speak against the custodial authorities. The other witnesses are police officers who usually doesn't cooperate in such cases as instilling a sense of fraternity and do not wish to involve fellow police officers. They'd twist the truth. Thus, the Law Commission rightly suggested amending the Evidence Act by "creating a new section 114B to provide a rebuttable presumption that the injuries sustained by a person in police custody were caused by the police officer in charge." At his shoulders will be the burden of proving his innocence. Once implemented, police will be prompted to treat suspects / accused persons in their custody more humanely and in accordance with law.

6. Edict legislation to curb torture in custody

The government should implement suitable central legislation to ensure the accused person / suspect's safe custody at cop shop. The legislation may, inter alia, cover the accused person's compulsory medical examination before and after police remand; the presence of his lawyer during interrogation; the making of senior officers responsible for the safe custody of the accused person; the enforcement of strict accountability at

³⁶ *Id. Eighth and Concluding Report 36 (1981)*

all levels; and compensation to the family of the victim in the event of his death during police remand.

7. Surprise periodic visits

The system of periodic surprise visits to police stations and other places of detention and imprisonment is a yardstick that can have a significant preventive effect in curtailing torture.

Is the Artificial Intelligence Liable for Any Life?

*Ms. Tridipa Sehanobis**

1. INTRODUCTION

Artificial intelligence (AI) has emerged as the most transformative technology of the 21st century that has huge societal and economic impact. Artificial Intelligence for its diverse technical expertise and high-level ability to deal with complex issues has started making inroads into various industries that were previously thought to be only the province of human experts. Healthcare is one of the leading beneficiaries of this revolutionary AI technology. It seeks to fill up the gap of human resource deficiency and supplement the existing.

With rapid progress in digital acquisition of data, machine learning (ML), deep learning (DL) and computing infrastructure, AI applications are expanding its arms in the healthcare sector. Distinct from the conventional meaning of technology, that only supplemented human capability, the AI is capable of being intelligent agents, process natural language, computer vision, machine learning, chat bots and for speech recognition.¹ Artificial intelligence (AI) is said to transform the medical world, in cancer detection and other diagnostic and treatment disciplines on basis of image based diagnosis like in the field of radiology, dermatology, ophthalmology, on basis of genome interpretation, by inferring health status from wearable devices, etc.

Artificial Intelligence has been making strides in the Indian healthcare sector too. The global analysts by referring to India's ever imbalanced and unsustainable patient-doctor ratio expect that the inclusion of AI and Deep Learning (DL) into the country's existing diagnostic and treatment processes is inevitable to improve healthcare delivery.²

Though the AI has emerged as an evolutionary weapon in lifting up the standards of efficiency in the healthcare sector but such revolution is not devoid of drawbacks

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1 Artificial Intelligence in the Healthcare Industry in India, <<https://cis-india.org/internet-governance/ai-and-healthcare-report> > accessed 25 May 2021.

2 *Ibid.*

and side-effects. The implementation of AI faces certain challenges as to liability when it causes error in the process of diagnosis or treatment. In absence of any specific legal framework and jurisprudence in this regard it creates an ambiguous situation as to who should be held liable if any error occurs due to the implementation of AI, for which there is obviously necessity for the legal development in this field both by legislature and judiciary.

2. OVERVIEW OF AI IN HEALTHCARE SYSTEM

Origin and Definition of Artificial Intelligence:

Although AI is regarded as a modern-day innovation, but it is been developed since more than half a century. It was Alan Turing who first came up with the idea that that machines could one day think as humans in 1950s and since then AI research began. The first 'machine learning' (ML) technology created by a computer scientist was a program which was proficient to solve puzzles on its own³. Originally, the word 'artificial intelligence' was devised by John McCarthy.⁴ It is defined as the "science and engineering of making intelligent machines".⁵ The definition of AI as recently suggested by the European Commission refers to as "*systems that display intelligent behaviour by analysing their environment and taking actions - with some degree of autonomy - to achieve specific goals*".⁶

Rationale behind introducing AI in Indian Healthcare system:

The Indian healthcare sector has always been a scope of opportunity that invites innovative solution. Such is effectively possible through the implementation of AI for the diversified health issues across the country which the human resource cannot meet.⁷

Shortage of qualified healthcare professionals:

According to World Health organization (WHO) there must be a doctor and 2.5 nursing staffs for every 1000 people in every healthcare center but it is evident that Indian healthcare lacks professional service providers and technical infrastructure. As per reports, in India, there is a huge gap between doctor patient ration, one doctor for every 10,189 people, resulting into a deficit of 6 lacs doctors.⁸

3 Mélanie Bourassa Forcier, et. al. 'Integrating artificial intelligence into health care through data access: can the GDPR act as a beacon for policymakers?', (2019) 6(1) JLB, <<https://academic.oup.com/jlb/article/6/1/317/5570026>> accessed 28 June 2021.

4 Daniel Schönberger, 'Artificial Intelligence in Healthcare: A Critical Analysis of The Legal and Ethical Implications', (2019) 27(2) IJLIT 171, 172-73.

5 Ibid.

6 Ibid.

7 AI and Healthcare Technology in India: Opportunities, Challenges, And Emerging Trends, Health Management, <<https://healthmanagement.org/c/healthmanagement/issuearticle/ai-and-healthcare-technology-in-india-opportunities-challenges-and-emerging-trends>> accessed 30 May 2021).

8 India facing shortage of 600,000 doctors, 2 million nurses: Study, The Economic Times, <economictimes.indiatimes.com/articleshow/68875822.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 22 June 2021.

Difficulties in accessibility of healthcare services:

There is a lack of uniformity in accessing the healthcare services across the country. Maximum rural people cannot access both the preventive and curative healthcare services which again create a gap in the healthcare sector. We know most of the advanced healthcare facilities and technologies are not available in government hospitals but in private nursing homes. And many of these facilities are available mainly on tier 1 and tier 2 cities. Such as Apollo Hospital in Chennai, where certain advanced facilities are available for, which people from different states of the country travel there to access good quality service. This indicates concentration of health facilities in few places which again is a barrier to physical accessibility of healthcare services.

Non- affordability and non-accessibility:

Most of the healthcare facilities are not affordable and for this the poor persons are deprived of their right to health that is implicit under Article 21 of the Indian Constitution.⁹ In the case of *Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Others*¹⁰ it was held that,

“In a welfare state, primary duty of the government is to secure the welfare of the people and more over it is the obligation of the government to provide adequate medical facilities for its people. The government discharges this obligation by providing medical care to the persons seeking to avail those facilities. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.”

Uses and benefits of AI in Healthcare system

The uses of Artificial Intelligence in healthcare system are diverse. Primarily, there are many benefits of implementing the AI mechanism in healthcare such as it supplements and empowers the existing work forces as in it helps the doctor in providing the healthcare services to the patients. It also provides for intelligent automation of complex physical task that requires adaptability and quickness. Besides these, AI technology is commendable and very beneficial as it drives innovation that the human resource lacks and provides up-to-date information and solutions to the doctors.

Widening the capability of healthcare system:

The paramount usage of medical AI is to come up with the things that human experts are still unable to do. Such as, Google's DeepMind declares that its AI equipment is able to foresee if a patient had any possible fatal injuries in the kidney 48 hours before any symptoms can be predicted by the doctors.¹¹ On the other hand, in present-

9 *Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Others*, (1996) AIR 2426 (SC).

10 *Ibid*.

11 Google's DeepMind says its A.I. tech can spot acute kidney disease 48 hours before doctors spot it, CNBC, <<https://www.cnbc.com/2019/07/31/googles-deepmind-says-its-ai-sees-acute-kidney-disease-48-hours-early.html>> accessed 23 June 2021.

day medical practice even a remarkable injury often goes unnoticed. In this context, functioning of algorithms can led to improvement in healthcare services overcoming the existing barriers created by human performance.

Proliferating medical knowledge and excellence:

AI supplements medical service providers with the proficiency and knowledge of specialists which they might otherwise lack. As image-based analysis technology of AI has majorly been part of development, the area of ophthalmology and radiology are widely targeted. By this technology it helps the general practitioner, technician, or sometimes even a patient to know what problem he is having and how to reach the conclusion. By such proliferation of knowledge and expertise the AI helps to cut down the limitation that occurs due to non-abundance of highly skilled experts in every healthcare organization.

Computerizing relevant records of patients:

The healthcare providers devote a large amount of time in inputting data, accessing those electronic medical records, and examining them, even in the room of diagnosis. Artificial intelligence technologies are capable of compiling up the most relevant information of patients available in the records which could save significant amount of time for providers as well as of the patients by facilitating fast treatment and action. Thereby it makes ways to serve a large number and improve the quality of the medical correspondence.

Management of medical resources and patients:

The benefits of AI in healthcare also extend its benefits mostly invisible to public, by prioritizing the patients who needs special care at the earliest. It might also envisage which departments are in need of additional short-term staffing for proper management, and more controversially, it can identify practices that may maximize revenue.

Narrowing the gap in doctor-patient ratio:

Due to the advent of AI system in healthcare, the wide gap between the availability of doctors as per patients has to some extent been narrowed. In the organizations, the lack of doctors has substantially been covered up by the services that AI system provides. In need of expert skills the AI suggests the general physicians by providing them the knowledge and proficiency thus helping to overcome the situation where specialists are not available. This in turn actually helps the proper delivery of services to the patient which otherwise would not have been possible.

3. IMPLEMENTATION OF AI IN INDIAN HEALTHCARE SYSTEM

According to Accenture Report, by 2035, AI's potentiality can add US\$957 billion to India's economy and boost the current gross value by 15%.¹² The Karnataka government

12 Accelerating India's Economic Growth With Artificial Intelligence, Accenture, <https://www.accenture.com/t20171220T030619Z_w/in-en/_acnmedia/PDF-68/Accenture-ReWire-For-Growth-POV-19-12-Final.pdf> accessed 02 July 2021.

will be mobilizing Rs.2000 crores for supporting startup based on AI.¹³ The physicians and doctors are of the view that with the growing influx of AI in the healthcare sector, there is further shrinkage of job opportunities.

Hospitals and nursing homes:

AI is employed in various hospitals and nursing homes including both public and private hospitals. According to study it is found that hospitals use mainly descriptive and preventive AI for diagnosis, treatment and to adopt preventive measures.

Potential AI equipment are installed to aid in medical decision-making. For instance, IBM Watson is installed in Manipal Hospitals for diagnosis and treatment of various kinds of cancers, employing the deep expertise of leading oncologists in cancer care.¹⁴ This supplements the doctors in the individualized treatments of the patients.¹⁵ However, *Stat* alleged the training of Watson by IBM engineers and staff to be problematic,¹⁶ claiming that Watson, used for the purpose of oncology, isn't an AI that cures cancer, rather it is an unverified mechanical turk signifying the speculations of a certain groups of medical practitioners.¹⁷

Pharmaceuticals:

The main purpose for which AI is deployed in pharmaceuticals is to discover drug. In such case AI is particularly to go through all the existing database available on certain molecule, to discover a drug, which otherwise would not have been even possible for a group of people to do so.

Diagnostics:

In Indian diagnostics descriptive and predictive AI are mainly employed. Apart from the superior companies like, Google and IBM, India is seen as multitude of many startup companies as well that focus being on AI mainly to detect disease. For instance, 'Niramai Health Analytix' employs current analytics for prior diagnosis of breast cancer.¹⁸

4. CHALLENGES AND DRAWBACKS OF IMPLEMENTATION OF AI IN HEALTHCARE SYSTEM

Though there are ample of benefits derived from the implementation of AI in healthcare segment yet the AI technology is not devoid of drawbacks. Many concerns are recognized with the decision-making ability of AI technology.

13 V. Pitchiah, Karnataka Govt to Invest \$6 Million in AI, Data Science Hub, <<https://www.vccircle.com/karnataka-govt-to-invest-6-1-mn-in-ai-data-sciencehub/>> accessed 01 July 2021.

14 Artificial Intelligence in medicine, IBM, <<https://www.ibm.com/watson-health/learn/artificial-intelligence-medicine>> accessed 02 July 2021.

15 *Ibid.*

16 *Ibid.*

17 Artificial Intelligence in the Healthcare Industry in India, <<https://cis-india.org/internet-governance/ai-and-healthcare-report>> accessed 25 May 2021.

18 *Ibid.*

Errors and faults:

The most apparent peril associated with the AI systems is that, it may go wrong sometimes and resultantly the patient can suffer damages or other complications related to health. If an AI application endorses any wrong medicine or treatment to a patient, or give out to indicate a lump on a radiological test, or allocates a hospital bed to one patient over another without noticing the seriousness of the latter, the patient may suffer.¹⁹ Faults and errors in AI may be viewed differently because of two reasons. Firstly, that providers and patients may react differently to the resultant injuries by the AI technology than the human errors. Secondly, that an error in an AI system may cause damages to numerous patients if it is widely used by different providers. For instance, foreign physicians complained that the Watson functions quite indifferently and biasedly towards American patients' population as it is not trained on diverse cancer patients across the world.

Possibility of Biasness:

There are risks that involve biasness and disparity in healthcare AI technologies. Technology is not unbiased and it is composed of varied choices. As machine learning (ML) is profoundly dependent upon the data, the main anomaly occurs when they are based on inadequate and faulty training inputs. This generally resembles the concept of "garbage in garbage out".²⁰ Also, the efficiency ML system hugely depends on the quantity of data. Resultantly, lesser data about certain group may lead to biased result for them.

Indecisive parallels:

Although the training data may be impeccable, still an algorithm can turn out to be bias and act prejudicially owing to indecisive correlations. Decision-making capability of algorithms generally is designed on 'inductive knowledge', emanating from intense interrelationship and parallels and not merely on traditional occurrences.

Inaccuracy:

ML models owing to their probabilistic nature must be anticipated to fail in distinct instances. No technology is flawless and sometimes tests of image classifiers demonstrate that systems still complicate cats with frogs. Certainly, a like error in cancer diagnosis could have further more dangerous consequences. Thus, inaccuracy in outcome is also a major drawback of the AI in healthcare system. It can also result from biasness.

Abundance of records:

A large sum of data is certainly required from various sources such as from pharmacy accounts, insurance claims records, electronic health minutes or consumer-generated data like fitness trackers to train the AI systems. However, health records often are

19 Risks and remedies for artificial intelligence in health care, Brookings, *available at*, <https://www.brookings.edu/research/risks-and-remedies-for-artificial-intelligence-in-health-care/>, (Visited on Feb 11, 2021).

20 Daniel Schönberger, 'Artificial Intelligence in Healthcare: A Critical Analysis of The Legal and Ethical Implications', (2019) 27(2) IJLIT 171, 172-73.

challenging. Records are naturally scattered across various systems. Like patient switch different insurance companies for health insurances according to their convenience. Consequently, this leads to splitting up of records in multiple systems and multiple arrangements which obviously increase the possible risk of error, cuts off the completeness of datasets, and there is also an increase in the expense for collecting records from various sources which also pose a limitation in development of effective health-care AI system.

5. POSSIBLE LEGAL SOLUTIONS

Healthcare sector is highly delicate with regard to any kind of error or negligence, as it is the place which saves the life of the people and any error can even cost a life. In case of usage of AI, there is fear in this regard because AI entities are not regarded as subject in the eye of law.²¹ Earlier, people feared the corporates as they could commit a wide range of crimes, but as the corporates are given legal recognition and are regarded as body corporate, they can be made liable to law.

Now the question arises that whether the thinking machines can be held liable? Whether the AI should be held liable for any wrong for which one suffers injury? The main problem in this regard is the absence of any specific legal framework and any jurisprudence, for which fixing the liability becomes difficult. First of all, to address this situation AI system should be recognized as a legal person so that it can separately be held liable as the corporate bodies are being held for their crimes and civil wrongs. The following legal solutions can be used to encounter the liability challenges of AI in the sphere of healthcare services:

Criminal liability

AI, by itself, is an artificial equipment. The concepts of liability or a jury for fixing liability are held as worthless in relation to AI system. A court may not be suitable for the AI, except in case the programmer has intended to cause damages, which would therefore result into a crime.

Many theories by different authors have been suggested to address this issue; one by Gabriel Hallevy deserves mention. Gabriel Hallevy did come up with a theory as to whether AI entities can be held criminally liable and if yes then how. For holding anyone criminally liable there is a requirement to establish both *actus reus* and *mens rea*. Accordingly, Hallevy has categorized laws as follows: ²²

- a. One where the *actus reus* involves an action or an omission to act;
- b. One where the *mens rea* requires to be informed or to have knowledge;

21 Gabriel Hallevy, 'The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control', (2010) 4 ALJ 171, 173, <<https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1037&context=akronintellectualproperty>> accessed 11 July 2021.

22 Artificial Intelligence and Legal Liability, Researchgate, <https://www.researchgate.net/publication/309695295_Artificial_Intelligence_and_Legal_Liability> accessed 21 July 2021.

- c. One where the mens rea involves only negligence; and
- d. The other strict liability offences, where there is no requirement of mens rea.

Hallevy introduces and proposes three model of criminal liability for the AI entities:²³

- i. The Perpetration-via-Another Liability Model
- ii. The Natural-Probable-Consequence Liability Model
- iii. The Direct Liability Model.

i. Perpetrator-via-another:

According to this concept, if the perpetrator of an offence is a minor or an animal who is unable to create a mens rea due to lack of the mental ability, then he or she is an innocent agent. This will be even true in case of strict liability. However, if the innocent agent acts under the instruction of someone else, then the latter will be held criminally liable.²⁴ Therefore, under this scheme of flow, AI programs would be a blameless agent and for the error of AI, either the software developer or the manufacturer or owner could be held as the “perpetrator-via-another” if he can foresee such consequences may result. As the they are responsible for training of the AI through input of data, so reluctance in training them in entirety may be a cause for the error, where the former become the perpetrator of such incident.

ii. Natural-probable-consequence:

As per this conceptual model, parts of the AI technology which is planned for satisfactory purposes may be spurred or manipulated inappropriately to commit any crime. An example, as stated by Hallevy, a Japanese employee, working in a motorcycle factory, was slayed by an AI robot equipped near him.²⁵ This was done by the robot based on a wrong assumption that the employee was standing as a threat to its action. So, it premeditated that eliminating this menace would be the best solution to the danger.

The concept of “natural or probable consequence” liability is generally used to sue the accomplices in a crime. When conspiracy between the persons could not be established, in US laws, it is possible to hold an accomplice liable based on the fact that such criminal acts by the wrongdoer were a natural or likely consequence²⁶ of an arrangement that was fortified or abetted by the accomplice. Hence, this means as long as the accomplice is mindful of such planned criminal activity to take place

23 Gabriel Hallevy, ‘The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control’, (2010) 4 ALJ 171, 173, <<https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1037&context=akronintellectualproperty>> accessed 11 July 2021.

24 *Morrissey v. State*, (1993) 620 A.2d 207 (Del.)

25 Gabriel Hallevy, ‘The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control’, (2010) 4 ALJ 171, 173, <<https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1037&context=akronintellectualproperty>> accessed 11 July 2021.

26 *United States v. Powell*, (1991) 929 F.2d 724 (D.C.Cir.).

or is under process, he will be held liable. Therefore, the programmers or the owner may be held legally accountable if they are acquainted with the fact that a criminal act can naturally or probably result out of their programs while using their application.

iii. Direct liability:

The concept of direct liability attributes the key ingredients of commission of a crime i.e. actus reus and mens rea to an AI-applications. Though attributing an actus reus to an AI system is easy.

As when the machine takes up an action and consequently results into a criminal act, or when it fails to act adequately, or omits to do its duty when it is necessary, then the part of actus reus of a crime is done. However, assigning a mens rea is difficult, as AI by itself is an artificial thing. But when we infer to the offences based on the principle of strict liability, where no particular intent is essential to constitute the offence, it may be possible to hold AI applications to be legally responsible for that offence. For instance, self-driving cars are held legally responsible if they break the speed limit, based on the principle of strict liability. Similarly, as per Hallevy, the AI too can be held criminally liable, based on strict liability principle, for the things it does beyond its jurisdiction, or function in an improper manner which give rise to certain damages. If we say AI technologies which are employed in hospitals performs a biased diagnosis succumbed to which a patient gives up his life this can be regarded as an offence and liable under the strict liability.

Civil liability

Liability under torts:

Usually, the law can take hold of the software like robots or equipment and make them liable only when it can figure out that the developer was negligent or could foresee harm. In *Jones v. W + M Automation, Inc.*,²⁷ the court did not find the defendant responsible where a robotic scaffold packing system wounded an employee, because the defendant i.e., the manufacturer based its action confirming to the regulations.

