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HNLU JOURNAL OF LAW & SOCIAL SCIENCES

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FROM THE EDITOR-IN-CHIEF

Dear Readers,

It is my pleasure and pride to pen this foreword on the release of the Vol. VI and VII of **HNLU Journal of Law and Social Sciences** (HNLU JLSS), – the flagship publication of **Hidayatullah National Law University**. It is a well-known fact that a copy of JLSS is a must not only in the social science and law libraries across the country but also as a personal collection at the libraries of the legal fraternity. The combined volumes under the "Open Access' platform and print mode serves a spectrum of vivid readers.

The 'Regime Complex of Law' today spans from the womb to the tomb of a human life cycle. Importantly the foundations of such 'Regime Complex' emanates from the cradle of social sciences. It is a fact the integrated law courses started with the goal of social engineering is yet to realize its potential. In such context the Journal which is fine blend of law and social sciences and one of its kind among Indian legal publications contributes to the goal of social engineering of Law.

The articles in these two editions have been contributed by authors who have made a mark and those who are in the process of making a mark makes it as a veritable collection of thought-provoking pieces. The articles and essays in the present volumes range from across diverse legal petals and address cross-cutting issues in the realm of law and social sciences. The articles and essays discuss the traditional and contemporary issues in a new lens, bringing out new perspectives. The contributing authors come from diverse compasses being academicians, jurists, practitioners and students of leading law schools, making the volume a rich reading through and in terms of their experiences, logic, conclusions and predictions.

"For the creation of a masterwork of literature two powers must concur, the power of the (wo)man and the power of the moment, and the (wo)man is not enough without the moment", says Matthew Arnold. Going by this saying, the present volume promises to converge both.

As these volumes are being released, I would like to congratulate and place my sincere appreciation of the contributing authors for their time and creativity. Importantly the editorial team deserves a rich praise for their patient and hard work to bring this to the discerning readers.

Wish you all a quality reading!

Prof. (Dr.) V. C. Vivekanandan

Vice-Chancellor

Hidayatullah National Law University, Raipur

EDITORIAL MESSAGE

Dear Readers,

It is greater than a joy to present to you the Vol. VII of HNLU Journal of Law and Social Sciences (HNLU JLSS), a journal which remains one of the widely recognized journals of the field. As you all know that law, today, has myriad facets and is ever evolving. The articles and essays in the present volume ranges from across diverse legal petals and address cross-cutting issues in the realm of law and social sciences. The articles and essays discuss the traditional and contemporary issues in a new lens, bringing out new perspectives. The contributing authors come from diverse compasses being academicians, jurists, practitioners and students of leading law schools, making the volume a rich reading through and in terms of their experiences, logic, conclusions and predictions.

'A Legal Anatomy of the Scope of Benjamin Cardozo's Methods of Interpretation in India (With Special Emphasis on Social Welfare Rulings)' is an article by **Ms. Shreya Kaul** and **Ms. Mishika Rathore** wherein jurists around the globe have offered their momentous two cents to explain what interpretation of statues entails for them. Through this paper, the authors resolve to analyse the relevance of Benjamin Cardozo's methods of interpretation in the Indian judicial setup.

'Legal Reforms and Legal Education: The Road to Change' is an article by **Mr. Saurabh Sinha** that talks about the profession of law as very dynamic in nature encompassing within itself a wide and myriad varieties of roles and tasks to be performed requiring meticulous planning, agility, a sharp mind and constant updating for a resilient and successful career and also for bringing a meaningful change in the society.

The paper **'The Practice of Inter-Country Adoptions in India – A Long Way to Legal Reckoning?'** by **Mr. Abhinav Goswami** and **Mr. Suyash Tripathi** analyses the practice of Inter-Country Adoption and why the existing legal framework is not enough, and demanding an update to the mark to encourage this practice, which might brighten the future of lakhs of deprived children.

The research paper '**Rethinking and Revisiting Independence of Judiciary: Decrypting NJAC vis-a-vis Collegium'** by **Mr. Shelal Lodhi Rajput** deals with the concept of independence of the judiciary as what is the litmus and true meaning of the concept that was intended by constitutional framers in Indian setup, the concept is decoded by emphasizing the appointment procedure of judiciary and a clash of two organs of state with their evolved instrumentalities, the decrypting of NJAC vis a vis Collegium system, here author adopted

novel thing in the way that paper does not discuss much about the what is two instrumentalities' means as many kinds of literature already dealt with it but it focuses more on the nature of two.

'The Humanitarian Crisis in The Middle East: A Narrative of United Nations' Triumph or Debilitated Reality?' by **Ms. Anukriti Trivedi** and **Ms. Ayushi Singh** maintains as while United Nations has long been exalted as a major peacekeeping international organization in the world, its failures in the contemporary backdrop of evolving political interests have been overlooked for an equally long period.

'Failure of Constitutional Machinery: An Uncanny Power to the Union?' is a paper by **Mr. Shivam Tripathi** which aims at analysing the uncanny power vested to the centre under Article 356 through the vires of constituent assembly debates, theories for incorporation of emergency provisions, report of relevant commission, and limited set of judgments which highlight upon the judicial wisdom of the courts regarding the application of the Presidential Proclamations.

Mr. Abhishek Porwal in his paper entitled **'Security and Privacy Issues Related to IoT Devices - A Comparative Study of Regulations of India, UK, Australia, USA, and Japan'** focuses on the need for security with IoT devices and the approach of different countries towards regulations for security aspects with IoT devices.

In the paper **'75 Years of United Nations: An Assessment of the Changing Narratives of Human Rights Laws'**, **Ms. Ayesha Priyadarshini Mohanty** aims to assess the changing narratives in human rights laws from cultural reservations of western discourses towards universal application. It calls forth the need for human rights laws to engage in equal participation by reinforcing the rights of peoples and organizations to the rights of states.

The paper **'Labelling the Sex Offenders and Sexual Offender Registry– Crime Control Method or Pushing Towards Crime'** by **Mr. Rahul Ranjan** and **Ms. Samiksha Singh** reviews the idea of bringing such a registry to India, its probable effect, drawbacks and lacunae, and impact on present enforcing machinery and system. The paper concludes by highlighting vital corrections that should be made in order to stand judicial scrutiny and make the registry more viable for law enforcement agencies as well as for the public.

The paper **'Increasing the Legal Age of Marriage of Female To 21 Years-How Far Viable?'** by **Ms. Shivangi Agrawal** and **Ms. Bhoomika Markam** seeks to run through the viability of proposal to increase the legal age of marriage of girls from 18 to 21 years and examine it in light of other relevant factors that influence the idea.

The paper **'The Wave of Innovation, Artificial Intelligence and I P Rights'** by **Dr. Vani Bhushan** and **Dr. Rana Navneet Roy** provides a concise overview of the interplay between law and artificial intelligence. Based on the analysis of legal resources, it identifies key topics, systematically organizes them and describes them in general, essentially regardless of specificities of individual jurisdictions. The paper depicts how artificial intelligence is related to copyright and patent law, how the law regulates artificial intelligence and the developments in artificial intelligence.

Mr. Shashank Dixit and **Ms. Soumya Mani** in their paper **'Addressing the Invisible: Women and Politics'** analyse reasons of lesser participation of women in politics despite having India's name in top countries who has given unconditional voting right to their women just after independence. The paper also analyses the effect to reservation on women's political partaking with need for enhancing women's reservation in area where women has no reservation.

Mr. Samyak Jain in his paper **'Decoding Minority Squeeze-Out: An Analysis in Light of the New Provisions'** analyses and finds the spaces in law which provide the scope of bettering the transactions of mergers and takeovers. The paper provides suggestions that can change the course of how minority squeeze-out is exercised in India and concludes by mentioning its findings and observations.

'Widowhood Practices and Human Rights Violation in India: An Appraisal' by **Mr. Ahmar Afaq** and **Mr. Vaibhav Suppal** throws light on the recent developments in the domain of widowhood and advocates for an urgent need for stringent legislation for the well-being of widows in India.

The paper **'Ethical Conundrum of Human Gene Patenting: Global Concern and Response'** by **Mr. Amrendra Kumar Ajit** examines the ethical arguments on different sides in its first and second part. The third part of this paper tries to focus the global behaviour on the ethical issues and further development of some common consensus through international legal instruments.

The article **'Agricultural Reforms: A Step Towards a New Era for the Farmers?'** by **Mr. Nikhil Singh Narwani** and **Ms. Anshika Dwivedi** contains an overview of the Indian agriculture sector starting from the time of Independence. After the opening up of the Indian economy in 1991 which certainly boosted agricultural sector too with increase in exports of our produce much was still left to be done and these new farm laws are the reforms which our agricultural setup was desperately vying for since long.

Through the paper **'Analysis of Draft Environment Impact Assessment (EIA) Notification, 2021: More harm than good?'**, **Mr. Abhishek Iyer** discusses the 2021 Draft notification in detail including the key highlights and important points as proposed, and critically analyses it in the light of India's environmental law parent legislation and international obligations.

The paper **'Artificial Intelligence Mimicking Human Intelligence: Can AI Ever Lead the Fight Back?'** by **Mr. Dhananjay Bhati** attempts to give an exhaustive overview to the audience on how AI is changing humanity and raising significant questions for the society, economy, and governance that need radical policy attention around the globe.

The essay **'J.S. Mill's Harm Principle: In Relation to Legalizing Sex Work in India'** by **Mr. Satvik Mishra** and **Ms. Shubhangi Gandhi** talks about sex work, i.e., prostitution of both male and female, issues related to its legalisation and stereotypes attached to it. It also introduces and explains J. S. Mill's Harm Principle and sex work in light of this principle.

The field of human rights is a very vast yet unexplored territory, and the paper **'Human Rights and Access to Justice: An Overview'** by **Mr. Siddharth Baskar** and **Mr. Atishay Sethi** is aimed at understanding human rights through a new lens.

The paper **'Exploring the relationship between Law and Governance in the Indian Context'** by **Mr. Abhijit Mitra** studies how Governance is a much broader concept than law by exploring the relationship between law and Governance through various typologies.

Mr. Divyanshu Chaudhary and **Ms. Akansha Ghose** in their paper **'India's Transformative Constitutionalism: Role of Indian Supreme Court and Competing Public Morality'** take two landmark judgments of the Court (Navtej Singh Johar v. Union of India & Indian Young Lawyers Association & Ors v. The State of Kerala & Ors) and critically analyze how the Court while using tools of Constitutional morality and transformative Constitutionalism, contested the claims of public morality.

The **'Legislative Commentary on Sections 66,67,68 & 69 Of Indian Evidence Act,1872'** by **Ms. Lavanya Ambalkar** is in crux, a legislative commentary of Sections 66, 67, 68 and 69 of the Indian Evidence Act, 1872. The paper includes a self- interpretation for each of these above-mentioned statutes and has included various pointers relating to the basic principle and scope of such sections.

Ms. Deyashini Mondal discusses extensively on the topic of psychological impotency and it being a valid ground for divorce in **'Case: Smt. Urmila Devi V. Shri. Narinder Singh, AIR 2007 HP 19: Psychological Impotency as a Ground for Divorce'**. The court in the present case held that even though divorce cannot be awarded under Sec 12 1(a) as such a claim has to affirm 2 questions: First, whether consummation had taken place. Second, if found that the consummation hasn't taken place then was it because of the impotency of the spouse.

While this volume reaches your hands, I would like to congratulate and thank all the contributing authors, on the very first place, for their quality research output. On the equal pedestal, I would like to appreciate the editorial team as well as those who have directly or indirectly, greatly or partially worked for this journal to see the light of the day.

With best wishes!

Dr. Avinash Samal, Assistant Professor

Jeevan Sagar, Assistant Professor

Executive Editors

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ARTICLES

A Legal Anatomy of the Scope of Benjamin Cardozo's Methods of Interpretation in India (With Special Emphasis on Social Welfare Rulings)

***Ms. Shreya Kaul**
****Ms. Mishika Rathore**

Abstract

Jurists around the globe have offered their momentous two cents to explain what interpretation of statues entails for them. Through this paper, the authors resolve to analyse the relevance of Benjamin Cardozo's methods of interpretation in the Indian judicial setup. The paper commences with an introduction elucidating the judge's conundrum during adjudication and the drastic shift like the Indian judicial process; this is linked with the importance of Cardozo's interpretation methods. After delineating the objectives, scope and research issues, the authors review noteworthy literature to determine loopholes in research and rectify the same in the present paper. Thereafter, Cardozo's methods have been explained succinctly, followed by the Indian Judiciary's response towards these interpretation methods by analysing landmark and contemporaneous judgments. Sufficient Indian and international case laws have been included in the paper for unearthing substantial answers to the research questions. The paper comes to a gradual halt with a set of humble recommendations and a conclusion that briefly sums up the learning of the entire paper, provides answers to the questions posed by the authors and signals towards an arduous yet hopeful journey of impressive judicial interpretations ahead.

Keywords

Interpretation, Statutes, Benjamin Cardozo, Judicial process, Judiciary.

1. Introduction

Never has there been a juncture in legal history where judges or even the highest stature and enjoying the pinnacle of judicial success have not confronted the dilemma of deciding what *'correct'* adjudication is. On one scale of the balances of justice lies the primary role of the judge, i.e., to interpret the legislative text precisely. In contrast, on the other scale, the judges may languish in a persistent desire to encroach

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** Symbiosis Law School, Pune

upon the legislative pigeonhole and engage in judicial review to rectify the pitfalls in the legislation itself. At this point, an introduction to Benjamin Cardozo becomes necessary. He was a celebrated American Jurist who served as a judge in the New York Court of Appeals and an associate Justice at the Supreme Court. He heavily shaped the common law system, and for him, the law made by the judge was an undeniable reality of the system.[1]He authored a book on the judicial process, naming it '*The Nature of the Judicial Process.'* This book acts as a Holy Grail for judges and the related judicial personnel for receiving guidance to interpret statutes in a contextually correct fashion. Judges may be the epitome of manifestation of 'righteous' interpretations. However, they are humans too and suffer from their personal political, emotional and traditional biases; these rule out the scope of objective judicial reviews. For the judges' rescue in such judicial impasses, the aids of interpretation provided by classical jurists come in handy. This paper seeks to analyse the methods of interpretation as advocated by Cardozo in a broader spectrum of explaining what 'judicial processes' authentically entails. Cardozo was a strong proponent of 'judge-made law,' the vigilance of the Judiciary over the law (judicial review) and of the application of the sociological method of interpretation (discussed in the later parts of the paper) when a dire need to plaster gaps in the existing legislation exists (to ensure social justice);[2] This is where the conundrum described at the beginning of the introduction shows its face again. The decision of whether the judge should or should not engage in judicial review is a slippery precipice to be on the edge of while having to follow due judicial processes simultaneously. Even in the Indian context, the judicial process and judicial review trajectory have been tumultuous. Article 14 (promotes equality and equal protection of laws) of the Constitution of India[3] (Constitution), Article 141 i.e. Apex court's law will be binding upon all the courts within the Indian territory, Article 225 i.e. assigns power to the High Courts to make court rules, sitting of the Court and its members, Article 32 i.e. power of the Apex court to issue writs and enforce fundamental rights and Article 226 i.e. power of the High Court to support fundamental and even other legal rights are the major articles dictating the nature of the judicial process and judicial review in India. On the one hand, sits the *ADM Jabalpur case*,[4] where the Apex Court firmly adhered to the procedural doctrine and the logical method of interpretation, steering

1 Benjamin Cardozo, The Nature of the Judicial Process, The Storrs Lectures Delivered at Yale Uni. (1921).
2 William Cunningham, Cardozo's Philosophy of Law: His Concept of Judicial Process, Master theses, 1557 Loyola Uni. Chicago (1960).
3 INDIA CONST.
4 A.D.M. Jabalpur v. Shivakant Shukla, (1976) 2 SCC 52.

away from judicial review and on the other flank, is the turnover *Maneka Gandhi case,*[5] which blazed the trail for a novel form of judicial review and activism in India. Several such landmark judgments have been analysed during this paper to appreciate the practicability of Cardozo's methods of interpretation as well as its imperativeness for judicial review and the execution of the entire judicial process in India.

2. Objectives and Research Issues

The authors embarked upon the journey to decode the mental workings of a judge, his employment of methods of interpretation for differing case laws, what weightage he attributes to social welfare, how vital it is for him to rely upon precedents, historical origins, and customs at the expense of social welfare and how does the judge get past a legal deadlock of whether to engage in judicial review. A succinct analysis of Cardozo's interpretation techniques, the judicial and legislative analysis of the same and the social footprints of these methods and judgments are to be understood by unearthing answers to the following research questions:

In a thoroughly dynamic society, have Cardozo's methods of interpreting statutes *stood the test of time?* Further, how have the Indian judicial luminaries utilised his interpretation techniques whilst adjudicating to generate a *positive social impact* and ensure *social welfare?* These objectives and questions further aid in formulating the scope of the paper.

3. Scope

This paper is authored to answer the raised research questions and recognise the judge's dichotomy during adjudication: whether to interpret the legislative text or to extend their judicial wisdom to practice judicial review. This study is conducted in the context of the applicability of Justice Cardozo's methods of statutory interpretation in the Indian context. A special emphasis has been laid upon the practical application and the *social impact* those judgments have created where Cardozo's sociological method of interpretation has been utilised. The authors eventually aim to provide a few proposals that can better the application of Cardozo's principles of interpretation in the Indian society (for social welfare) or enhance the existing judicial structure to enlighten the judges, the litigants, and the lawyers.

5. Theoretical Underpinnings

This research would fail its objective if the relevant theoretical foundations of interpretation were excluded. The *literal rule*[6] can be

5 Maneka Gandhi v. Union of India, AIR 1978 SC 598.
6 Duport Steels Limited v. Sirs, (1980) 1 WLR 142.

defined as *what the law says than what the law means;* this rule helps in preventing taking sides in political and legislative issues. Under the *golden rule,*[7] the statutory interpretation helps the judge to depart from the normal meaning to avoid the absurd outcome; this rule is commonly used in cases harbouring ambiguity and absurdity. As per the *mischief rule,*[8] the judge tries to adjudicate in a manner that rectifies the defect/ mischief that lies within the statute. This rule aims to suppress the mischief and advance the remedy. The *living tree doctrine*[9] empowers the judges to treat the constitution as an organic document of law and interpret it widely to address the changing needs of a fastidiously evolving society.

Oliver Holmes views on legal interpretation[10] make for a crucial theoretical consideration. Holmes believed that legislation should be interpreted as a private contract; there exists no need to understand what the legislators *might* have meant, and rather the bare meaning of the legislature should be grasped. If a situation does arise where the ambit is vast, and interpretation is necessary, then it must be undertaken only academically by reading English intelligently. Consequences of the adjudication are to be considered only when there is some reasonable doubt concerning the meaning of the words. Re-linking these theoretical underpinnings to Cardozo seems reasonable now.

Cardozo's Philosophy of Law[11]Cardozo perceived law to be a normative rule which would stand credible and sufficiently authoritative for the courts of law to drive proceedings and announce verdicts. He was never hard-bent interested in the exploration or formulation of law but more inclined towards mapping, understanding, and modelling the consequences of law's practical applications. His works were precisely a catalyst for the evolution of laws and how they are incorporated into the practical judicial process.

6. Literature Review

Joel K. Goldstein's article[12] proved to be one of the most resourceful articles while meditating upon Cardozo's methods. This article did not just deal with his principles and methods but additionally provided a succinct understanding of Cardozo's general thoughts and opinions on the law. This article leaves no questions unanswered with regard to Cardozo's work, methodologies, and principles. A section of this

7 Grey v. Pearson, (1857) 6 HL Cas 61.
8 Heydon's Case, (1584) 76 ER 637.
9 Edwards v. Canada, (1930) A.C. 124.
10 Oliver Holmes Jr., Theory of Interpretation, 12(6) Harv. L. Rev. Assoc. (1899).
11 Edwin Patterson, Cardozo's Philosophy of Law, Pennsyl.Uni. L. Rev. (1939).
12 Joel Goldstein, The Nature of the Judicial Process: The Enduring Significance of a Legal Classic, 34 Touro L. Rev. (2018).

article also dealt with the reasoning of positive responses which Cardozo received for his work, thus further empowering the authors of the current paper to undertake Cardozo's interpretation methods as a starting point to engage in the analysis of the nature of the judicial process. The paper explained how Cardozo's fellow judges praised him for clearing the misconception that judges merely utilise precedents to adjudicate- there are many dimensions to be considered rather than simply relying upon the logical method (precedent-based method); the sociological, historical, and traditional interpretation methods also must be duly considered to assess their applicability in the case. The relevance of Cardozo's work in the 21st century was also presented in this paper, but the paper failed to provide a wholesome *critique* of Cardozo's works. This minor gap has been tried to be fulfilled by the authors of this paper.

The authors relied upon *Sandipto* Das's[13] article to be acquainted with Cardozo's principles of interpretation of statutes and other legal philosophies he advocated for; he successfully managed to analyse the nature of the judicial process and provide a detailed and simple understanding of Cardozo's interpretation methods. However, this article lacked an Indian perspective, which led to an incomplete analysis of the Indian judge's opinions. Through this current paper, the authors have tried filling in this gap by not only elucidating upon Cardozo's methods but also linking them to landmark Indian judgments, while also assessing their social impact.

Chinmoy Roy,[14] via her article, attempted to explain the status of judicial review in India and its origin from the American Judicial Court thus leading to a comparative analysis between the two. In addition to extensively dealing with Indian case analysis, the author also dealt with the extent of the Court's power in constitutional and political issues. Lastly, he discussed the restrictions levied upon judicial review in India. This article helped the authors to appreciate the Judiciary's ambit and the curtailments on them when they attempt to follow the sociological method of interpretation. Although this article did not deal with the *methods or the reasoning* which the judges followed in the cases, the authors of the current paper have ensured to carry out such an analysis.

Dan Simon's[15] exemplary paper delves into a psycho-legal critique of Cardozo as a jurist and extra-judicial writer. The author brings out

13 Sandipto Dasgupta, A Possible Reading of "The Nature of the Judicial Process", 15 Student Bar Rev., 37-47 (2003).

14 Chinmoy Roy, Judicial Review, and the Indian Courts, SSRN (Jan. 24, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990601.

15 Dan Simon, The Double Consciousness of Judging: The Problematic Legacy of Cardozo, 79(4) Oregon L. Rev., 1033 (2000).

the misalignment between Cardozo's judgments and his extra-judicial writings. He makes well-researched points to showcase Cardozo's distorted self-concept since the opinions presented by Cardozo seemed to conceal the actual mechanism of his judgment making. Even though this article aided the authors in receiving a complete understanding of Cardozo's paradoxical legacy, it failed to mention enough case rulings to substantiate the argument. However, that is a minute fault in this well-structured and well-worded article.

7. Study of Cardozo's Methods of Interpretation

The lecture series delivered by Cardozo at Yale Law School with diminutive excitement metamorphosed into what can be understood as one of his most acclaimed works: the lecture series being converted into the critically as well as publicly acclaimed book[16], The Nature of the Judicial Process.[17] Herein, the guiding methods of interpretation as deliberated upon by Cardozo have been discussed, followed by a judicial analysis to understand their practicability and social impact on the Indian society and justice delivery mechanism. Cardozo did allow the methods of liberal decision to operate, albeit only in the absence of a befitting law or rule.[18] The authors have engaged in this insightful methodical analysis by placing reliance on Cardozo's original work:

1. **Method of Philosophy or Logic:** As per Cardozo, this method possesses a certain sense of logic, a definite natural and systematic succession, which leads with a certain favourable presumption in its stride. This method should be applied for all interpretations unless it is imperative to utilise some other method. Cardozo's aim is not to placate philosophy and logic on the same pedestal; rather, he tries to state how adhering to the precedents would be a logical method to interpret the statute[19] and will reinstate the plaintiff's faith in the Judiciary as they will be handled with uniformity. This method comes to the rescue of such a judge who is unable to handle his sentiments or emotional leanings based on customs or social mores.[20] This method is presumed to straighten out the wrinkles of traditional and emotional leanings, arbitrariness and uneven mechanism of a nation; the method postulates that the dependence upon the precedents logically produces a rightful conclusion for interpretation.

2. **Method of Evolution / Historical Development:** For Cardozo, the historical method functions upon tracing the *origins* of

16 *Supra* note 2.
17 *Supra* note 1.
18 *Supra* note 2 at 22.
19 *Supra* note 1 at 24.
20 *Id*, at 43.

the core of the case to clarify the legal issue at hand and not to focus on finding a solution. Even though Cardozo did not assign much momentousness to this method as he opined that the responsibilities of a judge extend beyond investigations to clarify the origins, he still recognises the value of this method while interpreting statutes concerning contracts and outmoded terms.[21] In a landmark case,[22] where an American daughter's title (who was married to an Austrian-Hungarian man) over her deceased father's property was questioned as the countries were at war, Justice Cardozo used the historical method of interpretation to advocate the concepts of loyalty, the distinction between enemy and friend and how the rights of the legal owners are historically deep-rooted and cannot be decimated in a jiffy.

3. **Method of Tradition:** While explaining this method, Cardozo adopts a centrist approach and rejects Coke's separation of common law from customs as well as Blackstone's glorification of customary law.[23] According to Cardozo, traditions and customs are used as a yardstick to check the practicality of established rules and laws and not *per se* to cultivate novel laws.[24] Cardozo seems satisfied with the interpretation that customs and traditions are merely used to apply the older laws/rules and hold them to a certain standard rather than generating new laws and rules.[25] This method essentially guides the judges to adjudicate in a standard, 'righteous' manner[26] and works in tandem with the method of sociological interpretation[27] as explained by the author next.

4. **Method of Sociology:** As per Cardozo, the method of sociological interpretation is an all-inclusive method, where, to achieve greater social welfare-oriented ends, traditions and customs are kept at bay, the orderliness of the logical method is sidelined, and history is forgotten.[28] This method can act as a sealant to fix any leaks in the written law so that this "*par excellence"* method can be utilised for the greater good of society. Mores, social welfare, and common law are the basal indicators of the sociological method which is best suited for interpretation of cases of constitutional and private law. Even though Cardozo expresses his will to let the method of sociological interpretation be liberal

21 Supra note 2.
22 Techt v. Hughes, 229 N. Y. 222, 239, 240, 128 N. B. 185, 190 (1920).
23 Supra note 2 at 28.
24 Supra note 1 at 60.
25 Id, at 62.
26 Id, at 63.
27 Supra note 2 at 32.
28 Supra note 1 at 65.

in nature, he expresses caution in the same breath[29] against arbitrary interpretation. As has been observed in an imminent paper[30], Cardozo has expounded this method to vaguely pander to the needs of 'equity.' The author of this literature observes that a sociological method of interpretation falls flat on its face in front of the logical method which strictly relies upon precedents. However, the authors of the current paper would prefer to disagree with this opposing stance as this method of interpretation will act as a catalyst for adjudication in cases where reliance upon precedents will lead to the theft of justice. It is through this method of interpretation that Cardozo promotes the position of the judge as a legislator[31], where he not only fills in the gaps of the written law but also embraces the concerns of the society and rectifies those loopholes accordingly. Cardozo strongly believed that judges can be used as tools for propelling the moral quotient of the society, though only by using objective standards to eradicate arbitrariness.[32] The judge has the liberty to use his legal creativity and judicial acumen for applying this method, but he shall do so by staying within the precincts of the area of customs and the mores of the society, while also being considerate of the legal restrictions.

5. Truth, logic, uniformity and mores 'of the day appear to be the driving forces of the judicial process for Cardozo.

8. Critical Scrutiny of the Judicial Approaches

1. ADM Jabalpur case[33]

Justice D.Y. Chandrachud has eloquently observed that this was a *judgment that was delivered but should have never been delivered.* After the emergency was pronounced, many arrests were happening across India. When the aggrieved detainees approached the Apex court under the writ of habeas corpus, the Court uninhibitedly held that the fundamental rights (including Article 21) have ceased to be functional due to imposition of emergency. The judgment was delivered by a five-judge bench with one dissenting judge. The four judges delivered a similar judgment applying the logical method of interpretation; they strictly stuck to statutes and precedents, working logically and systematically, ignoring all emotions, traditions, customs and the 'mores of the day.' The judgment day for this case can be christened as a black day in the Indian Judiciary because the judges did not concern

29 *Supra* note 2 at 32.
30 *Supra* note 11.
31 Supra note 2 at 34.
32 *Id*, at 35.
33 *Supra* note 4.

themselves with the present circumstances of the country and what kind of an ominous impact this judgment may have, hampering the future pleas for enforcement of fundamental rights. The only dissenting judge applied the sociological method while emphasising that a straitjacket rule is unfeasible to be applied in different and challenging times, such as the emergency. The dissenter boldly observed that when the life and liberty of the detainees are at stake, considerations of locus standi seems petty and any understanding of the situation contrary to this would render India appear as a country lacking judicial integrity.

2. **Maneka Gandhi judgment**[34]

Maneka Gandhi was legally issued her passport on 1/06/1976 following the Passport Act, 1967. Shortly thereafter, she received a letter on 2/7/1977 stating that under 10(3) (c) of the said Act, she is supposed to surrender her passport in "public interest" within seven days. The appropriate reasons for such illegal surrender were not communicated to her despite her questioning. Resultantly, she filed a writ petition regarding the same under Article 21 of the Constitution. The judges pounced upon this opportunity to reverse the blunder caused in the *ADM Jabalpur case* and opted for a sociological method of interpretation as the Court held that section 10(3) (c) of the Act violates Article 14 of the Constitution as it gives power to the passport authority vaguely and ambiguously under the garb of "public interest." After the emergency, the courts were extra cautious regarding cases where fundamental rights were violated. In this case, the judges abandoned the logical method of interpretation, did not rely upon the ADM judgment and pleasantly felt it to be necessary to amend the law as per the circumstances of the society to prevent a judicial emergency. A sociological interpretation in consonance with the 'mores of the day was adopted rather than relying upon the disastrous ADM precedent since social welfare and protection of fundamental rights were envisioned as the ultimate goals of this judgment. A similar approach was taken by the Court in the *Olga Tellis case*[35] where the judges held that Article 21 has a vast ambit and cannot be read restrictively. Even in the *Hussainara Khatoon case*[36] the Court gave a wider interpretation of Article 21 and held that when a party cannot engage counsel due to poverty or lack of resources, the state must provide them free of charge legal service.

3. **Shah Bano judgment**[37]

Shah Bano, a divorcee with five kids, was seeking maintenance from her husband in 1978. She sought alimony which wasn't allowed

34 *Supra* note 5.
35 Olga Tellis v. Bombay Municipal Corporation, 1986 AIR 180.
36 Hussainara Khatoon v. State of Bihar, AIR 1979 S.C. 1377.
37 Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

under the Islamic system. While the support leaned towards the husband, the Apex court amended section 125 of the *Code of Criminal Procedure*[38] to entitle Muslim women to seek and receive maintenance. Cardozo's sociological method was applied in the instant case; this method is based on the power of justice, social welfare, and a correct view of reasoning. Under this approach, when the social needs demand justice, the statute interpretation must be carried out in a way history should be ignored, symmetry can be let loose and statutes can be extended only to ensure the gap-filling of law (a brief association with the mischief rule can be observed). The judges opted for a liberal and empowering interpretation to promote equality and potentially benefit countless suffering wives. Much uproar was raised on the fact that no Islamic judge was on the dais to deliver this judgment which renders it unjust and problematic because they might choose morals that are convenient to them. However, through the usage of the sociological method, the judges proved the negative public opinion wrong by solely deciding in a manner that would enhance the dignity of Muslim women and took due notice of their maintenance suffragettes; the Court adopted sociological thinking not only for the current situation but also for the future to benefit the women embroiling in and languishing due to oppressive laws. Such an interpretation provides a special impetus even to other minority sections of the society to demand their rights for guaranteeing social welfare. A similar approach was also applied in the *Rudal Shah case*[39] where the Court shunned all procedures and technicalities to grant a compensation (to be compensated by the Bihar government) of Rs. 35, 000 to the plaintiff for his illegal detention of fourteen years even after his acquittal.

4. **Nirbhaya judgment**[40]

In 2016, the nation was left reeling in shock after a 23 year old girl was brutally sexually assaulted in a running bus by six men in New Delhi. While the five men got ten years of prison initially, the juvenile was sent to a correctional facility. A mammoth dilemma faced the judges: whether a person whose mind is developed enough to execute the most heinous component of a gross crime, is his mind not developed enough to be treated as a proper adult and not as a juvenile in law? The judges, in this case, opted for a sociological method of interpretation and the *rights in rem* aspect was considered by the Court. Consequently, The Juvenile Justice Act, 2000[41] was amended and the age bar of who was considered as a "juvenile" was reduced from the

38 The Code of Criminal Procedure, No. 4, Acts of Parliament, 1973.
39 Rudal Shah v. State of Bihar, AIR 1983 SC 1086..
40 Pawan Kumar Mehta v. State, 2019 SCC OnLine Del 11870.
41 The Juvenile Justice (Care and Protection of Children) Act, No. 56, Acts of Parliament, 2000.

age of sixteen years to eighteen years. The sociological method was the best fit for this case as the evolution of society was an imperative consideration, where children below the age of eighteen years aren't naïve, but rather are more nuanced and developed in understanding to assess the consequences of their actions. The Judiciary realised that as the society has evolved, several dimensions have led to massive awareness (sometimes negative awareness) booms amongst children and keeping the age of juvenility at eighteen years of age would be a disservice to the people of the nation and a sorrowful reminder of the 19th-century bar which reeks of insensitivity. This approach not only ensured social welfare guarantees but also displayed the judicial wisdom of not allowing soft criminals to escape the clutches of law using outdated legislative bars.

5. **Navtej S. Johar judgment**[42]

While the *LGBTQ* community remains the most cornered community in society, the judges have adopted a liberal outlook to promote 'equality' to the core by ensuring collective social welfare. The Apex court finally struck down the age-old law which criminalised homosexuality and opted for Cardozo's sociological interpretation method. The dilemma of divulging one's sexual identity, even to their close ones, has always been a matter of massive contention. This judgment not only de-criminalised homosexuality but, in the same breath, also initiated certain uncomfortable drawing-room discussions leading people to be increasingly vocal about their sexualities. This is a determinate example of where the judges did not stick to the logical method of interpretation rather combated the ancient, problematic societal beliefs and took the onus upon them to alter the society for good. While the judges themselves did not belong to the community in question, they still envisioned the welfare of the 'society', which also consists of the LGBTQ community. The judges undertook a deliberate effort to think sociologically and keep at par with the rest of the world, granting rights to enforce one's sexualities and embrace equality. A similar approach was adopted in the *Adultery judgment.*[43]

6. **Jallikattu case**[44]

Jallikattu is a controversial sport that is played in Tamil Nadu, consisting of bull-taming by men to highlight their physical prowess. It is an age-old sport which can be traced back to 2500 years. The question came in front of the Court where PETA and other animal welfare organisations considered it to be animal cruelty. Bans were imposed and withdrawn upon this sport multiple times owing to

42 Navtej S. Johar v. Union of India, AIR 2018 SC 4321.
43 Joseph Shine v. Union of India, (2019) 3 SCC 39.
44 Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547.

sensitive, simultaneous political turmoil, with a final judgment still being awaited. This case is a classic example of the *phase-wise application* of Cardozo's customary, historical, logical, and sociological methods of interpretation. When the ban was imposed, the method adopted by the courts was logical since they put aside traditional norms and customs followed by the community for the sake of law and judicial precedents. Cognisance of the bull torture was taken by the Court and animal welfare, the society-oriented ban was imposed. Conversely, when the ban was withdrawn, it had associated political reasoning, but additionally, the judges opted for a traditional and customary method of interpretation. The judges were presented with the arguments that the bulls are treated as family members by the community, and through the performing of *Jallikattu*, the farmers can display the strength of their bulls and benefit themselves by assessing the bull's strength to decide upon future bull-cow mating. Contentions were raised as to the unfairness a ban would lead to as a 2500-year-old tradition/custom would be demolished, and the farmers will have to abandon their stocks which have in any way been extensively replaced by tractors. Hence, the judges felt that tradition should be kept alive and accorded their fair share of importance. No new rules/laws were generated; rather a simple upholding of customs/traditions was observed- this fell in line with Cardozo's understanding of historical and traditional interpretation principles. This case goes on to show the substantial difference in approaches of judges and how their chosen interpretation method can lead to the formation of varied public opinions.

7. **Sabarimala judgment**[45]

The non-allowing of women of a certain age inside the premises of the Sabarimala temple of *Lord Ayyappa* recently came to light and experienced harsh criticism; this non-allowing had already been upheld by the Kerala High Court in 1991. Now, the Apex Court overruled the earlier decision and, in 2018, allowed the entry of women of all ages within the temple after a petition was filed by *the Indian Young Lawyers Association.* Justice Indu Malhotra, who was the only female judge on the bench, dissented. The interpretation method used by the Kerala High Court and Justice Malhotra seems to operate on similar lines, i.e. of opting for a customary and historical method of interpretation since both the Court and Justice Malhotra reasoned that the authentic worshippers of *Lord Ayyappa* should possess the discretion to discern the religious intricacies in tandem with their original customs and traditions; only they should possess the right to decide in the matter and external non-stakeholders should not interfere with the native

45 Indian Young Lawyers Association v. The State of Kerala, 2018 SCC OnLine SC 1690.

rules and traditions of worship. It was observed that *Lord Ayyappa's* women worshippers themselves respect this custom and do not feel discriminated against when they are denied entry inside the temple. Even after the judgment was passed, congregations of women had gathered around the temple to prevent other women from entering the temple. According to this school of thought, the one who lacks knowledge about the origins of the customs, traditions and the mores of a society should not mingle with them to achieve 'equity' as what may be 'justice' for one may be the massacre of justice for the other. Alternatively, the remaining four judges opted for a sociological, and to an extent, a logical interpretation approach, wherein customs and history were stuffed into the background, and the protection of women's fundamental rights became the centrepiece of adjudication. The judges, in a bold effort, also attempted to normalise menstruation and reduce the taboo that surrounds it in India. This judgment, though it seemed like a victory to many activists across the country, it also went on to disappoint many members, even women, who belonged to this community of worshippers. This further elucidates how Cardozo's methods of interpretation are not faultless methods to ensure judicial success since sometimes, social welfare translates differently for different people.

8. **Ayodhya judgment**[46]

This much-anticipated judgment was passed in 2019, where the dispute revolved around the control of a plot of land in *Ayodhya*, Uttar Pradesh which was claimed to be on the Birthplace of Ram (*Hindu Deity*) where the *Babri Masjid* had been allegedly forcefully constructed. According to many historians, Babri was constructed after the demolition of *Ram Mandir,* after which Babri was demolished during a political rally in 1992. The five-judge bench ordered to hand over the land to the Trust for building a *Ram mandir* and alternatively provide a 5 acre land to the Sunni Waqf Board for mosque construction. Herein, the judges applied the historical and logical method of interpretation. The logical method turns out to be essential in cases where the judges may engage in personal biases, leading to the jeopardising of the judgments. The judgment was delivered by a five-judge bench which also consisted of a Muslim judge. While many speculated a biased reiteration of the judges' personal religious beliefs, the judgment came unanimously in favour of the defendant. The judges unanimously did not let religion or customs hamper their logical interpretation strategy. They also utilised the historical method to dig deeper into history to look for verified facts and trace origins to interpret logically. The Court observed that law could not change history, and hence, the most crucial consideration

46 M Siddiq (D) Thr. Lrs. v. Mahant Suresh Das, 2019 SCC OnLine SC 62.

while passing the judgment would be the historical development of the case since it is rooted deep into the realms of society.

9. **Vineeta Sharma judgment**[47]

In 2020, a three-judge bench of the Apex court passed this historic judgment, overruling the 2005 judgment of a division bench of the same Court. The Court held that daughters have equal rights to their ancestral property and that this shall also be held retrospectively. If we picture the customary method, daughters weren't allowed to inherit their ancestral property as they were not considered a family member but a liability to be married off: '*paraya dhan*". The judges decided to apply Cardozo's sociological method to establish gender equality and reduce the dependency of women on others. The Court was inclusive in its approach and gave importance to the mores of the present day, to uplift the women of the society and guarantee them with their long-overdue rights. A similar stance was taken by the courts in the *Vishaka case*[48], where judges went a step ahead to formulate sexual harassment at workplace guidelines to ensure that women can work apprehension-free until legislation came into force.

Proposals

10 After a multifarious analysis, the authors propose the following recommendations for improved execution of Cardozo's interpretation methods and for enhancing the nature of the judicial process in India:

1. Cardozo's methods seek to achieve uniformity, a dwindling concept in India. From the self-enforcement of 'mini constitutions' by *Khap Panchayats* in villages to the non-applicability of a uniform civil code- the lack of consistency and uniformity is an aspect of consideration for the Indian legislators and judges to better implement Cardozo's methods.

2. An issue crops up when the sociological method of Cardozo needs to be applied to Indian cases as mostly the judges fail to associate with the suffering victim due to a lack of shared class consciousness while they harbour quite contrasting bundles of ethical, political, and moral values. The customs and traditions of the educated 'elites' thus end up with the privilege of becoming the 'standard mores' of the society, leading to an unequal setup. Cardozo sidelined this problem as he felt that the varying moralities of different judges will cancel out each other.[49] However, the authors consider this to be a genuine

47 Vineeta Sharma v. Rakesh Sharma, 2020 SCC OnLine SC 641.
48 Vishaka v. State of Rajasthan, (1997) 6 SCC 241.
49 *Supra* note 2.

concern, especially in India and hence recommend frequent training sessions for judicial personnel to keep them abreast with the hidden happenings of the country so that they interpret their next case with a conscience, a sense of awareness, and that their decisions are not incumbent upon their personal 'mores' but rather upon the 'authentic mores' of the society.

3. India is a multilingual and multicultural nation with even different sets of laws for different sections of the society. Cardozo's interpretation techniques, in the authors' opinion, may be excessively structural and rigid in nature. Thus, it is recommended that for enhancing the application of his principles, the judges may retain a robust structure in mind, but the application of that mental structure of interpretation should be in tandem with the facts of the case and the status of the parties to eventually deliver social justice.
4. It should not be forgotten that Cardozo was an American jurist and his interpretation methods were majorly in tandem with the American legal system. A blind application of his techniques would be detrimental to Indian society. Excessive logical interpretation will compromise the judicial chance to usher in change, excessive reliance upon the historical and traditional methods would lead to unwarranted riots and disharmony between societal groups, and immoderate sociological interpretation may lead to unencumbered judicial activism and judicial legislation which would be a threat to any democracy.
5. Therefore, it is indispensable that the judges remain contextually and socially aware to effectively combine Cardozo's methods with their style of statutory interpretation.

11. Conclusion: A Culmination

It can be safely stated that the Judiciary of a nation plays a prominent role in not only upholding laws but also in delivering justice and transforming the backward mindsets of society. Thus, it becomes even more necessary for judges to choose their methods of interpretation with utmost caution. The nature of judicial processes in India has remained noteworthy, and one can easily discern the application of Cardozo's methods of interpretation: Cardozo's sociological method of interpretation seems to be put well to work in landmark cases[50] in India. As analysed in the former parts of the paper, even the logical method of interpretation has been put to use,[51] while some cases have

50 I.C. Golaknath v. State of Punjab,1967 AIR 1643 ; Minerva Mills v. Union of India, 1980 AIR 1789 ; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; Lily Thomas v. U.O.I., (2000) 6 SCC 224.

51 *Supra* note 4.

been interpreted by the judicial stalwarts through the application of multiple methods.[52] This review process's study can come to a satisfactory halt only with the mention of the *Aarey colony matter,* where the Apex Court took cognisance of the indiscriminate felling of trees in the Aarey colony through a simple petition-cum-letter written by the protesting student activists; without delving into technicalities, the Court directed the Mumbai government to stay the axing of the trees.[53] This detailed probe conducted by the authors has appropriately answered the questions raised at the beginning of the study. Cardozo's method of interpretation, though published decades ago, has still left an indelible mark upon the judges and resultantly upon their judicial decisions; *his methods have not only passed the test of time but have also morally and logically guided the judges to deliver judgments which promoted social prosperousness, benefitted the society for generations to come and assisted in the transformation of mindsets with the parallel dynamic societal changes.* In a recent hearing in the Supreme Court, Justice Arun Mishra himself decided not to recuse himself during a land acquisition case hearing,[54] which undoubtedly set a foul precedent of bias but also depicted the gasping need for a revamp of the justice system with a long journey ahead, With appropriate recommendations being considered and judges adopting the contextually correct method of interpretation to ensure social justice, it will not be long before a structured yet fluid implementation of Cardozo's methods can be executed leading to societal welfare.