Under the tort law, a patient can also claim compensation from the doctor, nursing homes, medicinal companies, and producers of medical equipment if he or she suffers any injury as a result of failure to meet the judicially recognized standards which they were to observe. The emblematic tort claims in the field of medicine and healthcare system include negligence or medical malpractice and vicarious liability (*respondeat superior*). But when it comes to the fault of AI in healthcare organization for which the patient suffers, it becomes quite difficult to claim the tort rights as it requires a human action and AI is not even a legal entity against which a right can be enforced. However, both claim for negligence and vicarious liability can be claimed if the AI is entrusted with legal personality. Even the liability under absolute liability rule can be affixed to the healthcare organization employing AI technology in case of damage caused by the AI.

²⁷ *Jones v. W + M Automation, Inc.*, (2006) 31 A.D.3d 1099 (N.Y. App. Div.).

i. Negligence:

According to general principles, liability in negligence arises when there is a duty or obligation to take care. It would obviously sound and logical that a person who has suffered injury because of a decision made by AI must have a claim against it since the latter owed a duty of carefulness and should have exercised a standard of care. However, there is an ambiguity as to who has the duty to take care. As AI is not considered as a legal person, the liability may fall on the developer, the manufacturer as well as repairers, installers, suppliers and the owner of the AI jointly and they may be sued in tort for reasonably foreseeable damages happened to those to whom they owed a liability to take care. In a claim for negligence, the rationality of the behavior and action of the AI manufacturer will be scrutinized rather than the reasonable expectation of consumer/patient for the level of safety he is entitled to.²⁸

Again, in the event of a fault for which the injury is caused, the degree to which the manufacturers of the AI equipment warned of the risks shall be deeply scrutinized and whether such possibility of risk has been informed by the clinician to the patient or not and consent of the latter has been taken thereupon is a matter under consideration.

Moreover, medical negligence claims for using AI technology or software medical equipment could arise against doctors for countless reasons. For instance, suppose a doctor referred an app which keeps records unevenly and inappropriately, based on which he prescribed incorrect dosage of medicine. It was the duty of the doctor to check the appropriateness of the equipment or the app which he refers. Again, it may be the case that the doctor entered incorrect data into the software or the app which led to an inappropriate dosage calculation. In such cases the liability shall lie on the doctor and none other.

On the other hand, possibly the doctor may be responsible for a medical negligence independent of functioning of the AI or software, though there is a failure of AI, which means that in due course it was the doctors actions that caused the damage rather than the AI. All these situations prompt a thorough investigation and deep learning of the root cause of the injury suffered by the plaintiff.

ii. Vicarious Liability:

The vicarious liability principle is centered on a latin maxim namely, "*qui facit per alium facit per se*" which means that "he who acts through another does the act himself". Judicially it is recognized that if any of the hospital staff is negligent in performing their prescribed duty, the hospital can be held liable for their negligence, even such negligent conduct is done by borrowed doctors in certain operation.²⁹ Similarly, Artificial Intelligence if implemented by the hospital to discharge the duties in place of the doctors, then the hospital can be held responsible for that too.

28 Artificial Intelligence Update: Liability Arising from the Use of AI in Healthcare, Mason, Hayes & Curran, <<https://www.mhc.ie/latest/insights/artificial-intelligence-update-liability-arising-from-the-use-of-ai-in-healthcare>> accessed 27 July 2021.

29 *Aparna Dutt v. Apollo Hospital Enterprises Ltd.* (2002) ACJ 954 (Mad. HC).

Artificial Intelligence, though being artificial equipment is still performing the work for which doctors are borrowed. It makes its own decision in place of a doctor and implements it on the patients. Consequently, AI can be held to be a replacement to a doctor, thus it can also be considered as an employee of the hospital. Now, if the AI system commits any wrong, we may apply the principle of vicarious liability which states that the employer/ principal/master is responsible for the tort committed by its employee/agent/ servant. The maxim of respondeat superior is applicable as well in such case. Thus, the patient who suffered damages for the ill functioning of AI system may claim compensation from the hospital authority which has installed such AI technology and employed it in service.

iii. Strict Liability and absolute liability:

With the advancement of technology, the rule of absolute liability, which was developed from the rule of strict liability, as a part of Indian Law, should be made applicable in cases, where faults of AI cost a life. As per the principle of strict liability, that is laid down in the case of *Ryland v. Fletcher*,³⁰ the person who for himself takes on his lands and retains there anything, which is probable to do mischief if it outflows or escapes, must keep it in his own risk and under his control. If he fails to do so, he shall be responsible for the damages which is naturally going to result for such escape.³¹ This rule is limited to things used in land but the Indian judiciary modified the rule in the case of *M.C. Mehta v. Union of India*³². The court held that any enterprise which is involved in any perilous activity must be directed with a maximum level of safety standards. If any damage results because of the conduction of such activity, the enterprise shall be held absolutely and unconditionally liable to reimburse for such damage.³³ It should be no answer that the enterprise has taken reasonable care and it damage occurred without any negligence on its part.³⁴ The rule of absolute liability is devoid of the exceptions that are available while applying the rule of strict liability.

Now this rule of absolute liability can also be applied in the era of AI. If we take hospitals as the enterprise which installs AI technology the latter being a dangerous equipment if causing any damage or injury to the patients or if there is any error caused by the algorithm, the hospital is bound to take the highest standards of safety measures. Any such error which takes place by fault of AI technology that leads to the suffering of the patient the hospital or other healthcare organizations shall be held responsible for such damages. The hospital cannot defend itself by saying that it took all measures to prevent it. This is also called *no fault liability* which is also envisaged by the Motor Vehicle Act, 1988. In this case no such exception should be made available as well because healthcare centers are the place which should always ensure the highest standard of safety and care for the human life. It is

30 *Ryland v. Fletcher*, (1868) 3 LR 330 (HL).

31 R.K. Bangia, *Law of Torts*, (23rd ed., Allahabad Law Agency, 2013) 321.

32 *M.C. Mehta v. Union of India*, (1987) AIR 1086 (SC).

33 R.K. Bangia, *Law of Torts*, (23rd ed., Allahabad Law Agency, 2013) 322.

34 *Ibid.*

the trustee of the lives and thus no chances of pleading defense can be afforded to them to avoid their responsibilities. The hospitals and the health centers must be cautious while installing the AI system in their organization.

iv. Liability of negligent hiring and retention:

In the conceptual legal theory of “negligent hiring or retention” the main cause of action ascends when there is an assertion that the employer/company has failed to hire an employee with due diligence or reasonable care or it has been retaining the employee even after being aware of certain danger the employee may pose to others. This legal theory is grounded on the principle that the employer acted neglectfully by appointing or hiring a criminal for a position, consequently the former is exposing others to harm.³⁵ This paves the way to materially increase the risk of harm.³⁶

In *McGhee v. National Coal Board*,³⁷ the claimant had suffered dermatitis as a result of exposure to brick dust, but could not establish that the material brick dust was that to which he was not exposed or that to which he was negligently exposed. The House of Lord allowed the claim to succeed apparently on the basis that the claimant had shown that the negligent conduct had materially increased the risk of harm. Then installing AI, which is already condemned for their error and disastrous results, is like knowingly increasing the risk of harm to the one to whom it is applied. In that case the healthcare organization or the doctor using it can be held liable. For instance, as mentioned earlier that IBM Watson which is deployed in Manipal Hospital is complained by foreign physicians that the population that Watson is trained on does not accurately reflect the diversity of cancer patients across the world, and as a result, it is heavily biased towards American patients and standards of care.³⁸

Contractual liability

In the event of failure of AI, liability will also arise under contract. When a healthcare organization equips itself with various AI technologies there must be a contract between the healthcare organization and the supplier/manufacturer of AI. The contract may be of warranties, liability, indemnity etc. In case of loss caused by the error of the AI, the healthcare organization or doctor can claim damages from the supplier or manufacturer.

Liability under the Consumer Protection Act, 2019:

Before pooling up the various remedies available under the Consumer Protection Act, the status of AI technology in healthcare sector must be considered. Whether AI should be considered as service or product is a key question to determine the remedy.

35 When Can an Employer be Found Liable for an Act of an Employee?, HG.org, <<https://www.hg.org/legal-articles/when-can-an-employer-be-found-liable-for-an-act-of-an-employee-34389>> accessed on 29 July 2021.

36 Shaun D. Pattison, *Medical Law and Ethics*, 80 (1st ed., 2006).

37 *McGhee v. National Coal Board*, (1972) 3 All E.R. 1008 (HL).

38 Artificial Intelligence in the Healthcare Industry in India, <<https://cis-india.org/internet-governance/ai-and-healthcare-report>> accessed 25 May 2021.

It is seen that any information or data which is produced by software cannot be regarded as a product but the machine as a whole with AI technology can be called as a product. However, customized software designed for serving customers can commonly be considered as a service.

According to the act “service” means “service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service”³⁹. Ofcourse it can be said that AI is employed in healthcare sector to serve the patient and it is described earlier that how it is filling the gap of availability of medical service providers in various healthcare segments. In this light, the party aggrieved by the deficiency in service of the AI can claim compensation under this act. As provide by the act the aggrieved person can complain of “the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency”⁴⁰.

Again, if we consider AI technology as product, then the issue arises that whether the treating doctor engaging the AI technology is actually controlling the AI equipment, or it is the AI technology having control over the product’s operation. If latter is the case, then there are certain provisions in the Consumer Protection Act, 2019 which deals with the liability in case of product’s defect or fault. The act defines “product liability” as the “responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto”⁴¹. It is also provided that, “A product liability action may be brought by a complainant against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm caused to him on account of a defective product”⁴².

Constitutional remedy:

Beside these remedies as mentioned above, it is worth mentioning that any patient aggrieved by faults of AI appliances and suffers injury; he or she can always approach the Supreme Court or High Court under article 32 or article 226 of the Indian constitution respectively for the infringement of their fundamental right to health under Article 21.⁴³ As we know that fundamental rights are obviously available against the state actor as falling under the ambit of ‘State’ defined in article 12, however those can also be enforced against the non-state private actors if they are dealing with public function. In *Binny Ltd. & anr. v. Sadasivan & Ors.*,⁴⁴ Supreme Court held that.

39 The Consumer Protection Act, 2019, s. 2 (42),

40 The Consumer Protection Act, 2019, s. 2 (6) (iii).

41 The Consumer Protection Act, 2019 s. 2 (34).

42The Consumer Protection Act, 2019, s. 83.

43 *State of Punjab v. Ram Lubhaya Bagga*, (1988) AIR 117 (SC); *Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Others*, 1996 AIR 2426 (SC).

44 *Binny Ltd. & anr. v. Sadasivan & Ors.*, (2005) 6 SCC 657 (SC)

"It is difficult to draw a line between public functions and private functions when it is being discharged by a purely private authority. A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of public and is accepted by the public or that section of the as having authority to do so."⁴⁵

Certainly, fundamental right can without any doubt be enforced against government healthcare organizations as well as can be enforced against the private healthcare sector as providing medical care and treatment is of course a key public function. However, in cases though the courts declined to enforce fundamental right against private hospital,⁴⁶ but it is a clear point that even a private hospital shall be held liable if it receives any aid or grants from the government.⁴⁷

6. CONCLUSION

With the growing inflow of AI technology in the healthcare segment, of course it cannot be denied that it has the potential to take the healthcare sector to new level of betterment but still the drawbacks that it carries with its implementation is not negligible. It is matter to examine that whether the benefits of AI outweigh its drawbacks. The evolution of legal jurisprudence in this respect is utmost necessary to fix the present situation of ambiguity as to the legal liability in of AI appliance in healthcare sector in case of damage caused due to its failure. There is still an ongoing debate as to whether AI should be entrusted with some form of legal personality or not. As the standards of care that is demanded from the hospital authorities and the equipment incorporated in the hospitals are expected to be foremost, there should not be any scope of failure or error. This is because it may be the question of thousands of lives which is availing its service.

7. SUGGESTIONS

Attribution of legal personality on AI machines and equipment

Entrusting a legal personality on AI is required so as to hold it liable either criminally or tortiously. Like, the corporates has been entrusted with legal personality and are treated as a body corporate, the AI technologies and the equipment should also be entrusted with the same. This will end the challenges to fix the confusion as to who should be held liable in case of the errors caused by AI machines. If the AI is treated as a legal personality the persons who have developed the particular AI machine and those who are having the control over it can be held criminally and tortuously liable. Just as the corporates are held criminally and the term 'corporate crimes' is very common now; the AI's liability can also be fixed in like manner.

⁴⁵ *Ibid.*

⁴⁶ *Sanjeev Gulati v. Sri Ganga Ram Hospital*, (2005) W.P.(C) 13520/2005 (Del. HC).

⁴⁷ *Nookavarapu Kanaka Durga Devi v. Kakatiya Medical College*, 1989AIR 1607 (SC).

Enactment of Specific Law relating to Regulation of AI

As there is an absence of any specific legal framework to deal with the anomalies created by the AI machines and there is lack of legal regulation on the functioning of the AI equipment in the healthcare sector for which lots of ambiguous situation arises. Hence to address this inexplicable situation there is utmost need of enactment of an AI specific law so that their functioning can be regulated. More importantly, in case of their error which leads to the injury to the person, the liability can be fixed on the concerned people when it is specified in the law.

With the development of the jurisprudence in this regard it is expected that there may be change in the standards of implementation of the future as well as currently integrated AI in the healthcare sector.

Proper Training of the Health care Professionals

There must be proper training of the healthcare provider relating to the evaluation and interpretation of the AI systems is required while they come across in the developing and evolving health-care environment.

Proper Implementation Mechanism

There has to be proper mechanism so as to see that the standards prescribed for the implementation of AI are being maintained adequately. An independent authority must be established to keep check on the proper implementation of the existing laws and if any specific law is made with respect to AI and its implementation. It is also required to oversee that the healthcare professionals and the providers are at par with the prescribed standards. Such as, for which treatment and diagnosis the AI equipment should be used, how much caution should be adopted while its implementation, what standards should be maintained while interpreting the results of AI and to consider it as conclusive.

Marine Pollution due to Ineffective Legal Control of Port Pollution in India: An Enviro-Legal Study

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ABSTRACT

Marine commerce and marine transportation are essential for any nation's economic growth. The World's oceans comprise the major routes for carrying trade throughout the globe. Marine commerce is intrinsically associated with marine transportation, which is connected with the ports. Ports contribute for uplifting the marine commerce. But, if ports are not managed properly, they can cause huge marine catastrophes. Well-organized ports are backbone of pollution-free trade through oceans. Economic benefits solely, shall however, not be allowed to take a toll on duties with respect to environment. This research paper aims to analyze the issue of port pollution and consequent marine pollution in India and also ineffective legal control mechanism with respect to the same. The paper also aims to compare the Indian Ports Act, 1908 with newly proposed the Indian Ports Bill, 2021.

Keywords: *Marine Commerce, Economic Benefits, Marine Transportation, Environmental Degradation, Marine Trade, Marine Pollution, Ports, Port Pollution, Ecological Misbalance, Biodiversity.*

INTRODUCTION

The environment pollution and its different facets are responsible for ecological misbalancing in biosphere and lead to many adversities. The term 'ecology' refers to the science of detailed web of relationships that exist between living organisms and their living and nonliving surroundings. The interdependent living and non-living parts in a particular place, make up ecosystems. Ecosystems or combination of ecosystems which are relatively larger, occurring in similar climates and sharing similar kind of vegetation & characters, are called biomes.¹ There are five major types of biomes namely aquatic, forest, grassland, tundra and desert. The aquatic

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1 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* 4-5 (Oxford University Press, New Delhi, 2nd edn., 2001).

biomes can further be classified as freshwater and marine biomes. Fresh water biomes have less than 1% salt content and include ponds, lakes, streams, rivers and wetlands². On the contrary, the marine biomes have more salt content and include oceans, estuaries³ and coral reefs.⁴ Water, air and earth forming hydrosphere, atmosphere and lithosphere respectively, constitutes environment as a whole.⁵

As the living and non-living organisms (living include humans also) constituting an ecosystem, interact continuously among themselves, they introduce different variations in ecosystems. Since, interactions are numerous in any ecosystem, the variations in an ecosystem consequently result into a longer chain of effects and reactions; Thus, change in any part of ecosystem can be observed over all the environment. There are drastic examples where man has changed the course of nature adversely by introducing unwanted changes to it.⁶ As environment is closely related to ecology, any damage caused to environment will definitely disturb ecological balance. The Earth which is also referred as 'Blue Planet', have oceans covering almost 70% its surface and if seen from the space then, appears blue in colour.⁷ These oceans constituting 70% part of the Earth, together with other water constitute hydrosphere which is an important part of environment. Oceans follow oceanic carbon cycle, as a result of which, they absorb maximum carbon dioxide. Oceans by phytoplankton produce at least 50% of the World's oxygen, sustaining life on the earth. If oceans are polluted then it will definitely show a negative impact on ecological cycles and consequently on the whole environment.⁸ This is settled scientific proposition and cannot be rebutted at all, that once these ecological cycles are disturbed, humans don't possess knowledge to make good of these. It is also well known that man cannot grow fully in polluted environment⁹ and in worst cases, may succumb to these undesirable changes of the environment. i.e pollution.

Moreover, the oceans are important source of energy, food and minerals and this inherited wealth is to be conserved for future generations also. The principle of sustainable development as stressed by many International Treaties, Conventions

2 A wetland is a distinct ecosystem which is flooded by water, either permanently (for years or decades) or seasonally (for weeks or months).

3 An estuary is a partially enclosed coastal body of brackish water with one or more rivers or streams flowing into it, and with a free connection to the open sea.

4 Kinds of biomes? Available at: <https://education.nationalgeographic.org/resource/five-major-types-biomes> (Last Visited on: May 5th, 2022).

5 Dr. N.V. Paranjape, *Environmental Laws and Management in India* 3 (Thompson Reuters, 1stedn., 2015).

6 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* 5 (Oxford University Press, New Delhi, 2ndedn., 2001).

7 Mark B. Bush, *Ecology of a Changing Planet* 1 (Prentice Hall, New Jersey, 1stedn., 2000).

8 Oceanic Carbon Cycle. Available on: [https://en.wikipedia.org/wiki/Oceanic_carbon_cycle#:~:text=The%20oceanic%20carbon%20cycle%20\(or,Earth%20interior%2C%20and%20the%20seafloor.](https://en.wikipedia.org/wiki/Oceanic_carbon_cycle#:~:text=The%20oceanic%20carbon%20cycle%20(or,Earth%20interior%2C%20and%20the%20seafloor.) (Last Visited: June 3rd, 2022).

9 Dr. Mashhood Ahmad Khan and Arsalan Mujahid Ghouri, "Environmental Pollution: Its Effects on Life and Its Remedies" II Issue 2 JASC 277 (2011).

and Reports,¹⁰ utters the same thing. The Honorable Supreme Court has also directed in **Vellore Citizens Welfare Forum v. Union of India**,¹¹ that concept of sustainable development has to be treated as an integral part of life under Article 21. The Court further observed that the balance between the developmental activities carried on for the benefit of humans and environment protection can only be obtained by strictly following the principle of sustainable development. The core issue involved in protection of marine environment is maintaining proper ecological balance in aquatic marine biome which will prevent further ecological misbalancing in rest of the environment and also to save the biodiversity present within. Apart from this curbing marine pollution will also save the human beings because of the fact that, there would be the least possibility of pollutants entering humans via food chains.

India has abundant history of trade across the seas. Ports constitute an important economic activity in coastal areas. However, as the throughput of goods and passengers year-on-year by seas are increasing, more infrastructure, provisions and associated services are required.¹² Moreover, with the advancement in technology, due to large and complex vessels, burden on ports has increased a lot.¹³ In present hour, the ports need to be equipped with the latest facilities. Hence, if appropriate facilities and services are not being provided by the ports and there is absence of adequate legal framework for abatement of pollution generated in the ports, then, ports will affect marine environment and biodiversity in worse ways. Haphazard ports and ports with inadequate facilities will add to problem of marine pollution. Moreover, preferring economic interests over environmental aspects is definitely not an intelligent move.

Definition and Meaning of the term “Marine Pollution” and “Port”: The **Intergovernmental Oceanographic Commission** describes ‘marine pollution’ as, “the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries), resulting in such deleterious effects as: harm to living resources; hazards to human health; hindrance to marine activities including fishing; impairing the quality for use of seawater and reduction of amenities”.¹⁴ The term marine pollution is made up of two words ‘marine’ and ‘pollution’. “Marine”¹⁵

10 See Stockholm Declaration, 1972, Brundtland Commission Report, 1987, U.N Conference on Environment and development, 1989, Earth Summit 1992, Rio Declaration on Environment and Development etc.