52 Indira Sawhney v. Union of India, (1996) 6 SCC 506.

53 ANI, 'Big Relief': Petitioner Thanks SC for Taking Cognisance in the Aarey Matter, Business Standard (2019), (Oct. 7, 2019, 12:05 PM), https://www.business-standard.com/article/news-ani/big-relief-petitioner-thanks-sc-for-taking-cognizance-in-aarey-matter-119100700279_1.html.

54 Kaleeswaram Raj, On the Apex Court's Moral Authority, Indian Express (Nov. 1, 2019, 04:00 AM), https://www.newindianexpress.com/opinions/2019/nov/01/on-the-apex-courts-moral-authority-2055451.html.

Legal Reforms and Legal Education: The Road to Change

***Mr Saurabh Sinha**

The profession of law is very dynamic in nature encompassing within itself a wide and myriad varieties of roles and tasks to be performed requiring meticulous planning, agility, a sharp mind and constant updating for a resilient and successful career and also for bringing a meaningful change in the society.

The role which a legal professional performs are diverse, and enormous amount of resources are required including investment in human capital, financial and physical infrastructure coupled with their efficient management for the wheels of justice to move efficiently.

1. *Law and Legal Profession: The concept and perception*

Talking about law, the first things which occurs in everyone's mind is courts, lawyers and judges, a dispute between two parties which gives rise to a cause of action and an institutional mechanism through which such disputes are resolved.

Any reforms, therefore, with respect to the legal profession is always seen through the prism of Courts, and all improvements are centred around bringing about an efficient and meaningful change in the institution for better management, smooth functioning and strict administration of justice, plugging the loopholes which plague it.

Courts[1] primarily function as an institution of dispute resolution of various and myriad types and therefore the institutional set up is also humungous. There is a three-tier hierarchical structure under the Indian system with subordinate courts for each district, a High Court for each state and the Supreme Court as the head of the institution. Besides, there are also a number of specialized tribunals and commissions dealing with cases under specialized laws. For example, the Central Administrative Tribunal for adjudicating disputes related to service matters, the Consumer Commission for deciding cases under the Consumer Protection Act and the Armed Forces Tribunal for deciding disputes under the Armed Forces Tribunal Act etc.

Managing an institution as big as this with various personnel from Judges, Lawyers to Court staff is a challenging task. Legal reforms

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1 Which includes various Tribunals and Commissions

have been an agenda of all the Governments at the Centre since decades. Various policies, proposals and programs have been mooted and unveiled in the past many decades for the smooth functioning of the institution. To some extent they have been successful but largely have been unable to achieve the desired result.

Some of the major problems of Courts are as follows:

1. **Huge pendency of cases:** With a population of 130 crores, the number of cases clogging the already overburdened Courts is alarming. A very large number of new cases are filed in Courts across all levels every day, with the rate of disposal of old cases pending for disposal since decades being heavily outnumbered by new admissions, the wheel of Justice is clogged with litigants waiting for many years to see the light of the day.

2. **Low Judge to Population Ratio:** At any time, the working strength of Judges in the Courts remains low as compared to the sanctioned strength. This is complimented with a poor Judge to population ratio, a problem discussed at length from time to time as a part of judicial reforms. There are 20 Judges per 10 lakh people in the country compared to 17 in 2014. The total working strength of Judges in the Supreme Court though has considerably improved to 34. As of 01-09-2019 the total working strength of Judges in the High Courts was 665 as against the sanctioned strength of 1079. The judge to population ratio in the country works out to be 19.78 judges per million population.[2] The figure might have only marginally improved in 2019. This is abysmally low compared to 41 judges per million population in Australia, 75 in Canada, 51 in England and 107 in USA.[3] With frequent tussle between the Government and the Judiciary with respect to appointment of Judges to the Higher Judiciary[4] owing to controversies regarding to collegium system, with each side refusing to relent on any new mechanism for appointment, the appointments process becomes all the more complex.

3. **Poor physical infrastructure:** Physical infrastructure of the subordinate courts in India is in a very poor shape, and in many places in a dilapidated condition or in shambles with very poor amenities. Proper working atmosphere increases efficiency and this being absent in the subordinate courts of India, coupled with other problems as mentioned above, the efficiency level is bound to go down.

2 There are 20 Judges per 10 lakh population: Government, www.livemint.com
3 Judge-Population Ratio in India- Facts and Figures , www.alexis.org.in
4 High Courts and Supreme Court

4. **Huge government litigation:** Approximately 46 percent of the total pending cases in the courts pertains to the Government. This includes cases relating to the Public Sector Undertakings and other autonomous bodies. As per information available on the LIMBS website, as on June 12, 2017, 1, 35,060 government cases and 369 contempt cases were pending.[5]

It is alleged many times that flawed government policies or administrative excesses or a poorly drafted law forces the people to resort to the Courts to rectify the malady. Delay in accrual of benefits of various Government schemes to the intended beneficiaries, corruption in public distribution system and other maladies compel the citizens to turn to Courts who see it as their last hope for justice being delivered to them. Government litigation occupies a large chunk of cases in the Courts, and as a part of judicial reforms, there has always been an endeavour to device ways and mechanisms to reduce government litigation which are as follows:

a. Appointment of a nodal officer in every department at the Joint Secretary level to

b. Co-ordinate effective resolution of the disputes;

c. Nodal officer to regularly monitor the status of cases;

d. Avoiding unnecessary filing of appeals restricting them to important policy matters;

e. And avoiding vexatious litigation are some of the way suggested by the Government as a part of National Litigation Policy to reduce government litigation.[6]

5. **Efficient Court Management:** Adjudication of disputes is not the only work which the Courts do. Besides litigation or judicial work, there are many other types of activities which the Courts have to undertake. These primarily relate to file management, preparation of judicial data, keeping record of accrual and disposal rate etc. All these are not of a legal nature and hence would not necessarily require a law degree. This is also a huge task and presently in the absence of any supporting or professionally trained staff, the burden of this kind of administrative work fell with the Judges or their supporting staff. To tackle this problem, the concept of Court Managers was devised, where professionally trained graduates preferably with an MBA degree would assist

5 Action Plan to reduce government litigation: Department of Justice June 13, 2017, pg 5.
6 *Ibid*, pg 15.

the Court with its administration so that Judges may be able to concentrate with their core judicial work in a better manner.

On 02-08-2018, the Supreme Court directed the state chief secretaries to form panels which would ensure that each district court would have a manager armed with an MBA degree to unclog subordinate courts. Professionally qualified court managers preferably with an MBA degree, must also be appointed to render assistance in performing the Court administration.[7]

2. Prospects in law: The general concept

Primarily there are three options which a law student strives for after completing his legal education to make a successful career:

1. Enrol himself/herself as an advocate with the Bar Council and start practicing with a senior to learn the intricacies of litigation or start legal practice with a law firm. Those completing their LLB from national law universities[8] have an additional advantage of getting placed in reputed law firms or various multi-national companies to head their legal cell for managing litigation related work for the company, an advantage which is generally not available to those passing out from state universities or other central universities as these law firms or companies mostly visit National Law Colleges for placement related requirements quite similar to the IIT's and IIM's.
2. Appear for judicial service exam of various states conducted by the State Public Service Commissions under article 234 of the Constitution and become a Judge, a prestigious service which many vie for.
3. Pursue higher studies (LLM), qualify the National Eligibility Test (NET) exam conducted by the University Grants Commission twice a year and become a lecturer in any law college in India.

On a rough estimate, presuming the total number of law students completing their legal education every year both from national law and state universities and also the private law colleges to be 3500, more than 80 percent choose to exercise option 1 while only 20 percent choose the other two options of becoming a judge or a law professor.

This is because of three reasons (a) the opportunities available for the latter are not as bright as the former. In many states the conduct of judicial exams is erratic, the vacancies are not filled every year, the

7 Supreme Court asks states to appoint managers to unclog courts, www.economictimes.indiatimes.com August 03, 2018

8 The entrance examination for which is conducted through the Common Law Admission Test (CLAT)

posts advertised are very less and not sufficient to successfully clear the huge backlog or even remotely match the judge to population ratio required, the exams are many times embroiled in protracted litigation etc. (b) Many law students see practice as a more lucrative career option than becoming a judge with limited salary.

Many opine that if one establishes oneself very well in the world of litigation through persistent hard work, the salary earned by a judicial officer can nowhere match the income of a successful lawyer and since the general perception of the measure of one's success in life being determined by the amount of money which a person earns has taken deep roots, it further determines their resolve to become a lawyer. (c) The regulation of legal education, management of law colleges and framing of syllabus etc. is currently done by the Bar Council of India. Since legal work has become synonymous with Court and litigation and a legal professional is presumed to enter the bar for making a niche as a successful lawyer, the current pattern of study in all law colleges have taken shape accordingly.

From the very first year in a law college, the students are encouraged for internship with advocates to learn the intricacies of litigation, as a part of college activities moot court competitions are conducted to get an inkling of the world which they are going to enter in the future; the mind of the young student is therefore conditioned accordingly.

Assuming the percentage of students joining the Bar to be 80 out of the 3500 passing every year as described above, the figure comes to be 2800. Even if it is brought down to 2400 on the premise of an exaggeration, it is hugely disproportionate compared to the meagre 1100 exploring other avenues often due to constraints and compulsions mentioned above and at other times because of the general perception with respect to the career and choice available to a legal professional.

This has created an unwarranted imbalance in the society where one particular profession has become hugely overpopulated as compared to the demand and the numbers keep swelling every year, while others witnessing a shortfall as compared to the requirement. Also, there is a need to expand the scope and ambit of legal services and exploration of other areas which have never been hitherto thought of or given proper attention. The first requirement for this is to reframe the education and syllabus which our law colleges offer at present.

3. Changing the face of legal education

The syllabus for any stream of education should be framed according to the present need of the times, its relevance for the future and also to a great extent on the employability quotient.

In many law colleges in India, especially the state universities, many subjects which have become obsolete and will in no way help a student in his future endeavours are still being taught. For example, many law colleges in India still have Legal History as an option which gives an insight about the establishment and working of Courts during the British rule and also the post-independence period. The subject is not only dry which many students study out of compulsion just because it has been thrust upon them, it also has no relevance in making a successful career either at the Bar or the Bench.

Similarly, Jurisprudence which is the backbone and the foundation of law is taught in the first year of most of the law colleges in India. It contains certain special and basic principles of law, the understanding of which is absolutely essential for every legal professional for laying a strong foundation in later years of life. But like legal history, many students also dislike this subject and just want to clear it by mugging up everything without an intent to understand.

This is primarily because it contains two parts. The first is legal thought which contains the views of different legal philosophers like Savigny, Henry Maine, and Hans Kelsen etc., about the general definition of law and their legal thinking and philosophy. The second part contains elements of Jurisprudence like the definition of rights and duties and their relationship to each other, difference between ownership and possession, judicial precedents, legal personality etc. While the study of the latter is essential, it is the former which troubles the students makes them disinterested towards the subject. It also needs to be clarified that the study of legal philosophers is not relevant for any future legal prospects or even for the purposes of seminars or any other academic activities. Hardly have any of these philosophers found mention in legal articles published in various newspapers or any other legal journal in the recent years. It is therefore necessary to reframe the syllabus accordingly. The second part need to be severed from the first. As a subject in law colleges, only the second part i.e., elements of jurisprudence should be taught and the part related to legal thinkers need to be struck off. This will not only be a progressive step in making the subject more important and relevant, it will bring respite to hundreds of law students across the country.

Further, as mentioned above, the syllabus for law colleges is framed by the Bar Council of India which makes it heavily tilted towards making one a successful lawyer. Many subjects which hold considerable relevance for other career options as well are never taken into consideration while framing the syllabus. For example, each state has a Rent Control Act and is part of the curriculum of the judicial service exam of all the states, but is not taught as a subject in most law colleges of India. Similarly, many local laws of the state like the

Consolidation of Holdings Act, the Municipalities Act etc. are also the part of such competitive exams but absent as subject in law colleges. There needs to be created a fine balance in teaching subjects which provide diverse and a wide array of career opportunities and opens and widens a law students mind towards foreseeing a wide variety of career opportunities to attain legal excellence.

New and emerging laws like the Information Technology Act, 2000, Competition Act, 2002 and Intellectual Property Laws[9] do not find a place in the syllabus of many law colleges. They are offered as specialized subjects in some colleges as degree or diploma courses. The syllabus needs to present a semblance of the traditional and the new to make it more dynamic.

4. Legal Profession: The paradigm shift

There needs to be a paradigm shift in our thinking while talking of law reform proposals. They should not be confined or restricted to courts only.

A major area of thrust which needs our attention but has never been thought of is the changes that are needed to be made in legislative drafting or the way our laws are presently made.

Since law making is a prerogative of the Parliament and State legislatures, it therefore comes within the domain of the legislature. The need for drafting and reframing our laws is so dire and comprehensive that a separate reform proposal can be mooted to include legal education and professional opportunities as a part of the proposal.

The drafting of our laws have carried a legacy tag inherited from the Britishers which is followed till date. The language of legislations is complex, verbose and often too difficult for the common man to understand.

Primarily, the following are the major changes required in legislative drafting:

1. **Change in language:** All the legislations contain complex language, the title reflects uncertainty, contains longer sentences, and are drafted in negative expressions.

The language of the title of an Act for example, defined in section 1 of any statute reflects uncertainty as if the drafter has any doubts or lack of confidence about the name of the legislation. The Right to Information (RTI) Act in section 1 has been named as follows:

9 Copyright, Trademark and Patents Act are not a part of many law colleges in India, though in some it is included in the syllabus.

1. Short title, extent and commencement- (1) This Act may be called the Right to Information Act, 2005.

The use of the expression "may" raise doubt over the name of the Act.

It should have been drafted as- This Act is the Right to Information Act, 2005. This is a more positive affirmation confirming certainty.

Making the language simple and brief wherever possible- The statement of objects and reasons behind the enactment of a legislation is often very long and written in complex language which can be simplified. The box below illustrates the original and redrafted statement of objects and reasons of the same RTI Act

Original Enactment

An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith and incidental thereto.

Redrafted

An Act to promote transparency in governance by making information accessible to citizens through public authorities and by setting up a Central and State Information Commission for furthering the aim.

Negative expressions: Section 82 of the Indian Penal Code exempts a child under seven years of age from any criminal liability. The section has been drafted as follows:

82. Act of child under seven years of age- Nothing is an offence which is done by a child under seven years of age.

The section denotes a negative expression which cannot be logically justified. It should have been drafted as "An act committed by a child under seven years of age is not an offence".

2. **Minimizing References:** Incorporation by reference is a drafting technique for providing that a legislative text includes material (text, information concepts) expressed elsewhere. The material is not only referenced, it is also incorporated into the text. It has the following disadvantages:

a. The law is fragmented between legislative text and incorporated text published elsewhere, particularly when the incorporated text contains successive references to other texts.

b. It might be hard to obtain the incorporated material, particularly if there are multiple versions

c. The incorporated material may not be in the official language.[10]

It often happens that a section of a legislation contains a reference to another section in the latter part of the legislation or any reference to another section in a different statute for which one might have to turn the pages or refer that statute for making a logical sequence.

For example, section 82 of the Code of Criminal Procedure, (CRPC) 1973 provides for proclamation of the person absconding and clause (4) of the said section contains a reference to many sections of the Indian Penal Code under which, if an accused commits an offence under those sections, he can be declared a proclaimed offender by the Court.

It reads as follows: Where a proclamation published under sub-section (1) in respect of a person accused of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect].

The section contains many references to the Indian Penal Code and a person going through CRPC may have to pick the IPC to know what those offences are.

The best way to deal with the problem of references is to quote the text of the sections referred in the original statute by providing a footnote in the printed or the online version of the statute if it is available in pdf or word format or provide a link to those sections if it is available in html format.

This will not only be convenient and for the lawyers or judges who have to refer the statute as they may not have to carry multiple statutes while arguing a case, it will also save time.

4. **Sunset clause:** A sunset provision or clause is a measure within a statute, regulation or other law that provides that the law shall cease to have effect after a specific date unless further legislative action is taken to extend the law.[11]

All major laws in India were enacted during the British regime and hence many provisions in many statutes have become redundant with the passage of time.

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10 T.K. Viswanathan: Legislative Drafting- Shaping the Law for the new millennium, pg 121,123

11 www.en.wikipedia.org

Section 303 of the Indian Penal Code was struck down by the Supreme Court in Mithu Singh vs. State of Punjab[12] as being violative of Article 14 of the Constitution as it discriminated between persons committing murder in normal course and while under sentence of life imprisonment under the said section with death penalty being the only provision in the latter case.

The court opined that the section proceeds on the assumption that life convicts are a dangerous breed of humanity as a class but the assumption is not supported by any scientific data.

In State of Punjab vs Dalbir Singh[13], the Supreme Court struck down section 27 (3) of the Arms Act, 1959 as it provided for mandatory death penalty.

The bench said: "This is a very drastic provision for many reasons. Apart from the fact that this imposes a mandatory death penalty, the section is so widely worded to the extent that if, as a result of any accidental or unintentional use or any accident arising out of any act in contravention of section 7, death results, the only punishment, which has to be mandatorily imposed on the person in contravention is death. Therefore, the provision of section 27 (3) of the Act of violative of Articles 14 and 21 of the Constitution."

Despite the Supreme Court declaring mandatory death penalty as against the Constitution, it still finds a place in part 2 of section 307 (Attempt to murder) of the Indian Penal Code which reads as follows:

Attempts by life convicts- When any person offending under this section is under the sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.

In the absence of any sunset clause in the legislation, this draconian section still finds a place in the code despite the Law Commission of India recommending its repeal in its 156th Report, 1997.

There are many other minor and major changes which a legislation needs before it finally comes out from the law making house. It cannot be done unless the services of certain specialised legal professionals are taken to change the way our laws are being currently drafted.

Unfortunately, reforms like these have never been thought of or initiated.

It needs to be mentioned and emphasised that drafting a law is an academic exercise and therefore requires a very different set of skills from those required to master the art of litigation or sharpening the skills of lawyering.

12 AIR 1983 SC 473
13 Criminal Appeal No 117. of 2006

Despite being the work of a legal nature it has no relation, even remotely to litigation.

Drafting is an extremely onerous and highly skilled task and only those who have essayed it can appreciate how hard it often is to express exactly in words what is clearly in mind. It is common knowledge that a man is not necessarily a good draftsman merely because he is a lawyer or a Judge.[14]

Drafting a law is very different from drafting any document meant to be presented before the Court[15], while the latter requires lawyering skills, the following are the requirements to master the former:

1. Command over law
2. Good knowledge and command over English
3. Decent research skills
4. Knowledge and in depth understanding of policy issues and current affairs with an ability to analyse the same from multiple angles.

Law making is an academic exercise not related to court related work.

To take a step towards this paradigm shift therefore the following major steps need to be taken:

1. Create a separate cadre of law officers who can be recruited to draft and suggest changes in law. The qualifications for such candidates should be a degree in law from any recognized University.
2. Under the Constitutional scheme of things, legal profession has been provided under Entry 26 of List III of the Seventh Schedule[16], therefore both the Central and State Government have concurrent powers to legislate. The recruitment to such service should therefore be done under the said entry read with Entry 70 of List I by the Union Public Service Commission or even by the States under Entry 41 of List II by the Public Service Commission of the State, or alternatively the recruitment can be done by National or State Legislative Drafting Regulatory Authorities as described below. The candidates selected through this recruitment should be accorded protection under Article 311 of the Constitution.

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14 *Supra*, note 12, pg 67.

15 A plaint, written statement, writ petition or simply an application under any provision of any law. For example, an application to set aside an ex-parte order under Order IX, Rule 13 of the Code of Civil Procedure.

16 Concurrent List.

3. After selection, on the pattern of State (situated in any city of the State or the capital city generally) or National Judicial Academy (Bhopal), the Government should be set up State or National Legislative Drafting Academies where the selected candidates should be trained in the art of legislative drafting from domain experts as a part of induction programme and refresher courses from time to time. It needs to be mentioned that in the adversarial system as ours, courts are the chief architects of dispute resolution between two persons or a person and a state or between two states. Hence litigation involves resolution of the dispute through the instrumentality of the Courts. Enactment of legislation, on the other hand does not involve dispute resolution, but its primary aim is to resolve the general societal problem emanating from policy issues. Legislation is generally the result of and emanates from policy planning and involves a lot of research activity. Therefore, policy planning and research skills should essentially be taught as a part of the induction programme.

4. National and State Legislative Drafting Regulatory Authorities (LDRA) should be set up in the country which should Act as a regulator for these officers including determining their conditions of service, promotion, salary, post-retirement benefits, initiating disciplinary action etc. The Authorities should consist of the Director of the National Judicial Academy, Bhopal and a former Vice Chancellor of the National Law University or any other Central University where such Legislative Drafting Regulatory Authority is situated as the ex-officio Chairman respectively. It should consist of four other members two of whom should have been a professor in a law college[17] and two IAS officers having a law degree and having law as an optional subject in their civil services exam. All the four should be ex-cadre posts. Of the four members, two should be women. The members should be appointed for a period of five years with no provision for re-appointment. National Legislative Drafting Regulatory Authority should have its headquarter in Delhi, and the State Authorities at such place which the State Government might determine.

5. Since Bar Council of India rules do not permit professing any other avocation while practicing, those candidates who have enrolled themselves at the Bar should get their enrolment cancelled after selection in this service and get registered at the Legislative Drafting Regulatory Authority.

6. The selected candidates should start their career as Under Secretary (Legislative Affairs), and after regular and timely promotions, may reach up to the level of Secretary.

17 National or State

7. A separate Act called the "The Legislative Drafting Officers (Conditions of Service Act) along with Rules" should govern such officers and should be separate and severed from the Advocates Act, 1961 and the Bar Council of India Rules.

5. *Legal Education: Continued*

Presently since the standards of legal education, syllabus and recognition of law colleges in the country is within the domain of Bar Council.

To expand the scope of legal education and legal profession, therefore, the Legislative Drafting Regulatory Authority should also be empowered to grant recognition to the law colleges where students are trained in the art of legislative drafting and encouraged to take up legislative drafting as a career after completing their legal education.

On the pattern of National Law Universities (NLU), National Legislative Law Universities (NLLU) should be set up, and granted recognition by the LDRA. The authority should also be vested with the power to frame the syllabus. The admission to such colleges be on the basis of Common Law Admission Test-Grade II (CLAT-II).

Thus there should be two categories of law colleges in the country, viz. the NLU which are already existent and the NLLU. A student after completing his school education can exercise the option of appearing in both and thus may have a wider choice to study law from two different perspectives and shape his career and future life accordingly.

Besides the drafting officers selected through the competitive examination, the NLLU should also offer its students the opportunity to get placed in "Legislative Firms" which should be set up in country as a part of legal reforms programme. These Legislative Firms should be set up in the National Capital, all the State Capitals, and all the districts in the country with a population of over 35 lakhs with the number of legislative firms varying from one to five depending upon the population of the district. It should be headed by a chairman who should be a former Vice-Chancellor of any Law College in India. Those unable to qualify the legislative drafting exam conducted by the Union or State Public Service Commission or the LDRA, should get placed in these legislative firms through campus placements in NLLU.

The Legislative Firms should be registered with the LDRA and those working in it should be enrolled as Legislative Draftsmen/Drafter, a recognition granted by the LDRA. To distinguish between those who qualify the competitive exam and those who work in Legislative Firms, the former should be enrolled with designation as Legislative Officers with name and designation changing with each promotion and the latter should be enrolled as Legislative Draftsmen/Drafter.

The Legislative Firms should serve as a back up to the Government on drafting of laws, and as an advisory body on policy issues.

There should be various designation of draftsmen in these firms with designation changing with experience. The career should start with Legislative Drafting Associate, and with experience change to Additional Drafting Associate, Senior Drafting Associate with Drafting Director as the head.

Besides draftsmen, the firms should also engage research associates picked up from these NLLU's and handed over the task of research work for drafting laws. Like the Drafting Associate, career for research persons should start with Research Associate and go up to the post of Research Director with experience.

The salary for the persons working in Legislative Firms should be reasonably decent and start at Rs 50,000 for the lowest rung of personnel under each category with a 15 percent increase with each level of hierarchy. The Drafting Director and the Research Director should get a salary of 2, 25, 000 per month. The Drafting Director and Research Director should get HRA of Rs 45, 000 per month and others an HRA of 30, 000 per month with a ten percent revision every second year.

The working hours in these firms should be decent and not too demanding with not more than eight hours of working per day.

The salary for persons working in these firms should be subject to revision every five years.

The syllabus for the NLLU should be framed by the LDRA. While retaining the major papers substantive and procedural law taught in the NLU and other state or central universities and private law colleges, the thrust should be on legislative drafting and other nuances and tips needed for a successful legislative enactment.

In the final year of NLLU's, students should be taught all the aspects with respect to the drafting of a legislation from the statement of objects and reasons to the repeal and savings. As a part of the examination, students should be asked to draft a comprehensive law on a subject on which they think a legislation is needed.

The following papers should be taught in NLLU's:

1. Indian Penal Code
2. Code of Criminal Procedure
3. Code of Civil Procedure (with Limitation Act)
4. Companies Act

5. Easements Act
6. Evidence Act
7. Constitution of India
8. Contract Act (with Sale of Goods Act and Partnership Act)
9. Jurisprudence (only the essential elements of jurisprudence)
10. Principles of Statutory Interpretation
11. Law of Torts
12. Information Technology Law
13. Intellectual Property Law (Copyright, Trade Mark, Patents and Geographical Indicator of Goods Act)
14. Family Law
15. Environmental Law
16. Principles and Techniques of Legislative Drafting
17. Rent Control Law[18]
18. Arbitration and Conciliation Act
19. Transfer of Property Act
20. Land Acquisition Act.
21. Competition Act
22. Insolvency and Bankruptcy Code

The course at the NLLU should be five-year integrated course after intermediate and should be called as LGP&R which is the acronym for Law, Governance, Policy and Research. The first two years should be dedicated to teaching principles of public policy and governance, policy making and the art of mastering and analytical assessment of current issues both national and international from a socio-legal perspective and principles of legal research techniques. The next three years should be dedicated to teaching law with the subjects mentioned above.

As a part of their internship, from the first year, the students should get an opportunity to work in legislative firms, the legislative wing of the law ministry of the central or state government or the parliament or legislative assembly of the state. It will help them in learning the practical aspects of legislative drafting while mastering the theoretical aspect in the college.

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18 The Law of the State in which the NLLU is situated

Like moot courts in law colleges, the National Legislative Law Universities should also organize state and national level law making competition.

In the existing law colleges also, the students should be made aware about the NLLU's the wider career prospects in the legal field and should be given an option to choose legislative drafting as a paper in the final year and an opportunity to intern in the Legislative Firms. The art of mastering legal research skills should also be taught in these colleges.

6. Education as a brand

The career prospects of a student in any field of study including law as mentioned earlier, depends to a large extent on the college in which the student has got his education. While students of the National Law Universities have a brighter opportunity of being placed well in their careers, the same is generally not available to other state universities.

This is because just like the consumer market, ironically, education also carries with it a brand value. Those studying in premiere institutes with a tag of brand attached to it are deemed meritorious while those in state universities or other smaller cities are at a disadvantageous position and suffer in life. Companies never come for placement in these colleges irrespective of the pool of meritorious candidates that it might produce and as a result the students from these colleges have to struggle more compared to their counterparts from premiere institutes or private colleges.

There seems to be a deemed understanding and presumption that students of premiere institutes are intelligent and meritorious while their counterparts from state universities or degree colleges in smaller towns or villages are not just because they have the disadvantage of studying at that college. Individual merit and competence is disregarded completely because of this erroneous perception.

It is unfortunate that society has stratified the student community according to the educational portals they came from. Our students must feel they come from the same high portal and belong to the same pedigree. Youth needed universal education at world standards, not isolated oases of excellence. The whole education sector must become a single vast oasis.[19]

To cover this lacuna there needs to be a massive awareness programme with an aim to create a parity in educational institutions across all streams of education. Industry experts should be called and made aware of this problem. Companies should visit all law colleges

19 Lt Col K. Gopinath (Retd): The Coup: India Missed, pg 190.

in the country for placement and pick meritorious students after conducting interview.

With respect to the NLLU, interview of final year law students should be conducted for placement in the Legislative Firms. Those qualifying the legislative drafting exam after getting placed in these firm may be at will to leave the firm.

Students of other law colleges in the country may also get an option to apply for these firms through a common online portal and should be called for interview irrespective of the college from where they have studied. After testing the suitability of the candidate through interview or written test or both, the Chairman in consultation with both the Directors may be at will to post the candidate at any of the Legislative Firms in the country.

7. LLB as a post graduate degree

In the traditional stream of courses after intermediate, viz B.A., B. SC and B. Com, are considered as graduate degrees and any person completing these courses is considered as a graduate.

Any course which a candidate pursues after graduation is a PG course. Thus, M.A., M.SC and M. Com. are post graduate degrees. A student generally acquires a PG degree in five years after school education i.e. three years for graduation and two years of post-graduation.

Even in professional courses like management and computer application the PG degree is conferred after five years. Three years for BBA or BCA and two years for MBA or MCA.

However, this is not the case with LLB. In national law colleges and private universities there is a five-year integrated law course where a student is free to choose his stream of education for the first two years viz BA, BBA or B.Com. with the next three years reserved for law.

In other state or central universities, getting a law degree requires six years which can be acquired only after completing a graduation course of three years.

Despite pursuing education equivalent to other streams of education in terms of the number of years, a law degree is still considered a bachelor's degree and a law graduate without having a master's tag.

He has to complete two more years of education for pursuing LLM to get that recognition. Thus, to earn a master's tag, a legal professional needs eight years of education in state and central universities and seven years in national law colleges. Some colleges have now started offering a one-year LLM course but it still requires an extra year.

This distinction is beyond comprehension and places legal professionals at a very disadvantageous position in sectors where a PG degree is required for any job.

To overcome this lacuna, LLB should be considered as a PG degree retrospectively in all law colleges. In national law universities and private colleges, the integrated course should be considered as a post graduate course with retrospective effect.

Those who have already completed one year or two-year LLM course should be recognized as double or special PG.

Legal education in the country has since its inception followed a single track with deep rooted perceptions and notions. No revolutionary or major steps have been taken to usher in a complete change. Legal reforms and prospects in law therefore, have also been centred on the same line of thinking.

Taking up law as a profession has thus been restricted to doing court or litigation related work. This single-minded focus has put a brake on any innovative and practical thinking towards expanding the scope of law as a profession and widening the horizon of law professionals. It has also deterred any innovative thinking. As a consequence of this thinking, there has been a great disbalance in the legal services. While one sector is over populated and is constantly surrounded with problems, the other, where there is a huge potential and scope has never been explored. The time has come for some real introspection and meaningful legal reforms.

The Practice of Inter-Country Adoptions in India – A Long Way to Legal Reckoning?

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Abstract

This paper analyses the practice of Inter-Country Adoption and why the existing legal framework is not enough, and demanding an update to the mark to encourage this practice, which might brighten the future of lakhs of deprived children.

Inter-Country Adoption is currently developing as a blessing for the deprived and destitute children, who might have had to spend their lives in orphanages, had this practice not getting prevalent in the recent past. This practice has come as a ray of hope for the children, who otherwise have to spend their whole life in orphanages and child care homes, with nearly negligible life prospects.

Counted as one of the developing countries in the world, India still does not have appropriate legislation to deal with Adoption itself, let alone Inter-country Adoption. Countries like China and South Korea have advanced to the level that they have express laws dealing with the intercountry adoptions, but India is yet to reach that level, with the existing legal framework turning into an extra-protective rule forcing the law to be in more of a harmful law, with dwindling positive approach.

With the appropriate legal recognition to the guidelines, missing from the action to even those rules which have been propounded by various courts, these guidelines don't seem to have much effect in reality, as the guidelines are silent on various issues related to the child as well, for which detailed legislation governing Inter-country Adoption is the need of the hour.

1. Introduction

The process of adopting a child that belongs to a foreign nation is often referred to as "Inter-Country Adoption of International Adoption". It includes the process where a child is not national of the country of which a couple or any individual belongs, who want to adopt that child, and this process is transnational, under which that individual or couple get legal recognition as parents of that child. The to-be parents

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must fulfil all obligations laid on them of the country to which they are resident along with those to which the adopted child belongs. An example can be taken where a child who is English but has been adopted by Indian parents, then, it is necessary that the child must have renounced his country of birth or the original country and then, he will become the national of that country, of which his parents are citizens of.

However, what is to be noted here is that in a big country like India, there is the absence of any law which deals with inter-country Adoption. For a definition, Section 2(18) of CARA's guidelines[1] laid down in the year 2015[2]can be referred to, which defines Inter-country Adoption as below:

"Inter-Country Adoption is the process of adoption of a child or children by persons having the status of Non-Resident Indians or Overseas Citizens of India or Persons of Indian Origins or Foreign Nationals."

Basically, under this type of Adoption, there is necessarily an alteration in the resident country of the child, irrespective of the citizenship which is held by the parents who are following the process of Adoption. However, International Adoption is quite different as the residence of parents who are adopting the child may or may not be the nation from which the child resides.[3]Further, this follows an extreme type of Adoption, which is more of like Adoption by a "stranger" and is different from relative Adoption.[4]

The term Inter-country Adoption denotes the following general denotations under New Brunswick:

- Any child belonging to another country is adopted by an individual or couple;
- Any child who is a resident of any other country and is relative is being adopted by an individual or a couple; and
- Any individual or couple who belongs to any country outside Canada adopts a child from NewBrunswick.

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1 Central Adoption Resource Authority, (Ministry of Women & Child Development, Government of India), http://cara.nic.in/ (November 21, 2020, 10:00AM).

2 Adoption Procedure, Chapter-I, Preliminary, The Guidelines Governing Adoption of Children, 2015 (November 22, 2020,4:05pm)http://cara.nic.in/writereaddata/UploadedFile/NTESCL_635760082361561985_english%20guidelines.pdf.

3 UNICEF (United Nations Children's Fund International Child Development Centre Florence), "Inter-country Adoption", Innocent Digest, (Nov 22, 2020, 4:05pm) https://www.unicef-rc.org/publications/pdf/digest4e.pdf.

4 Elizabeth Bartholet & Lori Askeland, Children and youth in Adoption, Orphanages and foster care", (Greenwood Publishing Group Inc., 2005).

When the permanent parents of a child are not his or her birth parents, but the parental obligations are fulfilled not by parents who gave birth but by parents who have adopted the child, then this process is known as Adoption in the general sense. Similarly, when the child who is to be adopted is moved to the country where the individual or couple who wishes to adopt that child is national, then in the general sense, it is called International Adoption.[5]To be explained more, the procedure where the birth-giving parents of a child are absent, and there is another family who wants to adopt that child, somewhere in a developing country, while children being in such condition which needs Adoption, then this practice is termed as Intercountry Adoption which includes all category of children from infants to young.[6]

Further, while considering in a hypothetical nature, the term Inter-country Adoption has been adduced a definition under a State Statute, which states that it is the process where a child is born in a foreign country for whom a "special immigration visa" is made available by countries, having a federal structure. It further lays down that the process of Adoption has to be finished in the country which is the residence country of that child. Going into further clarification, it is provided that where the domicile of a child is changed by moving to a country which is a country of domicile of that individual or couple who is the prospective parent of that child. Moreover, the process of Adoption can be completed anywhere between the two countries- the country of which the child is a habitual resident or the country which is the residence of adoptive parents.

2. International Legal Framework covering the Rights of Adopted Children

Different Regulations and Provisions which form part of several International Instruments provide for the adopted child's rights, and some of these instruments are as provided:

i. The Geneva Declaration on Rights of the Child in1924

ii. Declaration of the Rights of the Child adopted by the UN General Assemblyon November20, 1959.

iii. DraftGuidelinesofproceduresconcerningInter-CountryAdoption.

iv. The Hague Convention of 15thNov.1956.

v. The United Nations Declaration on social and legal principles adopted by the UN General Assembly on December 3 1986.

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5 Child Rights International Network, (Nov. 18, 2020, 10:50 AM), https://home.crin.org/.

6 Scott Christian, Inter-country Adoption, UPEACE (Nov. 18, 2020, 11:00 AM), http://www.lawreview.upeace.org/index.cfm?opcion=0&ejemplar=25&entrada=96.

vi. The United Nations Convention on Rights of the Child, 1989.

vii. The Hague Conference on the Private International Law, 1992.

viii. The Hague Conference,1993.

3. The Hague Convention on the Inter-country Adoption[7]

Better known as"*Protection of Children and Cooperation in respect of Inter-country Adoption*", the process of legal recognition to this convention started in the year 1993, and to be very specific on the 29thday of May 1993, but this Convention only became officially enforceable on the 1stday of May 1995.

Important provisions which find their place in the Preamble of the abovementioned convention and are concerned with the rights of the child under Inter-country Adoption are givenbelow:

a. A familiar atmosphere has to be provided to the adopted child, which must lead to the harmonious and all-around development of the child. Further, the Environment of the Family should be such as to be full of love and care.

b. Necessary steps should be implemented by State to make sure that the child could remain under the supervision of the parents or family who are his or her original guardian.

c. Any child who does not have a family or whose origin of the family is untraceable can be provided with a permanent family through Inter-Country Adoption, which helps in countering abducting and trafficking of such children, thus, taking care of their fundamental rights, which is always in best interests of that particular child.

The standards laid down under The Hague Convention that provide that there should be the presence of proper consent are substantial and ethical, laying down specific standards of Adoption.

These guidelines call for three prerequisites to be fulfilled, which are provided as follows: -Firstly, there should be proper and valid consent on the part of parents who gave birth to the child, along with the obligations related to custody as well as rights of the adopted child, which has to be preceded by providing of instructions and awareness to the parents regarding extinguishment of a legal relationship shared by the child and his or her family.

Secondly. There should be an absence of inducement in connection with any type of monetary benefit.[8]

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7 The Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980.

8 *Clause 25* of the draft guidelines by the Economic and social council of the UN.

Thirdly, there should be the presence of free consent, which must have been an expression in written form along with evidence and prescribed legal form.[9]

4. The legal framework governing Inter-Country Adoption in India

It is pretty evident that where under Law of any state, there is vagueness as regard to any matter in the State or society, then, the need for welfare law on that matter arises, and it would be in the best interests of the society that a particular matter is regulated by law. The task of fulfilling this need as per the concept of Separation of Powers has been conferred on the Legislative organ of the State i.e., Parliament and Legislative Assemblies, which have a vast and crucial task to enact laws on those matters which are ambiguous or there is no certaintyin their nature. The role of the Legislative organ of the State is very crucial as its role comes into play before the formation of law while the role of other organs of the State comes after the Legislative organ enacts that law as regards thatmatter.

Focusing on the issue of inter-country Adoption in India, Legal System is silent on this matter. However, an indirect reference can be seen under the Guardianship and Wards Act, 1980.[10]It is pertinent to note that even this particular Act does not have any direct reference to the concept of Inter-country Adoption, better referred to as ICA. Therefore, the actual scenario regarding ICA is not visible from these laws, and thus, to make this scenario clear and visible, it is necessary to apply some efforts, which are yet to be made.

Considering the importance of not only the rising popularity of the concept of Adoption but also the acceptability of ICA, two of the very important bills were put in Parliament. Given below are particular efforts by the Legislative organ of the State i.e., Parliament.

4.1 Protection under the Constitution of India

The Constitution of India is the Parent law for the state of India and it has provided for utmost importance to the betterment and all-round development of children, which can be inferred from various Articles of the Constitution. While Clause (3) of Article 15[11]confers power on the State, which can enact laws proving for special treatment of children, Article 23 acts as a deterrent by prohibiting trafficking and forced labour. Further, Article 24 safeguards the rights of children by laying down criteria for employment of children, which explicitly prohibits the employment of any child below 15 years of age.

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9 *Id.*
10 The Guardianship and Wards Act, 1890, No. 8, Acts of Parliament, 1890 (India).
11 Indian Const. 1950 Article 15, cl.1.

Clause (e) and (f) of Article 39[12]are other provisions of the Constitution of India, which cast a duty on the State that its policies should be directed towards protection, betterment, and securing them, thus, preventing any type of abuse and making them sufficient able to develop in a healthy manner, which will help them in securing against exploitation.[13]

4.2 Historical Reference and Judicial Interpretation of Inter-Country Adoption in India

Adoption as a concept or practice is not new to India, and it is a practice that has been prevalent in Indian societies for years immemorial. It finds its mention even in Smritis Literature, where it has its basis in Parents and not in child and it was a suggestion by Smritikaras that Adoption of only one son is permitted and that too just because that family lineage has to be maintained and continued, while oblations can be offered to deceased ancestors. Dharmashastras are a bit more explanatory regarding Adoption as they provide for criteria that need to be fulfilled for adopting a son and according to them, the process of Adoption means that a son is moved to an adoptive family as precisely as possible it is a natural son. However, with the codification of Hindu personal laws, the Hindu Adoption and Maintenance Act of 1956, purely governs the practice of Adoption in Hindus.

Nevertheless, the conception of ICA is still new in the Indian perspective and will take time to be a familiar concept in Indian society. While examining the concept and legality of ICA, in a well-known case,[14]The Hon'ble Supreme Court of India established a set of guidelines to be treated as authoritative in disputes related to ICA.

The Court, while emphasizing the protection of the child, observed that the main object of the child to be provided in Adoption is the protection and utmost care of the child by the foreign parents. Moreover, it has to be supervised that neglect of child or abandonment of child does not occur and that the child should not be morally or sexually abused or is being used for experimental purposes or child labour. Therefore, the Highest Court of the land also laid down certain requirements to be fulfilled in the case of ICA.

At the onset, Court laid down that it is mandatory for any foreigner who wishes to adopt a child to be obtained a certificate from a Social or Child Welfare Agency, which has recognition by the Government or has a License to issue certification in the country, where the foreigner ordinarily resides. Any direct application is strictly prohibited.

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12 Indian Const.1950 Article 39, cl. (f).

13 Law Commission of India, Inter-Country Adoption, Report No.153, August 1994, (Dec. 2, 2020, 12:00PM), https://lawcommissionofindia.nic.in/101-169/Report153.pdf.

14 Laxmi Kant Pandey v. Union of India, AIR 1984 SC 469.

The Court, while laying down relevant guidelines, further stated that: -

"Since there is no statutory enactment in our country providing for the adoption of a child by foreign parents or laying down the procedures which must be followed in such a case, the resort had to be taken to the provisions of the Guardian and Wards Act, 1890 to felicitate such adoption."

The Bombay High Court examining the same issue *In re Jay Kevin Salerno*[15]stated:

"Where the custody of a child is with an institution, the child is kept in a private nursing home or with a private party for better individual care of the child; it does not mean that the institution ceases to have the custody of the child."

Thus, it can be inferred that the Supreme Court has taken up its role very well and has laid down explicit guidelines to deal with cases of ICA, while there have been no provisions to this effect.

Still, A lot was yet to be recognized at a global level, and this was fulfilled with India signing the "Hague Convention on Intercountry Adoption, 1993" on January 9, 2003, and soon after, keeping in mind that the cooperation has to be increased and strengthened at international level ratified the Convention June 6, 2003. Now, the rules which govern the further implementation are according to Laws implemented by the USA, the Intercountry Adoption Act of 2000 (IAA), and its rules, along with Indian Laws and Regulations. Ministry of Social Justice and Empowerment is the highest body at the Administrative level while the Authority at the Union level is an Autonomous body as Central Adoption Resource Authority (CARA), falling under the aegis of the Ministry of Women and Child Development. All the procedures related to In-Country adoptions or Inter-country Adoptions are governed by CARA with the help of its authorized agencies.[16]

A National Policy for Children was formulated in the year 1974, which mandated the present Ministry of Women and Child Development to make laws dealing with the issues of children, which includes the protection, care, and welfare and the most significant step in this direction was the enactment of The Juvenile Justice (Care and Protection of Children) Act, 2000. Under this law, an alternate way of care was provisioned for the child as 'Institutional Care.'

15 In Re Jay Kevin Salerno, AIR 1988 BOM 139.
16 Laxmi Kant Pandey v. Union of India, AIR 1984 SC 469.

4.3 Legal Yardstickfor Foreign Prospective Adoptive Parent/ s(FPAP)

Following are the requirements which need to be fulfilled before adopting a child:

- Firstly, the couple who are adopting the child must be married for at least five years, in which the marriage should be stable, along with the conditions that the economic and health condition should be stable as well as per the Home StudyReport.
- Secondly, Those parents who wish to adopt a child, and their united age is 90 years or is less than that. However, with none of the parents crossing the age of 55 years, then, they are very much eligible for the Adoption of infants and toddlers and the exception to this rule is that where the above mentioned first condition is good as per Home Study Report, then, child of older age as well as child who requires special care and protection, can be given for Adoption, for which reasons have to be recorded in the Home Study Report.
- Thirdly, those persons who are Single, which means, they have either been unmarried or have got a divorce, or even when they have become widowed, but with age, not more than 45 years, are duly eligible to apply for Adoption.
- Fourthly, the difference in age between the single parent and that of the child who has to be adopted has to be a minimum of 21 years.
- Fifthly, the person who wishes to adopt must have a minimum of 30 years of age and a maximum of 55 years of age.
- Sixthly, A parent can only go for Adoption for a second time when the process to adopt the first child is legally fulfilled.
- Seventhly, those parents married under Gay Marriage are not eligible to apply for Adoption in India.