11 (1996) 5 SCC 647.

12 G.S Dwarakish and Akhil Muhammad Saleem, “Review on the Role of Ports in the Development of a Nation” 4 SD 295 (2015).

13 Natural Resources Defence Council U.S.A, Report on Harbours Pollution: Strategies to clean U.S Ports (August, 2004).

14 Sebastian A. Gerlach, *Marine Pollution: Diagnosis and Therapy* 4 (Springer-Verlag Berlin Heidelberg, New York, 1st Edn.,1976) and Jerome Williams, *Introduction to Marine Pollution Control* 13 (A Wiley Interscience Publication, New York, 1979).

15 *Cambridge Advanced Learner’s Dictionary* 775 (Cambridge University Press, Cambridge, 2nd edn., 2005).

according to **Cambridge Advanced Learner's Dictionary**, means related to the sea or sea transport. However, the term "pollution" is defined as 'Pollution'¹⁶ is defined as damage caused to water, air etc. by harmful substances or waste.

Therefore, on analyzing above definitions it can be said that marine pollution is concerned with the seas only and not with the inland waters because the term 'marine' is used in respect of oceans only. Any kind of act of humans which tend to adversely affect the properties of oceanic water or the life present within oceans contributes to marine pollution.

The term 'port', according to **Wharton's Concise Law Dictionary**¹⁷ means "a place for lading or unloading of ships, created by royal charter or lawful prescription." **Oxford English Mini Dictionary** defines port as "an opening for boarding or loading a ship".¹⁸

Indian ports Act, 1908 defines port as "Port includes also any part of a river or channel in which this Act is for the time being in force."¹⁹ According to the **Indian Ports Bill, 2021**,²⁰ "Port means major or non-major port and includes any terminal, offshore terminal, shipyard, repair yard, bunkering station or roadstead or port facility or single buoy mooring which is normally used for the fuelling, refuelling, loading, unloading, warehousing, building or repair or anchoring of vessels, or any other place at which a vessel can call, or any part of a river or channel."

On analysing all the above definitions of 'port', it can be concluded that all the definitions discussed are either very simpler or inadequate, when analysed from marine pollution point of view. However, definition provided by Indian Ports Bill, 2021 gives the maximum precise definition of the term. The definition not only limits the function of ports unlike other definitions, to loading, unloading and boarding point of passengers. But the definition provided by the Indian Ports Bill, 2021 also attributes other functions to the ports. For example, the Bill provides that if a place is being used for fuelling, refuelling, anchoring of vessels etc. can be included in definition of port. The definition is very inclusive and covers in its ambit repair yards, port facilities, roadstead etc. where any of the named functions are being carried out.

Role of Ports in Maritime Trade: Since time immemorial, shipping activity has been the well-known source of pollution of marine environment. Erstwhile, the ships were operated manually but with the advancement of time and science & technology, the ships started operating on the energy generated from crude oil.²¹ Mankind engaged

16 Id. At. 975

17 Dr Justice A.R Lakshmanan, *Wharton's Concise Law Dictionary* 849 (LexisNexis, Haryana, Reprint, 2016).

18 Oxford English Mini Dictionary Indian Edition 426 (Oxford University Press, New Delhi, 1stedn., 2007).

19 The Indian Ports Act, 1908 (Act no. 15 of 1908), Section 3(4).

20 The Indian Ports Bill, 2021, Section 2(x).

21 Justice Ashok A. Desai, *Environmental Jurisprudence* 203 (Modern Law House, Lucknow, 2nd edn., 2002).

primarily in shipping for the purposes of passing through the oceans and carrying cargos. The history of transportation through waterways goes back to the thousands of the years. Foremost, the Egyptians used seagoing vessels in 1500 BCE. Apart from this, the Phoenicians, Greeks, Cretans and Romans also used waterways for trade and transportation.²² There is no iota of doubt that India too had a glorious history of trade via seas. India used to export many things through the seaways. Ports constitute an important economic activity in coastal States. Ports play an important and positive role because:

- (i) Ports are crucial connection between sea and land transport.
- (ii) Ports do act as supplier of jobs and because they provide job opportunities for many, they not only serve an economic but also a social function.
- (iii) In terms of load carried, seaway transportation is the cheapest and most effective transportation system compared to other systems and the industries require a safe and cheap means of exporting finished goods and importing raw materials. Hence, the majority of industries in the world prefer trade by seas and are located in the coastal belts, in the vicinity of major ports.²³ Thus, ports in a way boost industrial growth and this way also, contributed to economic growth of any nation.
- (iv) Marine transport is a significant link in the worldwide transport system, which provides the free flow of diversified cargoes and offers competitive prices compared to other modes of transport for the carriage of goods.

Apart from positive role played by the ports, there are also adverse effects of mismanaged ports. There are many sources which have led to introduction of pollutants in marine environment jeopardizing the marine environment, life of living organisms living within it, affecting the biodiversity and even having repercussions on human beings. Maritime trade isn't possible without shipping vessels and shipping vessels, in turn need ports for availing services. If any vessel is engaged in marine commerce, it is ostensible that it needs to access some offshore facilities like ports for various functions. The reasons for regulating ports effectively, are:

- (i) The tremendous growth of international trade has also resulted in growth of amount of products & goods, being shipped by the sea route. According to the Ministry of Shipping, approximately 95% of India's trading if measured in terms of volume and 70% in terms of value, is done through maritime transport.²⁴ Consequently, enormous ships approach ports on daily basis, thousands of diesel trucks visit ports per day; all these circumstances are making ports vulnerable to the pollution.²⁵ As much of the ports are seaports,

22 Pollution by marine trade. Available at: <https://www.frachtbox.com/blog/how-does-maritime-trade-cause-marine-pollution> (Last Visited: April 31st, 2022).

23 Supra Note 12.

24 Marine Commerce by India. Available on: <https://www.ibef.org/industry/ports-india-shipping> (Last Visited: June 8th, 2022).

25 Supra Note 13.

any environment imbalance therein have direct bearing on marine environment adjacent. Shipping vessels use ports for loading and unloading of cargos, for emptying wastes accumulated in their engine rooms, passengers board ships on the ports. Hence, ports are providing multiple facilities in respect of vessels. So, it can be calculated that how much pressure maritime trade is exerting on ports and there is demand of much port facilities, consequently. Port operations in absence of any regulatory mechanism can cause significant damage to water quality near to ports and subsequently to marine life and aquatic marine ecosystems and even to human health. These adverse effects may include contamination by bacteria and viruses of commercial fish and shellfish, reduction of dissolved oxygen in water, and bioaccumulation of toxins in fish.²⁶

- (ii) The intense maritime traffic across ports has put undesired burden on the world oceans. Although pollution by shipping vessels is not the largest source of marine pollution because it is somewhere susceptible to International Conventions; But its persistence is despite the International framework in this regard is in itself an issue.²⁷ The traffic across the ports of India grew by 6.13% , if compared with the previous year and again demands for ports with proper facilities.²⁸
- (iii) Seaports enabling waterborne transport have a major impact on the social and natural environment. If talked in terms of social effects, the ports make the surrounding places unfit for inhabitation due to pollution introduced by them.²⁹
- (iv) There are also other major water quality concerns at ports, which include wastewater management and leaking of liquid toxic substances from vessels, stormwater runoff, and dredging.³⁰
- (v) Dredging in ports also have adverse effect on marine environment and also needs regulation. As vessels need a particular depth of water for mooring and hence, dredging has to be done at regular intervals. Dredging in consequence produce many negative impacts on marine organisms by altering properties of oceanic water and promoting ecological misbalancing. For example, due to dredging, excessive sediments are produced and if port facilities are not adequate the oil present there get attached to the sediments which become dangerous to marine environment. As oil laden sediments settle down in marine environment and affect the light reaching to the plants. Moreover, such sediments

26 Ibid.

27 Richard A. Legatski, "Port State Jurisdiction over Vessel-Source Marine Pollution" 2 *HELR* 448 (1977).

28 Marine commerce in India. Available at: <https://www.investindia.gov.in/sector/ports-shipping> (Last visited on: May 9th, 2022).

29 Sandra Zukowska, "Concept of Green Ports. Case Study of Seaport in Gdynia" 3 *PKGK* 61 (2020).

30 Ibid.

having oil, attract chemicals toward them and have synergistic effect.³¹ These sediments engulfed by the marine organisms eventually find their path to human food chains.

- (vi) The economic benefits which can be reaped of marine ports are generally accompanied by notable environmental and health problems. Many dirtiest sources of air pollution gather at marine ports, and create a veil of brown haze which carries maximum air pollutants with it.³²

Hence, on analyzing all the benefits associated with ports and also, problems associated with the ports, it can be concluded that, ports not equipped with appropriate services and facilities will waste and destroy the resources of the country and its coming future, by poor utilization of resources present in the oceans and territorial waters. Also, if there would not be an adequate legal framework and enforcement mechanism, pertaining to pollution control across the ports, it can generate serious problems in coming future. To take example of France, there was massive contamination of the coasts and measurements taken showed that such pollution of coasts and the oceans consequently, was due to the inadequate port facilities. Concentrations measured in coastal areas, outside port facilities were recognized to be highly toxic due to pollution emanating from the ports.³³ If sea ports are not well-maintained then such ports add pollution to marine environment and have serious effects on flora and fauna present in coastal waters and the oceans.

Legal Regulation of Ports in India: The ports play a vital role in promoting maritime trade but at the same time if not managed properly causes serious threats to environment around. Establishment of the authorities like Marine Products Export Development Authority under the statute, Marine Products Export Development Authority Act, 1972³⁴ clearly establishes the fact that India is actively engaged in maritime commerce and hence, must have adequate legal mechanism for the preservation of its ports and adjacent marine environment. India has been gifted with a long coastline of 7500 kilometers approximately.³⁵ Many major and non-major ports are situated on this coastline. Within Indian Territory we have 12 major and 205 notified non-major/intermediate ports (under state government administration).³⁶

31 Jerome Williams, *Introduction to Marine Pollution Control* 129-131 (A Willey Interscience Publication, New York, 1979).

32 Supra Note 13.

33 P. Michel and B. Averty, "Contamination of French Coastal Waters by Organotin Compounds: 1997 Update" 38 Issue 4 MPB 268 (1999).

34 Act No. 13 of 1972.

35 Indian Space Research Organisation, Report: *Coastal Zones of India* (Ministry of Environment & Forests, 2012).

36 How many ports are in India? Available on: <https://byjus.com/free-ias-prep/major-ports-in-india/#:~:text=How%20many%20major%20ports%20India,notified%20minor%20and%20intermediate%20ports>. (Last Visited on: June 11th, 2022).

I. Constitutional Provisions with respect to ports: The Constitution of India is *supremalex* i.e. supreme law of the land and every other statute shall be in conformity to the provisions of the Constitution of India. If any law is not conformity with the Constitution the, it can be declared to be unconstitutional by the High Courts and the Supreme Court. According to the Constitution of India, ports declared by Parliament as major ports or are major ports according to any law made by Parliament or are major ports under any existing law then, any legislation in respect of such ports can exclusively be made by the Parliament of India. Also, any law pertaining to delimitation, and the constitution & powers of port authorities of these above-mentioned major ports, can also be made exclusively by the Parliament because these ports fall under the Union List.³⁷ So, it can be said that all the major ports are governed by the Union Government and laws made by it. At the same time, ports other than those declared by or under law made by Parliament or existing law to be major ports, can be governed by legislations enacted by both, the States and the Union Government as it is subject matter of the Concurrent List of the Constitution of India.³⁸ Jawaharlal Nehru Port is the largest port in terms of area, in India, while Mundra is the largest private port, in terms of area. Hence, there is distinction maintained between major and non-major ports by the Constitution itself.

II. Indian Ports Act, 1908. The Indian Ports Act, 1908 is Central Legislation pertaining to the major and other ports to which the Act is made applicable. It is analyzed in present paper to ascertain the adequacy of Indian laws relating to abatement of port pollution and to analyze their efficacy for consequent curbing of marine pollution. The Indian Ports Act, 1908 is a statute of pre-independence era and due to this very fact, have least welfare provisions incorporated in it. The Preamble of the Act says that "The Act is to consolidate the enactments relating to ports and port-charges."³⁹ The use of word 'consolidate' represents that the Act is exhaustive central legislation with respect to ports, to which it is applicable. However, the different coastal States have different local laws for regulation of ports situated therein and such legislations are in addition to the Indian Ports Act, 1908 because local legislations are subject to the applicability of the Indian Ports Act, 1908.⁴⁰

The Legislature made an attempt to impose certain prohibitions by way of Indian Ports Act, 1908. However, the Act is purely consolidating in nature and deals mainly with aspects other than environmental and pollution-related aspects. The Indian Ports Act, 1889, has been amended by no less than five other Acts. The object of the

37 As per the Constitution of India, Seventh Schedule, List I, Entry 27.

38 The Constitution of India, Seventh Schedule, List III, Entry 56.

39 Indian Ports Act, 1908 (Act no. 15 of 1908), Preamble.

40 For example, State of Maharashtra has Maharashtra Maritime Board Act, 1996. State of Kerala has Kerala Maritime Board Act, 2017. State of Karnataka has Karnataka Maritime Board Act, 2015.

Indian Ports Act, 1908 was to collect the provisions of all these six Acts and to incorporate them into one Act. The result of this was that the law had become more easily ascertainable related to ports and that one Act had taken the place of six, on the Statute book.⁴¹ The Act has the limited applicability as it extends to some particular ports which are mentioned in the Schedule I of the Act and also to parts of navigable rivers and channels leading to such ports and are subject to Act XXII of 1855 or the Indian Ports Act, 1875 or the Indian Ports Act, 1889. The Act can also be extended by the Government to other ports, channels and parts of navigable rivers in accordance with the powers conferred to Government by the said Act. It does not apply to all the ports in territory of India, which further leads to the conclusion that those ports may not be administered properly, in absence of the application of this law. The Act does define the term but not in very appreciable manner. The Act defines the term 'port' in inclusive fashion but doesn't make it clear, what does it actually mean.⁴²

On perusal of Section 6 of the Act, it can be said that the power to make port rules under the said Act by the Government includes power to make rules for containing marine pollution to an extent. However, the rules for containing marine pollution, produced within ports are not much comprehensive. Section 6 of the Indian Ports Act, 1908 confers power on the Central Government to make rules for providing the manner in which water mixed with oil or oil is to be discharged in any port.⁴³ The Section also provides that Central Government can make rules for checking introduction or spread of any infectious disease from vessels arriving at port, which can be a danger to public health and rules for prevention of conveyance of such infection from the port.⁴⁴ And if any such rule is made then, any person infringing any such rule may be punished with fine which may extend to one thousand rupees.⁴⁵ The power to make rules under Section 6 is not overall dealing with pollution of marine environment due to ports, but deals a little with marine pollution generated in ports due to oil. Moreover, no such rules are ever notified by the government of India for disposal of oil or water mixed with oil, generated within ports. However, there is absolute prohibition for discharging oil or water mixed with oil into ports.⁴⁶ The fine for doing so may extend to five lakh rupees.⁴⁷ If in case a master discharges oil even after warning from Conservator of Port, then he shall be punished with simple imprisonment, which may extend to one year and also with fine which may extend to five lakh rupees.⁴⁸ And the rest of powers under Section 6 to make rules are dealing with duties, fees to be imposed etc. and don't have any essence related to environment.

41 Id. Statement of Objects and Reasons.

42 Supra Note 19.

43 Id. Section 6(1)(ee).

44 Id. Section 6(1)(p)(vii).

45 Id. Section 6(3).

46 Id. Section 21(1).

47 The limit of fine raised to "five lakh rupees" from "five hundred rupees" by the Act 23 of 1992 (w.e.f 12-8-1992).

48 Indian Ports Act, 1908 (Act no. 15 of 1908), Preamble.

The Act also creates office of the conservator of port⁴⁹ which mainly has duty to enforce rules made under Section 6 of the Act.⁵⁰ But as discussed above the subjects upon which rules can be made under Section 6 of the Act, are not enough to control pollution generated in ports. Hence, the office of conservator of port is actually not been given required authority, suited to its name. The Indian Ports Act, 1908 permits the removal of obstructions through Conservator of Ports. Under the Act, the Conservator of Port can order removal of obstructions persistent in any part of port which in his opinion impedes the free navigation.⁵¹ So, this section can be used by the Conservator of Port to remove any visible pollutants which are present in port and also halts free navigation. Expenses of removal of such obstruction can be recovered by the Conservator of Port from the defaulter.⁵² Such visible pollutants may include various tangible objects. But this section is merely an incidental provision to the main theme of the Act which ultimately aims for the management of ports. The Act also prohibits throwing of any rubbish, ballast or anything in the ports, which can hinder the free navigation.⁵³ But the provision prohibits throwing such ballast or rubbish on grounds of hindering the navigation only and not on the ground of causing pollution. So, if any rubbish that doesn't hinder navigation, then is it allowed to be thrown into the ports. Lacuna in the language of the provision is major drawback. Graving⁵⁴ and breaming⁵⁵ of any vessel is not absolutely prohibited all over the ports and waters adjacent to it and limits can be set where such graving and breaming can be done.⁵⁶ But it is again not in consonance with the anti-pollution agenda and is not effective in abating pollution in ports. Boiling of pitch, oil or any other lustrous substances like tar, resin, turpentine and also other combustible matter on any vessel within the limits of port or such other limits as provided by the Government, is also prohibited and any person doing this may be punished with fine, which may extend to two hundred rupees.

Hence, on detailed study of the Indian Ports Act, 1908, it is found that the Act misses the environmental dimensions that should be observed in the ports. The Act mainly deals with the managerial aspects of the port and the Act lacks the provisions to curb the marine pollution or pollution related to the seas. The Act also doesn't deal comprehensively with increased problem of pollution across the ports. There are many pollutants which evolve within the ports but act is silent over those. Even the provisions related to managerial functions is outdated and not meeting the needs of the hour. The fines provided for different offences under the Act are meagre and

49 Id. Section 7.

50 Id. Section 8.

51 Id. Section 10.

52 Id. Section 11.

53 Id. Section 21(1).

54 The act of cleaning a ship's bottom.

55 The act of clearing a ship or its bottom of weeds, shells, or other accumulated matter by burning and scraping it.

56 Indian Ports Act, 1908 (Act no. 15 of 1908), Section 22.

the wrongdoer can easily escape his true liability. The Act also does not talk about marine pollution emanated from ports anywhere in it. So, this situation points that in India, there is no mechanism for combating pollution produced in ports which eventually causes marine pollution.

III. Indian Ports Bill, 2021. To replace this pre-independence era Act, i.e Indian Ports Act, 1908, the Parliament of India has introduced Indian Ports Bill, 2021. The Bill was circulated second time on 10th of December, 2020 for suggestions & comments, to all the Ministries for the purpose of Inter-Ministerial Consultations and also circulated among the stakeholders. The Bill simultaneously made available on the website of Ministry of Ports, Shipping and Waterways for public consultations. After duly scrutinising all the suggestions received from all the stakeholders and the Ministries and incorporating the appropriate ones in the draft Bill, the present draft of the Indian Ports Bill, 2021 was circulated on 10th June, 2021 for receiving the comments of stakeholders. The time span allowed for receiving comments from stakeholders was prior to the 18th meeting of Maritime States Development Council, which was scheduled to be organised on 24th of June, 2021. However, the present status of the newly proposed Bill is that the comments of some of the State Governments are awaited and the proposed legislation is still under consultative stage.⁵⁷

The effectiveness of the Bill can easily be adjudged by reading its Preamble, which provides that this Bill is to consolidate and amend the law relating to ports, which means that Bill is exhaustive in nature and seeks to amend the old law relating to the ports i.e the Indian Ports Act, 1908. The Bill also mentions in its Preamble that it aims:⁵⁸

- (i) At attaining the safety and security of ports.
- (ii) Preventing and containing pollution at ports.
- (iii) To fulfil obligations of India arising out of different maritime treaties and international instruments to which India is a party.
- (iv) At conservation of ports.
- (v) To establish and confer powers on the State Maritime Boards, for effective administration, control & management of non-major ports of India.
- (vi) To provide an efficient adjudicatory mechanisms for redressing the disputes, which can arise pertaining to ports.
- (vii) The Bill focuses on optimum utilization of the 7500 kilometres coastline of India by way of establishing and empowering National Council for fostering structured growth and development of ports and to provide for matters ancillary and incidental thereto, or connected therewith."