There is another landmark case of *In* ***re Rasiklal Chhaganlal Mehta,***[17] where the Apex Court pointed out to Courts in India, that while deciding on any issue related to ICA, it must necessarily refer to the principles forming part of the "*Report of European Expert Group on Inter-Country Adoptions organized jointly by the European Office of the Technical Assistant Administration, United Nations, and International Social Service*", and only after analyzing the facts of the case in light of the above-mentioned report, should proceed to pass a judgment.

Further commenting, Apex Court held that it is the responsibility of The Court that it must establish and satisfy itself that the laws of

17 Rasiklal Chhaganlal Mehta v. State, AIR 1982 Guj.193.

concerned states have been duly followed while adopting the child, and whether the adoptive parents have fulfilled all requisites laid down by the Supreme Court. Court further held that if this is not ensured, it will give rise to an abortive adoption which means it is not valid in any of the countries or a limping adoption, where the recognition to the Adoption has been granted by one country and not another and thus, it would lead to the child being helpless and this condition, at any cost must be avoided.

Later with more advancements, by Jan. 2011, New Regulations for the process came into force

and it made mandatory that the foreign parents who are adopting a child must know all the laws of India which govern ICA and thus, laid three main legislations for the process i.e., the Hindu Adoption and Maintenance Act of 1956, the Guardians and Wards Act of 1890, or the Juvenile Justice (Care and Protection of Children) Act of 2000.

In a case, Bombay High Court came forward to lay down certain guidelines dealing with inter-country Adoption, which had to have application as according to the guidelines laid down in the year 2011:[18]

i. *All the concerned Agencies viz RIPA, Specialized Adoption Agencies, SARA, ARC, AFAA to scrupulously follow the Guidelines which have been laid down in 2011*

ii. *Though there is no specific number mentioned in the Guidelines as to the number of Indian parents to whom the child should be shown, within 3/4 weeks, the child should be shown to as many Indian parents as possible and, secondly, at a time, the child should be shown only to one parent and not the multiple numbers of parents as has been done in the present case.*

iii. *Only if the child is not accepted by Indian parents and the Adoption Agencies on account of their experience concluded that the child is not likely to be taken in Adoption by Indian parents then, in that case, it should be shown to foreign parents.*

iv. *When the child is shown to the foreign parents, it should be shown in the list of priorities which are mentioned in the said Guidelines.*

v. *ARC and SARA should work not in conflict but coordination with CARA, it being the Centralized Nodal Agency."*

18 Varsha Sanjay Shinde &Anr. v. Society of Friends of the Sassoon Hospital and others, 2013 SUPREME (MAH) 2118.

5. The practice of Inter-Country Adoptions- A Brief Look at the Problems

It has been again and again argued that ICAs should be terminated as there is no specific legislation to deal with it, and it is of no benefit, instead of giving rise to several problems and issues. Appealing pictures of eminent personalities adopting a child, who is orphaned and taking care of it while loving it, seems to be very satisfactory and beautiful, but the rise in the cases of trafficking in connection with international adoptions is not discussed. In a report, it was found that adoptions by Americans dropped from 22,991 in 2004 to 9,319 in2011.[19]

Most recently, a new term has come out in legal scenario related to children and that is "*child laundering*" which exposes the motive behind ICA as to that the present system which deals with ICA which uses illegal means to obtain children from the original parents and then, giving it to some other couple or individual as a legally adopted child while using the same official process to adopt, and this, rather than being an adoption, turns out as a laundering. It is similar to money laundering, where people take the illegal money and then put them and use it in the legal business.[20]Thus, here comes the word "*ChildLaundering.*"

Another big problem that comes to the forefront is the maintenance of records of Adoption, sometimes due to mistakes in maintaining records, while at other times, deliberately manipulating the data. Because of all of these corrupt practices, the records of adoptions are often unreliable, as it includes only that data which comprises of children who have been adopted in foreign countries and not the in-home country. However, with the addition of safeguards and enactment of different regulations, there has been a significant drop in the number of adopted children but it has a positive effect rather than being negative.[21]However, it is still of utmost priority to fight corruption in these practices, which will help in the development of more partnerships of multinational and transnational nature.[22]

Due to UNICEF's Stand on children who have been brought from areas which are war-stricken or struck by natural disasters, that their reunion with their families is the utmost priority, gives rise to various issues like several times, children are illegally sold to agencies that handle adoptions and then, these agencies make them legal adoptions, which ultimately threatens the well-being of the child and gives rise

19 Gina Kim, *International Adoptions' Trafficking Problem*, HPR (2012).
20 David M. Smolin, Child Laundering: How the *Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children* (Express Preprint Series, Working Paper No. 749, 2005).
21 Supra note 19.
22 *Id.*

to corruption in these cases. Furthermore, with various countries prohibiting ICA, it is causing issues related to regulatory procedures and also gives rise to cost, which makes adoptions more corruption-prone.[23]

Activists working for the protection of Human Rights worldwide have become critical of ICA, appealing in a single voice that it should be disallowed. They argue that it violates the human rights of the children that they are taken away from their respective true homes and the claim of a country over a child does not exist. They further argue that children often fail to get developed and their shifting into nurturing homes has also been restricted through this process.[24]Often critical, they have been again and again raising the point that this system is giving rise to illegal "*Child Laundering*" system as before, the ICA system was for the welfare of the child but now it is more acting as a system to cater to need of child of childless parents and this is leading to Black Market ofChildren.

One more point which comes to the forefront is that ICA has led to children being devoid of their own native culture and traditions and if continued at a higher rate, it will cause the diminishing of certain cultural and heritage traits. No matter how much adoptive parents do at home to provide for the culture and heritage of the child, his or her removal from the native country cannot be substituted as it has its impact. However, the UN and the international community feels that family is more important than culture and identity.[25]

Finally arriving on to the most crucial instrument governing adoptions i.e.The Hague Convention. This convention is also experiencing and facing various flaws in its regulatory structure as well as in its implementation. It acts more as a cooperative relation governing instrument than actually governing the ICA. This Convention faces several loops when it comes to the misconduct happening in the steps followed for Adoption, and it can be visibly seen when analyzed in a close way. It is very simple to remove the history of a child with his family and then, that child can be made ready for Adoption as there is no process for background checks and verifications. This Convention must be revised to deal with emerging issues and trends, or else, it would start turning into a useless Convention, with diminishing applicability.[26]

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23 Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption,* 55 NYL SCH. L. REV. 733(2010-11).

24 Elizabeth Bartholet, *International Adoption: Thoughts on Human Rights Issues,* 13 BHRLR (2007).

25 Lara Kislinger, *Intercountry Adoption: A Brief Background and Case Study,* (November 27, 2020, 11:30 AM), http://www.adoptionpolicy.org/pdf/backgroundCS.pdf.

26 Hague Conference on Private International Law, The Netherlands, *The Grey Zones of*

6. Conclusion and Suggestions

After an analysis of the legal contours of the Inter-Country Adoption in India, with general reference to the international legal framework, it can be taken into conclusion that under this framework of Inter-Country Adoption, the presence of efficiency and sufficiency is less, therefore, making the process exposed to various defects, which can, in turn, be detrimental as well. The legal framework dealing with the inter-country Adoption is more in the negative aspect than in the positive aspect of Adoption, making it altogether a law, which has its entire basis on the question that something wrong can happen to the child, thus, making things in a negative point of view, which can be sometimes termed as extra-protective but that is the case here, as this negative perspective has made this entire framework more viable to violations, misdeeds, and negligence. It has a reflection of the legal framework governing the process of Adoption in India, which is altogether itself negative, but this particular system dealing with the international inter-country Adoption, to be additionally secure, have made it additionally negative by adding on to the general legal framework, in certain issues which are related to inter-country Adoption.

Comparatively, we do not find ample guidelines or laws, or even administration, which has its target to promote or improve the disastrous living conditions of the children who spend their whole lives on streets picking waste materials or begging to fill their stomachs with enough food. Their perception of life is not more than the food for two times, for which even policies have not been sufficient to deal. Those in the orphanages, spending their time without any love and care, have their dull life prospects with no one even bothered to pay attention to their problems, more of the mental and emotional, which ultimately is a deciding factor in destructing not only their life prospects but their future and talents as well. Those kids, who can get good love and care, by way of Adoption, as well as the prospects and encouragement to their talents, remain undoubtedly, deprived of this, because of these negative laws, which to be extra secured, increase the unfruitfulness of the law, therefore, defeating the objective and goals of the law itself.

The disadvantages of Inter-Country Adoption are not less anyway, as this has given rise to criminal acts, including human trafficking of a child most of the time, and exploitation and corruption at other times, which not only robs the child of his innocence and values but also distils fear in the child, which is at times, difficult to remove. Another

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Intercountry

Adoption International Social Service, Adoption Information Document No. 6 (June 17, 2010), (Nov. 27, 2020 11:45 AM), http://www.hcch.net/upload/wop/adop2010_info6e.pdf.

point which crops up is that when a child is moved to another country, then at the time of moving, he has the cultural values of his native country imbibed in him, by default, which is slowly and gradually overpowered by the culture and the values of the country he is moved to by the adopting parents. This leads to the loss of native culture as well as the values of the native country.

Yet, the process of Inter-Country Adoption is developed into practice in the past few years, therefore, getting popular, not much in India, but in foreign countries to a great extent, thus, regaining the belief that this development will keep on going, thereby, increasing the life-prospects of the deprived and destitute children. In foreign countries, where the number of infants which can be adopted is less in number, intercountry Adoption becomes a boon for them, which helps them in even getting their desires fulfilled by adopting in any other country. However, it is too early to comment on the prospective results of Inter-country Adoption in the coming years, but the success of this practice eventually depends on the beneficiaries of this practice, as well as the perspective of the officials from the original country of the child.

Suppose there is something that needs a change in this practice and the legal framework governing this practice. In that case, it is necessary for the governments or authorities of both the countries to help in not only promoting this practice but also facilitating this whole process, which can, in turn, be instrumental in promoting the parenting of such deprived children, as well as become a guiding factor for thousands of children, who need parents, which is extremely important to secure their future and life-prospects and cannot be done in orphanages or child care homes.

Another issue that needs the immediate attention of the authorities and the state is the issue of child laundering, which has been discussed above in detail, as this is the biggest and scariest disadvantage of this whole process and this concept of child laundering is expanding its wings in the universe of intercountry Adoption and this is need of the hour that the wings of this evil are clipped down so that the safety and security of the child can be ensured. This will be the answer to all the questions, which have been raised for the time being on the practice of inter-country Adoption, and will help in further countering the negativity surrounding this practice which is allowing people to have anti-adoption agenda to criticize this practice.

Further and the most crucial point that can be a vital suggestion to the authorities and the state is that it is high time that the reforms are brought in the process and the practice of Inter-country Adoption, which is adapted to the contemporary era of technology and modernity. It is necessary to improve and revamp the existing policies leaving behind the traditional concepts and half-truths, which can help in rehabilitating the children and bring a reduction in poverty and injustice.

Rethinking and Revisiting Independence of Judiciary: Decrypting NJAC vis-a-vis Collegium

*** Mr. Shelal Lodhi Rajput**

Abstract

The research paper deals with the concept of independence of the judiciary as what is the litmus and true meaning of the concept that was intended by constitutional framers in Indian setup, the concept is decoded by emphasizing the appointment procedure of judiciary and a clash of two organs of state with their evolved instrumentalities, the decrypting of NJAC vis a vis Collegium system, here author adopted novel thing in the way that paper does not discuss much about the what is two instrumentalities' means as many kinds of literature already dealt with it but it focuses more on the nature of two. The paper provides a complete understanding of the evolution of concept with a historical view and some dark events in the Indian Judiciary when checks and balances concept, constitutional conventions were deliberately breached and violated. Further, the other side is also discussed as to how the absolute freedom to judiciary can cause a threat to the doctrine of separation of powers. The paper is divided into specific headers that include research work. Paper not only focus on the theoretical aspect but will also be tried to explore the practical dimension by exploring the case law and drawing an analysis from it which can contribute to existing knowledge of the law and address the research gap

The author will try to cover different events where the conflict arises on the independence of the judiciary. Finally, after all this paper will conclude by stating the new findings and how this research helped to add something to existing knowledge and how the research gap is addressed by providing recommendations on an existing system and the concept.

Keywords: Independence, Judiciary, Separation of Power, NJAC vis a vis Collegium.

Introduction

Modern thoughts on political legal principles started with Austin declaring that *law is a command of the sovereign* to Montesquieu giving

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us the theory of *Separation of powers* ending with Rosco Pound who advocated shifting the centre of gravity in the legal system from *statute law to judge-made law.* Our constitution is broadly based on the theory of Separation of Power with the parlance of rule of law as the concrete principle of the Indian Constitution and therefore, what Montesquieu I said assumes great importance on Independence of judiciary [1] "There is *no liberty where judicial power is not separated from both executive and legislative power if judicial and legislative powers are not separated power over life and liberty of citizens would be arbitrary because the judge would also be a legislator if it were not separated from the executive power the judge would have the strength of an oppressor."*[2] On the prima facie independence of judiciary means the clear demarcation from the executive and the legislature but the concept is far wider in litmus sense. The concept is not merely the creation of autonomous institutions that is free from the interference of other two organs but there shall be no influence by any other organ on the judiciary in any way that can hinder or affect their functioning. The golden principle behind the independence of the judiciary is that the judges must be able to deliver justice according to the law, uninfluenced by any other factor. The judiciary is the most sacrosanct organ of a democratic republic like India as the constitution empowers the judiciary as its custodian, for this reason, the independence of the judiciary is a sine qua non for a free flow of democracy. The independence of the judiciary upholds and ensures the rule of law, as India is a federal country with a unitary bias any encroachment from anyone on the judiciary is unacceptable as it is a clear threat to one of the pillars of democracy.

There is a clear demarcation between the judiciary and other organs due to its very nature and functioning. The independence of the judiciary is always been crucial in multidimensional ways. The independence of the judiciary and impartial judiciary is a twin concept or we can more appropriate term this concept as a sister concept. The concept is normally assured through the constitution itself as it envisaged different provisions but it may also be assured through ***conventions*** (constitutional conventions), legislation, customs and other appropriate norms and practices.

Statement of Problem

The only thing that remains static is change. There is a plethora of research on the independence of the judiciary in the Indian context but there is a huge lacuna on the core concept as to what constitutes

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1 Alan Tarr G, *Without fear or favour: Judicial Independence and Judicial Accountability in the States* (Stanford University Press 2012).

2 Vile M J, Constitutionalism and the Separation of Powers (Oxford: Clarendon Press 1967).

Independence of the judiciary and how post-emergency development in judiciary brings a change vis a vis the procedure of appointment of judges, one of the major pillars on which the concept of judicial independence has its footing is the appointment procedure. The need for research arises on the aforesaid issue. The focal theme of the researcher here is revisiting and rethinking on the concept of independence of the judiciary and decrypting the collegium vis a vis NJAC, the prime question here is how we need to focus on ***how judges are appointed rather than who is appointing them*** with the view that there is a loggerhead and tussle between judiciary and legislature. Further, the research is needed on the new trend that judiciary opted as does it overstepping its power in the name of Independence of judiciary by violating the parliament supremacy and sovereignty. The present research mainly focuses on the following aspects:

- *Rethinking and Revisiting the concept of Independence of Judiciary in its litmus sense with the many shades focusing on the core pillar on which the concept lies i.e. the appointment procedure of judges.*
- *The indirect interference of legislature in the judiciary is a hindrance to the Independence of the judiciary.*
- *The NJAC and Collegium row in consonance of doctrines of separation of power and checks and balances.*

From the post-emergency appointment of *Justice A.N. Ray* in 1973 where he superseded the three most senior judges to become CJI, again in 1977 *Justice H.R. Khanna* needs to pay for his dissent in the judgement in the case of *ADM Jabalpur*.[3] This was a clear violation of the Independence of the Judiciary by the legislature in an indirect way. The researcher here focused on these issues and how now the judiciary is also expanding its view in undefined jurisdiction with the creation of new judicial inventions. There is a research gap despite the plethora of researchers on the topic of judicial independence. The researcher tried to fill that gap. The view taken by the researcher is to see the balancing feature of independence of the judiciary in the spirit of what framers of our constitution meant by the concept. This research is an attempt to find the solution to aforesaid questions and the challenges that we are still facing today as a transparent procedure for the appointment of judges that ensure the independence of the judiciary. And last but not least is that is now judiciary extending its supremacy in unchartered territories by declaring the act of legislature as unconstitutional to uphold their supremacy and unrestrained freedom with absolute power.

3 A.D.M. Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207 (India).

Research Objective

The present research paper's prime objectives are-

- To explore and understand the concept of Independence of the judiciary and its litmus meaning in consonance with the core concept of appointment procedure of judges.
- To unfold the true nature and meaning of NJAC vis a vis Collegium system with lacunae and drawbacks.
- To understand the attempts made by the legislature in the appointment procedure of judges to bring more transparency and to strengthen the independence of the judiciary.
- To understand how the independence of the judiciary is threatened by the practices of legislature implicitly and tried to identify loopholes in the applicability of the principle of independence of the judiciary.
- To come up with the possible solution in the form of recommendation to overcome the issues raised in the research paper.

For the aforementioned objectives, the researcher has first started with the meaning of the idea of judicial independence. Then the researcher dealt with further issues keeping in the mind the two prime doctrines that assure the idea of judicial independence i.e. Doctrine of Separation of Power and Doctrine of checks and balances. The existing gap is also addressed by the researcher in present people.

Research Question

The prime purpose of this research is to answer the untouched questions and existing lacunae (i.e. research gap) on the present topic and the critical analysis of two instrumentalities of appointment of judges. Below here the main research questions are listed:

1. What is the idea of judicial independence and how it is misinterpreted by researchers and courts?
2. Is the Indian judiciary independent and how does legislature still have a say implicitly in the concept of judicial independence?
3. Is the judiciary is trying to disturb the system of checks and balances in the name of the concept of judicial independence?
4. Does the Supreme Court Verdict damage Parliament sovereignty?

The aforementioned are the fundamental research question on which the researcher has focused along with the multidimensional questions that are unfolded inside them.

Literature Review

The review of the existing literature has been done by the researcher

as it is of paramount importance to find the existing research gap and to get insight for present research to work to add something to the existing body of knowledge. The researcher mentioned some of the work from the different works that have been useful for the researcher in the present research.

1. Shetreet S and Forsyth C (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (MARITUNAS NIJHOFF Publishers 2012)[4] This book is an outcome of research papers presented under the aegis of The International Project on Judicial Independence in six different conferences This book provides a complete overview of how the culture of judicial independence developed. The book offers a great conceptual understanding of the topic of judicial independence. The book deals with the multidimensional aspect of concept from practical world to theoretical world. Further, the book deals with a comparative analysis of the concept in different aspects. The book is not dealing with the concept in its litmus sense as it just discusses as what is the trend of judicial independence but there is no emphasis placed on the ulterior motive of the concept. Further, the book also does not deal with the solution to strengthen judicial independence but it is just giving them challenges and not an answer. These are the existing gap in research work.

2. M.P. Singh, *Securing the Independence of the Judiciary- The Indian Experience* [5] (Indiana Law Review) This scholarly research paper deals with the concept from A to Z at length in 48 pager documents. This paper traces its beginning from defining the concept of judicial independence and then moving on with the other subtopics in it. The researcher just focuses on the developments that happened and its criticism for the independence of the judiciary in Indian. Further, the paper also deals with some judicial precedents on the concept of judicial independence. The paper did not focus on the central aspect as to how we can secure the independence of the judiciary and while describing the procedure related to the appointment paper just reiterated the event of the past and no new knowledge as to what more can

4 Shetreet S and Forsyth, The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges (Maritunas Nijhoff Publisher 2012)

Wiley Online Library; Available at : https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.12009_2

5 M.P. Singh, *Securing the Independence of the Judiciary- The Indian Experience*, Indiana International and Comparative Law Review 10, no. 2 (2000): 245-292. Accessed at 12 September; Available at: https://mckinneylaw.iu.edu/iiclr/pdf/vol10p245.pdf

be done to meet the ulterior objective of concept. The paper has a lacuna in identifying the concept and no solution was provided to come up with a better system in appointment procedure of judges that can strengthen the concept of judicial independence.

3. Dr Anurag Deep & Shambhavi Mishra, Judicial Appointments in India and the NJAC Judgement (Jamia Law Journal (2018); Published in Manupatra Articles)[6] The research paper focuses on the issue of the recent tussle between the judiciary and legislature due to the NJAC. The paper did not analyse the idea of judicial independence in the light of constitutional setup in its true sense. Also, the researcher did not provide the ways to make a balance between two organs of state on the dispute of primacy. There is a lack of constructive criticism on the topic and a mere incident of events were described with legal acumen. The research paper is divided into seven different purposes in which the researcher explored the dimension of independence of judiciary but the researcher did not answer the prime question that is the ulterior motive of the concept.[7]

4. Indira Jaising, National Judicial Appointments Commission: A Critique (JSTOR, Journal Article)[8] The article describes the new law that was introduced in 2014, author argues that the new Act will provide supremacy to the executive and can be a fundamental change like the constitution which is not permissible due to basic structure doctrine. The author did not describe the positives of NJAC she just focuses on one side of the coin and not the other as she belongs to the domain of the judiciary. There is a not balance of views in the article.[9]

5. Prashant Bhushan, Scuttling Inconvenient Judicial Appointments (JSTOR, Journal Article)[10] The author took a harsh criticism on the controversy in the appointment of a judge in Supreme Court in the year 2014.

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6 Dr. Anurag Deep & Shambhavi Mishra, *Judicial Appointments in India and the NJAC Judgement* ,(2018 / Volume 3 /Issue: 2018. Accessed at 12 September; Available at: https://www.manupatrafast.in/articles/ArticleSearch.aspx?j=21&jn=Jamia+Law+Journal&s=1

7 Ibid

8 Indira Jaising, *"National Judicial Appointments Commission: A Critique.*" *Economic and Political Weekly*, vol. 49, no. 35, 2014, pp. 16–19. *JSTOR*, www.jstor.org/stable/24480485. Accessed 12 Sept. 2020.

9 Ibid

10 Prashant Bhushan. "*Scuttling Inconvenient Judicial Appointments." Economic and Political Weekly*, vol. 49, no. 28, 2014, pp. 12–15. JSTOR, www.jstor.org/stable/24480292. Accessed 15 Sept. 2020.

The author describes the threat to the Independence of the judiciary and the concept of favouritism following the choice of government. There is an implicit explanation of the concept of Independence of the judiciary and how the legislature can interfere with the concept in indirect means.[11]

Research Gap

The research gap that is persistent and not answered by the researchers yet in their research work on the instant topic is the lack of understanding about the end goal and ulterior motive behind the idea of judicial independence. Another huge lacuna is that every other researcher focuses on just the independence of the judiciary and forgets the question about the effectiveness and credibility of the judiciary. Further, the prime aspect of the research gap is as to how the independence of judiciary and instrumentalities for appointment of judges which is a basic pillar of the idea of independence of the judiciary are not even today addressed in the proper sense as there is a lack of analysis on the same and reading the concept in light of constitutional setup. In all and all the research gap that is existing is on the evolution of concept with the procedure of appointment of judges and how the attempt was made by legislature and judiciary to use the concept as per their needs.

Meaning: Independence of the Judiciary

The independence of the judiciary is not a novel concept but still, there is no crystal-clear meaning as what we mean by the independence of the judiciary as it is still imprecise.[12] The nucleus of the concept around which it starts and ends is the doctrine of separation of powers. To quench the thirst of getting the meaning of judicial independence, the concept is not defined in our constitution anywhere and still today there is not a clear strict meaning of the concept but the implicit meaning covers the wider ambit in different facets[13]. Some definitions are given by different scholars as what is the exact meaning of the concept. Here the author is discussing two important definitions by the leading jurist to get on a more appropriate definition, Shetreet[14] in his work focuses on the important considerations to get a clear understanding of the concept. While explaining the concept he separately discusses the two terms of concept i.e. "Judiciary" and "Independence". He explained the former term as

11 Ibid
12 Robert Stevens, *The Independence of the Judiciary 3 (1993); See also* Eric Barendt, An Intriduction to Constitutional Law 129 (1998)
13 Granville Austin, The Indian Constitution Cornerstone of A Nation ,26, 164.
14 Shimon Shetreet, Judicial Independence: New Conceptual Dimensions and Contemproary Challenge, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE

"The organ of government not forming part of the executive or the legislative, which is not subject to personal, substantive and collective controls, and which performs the primary function of adjudication."[15]

While dealing with the later part he explained "independence" by citing a difference of opinion by the already existing work and definitions given by other scholars.[16] To him, independence connotes two meanings that are the independence of the system of the judiciary as a whole and the personal and substantive independence of each judge. The concept explained by Shetreet's covered what exactly the framers of our constitution were envisaged when they discussed the concept of Independence of judiciary in CAD.[17] There is another comprehensive definition by Sir Guy Green he defines the concept as

"The capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control."[18]

The definition laid a particular emphasis that while discharging the judicial functions judges should be free from any type of inference in its true sense whether it is a direct or indirect interference. Further, it takes into consideration the most important aspect that is freedom from "*actual or apparent dependence*." From both definitions it is clear that the concept is revolving around a certain nucleus in which the same basic principles envisaged by different scholars and thinkers in their way, the principle of separation of power is a thing upon which the concept of Independence of Judiciary starts and ends.

Revisiting the Core Concepts: Judicial Independence & Appointments

The litmus meaning of the Independence of Judiciary that the author connotes is that Judicial Independence means freedom from any type of bias, favour or influence, freedom in actions or opinions while performing the duty, to act without any fear or favour, further the post-retirement probable apprehensions shall also get covered under these[19]. In all and all, the judiciary shall empower in a way that they are completely free to do their work without any reasonable fear in the minds of judges that can hinder their decision due to personal biases.

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15 *Id.* at 597-98.
16 *Id.* at 594-95.
17 Constituent Assembly of India Debates, Vol. VIII, Book No. 3. Date: 24 may 1949, Tuesday.
18 Sir Guy Green, Former Judge of Supreme Court of Tasmania.
19 P. Purushothaman,, *Higher Judicial Appointments in India – The Dilemma and the Hope: Trusting the Wisdom of the Generations,* NUALS L.J. Vol. 8, 2014, Available at SSRN: https://ssrn.com/abstract=2358043

The grundnorm of concept is the Oath that is taken by the judges themselves, this is what the independence and they are supposed to act in that way. Also, it should not be understood that independence is absolute and they are not accountable in any way. There is always a system of Checks and Balances.[20] The author will deal with the concept to a greater extent ahead.

The aforesaid principle of judicial independence rests on the various pillars but the base or central pillar of the edifice is the procedure related to the ***appointment of judges*** especially in the higher judiciary. This paper deals with the topic of rethinking and revisiting the Independence of the judiciary on the lines of the Collegium system vis a vis NJAC. The fundamental function of judges is to deliver justice by adjudicating matters but the appointment of judges is the function of the administrative sphere. Therefore, the judiciary needs complete independence from outside influence as well as independence from the inside influence that is from their superior judges in any way but the judges shall be also accountable to someone as our constitution has a system of checks and balances so not any single organ of state can have primacy over other two they all be must at same footing. Here, the researcher while dealing with the question of Independence of judiciary focuses on the decrypting of appointment procedure of judges i.e. NJAC vis a vis Collegium. The appointment process portraying the black and white about the independence of the judiciary, the history is evident that how the principle is not followed in its litmus sense that causes some darkest decision in the history that was given by Supreme Court of India.

Further, the process of appointment that is followed by the judiciary is an invention of the judiciary by themselves and the tussle between the judiciary and other two state organs is continued. The recent step by the legislature and the intervention of judiciary based on the doctrine of basic structure and upholding their primacy in the procedure of appointment of judges is upheld by the apex court. Is that in consonance with the concept that is underlined in the constitution of India? Also, did the act of judiciary is not an overuse of their power to uphold their primacy in the matters of appointment of judges? And did this Act of state is balancing the powers between three organs of the state is the question of the hour that is needed to be addressed on an urgent basis.

Unfolding The Concerns and Question Of Primacy.

The need for a truly independent judiciary in this country became a topic of debate by some of the darkest decisions given by the supreme

20 Speech of the Chief Justice on "Separation of Powers Doctrine – Roles of the Legislature, Executive and Judiciary", Available at I ndiacode.nic.in/mjr/Speech%20 CJ.doc

court under the influence of the existing government of that time which was an unfortunate and retrograde judgement of the Supreme Court it underscores the need for a truly independent judiciary in this country and to ensuring right judicial appointments to secure that[21] On the first bush it is fair impartial and honest adjudication guided by a commitment to justice an expression of justice in aw but to ensure this judge must be free to decide the questions of law and fact without the threat of retaliation physically, financially and occupationally it is equally important that judicial decision is not upturned or denied implementation surreptitiously or arbitrarily by the legislature or executive, which is quite often in India. Judicial Independence is one of the hallmarks of India's constitutionalism although it is present in dynamic forms do not absolute but essential for the good administration of justice[22]. The basic form is the concept of Party detachment which requires that judges are not required to relate to parties. Individual autonomy requires the judge to be beyond constrain by collegial and institutional pressures and must decide by individual conscience and responsibility for which he holds the position in the state. The serious form of independence on which there is a need to be concerned is political insularity, which requires that the judiciary be independent of the government and its popularly controlled institutions. To quench the thirst for the pursuit of justice the political insularity cannot be ignored in any way, it connotes that ***to do what is right and not what is popular.***[23] Since the '90s erosion of judicial independence and absence of political insularity is on account of the willingness of judges to do what is popular rather than what is popular. This factor leads to rethinking and revisiting the independence of the judiciary.

There are judges like Mr H. R. Khanna who is not get detracted from the track on justice and they delivered the judgement as following the law and not based on what is popular but they laid their judgement on basis of what is right and history is evident for this act he needs to pay as he dissented from the majority[24], the price of the dissent is the position of Chief Justice and here the independence of the judiciary is in threat. One of the prevailing factors of eroding the independence of the judiciary in the process of appointment. Here researcher had done a thorough study on the procedure that was used by the judiciary for its appointment as we have constitutional provisions[25] but the process

21 *Supra note* 3.
22 G.M. Manoher Rao, & G.BReddy, Judiciary in India Constitutional Perspectives, 271 (2009).
23 Dushyant Dave (Senior Advocate, Supreme Court of India), NALSAR Lecture series on Constitutionalism.
24 *Supra Note* 21
25 INDIA CONST. Art. 124 (Appointment for Judges of Supreme Court of India), Art. 217 (Appointment for Judges of High Courts).

that is followed by the judiciary "Collegium" system is not enshrined in the constitution but is a judicial invention. The concept of independence of judiciary lays its central pillar on the procedure of appointment of judges. There are some points which we need to ponder upon in the light of recent developments from NJAC to collegium row. This paper deals with the aspect of all the aforesaid topics with a new horizon that is underlying in the recent developments as we need to focus on the ***How the judges appointed and not who is appointing them,*** as constitution have provision for same but we need to strengthen the procedure. The researcher here deals with the same by creating a demarcation between collegium and NJAC[26].

The complete independence of the judiciary can be a threat to democracy as in the recent past the actions of the legislature held ultra vires[27] by the judiciary on the grounds of the doctrine of basic structure, there are multi-dimension horizons that researchers dealt here in this paper with the paramount importance to the edifice of the procedure of appointment of judges and procedure thereof.

Finding the Traces: Evolution of Concept of Independence of Judiciary

The concept is not a new invention but the procedure followed by judges to safeguard the concept is invented by the judiciary themselves as we did not have any traces of a collegium system in our constitution. But the framers of the constitution were concerned about the concept as Dr Ambedkar summed down the concept in the threefold way to secure the independence of the judiciary[28]. We can get a clear intent of constitution framers from the following words of Dr B.R. Ambedkar:

"There can be no difference of opinion in the House that our judiciary must be both independents of the executive and must also be competent in itself. And the question is how these two objects can be secured "[29]

It is clear that the concept is something on which framers were concerned and over time there was a need felt due to some dark decisions by the organs of state that led to the formation of 'collegium' come to safeguard the concept.

26 The National Judicial Appointments Commission (NJAC) Act, 2014.
27 Supreme Court Advocates on Record Association v. Union of India, AIR 2016 SC 117 (India).
28 Constitutional Assembly Debate, Vol. VIII, May 24, 1949.
29 Dr. B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India Reply to the debate on the draft provisions of the Constitution on the Supreme Court, (May 24, 1949), in CONSTITUENT ASSEMBLY DEBATES, vol.VIII, 258.

Revisiting & Rethinking the Judicial Independence: Judicial Precedents and Evolution

As the researcher mentioned aforesaid the prime pillar of judicial independence laid its strong footing on the appointment procedure of judges. The constitution of India provides a clear provision for the same.[30] The first issue on appointment came in 1968 with J. Zafar Imam when the constitutional convention was breached as he was not appointed as CJI but it was due to physical and mental infirmity[31] There was a deliberate violation of constitutional practice in 1973 by the Indira Gandhi led government when Justice A.N. Ray who was appointed as CJI by superseding three other judges.[32] But the justification for this was given by the government on the lines of the 14th Law Commission's recommendation. Again, a breach of practice happened in 1976 when government-appointed *Justice Beg* as CJI who superseded Justice H.R. Khanna.[33] In both, the aforementioned cases the justices were appointed by superseding the senior judges due to their decisions in favour or consonance with the government. *From aforesaid researcher here wants to point out the 2nd research question* and we can directly see that there is interference in the domain of judiciary and independence of the judiciary is not independent in litmus sense. To address this issue and to ensure that again such unhealthy practised will not follow, finally, an infamous case[34] where the tussle between the judiciary and executive reaches its peak were settled by the court itself But soon after the first judge case the 2nd judge's case nullified and overturned the effect of S. P. Gupta case and the second judge invented the instrument called "collegium" system. The crisp and crux of the famous three judges case are listed below:

- *First Judges' Case* (1982): This Apex Court held that consultation with the CJI must be effective in a matter of appointment and consultation only implies exchange of view. The court rejected that CJI's opinion has primacy or supremacy. The decision was given by the majority of 4:3[35]
- *Second Judges' Case* (1993): The Apex court overruled its ruling of the first judges' case and changed the meaning of the word from

30 INDIA CONST. Art. 124(2) and Art. 217(1).
31 Dr. Dharmendra Kumar Singh & Dr. Amit Singh, *Appointment of Judges and Overview of collegium system in India: A need to reform,* International Journal of Advanced Research ISSN No.2320-5407; DOI: 10.21474/IJAR01/4491 Available at: http://dx.doi.org/10.21474/IJAR01/4491
32 *Id.* [3 Other senior judges: Justice Shelatt, Justice Grover, and Justice Hegde]
33 Anil Diwan, "*A trojan horse at the judiciary's door,*" The Hindu, 14 June 2013, available at: http://www.thehindu.com/todays-paper/tp-opinion/a-trojan-horse-at-the-judiciarysdoor/article4812743.ece
34 S.P. Gupta v. Union of India AIR 1982 SC 149(India)
35 *Id.*

consultation to concurrence and the new instrument was invented by the court called "Collegium system" The decision was given by the majority of 7:2 popularly known as SCAORA case.[36]

- *Third Judges Case (1998)*: It was just an expanded view of the 2nd judges' case where the court held that consultation involves not sole consultation of CJI but it's a consultation of plurality judges. The court laid a composition of the collegium in the case.[37]

The collegium system was made for independence of judiciary but the system has many loopholes and it was turned out something else and not what *Justice JS Verma* wanted the collegium will. Therefore, the attempts made by the legislature to bring a more transparent form of body that ensure the independence of judiciary but there is a heated dispute in that every time.

Instrumentality by Legislature: Birth of NJAC

The concept of a commission for strengthening the independence of the judiciary is an excellent one.[38] The parliament tried it thrice since the advent of the collegium system as there are too many lacunae in the collegium system. But the attempt was failed in 1990[39],2003[40] and 2013[41] after this finally in 2014 parliament was able to do it to create an opportunity for a fair process of appointment of judges.

The NJAC was established by the 99th constitutional amendment Act,2014. The legal history is speaking for the need of a commission as independence of the judiciary is needed as it is a sine qua non for the effective judiciary. Ad Hoc Committee Report (1949)[42] , the 121st Law *Commission Report and Venkatachalaiah Committee Report* (2003) all suggested that there is a need for the formation of a body to bring more independence in the judiciary.

The NJAC was challenged on 16th October 2015 and this become the *Fourth Judges Case*[43] where Apex court struck down the Act by giving the ground that it is unconstitutional as it is violating the basic structure doctrine and independence of the judiciary. Here the researcher answered the 3rd research question as the judiciary here

36 Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441
37 *In Re:* Special Reference No. 1 of 1998, MANU/SC/1146/1998: (1998) 7 SCC 739
38 K.C. Sunny, "*Appointment to Higher Judiciary: The Need For National Judicial Service Commission,*" C.U.L.R., Vol.XXI, 1997, p.327; Prof. Nisha Dube, "Challenges Before the Indian Judiciary," IBR 34(1to4)2007, p.258.
39 The Constitution (Sixty-Seventh Amendment) Bill, 1990.
40 The Constitution (Ninety-Eight Amendment) Bill, 2003.
41 The Constitution (One Hundred and Twentieth Amendment) Bill, 2013 along with the National Judicial Appointment Commission Bill, 2013.
42 Constituent Assembly Debates (Proceedings), Volume VIII, Tuesday 24th May, 1949.
43 Supreme Court Advocates on Records Association vs. Union of India (2015) 6 SCC 408 (India).

struck down the Act for upholding its supremacy. The judgement was given by a majority of 4:1 only dissent was given by *J Chelameswar*[44].

Further, it can be argued more as it is a right decision by court or not researcher will do deal with it in critical analysis aspect. The researcher after referring to numerous works get to know that judges misinterpreted judicial independence with the only primacy in appointment procedure to declare NJAC as ultra vires.[45]

Critical Analysis

The researcher tried to fill the research gap as with the aforesaid research but there are still some things unanswered and here under the critical analysis researcher deals with the latter part of the paper *Decrypting the NJAC vis a vis Collegium* as how there is focus laid to further fill the existing research gap. Further, the judiciary is entitled to interpret the constitution but not to rewrite the constitution by using the tool and extending their powers. This section will critically analyse the present topic of research by way of answering four questions.

a. Does the Supreme Court Verdict Damage Parliament Sovereignty? (Emphasis laid on 4th judges' case)[46]

b. Was the government trying to compromise the idea of judicial imbalance in our system?

c. Was there a slow usurping of power by the Supreme court of India over the decades in defiance's of what founding fathers of the constitution?

d. What best will serve the interest of the people of India.

The basis on which the 99th Amendment was declared unconstitutional is that any involvement of the executive will vitiate the process of independence of the judiciary. This is the new stand taken by SC, the original constitution says "*The President shall appoint in consultation with Chief Justice.....*"[47] The SC says that it's the judges alone who will appoint as per the 2015 ruling of SC, there is no principle of interpretation of law anywhere in the world where the provision can mean the opposite of what it says but today the 2015 interpretation makes it mean the opposite of what constitution says. Secondly, the ratio is that the law minister involvement in the judicial

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44 *Id.*

45 See Siracusa Draft Principles on the Independence of the Judiciary, reprinted in CIJL Bulletin No. 25-26, at 59 (Apr.-Oct. 1990) ; See Philip S. Anderson, Foreword to Symposium, Judicial Independence and Accountability ; ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 129 (1998).

46 *Supra Note* 43..

47 INDIA CONST. Art. 124(2).

appointment and the composition of NJAC is not right as it involves the executive. Further, judges ignored that the chairman of NJAC was Chief Justice so there is no structural flaw. It is not wrong to say that SC was of the view that the involvement of politicians vitiates the process and only judges appoint judges as the member of gymnasium appoints new members. The rationale was that the independence of the judiciary is a part of the basic structure but how judges forgot that Parliamentary sovereignty, separation of power and primacy of parliament and many aspects that NJAC cover is a part of basic structure.

It is a misery that how courts neglected it and you can't take a unipolar view. Judicial exclusivity will disturb the theory of check and balances and being independent is important but to be credible is more important. And the present process that was restored by the judiciary is opaque, untransparent and dominated by personal biases and prejudices. The whole crux is on the primacy of the judiciary on which there is a difference of opinions. There is a need to ponder that don't judiciary is trying to get its supremacy as Soli Sorabjee rightly said that ***point out one modern democracy in the world where judges appoint judges exclusively.*** There is no denial that judges must have an important role but not an exclusive one. The technique of reading into shall be applied to draw the constructive conclusion of NJAC which was ignored by judges in decisions.

Our Constitution has two trusteeships one is justice text and political text. Judiciary is caretaker of judicial text and the substance of debate while decrypting NJAC vis a vis Collegium is a fight between the true nature of judicial text for judicial independence. There is no denying that in the 1980s the law ministers dominate the appointment procedures of judges.[48] Judiciary confirm that they will confirm with the executive on appointments but they don't want the past errors to happen again that led to 1993. But still, there is an issue *a constitutional court has to be base the interoperation of the constitution on the constitutional principle.* And the collegium system that was upheld by the judiciary is unaccountable to anyone instead of NJAC. From the aforesaid step of our Apex court, we can conclude that "***If judiciary starts to evaluate on the constitutional arguments that institutions in a democracy have to be protected from the elected you will end up creating the tyranny of unelected"49 and "it's not the primacy of chief justice but it is virtual de facto exclusivity of chief justice that is the important ant.***" This is what SC interpretation means and they are transgressing their powers.

48 Rajeev Dhavan (Advocate SCI), NJAC Debate, Legislature vs. Judiciary, October 25, 2015.

49 *Supra Note* 46..

There are some major falls in the existing collegium system that implicitly is a threat to the independence of the judiciary. Some prominent problem is as follow:

- Lack of transparency: Major fault.
- Lack of availability of body (e.g. evaluating body, standing council etc), need for an assisting body for collegium.
- Executives Indifferent role in this participatory process.

The freedom of the judiciary needs to align with the concept of checks and balances with the alignment of the idea of separation of power so each organ can have a demarcation what was the intent of constitutional framers. The paradox is that still, we are on the same problem that we have faced in 1973 and 1976 but after 90's we were in the notion that we get a solution but the solution is not able to settle the problem due to many problems

Conclusion & Recommendation

To conclude, we saw that from 1963 to 2015 we have seen the dynamic views, opinions and stands various times on the view of judicial independence. The factor of appointment procedure is analysed here by the researcher and the existing research gap is filled. Collegium is again restored but we need to ponder as to fill the lacuna in the existing collegium system and till then, Parliament shall review the NJAC decision to overcome the structural flaw that is argued by SC while declaring the Act as unconstitutional and Parliament need to work on new legislation that is completely free and have primacy of Chief justice and not an exclusivity of anyone in that commission. There is no denying that sometimes judicial independence was in danger and also breached but also in the recent time we can see that Parliamentary sovereignty is also violated, there is an imminent need to make a balance of things between organs of state, particularly for the existing system some recommendations are made here, the system needs to eliminate some problems and bring new bricks in the block.

First, Collegium is known to be for its secretive functioning that lacks transparency and process is completely opaque. The body needs to be accountable to someone as it is not accountable. There shall be some fixed criteria to appoint a judge, the social evil of nepotism needs to be eliminated therefore, candidates shall reveal their relationship with the existing judicial personnel's.

Secondly, there must be a fair process of appointing judges and there is a need to eliminate some things that led to the concept of *pre-retirement judgments being influenced by post-retirement benefits*. The process of appointment that is secretive in nature must be made public.

Thirdly, there shall be no bar on the working of the judiciary in any way even implicitly and also there is no absolute freedom but there is freedom for which the judiciary will also make accountable to someone.

Fourth, the organs of state shall not transgress in unchartered territories as happened in past, hence we need a system to ensure the implementation of the concept in its true sense.

Lastly, no one wants that there will be an exclusivity to anyone on the topic of appointment instrumentality there must be a balancing of powers between the organs of state in every possible way. We don't want to see the ugly past when judicial independence was shattered, hence there shall be the primacy of Chief Justice of India and not exclusivity in appointment procedure.

An aforesaid recommendation is for the multidimensional purposes which can further be unfolded while implying practically. We need an independent and strong judiciary that has high levels of credibility as it will satisfy the ulterior motive that is an effective judiciary, for these aforesaid values we need a judiciary which is appointed by participatory roles of various institutions, according to me as per research work will be a fair judiciary.

As the existing system has many flaws in it and Justice JS Verma who is the father of the collegium system himself regretted the functioning of the present system and therefore, we need reform by giving the paramount importance to judicial independence and doctrine of basic structure concept. We shall not forget why we need this concept a living letter and alive as the end objective is to get an effective judiciary that is the heart of functional democracy. The ethos of the constitution is in Preamble and there will be no dispute on the view of basic structure as it is clear from the very preamble.

While concluding researcher want to throw light that organs of state respect the spirit of the constitution as, after a clash on appointment instrumentality, the Apex court on 3rd October 2017 attempted to bring more transparency in the existing system by revealing the recommendation of judges and reason behind that recommendation for new appointments.[50]

For concluding in the words of Mr Sorabjee he said[51]:

"Please remember no system can be perfect. You cannot ensure independence; you cannot legislate independence. A judge must be independent even of himself, of his biases, prejudices,

50 Available at: http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-MinutesTransparency.pdf (last accessed on Dec 26, 2017).

51 November, 2013, as quoted by "the FIRM"

predilections, preconceptions. But the thing is, on the whole, it is a human system, it is not a perfect system."

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The Humanitarian Crisis in The Middle East: A Narrative of United Nations' Triumph or Debilitated Reality?

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Abstract

While United Nations has long been exalted as a major peacekeeping international organization in the world, its failures in the contemporary backdrop of evolving political interests have been overlooked for an equally long period. The many human rights violations and humanitarian crises in the Middle East present evidence of a unipolar influence on the United Nation from the United States as well as the failure of Resolutions and Humanitarian Aid due to political and financial complexities that conveniently ignore the inhumane conditions of the local populace. Its internal mechanisms in the form of Veto power given to Security Council Permanent Members have ultimately defeated its purpose. Therefore, to delve further into these issues, this article picks up four sample case studies - Iraq, Syria, Yemen, and the Israel-Palestine conflict as prominent examples of ceaseless human rights violations at the hands of state and non-state actors that create scope for UN interventions and analyses the inactions or failure of actions on part of United Nations and dives further into the reasoning behind it.

KEYWORDS

International Humanitarian Law Violations, United Nations, Middle-East, Humanitarian Crisis, Strategic Inaction

1. Introduction

The United Nations, an international edifice standing since the denouement of the Second World War, has served as a strong advocate of universal values such as freedom, justice, and peaceful resolution of disputes. As the sole organization with a panoramic membership, United Nations continues to wield considerable power and legitimacy in addressing issues of humanitarian crisis. Ideally, United Nations' impartiality and integrity create a wide scope to negotiate even in the most adverse quandaries. The Charter, the constituting document of the UN, distinctly lays down the rights and duties, establishes organs and procedures under a cohesive framework. With the main purpose

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to maintain international peace and security, the UN recognizes the sovereignty of all its member states and ensures the settlement of international disputes via peaceful means, dissuading States from the use of forceful means.

In recent times, the world has been embroiled in an uproar for widespread humanitarian crisis and senseless misery fuelled by selfish international political interests, especially in the Middle East. In this desolate state of affairs, there is an exigency for the UN to emerge as the champion of the cause of human rights. This paper sets out to delineate the disillusionment of the exalted stature afforded to the UN as the sole keeper of international tranquillity and has been ultimately reduced to a side-lined spectator.

The Middle East, attributable to its strategically advantageous locus, has served as a luring prospect for key international players seeking to advance their acquisitive agendas at the cost of human devastation. Marred with violence, they display disparate manifestations of humanity's most demanding catastrophe but also create an equal scope for an organization like United Nations to intervene to resolve the disputes.

UN Charter prohibits intervention through force in internal affairs of a state except in three conditions: intervention by invitation, self-defence under Article 51 of the UN Charter, and UN sanction. While the UN charter is primarily looked towards for justifying an act of forceful intervention, it is the collective body of international humanitarian law, encased in the Protocols, that is the benchmark for adjudging the validity of offensive military action. Furthermore, the UN has, as part of its legal arsenal, extensive avenues of invoking accountability and bringing to justice acts violating established legal boundaries. However, despite these existing provisions and many more, the incessant perpetuation continues only to provide extensive opportunities for examination of the context to identify culprits as well as reasons behind the failure, which this paper seeks to do.

2. **Syria: Regime, Intervention, And Terror**

Internal resistance to Assad's regimes evolved into one of the gravest human rights violations and human desolation studies of the contemporary world where the supposed rescue forces are indistinguishable from the malevolent militias. The Syrian conflict has spanned over 8 years, with no end in sight and progressive aggravation of the plight of the natives as evident from the civilian death toll of over five hundred thousand, 13 million requiring medical aid and over 11 million displacements, internal and external along with considerable

damage to basic facilities[1]. A minor peaceful act of resistance, forceful suppression of which incited country-wide rage only by the ways of peaceful manifestations of dissent, evolved into an armed insurgency, marking the beginnings of ceaseless civil war and uprising of extremist Islamist groups, ISIS being one of them.

UN remained in a state of inaction in preventing the uprising and consequent bloodshed due to legal restrains as Article 2(7)[2] prevented interference in domestic matters of a member state. The first series of resolutions focused on unarmed monitoring missions and remained indecisive in its orientation by not demanding 'compliance' by Syria or backing its resolutions with sanctions. Furthermore, the UN has also depicted regrettable disability in putting an end to the humanitarian crisis persisting in Syria at the hands of both domestic and international players regardless of the legal embargo on armed intervention[3]. The key international players in the Syrian antagonism remained Russia, and Iran in support of the Assad regime and the US, Turkey amongst others supporting rebel factions. Regardless of the elements they support, they have collectively brought utter destruction to the Syrian land in pursuit of their self-promoting interests under the guise of confronting ISIS or Assad's tyranny.

The Power of VETO

Furthermore, it has been consistently and emphatically acknowledged that the UNSC's role in mollification of the humanitarian crisis has been made debilitated by the systematic sabotage wrecked by the frequent utilization of Veto power by the Un permanent members. In Syrian mattes, Russia alone has utilized its veto an astounding 14 times till date for the furtherance of its strategic agenda, eight times out of which China cast its veto as well since 2011 to block resolutions of substantial significance such as those forcing the Assad regime to end human rights violations[4] and holding it accountable for the violations[5]. Russian veto has further immunized Assad from condemnation[6] and having to implement a cease-fire in 2012 or 2016, renew the mandate of the United Nations Supervision Mission in Syria (UNSMIS) as well as blocked sanctions from being imposed[7]. Neither did it allow the reference of the Syrian conflict to the International criminal court[8], or subject the reported matter of chemical weapon usage to the investigation[9],

1 U.N. News, Syria (Feb. 21, 2020), https://news.un.org/en/focus/syria.
2 U.N. Charter art. 2, ¶ 7.
3 U.N. Charter art. 2, ¶ 4.
4 S.C. Res. 612 (Oct. 4, 2011).
5 S.C. Res. 77 (Feb. 4, 2012).
6 S.C. Res. 846 (June 22, 1993).
7 S.C. Res. 538 (July 19, 2012).
8 S.C. Res. 348 (May 22, 2014).
9 S.C. Res. 321 (Oct. 23, 1972).

enabling unbridled mass killings of hapless civilians. Russia has even attempted, though unsuccessfully, to obstruct aggression by other States against chemical weapon installations in Syria.[10] The latest veto, cast in December 2019, blocked a resolution granting UN cross-border humanitarian aid to Syria another extension for a year and only allowed authorization based on its restrictive terms[11]. A distinct pattern has emerged as a result of Russia's unflinching endorsement of Assad's oppressive regime of unrepentant human rights violations[12].

Human Rights Violations

The US-ledcoalition, as well as the Syrian-Russian alliance, have, on multiple different occasions, violated the bounds of International Law on armed conflict and caused unaccountable humanitarian atrocities all under the garb of spearheading a war against terrorist groups. The Syrian government, backed by its supporters like Russia and Iran, is attributed a majority share of the unjustifiable attacks on civilians[13] and sensitive public facilities like schools and hospitals as a matter of pattern in pursuit of their military interests. There is also reported use of chemical weapons[14] in clear violation of Customary International Law[15] as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Chemical Weapons and on Their Destruction, to which Syria is a party as of 2013[16]. Measures taken by the Organisation for the Prohibition of Chemical Weapons as well as the UN[17] proved futile when faced with the staunch Russian support to the government. While Russia seeks to justify its military intervention under UN mandate[18] and intervention by invitation, where the mandate itself is criticized as vague[19] and Assad's government is

10 Press Release, Security Council, Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression, U.N. Press Release SC/13296 (April 14, 2018).
11 S.C. Res. 2504 (Jan. 10, 2020).
12 Iffat Idris, *International Humanitarian Law and Human Rights Violations in Syria,* K4D Helpdesk Report 127, (2017).
13 U.N.H.R.C. Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/29/CRP.3 (June 23, 2015).
14 U.N.H.R.C. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/30/48 (Aug. 23, 2015).
15 International Committee of the Red Cross,Jean Marie Henckaerts& Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rule 71 (2005).
16 U.N.O.H.R. Indiscriminate Attacks and Indiscriminate Weapons in International Humanitarian Law (March, 2016) https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/indiscriminate_weapons_legal_note_-_final_new_format_-_en_3.pdf.
17 S.C. Res. 2118 (Sept. 27, 2013).
18 S.C. Res. 2249 (Nov. 20, 2015).
19 Peter Hilpold, *The fight against terrorism and SC Resolution 2249 (2015): towards a more Hobbesian or a more Kantian International Society?,* 55Indian J. Int. Law535-555 (2015).

in a dubious position to grant the latter[20]. Furthermore, Resolution 2499 was primarily aimed to be an instrumentality against ISIS, but Russian forces have continued their Assad agenda under its authority by attaching non-ISIS opposition to Assad's regime while claiming to be a part of the war on terror.[21]

Offensive strategic airstrikes by the coalition forces purport to carry out the UN mandate against terrorist groups as well as Assad's chemical weapon ambitions. These airstrikes are dubious under International law according to the UN Charter[22] as well as Geneva Conventions in their execution, targets, and proportionality.[23] UK claims validity, not on the three established exceptions to non-intervention, but on humanitarian grounds and Responsibility to Protect (R2P), neither of which is codified into International law. Furthermore, R2P is envisioned to authorize peaceful means at first[24], which was conveniently ignored. The US, as has been its tendency for decades, does not find itself accountable to any external authority other than to offer a banal argument of self-defense. Moreover, the noble aim of rescuing Syrian civilians from the clutches of catastrophe is undeniably defeated as these interventions are contributors to the humanitarian distress too. UN has betrayed its helplessness in its guilt-invoking pleas for united action and cessation of hostile operations, finally placing its hopes on negotiating a political solution to the ceaseless violence.[25]

A Reference To The International Court Of Justice

Another failure of the UN, in terms of bringing the culprits of Syria to justice, is the inability to subject the matter to the International Court of Justice which could be granted jurisdiction over the parties involved only by UNSC referral as Syria is not a party to the Rome Statute. While a 2014 UN resolution failed due to the Russia- China Blockade, Syrian Refugees have taken matters into their own hands by filing a case of crime against humanity the ICJ on the precarious basis of the Myanmar precedent[26].

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20 Georg Nolte, *Intervention by Invitation,* Max Planck Encyclopaedia of Public International Law, Oxford Press(Jan. 2010), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL.

21 Mark Czuperski, *Distract Deceive Destroy: Putin at War in Syria,* Atlantic Council 11-12, (2016).

22 U.N. Charter art. 51.

23 Iffat Idris, *International Humanitarian Law and Human Rights Violations in Syria,* K4D Helpdesk Report 127, (2017).

24 Rep. of the U.N. Secretary-General, Implementing the Responsibility to Protect, U.N. Doc. A/64/677(Jan. 12, 2009).

25 Press Release, Security Council, United Nations Seeks Negotiated Political Solution as Syria Conflict Enters Ninth year, Under-Secretary-General Tells Security Council, U.N. Press Release SC/13751 (March 27, 2019).

26 Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, Pre-Trial Chamber III (Nov. 14, 2019).

Consolidated efforts of Russia and China have ensured that UNSC reaches no consensus towards a constructive solution to the Syrian conflict, raising apprehensions regarding its competence to serve its purpose. Furthermore, the drawn-out violence coupled with the politicization of the humanitarian action has translated into Syria standing at the cusp of a humanitarian calamity at the mercy of an incapacitated Organisation whose aid delivery programs are suffering.[27]

3. Failure Of United Nations in Iraq

Operation Desert Storm And Aftermath

Iraq's invasion of Kuwait on August 2nd, 1990 set into motion a series of futile attempts at diplomatic de-escalation along with severe sanctions and embargos which ultimately paved way for the US-led coalition's heavy-handed military intervention. Acknowledging Kuwait's sovereignty, regardless of Saddam Hussein's claims to the contrary, and condemning Iraq's actions[28], the UN invoked Article 39 of Chapter VII of the UN Charter in declaring a breach of peace by Iraq and demanded nothing short of absolute withdrawal of Iraqi forces from Kuwait with immediate effect. The natural corollary of declaring a situation under Article 39 allowed the UN to consider measures of suspending diplomatic and economic relations, the inadequacy of which to obtain desired results would further enable the UN to take non-passive actions by land, sea, or air under Article 42. Subsequent resolutions that imposed stringent economic and financial sanctions on Iraq with an extensive embargo on oil resources and air space bans faced brazen retaliatory actions by Iraq which ultimately culminated in resolution 678 promising forceful compliance to all the UN resolutions before the deadline of 15th January 1991.

UN's seemingly industrious attempts of peaceful persuasion, as evident from the total of 12 resolutions passed over only a period of fewer than 4 months and repeated urgings for compliance to avoid aggressive overtures that went unheeded, was succeeded by a six-week offensive operation under UN authorization, yet not direct supervision. Iraq assented to observe resolution 686 to fulfill all previous resolutions and over a few more months, the UN passed 12 more resolutions to execute resolution 687 affecting the conditional cease-fire.While the extensive military operation succeeded in pressurizing the withdrawal as well as compliance with the UN resolutions where sanctions had supposedly been ineffectual, it set a trend for the US to take liberties in the middle-east at the cost of worsening the already desultory human rights conditions in Iraq.

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27 Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014).

28 S.C. Res. 660 (Aug. 2, 1990).

The world undoubtedly recognized the necessity of retracting Iraqi forces from Kuwait and stopping the Iraq invasion of Saudi Arabia, which would have effectively put Iraq in the position of controlling as much as half of the oil- resources of the entire world. However, the US administration had planned for much more than a defensive and preventive action with the mandate of the UN. With the UN's delay in acting, weak attempts at diplomatic intervention, and sanctions that weren't evaluated for their effectiveness, a lacuna was formed for US intervention. The fact that the UN was indeed dancing to the tunes of US ambitions of either toppling Saddam's regime or rendering the Iraqi military vulnerable enough to not pose a threat with the chemical and nuclear powers decimated, is visibly apparent in its hastily granted consent[29] for launching the military offensive on Iraq the very next day of the deadline with no efforts of peaceful negotiations between Iraq and Kuwait as enabled by Chapter VI[30] other than a vague reference made in resolution 660. It especially becomes a grave mistake in the context that Iraq's invasion of Kuwait only began after the perceived impasse in negotiations which were being led by Arab nations in the backdrop of assuming Iraq's threats of invasiontobe a mere bluff.

Furthermore, even though economic sanctions were levied, the sanctions committee set up by the UN showed a distinct lack of commitment towards and faith in the viability of sanctions in exacting Iraq's submission. While in the beginning, the US-made statements regarding the potentially substantial success of sanctions, these appear more to be an assumed front to subtly go forward with an offensive action, which the US president had approved as early as October 1990[31], reducing the passive UN overtures merely a waiting game before realization of its ambition of annihilating a former ally turned liability. UN's easy acceptance of US dictates was evident from US's move to secure support from member states for resolution 678[32] and the provisions of the resolution itself which eliminated the UN Security Councils role by not invoking Article 43 along with granting blanket permission to bring about peace through 'all means necessary' with UN's role as peace-keeper role obsolete. The US interpreted 'means' to only imply military action with no room for consideration of other peaceful avenues.

29 Srinivas Burra & Upendra Ch., *Role of United Nations in Conflict Resolutions: The Case of Middle East,* 13 Indian J. of Asian Affairs Law167-183, (2000).

30 Ninan Koshy, *The United Nations and the Gulf Crisis,*32 Economic and Political Weekly 3011-3020, (1997).

31 Bob Woodward, THE COMMANDERS 319 (1992).

32 Ninan Koshy, *The United Nations and the Gulf Crisis,* 32 Economic and Political Weekly 3011-3020, (1997).

The US-led invasion of Iraq was systematically exalted as a liberating act to establish a new world order. While careful examination indeed revealed that Operation Desert Storm, to a certain extent, adhered to the intent of categorically destroying military targets with minimal civilian causality, the US forced hid an ulterior motive hidden behind those ostentatious speeches proclaiming the herald of a better world and carefully chosen words.

While the US is not outright accused of violating Article 48 of Protocol I which talks of civilians as direct targets, it violates different elements of international humanitarian law including the Geneva Convention and Protocol I & II. Helpless civilians suffered due to daytime bombings with no warnings on considerably populated public areas and essential infrastructure in clear violation of Article 57 of Protocol I which mandates precaution in attacking dubious targets along with substantial use of cluster bombs. The targets weren't exclusively military and attacks weren't carried out with the exceptional accuracy the US statements would have liked to portray. US authorities neglected to mention the damage done to targets that were of dual purpose.

Indeed, a pattern of premeditated and targeted attacks on public facilities, including telecommunication facilities, power stations, water facilities, emerged which threw into sharp contrast the abject desolation laid on civilian lives. Article 52 of Protocol I prohibits retaliatory attacks on 'civilian objects' and Article 54(4) prohibits the destruction of 'objects indispensable to the survival of the civilian population'. Various acts[33], in so blatant a violation of these, were overlooked in comparison to the bigger picture of Iraq's retreat. This calculated undertaking of fracturing the economy of the country to force Saddam's hand lead to fathomless human rights violations for a long time to come. Furthermore, the intent of instigating the tormented Iraqi people against the government through deliberately inflicted suffering is also assigned to the allied forces.[34]Once the allied forces had fulfilled their objective of protecting their oil interests in the middle- east, not only were the civilians left in ruins with wounds and widespread starvation, they were left at the mercy of an aloof despotic government that suppressed the resulting rebellion with the utmost cruelty, going on a tyrannical rampage of indiscriminate violence.[35] US' liabilities for its violations, though depleted by its conditional acceptance to Protocol I, are yet to be accounted for.

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33 Hockstader Lee, *Power Outages Said to Burden Iraqi Hospitals,* The Washington Post, 1991.

34 Amnesty Int'l, *Iraq: Respecting International Humanitarian Law,* AI Index MDE 14/041/2003 (March 25, 2003).

35 Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq and Its Aftermath* (1992).

Occupation Of Iraq (2003-2011)

The eight-year occupation of Iraq which began in 2003 as supposedly an attempt to implant an idealized democratic order in place of despot continues the legacy of the middle east being the sacrificial lamb to the pursuit of self-interest of the powerful. US authorities systematically spread wild facts of Iraq's cooperation with Al-Qaeda and the enlarging arsenal of weapons capable of mass destruction to justify its growing agitation to launch a crippling attack on Saddam's audacious threats.

While US and UK failed to garner explicit UN sanctions for their proposed war against Iraq, they put up a front of compromises when faced with unrelenting opposition, and impudently moved forward with a 24- hour ultimatum of disarmament and unconditional cooperation. UN prove to be incapable of stopping the US-UK allied forces from invading in complete disregard to Article 2(4) of the UN Charter, despite repeated opposition from the anti-war segment with their mighty vetoes. Ultimately, resolution 1511 was adopted which restored, to a degree, a balance of power between the UN and US as a result of French, Russian, and German resistance.

Although often the US took the cover of Article 51 which allows for use of force in self-defence, it, in fact, admittedly presented no evidence in support of the allegations[36], while there was enough evidence to the contrary[37], that would have permitted the drastic measures taken as per the requisites under Article 51. Furthermore, despite US and UK's biased interpretation, resolution 1441 did not authorize war and neither did the resolutions adopted during and after the Gulf war provide any continued sanction for purposes other than withdrawal of Iraq from Kuwait. Ultimately, it emerges that Iraq was not in any material breach and the UN was willingly misled into paving an 8-year illegal occupation and countless human rights violations.

Unbridled use of 'incendiary weapons banned by Article 1 of Protocol III of the Convention on Certain Conventional Weapons along with reported chemical weapons in violation of Convention on Chemical Weapons, cluster bombs. Mass killings of civilians, obstruction of medical care violated various Articles of Geneva Convention IV along with the use of poisonous gases violating the 1925 Hague Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and Bacteriological Methods of Warfare. Furthermore, the devastating state left in the aftermath of the war fostered the rise of ISIS and unleashed the never-ending saga of human rights violations

36 Ronald Kramer, Raymond Michalowski & Dawn Rothe, "*The Supreme International Crime*": *How the U.S. War in Iraq Threatens the Rule of Law,* 32 Soc. Justice 52-81, (2005).

37 *Id.* at 59.

in the middle east as a result of the violent confrontation between the armed sectarian militia, the State, and the international 'forces of good'.

The absurd ease with which these war crimes of the US, though globally condemned, were never brought to justice is further aggravated by the fact that the US is a ratifying state to both the Geneva Conventions and the Hague Convention of 1907, as well as the fact that US federal law, The War Crimes Act, 1996[38] declares war crimes, violation of the aforementioned International law punishable under US domestic laws. Furthermore, Principles V and VI of Charter of the Nuremberg Tribunal 1950, under which the Nazi war crimes were tried, can be made the mechanism to punish US authorities for the human rights devastation caused in Iraq.[39] In the past, the UN has discharged its duties as the guardian of fundamental human rights by setting by Tribunals to try States for war crimes committed in Rwanda, Yugoslavia, and East Timor. Alternately, with the sanction of the UNSC, US actions can also be brought to justice through the instrumentality of the International Criminal Court.

However, the UN proved incapable of restraining US ambitions or of holding her accountable for innumerable crimes, remained a hapless witness.

4. Case of Yemen Civil War

The Yemen Civil War, described as the world's worst humanitarian crisis[40], is an ongoing conflict following its foundations in the Arab Spring of 2011, when Saleh, then authoritarian president, handed over power to Abdrabbuh Mansour Hadi. The fight started in 2014 when Houthis, a Shia Muslim rebel movement, snatched control of Saada province and the capital, Sana'a. It reached a disastrous point when in 2015, Saudi Arabia with eight other mostly Sunni Arab states, backed by the US, UK, and France, attempted to back Hadi's government by striking Houthi captured locales. The anti-Houthi bloc has also been joined by militias including those seeking independence for south Yemen. The downside of this has been the biggest humanitarian crisis ever, with a collapsed health system, and 22 million people in Yemen suffering consequentially.[41] Yemen is not only a party to the

38 18 U.S.C. § 2441.

39 Noor-ul-Ain Khawaja, *Human Rights Violations under U.S. Occupation in Iraq: An Analysis,* 65Pakistan Horizon59-83, (2012).

40 U.N. Secretary General, Secretary-General's Remarks at Press Encounter on Yemen (Nov. 2, 2018), https://www.un.org/sg/en/content/sg/press-encounter/2018-11-02/secretary-generals-remarks-press-encounter-yemen.

41 Press Release, Secretary-General, with 22 Million People across Yemen Suffering, $2.96 Billion Humanitarian Response must be Fully, Rapidly Funded, Secretary-General Tells Pledging Conference, U.N. Press Release SG/SM/18968-IHA/1450 (April 3, 2018).

1949 Geneva Conventions[42] but has also ratified Additional Protocol II of 1977 concerning non-international armed conflicts among other obligations such as ICCPR[43] and ICESCR[44].

The first of the few attempts of the UN involved passing the UNSC Resolution 2216[45] which recognized the intervention of the Saudi-led coalition in support of the Hadi regime and reaffirmed the international recognition of the Hadi regime. Nonetheless, Houthis stated that this resolution creates scope for the furtherance of any talks but with fundamental flaws as they continue to control the capital. More than a thousand days after its passage, the UN has been unable to accomplish any substantial process. This resolution has boiled down to being a justification or defense used by the Saudi-led coalition for its legitimacy.

The Resolution had been criticized on many grounds, including, a utopian hope to achieve an unrealistic aspiration by conditioning for Houthi forces to relinquish the occupied regions including Sana'a, and disarm completely. Since its failure, the ground reality had changed a lot as well. The Resolution only envisaged a conflict between Hadi and Houthis, but since then, many internal actors, such as southern secessionists and Saleh loyalists, and international actors such as militia supported by UAE and Saudi forces have also gained ground. To expect the Resolution to achieve the same objective in a metastasized conflict now is a rather fruitless push towards success.

The coastal city of Hodeida had been the subject of an UN-brokered international agreement, the Stockholm Agreement[46]. It was supposed to re-establish harmony but despite the UN's backing of the bloc, Saudi led coalition has advantageously disregarded the agreement, with no counteraction from the UN. The proposed exchange of 16,000 prisoners under the agreement has failed to happen as the numbers of the same remain dismal. Furthermore, the western city of Taiz remains to be secured, as agreed upon, becoming the only aspect of the three-part Agreement that has been realized. To make matters worse, Yemen has also been amid the world's worst famine.[47] In November 2019, Riyadh Agreement took place, led by the Saudi bloc between the Yemeni government and Southern Transitional Council. However, this

42 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

43 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 17.

44 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

45 S.C. Res. 2216 (April 14, 2015).

46 Stockholm Agreement (Dec. 13, 2018).

47 Ahmed Abdulkareem, *Why Saudi Arabia's Bloody US-backed War in Yemen will Likely Escalate in 2020,* Mint Press News (Jan, 3, 2020), https://www.mintpressnews.com/saudi-arabia-war-yemen-escalate-2020/263856/.

has been criticized to be loosely worded and ambitious to the extent of impossible realizations.

Recent war studies have concluded that the various groups involved in armed conflicts in Yemen among other countries are relying heavily on the official market and the black market within States to get arms. These studies recommended that the United Nations should pay adequate attention to this serious phenomenon within the international dimension and to end the delivery of rams to criminal groups and militias around the world, something that is yet to seek substantial attention from the UN in this regard.[48]

The draft resolution currently circulating in the UN[49], however, limits to rebuking Iran over its alleged missile supplies instead of addressing the broader humanitarian issue. While the UN still wants to paint a hopeful picture to the international community, the increasing social, political, economic, and humanitarian deterioration of the state continues to narrate a different story altogether.

5. The Israel-Palestine Conflict

The Israel-Palestine conflict, essentially a contest of self-determination between the Jewish Zionist group and the Palestinian Nationalist group, laying claims over the same domain, has been developing since the early twentieth century, with current conditions mercilessly defaced with violence requiring a dire need to resolve the issue. While United Nations has maintained a two-nation solution with both the countries "living side by side in peace and security within recognized borders, based on the pre-1967 lines"[50], however, there is by all accounts, no ending to human suffering in the Gaza Strip, West Bank and other areas serving as bone of contention. Hope had knocked the door of the international community in 1993 with the signing of the Oslo Accords, but less than a decade later, the region was once more confronting difficulties, such as the Second Intifada.

The relations between Israel and Palestine continue to be administered by existing bilateral agreements[51] which do not disallow the building or extension of settlements, explicitly providing that the issue of settlements is reserved for permanent status negotiations. In

48 Jana Arsovska, *Introduction: Illicit Firearms Market in Europe and Beyond,* European Journal on Criminal Policy and Research (2014).

49 Michelle Nichols, *U.N. Council Mulls Condemning Iran over Yemen's Houthis' Getting* Missiles, Reuters (Feb. 18, 2018), https://www.reuters.com/article/us-yemen-security-un/u-n-council-mulls-condemning-iran-over-yemens-houthis-getting-missiles-idUSKCN1G10W4.

50 U.N. Secretary-General, Secretary-General Note to Correspondents In Response to U.S. Plan for Middle East (Jan. 28, 2020).

51 Israel Ministry of Foreign Affairs, Israel-Palestine Negotiations (2013).

the Israeli-Palestinian Interim Agreement of 1995[52], it was expressed that the Palestinian Authority has no jurisdiction or command over the settlements of Israelis. However, United Nations itself provides provisions for the protection of human rights and humanitarian interests.

International Law And United Nations: Provisions For Protection

United Nations itself has numerous arrangements that secure the interests and contain a balanced scope to moderate violence such as the fact that Israel is barred from acquiring sovereign title over any of the territories occupied in 1967 rendering any occupation over West Bank and other strips legally invalid, laid down as norm of customary international law[53] flowing from the UN Charter[54]. Furthermore, Israel, asserting the OPT status, must also abide by the norms of International Humanitarian Law, specifically the Hague Conventions of 1907[55] and Geneva Convention IV[56]. Israel, hence, cannot forcefully transfer or deport the local populace from the involved territory or transfer or deport its population into the occupied territory[57]. The foundation and advancement of Israeli settlements in the West Bankare thus infringing upon principles of International Humanitarian Law and may amount to a war crime[58], as has been restated by the International Court of Justice[59]. Lastly, the principle of self-determination has been perceived as a major aspect of customary international law and has an *ergaomnes* character[60]. The *Wall* opinion likewise expressed that Palestinian people are entitled to the right to self-determination and that Israel must respect it.[61]

Before the 1967 war, the UN passed Resolution 181[62]to partition Palestine into Jewish and Arab states with the city of Jerusalem as

52 Israel Ministry of Foreign Affairs,Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Sept. 28, 1995).
53 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 87 (July 9).
54 U.N. Charter art. 2,4.
55 Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, U.N.T.S. 539.
56 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.
57 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 49, Aug. 12, 1949, 75 U.N.T.S. 287.
58 Rome Statute of the International Criminal Court, art. 8(2)(b)(viii), July 17, 1998, 2187 U.N.T.S. 90.
59 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, 119-120 (July 9).
60 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 119-120 (July 9).
61 *Id.* at 88.
62 G.A. Res. 181 (II), Future Government of Palestine (Nov. 29, 1947).

corpus separatum, and Resolution 194[63] which talked of the Right of Return of Palestinian refugees who were driven out in 1948. Even the UN Security Council has approached Israel to pull back from all the territories occupied in 1967[64], to put an end to all measures aimed to alter the character and status of Jerusalem[65] and to cease all settlement exercises in the West Bank[66].

Failed Resolutions And Lack Of Un Actions

While the many existing legal standards and principles appear to be sufficient to shield humanity from this territorial clash, responses from the international community have been political without recognizing the direness to resolve the matter, especially recently with the US shifting its embassy in Israel to Jerusalem, as a political proclamation, overlooking the Palestinian claim to East Jerusalem as the capital of the future state. A draft resolution was introduced in General Assembly aimed at reversing Trump's decision on Jerusalem, which was ultimately vetoed by the US. In this manner, the Palestinian question has been extremely affected by the makings of the American policy which has displayed a consistent predisposition towards Israel in this conflict. This can also be deduced by breaking down US' casting patterns in the General Assembly and the Security Council which exhibits clear Israel favoritism despite the gravity of the resolution, such as when it vetoed a UN resolution objurgating violence against Palestinians[67] claiming UN's inclination against Israel.

Between 1948 and 1967, Israelis ended up occupying a major chunk of land including the Sinai Peninsula, West Bank, and Gaza Strip but don't focus on the original takeover of land that happened in violation of International Law and UN's resolution calling for partition.[68] When in 1967, Resolution 242[69] was passed, without any references to Resolutions 181 and 194, it originally called for Israel to, "withdraw all its forces from all the territories occupied by it as a result of the recent conflict". This was later changed by the US to remove the usage of the word 'all' from both places. This implied that Israel didn't have to give up all its territories, especially when there was no specification provided

63 G.A. Res. 194 (III), Palestine- Progress Report of the United Nations Mediator (Dec. 11, 1948).
64 S.C. Res. 248 (Mar. 19, 1968).
65 S.C. Res. 476 (June 30, 1980).
66 S.C. Res. 2334 (Dec. 23, 2016).
67 Rodrigo Campos, *U.S. Vetoes U.N. Resolution Denouncing Violence Against Palestinians,* Reuters (June 2, 2018), https://www.reuters.com/article/us-israel-palestine-un-vote/u-s-vetoes-u-n-resolution-denouncing-violence-against-palestinians-idUSKCN1IX5UW.
68 MersihaGadzo, *Palestinians Speak out on Anniversary of Resolution* 242, AlJazeera(Nov, 19, 2017), https://www.aljazeera.com/news/2017/11/palestinians-speak-anniversary-resolution-242-171117092925628.html.
69 S.C. Res. 242 (Nov. 22, 1967).

on the territories it was referring to. Furthermore, what was supposed to be a turning Resolution, didn't mention 'Palestine' anywhere in the Resolution, reducing it to 'refugee problem', conveniently overlooking their right to self-determination. This meant for the Palestinians that Resolution 242 only extended to regions occupied in the war, without giving any consideration to the occupations before it. Despite PLO's earlier rejection of the same, Resolution 242 became the basis of the Oslo Accords. Furthermore, a recommitment to Resolution 242 was declared in Resolution 2334[70] which leaves no room to gain profit of ambiguity, with the US in abstention. However, just as it seemed that the international community was coming together to resolve the dispute, Israel announced a plan to construct thousands of new homes in the West Bank region.[71] This has further led to Israel completely dropping the 'land for peace' formula and trying to rid itself of any international law commitments. Israel has since then accelerated its ''housing settlements in occupied territory, failing the objective sought to be achieved by Resolution 2334.

Israel has breached or ignored, over 32 UN Security Council resolutions directed at it alone for violations which it has never taken action to remedy.[72] However, with explicit ignorance of international law and UN Resolutions, lack of any strict sanctions against Israel, and the international political power play of the US, Israel continues to move deeper into occupied territories with seemingly no end to this humanitarian crisis.

6. Conclusion

The actions of the United Nations have been consistently influenced by the concept of protecting the interest of international hegemonic power in the unipolar world order. It has, time and again, turned an evident blind eye to unabashed abuse of international law at the hands of global forces and has pushed unassertive resolution one after the other, forcing ineffectual measures while playing ostrich to the infractions against its mandate and partially hoping mere condemnation will discharge the substantial onus on it. It is undeniable that veto power wielded by and unruly military powers of these countries coupled with the economic leverage held over the organization has reduced it to a mere puppet to their dictates instead of dissuading global forces from turning the innocent world into a bloodbath in their pursuit of superiority.

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70 S.C. Res. 2334 (Dec. 23, 2016).

71 Peter Beaumont, *Israel announces 2,500 more West Bank Settlement Homes,* The Guardian (Jan. 24, 2017), https://www.theguardian.com/world/2017/jan/24/israel-announces-2500-more-west-bank-settlement-homes.

72 Shlomo Shamir, *Study: Israel Leads in Ignoring Security Council Resolutions* (Oct. 10, 2002) https://www.haaretz.com/1.5127043.

Its failure in the middle-east is not just visible from lack of resolution of disputes but also failed attempts at humanitarian aids. It is apparent that United Nations now presents politically prejudicial characters, consequentially losing the path towards world peace and security through impartial means that it had set upon. As against this background, United Nations' hopeful outlook can only be achieved if the UN sheds off its uncertain, ambivalent, and aspirational character and adopts a goal-oriented and impartial action plan.

Failure of Constitutional Machinery: An Uncanny Power to the Union?

*** Shivam Tripathi**

Abstract

The concept of Presidential Proclamation has always been an intensively favoured topic for political debate. This is essentially based on the premise that the provision often attracts much controversy each time it is applied in a particular state. An analysis of these emergency provisions, their origin and subsequent evolution is imperative to the development of constitutional law. The scope of the present submission is thus aimed at objectively understanding the contours of Presidential Rule, with specific emphasis upon the term breakdown of constitutional machinery. Pursuant to the same, the submission seeks to critically review origin and development of the Presidential Proclamations with greater detail. The research is thereby aimed at analysing the uncanny power vested to the centre under Article 356 through the vires of constituent assembly debates, theories for incorporation of emergency provisions, report of relevant commission, and limited set of judgments which highlight upon the judicial wisdom of the courts regarding the application of the Presidential Proclamations.

Keywords: Breakdown of Constitutional Machinery, President's Proclamation, Article 356, Centre-State Relations, Centre's obligation towards States, Constitution and Federalism

1. Introduction

The Constitution of India prescribes for a quasi-federal structure of governance that is federal in structure but unitary in spirit. The statement simply implies that although states have been vested with autonomy in several aspects there still are certain areas that have been placed within the domain of centre. The rationale behind vesting these particular categories of power to the centre is to preserve the sovereignty and integrity of the country. In 1947, while the people of India, achieved their goal and "purna-swaraj" and were able to free themselves from the shackles of colonial regime, the framers of the constitution were aware of the diversities and differences which prevailed in the region. It was therefore only in order to safeguard the sates/provinces, that certain powers aimed at protecting the country from any kind of external aggression or internal disturbances were vested to the centre by the constituent assembly.[1] The provisions contained in part XVIII of the

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1 Sudhir Bisla, Historical Background of Article 356 of the Constitution of India,

Indian Constitution is a glaring example, as well as a testimony to the country's unitary spirit. Part XVIII essentially vests certain overriding powers to the central government towards administering or controlling any state throughout the territory of India.

The incorporation of these emergency provisions under part XIII, was in-turn heavily discussed in the meetings of the constituent assembly, especially with regard to the impact which such emergency provisions would have in the country's federal polity.[2] However, what was assumed to be dead letters of the law has now turned out to be one of the most abused provisions to stifle state governments. Furthermore, as has been rightly put forth by writers across various forums these provisions are now being heavily employed by the central governments for 'settling scores' with opposition parties ruling in states.[3] Although, the power provided for under Article 356 is quite extraordinary, it is its uncanny nature which in turn tends to corrupt the authority wielding it.[4] This being said, however, for a country as vast and as diverse as India, appearance of any extraordinary situation wouldn't be an unusual affair. The existence of such emergency provisions is therefore indispensable to Indian Polity.[5]

Thus, an analysis of these emergency provisions, their origin and subsequent evolution is imperative to the development of constitutional law. The present paper is thereby aimed at exploring the idea of emergency powers, with an emphasis upon the term "Failure of Constitutional Machinery" from a critical perspective. In the subsequent headings which follow through the course of this submission an attempt is made discuss at length, the origin, scope, evolution, and more importantly the present-day application of law on emergency power vested under article 356 to the Constitution of India. Furthermore, in order to further contribute to the literature on the subject certain suggestions relevant to India's context are explored for a better implementation of what has now become the "death letter" of the law.

2. Nature of Indian Federation & Presidential Rule: A Union of Centre & States

Before one begins to delve deep into dissecting the various facets involved in the term "failure of constitutional machinery" and the subsequent ramifications to Article 356 of the Constitution, it firstly

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(2012) 4 SCC J-3.

2 MP Jain: Indian Constitution Law 6th Edition 2013.

3 *Supra Note* 1

4 A.G.Noorani; Constitutional Questions and Citizen's Rights; Oxford University Press, 2006.

5 S Pal: India's Constitution-Origins and Evolution, 1st ed, Vol 10, Articles 352-395 & Schedules I to XII.

becomes essential to ponder upon the question what is the nature of Indian Polity i.e. whether it is a federation or union. This discussion is essentially relevant as it highlights upon the true spirit of our polity, and thereby serves as a pole star to navigate through the issue of what would actually constitute a failure of constitutional machinery and what wouldn't. It has to be firstly understood that in a federation like ours, there's always a dire need to promote and preserve the idea of harmony between centre-state relations. This can be achieved only when the principle of cooperative federalism is applied in its true spirit, i.e. where there is a genuine intent to work further benefit of the community/citizens and not with an attitude assert dominance over the other.[6] The above statement finds its approval in the words of Dr Babasaheb Ambedkar, who, during the constituent assembly debates emphasised heavily upon describing India as a union rather than a federation. Dr. Ambedkar emphasised "*…what is important is that the use of the word 'Union' is deliberate…*"[7] He further stated that while the country and its citizens have been divided into different states for the purposes of administrative convenience, its citizens as an integral whole derive their power from a singular imperium i.e., the constitution of India.[8] To simply state, this what the relationship between centre and states is all about under the Indian Constitution.

Furthermore, even upon an examination of similarly situated legal systems which have had their significant impact on ancient history, for instance be it the Lycian Confederacy or the Achaean League, one of the major takeaways in the wirings of these legal system has been that the consequences of usurpation of state's authority by the centre would be insignificant, when compared against the gradual withering away of a federation into smaller fragments due to external disturbances.[9] It is this very philosophy which forms the basis for the distribution of power between centre and states and also lays the foundation of certain overriding emergency provisions under the Constitution. The overarching point that has been conveyed in this heading by placing reliance upon constitutional assembly debates, and a reference to other ancient legal systems is that, one of the primary

6 Kamath, S., 2020. The imposition of President's Rule and Its Judicial Scrutiny: Courts Getting into the Political Thicket. RMLNLU Constitutional Law and Public Policy Blog, Available at: <https://seclpp.wordpress.com/2020/07/28/the-imposition-of-presidents-rule-and-its-judicial-scrutiny-courts-getting-into-the-political-thicket/>.

7 Rajashekara, H., 1987. President's Rule in the Indian States. *The Indian Journal of Political Science,* 48(4).

8 National Commission to Review the Working of the Constitution, Report, I, 8.1.2 (2002).

9 James Madison, The Alleged Danger from the Powers of the Union to the State Governments Considered, Independent Journal, 1788.

principles which should always be borne in mind is that, even though existence of emergency provisions is a necessary, it is only the spirit of "co-operative federalism" which can preserve the balance between the Union and the States.[10]

3. Dr. Ambedkar's Vision & Rationale for the Provision

After an analysis of the very nature of Indian Polity and philosophical foundation for inclusion of Emergency Provisions under the Constitution of India, this portion of the paper examines the historical underpinnings of the concept and the rationale behind the inclusion of the provision in the constitution of India. Firstly, even though article 356 to the constitution of India, was based on section 93 of the controversial government of India act 1935.[11] When this idea first came up before the constituent assembly to confer powers on the president which were similar to those exercise by the Governor General under the 1935 government of India act, the idea was very vehemently opposed by members of the assembly.[12] The debates indicate that several members opposed the idea of incorporating the then draft Article 278.[13] However, despite these contentions, it was Dr. B.R. Ambedkar who favoured the idea of vesting certain emergency provisions in favour of the centre, as he stated that a mere possibility of abuse cannot be considered as a ground for not incorporating the relevant provisions in the constitution. He further goes on to state: "…*In fact I share the sentiments expressed by my Hon'ble friend Mr. Gupte yesterday that the proper thing we ought to expect is that such articles will never be called into operation and that they would remain as dead letters. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces…*"[14] These statements of Dr. Ambedkar, nonetheless, clearly state on point in particular, i.e., the provisions are meant to address any exigencies which might arise in the functioning of polity, and thereby only meant to regulate possible disturbances caused to the state machinery.[15]

After a perusal of Dr. Ambedkar's sincere advice, next-up, it becomes essential to examine the rationale for the provision. Therefore, what

10 DD Basu: Commentary on the Constitution of India, 9th ed, Vol 14, Articles 311-369.
11 Samaraditya Pal, India's Constitution- Origins and Evolution Vol. 7, Lexis Nexis, 1st ed.
12 Sudhir Bisla, Historical Background of Article 356 of the Constitution of India, (2012) 4 SCC J-3.
13 Hasnain, D., n.d. Dynamics of Article 356 of the Constitution of India. Uttarakhand Judicial & Legal Review, available at: <https://ujala.uk.gov.in/files/ch11_1.pdf> [Accessed 17 October 2020].
14 National Commission to Review the Working of the Constitution, A Consultation Paper on Article 356 of the Constitution, II, ¶ 2.2 (2002), at http://lawmin.nic.in/ncrwc/finalreport/v2b2-5.htm.
15 T.K. Tope, Dr Ambedkar and Article 356 of the Constitution, (1993) 4 SCC J-1.

follows in the subsequent course of discussion are a set of arguments, favouring the legitimisation these provisions in terms of the nature of state autonomy and objectives of the union. The rationale behind the existence of Article 356 under the constitution of India can be simply discussed in terms of three heading and these are:

3.1. Objectives of the Union: India, as we know it, has always been a land of diverse cultures, linguistics, and religious beliefs. It is resultantly because of these key factors; the Indian Constitution cannot be strictly categorised as either a federation or union. In fact, the intention of the framers was more inclined in favour of having a singular government structure for the entire country.[16] One of the possible reasons for the constituent assembly members favouring a strong union, was an awareness of certain divisive forces which were at work throughout the country during the time of independence.[17] The constitution was thereby envisaged in a manner to counter any divisive forces which might disrupt the functioning of the country. More importantly, it was for this very reason that referring Indian Polity as a federation under Article 1 was purposefully avoided and the term "Union of States" was employed.[18]

3.2. Scope of State of Autonomy: India unlike America is not a Confederation of states, i.e., the union of India is not a result of agreements amongst various state governments who decided to come together and thereby surrendered a part of their autonomy/ independence towards the creation of a new federal government.[19] This consequently implies, that the states in India do not have any legal/ moral right to secede and have an identity of its own, separate from the union. However, the Constitution is yet so balanced that it confers appropriate powers to both the Central as well as the state government. This essentially means that even though the power of the union are quite extensive it does not implies that states do not have their own autonomy.[20] This was further rightly pointed out in case of S.R. Bommai v. Union of India[21] wherein it was observed: "The Constitution of India has created a federation but with a bias in favour of the Centre. Within the sphere allotted to the States, they are supreme"[22] The observation of the apex court in this case clearly indicates that even though states

16 A. Ratnavelu, Article 356 A Binding Force for the Unity of India in Our Constitution, (1999) 2 LW (JS) 21

17 MP Jain: Indian Constitution Law 6th ed. 2013.

18 A. Ratnavelu, Article 356 A Binding Force for the Unity of India in Our Constitution, (1999) 2 LW (JS) 21.

19 R. Prakash, Judicial Review of Presidential Proclamation Under Article 356, (1998) 6 SCC J-13.

20 Arvind P. Bhanu, Changing Face of Article 356- Judicial Zeal and Jerk, 2010 PL Feb 8.

21 AIR 1994 SC 1918

22 Ibid, para 434(9).

are supreme within the sphere of authority allotted to them by the Constitution, any interference of the Union in State's activity wouldn't be considered as an invasion as long as the constitution permits.