⁵⁷ Indian Ports Bill, 2021. Available on: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1744034> (Last Visited on: 25th of April, 2021).

⁵⁸ The Indian Ports Bill, 2021, Preamble to the Bill.

As discussed above in this research paper,⁵⁹ the Bill defines the term 'port' in most comprehensive and impressive manner. This definition strengthens the very foundation of the Bill and leaves almost no lacuna, while interpreting the term with respect to various issues. The Bill applies to all the ports⁶⁰ and is hence, inclusive in nature. Apart from this, the Bill provides that the Central Government may by notification in Official Gazette establish Maritime State Development Councils.⁶¹ The functions of these Councils will include making recommendations regarding adequacy of legal framework for increasing the efficiency of ports, monitor the development of non-major ports in the States with a view to exercise a check mechanism over the States by an agency created under Central Legislation⁶², collection of data pertaining to ports, conduct research studies etc. with respect to ports etc.⁶³

If talked at State-level, the Bill provides for the establishment of State Maritime Board for all the non-major ports within every State.⁶⁴ The Boards will initiate plans for development of non-major ports within the State, develop new non-major ports in States, protect the ecological balance in the non-major ports of the State, adjudicating disputes etc.⁶⁵ Under the Bill, altogether a different adjudicatory mechanism is set for adjudication of the disputes relating to the ports. The purpose behind setting such mechanism is conservation of ports without any delay and minimising the harmful effects on the environment, due to any problems associated with the ports.⁶⁶ The Bill mandates abiding to different International Conventions namely, Safety Convention, International Ship and Port Facility Security Code, MARPOL etc.⁶⁷ A whole Chapter⁶⁸ is dedicated to Prevention and containment of pollution across the ports, with all the minute details contained in it.

CONCLUSION

Oceans have become easy and cheap option to human beings, for solving their self-created problems. For example, oceans are being used as dumping sites, for meeting oil and gas demands from continental shelf, for fulfilling the food needs in form of sea food etc. Countries at international level are already planning how oceans can be divided, so that they can get a "fair share". Economists and politicians are eyeing on the treasure embedded in chest of the oceans in form of gold, gas, minerals etc. But we need to think from the lens of an environmentalist and a vigilant legal expert.

59 Supra Note 20.

60 The Indian ports Bill, 2021, Section 1.

61 Id. Section 3.

62 This is also the reason that many coastal states are opposing this Bill.

63 The Indian ports Bill, 2021, Section 10.

64 Id. Section 18.

65 Id. Section 19.

66 Id. Chapter VI.

67 Id. Section 46.

68 Id. Chapter X.

The nations and the governments need to do balancing of interests, so that marine environment can be conserved and preserved for future generations.

As discussed, maritime trade and the ports are a source of marine pollution, if they lack proper facilities or mismanaged. But ports if managed properly, they minimize the environmental repercussions, and also amazingly boost the economic growth of country. The universe of research paper is limited to marine pollution by mismanaged ports in India and their further contribution for polluting the marine environment and affecting on biodiversity present within. Due to lacuna in present Indian legal framework pertaining to ports, show that this problem has become most serious. However, the Indian Ports Bill, 2021 is panacea to the ills of old Indian Ports Act of 1908. The Bill aims to abide by the International Treaties and Instruments and therefore, will help India to be in line with International norms & International Community. Moreover, the present Bill aims at conservation of all ports, major and non-major, which was not the scheme of the Indian Ports Act, 1908 and hence, realise the goals of sustainable development. Apart from this the Indian Ports Bill, 2021 unlike to the old Act of 1908, aims at containing of pollution at ports, which is a step ahead in direction of recognizing the problem of marine pollution. If seen from trade point of view, the purpose of the Bill is to boost the best use of coastline of India. Hence, the Bill is tremendous work which balance both, the environmental, as well as economic interests. The new Bill would be a uniform law which will be applicable to all the ports,⁶⁹ with some novel provisions applicable in respect of the non-major ports but contained within the same Bill and hence providing much uniformity in the law applicable to the ports. Therefore, the Government of India need to redress the issue by readily adopting the new proposed Indian Ports Bill, 2021 as soon as possible, by expediting the procedure.

69 Section 1 of the Indian Ports Bill, 2021.

Implementation of Design Thinking in Business Intelligence and Analytics: A Review

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ABSTRACT

Although Design Thinking has been incorporated in many domains, most early studies in Information Systems research focused on building system, software and algorithms, designs to solve managerial, strategic and operational challenges. Studies on how Design Thinking may be incorporated in learning systems and processes and supported in the context of business intelligence (BI) and business analytics in design-oriented IS research (BA) are minimal. How can Design Thinking be incorporated and supported in the context of Business Intelligence and Business Analytics projects, particularly during the proof of concept and re-run/re-test stage? In this paper, a perspective on incorporating the attitude, mindset, way of engaging and toolset of the Design Thinking process in the learning and development experience is offered as guidelines for coaching the Design Thinking team. The findings of this study suggest that Design Thinking methods may be used to assist analysts frame and design their inventions and that the practice can be useful for building curriculum for teaching, creating and learning.

Keyword: Business Analytics, Business Intelligence and Design Thinking, Implementation Framework.

1. INTRODUCTION

Academicians and practitioners have expressed interest in the applications and adoption of Design Thinking, which is considered as a prospective approach that integrates

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both thinking styles and tools, therefore leading to successful industrial innovation and creativity (Dolata & Schwabe, 2016). These have been offered as a novel, inventive, and comprehensive method to challenge management (Brown, 2009) to employs a designer's perspective to address customer wants and criteria. Design Thinking originated in the design science era in the 1960s (Brown & Wyatt, 2010). Ever since, it has been conceptualized, modified, characterized, and recognized as an innovative approach that employs iterative and engaging processes of problem definition, idea creation, reflection, re-design, and refinement of thinking (Elsbach&Stigliani, 2018), and which has been successfully applied in a variety of fields, bridging the gap between researchers, managers and practitioners.

Design Thinking is an instructional strategy that aims to change people's mindsets in order to solve various challenges(Dolata & Schwabe, 2016) and present novel perspectives (Watchorn, Larkin, Ang, & Hitch, 2013).Some define it as an unique way to producing innovations that involves need-finding, brainstorming, and prototyping (McLaughlan& Lodge, 2019), which varies "significantly" from the sequential, breakthrough procedures that define typical business practices (Seidel &Fixson, 2013).Fundamentally, it is a strategy that promotes creative ideas with the goal of developing innovations and creative elements that are user-oriented and answer their requirements via the use of design techniques that place the user at the center of all operations (Plattner, Meinel, & Weinberg, 2009).Design thinking is progressively utilized in business to promote creativity for cooperation. IBM created the Enterprise Design Thinking model to "help diverse teams align all around genuine requirements of their consumers," saying that organizations who apply it are twice as fast to market, 75% more productive in terms of teaming, and experience a 300% investment return. Empirical evidence on how the usage of Design Thinking tools may help businesses establish culture (Elsbach and Stigliani, 2018). Many corporate consulting organizations, like IDEO, Malmo Living Labs,FabLabs and more have effectively brought such a concept to audiences and implemented, taught, and promoted it in the context of decision - making, process optimization, and new product creation (Adams, Daly, Mann, &Dall'Alba Adams, 2011). Indeed, it promotes "thinking like a designer," focuses on team members, and employs specific design techniques such as brainstorming, mind-mapping, think-aloud activities, participant observation, idea representation and visualization, and rapid and re-prototyping with the aim of innovation and free-thinking (Burdick & Willis, 2011).

There is minimal study on how Design Thinking is used as a creative and critical learning and development approach to facilitate decision making studies in the BI and BA. Information systems research, according to Nunamaker and Briggs (2011), is "the study of what individuals must comprehend in order to produce new value, as well as the analysis, design, development, deployment, operation, and management of systems that inform these understandings".Furthermore, also differentiated are three stages of design-oriented IS research: proof or re-run or re-testconcept, which focuses on testing ideas; proof of concept and value, which focuses on value creation and can add to existing theory and build on new frameworks or models; and proof of use, which focuses on self-determined, self-driven and growing communities of

practice (Nunamaker& Briggs, 2011). The purpose of this study is to understand the implementation of Design thinking in business analytics.

2. METHODOLOGY

The authors searched for keywords “Design Thinking” AND “Business Intelligence” OR “Business Analysis” in Google Scholar database, it resulted in 4210 documents, next the criterion from the period 2007-2022 was fixed resulting in 4010 documents, next only review papers were included, resulting in 142 documents, in the final stage the authors read the titles, abstracts and keywords for relevancy to high quality papers since this review’s niche is on designing thinking and not on any element of a designer’s work such as prototyping, ideating, mapping, etc, or designerly models like, six-thinking hats, 5W1H method of thinking, fishbone etc, irrelevant papers were not included in the dataset to ensure high methodological rigor, thus a final of 25 papers were analyzed.

3. LITERATURE REVIEW

The literature on business intelligence implies varied meanings in different contexts. Business intelligence and business analytics are a collection of technologies (Dorst, 2011), systems and processes that combine databases architectures, analysis tools and methodologies, and applications to assist enterprises in accessing and analyzing data in order to make improved and more quick decisions (Sharda, Delen, & Turban, 2019). BI, according to another, is a collection of tools and procedures that enable employees at all levels of a business to retrieve and interpret information (Howson & Hammond, 2014). The need for Design Thinking in Business Intelligence comes from its implementation in Information Systems (IS)-related projects, Design Thinking has been proven to improve software development processes (Kowark, Häger, Gehrler, & Krüger, 2014), as it enables Information Systems developers and designers in business modeling to carve the needs, challenges, and scope of processes and projects (Luebbe&Weske, 2012), design effective dashboards (Cahyadi&Prananto, 2015); and bridge the gap between the system requirements and ideas through storytelling (Hildenbrand& Meyer, 2012). Various studies have earmarked attempts to understand the perceptions of participants in a large-scale IT-oriented design project at a public library (Dindler, Eriksson, and Dalsgaard, 2016). A “design direction” as a creative method for identifying and evaluating Information Technology and Systems investment choices in order to modify organizational decisions (Frisk, Lindgren, and Mathiassen (2014). Studies have demonstrated the value of design-thinking process in the boundaries of Human-Computer Interaction (HCI) practices, as they provide a directory of guidelines for assessing the quality of the interaction and instructional design research contribution (Zimmerman, Forlizzi, and Evenson, 2007).

Another area in IS study that pulls together a variety of viewpoints connected to design and design science research is aiming to improve decisions making via the use of information, intelligence and analytics (Rai, 2017). Business intelligence principles open the door to chances to connect technologies to manage complex, large datasets

from increasing data sources, while emphasizing the analytical process of transforming the data into useful ideas for improved business choices (Phillips-Wren, Iyer, Kulkarni, & Ariyachandra, 2015). To manage, record, and analyze company data, business intelligence integrates the designs of a database's management layer, user interface (UI), BA, business performance management (BPM), and layer concentrating on data representation and visualization (SAS, 2012). The "how of design" describes the stages, techniques, tools, or shared activity, as well as the object or outcome of design. Designers' work in the era of AI seems to be more about conceiving a new offering and then designing the problem-solving loops that will create and design tailored services for individual consumers, rather than merely ideating things to be marketed at scale.

While Design Thinking has been effectively implemented in IS (Information system) research, most early and recent studies focused on building product and system designs to tackle managerial, strategic, social and operational challenges. Over the last few decades, the phrase "Design Thinking" has become more popular. Building on the institution employing the Design Thinking, the process is composed of three to seven stages, with popular structure and operations ranging from acknowledging the requirements of the users, offering solution and innovation-based techniques, and developing ideas from mind-mapping and brainstorming discussions to prototyping and designing and testing the proposed ideas and executing the most effective strategy at each level. The usefulness of design thinking as a reality, driving force in business (global giants such as Google and Airbnb have used it to considerable effect) corresponds to its popularity as a discipline at prominent worldwide institutions. Idea generation gives teams the opportunity to design up with novel ideas. The authors examined "The Five Stages of the Design Thinking Process" that can be implemented to incorporate Design Thinking in the context of Business Intelligence and Analytics projects, particularly during the re-run of concept stage.

Stage 1 Empathize: Because the success of Design Thinking is dependent on the efforts of the team, assembling the correct open-minded, interdisciplinary, and collaborative team is essential throughout and within the Design Thinking phases. Many initiatives are delegated to interdisciplinary groups rather than individuals (Wolff, 2018).

The first stage in the Design Thinking, as a team-based work approach, is to engage with the users for developing empathetic picture of the problem they are encountering and would like to address. The team must assist in observing user behavior, uncovering their true needs, experiencing their experiences, stories and motives, discovering their hidden emotions, and gaining deeper insights into user's life (Lindberg, Meinel, & Wagner, 2011).

Sympathy itself would generate a technology that is suitable for function, however empathy will indeed produce a system that is best usable. To aid inside this process, many methodologies specified in different models are available. Discussions, ideation, observing, the 5W and H framework, focus group exercises, etc.

Stage 2 Define: The Define period journeys by breaking and then integrating the meanings from empathy elements from the Empathize stage. The objectives are to (1) identify the primary problems, operational definitions, and challenges, which aid in the emergence of attributes and functions to fix the issue, and (2) develop a measurable problem statement in the form of a point-of-view statements to reveal insights and recognize the relevant challenges, both of which are necessary for creating a definitive solution(Hildenbr& Meyer, 2012).

Stage 3 Ideate: This stage seeks to produce design solutions by thinking beyond the box, going above the obvious answers, using brainstorming, mind maps, and idea re-grouping and selection. This stage contributes to the solution set's inventive potential by utilizing the notion of "free thinking and going wide" in order to explore a broadest solution and creation space in terms of a volume and variety of ideas.

Teams may frequently identify unanticipated areas of solution, bring viewpoints together, and then study and evaluate the collected ideas to solve the problem (Lindberg, Köppen, Rauth, & Meinel, 2012). A aesthetic leader may empower a team towards creativity via using tools such as sketching, fishbones diagrams, client profiling, story-funneling and other creative approaches leading to greater collaboration, authenticity and communication (Gahlot & Bathla, 2021).

Stage 4 Prototype: Creating a low-cost, scaled-down prototype can assist bring ideas and explorations out of the Ideate stage, bridging the gap between acquiring empathy, the design space, and the consumers during the Design Thinking project's pre-solution phase. Inexpensive prototypes enable team mates to work down the details, test and re-test assumptions, investigate possibilities, broaden the solution zone, identify constraints based on user stories, and gain a widest understanding of how users think, feel, and engage with the developed prototype (Asamoah, Sharda, Zadeh, & Kalgotra, 2017).

Stage 5 Test: The ultimate stage of Design-Thinking is to gather genuine and clear feedback on the team's agreed-upon solutions. This form of feedback is particularly useful for further prototype iterations, aiding in the refining of solutions or the point-of-view (POV) statement in the Define stage.

Another advantage something most teammates like is the opportunity to learn more users and create empathy (Empathize stage) through observed insights and engagement while testing prototypes, which usually results in unexpected discoveries about the solutions generated by the Design Thinking team. Testing the prototypes helps to determine the extent to which the team has been doing things right and successfully (Chen, Chiang, & Storey, 2012).

There are other prominent models as well. Following is the description of the most important ones and their creators:

- **3Is:** Designed in 2001 by the design firm IDEO in the setting of "social innovation". The model is divided into three sections "Inspiration, Ideation, and Implementation", each with its own set of tasks (IDEO, 2015)

- HCD: The previous HCD model was characterized by three domains of movement “hearing, creating, and implementing” (Tschimmel,2012), however its current recent version focuses on three fundamental steps, the same as the “3Is paradigm”. This is an extension of the 3Is paradigm that synthesizes IDEO’s significant expertise in sentient design stages. HCD is based upon seven attitudes “empathy, optimism, iteration, creative confidence, making, embracing ambiguity, and learning from failure” and a plethora of resources available via a portal (www.DesignKit.org) and a digital textbook. IDEO (IDEO, 2015).
- PI Stanford: Founded early 2005 at the “Hasso Plattner Institute at Stanford University” (United States), with profound impact from IDEO co-founder David Kelley. “Empathy, Define, Ideate, Prototype, and Test” are the five phases or stages in the paradigm (Hasso, 2018)
- HPI Potsdam: A variant of the preceding image generated at the University of Potsdam’s Hasso Plattner Institute (Germany). “Understand, Observe, Point of View, Ideate, Prototype, and Test” (Thoring,2011) are the six steps in the model.
- The British Design Council designed 4D or Double Diamond about 2005. It is divided into four stages: “discover, define, develop, and deliver” (Chishtie, 2022). However, unlike past versions, it depicts the “divergent and convergent” aspects of the “design process and thinking” graphically (Design Council, 2018).
- SDT: “Exploration, Creation, Reflection, and Implementation” are the four steps of the “Organization Design Thinking” methodology. One significant distinction between this paradigm and the others is that the output is a journey rather than a final article (Stickdorn, 2012).
- Evolution 62: It was created as a part of the “D-THINK” initiative with the goal of integrating it to education and training. “Emergence, Empathy, Experimentation, Elaboration, Exposition, and Extension” are the six components of the paradigm (Tschimmel, 2017).

3. FINDINGS

The fundamental aspect of a business analyst function is unlikely to alter, especially in an era of fast digital transition. This is not to say that some design thinking principles cannot be applied to the function of a Business Analyst. Design thinking is simply another type of business analysis, and many BAs have utilized design thinking principles in previous projects. Scope definition, requirements elicitation and analysis, and decisions validation are some of the most typical areas where business analysts might apply design thinking. The depth and length of the process will be determined primarily by the size and scope of particular projects, and as organization become more agile, so will the ideas that business analysts must utilize (Sharda et al., 2019).

On the basis of literature review, the authors outlined certain guidelines which can be considered while implementing design thinking in the field of business analytics.

3.1 Guidelines

A Design Thinking method in an organization context is employing a designer's experience and insight to realign user demands with available technology, and then turning that into a competitive business strategy with valuation. If this sounds familiar, it's because Business Analysts have been doing it for a long time, contrary to widespread belief that BAs spend their whole time buried in criteria paperwork. When used correctly, Design Thinking is like smart business analysis (Rivera & Meulen, 2014). The iterative, bottom-up style of Design Thinking distinguishes it from standard business analysis. Whereas BAs used to regard requirements papers as orders to be followed to the letter, a Design Thinking approach promotes spending time understanding the context, the driving elements behind that context, and the complicated business goals. Products are created from the ground up, rather from the top down. A Design Thinking technique, in particular, needs iteration and collaborative projects: cross-disciplinary teams provide critical input through an iterative methodology helped by prototyping, crowd-thinking, and cyclic flows (Govender, 2022).

The team then produces hypotheses, quickly models them, and severely limits the probable solutions for further testing and evaluation. Rather than building a solution based on requirements, BAs, designers, and developers work together to better understand the context, identify key driving forces, and align them with business objectives (Brown, 2008).

3.1.1 Design Thinking Can Help BAs in Three Areas:

A. Scope Definition

Scope creep is something that every BA who has ever worked closely with project management has heard. Scope creep occurs when the parameters of a project vary after its inception, such as when unanticipated requirements emerge out of nowhere and schedules/budgets must adjust. By conducting more detailed study and modeling of a product or idea at the which was before kickoff stage, a Design Thinking method can assist reduce scope creep (Seffah, 2021).

To assist elicit all functional needs in one fell swoop, requirements elicitation might be coupled with a fast prototyping workshop and design iterations.

Involving key stakeholders in creative thinking training sessions - those challenging customers who typically come up with great shock' criteria mid - way through a project - will also compress out more specifications earlier on, and raise collaboration much more skillfully than seeking feedback on text-based documentation (Brown & Wyatt, 2010).

B. Requirements Elicitation and Analysis:

BAs will seek to gain a clear picture of stakeholder and user objectives throughout

the requirements elicitation and analysis phase of a project. At this point, Design Thinking may assist in gathering needs, defining required functionality, and gaining some empathy for end users. Implementing a Design Thinking method to requirements elicitation and analysis entails the following steps:

B.1 performing initial stage conversations with end-users to determine their needs and perspectives

B.2 determining the extent of the task

B.3 bringing together a heterogeneous team consisting of engineers, designers, managers, external stakeholders, domain analysts, and consultants

B.4 Enabling Design Thinking Workshops - SAP provides some helpful hints for organizing and running Design Thinking Requirements workshops.