3.3. Article 355 & Union's duty to States: Article 355 to the Constitution lays down a duty on the centre to protect the state against "external aggression or internal disturbance" and ensure that the activity of the activities of state are administered as per the Constitution.[23] This, implies that the power vested under subsequent article i.e. Article 356, is ancillary to the primary goal enshrined under Article 355, which is to ensure that the functioning of the states is in conformity with the India Constitution.[24]

The major takeaway through this discussion is that, under the scheme of Constitution, there cannot be any other viable alternative to Article 356, in case of "Failure of Constitutional machinery" in a state, and that this article is merely aimed at addressing such exigencies which might, at time arise.[25] However, whether the article has been justly used by the Union is a different question altogether.

4. Constitutional Limits to Article 356

As we move on to the next portion of research two things are quite clear. Firstly, article 356 is a necessary evil. Secondly, it must be sparingly used only in cases where there is a breakdown of constitutional machinery in state.[26] This, in-turn brings us to the next part of the this paper. It is from here on, that we arrive at a "textual" breakdown of the provision itself. Article 356 to the Constitution of India, contained in part XVIII of the Constitution is divided into five major clauses. While the first clause sets out the conditions and consequences for invoking the article, the remainder clauses lay down the procedure to be complied with for invoking the article. The language of first clause further makes it amply clear that President's satisfaction is a prerequisite for an application of Article 356 in a particular state. This satisfaction can be achieved either upon a report from the Governor of otherwise, that circumstances have arisen in a state, under which, the government of a particular state can no longer function in accordance with the Constitution.[27] This implies, that clause one to article 356 is further divisible into major components viz., Satisfaction of the President &

23 T.K. Tope, Dr Ambedkar and Article 356 of the Constitution, (1993) 4 SCC J-1.
24 Vidushi Sanghadia, Justiciability of a Presidential Proclamation of Emergency under Article 352(1) of the Constitution, (2017) 12 NSLR 69.
25 Samaraditya Pal, India's Constitution- Origins and Evolution Vol. 7, Lexis Nexis, 1st ed.
26 DD Basu: Commentary on the Constitution of India, 9th ed, Vol 14, Articles 311-369.
27 Reddy, K. and Joseph, J., 2004. Executive Discretion and Article 356 of the Constitution of India: A Comparative Critique. Electronic Journal of Comparative Law, 8(1).

Failure of Constitutional Machinery. However, it is the usage of the term "failure of constitutional machinery", the interpretation of which, though the course of history has undergone several changes, and has thereby significantly shaped the present day understanding of President's rule.

4.1. Failure of Constitutional Machinery & Constituent Assembly: A missed opportunity

Despite being pivotal for the application of a President's rule, the term "failure of constitutional machinery", however, is left unexplored/ unexplained in the constitutional assembly debates. This omission is realised by the words of Dr. B.R. Ambedkar, the prime architect of Indian Constitution, when during the course of constituent assembly debates, he goes on to state that: "*The expression failure of machinery I find has been used in the Government of India Act, 1935. Everybody must be quite familiar therefore with its de facto and de jure meaning.*"[28] It becomes pertinent to mention at this juncture, that although such provisions dealing failure of constitutional machinery do find their mention in the Government of India Act, 1935, the term however, is left undefined even under this Act.[29] Thus, although, breaking down of constitutional machinery is a pre-cursor for invoking article 356, the term itself, however, has not been defined under the constitution of India.

However, under this article, the terms "*the government of the State cannot be carried on in accordance with the provisions of the Constitution*" is set forth in a broader sense. This entails that a multitude of decisions taken by the functionaries of state in order to discharge their day-to-day exigencies of governance, which at times, may not strictly be in accordance with the provisions of the Constitution, doesn't always amount to a transgression of constitutional principles.[30] In words of Pandit Thakur Das Bhargava:

"No Constitution can be said to have failed to work unless and until all the provisions of the Constitution relating to the State are exhausted. Unless and until every attempt has been made, and unless he (the Governor) finds that even the ordinary liberties cannot be enjoyed by the people, he will not come to the conclusion that the Constitution has failed"[31]

The statement simply elucidates that, only when each and every provision regarding the maintenance of government in the state

28 Para 251.
29 Dr. Anil Kumar Dubey, Presidential Takeover of State Government, ILI Law Review, 2018.
30 Akhilesh Patel, Constitutional Dynamics of Article 356 in India, SSRN (2011).
31 IX Constituent Assembly Debate 169.

has been exhausted and the liberty of its citizens still cannot be enjoyed ordinarily, such a situation would then qualify as a failure of constitutional of machinery. Furthermore, the words of Justice. Ramaswamy, through his judgement delivered in S.R. Bommai's case, serve as a cornerstone towards discovering the contours and implications of the term failure of constitutional machinery. Justice Ramaswamy stated that:

"The exercise of the power under Art. 356 is an extraordinary one and needs to be used sparingly when the situation contemplated by Art. 356 warrants to maintain democratic form of Government and to prevent paralyzing of the political process. Single or individual act or acts of violation of the Constitution for good, bad or indifferent administration does not necessarily constitute failure of the Constitutional machinery or characterizes that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution."[32]

At this juncture it becomes evident that there are no set parameters to answering what would constitute a failure of constitutional of machinery, and that the answer to this question can at best be said is 'left to the discretion of the courts.'[33] However, Prof. M.P. Jain[34] has pointed out certain instances which lead to breakdown of constitutional machinery, these include:

1. *"No party in the Assembly has a majority in the State Legislative Assembly to be able to form government*
2. *A government in office loses its majority due to defections and no alternative government can be formed.*
3. *A government may have majority support in the House, but it may function in a manner subversive of the Constitution.*
4. *The State Government does not comply with the directions issued by the Central Government under various constitutional provisions.*
5. *Security of the State may be threatened by a widespread breakdown of law and order in the State."*

4.2. Implications to Breakdown of Constitutional Machinery

When a President's Proclamation is made with regard to a particular state, the powers of the state are exercised by the parliament for that particular state under article 356(1). Furthermore, the parliament can either confer this power to the president or authorise him/her

32 T.K. Tope, Dr Ambedkar and Article 356 of the Constitution, (1993) 4 SCC J-1.
33 K. Madhusudhana Rao, The Scope of Article 365 of the Constitution, (2000) 4 SCC J-1.
34 MP Jain: Indian Constitution Law 6th Edition 2013

to further delegate this power to any other relevant authority which he/she specifies, by virtue of article 357(1)(a). It becomes pertinent to mention that the term "satisfaction of the president" does not mean satisfaction of the cabinet, and can therefore by challenged before the appropriate court on two grounds. Firstly, if the proclamation is issued with a mala fide intent and secondly, it is based upon entirely irrelevant grounds.[35]

Moreover, as enshrined under article 356, the president can issue proclamation without submission of a Governor's report for the particular state. This was essentially done by having borne in mind that it is the centre's primary duty to safeguard the constitutional machinery in the states. It was for this very reason that the constituent assembly did not confine the power of the President to issue proclamation entirely based on a Governor's report, as certain exigencies might not even warrant submission of report of the Governor.[36] The President can, under these circumstances, issue proclamation, if, due to the nature of events, he/she is satisfied that in order to fulfil the obligations under Article 355, and imposition of president's rule is required in the state. Furthermore, another relevant procedural implication for invoking article 356 is that it stays in operation for two months, unless it is approved by both, the Lok Sabha and Rajya Sabha, before the expiry of its term under Article 356(2). However, if the invocation is passed by both the houses of the parliament, then it stays in operation for six months, but cannot remain in operation for more than three years.[37]

However, throughout the history of Independent India, there have been numerous occasions wherein article 356 was invoked to restore the constitutional machinery in the state. If one critically analyses the frequency of application of the provision, one of the key takeaways which can deduced is that the fear of a possible misuse of provisions as apprehended by certain members of the constitutional assembly might be a reality today., i.e., despite Dr. Ambedkar's assurance that the provision was to be rarely it has now become one of the most frequently used provisions of the Constitution.

5. From Dead Letter to Death Letter of Law: Misuse of Article 356 & Sarkaria Commission

One of the key criticisms to invocation of Article 356 is that instead of being used in extreme circumstances which warrants an invocation of the provision, Article 356 has, in most case, become an

35 Role of Interstate Council In Promoting Indian Federation: From Yesteryears To Coming Years 2010 3 MLJ 22.

36 Dr. Anil Kumar Dubey, Presidential Takeover of State Government, ILI Law Review, 2018.

37 Alexander Hamilton, The Union as a Safeguard Against Domestic Faction and Insurrection, The Federalist No. 9, Independent Journal, Nov. 1787.

instrument to stifle opposition state government by the centre.[38] It was in the year 1951, that the article was invoked for the first time In State of Punjab and has been subsequently used in Vimochana Samaran to topple government which was democratically elected in Kerala during 1959.[39] However, it was during the period from 1970s two 1980sThat the problem that the practice became prominent by the central government. Both Indira Gandhi as well as the Janata party are known to have extensively employed this provision. Interestingly, it was during the period from 1966 to 1977 that is under Prime Minister Indira Gandhi's regime that the provision was invoked as many as 39 times across various states.[40]

Resultantly, the Sarkaria commission[41], under the chairmanship of Justice R.S. Sarkaria, was set up in the year 1983 with the primary objective of reviewing existing Centre state relations and its various arrangements. The report of the commission was finally submitted along with 247 recommendations in the year 1987. Some of the prominent recommendations made by the commission are as follows:

1. One of the most important recommendations, made by the commission was that the article should be used only in the rarest of circumstances. The commission specifically pointed out that the term Failure of constitutional machinery was extremely vague and therefore every infraction of constitutional principles, regardless of their importance, cannot fall within the contours of the provisions. It was further recommended that the provision was to be used only when all available alternatives have been exhausted. The commission was further quick to point out that any miss-use of power envisaged in Article 356 would have the catastrophic effect of disturbing/altering the very fabric of democracy.[42]
2. It was also recommended, that the condition to utilise/exhaust all available alternatives before invoking article 356 could be omitted Only under extreme circumstances where any delay in action By the central government would have dire consequences.[43]
3. More importantly, one of the most important recommendations

38 DD Basu: Commentary on the Constitution of India, 9th ed, Vol 14, Articles 311-369.
39 S Pal: India's Constitution -Origins and Evolution, 1st ed, Vol 10, Articles 352-395 & Schedules I to XII.
40 DD Basu: Commentary on the Constitution of India, 9th ed, Vol 14, Articles 311-369
41 Sarkaria Committee, Emergency Provision. Inter-State Council Secretariat. Available at:
<http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERVI.pdf> [Accessed 18 October 2020].
42 *Ibid* Para 6.7.04.
43 *Ibid* para 6.7.08.

that was made, stated that for every invocation of article 356, a detailed report was to be compulsorily submitted. The recommendation was undoubtedly a crucial one for it made judicial review of article 356 possible, which would ultimately act as a check to centre's mala fide intentions.[44]

6. S. R. Bommai v. Union of India: Demarcating Limitations

The above discussed recommendations, were, as one would expect, not implemented by the central government, and that it was ultimately the Supreme Court, which had to finally step in, in the year 1995, to read in the recommendation, through similar observations in its judgement. Since, S.R. Bommai's[45] case has been pivotal to the development of law on what conditions would qualify as a failure of constitutional machinery, it becomes relevant to analyse the observations of the apex court in order to gauge an understanding of the provision as it stands in Indian Contemporary Indian Society. The gravity of the judgment can be understood from the words of eminent jurist, Soli J. Sorabjee, who, in his words, writing for the Indian Express, summarised the entire position of law on article 356 and stated that "*After the Supreme Court's judgment in the S. R. Bommai case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed.*"[46] Two of the major takeaways away from this judgement were: Firstly, an observation by the apex court that article 356 to the Constitution of India, was justiciable and not immune from judicial review. Secondly, dissolving duly constituted assembly of a state on the grounds that it had suffered defeat in Lok Sabha elections by invoking Article 356 would also not qualify as being valid.[47] Inter alia it becomes relevant to mention some of the major significant observations by the apex court which were laid in this judgement:

1. Firstly, the apex court clarified that the power vested to the President within article 356 is Actually that of the union, i.e. The Prime Minister along with the council of ministers. Additionally, the satisfaction envisaged under the provision is also subjective in its nature.[48]

2. The power vested under article 356 is not absolute, and is contingent upon satisfaction which is to be formed to only upon a serious and relevant consideration of all material at hand.[49]

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44 *Ibid* para 6.6.26.
45 AIR 1994 SC 1918.
46 Soli Sorabjee; Constitutional Morality Violated in Gujarat, Indian Express, Pune, India, Sept. 21, 1996.
47 Soli J. Sorabjee, Decision of the Supreme Court in S.R. Bommai v. Union Of India: A Critique, (1994) 3 SCC J-1.
48 Para 389.
49 Para 386.

3. Although, the power to dissolve a legislative assembly is implicit under President's proclamation, an assembly shouldn't be dissolved in ordinary course, and should be resorted to, only under the most extreme circumstances, which would further the objective of the provision.[50]

4. Article 356 can be invoked only when the conditions stipulated in clause one is met with. In this situation the President takes over the entire functioning of the state and not a fraction of it. To simply put, this means that there cannot be two governments for one state.[51]

5. In case, when both the Rajya Sabha and the Lok Sabha do not approve the invocation of article 356 by the President, then under such circumstances the proclamation issued is lapsed after a two-month period and order made by the President during this two-month tenure too become illegal or void.[52]

6. So far as Article 74(2) is concerned it only bars a judicial enquiry into what advice has been tendered by the Council of ministers to the President, if any. This provision however, does not bar the court to call upon the council of ministers and disclose the material on the basis of which their advice was tendered to the President.[53]

7. Since the proclamation issued under article 356 is not immune from judicial review, the Centre cannot refuse to provide the relevant material to the court on the basis of which the decision was taken. Both, the Supreme Court and High Court are open look into the adequacy of the material placed before it and can further strike down the invocation of article 356 if made on mala fide grounds.[54]

8. Finally, the court upon striking a proclamation also has the power to revive the dissolved legislative assembly of that state.[55]

7. Judicial Review & Article 356: A Consistent Development

As stated above, the question whether President's proclamation was immune to judicial review has been brought up before the court quite a number of times, before it finally laid its clear dictum in S.R Bommai's case. The case of *K.K. Aboo v. UOI*[56] can be traced down to have been the

50 Para 108.
51 Para 293.
52 Para 289.
53 Para 312.
54 Para 365.
55 Para 292.
56 AIR 1965 Ker 229.

first case in this regard. In this case Article 356 was invoked for State of Kerala in the year 1965 on the premise that a stable government wasn't formed after the general elections. Resultantly, the decision of the centre was challenged on the basis, that the President's Proclamation was issued without having meetings for the state legislature. The high court however, refused to get into the question of constitutionality/validity of invoking Article 356, and rejected the petition.[57] Furthermore, the Punjab High Court, on a similar issue, too gave a similar dictum, and in case of *Rao Birender Singh v. UOI*[58] observed that, while excreting powers under Article 356 since the President acts in a Constitutional capacity and not on behalf of the Central Government, therefore a proclamation made through the vires of this Article was immune from Judicial Review.[59] Similar view was taken by the Calcutta High Court in *Jyotirmay Bose v. UOI case*[60] as well.

Furthermore, in *Bijayanand v. President of India*[61], the Orissa High Court discussed the scope of judicial review to President's Proclamation with greater degree of detail. Interestingly, the court observed that the decision of the governor to submit report to the president should be based upon material facts and not upon the influence/advice of the council of ministers. However, in regard to the position of President, the Orissa High Court observed that, the question of the report itself being mala fide cannot be looked into by the court. Hence, it was this judgment as well that judicial review of article escaped court's consideration.[62]

Moreover, in case of *A. Sreeeramulu v. Unknown*[63], the Andhra High Court was faced with the same question. The exact issue before the court was whether the court could interfere with the proclamation made under Article 356, if it had doubts with regards to the veracity of satisfaction of the President for failure of constitutional machinery in the particular state. Upon a perusal of the judgment, it can be inferred that Justice Chinnapa Reddy, presumably didn't want to get into the nuances of whether or not Article 356 was immune to judicial review.[64] However, interestingly he did suggest that any consideration guiding President's discretion towards determining a failure of constitutional machinery should always be relevant. Consequently, it was observed in the judgement, that even if it is assumed that the court has a limited power of judicial review, the invocation of article 356 in the instant

57 *Ibid* para 7.
58 AIR 1968 Punj 441.
59 *Ibid* para 16.
60 AIR 1971 Cal 122.
61 AIR 1974 Ori 52.
62 *Ibid* para 71.
63 AIR (1974) AP 106.
64 *Ibid*, para 14.

case was justified, having regard to the factual matrix, and therefore the petition was accordingly dismissed.[65] The case assumes immense significance, since it was for the first time, the concept of judicial review of administrative action was argued for, as a yardstick to be used in order to assess the validity a President's Proclamation.

A common string which runs through all cases discussed till this point is that all of them have been decided by high courts across the country and that none of them was brought before consideration of the Supreme Court. Moreover, in the mid 1970's with the introduction of 38th Constitutional Amendment, judicial review of President's Proclamation was strictly barred, as the amendment declared the satisfaction of president to be the final authority. The clause was however subsequently removed in 1978 by way of the 44th Constitutional Amendment.[66]

Meanwhile, at the time when 38th Constitutional Amendment was still applicable the question for judicial review of President's proclamation, for the first time, came before the apex court in case of *State of Rajasthan v. UOI.*[67] The court therefore accordingly held that since judicial review to article 356 was barred by the constitutional amendment it cannot interfere with the action of the central government. Justice Bhagwati observed "*the satisfaction of the President under Article 356 is a subjective one and cannot be tested by reference to any objective tests or by judicially discoverable and manageable standards.*"[68] Resultantly, judicial review to Presidential proclamation was thereby struck down, until it was finally for the judgement of *S.R. Bommai* wherein the apex court, being the sole sentinel to the Constitution. emphatically laid down the contours to Article 356, as discussed in the previous heading.[69]

At this juncture it must be borne in mind that it was for the judgments rendered by the Apex Court in the 90's which had a profound impact on the construction of Article 356. It would not be an overstatement to say that S.R. Bommai[70] and subsequent cases like *Jagdambika Pal v. Union of India*[71] for instance, were to an extent able to deter misuse of the abject power contained under Article 356 of the Constitution of India, and these judgements are therefore in true sense a reflection of the progress which the Indian Judiciary has made over the course of time.

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65 *Ibid*, para 15.
66 The Constitution (Forty-fourth Amendment) Act, 1978, sec. 38.
67 AIR 1977 SC 1361.
68 State of Rajasthan v. Union of India, AIR 1977 SC 1361, para 150.
69 Dr. Dharmendra Kumar Singh, An Analysis of Pre and Post S.R. Bommai Scenario with Reference to President's Rule in States, (2017) *International Journal of Humanities and Social Science Invention* 6(6).
70 AIR 1994 SC 1918.
71 1998 (2) SCALE 83.

8. Article 356: Need for Amendment?

Having regard to the discussion that has taken place through the course of this submission, a pertinent question which requires an answer is, whether there is an exigency to amend the provisions contained in Article 356 of Indian Constitution. In fact, abrogation of Article 356 is being suggested as an end all solution to towards curbing centre's encroachment upon state administration. However, this suggestion in turn suffers from fallacy, since even upon an abrogation of Article 356, the provisions contained in Article 355, i.e., union's duty to protect the state, may simply worsen the problem for states. This in turn has been put forth by writers across various forums, that existence of Article 356, and specifically clause (3) therein, acts as a counter measure to keep in check the power contained under Article 355. In the absence Article 356, the central government would be free to take any action in the name of restoring the constitutional machinery in the state. It is for this very reason that complete abrogation doesn't appears to be a viable solution to the problem. The overarching point that this being conveyed here is that Article 356 cannot be simply done away with entirely, on the major premise that deletion of this article would also require abrogation of certain other provisions under the constitution, for instance Article 355. Furthermore, even after such deletion/removal of existing provisions there is no guarantee that the Centre wouldn't devise new ways to encroach upon the functions of the state. Therefore, what is consequently required is the proper use with judicial restrictions/limitations placed by courts, from time to time.

9. Conclusion

From an analysis of article 356 and its subsequent judgements it can be inferred that there is certainly a potential for misuse of power, which is vested to the centre through the vires of this article. Furthermore, what has happened throughout the course of the history of Independent India is that, the only safeguard provided within the article i.e., "parliamentary approval" has lost its essence due to biased application by the centre. However, on the other hand, a case for abrogation of article 356 also cannot be most certainly made, owing to the fact that there is no dearth of crises which might arise under the constitution. It was for this reason that even the National Commission to review the working of the constitution (NCRWC) too advised against abrogation of Article 356[72] as it would further an imbalanced centre state relation. Thus, some of the major suggestions which are more feasible and also further the proper implementation of the constitutional objectives are as follows:

72 National Commission to Review the Working of the Constitution, Report I

1. Certain provisions must be made which stipulate that unless invocation of Article 356 is approved by both Lok Sabha and Rajya Sabha, the legislative assembly of a state cannot be dissolved.
2. Prior to issuance of President's proclamation as practice must be adopted whereby the President states the factors which leads him/her to believe that there is a breakdown of constitutional machinery in the state, and the state government should thereby be given appropriate opportunity to address the situation which has been stated by the President, unless a situation has arisen which warrants immediate action by the centre.
3. Moreover, the proclamation issued must clearly substantiate the reasons upon which the satisfaction of the President for invoking Article 356 is based.

Above all, if there is anything which can be said with absolute certainty regarding Article 356 and its implications, it is that, it should be utilised only in most extreme circumstances and that judicial guidance by way of precedents is the way forward.

Security And Privacy Issues Related to IoT Devices - A Comparative Study of Regulations of India, UK, Australia, USA, and Japan

*** Mr Abhishek Porwal**

Abstract

The idea of embedded internet has been around since 1970, which has gained popularity with the name of Internet of Things (IoT) pushed by Kevin Ashton in 1999. The growth of IoT devices can be seen by adopting the idea of the internet-connected fridge by LG in 2000, self-driving cars by Google in 2009, Google glasses in 2013, and the adoption of international standards in 2015. Many sensors and cameras have been utilizing the IoT device's capabilities and gathering massive data of people, and many a time, without the knowledge of people, their privacy is compromised. Manufacturers are concerned about the devices' features and cost, and security is not the prime concern of these devices. Connected devices with lesser security features help the hacker to take over the whole network. In 2016, the first IoT malware played on the security loopholes of IoT devices.

Many Governments started thinking about IoT security after the IoT malware attack because IoT began playing a significant role in collecting specialized and precise data and becoming an integral part of digital transformation. This study focuses on the need for security with IoT devices and the approach of different countries towards regulations for security aspects with IoT devices.

Keywords – Internet of Things (IoT), Information Technology, Internet Security, IoT regulations, Malware.

Introduction

The idea of delivering hot pizzas to customers or keeping human specimens at a specific temperature during transportation has come to reality with the power of sensors used in IoT systems. IoT systems are networks of devices and the transmission of messages happens with wireless technology. These devices include wireless sensors, software, actuators, and computer devices.

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Definition provided in IoT policy document for IoT device from Meity[1] as follows.

"IoT is a seamlessly connected network of embedded objects/ devices, with identifiers, in which M2M communication without any human intervention is possible using standard and interoperable communication protocols."-Phones, Tablets, and P.C.s are not included as part of IoT."

Many industries are taking advantage of IoT devices, e.g., logistics companies are using IoT devices to track their trucks in real-time and issue commands to a truck driver from the mission control center. Pharmaceutical companies measure parameters like temperature or acidity of their biological drugs during production using IoT devices and take real-time action to achieve the required results. The sports world is utilizing IoT sensors fitted in the pieces of equipment like a tennis racquet or a cricket bat to provide feedback to sportspersons to give feedback and improve their performances.

IoT Usage in Indian Public Infrastructure

The Indian government is working towards creating the IoT infrastructure for a long time. In 2012, India rolled out its National Telecom Policy, and in 2014, Meity released the IoT policy documents, which focus on the areas in which multiple initiatives will be taken. Smart Cities Mission (SCM) 2015 focuses on developing 100 smart cities. These model smart cities will have provisions for intelligent and responsive infrastructures. These infrastructures include sanitization, health, agriculture, and the environment. IoT devices will play a critical role in the success of developing smart city infrastructures. Apart from government initiatives, private actors are working in other areas that have the potential to utilize IoT abilities, including manufacturing, automotive, transportation, energy, and utility sectors. In 2018, National Digital Communications Policy (NDCP) IoT goals were laid down with the objective of having 5 billion connected devices by 2022 by leveraging emerging technologies like 5G, A.I., robotics, IoT, M2M, and cloud computing.[2] Indian government understands the potential of IoT devices and adopted the IoT Centre of Excellence set-up as part of the Digital India initiative.[3]

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1 "IoT Policy Document - MeitY." Accessed December 15, 2020. https://www.meity.gov.in/sites/upload_files/dit/files/Draft-IoT-Policy%20%281%29.pdf.

2 "National Digital Communications Policy – 2018 - Department ...." Accessed December 15, 2020. https://dot.gov.in/sites/default/files/Final%20NDCP-2018_0.pdf.

3 "Future of IoT - FICCI." Accessed December 15, 2020. http://ficci.in/spdocument/23092/Future-of-IoT.pdf.

Vulnerabilities In IoT

IoT devices help to convert innovative ideas into reality. Today a massive amount of data goes through the IoT devices with minimal security features. Manufacturers have focused on the core feature required from the IoT device but missing the gravity of security requirement, which can create havoc if the device is compromised. Such a compromise happens because of the very nature of the security practice adopted by the manufacturers of IoT devices.

Compromise Of Security by Design in IoT Devices

Vice president of marketing at automotive security firm Argus Cyber Security, Yoni Heilbronn, has stated if a computer is connected to the Internet, it can be hacked[4]. IoT devices are mini-computers that have the smaller processing power and are connected to the Internet. Manufacturers of IoT devices would not have thought that they are nurturing a security flaw for the whole network to which device will be connected by adopting the prevalent design for the IoT devices, or maybe security has been kept at the last priority. One of the reasons is the cost and small size of devices, and small processors are used. FICCI, in its report for the Future of IoT devices[5], has provided security measures that should be adopted; other industry practices also offered a list of security measures that should be used while designing the IoT devices. But the major issue, backdoor entry to IoT devices is a huge concern. The Weakest Link Principle illustrates that the strength of any system is not decided by the strong character of the strongest part, but it is measured by the strength of the weakest component; if IoT devices are not protected, however, the strong infrastructure around it, it can not make the system robust.

One of the major issues is the default username and password used by many of those devices and the majority of people do not change the default password. Imagine the case of an IoT home automation switch hacked by using the default password and the stored Wi-Fi password in plain text is available to hackers. It made the life of hackers so easy to access the password of the Wi-Fi router.

Another example of the health IoT system is "Diabetes Management using devices," which is attached to the patient body and checks the sugar level at regular intervals, and pumps the insulin as and when required. It directly gives access to hackers to the life of a diabetic person.

4 "Smart Car Hacking: A Major Problem For IoT | by ... - Medium." Accessed December 15, 2020. https://medium.com/hackernoon/smart-car-hacking-a-major-problem-for-iot-a66c14562419.

5 "Future of IoT - FICCI." Accessed December 15, 2020. http://ficci.in/spdocument/23092/Future-of-IoT.pdf.

Real Life Incidents in IoT Hacks

1. **Jeep Cherokee hack:** A security researcher found vulnerabilities in the automobiles made by Jeep Cherokee in 2014, which allowed remote control of the vehicle over the Internet.

There are multiple possibilities for attackers to control the devices inside the car, while attackers may be sitting at a different location from the vehicle.[6]

1. The Multi-media system in the car can be hacked and the volume is turned too high, imagine the situation where drivers driving at high speed, may get a sudden shock.
2. CAN bus is an internal network of the car, and it connects the vehicle's internal components, including engine, transmission, and sensors. A multimedia controller can connect to the CAN bus via the V850 controller. The researcher could change the firmware of the V850 controller and send commands to the CAN bus. Once commands could be triggered to the CAN bus, you can control the engine, transmission, and sensors of the cars.
3. The researcher could control the wiper, the air conditioner, breaks, door, steering wheel, and engine stop and start.

Such vulnerability forced manufacturer Chrysler to recall 1.4 million cars. It is a huge embarrassment for the brand, affecting the company financially and potentially hazardous for car users.

1. **Mirai Botnet:** Another incident, Mirai Botnet, occurred in 2016 in which IoT network devices aided in distributed denial of services (DDOS) attacks. Mirai is malware that affects the network devices and makes them a bot in the botnet. Under the control of Bot-Master, which commands the IoT devices to flood the websites with the requests.

Mirai malware source code is open-source code, and it was published on GitHub, which resulted in different versions of Mirai. Mirai botnet used over 100,000 compromised IoT devices to flood DNS provider Dyn with a massive traffic volume. Mirai DDOS attack was made to affect many websites and make them inaccessible. These websites were GitHub, Twitter, Reddit, Netflix, Airbnb and Spotify, and PlayStation Network.

Computer security journalist Brian Krebs disclosed the name of the suspects who wrote malware. The FBI investigated the case and

6 "Black Hat USA 2015: The full story of how that Jeep was hacked." Accessed December 15, 2020. https://www.kaspersky.com/blog/blackhat-jeep-cherokee-hack-explained/9493/.

questioned Paras Jha. Paras Jha, Josiah White, and Norman were pleaded guilty to criminal information in the District of Alaska to violate the Computer Fraud & Abuse Act[7] and the offender is ordered to pay damages and sentenced for house arrest[8].

1. **St. Jude Medical's implantable cardiac devices:** In 2017, the FDA confirmed that cardiac devices like pacemakers and defibrillators from St. Jude Medical could be hacked. These devices are used for monitoring and controlling heart functions and preventing cardiac arrest. The aforementioned is one example where IoT devices can help in the regular monitoring of patients and assist in sudden attacks. Still, the security issues in such devices can turn these devices from lifesavers to life-threatening devices.
2. **Amazon-owned Ring:** A security and privacy issue was found with the Amazon-owned ring, which gave hackers access to devices, and they could monitor the activities of the families. Once the device was compromised, access to the Wi-Fi password was easy as the ring doorbell leaked the Wi-Fi passwords. Further, it was revealed that Amazon was giving access to data to the police department for surveillance. One of the effects could be seen in the incident where a hacker compromised a ring security camera, and he was yelling at a small girl residing in Mississippi.[9]

Five U.S. senators had asked Amazon to explain the security vulnerabilities and privacy issues related to the device. Such vulnerabilities could threaten the privacy and safety of an individual and also threaten U.S. national security.

Answers from the Ring were not satisfactory at all. They created a policy for privacy and security video doorbells. In this new approach, they will intimate the users once their devices access their account. In this new policy, a passive approach is followed where they will inform the users if their passwords are compromised. It does not specify what is the steps taken to protect the system by the solution provider.

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7 "Justice Department Announces Charges And Guilty Pleas In ...." Accessed December 15, 2020. https://www.justice.gov/usao-nj/pr/justice-department-announces-charges-and-guilty-pleas-three-computer-crime-cases.

8 "Paras Jha, a Mirai Botnet hacker ordered to Pay $8.2 million in ...." Accessed December 15, 2020. https://techgraph.co/tech/paras-jha-a-mirai-botnet-hacker-ordered-to-pay-8-2-million-in-damage/.

9 "Ring's new security measures don't go far enough, senator ...." Accessed December 15, 2020. https://www.cnet.com/news/senator-criticizes-rings-new-security-measures-calls-for-company-to-go-further/.

All the elucidated incidents highlight the following points -

1. IoT devices help in monitoring and aid the functioning of critical features. Simultaneously, poor security design and failure of active tracking of such incidents result in compromising an individual's health, life, and liberty.
2. IoT devices are becoming critical devices in individuals' lives, but they are regulated with legislation that does not explicitly apply to such essential functions.
3. Current legislation's scope is very vast, and many times it is vague. Bigger actors can escape from the liabilities easily.

Regulation In India

In India, the Information Technology Act, 2000 and Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 covers the "reasonable security practices and procedures" and data disclosure of information to third parties. These regulations are very vast and apply to all cyber incidents. There are no specific acts or regulations or guidelines which are meant only for IoT systems.

Regulations In Australia

The Australian authorities have adopted a code of practice that is voluntary in nature, particularly to secure the IoT systems. This code is in the form of guidelines for device manufacturers, IoT service providers, and mobile application developers. This code of practice is applicable on all those IoT devices which are operational in Australia, covering the access to the internet in the country, and transmission of data in Australia.

1. Code of practice lays down thirteen fundamentals, including no duplicated default or weak password usage for the devices or implementing a vulnerability disclosure policy. One of the principles, "Minimise exposed attack surfaces," is very important, which lays down those unused functions should be disabled. It is ubiquitous in the I.T. industry to keep adding the features. Once it is clear that one function is not used or the manufacturer is removing the support of some features, all the access points related to that function should be disabled. Using such a practice gives lesser options to hackers to find the vulnerability with the device.
2. Once these codes of practice were released from the government, it provides the set of instructions for the manufacturers to consider the security practices inbuilt in the IoT devices. It also makes the users aware of the security norms required for the

IoT devices so that due consideration is given while buying IoT devices. Other players like mobile application developers also become aware of the security features which should be provided default once they develop the applications.

3. These codes of practices comply with the international standards and build upon the U.K. government guidelines[10]. Similar guidelines are published by the European Union as well[11]. It is imperative that Australia adopt international standards because most IoT device manufacturers are catering at the international level. Such international standards complaint guidelines help them adopt it quickly.

4. The Australian Cyber Security Centre has also released a guide for the IoT device manufacturers to implement the code of practices principles.[12]

5. The Australian Cyber Security Centre has also provided guidelines to end-users of IoT devices, what they should consider while buying the devices, setting up the devices, maintaining the device, and disposing of the device.[13]

6. The code of practice has described how the IoT device manufacturers should display on their devices. It gives a better understanding of the users about the compliance of the devices. e.g., "Our organization has complied with principles 1, 2, and 3 of the Code of Practice: Securing the Internet of Things for Consumers". IoT device users can quickly figure out if the device has fulfilled the mandatory guidelines or not, or the other guidelines which are related to their interests.

Regulation In the United Kingdom

In the United Kingdom, the government is working on the concept of a built-in security model, which comes from the design of IoT systems. The Department for Digital, Culture, Media, and Sport has adopted the following measures to achieve its objective.

1. The United Kingdom has released the code of practice, which is similar to the European Union, and other countries like Australia have also adopted the code of practice.

10 "Secure by Design - GOV.UK." Accessed December 15, 2020. https://www.gov.uk/government/collections/secure-by-design.

11 "TS 103 645 - V1.1.1 - CYBER; Cyber Security for ... - ETSI." Accessed December 15, 2020. https://www.etsi.org/deliver/etsi_ts/103600_103699/103645/01.01.01_60/ts_103645v010101p.pdf.

12 "IoT Code of Practice: Guidance for Manufacturers | Cyber.gov.au." Accessed December 15, 2020. https://www.cyber.gov.au/acsc/view-all-content/publications/iot-code-practice-guidance-manufacturers.

13 "Internet of Things devices | Cyber.gov.au." Accessed December 15, 2020. https://www.cyber.gov.au/acsc/view-all-content/advice/internet-things-devices.

2. The U.K. government has realized that the code of practice is a guideline to different stakeholders, and there is no penalty on them if they default to comply with the guidelines. The U.K. government has released a call for views on proposals for IoT system security. Supporting documents, including the vulnerability and cost of intervention, have also been provided.[14] The proposal contains the definitions of smart devices, which are similar to the definition provided by the European Telecommunications Standards Institute in their standard of European Standard (EN) 303 645 v2.1.1. The proposal also consists of the scope of the regulation (covering in scope and out-of-the-scope products), security requirements for the smart devices, obligation on the producer, obligation on the distributor, obligation for online actors involved in the sale of smart devices, and enforcement body.[15]
3. The proposed regulation will have the following mandatory security requirements, which are part of the code of practice.
    a. Banning universal default passwords in IoT products;
    b. Implementing a vulnerability disclosure policy; and
    c. Providing a defined support period.

Regulation In The USA

The approach of the USA is to further the business in the country. In the USA, the FTC has disclosed critical security and privacy issues of the IoT systems in 2015. It covers practices of security by design, data Minimization to get privacy by design, and notice and choice framework for sensitive personal information.[16]

California and Oregon IoT security law has placed the responsibility on device manufacturers for observing the reasonable security feature. Still, it lacks the concrete instructions which the industry needs to follow.

On 7th December 2020, a bill for cybersecurity standards was adopted mainly to cover the devices used for government purposes. Internet of Things (IoT) Cybersecurity Improvement Act of 2020 covers the following.

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14 "Proposals for regulating consumer smart product ... - Gov.uk." Accessed December 15, 2020. https://www.gov.uk/government/publications/proposals-for-regulating-consumer-smart-product-cyber-security-call-for-views.

15 "Proposals for regulating consumer smart product cyber security." Accessed December 15, 2020. https://www.gov.uk/government/publications/proposals-for-regulating-consumer-smart-product-cyber-security-call-for-views/proposals-for-regulating-consumer-smart-product-cyber-security-call-for-views.

16 "Internet of Things - Federal Trade Commission." Accessed December 15, 2020. https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf.

1. The National Institute of Standards and Technology will be accountable for the norms, rules, and recommendations for the usage and administration of those IoT devices used in the Federal government. It will also lay down the security provisions for the IoT devices in light of the trending cybersecurity threats and incidences.
2. The Office of Management and Budget will be responsible for reviewing the federal government information security policy, and it should be in sync with standards and guidelines placed by the National Institute of Standards and Technology.
3. Appropriation of IoT systems in federal agencies is subject to the safety and protection specifications laid down. If these IoT systems do not follow these regulations, they will not be used by federal agencies.

Apart from the IoT devices, the Act places the liability under section 7 on the provider for the other areas like application programming interfaces (APIs). The liabilities will be on the providers of IoT devices to find and report the security issues for IoT devices.[17]

Regulation In Japan

The document[18] circulated by the Ministry of Internal affairs and communication in October 2018 shows that attacks on IoT devices have increased 5.7 times from 2013 to 2017. Most of these attacks are on routers and Wi-Fi cameras. The data was collected by the National Institute of Information and communications technology (NICT), which monitored the cyberattacks utilizing unused IP addresses.

Olympics 2020, which were supposed to be hosted by Japan, and now postponed to 2021, was recognized as a critical event by the Japanese government. Keeping in mind the criticality of the event and more so over the threat of cyber attacks looming over the sports event, the following measures were taken.

1. An amendment to the NICT Act was brought forward in September 2018. This amendment gives the NICT agency the power to scan IoT devices on the Internet and identify IoT devices that are vulnerable to being compromised. Once the vulnerable device is found without proper password settings, the device owner is alerted to change the password. Default password usage by the

17 "Hurd, Kelly Bill to Improve Cybersecurity Standards for ...." Accessed December 15, 2020. https://hurd.house.gov/media-center/press-releases/hurd-kelly-bill-improve-cybersecurity-standards-government-devices.

18 "Comprehensive Package of IoT Security Measures in ... - ITU." Accessed December 15, 2020. https://www.itu.int/dms_pub/itu-d/oth/07/14/D07140000010001PDFE.pdf.

user is one of the significant issues observed with IoT security. Most of the users don't change the default passwords or keep weak passwords.

2. In May 2018, another bill was passed to create an information-sharing system. In this system, a third-party institution can exchange required information with telecommunications carriers. In the case of cyber-attacks on devices, communication of compromised devices can be blocked by the telecom carriers.
3. NICT has taken on a few R&D activities like NICTER and NIRVANA-KAI. These initiatives are adopted as countermeasures against indiscriminate and targeted attacks.
4. Similar to the concept of **Honeypot**, which is used by antivirus companies to identify and defend the systems by cyberattackers, Stardust (HoneyNet) is created by the NICT. Stardust executes the infected emails, etc., from the attackers in a decoy environment and observes the malicious program's behavior which helps in finding the countermeasures for such attacks.
5. Other measures include collaboration through public and private partnerships for critical information infrastructures across the country, agencies providing safety standards, infrastructure protection, risk management, and countermeasures.
6. Creation of the human resource groups CYDER, Cyber Colosseo, and SecHack365 under the National Cyber Training Center, where hands-on training is given to responsible teams for the event. Drills of different types of attacks are being conducted, and groups are trained to overcome these attacks.

At regular intervals, reports were circulated by the director of MIC, JAPAN regarding the mentioned initiative's progress.[19]

Such active monitoring measures were taken by the Japanese government, keeping in mind the complexity and criticality of the sporting event in the country.

The Shift Required for Regulation(s) of India

1. **Indian Computer Emergency Response Team** (**"**CERT-IN") is the nodal agency to deal with cybersecurity threats like hacking and phishing. CERT-IN has signed the MOU with agencies in countries like the U.K. and Japan. CERT-IN can leverage the information collected from NICT, JAPAN by active monitoring

19 "IoT Security Measures in Japan - EUNITY." Accessed December 15, 2020. https://www.eunity-project.eu/m/filer_public/4d/ff/4dff1a1a-b95e-4afe-8d52-e79f88336fdf/ecso-eunitymic.pdf.

of IoT devices. A multi-stakeholder, multi-level approach is required to face this challenge. National Critical Information Infrastructure Protection Centre ("NCIIPC") was designated as the national nodal agency. It is accountable for all actions and steps to shield CII from illegal and unlawful access, alteration, use, or disclosure. NCIIPC should be made responsible, similar to NICT, JAPAN, to actively find vulnerabilities in IoT devices related to critical information infrastructures and other initiatives of the government like smart city initiatives. The industry shall fund the program, and the industry should actively participate in the group. Participation and funding from the industry are required to make this agency as an agile group, work ahead of hackers, and utilize world-class infrastructures.

Practices adopted by the NICT, JAPAN for the sports events can be adopted during any international or critical event organized by India.

2. Code of Practice guidelines published by Australia, the European Union, and the United Kingdom provide the best practices to secure the IoT devices for different stakeholders, including device manufacturers and application developers. Indian government should also adopt the code of practice as a first step to provide the guidelines to various stakeholders. These codes of practice should comply with international standards for easier adoption by stakeholders.

3. India has the Information technology Act 2000, which places the liabilities for security and privacy on the service provider. They need to follow "reasonable security practices" similar to the law laid down in California and Oregon IoT security law**,** which is very vast and does not provide specific instructions for stakeholders.