These Design Thinking-focused exercises complement rather than replace traditional requirements elicitation methodologies. By incorporating Design Thinking into requirement analysis, BAs may have entire or almost complete requirements in their hands in days rather than weeks or months(Howson & Hammond, 2014).

C. Validation of Decisions:

Design Thinking creates an empirical approach to decision-making, which means that BAs may offer actual data rather than hunches when defending decisions to the development team or stakeholders. Design Thinking ideation enables the entire team to brainstorm and prototype as many alternatives as possible before collaborating to identify the optimal answer for the business and intelligence context. Using that data subsequently helps to reduce the tenor of difficult stakeholder talks, validate all choices, and, ultimately, create a great result (Klosen, 2022).After all, it's part of the job description for business analysts to be analytical. However, this does not imply that creative thinking is incompatible with the practice of business analysis. BAs no longer have to accept a set of criteria as gospel and create a whole strategy upfront. As firms grow more dynamic and enterprise software becomes more consumerized, business analysts must apply creative thinking to more difficult business challenges in order to create user-centric solutions. Bringing a solely economic approach to today's "wicked" problems would not suffice (Ho, 2019).

As a result, business analysts should always explore innovative approaches to meet the new difficulties given by product development and 'wicked' business problems. BAs that want to retain a user-centric approach while keeping stakeholders involved and using a business framework might utilize Design Thinking as a road map (Tursunbayeva,2018). BAs may manage requirements more efficiently, define project scope more clearly, verify choices based on evidence, and, ultimately, develop better products by incorporating a designer mentality into their analytical processes. BAs may become more analytical and successful by employing Design Thinking (Dorst, 2011)

4. CONCLUSION

This design thinking method provides a systematic procedure that combines creative and analytical stages to establish a structure for establishing an innovation incubator within a standard PMO's pre-project setting. Perhaps to standard business planning, this type of procedure is launched prior to the start of initiatives, giving a solid foundation to justify a course of action and capital commitment. When businesses pass off on business cases, they may have a far better degree of assurance and less uncertainty since precise design features have been considered through collaboration, testing, and trial and error. A distinction across standard business analysis methodologies and design thinking techniques is supported by "Designing for Growth" stating that most business methods include investigation with the goal of uncovering one "best" solution, whereas designers' experiment with the goal of looping forward towards a "better" response. Inventing the future by keeping and improving the finest of the today (Liedtka and Ogilvie 2011; Frisendal, 2012). Typically, corporate planning is carried out with limited tools or insights to appropriately analyze the viability of strategic initiatives related with strategic objectives, which is an outcome of high-level planning. Most organizations lack the ability to accelerate the discovery phase of a project and instead take a linear approach to advancement, owing to project overhead and SDLC. Once a C-Suite or operations employee has a concept, the organization needs a mechanism to expedite the discovery and design process in order to learn what works and what does not in a light-weight, rapid, and efficient manner (Thees, 2020). Even though this strategy is pre-project, the budgets that finance it would be from operational spending and could therefore be handled as a permanent rather than a transitory endeavor like a project. Who wants to be innovative only some of the time?

An organization could create an ICOE (Innovation Centre of Excellence) as a business integration capability and construct an interaction model that allows services and competence to be established across business units, allowing many potential innovation engines to be created in areas of rapid success and progress. Organizations would gain the advantages of many continuous innovation streams. This horizontal aspect of innovation has a tremendous cultural impact since it is no longer project-based, but functional; rather, it is part of the organization's DNA, beliefs, and behaviors. Design thinking inside a structured logical framework may serve as an organizational engine and a source of innovation. It decreases risk, cutting costs, leads to better performance, and alters organizational culture to promote a more collaborative and productive way of working.

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Use and Misuse of Cyber Space in the Act of Terrorism: A Threat to National and International Security

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INTRODUCTION

The development in information technology and electronic media especially from the 1980 s onwards have given rise to a new variety of computer related crimes which are commonly called "Cyber Crimes". The widespread growth of these crimes has become matter of global concern and a challenge for the law enforcement agencies in the new millennium. Because of the peculiar nature of these crimes, they can be committed anonymously and far away from the victim without being physically present there. Further, cyber criminals, have a major advantage, they can use computer technology to inflict damage without risk of being caught.

Most people would say they know what terrorism is, but surprisingly there is no internationally agreed definition. There are literally hundreds of different definitions in current use with the use of violence or threat of violence being the only general common theme¹. The only other elements to appear in more than 50% of definitions are "Political" and "fear, terror emphasized"². This is a hamper on international cooperation as some terrorist organizations are seen as legitimate fighters by some countries. Terrorism does differ from other crimes in its mens rea; it is done with a purpose and a specific strategic outcome in mind.

It is important that we consider who the terrorists are. There are literally hundreds of groups of varying size and ability, which, to some extent, warrant the label of terrorists. Terrorism has 4 classic motivations³. Firstly there are single-issue terrorists,

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1 FARC (Revolutionary Armed Forces of Columbia) are probably the most active today.

2 The PKK Kongra/Gel terrorist organisation, active in Turkey, began seeking a socialist revolution in that country.

3 Religio-Political groups have been more lethal over the last 5 years.

those who believe in a particular cause and are prepared to use violence to protest their message in the hope of ending the issue, which sparks their grievance. Animal Rights and Anti-Choice over abortion are the two most prevalent of such issues. Vivisection researchers or family planning workers have been the targets of sustained campaigns and assassinations in protest over these issues. Although generally small and with a low lethality rate, these groups could find the cyber world particularly to their liking as in the cyber environment they can effectively punch above their weight. Ideological Terrorists are those who use violence to promote their political ideology, usually from the far left or right. While these groups were most active in the Cold War, there are still several of such groups still active and other active groups that have evolved from their beginnings as an Ideological Terrorist group.⁴

TERRORIST USE OF THE INTERNET

Propaganda is essential to terrorism, these are rational people who carry out their campaigns for a political or social end state, they must have a medium to explain their message and justify their actions. Before the Internet this was relatively difficult to achieve for a mass audience. Television and print media would run stories on terrorists but these would be subject to editorial control and sometimes to legal restrictions. Books, magazines and pamphlets would only hit a small audience and would only really be read by those with an interest in the terrorist's cause. The World Wide Web is unregulated and accessible to almost everyone. Internet Cafes are increasingly popular and allow access to the public without the need for the ownership of a computer or subscription to an Internet Service Provider. Simply by adding the correct key words or links via a seemingly mainstream site, the terrorist organization can easily display its message without regulation. It can allow the key grievances, which motivate the terrorists, to be publicly aired, and as they control the content, these can be backed up with proof manufactured and edited by the organization. These sites look official and will use multimedia to attract attention and create an air of legitimacy for the site visitor. They also have the advantage that their Information Operations are not bound by truth or conventions, which allows, with appropriate editing, a seemingly convincing piece of propaganda without any real basis. By May 2005, using only the US State Department's list of terrorist organizations, there were over 4500 terrorist supporting websites [5], rising to 5500 in 2007 [6]. An example of how easily websites can be used for misinformation is the German Bund Deutscher Juristen [7]. This website for the German Lawyers Association ran an article about their Chairman, Dr Claus Grötz, quoting that he said the possible use of testimony gained after light torture could be used in German courts. There was public outcry and headline news calling for his resignation. The site had only been set up 2 days before the story broke and neither the Association nor Dr Grötz actually existed. Although this is not a terrorist example, it highlights the possibilities that a terrorist organization could exploit. Lazy journalism meant that the story was not corroborated and given to the German public as authentic by the mainstream media. To have this about a State's

4 The EU lists LTTE and PKK as terrorist organizations.

action relating to a terrorist situation could be used by the terrorist organization to gain public sympathy and international condemnation of the victim state.

Recruitment and Radicalization are an essential element for a terrorist organization. The Internet provides a greatly enhanced forum for this. The ability for terrorists to find and groom young people is demonstrated in Forum and Chat Room websites. This provides a largely unregulated medium for terrorists to meet and groom potential recruits. Often they will monitor those Forums and Chat Rooms that may have a relevance to their motivation, grievance or cause. This could be an animal rights Chat Room where extremists Single Issue terrorists may use the opportunity to engage anyone who shows thoughts or emotions along the same lines. This form of contact can be well orchestrated and involve several people, effectively keeping the potential recruit in an air lock away from the terrorist proper until they are deemed ready. Initially a pro-terrorist chatter will engage the potential recruit in fairly mainstream conversation and ask a few probing but seemingly innocent questions over a period of time. They will use this time to pass on pro-terrorist messages and try to affirm the potential recruit's feelings to that particular cause. They will also post messages against the terrorist's targets in an attempt to convince the potential recruit that the terrorist message is accurate.

Once regular contact is made, the initial contact will assess the potential recruit and pass them on to a groomer. Those selected for such grooming have already displayed some form of agreement with the terrorist cause and also the personality traits that suggest they may be willing to take an active part in any struggle. Still at this point the potential recruit is unlikely to know she or he is in contact with anyone other than a fellow chatter of a like mind and engaging in serious conversation. The groomer is likely to be very knowledgeable about the cause and will start to feed strong propaganda about the terrorist's motivation. This is again a filtering process to find out those who would continue towards direct action from those who have strong views but would never cross from political protest. Those who are regarded as strong believers in the terrorist cause, and displayed the correct personality traits to suggest they would join are then passed on to their first proper contact with the terrorist organization itself. This process can take a long time, as the groomer has to be certain they have the right people and the potential recruit is not going to be made aware that he or she is in contact with a terrorist until they are ready.

The groomer will pass the potential recruit onto a recruiter who, at that stage will, for the first time, make indications that they are from a terrorist organization. From this point the skill set of the potential recruit will be examined and their commitment finally checked before they are in a position to ever actually meet or know the identity of anyone they have been engaged with.

According to U.S. National Infrastructure Protection centre, Cyber terrorism defines as-

A criminal act perpetrated by the use of computer and telecommunication capabilities, resulting in violence, destruction and disruption of service to create fear by causing

confusion and uncertainty within a given population, with the goal of influencing a government population to conform to a particular political, social or ideological agenda.⁵

Thus, cyber terrorism may be said to be a convergence of terrorism and cyber space involving unlawful attacks or threats of attacks against computers, networks and the information stored therein, in order to coerce or intimidate a government or its people in furtherance of political, social or ideological objective. Cyber terrorism is resorted to either by attacking the critical infrastructure via cyber attack or by misusing the internet.⁶

However, Cyber terrorism has been a significant part of the study of Cyber Crime, since the impact/extend and effect of cyber terrorism have been such that it needs to be taken up as a separate subject. Further we ll define Cyber Crime and its important aspects.

Classifications of Cyber Crimes: Cyber Crimes which are growing day by day, it is very difficult to find out what is actually a cyber crime and what is the conventional crime so to come out of this confusion, cyber crimes can be classified under different categories which are as follows:

CYBER CRIMES AGAINST PERSONS

There are certain offences which affect the personality of individuals can be defined as:

- **Harassment via E-Mails:** It is very common type of harassment through sending letters, attachments of files & folders i.e. via e-mails. At present harassment is common as usage of social sites i.e. Facebook, Twitter etc. increasing day by day.
- **Cyber-Stalking:** It means expressed or implied a physical threat that creates fear through the use to computer technology such as internet, e-mail, phones, text messages, webcam, websites or videos.
- **Dissemination of Obscene Material:** It includes Indecent exposure/ Pornography (basically child pornography), hosting of web site containing these prohibited materials. These obscene matters may cause harm to the mind of the adolescent and tend to deprave or corrupt their mind.
- **Defamation:** It is an act of imputing any person with intent to lower down the dignity of the person by hacking his mail account and sending some mails with using vulgar language to unknown persons mail account.
- **Hacking:** It means unauthorized control/access over computer system and act of hacking completely destroys the whole data as well as computer programmes. Hackers usually hacks telecommunication and mobile network.

5 Wilson Clay: Computer attack and Cyber Terrorism (2003).

6 Sastry P.K: Computer Science and Computer Forensics (2001).

- **Cracking:** It is amongst the gravest cyber crimes known till date. It is a dreadful feeling to know that a stranger has broken into your computer systems without your knowledge and consent and has tampered with precious confidential data and information.
- **E-Mail Spoofing:** A spoofed e-mail may be said to be one, which misrepresents its origin. It shows its origin to be different from which actually it originates.
- **SMS Spoofing:** Spoofing is a blocking through spam which means the unwanted uninvited messages. Here an offender steals identity of another in the form of mobile phone number and sending SMS via internet and receiver gets the SMS from the mobile phone number of the victim. It is very serious cyber crime against any individual.
- **Carding:** It means false ATM cards i.e. Debit and Credit cards used by criminals for their monetary benefits through withdrawing money from the victim's bank account mala-fidely. There is always unauthorized use of ATM cards in this type of cyber crimes.
- **Cheating & Fraud:** It means the person who is doing the act of cyber crime i.e. stealing password and data storage has done it with having guilty mind which leads to fraud and cheating.
- **Child Pornography:** It involves the use of computer networks to create, distribute, or access materials that sexually exploit underage children.
- **Assault by Threat:** refers to threatening a person with fear for their lives or lives of their families through the use of a computer network i.e. E-mail, videos or phones.

CRIMES AGAINST PERSONS PROPERTY

As there is rapid growth in the international trade where businesses and consumers are increasingly using computers to create, transmit and to store information in the electronic form instead of traditional paper documents. There are certain offences which affect persons property which are as follows:

- **Intellectual Property Crimes:** Intellectual property consists of a bundle of rights. Any unlawful act by which the owner is deprived completely or partially of his rights is an offence. The common form of IPR violation may be said to be software piracy, infringement of copyright, trademark, patents, designs and service mark violation, theft of computer source code, etc.
- **Cyber Squatting:** It means where two persons claim for the same Domain Name either by claiming that they had registered the name first or by right of using it before the other or using something similar to that previously. For example two similar names i.e. www.yahoo.com and www.yaahoo.com.
- **Cyber Vandalism:** Vandalism means deliberately destroying or damaging property of another. Thus cyber vandalism means destroying or damaging the data when a network service is stopped or disrupted. It may include

within its purview any kind of physical harm done to the computer of any person. These acts may take the form of the theft of a computer, some part of a computer or a peripheral attached to the computer.

- **Hacking Computer System:** Hacktivism attacks those included Famous Twitter, blogging platform by unauthorized access/control over the computer. Due to the hacking activity there will be loss of data as well as computer. Also research especially indicates that those attacks were not mainly intended for financial gain too and to diminish the reputation of particular person or company.
- **Transmitting Virus:** Viruses are programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worm attacks plays major role in affecting the computerize system of the individuals.
- **Cyber Trespass:** It means to access someone s computer without the right authorization of the owner and does not disturb, alter, misuse, or damage data or system by using wireless internet connection.
- **Internet Time Thefts:** Basically, Internet time theft comes under hacking. It is the use by an unauthorised person, of the Internet hours paid for by another person. The person who gets access to someone else s ISP user ID and password, either by hacking or by gaining access to it by illegal means, uses it to access the Internet without the other person s knowledge. You can identify time theft if your Internet time has to be recharged often, despite infrequent usage.

CYBERCRIMES AGAINST GOVERNMENT

There are certain offences done by group of persons intending to threaten the international governments by using internet facilities. It includes:

- **Cyber Terrorism:** Cyber terrorism is a major burning issue in the domestic as well as global concern. The common form of these terrorist attacks on the Internet is by distributed denial of service attacks, hate websites and hate e-mails, attacks on sensitive computer networks etc. Cyber terrorism activities endanger the sovereignty and integrity of the nation.
- **Cyber Warfare:** It refers to politically motivated hacking to conduct sabotage and espionage. It is a form of information warfare sometimes seen as analogous to conventional warfare although this analogy is controversial for both its accuracy and its political motivation.
- **Distribution of pirated software:** It means distributing pirated software from one computer to another intending to destroy the data and official records of the government.
- **Possession of Unauthorized Information:** It is very easy to access any information by the terrorists with the aid of internet and to possess that information for political, religious, social, ideological objectives.

CYBERCRIMES AGAINST SOCIETY AT LARGE

An unlawful act done with the intention of causing harm to the cyberspace will affect large number of persons. These offences include:

- **Child Pornography:** It involves the use of computer networks to create, distribute, or access materials that sexually exploit underage children. It also includes activities concerning indecent exposure and obscenity.
- **Cyber Trafficking:** It may be trafficking in drugs, human beings, arms weapons etc. which affects large number of persons. Trafficking in the cyberspace is also a gravest crime.
- **Online Gambling:** Online fraud and cheating is one of the most lucrative businesses that are growing today in the cyber space. There are many cases that have come to light are those pertaining to credit card crimes, contractual crimes, offering jobs, etc.
- **Financial Crimes:** This type of offence is common as there is rapid growth in the users of networking sites and phone networking where culprit will try to attack by sending bogus mails or messages through internet. Ex: Using credit cards by obtaining password illegally.
- **Forgery:** It means to deceive large number of persons by sending threatening mails as online business transactions are becoming the habitual need of today's life style.

Since users of computer system and internet are increasing worldwide, where it is easy to access any information easily within a few seconds by using internet which is the medium for huge information and a large base of communications around the world. Certain precautionary measures should be taken by netizens while using the internet which will assist in challenging this major threat Cyber Crime.

AIM, OBJECTIVES AND UTILITY

It is said that identifying a problem is what gives us power and energy to solve them as every problem has in it the seeds of its own solution. This statement signifies the need of defining the objective of research. The objectives of this research work are to touch all the important facets of the cyber crimes in a comprehensive way and to achieve new insights into it.

The main objectives of the present study are as under:

1. To understand the basic concepts of the cyber world.
2. To trace the origin and development of the cyber crimes.
3. To examine critically the position of intellectual property rights in cyber space.
4. To analyze the principles of jurisdiction in cyber offences.
5. To discuss comprehensively the concept of electronic evidence.
6. To decipher as to how the issue of cyber crimes has been dealt with in the Indian scenario.

7. To find out the international initiatives to curb cyber menace.
8. To point out the possible defects and loopholes in the existing laws relating to cyber crimes.
9. To suggest the reforms and remedial measures for the prevention and control of cyber crimes.

Hypothesis

Hypothesis The pilot study conducted helped the researcher to frame the following research null hypothesis based on the main objectives of the research.

The following are the null hypothesis framed for research:

1. H_{01} All the cyber crimes are NOT intimated to the cyber police in India.
2. H_{02} All cyber crimes are NOT properly investigated (and charge sheeted) by cyber police.
3. H_{03} All cyber cases brought before the court are NOT properly handled by court.

RESEARCH METHODOLOGY

The methodology of research differs according to the subject. This study is doctrinal in nature. An attempt has been made to make a comparative analysis of cyber laws of various countries. This monograph is an attempt in the direction of getting a world view of cyber crimes by studying an approach to it at the international level. The material from decided cases of courts of United Kingdom, United States of America and India has been used. The basic data has been drawn from the decided cases from the High Court and House of Lords in United Kingdom, United States District Courts, United States Court of Appeal, U.S. Supreme Court, and the High Courts and Supreme Court of India. The cases have been drawn from AC, AIR, All ER, Ch. D, CTMR, FSR, PTC, RPC, SCC, USPQ, WLR etc. As the scope of the subject is vast and ever expanding with regular output of decisional material from the courts, a representative selection of cases from United Kingdom, United States of America and India has been made to cover all the important aspects of the chosen problem. A list of cases has been given for ease of reference to the reader.

Use and Misuse of Cyber Space in the Act of Terrorism

It is indisputable that, globalization has forever changed the world in which we live a world that has become connected with the advancement in technology. The Cyber space is perhaps the most prominent tool that has facilitated this interconnectedness. It has forced states to alter their interaction, changed how people live their daily lives and has made unprecedented amounts of information available to a significant percentage of the global population. These changes are generally hailed as positive improvements to the world we live in. There are, however, some negative impacts too.

The internet offers terrorists a form of safe haven similar to that of territorial safe haven where they can train, recruit and perform a multitude of operational tasks. Further, the internet has become a de-facto safe haven for terrorist groups that have become transnational in nature and the lack of a robust territorial or geographical safe haven.⁷

Terrorist, terrorist organizations and supporters have created a space and presence for themselves in the cyber space, which is a safe haven for them, though (Anon, Cyber crime Issues and Explanations, terrorism and the internet):

- 1) Official terrorist websites- Run by the terrorist organizations themselves or by the extremist religious scholars.
- 2) Unofficial terrorist websites – such as discussion forums and blogs which address issues of terrorism (usually from a pro-terrorist perspective)
- 3) Distributors' websites – which provide links to the above as well as other terrorist materials such as online magazines and videos.