4. Indian government should enact a law for the security of smart devices similar to the United States and the United Kingdom, which provides the practices to be observed by stakeholders and liability should be placed on the stakeholders in case of a breach. Once a deterrence is in place, it will give the remedies to the injured party, and manufacturers, including foreign players and application developers, will be aware of their responsibility established by a statute.

Conclusion

IoT devices have shown a way to achieve small and intricate features in many areas like health appliances or real-time logistics tracking. Manufacturers and application developers work mostly on IoT devices'

functionality, and security takes the back seat. There is a cost attached to build security, and also time needs to be invested. On the other side, a breach of security can cost financially, affect human life, and affect critical infrastructures. The government should provide the guidelines to make the stakeholders aware of the best practices required to cover the vulnerabilities associated with IoT devices. With the specific law for the security and privacy of information related to IoT devices, the government should place the liabilities on different actors.

75 Years of United Nations: An Assessment of the Changing Narratives of Human Rights Laws

*** Ms. Ayesha Priyadarshini Mohanty**

Abstract

With the development of human rights laws, challenges over its implementation, and 75 years since the establishment of the United Nations, we continue to deliberate on a fundamental question: Do the human rights laws overstep the boundaries of sovereignty rights in the international arena. This article aims to assess the changing narratives in human rights laws from cultural reservations of western discourses towards universal application. It calls forth the need for human rights laws to engage in equal participation by reinforcing the rights of peoples and organizations to the rights of the state. This can be manifested with the judicious lead of humanitarian diplomacy that strengthens the human dignity of people, making conversations inclusive through youth engagement and peacebuilding.

1. INTRODUCTION

The development of human rights laws through generations is always deliberated from the purview of State and Individual relations. This challenging interface deliberated more often than not, leads to limited growth of human rights laws beyond its capacities. It brings alongside masked under the realities of dogma and authoritarianism, manifold challenges that carry historical traces, engulfing the institutional and organizational frameworks and workings and the harrowing interaction of unprecedented new forms of realities with static structures, awaiting the possibilities to first understand and then tackle them. Today, interactions between global institutions are narrowing gaps and trying to pave the way to strengthen international security. Yet, the formal frameworks wage battle against them as the UN Charter, though recognized the need to protect to save mankind from the miseries and brutalities that war is vague on the scope of rights the corollary obligation by the states[1].

International public law[2] is harmonious in its implementation with

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1 Douglass Cassel, A Framework of Norms: International Human Rights Law and Sovereignty, 22 Harv.Int'l R.60 (2001)

2 T. Landman, *Measuring Human Rights* (London: Routledge, 2008)

international human rights [3]law and the principle of state sovereignty.[4] States thereby under a garb of sovereign equality dispose of rights in their ends as the final administrators, on the decisions to uphold or do away with international resolutions and agreements. This can be challenging in circumstances where the continuous usage of sovereign immunity against systemic human rights violations. It blindfolds States away from International norms. This leads way for the oppression of the rights of those who are marginalized and human rights law inevitably undermined and lost in the trajectory. The United Nations is also not authorized directly to intervene in the matters of the state, though more often than not, it has come to the rescue of individuals of the state. Yet, these interventions are limited to situations where arbitrary, heinous, and brutal atrocities flagrantly observed by power-obsessed heads of state against individuals cannot go unnoticed without action.

Reconciling of Sovereignty Rights – Rights of People v. Rights of States

The international scrutiny on subjects of the State has also brought limitations, on the normative framework of humanitarian law, dominated by its subjects to only morality and international order. States, in the aspect of international sovereignty, exert their dominance over jurisdiction [legislative, executive/administrative capacities, and judicial competency] over a territory. This is further supported by an act of States in the international arena with formal equality and freedom being the cornerstones. In essence, States, are individual bodies, "equal and autonomous with the right to self-determination." A similar resemblance can be drawn to the Hobbesian theory of the Westphalian system[5] which asserts the independence of legal positivism and denies any digression from it[6]. Therefore, the supremacy of human rights and its normative framework through international human rights law is antithetical to the traditional conception of state sovereignty, where the latter exerts its supremacy.

With the accession of the Universal Declaration of Human Rights, however, a different narrative started construing within. This was concerning the Rule of Law and State Sovereignty in international conversations. Before World War 2, states' treatment of their citizens was a matter of exclusive domestic jurisdiction[7]. In half a century, this

3 Reus Smit, *Globalisation of World Politics: Introduction to International Relations, International law* in J. Baylis,

4 Ian Brownlie, *The Principles of Public International Law* (6th ed, Oxford University Press 2003) 287.

5 Allan Rosas, *State Sovereignty and Human Rights: Towards a Global Constitutional Project* (Political Studies XLIII 1995) 61-78

6 T. Hobbes, *Leviathan, or The Matter, Forme & Power of a Common-Wealth Ecclesiastical and Civil, Penguin Classics,* (C. B Macpherson (ed.), London 1651) 223.

7 Shirley V. Scott, *International Law in World Politics* (Lynne Rienner Publishers,

perception has been progressing significantly with the idea of human rights legitimizing the issue as part of global, ethical discourse[8]. The national laws which are held of prime regard by the States, now are fusing in spirit with the global world and the inter-relations. This can be taken into consideration while observing the development of fundamental freedoms and human rights mechanisms in decolonized nations post World War. Yet, while "everyone has a right to" and "no one shall be" translated into paper, the deep underlying of varied conflicts and the failure of its true assessment, continues till today to perceive a conservative stance of human rights.

State sovereignty is, therefore, essential in understanding the complementary development of international human rights laws and strengthening its behavioral implementation. When States started surrendering their sovereign right to become less sovereign- it amplified the laws of trade, arms control alongside laws of human rights in the international arena. It led to the golden record of two comprehensive UN human rights treaties- International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, ratified by 140 out of 189 UN member states. Moreover, the Universal Declaration of Human Rights provided a pedestal for the universal nature of human rights. This gave way to the Vienna Declaration and Programme of Action to assert that such rights are beyond question of deliberations and are inherent with as birthright of human beings. Therefore, it is the first responsibility of Governments[9] to protect and promote them. This in essence challenges the Westphalian system with a proclamation and interpretation of universal values rather than a negotiated compromise between different wills.[10]

Therefore, "*human rights are the cornerstone underpinning the rule of law and state sovereignty*" [11]The rule of law in essence is of supreme importance and can be seen as pivotal means of ushering in

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London 2004) 29-30

8 M. W. Reisman, *Sovereignty and Human Rights, Contemporary International Law* (The American Journal of International Law, Vol. 84, No. 4, Oct. 1990) 866-876

9 *supra* note 7

10 The UDHR essentially went on to be accepted and adopted by the UN General Assembly. Yet the primary draft was outlined in recognition by the intergovernmental Commission on Human Rights. It has evolved as a concept of modern law beyond the traditional state-individual; subject-object relationship.

G Sperduti, "*La Souverainete',*" *le droit international et la sauvegarde des droits de la personne*"", Y. Distein, *International Law at a Time of Perplexity : Essays in Honour of Shabtai Rosenne* (Dordecht, Martinus Nijhoff, 1989)

879-85, 881

11 Robin Guittard, National sovereignty v Human Rights? (Aug. 21, 2020, 11:14 PM,) https://www.amnesty.org/en/latest/campaigns/2014/11/national-sovereignty-vs-human-rights/

International law. It is not an abstract concept in stratum rather rules and principles that continue to keep a check on the arbitrary power of regimes in the Nation States and bind them under the garb of public opinion, political consciousness, and the prevailing sense of justice.[12] As proclaimed by the International Commission of Jurists :

"The rule of law is more than the formal use of legal instruments; it is also the Rule of Justice and Protection for all members of society against excessive governmental power."[13]

The development of state sovereignty and its balancing interests with Rule of Law has also been echoed by the Inter American Court of Human Rights in the historic case of Haiti v Dominican Republic[14] as:

"It should be seen as a way of strengthening the rule of law, social harmony, and fundamental freedoms in the country."[15]

The assertion of the international treaties with those likes of UDHR[16], the Millennium Declaration, 2005 World Summit Outcome emphasized that human rights and rule of law were interlinked and mutually reinforcing[17]. Today, domestic jurisdiction, self-determination, and rule of law are combining the importance and magnifying goals of human rights law. In many cases of State sovereignty and the protection of human rights must be looked at from the perspective of self-expression of individuals and communities as essential elements of human rights through self-determination[18]. While this might be in direct conflict with state sovereignty yet shapes the principles and values that a community of self-determination of people concerning human dignities and shared values lead way for strengthening and combining the forces of Human Rights Law. This is paved together in a normative framework supported by international humanitarian law, international criminal law, and international refugee law.[19]

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12 Joshua Castellino, General Principles Relevant to International Law, (Aug. 21, 2020, 11:18 PM http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/general-principles-relevant-to-international-law

13 Id.,

14 Case of Haitians and Dominicans of Haitan Origin in the Dominican Republic v. the Dominican Republic (Order of the Inter-American Court of Human Rights), Inter-American Court of Human Rights (IACrtHR) (2001)

15 Supra note 11

16 Universal Declaration of Human Rights (1948)

17 Rule of Law and Human Rights, United Nations and Rule of Law (Aug. 22, 2020, 1:12 PM) https://www.un.org/ruleoflaw/rule-of-law-and-human rights/#:~:text=As%20defined%20by%20the%20Secretary,6).

18 Quincy Wright, *Relationship Between Different Categories of Human Rights, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* (UNESCO staff eds., 1949) 149

19 Supra note 19

As stated by Prof. Brownlie, "self-determination surfaces in the examination of the rights[20]", where "the right of cohesive national groups (peoples) to choose for themselves a form of political organization and their relation to other groups[21]." Several states have outrightly through their legal constructions manifested this. The Croatian Constitution of 1990 advocates "the generally accepted principles in the modern world and the inalienable, indivisible, non-transferable, and in expendable right of the Croatian nation to self-determination and state sovereignty, including the inviolable right to secession and association." [22] Likewise, the French Constitution calls for "government of the people, by the people, and for the people[23]."

Therefore, the concept of self-determination and its existence in international law draws preference and understanding of the status it holds. [24]The enforcement of the rights of both the individual and group about each other, without undue restrictions or curtailing of fundamental freedoms by members they live together in society. The right so exercised expresses the free will of the people [25] manifested the breakdown of colonial constructions. It has led to "reaffirm in the equal rights of men and women of nations large and small."[26] Yet, this is still limited to a few. In recent awareness around subjects of the state, many individuals are unable to claim their rights owing to a façade of state constructions that limit their autonomy. The constant awakening to their human rights violations and advocacy, at the grassroots level, has little or no impact on policy or implementation measures under domestic surveillance.

The challenges awaken due to the "deep divisions among the Member States", which has led to blatant underperformance of institutions. The distrust has prevented states to look eye to eye in overcoming challenges and actively seeking opportunities.[27]

Of course, when looked at from the microscopic view, these opportunities might seem limited to only conversations and agreements

20 Father Robert Araujo, *Self-Determination, Popular Sovereignty and Human Rights, Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law* (Fordham International Law Journal, Vol. 24 Issue, 2000)

21 Ian Brownlie, *Basic Documents on Human Rights* (3d ed. 1992) 599

22 Preamble, Croatian Constitution (1990)

23 Article 2, French Constitution (1791)

24 Hurst Hannum, Rethinking Self-Determination (Va. J. Int'l L. 1, 1993) 34

25 John Locke, Second Treatise of Government (Hackett ch. VIII. 95, 1980) (1698) 52, *also* Prof. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, 1995) 128 has stated that

"The governments must not decide the life and future of peoples at their discretion. People must be enabled freely to express their wishes in matters concerning their conditions."

26 Article 1, para 3 and ch. IX (Articles 55-60), UN Charter (1947)

27 Kofi Annan, *Address to the 2005 World Summit* (Press Release, Sept. 14, 2005)

that happen at international forums those with the likes of the United Nations and other regional alliances. It extends far beyond these conferences and forums bringing alongside the amalgamation of municipal and international laws.

Though states assume the "self-executing" doctrine to make certain provisions of international treaties enforceable under domestic legislation, many municipal laws have incorporated strict adherence of their justice systems in contextualizing global affairs and international policies and laws. Subject to legislative scrutiny in case of non-self-executing doctrines, Article VI of the United States Constitution [28] explicitly states that "all treaties made under the authority of the United States, shall be the supreme law of the land and the judges of every state shall be bound thereby". Similarly in "agreements duly ratified and approved[29]" will prevail over the Acts of French Parliament and international law as an integral part of federal law[30] and its precedence[31] over the federal territorial German laws enumerate the constant developments in constitutions of various states in the evolving international mandate.

The normative framework of international human rights law, therefore, hinges upon the co-relations of a compound sovereignty doctrine- The Sovereignty of State and the Sovereignty of People. While the former hinges on the regime of power relations externally between the Nation States, it may or may not be dominated by the internal controls of the self-determination of people. The Sovereignty of People is more exemplified in State institutions of democracy whereby, the representatives in an international arena assert the unified dignities that are reflective of the people. Yet, this should not be seen as a true measure of human rights efficacy as many democratic nations have also undermined the human rights values internally and supported the mechanisms and controls outside their jurisdiction while non-democratic nations have shown progress contrastingly.

An aspiration, that the Covenant seeks to achieve, through reasonable differentiation, is discriminatory when viewed from the polarising tussle between human rights and rule of law[32] This enunciated as a reasonable relationship of proportionality [33]that seeks to enforce human security and development [34], alongside to be treated

28 Article VI, U.S. Consitution (1789)
29 Article 55, Constitution of France (1791)
30 Article 25, Basic Law for Federal Republic of Germany (1949)
31 Article 25, Basic Law for Federal Republic of Germany (1949)
32 Gen. Comment. 18, Human Rights Committee, also supra note 14
33 Application no. 6833/74, Marckx v. Belgium, Council of Europe: European Court of Human Rights (13 June 1979) available at https://www.refworld.org/cases,ECHR,3ae6b7014.html (accessed 22 August 2020)
34 Secretary-General K. Annan, Gen. (A/59/2005) Assembly Docs, noted in Para. 27

with dignity and respect. It has to tread on a fine balance between individual liberty and public order, which has to be asserted in dictum by the independent courts of Nation States. Every state has to face the need to maintain a delicate balance in reconciling human rights with public order.[35] The Inter-American Court of Human Rights has supplemented the view of the UN:

"It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic, or in conflict with the essential oneness and dignity of humankind[36]"

Aside from these known revelations, it is important to note, that rights exercised by a sovereign nation can also be looked at as the inherent core of human rights.[37] For example, smaller states are often unable to influence the larger ones through primary means of power. When they express sovereign rights, they are inherently protecting the human rights of people under their territory. This legitimizes the transformation of the geopolitical sphere where similar yet diverse conflicts, wield on customary power interests of the states are appealed to and measured in the application.

Thereby, states have a Responsibility to Protect the members of the international community who are outside the purview of the limited scope of international human rights law. It calls for the protection and enforcement of socio-economic rights enlisted under international conventions. This affirmative action of ensuring effective equality, calls for cooperation – Rights of Peoples and the Rights of States. The merging of societies actively encourages welfare and security.[38] With the emergence of cross-national citizenship, stringent measures that aim to transform the social-emotional life of small target groups' positions will not survive.[39] This would call for proactive conciliation of interests to enforce human rights law.

"While the freedom from want and fear are essential, they are not enough. All human beings have the right to be treated with dignity and respect."

https://undocs.org/A/59/2005 (Aug. 22, 05:49 PM)

35 Id. at 14

36 Proposed amendments to the naturalization provisions of the Constitution of Costa Rica', Advisory Opinion No.04, OC-4/84 (19 January 1984) 57

37 GA Res. 41/128, Declaration on the Right to Development, where approving members of the U.N indicated "the human person is the central subject of development and should be an active participant and beneficiary of the right of development."

38 E. De Vattel, *The Law of Nations or The Principles of Natural Law: Applied to the Conduct and the Affairs of Nations and Sovereigns* (Oceana Publications, 1964) 3

39 Bossuyt, UN Doc. E/CN.4/Sub.2/2001/15

3. From "Liberal West Discourse" towards "Universal Application"

The Copenhagen Meeting of the Conference of the Human Dimensions of CSCE reclaims that democracy is inherent in the Rule of Law[40] and that justice is looking beyond the formal means of legality towards acceptance of the personalities of humans[41]. This is grounded in the national constitutional traditions of various nation-states that combined with the synergies of treaties of international law lead to its ratification and duty to respect such obligations. This also brings forth a combined force of self-determination and popular sovereignty. Yet, looking under the microscope, in essence, a creation of human rights as a liberal discourse of the West brings alongside strong opposition. In the event of celebrating the 75 years of the establishment of the United Nations and the 50 years of the Commonwealth Federation of Nations, we might be overlooking and undermining the human rights laws and their possible implications on universal application.

Today, the world is advancing with populist regimes and this invites a challenging intervention in human rights discourses – a challenge of conversations between "us" over "them". In the regimes of the States, we have a progressing majoritarian movement of illiberal nationalism. This also leads to gaps in addressing the human rights systems as viewed by these representatives of states and further translates into the conversations across the regions of the globe. The asymmetric power balance draws from different perspectives of addressing such conversations like- populism supports only the "majority" and human rights only address the needs of "minority" or "vulnerable groups". This is often further exploited for disregarding the mechanisms of humanitarian laws due to the political dynamics and the interactions of various actors in a State. The divide that creates the human rights movement into the two extremes of scepticism and defensiveness, and with the leaders propagating radical and exclusionary views based on "who are the real people" and "who are the enemies of the people". It measures as a cyclic catastrophe for legitimacy and actions of human rights actors and organisations [42] and inevitably seeks fissures in the grey areas of contemporary human rights.

However, these are not the end times of human rights[43], and neither that human rights are compromised in the rising association of

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40 Id. at 14

41 Id. at 14

42 César Rodríguez-Garavito and Krizna Gomez, Populism and Human rights: A new Playbook, Columbia (Aug. 23 2020, 05:05 PM)
https://www.civicus.org/index.php/re-imagining-democracy/overviews/3384-populism-and-human-rights-a-new-playbook

43 Foa, Roberto Stefan, and Yascha Mounk, The Danger of Deconsolidation: The Democratic Disconnect (Journal of Democracy,27, No.3, 2016) 5-17

liberalism against the fight of populism nor are we advancing towards the end of the era of human rights application[44]. It also does not mean that we become reclusive of the tools and resources of human rights present before us as we challenge the emergence of this populism with the old domination of authoritarianism. [45]What we need to look at is a structured intervention combining the existing principles and values to further create more far-aching progress that derives strength from the small grassroots peoples movement. The understanding that populist regimes are driven by fear and resentment is now being popularized by the advancements of technological connectivity beyond borders.[46]

The counter-narrative, however, is the development of human rights as a western discourse and disregards the diverse cultural situations. This perspective and divide of human rights law that counters only to the marginal and oppressed minority on one hand and cultural relativity, would lose its momentum in a neo-cold war era. The arguments in favour of such views are held in high regard by cultural relativists who see human rights as a concept of the western denomination.

Cultural relativism is, primarily, an ethical stance that assumes that no one culture can, or should, dominate the customs and beliefs of all others.[47] Yet when taken to an extreme, relativists are critical of any outsider who passes judgment on practice that is culturally grounded. This manifests into strong apprehensions of the human rights relevance to such cultures and they reject and promote Human rights as a concept of western narrative[48]. This can be noted as the undertones or the foundational concept of inalienable human rights and a central component of UDHR, is from The French Declaration of the Rights of Man and Citizen and the US Declaration of Independence. For instance, Article 1 of UDHR which declares "All human beings are born free and equal with dignity and rights" is almost similar to the French State Declaration which exclaims "Men are born free and equal in dignity and rights."[49]

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44 I. Wuerth, International Law International Law in the Age of Trump: A Post-Human Rights Agenda, https://www.lawfareblog.com/international-law-age-trump-post-humanrights-agenda (accessed on Aug. 23, 05:22 PM)

45 S. Moyn, Trump and the Limits of Human Rights (Open Democracy, 14 November 2016) https://www.opendemocracy.net/en/openglobalrights-openpage/trump-and-limits-of-human-rights/ (accessed on Aug. 23, 2020, 05:27 PM)

46 Phillip Alston, The Populist Challenge to Human Rights (Journal of Human Rights Practice, Volume 9, Issue 1, February 2017) 1–15, https://doi.org/10.1093/jhuman/hux007 (accessed on Aug. 23, 2020, 05:30 PM)

47 Rhoda E. Howard and J. Donnelly, *Human Dignity, Human Rights, and Political Regimes* (The American Political Science Review 1986)

48 R. Howard, *Human Rights and the Search for the Community* (Westview Press, U.S.A 1995)

49 National Assembly of France, in L. Hunt, *Inventing Human Rights: A History* (2007)

In general theory, modern human rights have evolved from the period of Enlightenment as a philosophical and ideological conversation[50] and its legacy in the development of modern human rights supersedes all cultural influences. [51] Rights are awarded to all humans simply for being human, and inherently inalienable as they cannot erode with time or be forfeited or stolen[52]. Even as we assert that the Universal Declaration of Human Rights is essentially from western legal prowess, we must also consider the contextual background of the development of sovereign states as we saw post the development of World War and Colonial constructions, and continue seeing till today. The challenges and atrocities that domination of one state against nations and the individual [53]brought in the post-war climate[5455], paved the way for United Nations to unanimously adopt this Declaration. Moreover, the UDHR became a testament to provide for a more egalitarian formulation of rights than its historical predecessors[56]. Article 27 of the UDHR states, "everyone has the right to freely participate in the cultural life of the community". Further supported with the ICCPR and ICESCR, the modern International Human Rights Law, brought light to diverse cultural identities with the inclusion of women's rights, rights of indigenous peoples, and the right to political participation.[57]

It is important to note that human rights as it seems individualistic is rather not so even though such has been argued by traditionalists to proclaim them as "inappropriate or irrelevant" in a communal setting[58]. The argument that human rights and local culture are not compatible as dominated in conversational discourses by many governments in Asia, especially on the aspect of cultural traditions and values can be refuted. In the World Conference on Human Rights 1993, many Asian governments advocated the promotion of Asian values against Western Human Rights and saw many ally nations on the opposite sides.

The poignant development from that conference was the adoption of Article 8 of the Bangkok Declaration which asserts

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50 R. Falk, *Cultural Foundations for International Protection of Human Rights* (1992) in Abdullahi Ahmed, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press) (accessed on August 23, 2020)

51 M. Ishay, *The History of Human Rights: From Ancient Times to the Globalisation Era* (University of California Press, London 2004)

52 J. Donnelly, *The Universal Declaration Model of Human Rights: A Liberal Defense* (Human Rights Working Papers, University of Denver 2001)

53 D. Bersama, *Philosophy of Human Rights* (Westview Press, 2011)

54 L. Bell, A. Nathan, and I. Peleg, *Negotiating Culture and Human Rights* (Columbia University Press, New York 2001)

55 J. Morsnik, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, Philadelphia 1999)

56 J. Nickel, *Making Sense of Human Rights: Philosophical Reflection on the Universal Declaration of Human Rights* (University of California, London 1987) 6-7

57 Id.,

58 Supra note 52, Page 87

"Recognize that while human rights are universal in nature, they must be considered …, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."

This was also a basis for guided declaration in the Vienna Conference later that same year. [59]This calls for a strong implication of how human rights laws are growing and adapting to changing times. It also qualifies that there is the universality of the basic values and principles that promote its application rather than reiteration from the same. Culture relativism is equally important to a holistic application of universal human rights laws; however, such must not dominate the narrative where human rights abuses are justified beyond measure. The transition from a society whereby age-long traditions which on the face of archaic structures are normalized, and adherence to the new set of norms will inevitably become more challenging. Yet, the intervention is important for the growth of the state which is exemplified in the observance of human rights laws. The author would also like to note that the human rights mechanism in essence might also be ineffective when we look at it from short-term perspectives. In particular when we speak of states that have developed post the colonial period, or from revived from conflicts and wars or are currently battling so post the 9/11 ramifications, a direct intervention of other states policing on human rights application might seem to challenge and push states further in disregarding their observance.

Particularly, in the recent developments whereby driven by populist regimes, many states are facing internal conflicts owing to a historical narrative of shaping the legislations and power relations. This when magnified with neo-cold war situations across many neighbouring states brings an untraceable divide and pushes states further inward looking geopolitics. The understanding that the cultural diversity and identity of nations go beyond the perseveration of artifacts and colourful facets highlight the challenges to impositions and conditions of other States. [60]The state system, in a neo-liberal globalized world, has become more statist with the corresponding retreat to protect the

59 Article 5 of the Vienna Declaration and Programme of Action mentions that :

"All human rights are universal, indivisible and interdependent, and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural, and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms."

60 Joseph Cassar, *The Rights of Nations, Global Research Monograph Series, Center for Global Education* (St. John's University, No. 004, New York Nov. 1997) 31

human rights of vulnerable groups. It is also important to note that in the past, human rights have been seen as valuable propaganda to convey the Cold- War adversaries from one another in a self-serving manner. Therefore moving on forward, with the support of International Organisations, the development of conversations on the human rights agenda need to be viewed from a very fresh perspective- one that develops from criticisms and widens its dialogues on subjects that are not just limited to civil rights but also brings alongside a holistic amalgamation of social and economic rights.

4. Reinforcing of People and Institutions – Strengthen, Engage, and Inclusivity

Since the beginning of the 20th century, we have seen the extermination of humanity by humanity. There has been a considerable rise in far-right ideologies who passionately proclaim religious autonomy seeking to dilute or eliminate protection of rights of many fractions of society- including the likes of religious dissenters, minorities, women, etc., as they believe it to be inconsistent with the fundamental religious teachings and deeply held beliefs[61]. Added to this was, the enforcement of intransigent proclamation of superiority and authority of social structures, that must be strictly adhered to in the wake of developing fluidity in patterns of social norms and transformation of discriminatory practices. Today when we open any technological medium, we are flooded with information of atrocities committed to asserting conservative beliefs of one particular section upon another, with only discourses to negative actions. While the inextricable link of culture and human rights laws undoubtedly synergies, we can tap the power of existing organizations to drive fundamental change.

4.1 Strengthen and Leverage Social, Religious, and Economic Institutions

While often ridiculed as a norm that underestimates the importance of religious, cultural, and social practice, the fundamental genesis of human rights development is magnified with the inclusion of the trajectory of such practices. In the South Asian context, the famous Gandhian philosophy of humanism stemmed from Hinduism's spiritual practices of self-discipline and exerting the dominance of your conscience in your acts. Similarly, Martin Luther King Jr. was extremely popular amongst the Catholic and Jewish minorities, utilizing excerpts from Bible during this apartheid marches to communicate the language of God as the language of love and non-violence. The civil wars of Central and South America with the passionate outcry of the official Church in its struggles and historic proclamation of San Salvador Archbishop

61 Jean-Paul Marthoz and Joseph Saunders, *Religion and Human Rights Movement* (Human Rights Watch World Report 2001)

Oscar Arnulfo Romero to "disobey an immoral law" exerting in his speech "Thou Shalt not kill", personify the human rights inspired from religion. Similar movements have also been noted in the Philippines and Jewish organizations' dissent in Helsinki Accords. The South African movements in 1990 have been a remarkable human rights campaign that brought people from communities of Jewish, Muslim, Christian denominations alongside the support of many Marxist and Communist organizations to fight apartheid. Supplemented by UNESCO excerpts from 1947, it was stated

"Such a Declaration (of human rights) depends, however, not only on the authority by which rights are safeguarded and advanced but also on the common understanding which makes the proclamation feasible and the faith practicable."

The proclamation was further strengthened through the foundations of human rights laws, that have flourished in the past and present and continue to evolve towards the future.[62]

United Nations even with its growing importance is limited in scope, due to its lack of independent political capabilities needed to implement its recommendations. What this means in terms of commitment to international human rights instruments by many member states which do not seem to respect such covenants or do so with reservations- we provide them with not just pragmatic political reasons but also build a stronger consultation to address deeply held beliefs. For example, in the Convention of Rights of Child, Singapore is one of the most advanced nations of Asia had three strong reservations which necessarily might not be appreciated by other nations. In the context of China, where Confucianism advocates for communal duties, inalienable individualistic rights might not be subscribed to. Moreover, cultural, and social rights and responsibilities are deeply embedded in many nation-states which brings stronger fusion with international law.

While soft law is not legally binding, it develops the value-oriented principles derived from what a treaty clause of 1899 terms 'the laws of humanity, and the requirements of the public conscience.[63]' The ubuntu philosophy brought the establishment of the Truth and Reconciliation Commission in South Africa and while the Gacaca courts of reconciliations played strong importance in Rwanda. A need for a

62 G. Mantilla, *Emerging International Human Rights Norms for Transnational Corporations* (Global Governance 15(2), 2009) 279-298

63 Martens Clause, Convention (11), Customs of War on Land of 1899; Convention (IV), Laws and Customs of War on Land 1907; art 1. Para 2. Protocol I of 1977, Geneva Convention of 1949., in supra note 7,

Allan Rosas, State Sovereignty and Human Rights: Towards a Global Constitutional Project, Political Studies XLIII

combination of unenforced consensus of human rights and proto ideas or sources of human rights[64] will indefinitely lay applications of human rights into the best possible way to contemporary circumstances. This will help also make public affairs more inclusive rather than pushing them into defensive mechanisms of state control promoting plurality and striving for more equitable positions of various groups in the society. With the increase of the global economy, education has also gone beyond national frontiers paving the way to manifest human rights norms in life and foster values embedded in rules.[65] This trajectory also helps in the transnational diffusion of domestic and international human rights experiences[66] and practices amongst the torch-bearers for justice. The 75 years of the United Nations must now pave the way for the roots of justice to be strengthened and the deliverance of social regulations effective. A need for a transformative growing momentum of humanistic revolution in the face of International Organisations will promote the significant determination of its success in the future world or bring its inevitable breakdown.

The current human rights regime leaves the primary responsibility to respect, protect, and fulfil the human rights of its populations in the hands of the government apparatus of each state. They are also complemented with the strong support of civil society organizations who tirelessly stress the grey areas and through constant advocacy drive public opinions. The latter is now slowly gaining momentum in the global discourse. Meanwhile, more demanding international human rights standards could increase the citizens' autonomy vis a vis their state and other states as well as large multinational corporations. The need to also bring corporations as major stakeholders in international human rights law must not be undermined. They are crucial in accountability measures through their actions and equal partners in enforcement of dignity of respect of the individual, though this phenomenon must go beyond the boundaries of domestic origins of the corporation.

Today, there is increasing interdependence and move towards global and transnational markets, and states do not want to 'opt out' from international human rights treaties. With the states that have even

64 Joanne Bauer, *International Human Rights and Asian Commitment* (Human Rights Dialogue 1.3, 1995) https://www.carnegiecouncil.org/publications/archive/dialogue/1_03/articles/514 (Aug. 23, 2020, 10:19 PM)

65 F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford, Oxford University Press, 1991) 126, 133

66 Supra Note 7 in *Allan Rosas, State Sovereignty and Human Rights: Towards a Global Constitutional Project,* Political Studies XLIII 61-78 https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-9248.1995.tb01736.x (accessed on Aug. 24, 2020, 10:14 PM)

done so, it is limited with temporary duration[67]. Therefore, even though the accessions and ratifications to many international documents are painstakingly slow, the combined transformation of human rights law structures that still yet retain their inherent values, will in the future magnify the growth through rigorous implementation.

4.2 Engaging in Humanitarian Diplomacy and Dialogue

In today's world order whereby actions of and/or omissions by one state, binds their power play in the international economic arena, we are looking at the existence of the principle of "erga omnes parte" in a shadow that must be brought to the forefront. Though often spoken about parties to Genocide Convention, its growing importance in light of the violence and hate in communities that if not interpreted in early days, would follow with catastrophic results in a countries community demographics, whereby a group of individuals with particular beliefs and ideologies overpowers and dominate over the other, irrespective of majority and minority context. It goes beyond the reciprocal relationships that states enjoy when they combine and come together over agreements and treaties.

Humanitarian Diplomacy promotes the idea of humanitarian competition as opposed to military and political power, which is only effective for a stipulated period and its dominance has resulted in worse than good. This humanitarian competition, a term coined by Japanese educator Tsunesaburo Makiguchi [68]"*utilizes moral suasion to influence people"*, i.e., "*in place of submission exacted by authority"*, states exert the spirit to base themselves on mutual trust and build institutions with unabridged support of each other.

Although, it might sound extravagant and a far-sighted dream, developing nations, and even the developed member-states are actually in essence seeking the same by manifesting diplomatic and cultural relations. When we seek to focus a lot on military and political dominance over large national budget allocation by member-states, that leaves no room for human dignity to prevail. The pursuit of such goals leads to a belief of ruthless competition only to seek advantages and states acting in absolute isolation which triggers inequalities to prevail in local structures, furthering a vicious cycle of human rights violations and entrapment, that leads to draining of limited resources into a catharsis of mayhem.

United Nations in the 75 years of its establishment is celebrating 2020 as a year of dialogue to build a better future for all. This resembles the hopes of the former UN Secretary-General Kofi Annan who stated:

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67 In 1965, Indonesia announced to depart from the UN body but their leave for a year was noted as a temporary absence. Similar credentials have been noticed in cases of South Africa, Serbia, Montenegro, Albania, Lesotho, and even the United States.

68 Tsunesaburo Makiguchi, *Geography of Human Life* (1903)

"States working together can achieve things that are beyond what even the most powerful state can accomplish by itself."

This is centrally true as the notion of hard power which through coercive approach mobilized tools and resources to push through agendas and achieve goals has on a distant future rarely established peaceful societies that have contributed to the best of the growth of these member-states. Soft power, meanwhile, through volition and nurturing the spirit of dialogues completely transformed situations that were impossible to achieve a breakthrough in. For example, even after the breakdown of the Yalta system and the imminent advancement towards a dark period of Cold War that led to a fierce struggle of military dominance were concluded with the passionate back-channel communications of many plenipotentiaries, without whom the entire world would be in shambles. With the understanding of this thought, many advocates of radical idealists believe that faith is the only key to encompass and overcome this divide, and they push through their propositions by tapping into these vulnerable young minds. To terminate such plausibility whereby we continue approaching power with power might lead to an unbroken cycle of brutalities with no scope for the establishment of freedom and peace. Therefore, a rethinking of these systems would require a reduction in the military efforts while continuous pursuance of strategic dialogues with members of different perceptions to become more empathetic and be willing to accept various perspectives.

A common challenge to this assessment has been the monotonous statement by various international leaders that they do not look for a settlement with terrorists and radicals. Although it might seem pessimistic in the conception of pursuing dialogue, the approach must begin with the perception that soft power unleashes the inner energies of an individual. In the past, Second UN Secretary-General Dag Hammarskjold sought through his active role in "quiet diplomacy[69]" by personally mediating conflicts no matter how dire and challenging the situations would be specially to bring back the American prisoners of Korean War. During one such private session with Premier Zhou Enlai, he spoke passionately advocating peace through the following lines:

"It does not mean that I appeal to you or that I ask you for their release. It means that-inspired by my faith in your wisdom and in your wish to promote peace- I have considered it my duty as forcefully I can, and with the deep conviction, to draw attention to the vital importance of their fate to the cause of peace…Their fate may be well decided the direction in which we will all be moving shortly- towards peace or away from peace…[A]against all odds, this case has brought me around the

69 Brian Uruqhar, *Hammarakjold* (Norton 1972) 106

world to put before you, in great frankness and trusting we see eye to eye on the desperate need to avoid adding to existing frictions, my deep concerns both as a Secretary-General and as a man."

Therefore, the pursuit of fundamental freedoms, dignity, and human rights cannot stand in isolation bounded by the confines of hard power, but channelizing of leaders of economic, cultural, social, and religious organizations to come together often working in close partnership with governmental and international organizations for the development of a new set of global order. This will lead the way to drive systemic changes through adaptability and flexibility in transforming state policy and implementation measures, leaving behind the grey areas in the old rigid structures to be nullified.

4.2 Understanding the Active Inclusion of Youth in Peacebuilding

Secretary-General António Guterres said to the Security Council on April 18, 2017, that to sustain peace and prevent conflicts, human rights is extremely important to be observed in the strongest regards[70]. These are further enunciated in many UN resolutions that proclaim a cohesive construct of laws to build momentum on sustaining peace and amplifying the fundamental freedoms and human rights values[71]

In the last two decades, concerning such conversations in the international arena, we have seen evolving concepts of peacebuilding. Understanding that addressing conflict and violent extremism, preventing and countering terrorism would need the impetus of mutually reinforcing imperative between "justice and peace" and not looking them as exclusive objectives. This has been increasing with the impetus of UN resolutions on the moral discourse of global politics with the 2030 Agenda for Sustainable Development that explicitly calls for institutional efforts to "build peace and enhance justice". This is advocated with Goal 16 which states

"The promotion of just, peaceful and inclusive societies, provision of access to all, and development of effective, accountable and inclusive institutions at all levels[72].

Human rights and peacebuilding are now advancing and "blurring" forward to facilitate "durable peace" at both grassroots and policy levels. This can be noticed concerning the legal aid, mediation and negotiation skills, and the understanding of human rights instruments in various

70 A. Athie and Youssef Mahmoud, *Human Rights and Sustaining Peace* (International Peace Institute 2017)

71 Foundations for International Human Rights Law, Universal Declaration of Human Rights https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html (accessed on Aug. 24, 2020, 10:36 PM)

72 UN General Assembly (2015)

Member states. For example, the South Africa Centre for Conflict Resolution and Lawyers for Human Rights, Nepali Informal Sector Service Centre, and the Colombian Centre for Research and Popular Education led these parallel action approaches – that of human rights monitoring and reporting and dialogue initiatives.[73] The role of civil society actors to facilitate relationship building through peacebuilding reinforces human rights and promotes holistic developmental cooperation. This addressable of conflict sensitivity also has called for the amplification of youth voices not just in a participatory approach but whereby they are the means to sustain peace in societies.

Young people are the transformative forces of change. Although across the world the dominant narrative portrays them as the agents or perpetrators of violence, they have magnified with their vision and resolute commitment to become the first-hand responders of any crisis. The UN Resolutions [74]also strongly mandates the inclusion of youth directly in the spaces of the international community as the key stakeholders in "building and sustaining peace and resolving conflict and preventing violence." The Youth, Peace, and Security agenda particularly also seeks to promote their meaningful engagement in the peace process and conflict transformation. Though as states advocate the inclusion of youth in civic spaces, we still find them pushed out from important conversations that surround them. The need for ever more reliance on the younger generations who are advocating the social transformation and trying to bridge the gaps in state structures must be welcomed and supported with human rights education. This will not only lay a stronger basis for the future success of the development of Member-states, but it also changes the attitudes of hostility and disregard for policymakers and institutions alike

Dr. Daisaku Ikeda, a prolific writer, and peace activist lost his oldest brother in World War II and continuously strives in his efforts alongside the UN and Soka Gakkai International to promote ties of friendship that transcends across borders. He calls out to the "Youth of the 21st Century" to widen their vision:

"Youth, have a special aptitude for sharing what they have learned about human rights with others in their lives, making them a powerful force for expanding the circle of those committed to overcoming discrimination and prejudice. If the members of the younger generation can shape the movement for human rights promotion, we can surely shift the global current from one of division and conflict to one of co-existence."[75]

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73 HUMAN RIGHTS MONITORING, FACT-FINDING, AND INVESTIGATION BY THE UNITED NATIONS (HR/P/PT/7/Rev.1 2011)

74 UNSCR 2250 (S/Res/2250, 2015), UNSCR 2419(S/Res/2419, 2018) UNSCR 2535 (S/Res/2535, 2020) are on the Youth, Peace, and Security Agenda

75 Daisaku Ikeda, *Learning to Live Together, Towards an Era of Human Rights: Building*

There has been a steady increase in the concept of global nationalism which transcends across borders. and where people are raising voices together against the injustice prevalent in the societies and leading such movements are the young people in the forefront. Relying on their capacities, bridging the world farm exclusionary practices to those of inclusion.

Young people with a particular focus on youth-led organizations are critical stakeholders to develop local, national, regional, and international networks on issues of international peace and security. The need to imbibe and call forth for the absolute protection and human rights of young people is needed to enable safe-space conversations around gender-based, sexual violence and a more cohesive environment for youth employment and participation. We must realize they are assets to sustaining peace taken alongside the implementation of various strategies that concern them, not just from the sideliners. The young people are equal stakeholders to prevent conflict and build and sustain peace [76]as was exemplified in their response to the humanitarian crisis of Covid-19. Stepping away from stereotypes that associate them with violent aggressors, we will be able to realize their truest potential in driving not just movements to bring systematic changes but further growth of human rights laws.

The basic Westphalian concept of state is continuously evolving, and human rights interplay a crucial role in its dynamic engagement and change. At present times, the "old fissiparous nationalism" that has brought alongside "national self-determination" needs reassessment because many nations and people who have been blurred in the international standards of statehood, unable to realize the goals of human rights and their sense of dignity lost in the trajectory of "majority" vs. "minority" awakening. Such ideologies might challenge in absolute terms, the cohesion and peaceful world where freedoms of the rights of people are far from being realized – only exist constructively. Therefore, the need for a new peaceful world order when a variety of conflicts continue to plague the world and are magnified with global issues of poverty, social inequalities, refugee crisis, climate change, international terrorism, and environmental annihilation which threaten human dignity will deepen when we ensure that national solidarity fuses with international camaraderie to ensure that human rights of individuals are not vanquished and dignity of each respected. The inclusion of youth to bring forth a new narrative supported by the state structures will inevitably pave the way for the continued success of the United Nations.

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a Peoples Movement (Soka Gakkai Press, Japan 2018)

76 UN Youth Envoy Jayathma Wickramanayake, (Briefings from YPS Open Debate, 27th April 2020)

5. Conclusion

This Note examines the need for holistic development of United Nations and the normative framework of discourses on International Human Rights Laws. Part I addresses the reconciling interests of state sovereignty and self-determination of people which calls for more affirmative action of individual human rights under the rule of law. Part II calls for the conversations around the narratives of human rights as western discourses and the challenges to it during regime changes and geopolitical interactions. The plurality of human rights law and cultural reservations is looked from the purview of not distant past against a dominant trajectory but symbiotic relationship will ensure a more universal application. Finally, Part III calls forth for strengthening of social and economic structures, particularly in engaging in humanitarian diplomacy and dialogue with the active inclusion of youth. Humanism can never be devoid of the inner morale of individuals, no matter their diverse views of life. Its inter-relations, placing dependence on military or political will and tactics though might objectively align to the national will, will not produce credible results in a growing climate of statelessness of individuals and combat the incitement to hatred moving us towards mayhem of crisis. To ensure a world where there is constant development in areas of peace, environment and inequalities bridged to accelerate sustainable economic growth, the lives of people in that sovereign state must be treasured and valued. This has already been amplified in the humanitarian crisis of Covid-19 that calls forth the combined efforts of states. The mere and basic understanding that we are all in this is the substantial premise of human rights law that will ensure equality of all persons.

Labelling the Sex Offenders and Sexual Offender Registry– Crime Control Method or Pushing Towards Crime

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Abstract

The Idea of balancing the conflicting rights of either side is the backbone of any enactment or step formulated by the government. Sexual offender registries are one of these steps which raise an eyebrow. Arguments from both sides have been taken into consideration and the paper extensively scrutinizes if the registry fails in balancing the rights of the persons labelled and the positive impacts labelling can produce. In order to curb the increasing acts of sexual violence, a sexual offender registry has been introduced in India as a method of crime controlling using the concept of labelling the offenders. This paper revisits the importance of crime controlling and the idea of labelling theory as a crime controlling method. Thereafter the authors have tried to study the nuances of such registries in various countries of the world. Further, the paper reviews the idea of bringing such a registry to India, its probable effect, drawbacks and lacunae, and impact on present enforcing machinery and system. Moreover, the authors have tried to delve into the possibilities and pros and cons of making such a registry accessible to the public in a country like India. The paper concludes by highlighting vital corrections that should be made in order to stand judicial scrutiny and make the registry more viable for law enforcement agencies as well as for the public.

1. Introduction

There is no crueler tyranny than that which is perpetuated under the shield of law and in the name of justice."1 -Charles de Monstesquieu

The gallows march and dying speech, the branding of petty criminals, the use of the pillory, or the whipping of convicts at appointed stations

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1 Pastor Stephen Kyeyune, Imparted Wisdom in Troubled Times: Making Sense of the Senseless Situation (Author House 2018).

through a given community[2] are a few examples from history which signals that stigmatization operated as kernel of punishment in the past. The main motive behind such sanctions has always been crime control, as a stigma attached to a person helps others knows about the possible pattern of behaviour of that person which leads them to act more diligently while having an interaction with him. He too in order to get rid of the malignity attached to his name restrains himself from any deviant behaviour.