Cyber space, indeed, is a revolution that goes far beyond communications. This is because use of the Cyber space has literally exploded from a handful of scientists in the U.S. to a world where „net“ access is almost universal. The net has become a medium for all the good, the bad and the ugly, and terrorists are no exception. Terrorists, terrorist organizations and their sponsors have all become increasing users of the cyber space for a variety of functions. Earlier terrorists relied on other technologies such as telephone, radio, mails and other systems and now they cannot be barred from net access and will continue to use net resources for their purpose⁸. (Abraham R. Wagner, Chapter 1- terrorism and the internet: use and abuse 1)

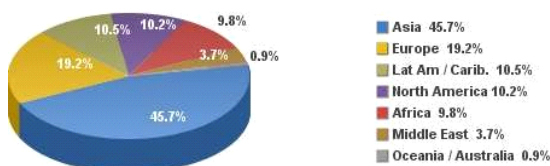
Though, cyber terrorists have the same motives as traditional terrorists but use computer, computer network, computer system and internet as the medium for attacks that are non-explosive but more destructive create a new form of threat, like for instance altering formulas for medication at pharmaceutical plants, crashing telephone systems, misrouting passenger trains, changing pressure in gas pipelines to cause valve failure, disruption of operations of air traffic control, triggering oil refinery explosions and fires, scrambling the software used by emergency services, turning off power grids and detonating simultaneously hundreds of computerized bombs around the world.

This is made possible as the use of internet has increased in the past 15 years at a greater rate.

7 David H. Gray "The importance of the internet to the post-modern terrorist and its Role as a form of safe haven- European Journal of scientific research-2009)

8 Study conducted by Miniwatts Marketing group, <http://www.internetworldstats.com/stats.htm>)

**Internet Users in the World
Distribution by World Regions - 2014 Q2**



Source: InternetWorld Stats - www.internetworldstats.com/stats.htm
 Basis: 3,035,749,340 Internet users on June 30, 2014
 Copyright © 2014, Miniwatts Marketing Group

Statistics have revealed that the use of internet have increased to greater rate in many countries by the government, civilians and no doubt for the terrorists too and such an increase has become possible as, internet plays an important role in creating anonymity among the user and the use and misuse of the internet depends upon the vice and begin intention of the user. What experts are looking for now, when internet is being misused, are there ways to implement responsible, accountable and identifiable use if the internet and deny anonymity to the attackers.

For instance in the case if supervisory control and data acquisition system (SCADA)⁹ which is connected to the internet and run in commonly understood operating systems using well known standard communications protocol include railroads track switches, draw bridges, sewage treatment and water purification plants, traffic signals in busy cities, the electrical distribution grid, subway control systems and other critical systems that can easily cause massive injuries and loss of life if exploited maliciously. For eg. Cyber terrorism attacks in these systems in Romania where a cyber terrorist illegally gained access to the computers controlling the life support systems at an Antarctic research station, endangering the 58 scientists involved. This is possible because in many cases, access to these systems is not controlled as tightly as expected given in their potential impact on life and safety.

Role of Cyber space in Propaganda

Senior Al Qaeda leader Ayman-al-zawahiri wrote “we are in a battle and more than half of this battle is taking place in the battlefield of the media” and internet plays a very important role in propagating the acts of terrorism.

Terrorist organizations exploit the internet medium to raise awareness for their cause, to spread propaganda and to inspire potential across the globe. Websites operated by the terrorist groups can contain graphic images of supposed successful terrorist attack, lists and biographies of celebrated martyrs and forum for discussing ideology and methodology.

⁹ Supervisory control and data acquisition system (SCADA) related to the nation’s critical infrastructure and are the industrial controls systems that are managed by computer system)

For instances:

- i) The Quetta Shura Taliban reportedly maintains several dedicated websites, including one with an Arabic-language online magazine and publishes daily electronic press releases on other Arabic language jihadist forum
- ii) Website can also carry step by step instructions on how to build and detonate weapons, including cyber weapons.
- iii) HAMAS s site, for instance shared over 20 highly valuable design features, including search engines, mission statements what s new section and a frequently asked question page etc.

Role of Internet in Recruitment and Training

The cyber space acts as a virtual training camp. Many terrorist groups operate various online training camps such as Al Battar training camp, created in 2004 and is released bimonthly. In addition to Al Battar, many sites post well known manuals such as The Terrorist s Handbook, The Anarchist cookbook, and The Mujahadeen s Poison Handbook. However it is argued by some authors that there is training utility effort in materials presented on the Internet, but that there is not an organized training effort, therefore no trading camp. But availability of various books on how to train oneself and availability of training manuals online suggests that terrorists recognize and utilize the forum that the internet provides for training.

Role of Cyber Space in Fun-Raising

To enable fund raising various techniques and methods are adopted by terrorist group and one of the easiest way of raising fund is the through phishing, through online credit card fraud. Further, terrorists and extremists in the Middle East and South Asia are increasingly collaborating with cyber criminals for the international movement of money and for the smuggling of arms and illegal grogs.

Cyber Space as means of Communication

The primary advantage of the Internet offers to all including terrorist group centers around its used as a medium for communication, networking and publishing. And such communication is executed by the means if chat rooms, email, even hidden messages found in websites. Such means offers for relatively sure and rapid communication between terrorist operatives. Furthermore, beyond the normal use if email and chat room communication, terrorist take advantage of commercial encryption software to enhance their security, uses steganography, the use of secret messages, hidden in apparently harmless information, that is then posted online

All of this suggests that the internet can serve as a primary means for strategic communication also DOD has defined strategic communication as focused United States government efforts to understand and engage key audience to create, strengthen or preserve conditions favorable and engage key audiences to create, strengthen or preserve conditions favorable for the advancement of the United States government

interest, policies and objectives through the use of coordinated programs, plans, themes, messages and products synchronized with the actions of all instruments of national power. The use of such as facebook and twitter as a means of strategic communications and public diplomacy.

These tools can not only spread propaganda but can also host embedded malicious software in links and applications that can corrupt an unsuspecting user's electronic device. Based on these security concerns, several services and offices within DOD had banned certain social networking sites from access on unclassified networks.

In Planning and Coordination

Terrorists have been known to use the internet as a major tool to plan and organize attacks for instance, through using public email addresses and chat rooms to provide instructions, orders and plans for communication operations.

To Spread Publicity in following ways

1. Internet can be used to wage psychological warfare for instance through the dissemination of horrific images and threats aimed to spread fear such as the release of execution videos in which Islamic fundamentalist groups behead kidnapped western victims.
2. Internet can be used to garner support: terrorists spread publicity which attempts to emphasize issues of victimization and injustice and arouse the emotions of supporters and potential supporters.

Thus these six differences categories, sometimes overlapping, also include Data mining¹⁰ Networking, Recruitment and Mobilization, instructions and Online manuals (Training) Planning and Coordination, fund-raising and attacking other terrorists. Such use of Internet is described as Instrumental use of Internet)

The Question can be raised as to why the internet is being such an attractive medium for terrorists?

1. The technological difficulty associated with tracking and tracing cyber communications which is based on Internet Protocol (IP).
2. Another layer of difficulty in tracking and tracing cybercrimes is caused by disparities in the various legal systems around the world.
3. Inadequate and inconstant legal frameworks governing cybercrimes and government access to information.
4. Jurisdictional issues such as the necessity of letters oratory, dual criminality requirements, extradition restrictions, conflicts of laws and inadequate procedural laws.

¹⁰ in the data mining the internet is a vast source of information on the topics and is utilized by terrorists to gather any information that may be relevant to their causes or to future operations- such as the satellite images, maps and blueprints of future targets. Information from <http://www.unicri.it>).

5. Lack of sufficient technical experience of law enforcement prosecutors and judges regarding investigative assistance and the search and seizure of electronic evidence and
6. Inadequate mechanisms and procedures for international cooperation.
7. Easy access and way to propagate through numerous televised broadcasts, published memoirs, giving interviews, giving instruction on as to how to post videos, defeat and enhance security, conduct anonymous browsing, crack server vulnerabilities and use third party hosts to disseminate information and posting speeches on the Internet (Al-Zarqawi posted beheading of the U.S contractors and took credit for suicide bombings on behalf of Al-Queda. He showed his face in an internet video and accused the President Bush of lying to Americans about military successes in Iraq. His posting and media campaign, conducted largely over the internet, helped attract Al Queda followers to Iraq and establish the irony that the U.S invasion is Iraq, not Saddam Hussein, had enabled Al Queda to use Iraq as a breeding ground for terrorist activities. Setmariam called on internet for the use of weapons of mass destruction against the United States. Dirty Bombing for dirty nations.).

The threat of misuse if this technology is growing with each day and with every development in technology and this is possible because of:

1. Globalization if the Internet user that makes governmental efforts to control Internet attacks much more challenging than ever before.
2. Many hackers oriented sites resulting in democratization of the tools to be used for disruption and destruction.
3. Terrorist organizations have broken away from their place causing further complications to our technologically vulnerable societies.

These new political realities, coupled with easily accessible cyber weapons, have enhanced the threat and capabilities of terrorist group to the degree in which they could forever alter our planets existence as already stated that information technology is double edge sword, which can be used for destructive as well as constructive work. Thus, it is upon the intention of the user, wise or benign that the fate of many ventures depends.

For instance, where IT has been used for the benefit if the society,

1. The creator of the "Sasser worm" has been hired as a "security software programmer" by a German firm, so that he can make firewalls, which will stop suspected files from entering computer systems. Thus, these methods may also be used for checking the authenticity, safety and security of one's technology device, which has been primarily relied upon and trusted for providing the security to a particular organization.
2. Another commonly offered scenario involves the air traffic system. The world's air traffic control system is highly computerized. The terrorist either obtains

control of the system of alters the system in such a fashion that airplanes are flown into each other, resulting in mass death.

Ross Anderson¹¹ has also suggested research into how to port techniques and experience from the world of electric warfare (EW)¹² analysis, which is a tool of the signal intelligence (SIGINT) community. Traffic analysis is looking at the number of messages by source and destination. This can give very valuable information not just about imminent attack but also about unit movements¹³.

However, sometimes terrorists have targeted critical infrastructure to cause disruption only. At other times terrorists have target critical infrastructures, including critical information infrastructures to maximize disruption in addition to generating fear through deliberate attacks on human life (as occurred with the world trade center attacks). Worldwide there have been numerous cases of conventional methods used to attack critical information and other infrastructure.

There are many instances of where internet is being used leading to catastrophic results such as:

- 1) During the 1990s some of the operations planned and conducted by the provisional Irish republican Army were assessed to have the primary goal of causing damage and disruption to critical infrastructures while minimizing harm to people.
- 2) The October 1992 week end bombing of the square mile financial district of London and the planned bombing of six substation of the London power grid 1997.
- 3) In Romania, cyber terrorist illegally gained access to the computers controlling the life support system at an Atlantic research station thereby endangering life 58 scientist.
- 4) In October 2007, the website of Ukrainian President ViktorYushchenko was attacked by the hackers.
- 5) In May 2007 massive and coordinated cyber attacks were launched against website of the government, banks, telecommunications companies, internet service providers and news organizations in Estonia. The attacks have been described as targeted and well organized from outside Estonia and were attacks on the public and private critical information infrastructure of a state. It was

11 Ross Anderson is a researcher, writer and industry consultant in security engineering at the University of Cambridge computer laboratory, where he is engaged in the Security Group.

12 Electronic warfare is defined as military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy. Electronic warfare consists of three divisions: electronic attack, electronic protection and electronic warfare support.

13 Paper presented by M.W David, K. Sakurai combating cyber terrorism: countering cyber terrorist advantages of surprise and anonymity", cubic corporation, Kyushu University.

estimated that 1 million computers around the world were involved through the use of botnets. Some described it as the Big Bang as 4 million packets of the data per second, every second for 24 hours, bombarded a host of targets that day. The attacks forced banks to shut down online services for all customers for an hour and a half and disrupted government communication.

- 6) In August 15, 2013 the personal website of Vijay Malia, RajyaRabha member and industrialist, was hacked allegedly by Pakistani hackers and the Pakistani flags has been placed with dire threats by an organization known as the Pakistan Cyber Army, that India's cyber space was not secured being posted on it. (Article available at; <http://articles.timesofindia.indiatimes.com>)

Likewise there are innumerable examples of attack of terrorism using internet as the means, thereby causing huge loss to human in terms of life and money both.

Cyber attacks are not only a national concern but is a worldwide problem for which all the major nations of the world are coming together in order to find out a solution and to combat the problem of terrorism including cyber terrorism.

CYBER SECURITY IN INDIA

Cyber security-Introduction

The goal of cyber security is not to prevent information flowing „down a hierarchy but to prevent in flowing „across between departments relevant applications range from healthcare to national intelligence. There are different models of how to implement access controls and information flows controls in a multilateral security model (these are compartmentation, used by the intelligence community) the Chinese Wall model, which describes the mechanisms used to prevent conflicts of interest in professional practices; and the BMA model, developed by the British Medical Association to describe the information flows permitted by medical ethics. But these models are just to provide for the security system that can be taken at an individual as well as government level to avoid misuse of ICT and is not the ultimate solution to the problems we are facing today.

Cyber security system secures the ICT and e-governance base. In India cyber security provision have been laid down; though not sufficient to meet the challenges posed by the internet but, so some extend, by making physical laws applicable to the virtual world trying to check the nuisance created by the misuse of internet. In India Section 2(1)(n)(nb)¹⁴ provides Cyber Security means protecting information, equipment s, devices, computer, computer resource, communication device and information stored therein from unauthorized access, use, disclosure, disruption modification and destruction¹⁵.

To ensure Cyber security the analysis should have the objective of providing early warning or indications of a cyber attack. Efforts should be made to create databases and profiles/templates of attackers and use them to distinguish a cyber-terrorism attack from the hacker or black hat community attack.

¹⁴ Inserted vide Information technology Amendment Act 2008

Immune. To create havoc in the country these are lucrative targets to paralyze the economic and financial institutions and the damage that can be done with the use of internet and technology can be catastrophic, irreversible and beyond imagination¹⁶.

In recent years cyber Attacks have taken a toll, some targeted attack and other are opportunistic attacks¹⁷.

Targeted attacks are mainly to paralyze government structure and are pre-planned, opportunistic (Directed) attacks are targeted at private sectors that can be planned or unplanned and random attacks are directed at the users of the net i.e. netizens. All three kinds of attacks are made either to create apprehension of fear or catastrophic results. But in spite of such attack, India is still lacking behind in dealing with crimes committed using internet, computer, computer system and computer networks and this is mainly attributed due to below challenges and concerns:-

- a) Lack awareness and the culture of cyber security at individual as well as institutional level.
- b) Lack of trained and qualified manpower to implement the counter measures.
- c) Too many information and security organizations which have become weak due to turf wars or financial compulsions.
- d) A weak Information and technology Act which has become redundant due to non-exploitation and age old cyber laws.
- e) No email accounts policy especially for the defence forces, Police and the agency personnel.
- f) Cyber attacks have come not only from terrorists but also from neighboring countries inimical to our National interests.
- g) In India there is no emergency response team for phishers and they don't respond as fast as an American or European bank would¹⁸.

Though, these challenges are faced by India in dealing with cyber attacks, but still some steps have been taken by India. Madhabi Puri Buch explains that in case of phishing, that plays an important role in raising the funds for terrorists, we have taken an initiative that includes introducing true factors verification on the websites, which mean in addition to the user ID and password, the customer now has a challenge mechanism, where we ask them things only they know and only if the answer is correct, do we allow him to do a transaction.

15 Information and technology Amendment Act 2008

16 Cyber security in India's counter Terrorism strategy, available at: www.ids.nic.in

17 B J Srinath "Cyber security : threat and concerns, Indian computer Emergency response team (CERT-In), Ministry of communications and Information technology Government of India, Source: Data breach Investigation report, 2014. Available at: www.cpri.in/security2015/TI_Lecture_1_Securing_Indian_cyber.

18 Cyber Law cases available at: <http://www.cyberlawsindia.net> data assessed on 15th May, 2023.

Further, to control and combat the act of misuse of internet in furtherance of terrorism, it is necessary to investigate the technical means that groups use to support terrorist activities like examining ICT infrastructure. This involves examining topics like anti-forensics techniques, social networking tools and electronic propaganda. What is required is improved intelligence gathering resources against terrorist; enacted appropriate legislation; proper procedure for apprehension, prosecution and punishment of terrorist; and providing greater protection measures have been taken at places where terrorists have been able to do great damage, most notably airports.

Moreover, certain steps can be taken to track and trace the cyber communication with the help of IPv6¹⁹ that have larger header space and a 128-bit IP address, thereby enabling unique IP addresses to be assigned to all users. In fact, the implementation of IPv6 will allow for several quadrillion unique IP addresses enough to assign addresses to all computers, radio frequency identification tags (RFID), sensor, unmanned aerial vehicles and other devices communicating via networks. In addition, IPv6 mandates authentication or encryption or both, for all packets, which will prevent spoofing and enable better tracking and tracing.

Another technique of tracking cyber communication is the concept of security and cyber forensics. However the two concepts are not only interrelated but also indispensably required for the success of each other.

The Information and technology Act, 2000

As amended by the Information technology Amendment Act 2008 which came into force on 27-10-2009 provides legal framework to address the issues connected with hacking and security breaches of information technology infrastructure. Section 70 of the Act provides to declare any computer resource which directly or indirectly affects the facility of critical Information Infrastructure, to be a protected system. Section 70 (a) provides for establishment of National Nodal Agency in respect of critical information Infrastructure protection. Section 70B has empowered Indian Computer Emergency response Team (CERT-In) to serve as national nodal agency in the area of cyber Security²⁰.

19 Microsoft supports industry standard technologies including the new standard protocol for the Internet, internet Protocol version 6 which is the next step beyond IPv4, the current standard protocol for internet. These protocols provide IP addresses, the phone numbers for the internet that are responsible for identifying computers and devices so they can communicate. IPv6 expands the address space on the Internet from 32 bits to 128 bits. This enables essentially an unlimited number of IP addresses and subsequently, an unlimited number of devices that can be directly connected to the global internet. IPv6 is also designed to solve many of the problems of IPv4, including mobility, auto configuration and overall extensibility. Available at: <http://technet.microsoft.com>

20 Crisis management Plan for cyber attacks, Ministry of communication and information technology, available at : <http://pib.nic.in>

Logical Security

It is a cyber-security battlefield where digital information is being exchanged or stored and security measures are performed by a non-human device in the digital world. This Logical Security is carried out by:

- a) Encryption
- b) Network security
- c) System security
- d) Application security
- e) Security monitoring/auditing

Crisis Management Plan

The government has formulated this plan for countering cyber attacks and Cyber terrorism, for implementation by all Ministries/Departments of Central Government, State governments and their organizations and critical sectors. The organization operating critical information infrastructures have been advised to implement information security management practices based on International Standards ISO 27001.

National Information Centre (NIC)

A premier organization providing network backbone and e-governance support to the Central Government, Union Territories, Districts and other Government bodies. It provides wide range of information and communication technology services including nationwide communication network for decentralized planning improvement in government services and wider transparency and local government.

Provides services to Ministries/Departments that is continuously strengthening the security of the network operated by them and its services by enforcing security policies, conducting regular security audits and deploying various technologies at different level of the network to defend against the newer techniques being adopted by the hackers from time to time.

Another steps that can be taken to enable cyber security is providing training to the Cyber Troops

Training the Cyber Troops is also important to insure cyber security. Such training can be provided in three ways by:

1. Proactive securing of target includes the deployment of a system with the applications of security checklists in order to bring the systems and network components to a securely configured level. There are passive security measures deployed to monitor the system as well as provide sufficient auditing data to identifying that happened.

2. Immediate reaction on an attack and security of the target in analogous to security drills on a military case. Here, an alert is issued to team members who have to gain control over the system and remove all the attackers from the system (It is done in cooperation with offensive warfare teams). After alert is issued there needs to be an escalation procedure executed which informs global Security Control center (GSC2) of an ongoing attack.
3. Security forensics after attack and securing of targets infrastructure to prevent more attacks that takes place in systems which are already hacked. Its main objective is to analyze system state and logs and reconstruct the actions that attackers did. This can help to secure the system as well as give some information to offensive warfare teams how to perform similar attacks. Its objective is to detect what has been changed in the system to prevent further damages or fraud.