Labelling theory is one method of crime control out of various crime control methodologies. This theory runs on the idea of branding a criminal by tagging, identifying, segregating and defining criminals under different heads. Criminologists are divided in their approach with respect to the pertinence of this theory. Those who support this method advocate that such labeling is useful in the treatment of offenders by reforming them and bringing them back to the societal framework as the aim herein is to show a mirror to them. It would help the offender to introspect themselves and the wrongness in their acts leading to repentance. This would eventually end with an attempt of reconciliation with the society whose norms they have transgressed.[3] On the other hand, those who condemn this method have based their argument on the premise that the harder the control agencies try to reform the evil, the greater it grows under their hands. Thus, they conclude that this theory leads to stigmatization which rather than reforming the offenders leaves them in the clutches of deviance behavior.[4]

Various countries across the world have incorporated labeling theory in their criminal justice system such as Canada and Australia. Out of all areas of crime where this practice is involved, one such crime is sexual violence wherein this method under the head of sexual offender registration has been embraced by few countries.[5] With the advancement of technology, this big and never-ending world has reduced into a global village where everyone is sitting beside each other and knitted so close that no one is out of the reach of anyone. Each country thus imitates other country's policies for their development and crime control. One such crime control mechanism that India has adopted is the labelling of sexual offenders by establishing the National Database on Sex Offenders which made India the ninth

2 David Nash & Anne-Marie Kilday, Cultures of Shame: Exploring Crime and Morality in Britain 1600–1900 (Palgrave Macmillan 2010).

3 K. Hatjimatheou, *Criminal Labelling, Publicity, and Punishment,* 35 Law & Philosophy 567, 585 (2016).

4 E.B. Ciaravolo, *Once a Criminal, Always a Criminal: How do Individual Responses to Formal Labeling Affect Future Behavior? A Comprehensive Evaluation of Labeling Theory,* Florida State University Libraries 3-4 (2011).

5 Terry Thomas, The Registration and Monitoring of Sex Offenders: A Comparative Study 1 (Routledge, 2012).

country to adopt such mechanisms on a national level after the US, Canada, the UK, Ireland, South Africa, Trinidad & Tobago, Australia, and New Zealand.[6] Nevertheless, various other countries have such registries for child sex offenders or few countries have it at the state or provinces level.[7] The policymakers advocate that a sexual offender database would be helpful to the authorities as it might help in the early detection of crime and its prevention by keeping an eye upon the habitual offenders registered in the database, and would further substantiate while making arrests of persons accused of criminal offences.[8] However, the centre of discussion still revolves around the question as to what would be the effect of labelling on the offender. As on one side, it may encourage the offender to desist, but on the other side, it may push him towards the world of crime. The real question still subsists as to what if this experiment fails and we further see a rise in sexual violence from men and women who are duly incorporated in the long list of sexual offenders? And moreover, what if there is a steep rise in the violation of basic human rights because of the attached stigma of once a criminal, always a criminal, which would directly or indirectly affect the rights of the accused persons? It can be said that to tackle the issue, there needs to be a backup plan that would guide the authorities and other concerned persons and a proper sensitized and trained officials seem to be the most viable solution for the same; it should never be forgotten that accused too, like every human being, has some human rights.

2. Crime Controlling- What's the Need?

Crime controlling has always been the fundamental principle of criminal justice system[9] irrespective of the differences in boundaries, culture, ethnicity, or religion. Definition of prevention of crime and the safety of community will always remain a matter of debate owing to its socially and historically contingent category. However, the abovementioned aspects tend to be connected with actions that aim towards prevention of crime. All the three dimensions of detection, prevention, and safety necessarily demand conjoint actions of the community, technology and administration. In this context both crime prevention as well as community safety often becomes metaphors for much wider moral and political questions about justice, social order

6 Vrinda Bhandari, *Why India's registry of sex offenders may do more harm than good,* Scroll (Sept 25, 2018, 07:30 pm), https://scroll.in/article/895346/why-indias-registry-of-sex-offenders-may-do-more-harm-than-good.

7 Global Overview of Sex Offender Registration and Notifications System, Smart (Apr. 2014), https://www.smart. gov/pdfs/GlobalOverview.pdf.

8 Leah Verghese, *Will a Registry for Sex Offenders in India Deter Rapists?,* The Wire (July 20, 2018), https://the wire.in/law/sex-offenders-registry-india.

9 Shiv Kumar Dogra, Criminal Justice Administration in India 156 (Deep and Deep Publications 2009).

and the good society.[10] From the time when crime was just a sapling to the time when it will be the oldest tree alive, one thing that would be strived for is a proper method of crime control; though it seems like a castle in the air. Society's reaction towards crime and criminals has been the centre of discussions of all the schools of criminology and is of great importance in the perpetuation and intensification of criminals as a permanent stigma of a bad-person who is shunned by the society may lead him to live up to that tag.[11] Crime controlling basically signifies prevention of crime that might be committed by any person. However, one of the underlying principles behind the concept of crime controlling is to stop recidivism as without recidivism being checked, crime can hardly be controlled. Inferring from this fact it can be said that apprehended offenders are the primary targets of controlling crime, particularly recidivists. The list is followed by those who might show any deviance but short of being officially recognized or persons with no anti-social acts, as in order to control crime there is no other better way than by actually adopting the reformation and restorative policies[12] so that once the offender gets back into the society he never looks back toward the world of crime. This idea of crime controlling has found its roots from Classical school which talked about the hedonistic principle and crime prevention.[13] Jeremy Bentham was of the view that every person does a calculation of pleasure and pain[14] before doing an act. He opined that in order to reduce crime commission the pain associated with it should outweigh the pleasure to be derived from the criminal activity. Similarly, Cesare Beccaria opined that crime prevention is vital, and not punishment. He was of the opinion that crime can be prevented by inflicting more deterrent and effective punishment and maximizing the fear of the state agents.[15] Thereafter, came the Control theory of crime primarily propounded by Durkheim who believed that crime generate when social and personal controls that prevent most people from engaging in criminality, weakens.[16] Thus, it advocated for a closed knitted society with a proper and strong social control and a strong connection between individuals and group for controlling the crime. Controlling the crime by the process of naming and shaming has also positioned itself among all the other theories of crime control.

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10 Gordon Hughes, *Crime Prevention, Community Safety, Crime and Disorder Reduction,* in Student Handbook of Criminal Justice and Criminology 170 (Gordon Hughes, Adam Edwards (eds.), Cavendish Publishing Ltd., 2006).

11 L.J. Siegel & J.L. Worrall, Introduction to Criminal Justice 107 (14th ed., Cengage Learning 2013).

12 Dogra, *supra* note 9 at 12.

13 Ahmad Siddique, Criminology Penology and Victimology 14 (7th ed., Eastern Book Company 2016).

14 Steve Case, Phil Johnson, et.al.,Criminology 326 (Oxford University Press 2017).

15 Siddique, *supra* note 13.

16 N V Paranjappe, Criminology, Penology & Victimology 55 (17th ed., Central Law Publications 2017).

Labeling theories now mainly focuses on the power of the state to control crime.

3. Labeling Theory

a. Looking Back to History and the Literature

The formal idea of labeling theory took root in British Criminology in 1960s but it has a long history. Many researchers gave their perspective on the theory but their discussion mainly focused around the effect of the labeling theory and reactions of the social environment. They also talked about the effect on the deviant individuals because of such reactions.

Frederic M. Thrasher (1936) in his work recognized that the official label of deviant had potentially negative effect on the youths.[17] Peter Tannenbaum (1938), in his dramatization of evil concept observed that tagging, identifying, making conscious and self-conscious might result in one's living up to such description as gradually the definition of evil shifts from certain acts of the individual to the individual himself.[18]

Later, Edwin Lemert (1951) classified offenders into two categories namely the persons with primary and secondary deviance.[19] According to him, the former is the resultant of biological, psychological or sociological reasons whereas the latter is the result of societal reaction to primary deviance. Thus, societal reaction plays a major role on the two deviant behaviors. Howard Becker (1963) suggested that labeling theory does more harm than good.[20] This theory of labeling is also termed as societal reaction theory which advocates that law breaker when labeled see themselves as outsider and different from the mainstream of the society. Ditton (1979) advocated that labeling theories are branches of controlology and it gives preponderance to the state's power to prevent happenings of crime. The states following this method treat criminal justice system as a measure of reformation and a tool to control troublesome population of criminals.[21]

There are procedures in criminal justice system which works by incorporating labeling mechanisms such as security bonds by habitual offenders.[22] Similar has been the situation pertaining to the sexual offences in last few decades and among various policies that specifically

17 F.M. Thrasher, *The Boys' Club and Juvenile Delinquency,* 42 American Journal of Sociology 66-80 (1936).
18 E. Carrabine, P. Cox, et.al., Criminology: A Sociological Introduction (3rd ed., Routledge 2014).
19 R. S. Broadhead, *A Theoretical Critique of the Societal Reaction Approach to Deviance,* 17 The Pacific Sociological Review 292-293 (1974).
20 *Id.* at 289.
21 R. H. Burke, An Introduction to Criminological Theory 203 (4th ed., Routledge 2014).
22 The Code of Criminal Procedure § 110 (1973) (Act 2 of 1974).

target the same, the most prominent attack pertains to sex offender registration and notification. Brooks (1996) argued that such laws are not punitive and their main purpose is not to punish offender but to protect the potential victims from dangerous offenders.[23] On the other hand Finn (1997) argued that registration of the sex offender neither helps the victim nor reforms the offender and is thus ineffective having no effect on recidivism.[24]

b. The Idea Behind

Labeling theory states that everyone shows behavioral pattern of deviance at times but not all are labeled so.[25] Those who are labeled are the ones who transgress the criminal law. Almost everyone on one occasion or the other has transgressed the criminal law but not all are punished; only those who are caught are labeled and punished making labeling a contingent subject.[26]

Labeling theory proposes that deviance is socially construed through reaction instead of action. The theory signifies that no matter what factor for initial act of deviance was but when such acts of deviance is repeated, it is a result of being labeled as a deviant.[27] Revised version of theory distinguish two perspectives of functioning of labeling-

- Firstly, a label upon someone can influence his self-perceptions and might increase his association with delinquent individuals[28] which could amplify their offending behaviour.
- Secondly, it can also act as a blockage of non-criminal opportunities for the person being labelled thus pushing him towards a criminal lifestyle. A stigma is attached to those who are labelled, and it makes it difficult for them to enter into the mainstream of society and act as a barrier for education attainment or employment post their incarnation and reformation.[29]

Moreover, labelling can have different effects on different people as it might have a significant say on young offenders as their personality

23 Sean Maddan, The Labeling of Sex Offenders: The Unintended Consequences of the Best Intentioned Public Policies 13 (University Press of America 2008).
24 P. J. Benekos and A. V. Merlo, Crime Control, Politics & Policy 94 (2nd ed., Routledge 2015).
25 J. Knutsson, *Report No. 3 on Labeling Theory: A Critical Examination* 9 (National Swedish Council for Crime Prevention, 1977), https://www.ncjrs.gov/pdffiles1/Digitization/47664NCJRS.pdf.
26 *Id.* at 14.
27 Donald J. Shoemaker, Theories Of Delinquency: An Examination Of Explanations of Delinquent Behavior (6th ed., Oxford University Press 2005).
28 J. G. Bernburg, M. D. Krohn, et.al., *Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test Of Labeling Theory,* 43 Journal of Research in Crime and Delinquency (2006).
29 John Hagan and Holly Foster, *Intergenerational Educational Effects Of Mass Imprisonment In America,* 85 Sociology of Education (2012).

and behaviour are ductile,[30] while the same may not be the situation with habitual offenders.

John Braithwaite in his naming and shaming theory describes the working of shaming in relation to crime and tells the after-effects of the same which leads to higher or lower crime rates. The same principle has been used to inculcate the responsibility upon the offenders.[31] Two kinds of shaming as discussed by him are-

1. Disintegrative shaming[32]- It folds individual stigmatization within itself and is a highly demoralizing and ostracizing event. It basically tends to outcast evil people from others in the minds of its peers. Thus, a way back to society becomes much difficult. The result of branding them as criminals incites a feeling of deviancy in the individual, leading him to commit more crimes.
2. Re-integrative shaming[33]- This can result in effective deterrence. It recombines the offender with the societal framework as a law-abiding citizen. Here, a bond is maintained with the offender while communicating disapproval for his act, emphasizing reformation and rehabilitation. The individual is reintegrated into society, but he is fully made aware that his act was wrong and not in conformity with the law.

Re-integration via shaming is prevalent in societies which don't hesitate back from accepting the fact that the offender is a part of the society. These societies witness a lower rate of crime[34] as they treat the act of the offender as a result of deviance and treat him with an approach of forgiveness and instill a feeling of belongingness. This labelling perspective opens up a gamut of opportunities for the offender to make his way back into society.[35]

Some sociologists stated labelling theory as 'the shoe fits, wear it' theory. It signifies that no one is born deviant but it is the society that labels people as deviants by passing such laws which if infringed would constitute deviance.[36] Thus labelling can be said to be a double-edged sword; a sword that can either help the experimenting state in lowering the rate of crime or can just act as an easy approach for the criminals

30 Jón Gunnar Bernburg & Marvin D. Krohn, *Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention In Adolescence On Crime In Early Adulthood,* 41 Criminology (2003).
31 John Braithwaite, Crime, Shame and Reintegration 102 (Cambridge University Press 1989).
32 Id. at 55.
33 Id.
34 C.R. Tittle, Jason Bratton, et.al., *A Test of a Micro-Level Application of Shaming Theory,* 50 Social Problems 594 (2003).
35 Stuti S. Kokkalera, *Rethinking the Indian Sex Offender Registry,* 4(1) NLUJ Law Review 70 (2017).
36 Paranjappe, *supra* note 16 at 58.

who already have been tagged with a criminal tag. With a steep rise in sexual offences around the world, labelling theory seems to be a legit solution to this ever-rising problem as a stigma attached to a sexual offender might restrain a possible offender from committing such a crime.

4 Sexual Offender Registries- International Scenario

Every Government is entrusted with a great amount of hopes and believes by the general public under its jurisdiction. Amongst the plethora of those hopes, one is that such designated body will work for the protection of people and take appropriate steps, within the framework of human rights,[37] for their safeguards by detecting and preventing crime. Protection and public safety by introducing restrictive measures upon the accused or the convicts is unquestionably a legal and valid aim of every state of the world, but the cardinal principle of natural justice speaks for the balance of the accused and the victim's rights. Thus, no restrictions can exceed the extent consistent with the provisions, aims and objectives of the Universal Declaration of Human Rights (UDHR) and the International Covenant for Civil and Political Rights (ICCPR) and International Covenant for Economic, Social and Cultural Rights (ICESCR). Such restrictions pass the test of reasonability when they are apt for the circumstance and are also proportional to the end sought.[38] The UN Human Rights Committee has stated that the restrictions must be in conformity to the principle of proportionality and be appropriate to achieve their protective function.[39]

In order to achieve such aim of detecting and preventing crime, the US became the first nation to pioneer a step towards adopting a sexual offender registry and recently adopted a set of standards named the Sex Offender Registration and Notification Act (SORNA) passed in 2006.[40] Reasons for passing such a statute arose from incidents of eleven-year-old Jacob Wetterling abduction and murder in 1989, and the sexual assault and murder of seven-year-old Megan Kanka in 1994 by one of the neighbours who was earlier convicted for sexual assault against children.[41] The US keeps the goal of public safety at the highest pedestal,[42] above from individual's right to privacy and is one of the few

37 Stubbings v. The United Kingdom, (1996) 23 EHRR 213.
38 Nicholas Toonen v. Australia, Human Rights Committee, 50th Session, Communication No. 488/1992, United Nations Doc CCPR/C/50/D/488/1992 (1994).
39 Marta Gil Gonzalez, *The Right to Privacy of Travelling Child Sex Offenders Versus the Right of Children to Protection,* ECPAT 5 (2015).
40 Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Global Survey of Sex Offender Registration and Notification Systems* (US Department of Justice, 2016).
41 Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws,* 86 Boston Law Review 326 (2006).
42 Cannon v. Igborzurkie, 779 A.2d 887 (DC 2001).

nations which has made such records open for the public. Though, it cannot be denied that open access to the public about such records may lead to an increase in crime[43] such as frequent attacks on the offenders and other violations of the rights of the accused.[44] When the question of the constitutionality of the Registers of certain states arose, it was opined that holding such registries as unconstitutional would eventually lead to an inference that sexual predators have overpowered the society. Thus, it was held that compulsory and necessary registration would have resulted in unavoidable consequences.[45] In the case of Smith v. Doe,[46] the court found that the stigma attached with the enrolment under the registration doesn't make the Act effectively punitive since such registration does not have any affirmative disability or restraint on the person and held that where such registries serve to protect the community and prevent recidivism acting in a bona fide manner would withstand the constitutional scrutiny. Similarly, the Canadian province, Ontario in 2001 was the first in the country to enact and adopt a sex offender registration system, followed by the country itself adopting Sex Offender Information Registration Act, 2004.[47] Certain provinces have also adopted their own set of registries, having various dissimilarities regarding the concept of making things open for public access, but at the national level, public posting of sex offenders has been restricted to high-risk potential recidivists.[48] The fact that the consequence of someone's entry in such a sex offender registry is not penal in nature was re-iterated in the case of R v. Dyck.[49] It was laid down that the legislature was entitled to choose to include all offenders convicted of designated sexual offences in the Register, having regard to the general risk of recidivism in that group and the potential danger to victims and moreover such entries are made post-conviction of an offender by a court of law under a free and fair trial. A part of the legislation speaking for mandatory lifelong registration in the registry was challenged in the case of R v. Ndhlovu[50] and the judgment partly overruled the former case of Dyck[51] making mandatory registration of

43 Carolyn Marshall, *Man Charged in Killings of Sex Offenders*, The New York Times (Sept. 7, 2005), https://www.nytimes.com/2005/09/07/us/man-charged-in-killings-of-sex-offenders.html. ; Iver Peterson, *Mix-ups and Worse Arising from Sex-Offender Notification*, The New York Times (Jan. 12, 1995), https://www.nytimes.com/1995/01/12/nyregion/mix-ups-and-worse-arising-from-sex-offender-notification.html.

44 John T. Macquiston, *Sex Offender is Suing his Neighbors over Protests,* The New York Times (June 20, 1997), https://www.nytimes.com/1997/06/20/nyregion/sex-offender-is-suing-his-neighbors-over-protests.html.

45 John Doe v. Deborah Poritz, 662 A.2d 367 (NJ, 1995).

46 538 US 84 (2003).

47 Smart, *supra* note 7.

48 *supra* note 40.

49 2008 ONCA 309 (CanLII).

50 2016 ABQB 595.

51 *supra* note 49.

all the offenders in the registry, without looking and discussing the possible future risk factors along-with other factors. This judgment made the situation confusing on the issue of the final decision on the inclusion of names in the registry.[52]

Shifting to the European countries, Resolution no. 1733 of 2010 of the Parliamentary Assembly was passed which made a recommendation that each state of the European Union should take steps towards preventing sexual offences and maintain a sex offender registry.[53] The UK, primarily via Sex Offenders Act, 1997 made it compulsory for certain set of persons having committed sexual offences to get registered with police which was later repealed and replaced vide Sexual Offences Act, 2003 and was further expanded and strengthened with the Crime Reduction Act, 2006.[54] The police are also empowered to pass orders such as Sexual Risk Orders against any person posing a risk to public and Sexual Harm Prevention Orders against any person who has been convicted of any violent offence. Regarding the issue of community notification and public access to the registry, it has been limited fairly via Sarah's law[55] which can help in finding any person who wishes to know about the presence of sex offenders in the locality with the help of police. The lifelong requirement for the sex offenders to notify the police authorities whenever he moves house or travels abroad was held to be a breach of the right of respect for private and family life enshrined in Article 8 of the European Convention on Human Rights and a right to review for removing a name from the sex offender registry was granted.[56] However the judgment was widely condemned in the house of the country[57] and was criticized on the basis that such removal undermines the right of the survivors' victims as reporting of such sexual abuses takes a lot of courage and personal resilience, and if the perpetrator's name is removed from the possible harms list it only degrades the confidence and self-esteem of the victim and places them in extremely vulnerable situations and perpetual fear.[58] The French

52 Michael Firscolanti, *Who belongs on Canada's Sex Offenders Registry?,* Macleans (Feb. 23, 2017), https://www.macleans.ca/politics/who-belongs-on-canadas-sex-offender-registry/.

53 Parliamentary Assembly, *Reinforcing Measures against Sex Offenders,* Res 1733/2010, Council of Europe (May 21, 2010).

54 Parliamentary Assembly, *Reinforcing Measures against Sex Offenders,* Doc 12243, Council of Europe (May 4, 2010).

55 Supra note 40.

56 R v. Secretary for the Home Department, [2010] UKSC 17.

57 Alan Travis, *David Cameron Condemns Supreme Court Ruling on Sex Offenders,* The Guardian (Feb. 16, 2011), https://www.theguardian.com/society/2011/feb/16/david-cameron-condemns-court-sex-offenders.

58 Matt Drake, *Nearly three-quarters of sex offenders removed from register by asking police,* Independent (Jan. 3, 2020), https://www.independent.co.uk/news/uk/home-news/sex-offenders-register-remove-list-police-a9269566.ht ml.

registration law[59] was also challenged for the violation of Articles 7 and 8 of the European Convention on Human Rights. However, it was decided that such registration and authorities asking for information are not punitive in nature but only preventive and thus pass the test of proportionality, equally substantiating the competing rights of the convicts or the individuals and public interest.[60]

Apart from these and many other countries like Australia, South Korea and online platforms like Facebook put restrictions upon those who have been convicted for some sexual offences.[61] Thus a common trend by various international courts of law has been that such listing of a sex offender convict in sex offender registry is not against the basic human rights or the Constitution of those countries, and it only acts as a preventive measure which substantially brings the competing parties rights and public interest at an equal footing. However, it has been seen that all of these laws have been introduced after due diligence and amendments made in the existing laws, has been widely discussed and amended in the court of law. They have been subjected to public scrutiny which makes the common public aware of the working and extent of such legislations. Moreover, one thing that is common about all these registries is that they are attached with a notification system, though with certain limitations.

5. Sexual Offenders Registry- Where India Stands?

The aftermaths of the brutal gang-rape which took place on December 12, 2012,[62] gave rise to a lot of discussions and debates for changing the rape laws in India and redefining the provisions regarding sexual violence. Since then, India has seen a great rise in the public outcry against sexual offences, may it be the Kathua gang rape case or Unnao rape case,[63] Muzaffarpur shelter home case.[64] These incidents pressurized the government for formulating and reformulating laws related to sexual offences. Criminal Amendments Act, 2013,[65] one

59 Thomas, *supra* note 5 at 83-84.

60 Gardel v. France, no. 16428/05, ECHR 2009; B.B. v. France, no. 5335/06, ECHR 2009; M.B. v. France, no. 22115/06, ECHR 2009.; See Editorial, Case of Gardel v France, European Court of Human Rights (Dec. 17, 2009), https://www.legal-tools.org/doc/315a62/pdf/.

61 *Terms of Service,* Facebook, (July 31, 2019), https://www.facebook.com/legal/terms.

62 Shareen Joshi, *Missing Women and Violent Crimes in India,* Georgetown Journal of International Affairs 35, 40 (2014).

63 Rachna Dhanrajani, *Kathua, Unnao rape: Rage on the Street,* The Hindu (Apr. 14, 2018), https://www.thehindu .com/news/cities/mumbai/kathua-unnao-rapes-rage-on-the-street/article23531437.ece.

64 Aneesha, *Muzaffarpur shelter home case: Charges framed against 21 accused, trial to start from April 3,* India Today (Mar. 30, 2019), https://www.indiatoday.in/india/story/muzaffarpur-shelter-home-case-21-accused-charged-trial-start-april-3-1490126-2019-03-30.

65 The Criminal Law (Amendment) Act, 2013 (Act 13 of 2013).

such results of Nirbhaya incident coupled with wide international coverage and criticism from various international organizations, totally focused on making sexual offences law more stringent and a bit safer for women by amending criminal statutes and introducing a new set of provisions related to sexual offences. Amidst all these, the setting up of Committees for criminal reforms by the then UPA government and voice for a national registry of all the sex offenders was also raised; however, not much effort was put in to make this a reality. Afterwards, the issue was again proposed by Maneka Gandhi in 2015, who opined to include all the Charge-Sheeted sexual offenders irrespective of the age to be a part of such registry.[66] Thereafter, the demand for registry arose again in January, 2017 after the arrest of Sunil Rastogi, a paedophile who had been alleged to rape and sexually assault over 500 little girls.[67] Amidst all the debates and discussions and a steep rise in crimes against women and children[68] Sexual Offenders Registry became a reality in India by adopting the National Database on Sexual Offenders (NDSO) on 20th September 2018. It aimed at assisting the productive investigation and tracking of sexual offences as it would keep an identification record of the offenders convicted for various sorts of sexual offences.[69] The database would work under the aegis of the National Crime Records Bureau and presently would be accessible to law enforcement agencies.

Sexual Offenders Registry basically work on the concept of labelling the sexual offenders by recording their information in a database accessible to law enforcement agencies most of the time, but maybe available to the general public too like it is in the US,[70] South Korea and the Maldives[71] and in states like Delhi,[72] Kerala and Haryana.[73]

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66 Shruti Ramakrishnan, *Sex Offenders Registries don't Work,* The Hindu (Feb. 13, 2017), https://www.thehindu. com/opinion/op-ed/sex-offender-registries-dont-work/article17292629.ece.

67 TNN, *Maneka: Sex offenders' registry need of the hour,* The Times of India (Jan. 17, 2017), https://timesofindia.indiatimes.com/city/delhi/maneka-sex-offenders-registry-need-of-the hour/articleshow/ 566069 68.cms.

68 ET Online, *Centre releases National Registry of Sexual Offenders,* The Economic Times (Sept. 21, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/centre-to-release-national-registry-of-sexual-offender-today/articleshow/65881773.cms.

69 PIB Delhi, *Union Home Minister launches two portals to strengthen Women Safety,* Ministry of Home Affairs (Sept. 20, 2018), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1546835.

70 Srishti Gupta & Awsad Masoodi, *Is a national sex offenders' registry need of the hour?,* LiveMint (Dec. 19, 2015), https://www.livemint.com/Politics/V5xAnyIoSzEzxoCzxXPUmN/Is-a-national-sex-offenders-registry-need-of-the-hour.html.

71 Maggie Hall, *Sex Offender Registries don't prevent re-offending (and Vigilante Justice is Real),* The Conversation (Jan. 19, 2019), http://theconversation.com/sex-offender-registries-dont-prevent-re-offending-and-vigilante-justice-is-real-109573.

72 Editorial, *Just go Online for List of Delhi's Sexual Offender Since 1983,* India Today (July 6, 2013), https://www.indiatoday.in/india/north/story/delhi-police-sex-offenders-details-online-169332-2013-07-06.

73 Geetika Mantri, *India Starts First Ever Sex Offenders Registry: Who Will it Help and*

The effectiveness of a non-public registration system, alike in India, has received considerably less attention but studies provide some evidence that sex offender registration may reduce reoffending through specific deterrence as it provides a helping hand to the police authorities.[74]

Nevertheless, the database will store the data of the convicts primarily on the basis of amount of danger to the community, and will be placed under three different heads-

- Low danger whose information will be stored for 15 years,
- Moderate danger whose information will be stored for 25 years, and
- Serious danger (habitual offenders, convicts in gang-rape and violent criminals) whose information will be stored for lifetime.[75]

It has been directed to the state police forces to keep the database up to date, starting from 2005 in order to keep a check on the convicts of sexual offences and their whereabouts. The database is also scheduled to store data of the arrested and charge-sheeted offenders, though it would only be accessible to certain officers.[76] This Registry would basically help to have a background check and will assist in police verifications of the prospective neighbours, tenants, employees and so on. It will act as a one-stop stall for all the information regarding any person who, at any time at any place in India, has been convicted of any aforementioned sexual offences. It will also help to keep a check even after the convicts have been released from jail and have moved to any part of the country.

If such a procedure of tagging, identifying and labelling of offenders is done based on the crime committed by individuals then it adds stigmatization to their identity by making it difficult for them to sustain in the mainstream society. It acts as a hindrance to their development even if they have completed the terms of prison and have reformed themselves.[77] Such branding of criminals, though the register is only

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How?, The News Minute (Sept. 21, 2018), https://www.thenewsminute.com/article/india-starts-first-ever-sex-offenders-registry-who-will-it-help-and-how-88743.

74 Sarah Napier, Christopher Dowling, et.al., *What impact do public sex offender registries have on community safety?,* Australian Institute of Criminology (2018). ; JJ Prescott & JE Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?,* 54 The Journal of Law & Economics 161 (2011).

75 Rahul Tripathi, *Names, Photos, ID: First Registry of Sex Offenders out Today,* The Indian Express (Sept. 20, 2018), https://indianexpress.com/article/india/names-photos-id-first-registry-of-sex-offenders-out-today/.

76 Editorial, *Things You Should Know about India's first National Sex Offenders Registry,* Think Change India, (Sept. 20, 2018), https://yourstory.com/2018/09/things-know-indias-first-national-sex-offenders-registry.

77 Carla Schultz, *The Stigmatization of Individuals Convicted of Sex Offenses: Labeling Theory and the Sex Offense Registry 2* Themis: Research Journal of Justice Studies and Forensic Science 63 (2014).

available to law enforcement agencies, cannot be denied as once a convict gets his name registered won't be left out whenever any crime happens in and around his locality. He would be the first to get arrested owing to the tag he has earned. India, being a close-knitted society, seems to know anything and everything going on in its localities, and a regular visible check on a person by the police authorities may rather than suppressing the deviant behaviour, enhance the menace such as recidivism, mob lynching or a social ex-communication. There have been ample examples provided by the police authority, designated to maintain discipline breaking it according to its whims and fancies,[78] and the probability of misuse of the registry cannot be negated.

6. Background Check of Making the Registry a Truth

It seems like Indian National Database on Sex Offenders is a result of the community's extreme pressure upon the government against which government has taken such a haphazard step. Sexual offences are indeed a fatal blow to anyone's life, and the government is the one the public looks onto to get themselves protected. But any law which might affect someone's right in order to protect another's right must be thoroughly discussed and debated and made known to the public. NDSO can prove out to be a noble step towards crime prevention, particularly sexual offences, but the government seemed to be in quite a hurry to pass an order for the formulation of such a registry just to silence the widespread agitations.

a. Executive Action with No Debate and Discussion

Before passing any new policy, law, acts or amendments sufficient amount of debate and discussion must take place in both houses. But the government passed this law hastily, ignoring the need for proper and long debates and discussion on such critical topics relating to sexual violence and possible breach of privacy, which ultimately imparts a connotation that act is not the mandate of the legislature rather an executive action. Nevertheless, placing reliance on the recent judgment of the Apex Court on privacy,[79] NDSO can be prima facie termed as an infringement to the privacy of the individuals till a wide discussion is done over it. Sufficient parliamentary debates and expert consultation ensures that the concerns of each and every citizen are addressed, and sufficient safeguards must be added before individuals are deprived of their rights.

b. Recidivism Rates

A mindset exists that those involved in the commission of a crime are likely to resort to crime commission even after serving their

78 Kharak Singh v. State of UP, AIR 1963 SC 1295.
79 K .S Puttaswamy v. Union of India (2017) 10 SCC 1.

sentence and based on this same assumption the government of India created and adopted NDSO. As per the data collected on the percentage of recidivism among arrested persons under penal provisions by the National Crime Records Bureau (NCRB) for 2016, there is only 6.4% and 5.2% of recidivism rate among juveniles.[80] However, this speaks for a cumulative outcome as there has been no divided data explicitly dealing with recidivism of sexual,[81] and thus raises an eyebrow over the adequacy and justifiability of the existence of such a database. The implementation of the same does not seem to be a cakewalk for the ministry as pre-implementation works like creating a research base on recidivism among sex offenders, analyzing the risk factors and, importing the proper takeaways of registries from foreign countries must be carried out.

7. Drawbacks of the NDSO

An analogy cannot be drawn when we compare the societies of the US, the UK or Australia or Canada to that of India, relying on the fact that India is a country of villages. It has a societal pattern along with its legal framework far more different from all the above-mentioned nations. It is a country whose police authority is seen more as a symbol of fear than that of security. Giving them a tool such as a sex offender registry containing a list of convicted, charge-sheeted sex offenders may prove out to be fatal and may lead to the widespread violation of the human rights of the persons in the registry. It is indeed true that the country has seen a steep rise in the number of sexual offences in the past few years but in spite of innumerable laws and legislations, why does the need arise for an extra set of rules and regulations putting an extra burden on already over-burdened police authority. This conveys an idea that this rise is surely not a result of the failure of law or deficiency of law, but a failure of law enforcing authority, their working mechanism and deficiency in the certainty of justice to the victims. In order to cover up these loopholes, the government, in form of NDSO provided a false hope of safety to put a break on long ongoing agitation. Nevertheless, the mechanism of NDSO also suffers other drawbacks in its constituent terms. It is an accepted fact that any law passed by the legislation is deemed to be constitutionally intra vires until challenged in a court of law for constitutional scrutiny based on a plethora of aspects. The NDSO contains a vast range of information which is sensitive personal information82 and because of the same, it may amount to a possible breach of the right to privacy.83 Moreover,

80 NCRB, Report no. 64 on Crime in India 2016: Statistics (Ministry of Home Affairs, October 10, 2017).
81 Verghese, *supra* note 8.
82 MEITY, Report of Justice BN Srikrishna Committee on Data Protection (2018).
83 Puttaswamy, *supra* note 79.

to rebut the claim that such storing of information meddles with the privacy of the offender and makes things worse, reliance can be placed upon The European Court of Human Rights and the European Court *of Justice*.[84] Although, the purpose of the state in doing so maybe to prevent further crime but the states nevertheless must abstain from this practice as data sensitivity depends upon the legal and sociological context of the country concerned.[85] In a country like India, storing information about DNA and PAN numbers may prove out to be sensitive information. The way data is stored is an example of disintegrative shaming and this leads to stigmatization in a way that even after the accused has served the punishment, he becomes unable to live freely in the society without the fear of being arrested for an offence he never committed. This defeats the idea of rehabilitation and reformation and in turn, causes social and economic loss to the offender. Nevertheless, with discussions on the Protection of Data Protection Bill, the non-inclusion of the pathway for listing someone's name in the registry,[86] absence of grievance redressal committee or no pathway for delisting someone's name[87] and no other rights to the data principal as under Section 17 of PDPB makes NDSO a bit confusing and conflicting with the Data Protection Bill. This automatic inclusion of the name in the registry without any hearing on the matter of risk factor or possible dangers and circumstances of the crime makes the life of petty and remorseful criminals a hell as the stigma of a sexual offender is always tagged with them, at least for a period of fifteen years.[88] Apart from these, it has been maintained that the registry will include the name of the juvenile offenders[89] which can be a problematic situation as it will be against the general principle to be followed in the Juvenile Justice Act, 2015 under Section 3.[90] Moreover many of the Prevention of Children from Sexual Offences Act cases arise from the initial fact of intimacy and consensual sex[91] but after being caught by parents, the case is given a new direction, generally of penetrative sexual assault. Under these circumstances, the fate of the male partner gets doomed anyhow,

84 ECHR, Guide on Article 8 of the European Convention of Human Rights (Council of Europe, August 31, 2019).

85 K Mccullagh, Data Sensitivity: Proposals for Reforming the Conundrum, 2 Journal of International Commercial Law & Technology 191 (2007).

86 Personal Data Protection Bill cls. 7(f), 7(g) 2019 (Bill No. 373 of 2019).

87 *Id.* cls. 7(k), 7(l).

88 Eli Rehrer, *Rethinking Sex-Offender Registries,* American Enterprise Institute (2016), https://www.nationalaffairs.com/publications/detail/rethinking-sex-offender-registries.

89 Lilly Paul, *National Registry on Sexual Offenders: Keeping a Track,* India Legal (June 20, 2018), https://www.indialegallive.com/special-story/national-registry-on-sexual-offenders-keeping-a-track-50086.

90 Juvenile Justice Act § 3 (xiv) 2015 (Act 2 of 2016).

91 Swagata Raha*, Love and Sex in the Time of POCSO Act, 2012,* In Plainspeak (June 1, 2014), http://www.tarshi.net/inplainspeak/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/.

leave alone the matter of his name getting listed under the registry, as the consent of a minor is not acceptable in any circumstances and punishment is based upon the principle of strict liability.[92]

It is noteworthy that the registry was brought in order to curb out sexual violence in India, but no results have been published to showcase its utilization. This is because sufficient debates and discussion; and proper analysis of social and economic factor has been overlooked. Nevertheless, as per the press release[93] and the succeeding debates and discussions from the various sources over the same topic, nothing has been made clear about the working module of the NDSO. All these only lay down that NDSO will be used for investigation and monitoring processes by the investigating agencies. Nevertheless, a public notification system for habitual hardened criminals, without violating the offender's privacy, would help in realizing the NDSO adequately. If there is no such notification system then this registry may just amount to be a cover-up of the failure of the large webbed Indian criminal justice system as records of every person convicted is already maintained and eventually, the money allotted to such projects, alike various other projects, will result in disdain. Ultimately this database of sexual offenders gives a false sense of security to the individuals as unlike other countries, India has not made it clear about the notification process as to the presence of sexual offender convicts. Moreover, the government hasn't done anything to get the general public acquainted with such evolvement, which ultimately would lead to the failure of such machinery. Had it been done, it could otherwise have been proved out to be beneficial for diminishing the offence of sexual violence. This registry basically metes out only the persons convicted for sexual offences from all other criminal acts and offences which connotes that these offenders are singled out from all the other offenders. Nevertheless, a research study on the effectiveness of a sexual offender registry and notification system of South Carolina made a conclusion that such programs look good on paper but have little or no effect in actual working in a long run. Furthermore, when India is still on its way to development, the inadequacy of the resources for substantial monitoring of all the registered offenders, which is a vital part of such registries,[94] cannot be kept in abeyance. Implementation of the same in such absence of resources may lead to targeted supervision of some and thus would fail the motive of the formation of the registry.

92 Santosh Kumar Jayanti v. State of Gujarat, (2015) 7 SCC 359.

93 Ministry of Home Affairs, Union Home Minister launches two portals to strengthen Women Safety, (Sept. 20, 2018), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1546835.

94 EJ Letourneau, JS Levenson, et.al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women,* Medical University of South Carolina 48 (2010).

8. Should Sexual Offenders Registry be made Public?

One's right to be safe and right to information must not hamper someone else's right to live with dignity. In a country like India where mob lynching among vigilante groups has become a far-flung problem that the government is grappled with currently,[95] publicizing the names of the people who once have been convicted for sexual offences will lead to doing more harm than good. Offences against women and children, basically related to sexual activities is commonplace for widespread anger of the society, and once a criminal even alleged to be accused of such an offence gets into the hands of the common public, there will be no way back for such an accused. Though those who advocate of making this registry open for public access support their stand with arguments like they have the right to know about the perpetrators as in order to be safe, it will be helpful against offences against children, it will deter criminal acts and many more,[96] but the reality is that making such database public in most of the cases will lead to the failure of the justice system. It will lead us to a situation where even after an accused has served his punishment awarded by the Court, he still will suffer for the rest of his life just because of the shame which has been attached to his name. Labelling anyone as a criminal, that too as a sexual offender, not only hampers the rights guaranteed by the state but also hampers his/her social life, mental health and physical condition.[97] Naming and shaming brings with itself certain other problems such as residency problems and isolation.[98] But as it has been said that every saint has a past and every sinner has a future.[99]Similarly once a criminal is not always a criminal and criminal justice system has a vision that every person can be reformed but labelling has the characteristic of stigmatizing one with a label of criminal for his lifetime. Unemployment[100] can also be attached as a problem with making the NDSO a public affair. Naming and shaming do not only affect the criminal himself but also the society in which he lives, and the persons associated with them.[101] For example, if a person, who has once been convicted of rape which makes him an entrant in the Sexual Offenders Registry, can at any later time be prejudiced to have committed such crime again whenever such matter arises in the locality in which he resides. Thus, publicizing the NDSO in a country

95 Meena Radhakrishna, *Crime of Vigilante Justice* 43 Economic and Political Weekly 16-17 (2008).
96 Masoodi, *supra* note 70.
97 Marshall, *supra* note 43.
98 Macquiston, *supra* note 44.
99 Mohammad Giasuddin v. State of Andhra Pradesh, (1977) 3 SCC 287.
100 Lauren Cui, Maryellen Fairfax, et.al, "The Benefits and Detriments of Sex Offender Registries: A Comprehensive Qualitative Analysis" 27-31 (HAQ: Centre for Child Rights 2018).
101 Masoodi, *supra* note 70.

like India at this point of time will be a bad decision and will not only act as a hindrance to the development of the society but with also deter the idea of reformation. It will basically act as a push towards engaging in criminal activities even more and the possibilities of a convict to improve and move on in life will be lost. It should never be forgotten that torture by police and other authorities cannot minister a diseased mind. If one wants to heal a malformed man, the aim should be treating him from inside because barbarity most of the time breeds barbarity.[102]

9. Suggestions and Conclusion

Committing a crime is atrocious and is totally against the general conscience of the society but adopting a crime control mechanism that stigmatizes the offender and thus prevents their reintegration into society is way more barbaric and totally against the notion of reformation. It hampers the accused right to live with dignity[103] of the Indian Constitution. Sexual Offenders Registry is certainly a way forward in the path of women protection, but it will prove to be more beneficial once the conviction rate goes up as well as proper and actual reporting of the cases of sexual offences are made.[104] Moreover considering the societal pattern of the nation along with the problems that arose in some of the countries and speculating the enforcement of the Data Protection Bill, 2019 as an Act, the lacunae attached with the current form of the National Database of Sex Offender such as no dispute redressal authority, automatic inclusion of the name, the inclusion of sensitive data such as PAN card and biometric information and inclusion of juvenile offender must be checked so that a noble mechanism which may prove out to be a landmark in curbing out one of the nation's biggest hindrance to gender equality doesn't fail in the court of law.

The data collected in SOR as of now remains with the police and law enforcement agencies. There is a debate on the issue that whether such data should be made public. If it is done, then that would be against the interest of the offenders who have served the prison and have reformed. Such data might attach a stigma to their identity, and this would make it difficult for them to sustain their life in the mainstream of society. Moreover, at times media coverage would make the situation even worse for the offenders. Shaming the person won't act as deterrence; rather it will lead the reformed offenders toward deviance again. It must be noted that the overburdened criminal justice system of India runs at a slow pace and the number of under-trial prisoners

102 Giasuddin, *supra* note 99 at 289-290.
103 Indian Const., Art. 21.
104 Cui, *supra* note 100 at 47-49.

is quite high[105]; in such circumstances introducing a mechanism that further adds burden on these already overburdened authorities surely makes it a total loss situation. Even if the data remains with the police or investigating officer it defeats the cardinal principle of a criminal justice system that is the presumption of innocence[106] as economically and socially weaker sections of the society are more likely to be targeted disproportionately with the implementation of NDSO as the issue of unequal access to justice in India cannot be ignored.[107] The current scenario in India where there is a lack of data on the recidivism rates, such vilification only harass and stigmatize the offender rather than controlling the crime. For the law to govern, properly and adequately, the system through which it is administered must not be the one failing the entire aim and ambitions of such law. Thus, although the objective which NDSO seeks to achieve is the need of the hour in absence of proper mechanisms and data, the government might just be walking ahead towards an unintentional error.

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105 Inhuman Conditions in 1382 Prisons (II), In re (2016) 10 SCC 17.
106 Ghurey Lal v. State of UP, 2008 (1) SCC 450.
107 Cui, *supra* note 100 at 48.

Increasing the Legal Age of Marriage of Female To 21 Years-How Far Viable?

***Ms Shivangi Agrawal**
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Abstract

India's largest adolescent population presents both an unprecedented opportunity and challenge. The population holds the huge economic potential but faces the persistent grunt of nutrition deficits, improper health services, unequal gender norms, etc. From past, there has been discrimination on the basis of caste and gender but rapid industrialization, development plans, and policies have brought substantial change in the attitude of people. This is due to increasing levels of education, health policies, responsive motherhood, family formation, and other significant factors. The paper seeks to run through the viability of proposal to increase the legal age of marriage of girls from 18 to 21 years and examine it in light of other relevant factors that influence the idea.