Further, in 2014 a notification was issued laying down guidelines for steps to be taken by Cyber cafes to ensure cyber security²¹.

1. That all cyber café will be registered with the agency called as registration agency as notified by the Appropriate Government in this regard including:
 - a) Name of the establishment;
 - b) Address with contact details including email address;
 - c) Whether individual or partnership or sole proprietorship or society or company;
 - d) Date of incorporation;
 - e) Name of owner/partner/proprietor/director;
 - f) Whether registration or not (if yes, copy of registration with Registrar of firms or registrar of companies or societies);
 - g) Type of service to be provided from cyber café.
2. That the cyber café shall not allow any user to use its computer resource without the identity of the user being established with documents such as:
 - a) Identity card issued by any school or college; or
 - b) Photo credit card or debit card issued by a Bank or Post Office; or
 - c) Permanent Account Number (Pan) card issued by Income tax Authority; or
 - d) Voter Identity Card; or
 - e) Passport; or
 - f) Photo identity issued by the employer or any government agency;

²¹ Notification no G.S.R. 315(E), New Delhi, the 11th April, 2014, available at: [http://www.mit.gov.in/sites/upload_files/dit/files/GSR_10511\(1\).pdf](http://www.mit.gov.in/sites/upload_files/dit/files/GSR_10511(1).pdf)

- g) Driving License issued by the appropriate Government; or
 - h) Unique Identification Authority of India (UIDAI)
3. That the Cyber café shall keep a record of the user identification document by either storing a photocopy or a scanned copy of the document duly authenticated by the user and authorized representative of the cyber café. Such record shall be securely maintained for a period of at least one year.
 4. That the cyber café may photograph the user using web camera installed on one of the computers in the cyber café for establishing the identity of the user. Such web camera photographs, duly authenticated by the user and authorized representative of cyber cafe, shall be part of the log register which may be maintained in physical or electronic form.
 5. That a minor without photo identity card shall be accompanied by an adult with any if the documents, being an identity proof.
 6. That the cyber café shall record and maintain the required information or each user as well as accompanying person, if any, in the log register for a minimum period of one year and if the cyber café may maintain an online version of the log register. Such online register version of the log register shall be authenticated by using digital or electronic. Such register shall contain, Address, gender, contact Number, Type and detail of identification document, date, computer terminal identification, log in time, and log out time.
 7. That the cyber café shall immediately report to the concerned police, if they have reasonable doubt or suspicion regarding any user.
 8. That the cyber café shall prepare a monthly report of the log register showing date wise details on the usage of the computer resource and submit a hard and soft copy of the same to the person or agency as directed by the registration agency by the 5th day of the next month.
 9. That the owner of the cyber cafe shall maintain backups of following log records for each access or login by any user if its computer resource for each access for at least one year. That includes history if websites accessed using computer resource at the cyber café; logs of proxy server installed at cyber café.
 10. Management of physical layout and computer resource:
 - a. Partitions of cubicles built or installed if any, inside the cyber café shall not exceed four and half feet in height from the floor level.
 - b. The screen of all computers installed other than in partition or cubicles shall face outward i.e. they shall face the common open space of the cyber café.
 - c. Any cyber café having cubicles or partition shall not allow minors to use any computer resource in cubicles or partitions except when they are accompanied by their guardians or parents.

- d. All time clocks if the computer systems and servers installed in the cyber café shall be synchronized with the Indian Standard time.
- e. All the computers in the cyber café may be equipped with commercially available safety or filtering software so as to avoid as as possible, access to the websites relating to pornography including child pornography or obscene information.
- f. Cyber café shall display a board, clearly visible to the users, prohibiting those viewing pornographic sites as well as copying or downloading information which is prohibited under the law.
- g. Cyber café shall take sufficient precautions to ensure that their computer resources are not utilized for any illegal activity.
- h. Cyber café shall incorporate reasonable preventive measures to disallow the user from tampering with the computer system settings.
- i. Cyber cafe shall also maintain a record of its staff for period of one year.
- j. Cyber café shall maintain the user identity information and the log register in a secure manner.
- k. Cyber cade shall mot misuse or alter the information in the log register. These guidelines are one of the effective steps that are being taken by Indian Government to combat misuse of Internet by the terrorist. Also, follow the above mentioned guidelines will to some extend help in ensuring cyber security and protection of communication and information infrastructure. It can prove as an effective tool in the hands of government to check the activities if terrorist groups and to have catch hold wrongdoer.

Constitution of India

The constitution of India, like other constitution of the world, is organic and living in nature and is capable of molding itself as per the time and requirements of the society. It is due to this change in the society that necessitates proper law in a country to tackle with the problems that are taking new shape and position in a society. Terrorism via internet is the worst form of crime that is committed in cyber world having its great impact on physical world. Tis necessitated to expand the horizon of physical laws to such extend so as to include within its ambit the act that needs immediate attention. The protection of various Articles is extended to safeguard the rights of an individual in cases if misuse if internet.

Article 19 (1) (g)	Where under use if information technology is also considered as an integral and inseparable part of any trade, occupation or business and the same is covered under this Article.
Article 21	The use of technology is considered to be one of the means of livelihood and thus protected under this article, Article 300A- considering technology propertyas intangible property.
Articles 301 to 305	Deals with free trade, commerce and intercourse and the same through use of technology false within the ambit of this Article.

Apart from the constitution protection, protection under other statutes can also be available of in case of violation of legal or natural rights of an individual.

1. Protection under the Indian Penal Code (IPC), 1860.	
Section 22	Defines the term movable property that includes information, stored in the computer and any damage to such information would amount to an offence against the property.
Section 23	Provides that „wrongful gain” and includes any unlawful and illegal gain derived or loss incurred through use if malware.
Section 33	Deals with the terms act and omission. These terms includes within its ambit an act if launching a virus in the Internet causing inconvenience and destruction in a series.
Section 44	Injury denotes harm illegally caused to any person, in body, mind, reputation or property and includes any harm by the use if malware as an injury.
Under Section 96 and 97	Provision for self defence are laid down. These provision are extended to the virtual world also. For instance, a netizen who is an expert in protecting computer from virus may make aerogramme, which has a potential to curb the virus put on the internet and may launch the same in it. In such a situation the person launching the malware cannot complain that such third party has no reason to feel aggrieved and had no right to retaliate.
Section 268	Deals with “public nuisance” and this nuisance is created in virtual world by launching virus and worms and thus, the person launching them can be prosecuted under this section.
Section 378	Deals with criminal misappropriation of property and includes within its ambit any wrongful gaining of data from the computer of another through hacking or violating the copyright of a software developer by illegal downloading it.
Section 425	Defines “mischief” and includes a offences like hacking as it involves intention to cause loss or damage to the owner of the property.
1. Protection under the Information and Technology Act, 2000.	
Section 66 (f) (inserted by the Amendment of 2006	Defines and punishes the offence of cyberterrorism. It states that: (A) Any activity done with intent to threaten the unity, integrity, security or sovereignty of India or to strike
after 26/11 attack & on the parliament of India.	terror in the people or any section of the people by:- 1) Denying or cause the denial of access to any person authorized to access computer resources; or 2) attempting to penetrate or access a computer resource without authorization or exceeding authorized access; or 3) introduction or causing to introduce any computer contaminant and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under section 70; (B) any activity of knowingly or intentionally penetrating or accessing a computer resource without authorization or exceeding authorized access to information, date or computer database that is restricted for reasons for the security of the state or foreign relation, or any restricted information data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the state friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence or to the advantage of any foreign nation, group of individual or otherwise, commits the offence of cyber terrorism. If any of the two categories of activities take place using computer, computer systems, computer network, computer resources and communication devices, then the same come within the offence of cyber terrorism. Cyber terrorism has been declared as a heinous cyber crime punishable with imprisonment which may extend to imprisonment for life.

Section 69	Direction of controller to a subscriber to extend facilities to decrypt information:- 1) if the controller is satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, the security of the states or public order or for preventing incitement to the commission of any cognizable offence, for reason to be recorded in writing, by order, direct any agency of the Government to intercept any information transmitted through any computer resources. 2) The subscriber or any person in charge of the computer resources shall, when called upon by any agency which has been directed under sub section (1) extend all the facilities and technical assistance to decrypt the information. 3) The subscriber or any person who fails to assist the agency referred to in sub section (2) shall be punished with an imprisonment for term which may extend to seven years.
National Investigation Agency Act, 2008	
After the Bombay terror attacks, the central Government constituted a special agency known as National Investigation Agency for Investigation and prosecution of offences under the Acts specified in the schedule to the Act. However, an important set back of this act is that it does not deal with Cyber terrorism and no agency is created to deal with this offence that should be created as a need of the hour.	
Unlawful Activities (prevention) Amendment Act, 2008	
Section 15	Any act done with the intent to threaten the unity, integrity, security, sovereignty of India or with the intent to strike terror or likely to strike terror in the people of India or any foreign territory by using any means and thereby causes death injury of persons, damage or destruction of property disrupt the supply of essential services, tries to overawe or cause the death of any public functionary by means of criminal force, commits a terrorist act. This section includes within its ambit the offence of cyber terrorism as well.

Besides these provision there have been other initiatives taken in India to ensure cyber Security.

National Information Security Assurance Programme

This is for government and critical infrastructures, and provides for that:

- Setting up an Indian Information sharing and analysis center (ISAC) for better cooperation in anti hacking measure.
- Setting up India Anti Bot Alliance to raise awareness about the emerging threats in cyberspace by the confederation of Indian Industry (CII).
- Ongoing cooperation between Indian s standardization testing and Quality certification (STQC) and the US National institute of standards and Technology (NIST) would be expanded to new areas.
- The R&D group will work on the hard problems of cyber security, cyber forensics and anti-spasm research.
- Chalked the way for intensifying bilateral cooperation to control cybercrime between the two countries.

Cryptography, privacy and national security concerns-

The Internet has provided its users with a new forum to express their views and concerns on a worldwide platform. As a necessary corollary to the freedom to

communicate and speak is the fact that this must be allowed with as little State interference as possible; in other words, in the absence of State intrusion. This immediately raises the controversial issue of the right to privacy. It can be considered a logical corollary to the freedom of speech and expression. At the same time it is common knowledge that liberty cannot thrive without certain restrictions put on them so that each individual in society can be best protected. The practice of encryption and its study, which is known as cryptography, provides individuals with means of communication that no third party can understand unless specifically permitted by the communicators themselves. It would therefore seem that this practice is a legitimate utilization of the right to freedom of speech and expression and the right to have a private conversation without intrusions²².

Breach of Confidentiality And Privacy Under The Information And Technology Act 2000

If a person has secured access to any electronic record, book register correspondence, information, document or other material without the consent of the person concerned and discloses the same to any other person then he shall be punishable with imprisonment upto two years, or with fine which may extend to one lakh rupees, or with both²³ the celebrated case of *P.U.C.L. V. U.O.I.*,²⁴ Where the issue of telephone tapping of several well known personalities connected with the field of politics was examined, the Hon ble supreme court, speaking through Hon ble justice Kuldeep Singh held that:

“Telephone tapping was definitely a move against privacy and therefore, ought not to be permitted except in the gravest of grave circumstances such as public emergency.”

In this case, the provision of section 5[2] of the Indian Telegraph Act was under challenge which is *pari-materia* with section 69 of the Information technology Act, 2000. The Court had upheld the constitutional validity of section 5(2) of Indian telegraph act, however, it has also held that the right to privacy could not and should not be invaded unit a public emergency has taken place or public safety was threatened.

The issues of privacy rights have also been hotly debated in the united sate America all along the corridors of decades. However, the US Govt. has shown due concern to safeguard the national security while keeping the issue of right to privacy well under strict review. Ever, the Federal bureau of Investigation in the United States proposes to install surveillance software with every Internet Service provider that world intercept and view all the e-mails and web-browsing activity of suspects. They have installed the diagnostic tools like Carnivore which has successfully been used a number of times and has brought out instances where adult were found attempting to correspond with minors over the Net to have sex. It has also caught bomb-makers by using the carnivore.

22 Supra Note 47, p. 40

23 According to section 72 of the above mentioned Act,

24 [1997 (1)SCC318]

The Right to Privacy and Encryption

It is usually agreed upon that in most democracies there do exist private and public spheres in every citizen's life and that these two spheres are distinct and have to be treated as such. Although the line of distinction is blurred and continues to be the subject of much debate especially with regard to certain subjects such as pornography or the use of narcotics, it is generally agreed that the liberal democratic state has no power to interfere with the private aspect of its citizen's lives. There is a common misconception that the right to privacy is merely a weapon to ensure confidentiality in human affairs. This however does not present the complete picture. It must be remembered that the right to confidentiality arises only after information regarding human transaction or affairs have reached third parties. It may be said that privacy involves the right to control one's personal information and the ability to determine it and how that information should be used and obtained. This principle has sometimes been referred to as the right to "informational self-determination". This principle becomes all the more relevant with the onset of the Internet and e-commerce. The volume and the varying nature of the transaction carried out on the net are such that the right to privacy must extend at least to a limited extent. At the same time, the very same factors, volume and the nature of transactions also raise the issue of security²⁵ concerns as to the political, social and economic health of the country. Encryption of the details of our personal transactions would certainly assure us of greater degree of privacy but may also encroach upon the domain of national security concerns and two ends may be said to be in conflict.

CONCLUSION

Digital divide and brain drains are creations of negative minds.²⁶ The growing technologies have created a nexus between the hacker and the terrorist. Being a Cyberterrorist and a hacker are closely connected and the day is not far when terrorists themselves will be excellent hacker and that will change the entire landscape of terrorism. Like in the Bruce Willis movie "Live Free or Die Hard", in which hackers take down the transportation system, then communications, and finally the power grid. This movie depicted that network of electronic information flow are now embedded in nearly every aspect of modern life. From controlling traffic lights to routing airplanes, computer systems govern virtually every form of transportation. Radio and TV signals, cell phones, and (obviously) e-mail all provide vivid examples of how communication depends on computers, not only in daily life, but also for military, financial, and emergency services. Utility systems providing electricity, gas, and water can be crippled by cyberspace disruptions. Attacks on any of these networks would potentially have disastrous consequences for individuals and for society.

25 S.K.Garg An Introduction to Cyber Crime Investigation by, Page 41

26 Shri Ved Prakash Sandlas, Cyber-Space Security. http://www.freewebs.com/vpsandlas/Full%20Papers/article_Jul_Sep06_10.pdf

This is why a common vision is required to ensure cyber security and prevent cyber crimes. The time has come to prioritize cyber security in India's counter terrorism strategy while governments are trying to counter and catch those using traditional means.

Thus to ensure cyber security and avoid misuse of internet in terrorist activities, nationally and internationally many steps can be taken. In India, at individual as well as at governmental level some of the steps that can be taken can be summarized as below:

1. Implementing strong access control systems to ensure that only authorized individuals can access cyber systems. For which CERT-In should engage academic institutions and follow an aggressive strategy.
2. Using strong encryption to ensure confidentiality and integrity of information stored, processed, and transmitted on and through cyberspace.
3. Closely monitoring all cyber activity by using log files and log analyzers.
4. Implementing effective detection systems to recognize cyber-attacks quickly. Like "Check the Web" initiative adopted by European Union.
5. Appointing active cyber-security leadership, giving training to officials in the field of cyber-security, to implement a real-time national defense strategy, Joint efforts by all Government agencies including defence forces to attract qualified skills personnel for implementation of counter measures. Similar to Cyber Intelligence (CYBERINT)²⁷ Analysis Center (CAC) established by China.
6. Developing filters, like one created by china "The Great Firewall of China", to remove terrorism-related content from the web or to deny access to terrorist websites through ISP filtering systems. Like ISPs in the United Kingdom already cooperate with law enforcement to shut down sites with illegal content, including sites containing child pornography.

Further, the common citizens need to sensitize about the dangers of Cyberterrorism and efforts are required to be taken not only at International and National level but, also at individual level, efforts should be taken to check and control the activity of Cyberterrorism in the digital world, this is because Cyber Space is a space where activities can be carried out with an ease and convenience and without any fear of being punished or spotted. In this information and technology age not only high profiles sites are under the danger of being misused but every netizen is under a danger. Thus every netizen should be vigilant and careful while accessing Cyber Space and must make sure to take protective steps like, frequent change of password, not accessing unknown email. Another step that can be taken is to involve a large part of our population to solve cyber-space security problems and survive in the

23 The creation of a Cyber Intelligence (CYBERINT) Analysis Center to develop and evaluate methods to improve the ability to detect, identify and deter Cyberterrorist attack. It also proposes ways to implement responsible, accountable and identifiable use of the Internet, and deny anonymity to the attackers.

race to save ourselves. Unfortunately, there is no 100 per cent guarantee that even with the best precautions some of the bad things won't happen, but there are steps one can take to minimize the chances of harmful intrusions and their damage potentials.

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The Impact of Digital Transformation on Various Sectors of the Economy During COVID-19

*Dr. Sangeeta Malik**

ABSTRACT

The year 2020-21 was full of improbabilities. The Covid -19 pandemic's impact was worldwide and affected almost all sectors of the economy (Fernandes 2020). Amidst socioeconomic (Nicola et al., 2020), political, environmental, and other impacts, the pandemic emerged as a catalyst for quick digital platform adoption. A significant change observed in the practices of day-to-day routine work from off-line to online classes, office to work from home, physical purchasing of food items to online delivery services, online purchase of medicine & consultation, media & entertainment, etc. The uncounted digital growth and customer adoption within a few months became normal. The COVID-19 pandemic was perceived as full of uncertainties but similarly provided abundant digital technology opportunities. This transition gave options to many ready to transform them and adopt technological advancement. It created threats to others who were unprepared. This Global Pandemic gave the industries & business houses a new slogan to exist or exit. An attempt has been made in this research to study the consequences of COVID-19 on adopting the digitalization practice by various companies participating in improving other sectors of the economy.

Keywords: Digitalization, Work from home, cashless transaction, ease of operation

INTRODUCTION

This on-going epidemic has taught us the lesson of survival, indicating that if we have to exist during such difficult times, we must transform business strategies for survival and growth. Enterprises experienced the pressure of digital change to include newer technology know-how to remain competitive, sustainable, and able to withhold customers (Ting et al., 2020). Digitalization has brought a revolution by bringing mobility & ease of operation. It became necessary for any business to exist amidst serious lockdown challenges.

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The pandemic has taught a lesson from direct to remote. Further, the business model is continuously altered from direct selling to home delivery of goods & services to delight customers and ensure they are safe from the hazards of viruses and other infections.

This challenging process shifted from the traditional business model to the desired digital platforms. However, digitizing this process was more complex, which included changing conventional paper-based transactions to hassle-free 'cashless' transactions to make day-to-day operations more manageable. COVID-19 has turned digitization into an essential requirement for all organizations to survive amidst risks and uncertainties like 'should have to must have' by adapting required changes to remain competitive and sustainable.

COVID-19 impacted many sectors like education, telecommunication, Pharmacy, food delivery, organizing virtual events, trade, manufacturing, hospitality, tourism, etc. This steep rise in virtual working platforms enabled these big organizations to ensure a workable workforce who continued to be productive even staying at home or their remote recourse. This feasibility of working from home has changed the employment dynamics for both the employer and the employee, resulting in reductions in the offices' operating expenses, which might be a game-changer for the future of work (Akala, 2020). There were continued job losses in every sector due to the shutdown of industries and businesses. It was more with mid to small companies than big businesses. Many workers could not switch to alternative companies as they found difficulties in learning new skills & limited market demand.

REVIEW OF LITERATURE

When writing this article in early June 2020, more than 250 countries were affected by the coronavirus pandemic, including primarily rural and urban areas.

As the news of the spreading of the Virus, the lockdown was implemented in almost all regions and closed down any activities which required gathering and interactions. This includes all educational institutions, Shops and malls, religious and worship places, temples, public-private offices, roadways, railways, and airways. People started interacting from home as work from home became the new normal, requiring Internet and Internet-based services to connect with the world to educate, entertain, and communicate. The network impact of the global COVID-19 pandemic (Branscombe, 2020) rose from 40 % to 100 %, and video-conferencing services like Zoom have seen a ten times increase in usage. There was a 100% upsurge in internet traffic in Bangalore city. During the lockdown, schools, colleges, universities, educational institutes, and many corporate houses worldwide shifted their classes and office work to virtual classes and video conferencing platforms like Zoom, Google Meet, and Microsoft Teams.

Along with these synchronous modes of teaching, asynchronous platforms like edX and Coursera have also seen an increase in enrolments (Shah, 2020). Some institutions are now shifting entirely to the online mode for the forthcoming academic year, except for sessions that require a physical presence, such as the University of Cambridge

in the UK and the California State System in the US (New York Times, 2020). Research on telecommuting and virtual teams (Belanger, Collins, & Cheney, 2001; Morrison-Smith & Ruiz, 2020) has a long history in IS literature. There was easy access to bosses and managers to locate their subordinates anytime. In many organizations, the meeting used to be held at midnight, but Digital technology makes it easier for them. Though there is early anecdotal evidence that this has led to an increase in productivity, it has also led to increased technostress (Ayyagari, Grover, & Purvis, 2011; Tarafdar, Tu, Ragu-Nathan, & Ragu-Nathan, 2007) where employees must learn new technologies, be available for work at almost all times, stay with digital devices all the time, and cope with multitasking. On digital divide, unaffordable device access, unaffordable Internet access, content relevance, access skills, or Government ordered Internet shutdowns (Armbrecht, 2016; Scheerder, van Deursen, & van Dijk, 2017). Although these issues have been researched and discussed earlier (Warschauer, 2004), as a few studies have suggested, access or no access to ICTs may reinforce societal inequalities (Ragnedda, 2017). The existing literature on net-neutrality regulations and zero-rating plans (Belli, 2017; Cho, Qiu, & Bandyopadhyay, 2016) forms the basis to enhance research in this aspect – two essential things related to digital money are considered necessary during the pandemic. First, banknotes and coins were suspected of carrying the Virus, and digital payment was preferred to ‘dirty money’ (Gardner, 2020; Samantha, 2020). Online delivery services encourage customers to make payments through digital payment systems like credit/debit card or mobile payments, with mandates by the Government in several parts of India (Bhandari, 2020). These are a convenient mode of fund transfer from donors to recipients, as seen in previous crisis relief cases (Pollach, Treiblmaier, & Floh, 2005). In various crisis and disaster events, where the mobility of civilians was restrained, many mobile payment service providers (e.g., Vodafone in Afghanistan, Safaricom in Kenya, and Orange in Africa) provided quick funds transfer of remittances from migrants to their homes, and relief aid from the Government to victims (Aker, Boumnijel, McClelland, & Tierney, 2016; Pega, Liu, Walter, & Lhachimi, 2015; Wachanga, 2015). During Covid-19, new surveillance applications for tracking people’s health with the Virus symptoms. This includes the Covid-19 tracker in China (Davidson, 2020), the Aarogya Setu app for tracking infectious citizens in India (Shahane, 2020), and contact tracking apps in the United States (Guynn, 2020). This has resulted in a surge in IS research on implications of such web or app-based surveillance in applications, including mobile health apps (Lupton, 2012), environment monitoring and pollution control apps (Castell et al., 2015), self-tracking apps (Barassi, 2017), and parental surveillance (Ghosh, Badillo-Urquiola, Guha, LaViola, & Wisniewski, 2018). Blockchain (BC) technology presents an opportunity to create secure and trusted information control mechanisms (Upadhyay, 2020). During the lockdown, workers employed by these platforms have suffered heavily as the demand for their services, taxi rides, rentals, or skill work, has disappeared (Bhattacharya, 2020).

THE RATIONALE OF THE STUDY

The COVID-19 pandemic undoubtedly accelerated the digital transformation process

across various sectors of the economy. Digital transformation has become a strategic imperative for organizations across multiple sectors of the economy. By embracing digital technologies, businesses can achieve enhanced operational efficiency, improved customer experiences, innovation, agility, data-driven decision-making, scalability, and global reach.

The effect of digitalization on various sectors of the economy during the COVID-19 pandemic is highly relevant for several reasons. With lockdowns and social distancing measures in place, many organizations quickly transitioned to remote work. Digital transformation facilitated this shift by enabling employees to work from home using various collaboration tools, cloud-based technologies, project management software, and video conferencing platforms. This transformation allowed businesses to maintain continuity and productivity during the pandemic. The restrictions on physical stores and consumers' concerns about in-person shopping led to a surge in e-commerce and online retail. Digital transformation played a vital role in enabling businesses to establish or enhance their online presence, develop user-friendly e-commerce platforms, and implement robust logistics and supply chain management systems. The pandemic highlighted the importance of remote healthcare services. Digital transformation empowered the healthcare sector to adopt telehealth solutions like virtual consultations, remote patient monitoring, and digital health records. These advancements allowed healthcare providers to deliver essential patient services while minimizing physical contact and reducing hospital burden. With the closure of schools and universities, educational institutions had to adapt to online learning quickly. Digital transformation facilitated the implementation of e-learning platforms, video conferencing tools, and educational apps. These shifts enabled students to continue their education remotely, access educational resources, and virtually engage with teachers and peers. The pandemic accelerated the adoption of digital financial services, such as mobile banking, contactless payments, and online transactions. Digital transformation enabled financial institutions to provide seamless and secure digital banking experiences, reducing the reliance on physical branches and cash transactions. This transformation enhanced financial inclusion and convenience for individuals and businesses alike. Digital transformation facilitated the implementation of technologies like blockchain, the Internet of Things (IoT), and data analytics, enabling businesses to monitor and manage their supply chains more effectively. This digitalization enhanced visibility, traceability, and risk management, allowing the companies to respond quickly to disruptions and ensure the continuity of operations. Organizations increasingly embraced automation and artificial intelligence (AI) technologies to cope with the challenges posed by the pandemic. Digital transformation allowed businesses to automate repetitive tasks, streamline processes, and enhance operational efficiency. AI-powered solutions facilitated demand forecasting, customer service chatbots, and data analysis, enabling companies to make data-driven decisions and adapt to rapidly changing circumstances. Overall, the COVID-19 pandemic acted as a catalyst for digital transformation across various sectors of the economy. Adapting to remote work, maintaining customer engagement, and ensuring operational resilience accelerated the adoption of digital technologies. These transformations have helped businesses navigate the crisis and

paved the way for long-term changes in how sectors operate, offering new opportunities for growth, efficiency, and innovation.

THE OBJECTIVE OF THE STUDY

The following objectives have been framed to study the impact of digitalization on various sectors of the economy:

1. Understanding and accepting the impact of digitalization in different areas was a need of time During Covid -19 and its effects on various sectors of the economy, i.e., education,telecommunication,Pharmacy, food delivery,Trade, manufacturing tourism,hospitality, etc., in India.
2. To study the challenges and opportunities of Covid -19

METHODOLOGY

This study is based on the self-observation method.Self-observation was mainly practiced during the COVID-19 pandemic.This self-observation helps to identify areas that require improvement or optimization. Applying the self-observation method to study the digital transformation journey during COVID-19gains valuable insights, drive meaningful change, and ensure that organizations remain resilient and responsive to evolving challenges and opportunities. The data was collected from various secondary sources, i.e., websites, books, journals, etc.

DISCUSSION AND ANALYSIS

Digital transformation in different sectors

Digital transformation has become a transformative force across various sectors, revolutionizing how organizations operate, interact with customers, and deliver value. In this, we explore the impact of digital transformation in different industries and highlight specific examples of its application.

E-commerce:E-commerce experienced significant growth during the pandemic as more people shifted to online shopping. According to Statista, global e-commerce sales reached \$4.248 trillion in 2020, up from \$3.351 trillion in 2019. In 2022, e-commerce sales reached \$5.717 trillion. The e-commerce market is projected to reachUS\$ 6.310 trillion.The report of India Brand Equity Foundation (IBEF), has assessed in India, the e-commerce market at \$63 billion in 2020 and is predicted to touch \$99 billion by 2024, rising at a CAGR of 27%. Furthermore, the online grocery market in India is also anticipated to rise at a CAGR of 60% between 2020-2025. India saw significant growth during the pandemic as more people shifted to online shopping. By 2034 Indian e-commerce will surpass the US and become the second-largest e-commerce market on an upward growth trajectory.In 2025, India's e-commerce is predicted to reach US\$111.40 billion from US\$46.20 billion in 2020.rising at a19.24% CAGR, grocery and fashion/apparel is critical to this upward growth. The Indian online grocery market has projected to toughUS\$ 26.93 billion in 2027 from US\$ 3.95 billion in FY21, expanding at a CAGR of 33%.

Healthcare: The healthcare industry also saw a significant shift toward digital transformation. The pandemic led to increased demand for telemedicine and remote healthcare services. According to a McKinsey report, telehealth services increased 38 times during the pandemic. The report also predicts that the telehealth market could reach \$250 billion in revenue by 2025. The healthcare industry in India also saw a significant shift toward digital transformation. The pandemic led to increased demand for telemedicine and remote healthcare services. A report by Frost & Sullivan states that the telemedicine market in India was assessed at \$2.8 billion in 2020 and is estimated to rise at a CAGR of 31.2% between 2020-2025.

Education: The pandemic accelerated the adoption of digital technologies in the education sector. Online learning platforms, virtual classrooms, and other digital tools became essential as schools and universities were forced to close. A report by Research And Markets, the global e-learning market is predicted to rise at a CAGR of 14.6% between 2020-2025. The pandemic has accelerated the adoption of digital technologies in the education sector in India. According to a KPMG report, India's e-learning market was estimated at \$247 million in 2016 and is expected to reach \$1.96 billion by 2021, expanding at a CAGR of 41.5%. Furthermore, the pandemic has led to the development of ed-tech platforms that provide online tutoring, test preparation, and other digital learning tools.

Finance: The finance industry underwent a significant digital transformation during the pandemic. According to a report by McKinsey, the use of digital banking channels increased by 20-30% during the pandemic. The report also predicts that digital banking could account for up to 50% of banking revenues by 2025. The finance industry in India also underwent a significant digital transformation during the pandemic. According to a report by McKinsey, the use of digital banking channels in India increased by 20-25% during the pandemic. Furthermore, the adoption of digital payment systems such as UPI (Unified Payments Interface) has accelerated, with UPI transactions in India increasing by 78% between 2020-2021.

Manufacturing: During the pandemic, the manufacturing industry saw increased acceptance of digital technologies such as automation, artificial intelligence, and the Internet of Things (IoT). According to Markets and Markets, the global industrial automation market is predicted to reach \$269.5 billion by 2024, ahead of \$168.5 billion in 2018. The manufacturing industry in India saw increased acceptance of digital know-how such as automation, artificial intelligence, and the Internet of Things (IoT) during the pandemic. According to a report by Accenture, the digital transformation of the Indian manufacturing sector could potentially add \$340 billion to India's GDP by 2025. Digital transformation data from 2020-2022 on various sectors of the economy during Covid-19 in India:

Digitalization: Challenges and Opportunity

The Unpreparedness of the first wave enforced the dire need for the much-neglected digital transformation, which became an ultimate need of everyone during the second wave of the Pandemic (Datta & Nwankpa 2021). Digital platforms via collaborations

on various entertainment portals gained momentum in valuation to overcome the mundane caused by remote- virtual working. People went into Quarantine, followed by complete isolation & drastic change in their lifestyles (Bentlage et al., 2020). These new digital media apps have played a significant role. These platforms are considered a source of entertainment by diverting the mind & bringing life to be regular. (Xiao, Becerik, Lucas, Roll, 2021). Personal entertainment engagements like concerts, museums, live shows, events, online-meet-ups, etc., gained popularity within the realm of safety. At the same time, social media, gaming, news, video streaming, and e-books increased multi-fold. People started using digital platforms to exhibit their long-lost skills like cooking, dancing, singing, painting, drawing, organic farming, etc.

The abrupt rise in the online delivery apps and various free food supply platforms to the covid-19 patients and quarantines increased multifold. Grocery delivery became a new normal for people who never bothered to order online and believed only in physical shopping mode. Insurance companies emerged as a more robust sector to promote online services to remote telehealth services. Event industries also took a giant leap from physical to digital events and content (Virtual tours). They used to share photos of natural physical events in their online meetings, events, Video-conferences, seminars, workshops & other exciting events on social media.

Digital platforms

To promote digitalization, the joint initiative between Google & Apple, a Bluetooth-based contact tracing platform, helped the Government, health agencies, and people to reduce stress and combat the spread of the Virus, keeping in mind user privacy and security (Guynn, 2020). In the health sector, telemedicine (Hollander & Carr 2020) and various health awareness and service provider apps developed during the first & second wave of covid-19 in India, mainly Aarogya Setu, Quarantine Monitor, Mahakavach, Quarantine Watch, Cova Punjab, Test yourself, Gok Direct-Kerela, etc. In the health sector, telemedicine platforms Mobihealth, Numen Health, Practo, Athena Health, Lybrate, Praxify, Curve Health, Zoc Doc, One Mg, etc. These apps aim to protect Indian citizens from the mass spread of viruses & services provide 24-hour teleconsultation by reputed doctors. Many apps extend medical services to reduce the burden of overstretched health centers and hospitals. Home delivery services of medicines and various essential items were readily available with one click.

The digital revolution during Covid-19 could not have been possible without the cooperation and collaboration of IT sector developers, Government, and public health workers, who aided in smooth, user-friendly digitalization progress. This digital revolution came as a new hope for the people in such unprecedented times. It acted as a significant problem solver to spread awareness & information regarding the Covid-19 protocols across various countries & continents. News and information like the recent development in vaccines, healthcare facilities, preventive steps to combat the Virus, and the real-time data count of the infected and the deceased were significant technological advancements in these difficult times.

Digitalization and e-education

COVID-19 impacted all the significant streams of education. Schools, colleges, universities, and other academic institutions immediately closed. Due to this crisis, more than 32 crore students have been affected by the nationwide lockdown. Central and State governments and national bodies regulating education and various school administrations had to adopt a quick e-learning mode for the home-bound students to keep their studies intact during the Lockdown (Dwivedi et al., 2020). It considered social seclusion and other quarantine parameters (Chien, 2012). The digital transition for making their life go (Iivari, Sharma, & Olkkonen 2020) through various new platforms like Microsoft Teams, Zoom, Google meet, WebEx meetings & various other virtual platform tools, enabling communication and interaction faster. This digital bend was limited to the education sector and used within organizations and outside work teams (Kodama 2020) for entertainment, health, etc. It soon became one of the essentials in the Corona period and gained quick momentum in the market share. Online classes, video conferences, e- workshops, e-seminars, skill development activity & working with teams became more accessible for the learner during the first & second waves of the Pandemic (Chien, 2012). The pandemic compelled Organizations and governments to consider incorporating technology into their operations, as this Virus left them with no choice of existence (Close et al., 2020). Digital technology also helped overcome language barriers; learning materials were available in multiple regional languages from primary to postgraduate levels. National Digital libraries (NDLI) were setup to assimilate contents from different institutional digital depositories in a considerable amount from various Indian Educational and Research Institutions. Resources in the form of Books, Audiobooks/lectures, videos, presentations/notes and simulations, Question papers, solutions, single-window learning resources, etc., were made available to the learners in one go. The national digital library of India (NDLI) project was setup, which got support and funds from National Mission on Education through Information and communication technology (NMEICT) through the Ministry of Education. The ongoing pandemic has created interest and preferences in the learners for online education- like MOOCs and the Swayam portal (Carey, 2012; Shah, 2020).

Digitalization helped in skilling people

Digital technology also gained popularity in skilling people during covid-19. Factory workers, retail associates, and truck drivers, who were laid off due to the closedown of business houses, millions of people switched to online learning courses for reskilling themselves from Git Hub & LinkedIn. Nasscom launched various online training platforms for future skills. Similarly, the role of prominent universities like Harvard, University of California, Georgia Institute of Technology, Michigan State University, California Institute of the Arts, Hong Kong University of Science and Technology, UCLA & many others came as active partners in taking initiatives in imparting online education & training for future skills were much acknowledged and appreciated. Many technical courses were made available free of cost. The blended learning modes were incorporated with a concept of independent learning and later integrated into

existing central systems. These e-learning platforms were designed in such a way intending to improve universal acceptance of quality structure and sustainability in the long term. Moodle and LMS are learning platforms for venues and cloud solutions from Microsoft and Google.

In India, IGNOU, Sikkim Manipal, IMT Distance & Learning, Symbiosis, Bhoj University, MDU, Dr. B.R Ambedkar Open University, Netaji Subhas Open University, etc. helped people to gain and continue learning during the pandemic. Private partners like Course Era also joined hands during the pandemic to facilitate learning for the demand courses.

The challenges of migrant laborers due to the lockdown and the gig economy also suffered, such as taxi rides, rentals, or skill work (Mason, plumber, electrician, carpenter, factory workers, etc. (Bhattacharya, 2020)). Because of the low demand for their services, the Government quickly appointed a group of top officials, ministers from social justice and empowerment, who initiated various skill training programs to help them regain their livelihood. In reskilling initiatives, Govt. introduced multiple programs to reskill them. Under this program, nearly one lakh Covid frontline workers were initially trained at 111 training centers across 26 states. Situations like elderly home care assistance, emergency cases for providing medical facilities to Covid-19 infected patients, life support equipment handling training RTPCR sample collections, etc. The future skill Platform offered various IT skills in artificial intelligence (AI), machine learning (ML), Blockchain, cyber security, Big Data Analytics, and User Interface/ User Experience.

Upsurge in Digital Cash

During the Covid-19 Pandemic, an upsurge in monetary digitalization sparked new hopes for hesitant users who felt unsafe and avoided direct transactions because of virus infection. The Digital India initiative provided a faceless, paperless, and cashless economy. It was a boon in disguise for them. They considered the need for digital payments and several initiatives the Government of India took to promote and popularize digital payments with many attractive offers. Various other digital payment modes emerged during this covid-19. They were mainly debit/credit cards, internet banking, mobile wallets, digital payment apps, Unified Payments Interface (UPI) service, Unstructured Supplementary Service Data (USSD), Bank prepaid cards, mobile banking, etc. To bring rural India to par, a digital push by the Ministry of Electronics and IT (MeitY) initiatives in promoting "Digital Finance for Rural India" to generate attentiveness and reach out through Common Service Centres (CSCs). Other Mobile money technology, namely PayTm, Z Pay, Amazon Pay, Google Pay, Pay Pal, Phone Pe, etc., became very popular to minimize the spread of the coronavirus and reduce the dependency on the need for physical cash transactions (Bhandari, 2020). E-commerce platforms, including Amazon, Flipkart, Big Bazaar, and Big Basket, also accelerated during the pandemic. Hundreds of other e-commerce websites performed as delivery platforms for consumers to buy bare essentials. Mainly foods, health, sanitary, daily living, and electronic products, leveraging their existing

technology-enabled logistics systems. Blockchain technology also became popular in the second wave of the Pandemic (Upadhyay 2020). People who knew gained a lot by investing in cryptocurrency. The success of digitalization would have never been possible without various ISP (Internet Service Providers) partners, commonly Airtel Xstream Fiber, Reliance JioFiber, Excitelroadband, ACTBroadband, BSNL, Hathway (ET, 2020).

FUTURE IMPLICATION & CONCLUSION

Digital transformation was a need of time across the globe. It helped transform business processes to sustain in the market. Businesses have grown by leaps and bound at a fraction of the cost. The other sectors, including education, telecommunication, Pharmacy, food delivery, virtual events, trade, manufacturing, hospitality, tourism, agriculture, real estate, public healthcare, investment banking, blockchain technology, etc., would have been better contributors in upscaling present economic conditions. This study serves as an essential resource for businesses to prepare for an alternative in advance for sustenance. Government and policymakers can also plan for Digitizing process by adding more channels for sales and marketing. It will further help telework to take an intake of technological products more efficiently using hybrid communication mechanisms accessible easily from any corner of the country and not solely from their dependency on physical mode. There are several limitations to this study. This study was conducted during the second wave of COVID-19, the deadliest delta crone variant that affected several lives, people, and companies. Many companies were unprepared for this transition, yet only a few could adopt this practice. There was immense pressure on the managers to run their businesses amidst all crises. Secondly, some countries had imposed restrictions on business activity across the boundaries, which incurred heavy losses. The limits on business travelers and students become jeopardized. This study is based on secondary data; the primary pinch could have been an added advantage. The future work of this study could be in the different sub-sectors of the economy and relevant feedback from the company on their plans for digitalization.

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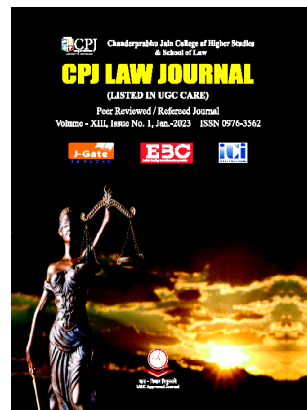
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