The paper begins with going through the notion for the age of marriage from ancient times according to great saints. It also notes the age of marriage according to different legislations prevalent in India. The paper then goes to present scenario using NHHS-4 survey on three major factors that emphasizes on the need to educate the females, attention to be given to their health standards, and the legislative framework. It also takes into consideration the international norms and concludes with recommendations to work succinctly at base today to have stronger infrastructure tomorrow rather than to increase the age of girls through the Parliament by just getting the legislation passed that appears an easy way to make citizens fool.

Keywords: Female, Age, Legislation, Undernourishment, Education

Introduction

On 73rd Independence Day 2020, the Prime Minister from the Red Fort called for increasing the age of marriage of girls from 18 years to 21 years aimed towards "lowering the maternal mortality and improving nutrition levels". The same was earlier announced by Finance Minister Nirmala Sitharaman while presenting the 2020 budget. The proposal to increase the legal age of girls' marriage has been made in the wake

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of 205th Law Commission Report[1] entitled "Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other allied Laws" in reply to questions put in the writ petition by the Supreme Court [2] and presented before it in December 2007. In June, the Union Ministry for Women and Child Development, led by Jaya Jaitly, established a Task Force to investigate the connection between marriage age and Maternal Mortality Rate (MMR), Total Fertility Rate (TFR), Sex Ratio at Birth (SRB), and Child Sex Ratio (CSR), etc.[3] The MMR is a key pointer of maternal wellbeing in a nation whereas TFR, SRB and CSR of population and gender balance.

There has also been earlier attempt by government when it considered reducing the age of men to 18 *at par* with women to strive equality between both sexes and make child marriages void by default.[4] Considering the stirring condition of females in India, the present issue is pertinent in utmost respect. Although India, as the representative of SAARC, signed the Kathmandu Call to Action to End Child Marriage in Asia in 2014 and pledged to create a uniform minimum legal age of marriage of 18 years, it is also committed to ending child marriage by 2030 in accordance with the UN Sustainable Development Goals and is a signatory to the Convention on the Rights of the Child (CRC). Thereby the proposed step becomes important to scour into.

The paper is divided into three Parts. Part I delves into the ancient notions of approved age of marriage according to great saints of India. It further notes the provisions of acts of different sects with regard to the age of marriage.

Part II goes through the judicial pronouncements made in the favour of proposal at appropriate times and reasons cited thereby. It further studies the present condition of females on three broad points: Legislation, Education and Health according to various reports including but not limited to NFHS-4 survey, NITI Aayog and UN Reports fairly establishing that despite the reasons cited the conditions are not going to change with mere enactment of legislation emphasising on various other relevant sectors that need to be worked upon.

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1 Government of India, Law Commission of India, *Report 205: Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws 6* (2008), <http://lawcommissionofindia.nic.in/reports/report205.pdf> accessed August 29, 2020.

2 Writ petition number (Criminal) No. 81 of 2006

3 PTI, *Govt Sets up Taskforce to Examine Maternal Mortality Rate, Age of Motherhood,* The Economic Times <https://economictimes.indiatimes.com/news/politics-and-nation/govt-sets-up-taskforce-to-examine-maternal-mortality-rate-age-of-motherhood/articleshow/76231535.cms?from=mdr> accessed September 06, 2020.

4 *Modi Govt Considers Lowering Marriage Age for Males: Can Indian Men Handle It at 18?,* ThePrint Team <https://theprint.in/talk-point/modi-govt-considers-lowering-marriage-age-for-males-can-indian-men-handle-it-at-18/313366/> accessed on September 23, 2020.

Part III compares the legal age of marriage for both male and female for 21 countries, which shows that globally 18 years has been accepted as the legal age of marriage for both sex. The two exceptions noted are New Zealand and China and thus a comparison has been made with India on the basis of Maternal Mortality Rate (MMR) and Gross Enrolment Ratio (GER) at pre-primary education level. Vast difference has been noted with very low MMR and high GER of two countries as compared to India particularly as the former also have focused on education and health standards of females along with sanctioning legal age of marriage more than 18 years. The paper further brings up the reasons India has lacked behind according to UNICEF Annual Report of 2018.

The paper at last hunts the recommendations through various reports and the way ahead.

The paper thus hopes through the presented facts and analysis thereof to bring light to the realistic factors that need to work in practical and constructive manner to achieve actually desired end goal.

1. The Ancient Notions & Legislations

The question relating to the age of marriage of girls has been in vogue from very early period. From men to women and from age to age it has varied. There are different suppositions regarding the age of marriage. Ancient scholars suggested that a man should marry on the wake of finishing his Vedic studies and ought to go to the following stage i.e. marriage. Dharmasutras didn't recommend a particular age for marriage. Parents used to get their girl wedded before they arrive at pubescence so far during Rig-Veda as disgrace was appended to it. Girls were normally married after puberty. Manu, Brihaspati, Vasistha, Paithinasi, Kasyapa, and Vyasa always considered that a girl should marry before puberty.

Vasistha said the father should let his daughter marry while she still runs naked as sin falls on the father if she hasn't married after attaining puberty.[5] Dharmasutra of Baudhayana[6] furthermore says that a girl should get married before puberty. Around 500 BC legal works were written which correspondingly implied that girls should be married at the time of puberty. Manu advocates a thirty-year man shall marry a twelve-year girl who satisfies him or a man of twenty-four years to a girl of eight-year.[7] However Manu permits getting married before attaining proper age.[8] Kautilya in his Arthasastra didn't mention

5 Gautama XVIII, 23.
6 BD IV,I,11
7 Manu IX, 94
8 The Laws of Manu, Manu, IX, 88 (George Buhler trans, Scared Books of East 1886) According to Kulluka, proper age means the age of eight years but according to

the age for marriage although indirectly indicates that it should be 16 for boys and 12 for girls.[9] There had been many interpretations each according to personal views and satisfaction.

The same variation is seen in the legislations also which have been codified according to personal laws of each community. Muslim Personal law lays down that the girl can marry when she attains puberty or complete 15 years of age. The Parsi Marriage and Divorce Act, 1936, governs Parsis and does not prescribe an age for a legal marriage contract. Similarly, the Indian Christian Marriage Act, 1872 regulates Christian marriages, with males and females marrying at the ages of 18 and 21, respectively. The Special Marriage Act of 1872 established a minimum marriage age of 14 years for a girl and 18 years for a boy.[10]

The Baroda Early Marriage Prevention Act of 1904 stipulated that a person must be 12 years old to marry. The Hindu Marriage Act of 1955 established the minimum age for marriage as 18 years for girls and 21 years for boys. .[11] The British government passed Indian legislation on the age of marriage on September 28, 1929, known as the Child Marriage Restraint Act, 1929, also known as the "Sarda Act." Girls had to be 14 years old to marry, while boys had to be 18 years old. [12]. Later the age of girls was increased from 14 to 15 years through amendment in 1976.[13] As a result, in 1978, the Act was revised to increase the age of girls from 15 to 18 years. .[14] By increasing the age of marriage it was believed that it can help in population control.[15] Since the Child Marriage Restraint Act failed on many occasions, it was replaced by the Prohibition of Child Marriage Act, 2006 (PCMA, 2006). [16] Despite the fact that the PCMA stipulates a legal marriage age of 18 years for girls and 21 years for boys, the social and cultural practise of child marriage continues due to a lack of knowledge, lack of regulation, and administrative laxity.

Medhatithi - the term 'aprapta' means 'before she is bodily fit for marriage'.

9 VD, XVII, 74, Srimula on Arthasastra, III, 2, 1.

10 Rep Opinion 2014; 6(4):16-25]. (ISSN: 1553-9873). http://www.sciencepub.net/report

11 Sec 5 (iii) of Hindu Marriage Act, 1955

12 Sec 2 of Child Marriage Restraint Act,1929

13 Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949)

14 Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)

15 *India set to raise age for marriage,* The New York Times <https://www.nytimes.com/1974/08/11/archives/india-set-to-raise-age-for-marriage.html> accessed September 15, 2020.

16 Malvika Rajkumar, *To Root Out Child Marriage, Existing Laws Need Tightening,* The Wire, <https://thewire.in/rights/child-marriage-laws-india> accessed 20 September 2020; *Child Marriage in India: Loopholes in the Law,* IntLawGrrls <https://ilg2.org/2015/07/02/child-marriage-in-india-loopholes-in-the-law/> accessed September 20, 2020.

2. Present Scenario:

India has the world's highest rate of child marriages, with at least 1.5 million girls marrying before the age of 18 every year. . The existing anomalies of poverty, unemployment, the notion of 'one less mouth to feed', dowry demands, purity & sanctity of women, and absence of choices with women drive them to get married early. For e.g., in Bihar, in a survey by Nirantar Trust[17], respondents from the Yadav community states that "younger the girl, the more respectable and *Punya* (holy) it is to "give her away", clearly depicting the sexual purity of younger girls. India is still a suburb to a largely rural population where the '*chaal chalan'* of the girl is constantly being noticed to prevent any '*oonch neech'*.

Despite the fact that the number of children married in India has decreased between 2000 and 2018, by 51% according to the End of Childhood Index 2019[18] due to factors such as economic growth, increasing education rate, and substantial government spending. The schemes such as Conditional Cash Transfers, Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (SABLA), Kishori Shakti Yojana, and Nutrition Programme for Adolescent Girls have been major players. Various studies from countries like Brazil, Columbia, Mexico, and Nicaragua have also illustrated that such initiatives like conditional cash transfer programmes have been efficient in schools in raising consumption levels.[19]

There have been a slew of judicial rulings and lawsuits submitted in recent years in support of increasing the minimum age for girls to marry. The Madras High Court in *R.Thiagarajan v/s The Superintendent of Police*[20] had questioned if the legal age to drive, vote, etc. is 18 years for both male and female, then how can one expect a female to be more mature at 18 years as compared to man for whom age is 21 years. The Court had asked to consider increasing the age of girls to 21 years or more than 18 years.

A PIL[21] has also been filed in Delhi HC by BJP spokesperson Ashwini

17 Nirantar Trust, Early and Child Marriage in India, A Landscape Analysis, 2015, p.40

18 Global Childhood Report 2019, <https://reliefweb.int/sites/reliefweb.int/files/resources/global-childhood-report-2019-pdf%20%281%29.pdf> accessed October 03, 2020.

19 Rammohan A., The Effect of early Marriages and early Childbearing on Women's Nutritional Status in India, 2015, p.13-14

20 2014 SCC OnLine Mad 6659

21 Sanya Talwar, *Different Ages For Marriage Of Men & Women Perpetuate Gender Stereotypes: Plea In SC Seeks Uniform Age Of Marriage & Transfer of Similar Pleas From HC* , LiveLaw, <https://www.livelaw.in/top-stories/different-ages-for-marriage-of-men-women-perpetuate-gender-stereotypes-plea-in-sc-seeks-uniform-age-of-marriage-transfer-of-similar-pleas-from-hc-164837> accessed October 25, 2020.

Kumar Upadhyaya to increase the legal age of marriage of women to the same age as male arguing that the existing provision breaches respectively Article 14 and 21 of the Constitution, which are essential rights to equality and the right to live with dignity. A PIL[22] on same issue was filed by him. He also demanded that the legal age for marriage be raised to 25 and 21 years for men and women, respectively, from the existing 21 and 18 years, in order to monitor the growing population rate and thereby increase the age of fertility.

The Hon'ble SC has also taken up the concept of equality at sufficient times through legal pronouncements in line with moral conscience. While recognising transgender people as a third gender, the Supreme Court of India held in *National Legal Services Authority vs Union of India*[23] that "justice be delivered with the assumption that human have equal value and should, therefore, be treated as equal, as well as by equal laws." In *Joseph Shine v/s Union of India*[24], Supreme Court decriminalising adultery had again stated "a law that treats women differently based on gender stereotypes is an affront to women's dignity."

Despite all the judicial pronouncements, legislative frameworks, schemes implemented, reasons cited, reports presented, the efforts have not been yet sufficient enough to end discrimination against women. Tracing the "origin" of problem, it is not easy as it appears to be cured just by legislation, however progressive it might be. The roots are decades old and are being continuously perpetrated by poor quality education, poor health conditions and lack of economic opportunities. The increase in age of marriage will only delay the problems and not fix it. At its outset, increasing the age of marriage seems to be undoubtedly better in many ways:

1. It would give more exposure for educational opportunities to the females and late but safe pregnancy,
2. Increasing the age of marriage can contribute significantly to a reduction in birth rate and population growth. The greatest example is China which had implemented the one-child policy. However in 2015, due to the rise in its aging population, it relaxed the policy and allowed the couples to have two children after three decades. But, the birth rates have not shown the desired

22 Apoorva Mandhani, *Raise Minimum Marriage Age To 25 Years For Men And 21 Years For Women To Curb Growing Population: Petition In SC [Read Petition]*, LiveLaw, <https://www.livelaw.in/raise-minimum-marriage-age-25-years-men-21-years-women-curb-growing-population-petition-sc-read-petition/> accessed November 08, 2020.

23 AIR 2014 SC 1863

24 2018 SCC OnLine SC 1676

results as 1.2% in 2015 to 1.1% in 2018[25] according to data from China's National Bureau of Statistics. But, the attempt in China had been successful due to better structure of other social and economic conditions also,[26]

3. It will encourage more active parenting and aid in the improvement of the mother's and child's health.

4. It would lower the divorce rates among the families.

Having mentioned the reasoning behind the present step, the paper would analyse through the statistics and reasonable arguments that the conditions are going to remain more or less same even after increasing the age of marriage. Eileen Malon Beach for improving the conditions of women sees education, healthcare, and income as a blessed trinity because they are so closely related.[27] Considering those factors below reveals the true facet of the policy structure and brings out the areas which actually need to be worked upon i.e. Legislative Framework, Education and Health reforms. Let us understand the three points in detail:

2.1 Legislation: In India, child marriage is voidable[28] with the option to repudiate the marriage within two years of reaching majority, but sex with a minor wife is rape, according to a Supreme Court ruling in 2017[29]. That is to say, marriage with a girl under the age of 18 is legal, but sex with her is not.That means, marriage with a girl of less than 18 years is not illegal but sex with her is! The marriage is also void when it involves the elements of enticement, force, deceit, and trafficking.[30] This provision is appreciable along with Section 3(3) of the Act which provides two years to nullify the marriage after attaining the majority.

Indian society is predominantly Hindu society. Marriage has been regarded as one of the main 'sanskars' in the life of every Hindu. The above-mentioned provision of PCMA is contrary to the notion of Hindu marriage which considers marriage as sacrosanct in nature and procreation of children as one of its objectives. Increasing the legal age of girl to 21 would bring more uncertainty about the status of married minor girls. Additionally, the girls won't have any say in other

25 *Chinese Proposal to Lower Legal Marriage Age to 18 Is Widely Mocked,* AsiaOne, <https://www.asiaone.com/china/chinese-proposal-lower-legal-marriage-age-18-widely-mocked> accessed October 23, 2020.
26 Infra note 53, 54.
27 Khushboo Singh, *Importance of Education in Empowerment of Women in India,* (2016), <https://www.motherhooduniversity.edu.in/pdf/Publications/2016/Khushboo%20Singh.pdf/> accessed November 13, 2020.
28 Section 3, PCMA, 2006
29 NGO Independent Thought v/s UOI, (2017) 10 SCC 800
30 Section 12, PCMA 2006

legal matters like inheritance, divorce, right to express her opinion, etc. as those rights would be exercised by their parents or legal guardians. There have also been large instances of marriage that are self-arranged, i.e. where teenagers elope from the house and marry on their own. The majority of the parents reach to Court for annulling the marriage as they continue to exercise control over the girl. There had been several instances where a boy has been wrongfully abused of rape, kidnapping, and abduction. Though the marriage of girl and boy, both of who are major and eloped with mutual consent is valid as set out in precedents. The relevant example is *Shafin Jahan v/s Ashoka K.M.*[31] or 'Hadiya Case'. The parents of the girl approached the Court to annul Hadiya's marriage, aged 25, who converted to Islam and married a Muslim boy. Hadiya was major and claimed throughout the proceedings that she converted and married on her own will and no force was exercised on her as her parents were alleging. The SC had set aside the HC's judgment and held marriage as valid. If the said proposition is enacted it would push around 56% of girls and boys who married before 21 years in 20-24 year age group under the criminal status.[32] There would be no need of honour crimes, when parents have law to punish elopement.

The current legal provision, such as Section 13 of the PCMA, which enables the courts to issue an injunction banning child marriages after receiving an application from the Child Marriage Prohibition Officer (CMPO) or complaints from any other individual, is extremely strong. Even with provisions of penalty in lakhs[33], rigorous punishment for raping girls under 12 and 16 years of age up to death, and 20 years respectively[34], the prevention of child marriage has not been effective enough.

Increasing the age of marriage would also bring in more hurdles, especially for SCs and STs, Dalits who already lag behind for minimum basic needs and do not have fair knowledge of legal safeguards. There also exist differences among various laws for the legal age of marriage.[35] So, it leaves a big question, how universalization of the age of marriage would be preferable and acceptable to all the sects of this secular nation where the debate for Uniform Civil Code (UCC) could not have been settled till date even after continuous attempts of judiciary, learned activists and numerous civil society organisations.[36]

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31 2018 SCC OnLine SC 343

32 *Poverty, Not Age of Marriage, Is Responsible for Women's Poor Health Indicators,* The Indian Express <https://indianexpress.com/article/opinion/columns/women-health-index-india-marriage-age-6531515/> accessed November 23, 2020.

33 Section 9,10,11, PCMA 2006

34 Section 376(3), 376AB, 376 DA, 376 DB, Indian Penal Code inserted via Criminal Law (Amendment) Act, 2018

35 See Part I of the paper.

36 *Mohd. Ahmed Khan vs. Shah Bano Begum,* AIR 1985 SC 945; *Sarla Mudgal & Ors. vs.*

Child marriage affects the basic rights to freedom and life and hinders the overall development on an individual. Though, there has been[37] significant fall in the child marriages in the country and any attempt, even a small one, in hastle and ill-conceived manner would reverse the gains considerably. India certainly is not in a position to bear the brunt of the fall-back when it has committed itself to achieve 2030 UN SDG goals. Proper and strict enforcement of existing laws, check for authorities established under PCMA would bring substantial change into society instead of increasing the age of girls because increasing the age wouldn't change the mind-set and attitude of people; sufficient food, proper education, and a sound environment would do.

2.2 Education: The country with the most school-aged children is India. In the 15-18 year age groups there are 39.4% of young females, compared with 35% of boys who are not attending educational institutions i.e. drop-outs, according to the national commission for the protection of the child rights.[38] The incidence of dropouts among girls is very high. In India, the school environment for girls has remained unfavourable with poor drinking facilities, sanitation, absence of infrastructure, etc. being the major factors. Even when education is free and compulsory for girls in the country, parents are not convinced of the merits. The notion of being a "good girl" and the trademark of "being the honour of family" controls a major part of their lives. There has been a slight change in the disposition of individuals with respect to the universalization of education, but that is not enough to empower and raise the status of women in society.

Several studies[39] have shown that literacy level accounts for maximum variation in age pattern of marriage among the Indian states and the effectiveness of fixing the minimum age of marriage has been almost negligible. Children whose mothers are illiterate or have not completed their education are likely to be more stunted[40]. The NFHS-4 data establishes a clear connection between schooling and deferred marriages, with the previous affecting the last mentioned, not the other way round.[41] The data show that 48% of women in the 20-24 age

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Union of India & Ors, AIR 1995 SC 1531; *John Vallamattom vs Union Of India,* (2003) 6 SCC 611; *Jose Paulo Coutinho vs. Maria Luiza Valentina Pereira,* 2019 SCC OnLine SC 1190.

37 Supra 21

38 NCPRC, *National Colloquium Report, Vocational & Training Skills training of Out-of-school Adolescent Girls in the age group 15-18 years* (2017) <https://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=1357&lid=1558/ > accessed Septmeber 01, 2020.

39 KB Pathak, *Law and age at marriage for females in India, p. 9,* <http://ijsw.tiss.edu/greenstone/collect/ijsw/index/assoc/HASH2679/7d4a3838.dir/doc.pdf> accessed November 13, 2020.

40 *Women's Education Can Improve Child Nutrition in India,* NFHS, (2000).

41 Shalini Nair, *Increasing Legal Age of Marriage Will Add to Existing Hurdles for Young*

group, who are married at 20 years old, obviously are over 18, which is certainly a positive sign. But the notable point is that majority of such women are from urban area and well-educated. In sharp contrast, the same data highlights that poorest women with no education or hardly any pre-primary education marry at 17 or 18 years of age and get pregnant at age of 20. This gives a clear conclusion that MMR is inversely proportional to higher education of mother.

Unawareness about contraceptives, family planning, dietary supplements are major reason behind such deteriorating conditions. Poverty is another major reason because of which families are not encouraging towards education of girls. People in progressive societies with more advanced levels of education have better health and longer lives. It would be a positive measure to extend compulsory and free education until the age of 18 and the government already has extensive evidence to demonstrate this.[42] Similarly, socially and economically advantaged people also show an upward trend. There is a greater need to address the gender and caste-based inequalities with an inclusive and comprehensive development rather than such laws with stark ignorance of the standrads of socio-economic justice. Ensuring basic level of education and encouraging vocational training programmes would be a welcome step, thereby creating a platform ensuring opening of employment opportunities for women. The gradual increase in the status of women would make them independent and empowered which will slowly break the vicious cycle of inter-generational poverty and discrimination.

2.3 Health: India and China are more than a third of all global maternal mortality rates, according to the United Nations Population Fund (UNFPA). It has predicted, "India will retain the biggest national adolescent girl population, with hardly any net change from 2010 to 2030 (93 million to 95 million)".[43] Maternal deaths however have reduced from 448 in 1994 to 130 deaths per lakh live births in 2014-16 due to civil society organisations and government interventions.[44] In India, though the legitimate age of marriage is 18, families force to marry as soon as a girl attains puberty, and thereafter they have to bear kids as they are impotent to refuse sex in most of the cases. As pointed earlier, lower education standards with no knowledge of contraceptives are also major reasons. Reports[45] have shown that India

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Women's Access to Reproductive and Sexual Healthcare, Indian Express, <https://indianexpress.com/article/opinion/columns/india-marriage-age-women-pm-modi-6564759/> accessed August 30, 2020.

42 Infra 57

43 Ghose S, John LB, Adolscent Pregnancy: an overview, (2017), p. 1-2.

44 *Maternal Mortality Ratio (MMR) (per 100000 Live Births),* NITI Aayog' <https://niti.gov.in/content/maternal-mortality-ratio-mmr-100000-live-births> accessed December 03, 2020.

45 *NEW STUDY: Teen Pregnancy Still a Major Challenge in India, Strongly Linked to Child*

lacks national education policies and an active independent role of States to deal with teenage pregnancies. Poor eating habits increase the prevalence of anaemia, vitamin-A deficiency, hemoglobinopathies, and other diseases leading to birth injuries. The prominent factor in improving the health status of women is education, empowerment, freedom, self-sufficient and age appears to play a meagre role in doing so.

One explanation may be that increasing marriage age would further increase maternity age, resulting in healthier mothers and children. But this is drastically misleading conception as both mother and child continues to have poor health conditions at present and raising the age of marriage is likely to yield same adverse results. Government initiatives like Jannani Suraksha Yojana, Swach Bharat Abhiyan, National Nutrition Mission (POSHAN Abhiyan), sanitary hygiene programmes have contributed significantly to improve the status of women. While presenting the budget for FY21, Finance Minister Nirmala Sitharaman has also announced allocation of ₹36,500 crore for nutrition-related schemes and supplemental ₹28,600 for women-connected programmes.[46] While the conception of delaying the age of marriage is critically linked with health status, it would is invested intelligently on WASH, immunisation-related other schemes. There is need of such committed, innovative and missionary planning to realise the ultimate objectives.

3. International Norms:

To understand the trends globally regarding the legal age of marriage, 21 countries have been studied. The report has been summarised in the table and map (See below).[47]

S.No.	COUNTRY	AGE OF MARRIAGE-FEMALE (in years)	AGE OF MARRIAGE-MALE (in years)
1	Afghanistan	16	18
2	Australia	18	18

Stunting, IFPRI, <https://www.ifpri.org/news-release/new-study-teen-pregnancy-still-major-challenge-india-strongly-linked-child-stunting> accessed September 27, 2020.

46 Neetu Chandra Sharma, *Budget 2020: FM Announces ₹35,600 Crore for Nutrition-Related Programmes,* Livemint, <https://www.livemint.com/budget/news/budget-2020-fm-announces-rs-35-600-crore-for-nutrition-related-programmes-11580552581322.html> accessed October 03, 2020.

47 *FT_Marriage_Age_Appendix_2016_09_08* <https://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/FT_Marriage_Age_Appendix_2016_09_08.pdf> accessed December 03, 2021.

S.No.	COUNTRY	AGE OF MARRIAGE-FEMALE (in years)	AGE OF MARRIAGE-MALE (in years)
3	Bangladesh	18	21
4	Bhutan	18	18
5	Brazil	18	18
6	China	20	22
7	France	18	18
8	Grenada	21	21
9	Honduras	21	21
10	Iran	13	-
11	Japan	16	18
12	Kiribati	21	21
13	Nepal	18	-
14	New Zealand	20	20
15	Pakistan	16	18
16	Russia	18	18
17	Rwanda	21	21
18	South Africa	18	18
19	Sri Lanka	18	18
20	United Kingdom	16	16
21	USA	Varies by State	Varies by State

Analysis of the tables and maps reveals that the average marriage age is eighteen years for both men and women in most nations of the world. China and New Zealand have legal age of marriage between 20-22 years are territorial countries and have varied demographic, social, cultural, and economic resources compared to other nations. E.g., New Zealand records 15.51 maternal deaths per lakh maternities (2006-16)[48] which is much lower than India due to former's success in other fields such as record 95% Pre-primary school participation (GER) for females and 101.1% for males (2008-12), improved drinking water sources, immunization coverage, etc.[49] The same is the case with the highest populated country, China as it has well-succeeded in maintaining its growth with considerable spending on human resources. The three

48 PMMRC, 12th Annual Report, p.160, <https://www.hqsc.govt.nz/assets/PMMRC/Publications/12th-PMMRC-report-final.pdf> accessed September 13, 2020.

49 *Statistics At a Glance: New Zealand,* UNICEF, <https://www.unicef.org/infobycountry/newzealand_statistics.html> accessed November 22, 2020.

indicators for New Zealand, China and India are as:

Country/ Indicators	MMR	Pre-primary education: GER (Female)	Pre-primary education: GER (Male)
New Zealand	15.51 (2006-16)	95% (2008-12)	101.1% (2008-12)
China	19.6 (2017)[50]	87.85% (2018)	88.37% (2018)[51]
India	130 (2014-16)[52]	35% (2017)	39.4% (2017)

Thus, there are several indicators around which the effect of policy on its population depends. Going through the data above-mentioned, the specific and dominant role the age factor assumes in improving the health status of women and children doesn't seem to appear. Instead, the socio-economic development and focus on improving the ground level issues appear to be a more intelligible step for a long-term vision.

With average legal age of marriage being 18 worldwide, it makes no sense to disturb it. With poverty, insecurity, unemployment and financial burdens being the driving factor behind early marriages, well-thought and planned investments and not blanket laws will enable the disadvantaged girls to flourish. The UNICEF Report[53] brings out the challenges that need to be overcome and the solutions thereof:

1. Engaging with out-of-school girls is extremely difficult since they are probably going to be occupied with paid work. Instead of amending the PCMA, well-structured and better policies reaching the disadvantaged would bring the desired results. Increased investment in gender-sensitive laws, nutritional programmes, and strict education policies are the way forward.

2. Since India has a federal government structure, the relationship between two tiers of government is not effective. There lacks a vision for broad-scale investment in most of the states. Proper coordination, addressing specific issues while integrating with national legislation would pave more positive results.

3. The dropout rate among children remains high in India.

Recommendations

50 *Maternal Health in China,* WHO, 2017

51 China, UNESCO, <http://uis.unesco.org/en/country/cn> accessed November 22, 2020.

52 Supra 46.

53 *UNFPA-UNICEF Global Programme To Accelerate Action To End Child Marriage 2018 Annual Report Country Profiles,* UNICEF, <https://www.unicef.org/media/60281/file> accessed November 22, 2020.

The NHRC in its 2018 report[54] urged the government to take the following steps to curb the child marriage in India:

1. To make marriageable age uniform for both girls and boys. However, it did not specify what the age should be,
2. It also suggested making free education mandatory for children up to the age of 18 years or until class XII,
3. To appoint child marriage prohibition officers for every village in the country as is practiced by the Karnataka government.

While keeping the challenges and other constraints in mind, suggestions have been put forth below. The author believes that substantial result would be seen if the points are taken into consideration.

1. The HC of Kerala in *Punarjani Charitable Trust v/s State of Kerala*[55] in 2019 directed State Government to appoint CMPO "to effectively carry out functions mandated under Section 16 of PCMA and to create awareness and sensitise the community on evils of child marriage." It also directed the State Government to instruct marriage Registration Officers to intimate CMPO any marriage involving children so that appropriate actions could be taken. Gaurav Agrawal on behalf of NGO 'Independent Thought' also reached the SC in 2018 and asked for the urgent appointment of CMPOs urging the court's intervention to curb serious inconsistency in the implementation of laws. He mentioned in his petition "the numbers of CMPO vary in a range of one CMPO per district in West Bengal to above 1,850 CMPO per district in Karnataka." SC instructed the Centre to look after the matter seriously. Notably, the NFSH-4 report (2015-16) reveals West Bengal as the highest State with child marriages between 15-19 years of age at 25.6%. Taking the causalities seriously, there is a dire need government takes efficient steps to comply with the SC's direction. In relevant times, NGOs, social activists have come forward to point out the loopholes, but their demand has been ignored. It's high time we pay focus on implementing the existing provisions diligently.
2. Along with going programmes, flagship interventions like conditional cash transfers on school enrolment or attendance, life-skills curriculum, livelihood training, economic incentives would boost growth status. Other programmes such as Public Distribution System (PDS), Mid-day Meal (MDM), Total Sanitation Campaign

54 *National Conference on Child Marriage held in New Delhi on 29-30 August 2018,* NHRC, <https://nhrc.nic.in/sites/default/files/Revised_recommendation_CM_as_on%2026-10-2018_1.pdf> accessed on October 21, 2020.

55 MANU/KE/0720/2019

(TSC), National Nutrition Mission (NNM), National Health Mission (NHM), National Policy for Women Empowerment and MNREGA are critical for the healthcare utilisation and improvement in nutritional status among women.[56]

3. Reduction in the cost of contraceptives for adolescents and legislating access to contraception information and services. Building people group support for contraceptive provisions to adolescents and developing a greater understanding of how sex standards mean affect contraceptive use. Scotland has become the first country to provide menstrual hygiene products free of cost[57], initiative could be taken on that verge too.

4. Empowering girls for independent decision-making process so that they can resist coerced sex. Influential social norms, monitoring of attitudes of families towards the process would critically help to contriving laws and strategies pointed toward forestalling sexual intimidation.

5. On the verge of dental and health check-ups at schools, screening of young girls for anaemia and accessibility of food stronghold (wheat flour with iron and folic acid), milk, and egg in mid-day meal at schools would develop long haul iron stores and would be vital to curb anaemia.[58]

6. There exists a large digital divide among the girls and boys in India in rural areas. #eSkills4Girls initiative launched by the G20 group of nations in 2018, Equal Global Partnership, Pradhan Mantri Gramin Digital Saksharta Abhiyan, Saathi- a project of Google and Tata Trusts, and Udaan are flagship initiatives that have shown positive growth and another milestone would make it reach to each child.[59]

7. A regular and continuous monitoring and tracking system of women's nutritional needs and implementation of existing policies through existing systems like Nutrition Resource Platform (NRP) would certainly give better outcomes.

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56 Supra Note 22.

57 *Scotland Becomes First Country in the World to Make Sanitary Products Free; Can India Follow Suit? Lifestyle News,* The Indian Express <https://indianexpress.com/article/lifestyle/health/scotland-first-country-sanitary-products-free-india-7065074/> accessed on November 27, 2020.

58 Supra Note 22.

59 *Experts Predict 20% Increase in Girl School Dropouts. What can we do about it?,* The Better India, <https://www.thebetterindia.com/230081/india-school-girl-dropout-rate-coronavirus-pandemic-study-expert-steps-methods/ > accessed on November 16, 2020.

Conclusion

This article was an attempt to understand the true nature and consequences of the proposed legislation. The author has likewise tried to bring out the genuine and underrated causes of inequalities in the country. The economic and social development of the country depends on each section of its population and special attention towards the children is much required for developing nations. There is a positive correlation between educational, health attainments of women and greater opportunities for the nation.

With this in mind, the author has assessed various existing legislations, policy frameworks, government reports that have culminated contrary to the reasons mentioned in support of proposal above. Increasing the legitimate age of marriage would not open more avenues for education until the families have become financially stable to spend on their daughters' education and realise the urgency of such action. It would neither ensure safe and healthy pregnancy until the health conditions of women is improved with access to adequate dietary supplements. The legislative framework can play a key role ensuring proper and strict implementation of existing laws and ensuring accountability of administrative actions.

There is always a light at the end of tunnel, the task of upliftment of women with strategizing it properly is difficult though but not impossible. Government initiatives such as Skill India Mission have crucially led to an increase in women's participation in entrepreneurship. Bringing educated and strong women to India's demographics would be beneficial for the nation. Literacy rates have increased significantly from 53.6% in 2001 to 65.46% in 2011 though it's still less than males.

Thus, keeping in view the main objective behind the proposal, it concludes that the development and empowerment of women across social and economic sectors such as education, immunization, nutrition status, economic empowerment as a long term vision would not only benefit the female and the child but would also bring indispensable entitlements to the nation.

The Wave of Innovation, Artificial Intelligence and I P Rights

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Abstract

The paper provides a concise overview of the interplay between law and artificial intelligence. Based on the analysis of legal resources, it identifies key topics, systematically organizes them and describes them in general, essentially regardless of specificities of individual jurisdictions. The paper depicts how artificial intelligence is related to copyright and patent law, how the law regulates artificial intelligence and the developments in artificial intelligence. Everything that civilization offers is a product of our intelligence. AI provides a way to expand that intelligence along various dimensions, in much the same way that cranes allow us to carry hundreds of tons, aeroplanes allow us to move at hundreds of miles per hour, and telescopes allow us to see things trillions of miles away. AI systems can, if suitably designed; support a much greater realization of human values. In many dystopian scenarios, AI is misused by some to control others, whether by surveillance, robotic policing, automated "justice", or an AI-supported command-and-control economy. These are certainly possible futures, but not ones the vast majority of people would support. On the other hand, AI offers greater access for humans to human knowledge and individual learning; the elimination of language barriers between peoples; and the elimination of meaningless and repetitive drudgery that reduces people to the status of, well, robots. Artificial intelligence (AI) will have a fundamental impact on the global labour market in the next few years. Therefore, the authors discuss legal, economic and business issues, such as changes in the future labour market and company structures, impact on working time, remuneration and on the working environment, new forms of employment and the impact on labour relations.

Keywords:

Artificial intelligence, law, legal reasoning; liability; privacy, machine learning, overview algorithmic decision-making, society; intellectual property, human-computer interaction robotics.

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Introduction:

For the first time in 1955 John McCarthy, Marvin L. Minsky, Nathaniel Rochester, and Claude Shannon[1] presented a proposal of a research project which was widely recognized the term "Artificial Intelligence" in the field of Computer Science. The same expression was used in legal science already in 1848 by a strange author in an article complaining about the inefficiency of the jury system[2].

The time has come when the world requires a new perspective on the advancements in technology. It is time that we human beings understand and accept that there can be intelligence superior to human intelligence. Innovation and creativity are reaching new levels every day and the same can be seen around the globe. The world has reached a level where there are services for everything required. We can simply talk to our phones and get all the works done. We can have our phones as our friends, helpers, guardians and as a companion as well. How has it all changed? What are the other things associated with it? Are we moving in synchronization with the developing technology? We are at the stage where the recent controversy is about the legal status of Artificial Intelligence (Hereinafter referred to as 'AI'). In developed countries, most companies depend upon Artificial Intelligence for most of their work. With news of law firms hiring their personal AI as lawyers[3] and Bill Gates discussing the taxation policies on works done by Artificial Intelligence[4], their legal status is a very vital question to even start discussing the other aspects.

We human beings consider ourselves to be the most intelligent creation of God and it is not false to say so. Man has created the computer which has made lives easier and it is the human beings who are creating Artificial Intelligence that will take innovation to new levels of creativity. However, it also raises the question that if we human beings are creating an intelligence which is surpassing the intelligence levels

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1 J. McCarthy, M. L. Minsky, N. Rochester, C. E. Simon. (2006, Dec.). "A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, August 31, 1955." AI magazine. [On-line]. 27(4), pp. 12-14. Available: https://ocs.aaai.org/ojs/index.php/aimagazine/article/viewFile/1904/1802 [Sep. 9, 2017].

2 M. Gibbs, E. Adams. (1962, Dec.). "A Report on the Second National Law and Electronics Conference." M.U.L.L. Modern Uses of Logic in Law. [On-line]. 3(4), pp. 215-223. Available:http://heinonline.org/HOL/Page?handle=hein.journals/juraba3&start_page=215&collection=journals&i d=225 [Sep. 9, 2017].

3 Weller Chris, The World's First Artificially Intelligent Lawyer Was Hired at a Law Firm, Business Insider, (Mar 16, 2016)http://www.businessinsider.in/The-worlds-first-artificially-intelligent-lawyer-was-just-hired-at-a-law-firm/articleshow/52296964.cms.

4 Morris David, Bill Gates says Robots Shall be Taxed Like Workers, Fortune Tech, (Feb 18, 2017)http://fortune.com/2017/02/18/bill-gates-robot-taxes-automation/?xid=soc_socialflow_facebook_FORTUNE.

of human beings, does that intelligence deserves credits and rights for the works done or created? There was a time when the entire concept of 'artificial persons' was brought up and the study of jurisprudence accepted the same. Is it the time for a change where any new concept for Artificial Intelligence is required where the same can be given a kind of legal status? A term like 'mechanical persons' or 'AI persons' which can elaborate on the rights and liabilities associated with the same might be the distant future of law. With many examples of robots and artificial intelligence around the world, it is not justified to simply call them machines who are slaves to human beings. Gone are the days where machines are human beings' slaves. Artificial intelligence is evolving every day and it is helping human beings in ways they had never thought of. However, is it the right step? Is society ready to bring machines at par with human beings? Can we accept that Artificial Intelligence can be smarter and more creative than human beings?

Impact of Innovation and Artificial Intelligence on Labour Market:

The impact of automation and digitalization in developed and developing countries cannot be said to be the same. While we analyze the trend of innovation in the context of AI in both countries. We found some strange results. "As stated by a 2016 survey by the World Economic Forum, technically highly endowed countries such as Switzerland, the Netherlands, Singapore, Qatar or the US are regarded to be particularly well prepared for the fourth industrial revolution".[5] But in the case of developing countries it is found that the innovation completely depends upon the technical skills of young people and it is expected from them that they will shape the future of the market. According to Survey, a high percentage of young people in developing countries and are very optimistic with regard to their professional careers. The young people in these countries are very much confident about their own ability but unfortunately, it is not found in the young generations of developed countries. Also, a very surprising trend comes out in the survey, showing that in a number of developing countries, women are more inclined towards access to education. UAE is the best example where female graduates are more than men. Women are more likely to have more developed 'soft skills' which makes them a prominent talent pool – especially in developing countries.[6] It is not out of context to mention here that the increasing trend of innovation in artificial intelligence might have an adverse impact on countries like China, India and Bangladesh. Where there is a surplus of low skilled workers. If AI makes an entry to these countries the low skilled worker's

5 See:www3.weforum.org/docs/Media/GCR15/WEF_GCR2015-2016_NR_DE.pdf (last accessed on 15 February 2016).

6 International Organization of Employers, 'Brief on Understanding the Future of Work' (6 July 2016) 18.

potential might be turned into a curse for these developing countries[7]. So that the question arises how can we integrate the benefits of AI with these low skilled workers in these countries?

The social security system in developing countries is also a threat to the economic system of these countries[8]. With the introduction of the production of robots, there is no doubt that it will increase the production as well as the quality of the product, but it will prove the menace to the life of labourers in these countries. Here we have to think about, or it is normally correct to decide that society needs only wealth by selling its products in the International market or it has to consider about unemployment as well the labourers of the society[9]. No doubt when we assume that in most developing countries market for autonomous IT system will be opened up with a delay of few years. The need of the hour is why not to train the low skilled workers to the proficiency of high skilled workers and use them for operating the mechanism of A I. If such thing happened by making policies by developed countries with the support of developed countries, the word may have a peaceful economic order. If developing countries thus can facilitate qualified staff in the technological sector, it can be supposed that developing countries will also be efficient to profit from technological change[10].

Identity and Status of Artificial Intelligence:

A major problem arises with this idea of giving the AI its own identity and status. The problem is as to the authority and rights associated with the creations of such Artificial Intelligence. A very simple instance would be that if I make a machine and that machine creates a drawing, I am entitled to the rights over the drawing. Just like a photographer gets credit for his pictures and not his camera, I shall get credit for any work created by my machine. However, what if the machine is not any ordinary machine and works on its own creation which has been created by me? Can there be any right for that machine? Such machines are Artificial Intelligence which works on their own creativity and learning. Giving them their rights would bring an enormous change in the entire concept of law and persons. It will bring its liabilities attached with it and as Sir Bill Gates said in a recent interview, they might even have to be taxed for their work!

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7 UBS, 'Extreme automation and connectivity: The global, regional, and investment implications of the Fourth Industrial Revolution' (January 2016) 24 ff.

8 UBS, 'Extreme automation and connectivity: The global, regional, and investment implications of the Fourth Industrial Revolution' (January 2016) 24 ff.

9 See: www.bcgperspectives.com/content/articles/lean-manufacturing-innovation-robots-redefine-competitiveness (last accessed on 3 August 2016).

10 See: www.alumniportal-deutschland.org/nachhaltigkeit/wirtschaft/artikel/wachstumsmotor-digitalisierungindustrie-4-0-ikt.html (last accessed on 17 February 2016).

Artificial Intelligence and Intellectual Property Rights:

If we focus on the intellectual property rights associated with creations, we have to study the copyright laws which reward the rights over creations to the creators. The main objective of the Copyright Act, 1957 is to reward a person for his creativity and to give it rights over the same. It gives authors certain rights over their creations and thus finds its justification in fair play. The language of the provisions clearly defines an author as an author of the work, the composer, the artist, the person taking the photograph, the producer and the person who causes the work to be created. [11] The act however doesn't define the meaning of 'person' and the General Clauses Act, 1897 inclusively defines a person as any company or association or body of an individual, whether incorporated or not. [12] The question here is whether this definition can include 'artificial intelligence (AI)' as persons to claim their rights over their creation? The point of debate here would be that an AI is ever qualified as a person? This would be a huge step in the history of laws over the world, but it might be the need of the hour. The essence of law lies in the fact that law is dynamic in nature and the same shall understand that the world needs amendments in law whereby the AI should be given status and identity of its own.

What is creativity? As Boden explains in the very famous 'The Creative Mind Myths and Mechanisms', creativity is the capability and ability to come up with new ideas or artefacts that are new and exciting. [13] Is it true that only we human beings are capable of being creative? Why can we not see from another dimension of this universe and see the animals being creative? Why can we not accept that our very own AIs are creative in nature? Is this too far-fetched? In the very famous case of the picture taken by a macaque, the Courts of the US did not agree on giving the copyright to the monkey on the grounds that work created by non-humans cannot be granted copyrights. [14]Creativity lies in all minds. There is nothing which can prove that anyone, but humans can be creative in their own sense. The concern of copyright law should be restricted to creativity and creations and not defining personhood. The topic of personhood is a vast area where the definitions might change with time. This might be the future of Artificial Intelligence and

11 Copyright Act, 1957 , Section 2(d), available at http://copyright.gov.in/documents/copyrightrules1957.pdf

12 General Clauses Act, 1897, available at http://comtax.up.nic.in/Miscellaneous%20Act/the-general-clauses-act-1897.pdf

13 Boden A. Margaret, The Creative Mind Myths and Mechanisms, Routledge Taylor and Francis Group, Second Edition, 2004, available at https://pdfs.semanticscholar.org/52f1/53075b22469fa82ecb35099b8810e95c31f6.pdf

14 Naruto v David John Slater, United States District Court, Northern District of California, Decided on January 18, 2016, available at http://law.justia.com/cases/federal/district-courts/california/candce/3:2015cv04324/291324/45/

its laws where the copyright laws would not hesitate to grant any non-humans rights over their creation.

Understanding creativity in the context of machines is a challenge in itself. Can machines possess the element of creativity? Isn't the creator of a machine mainly creative to build up something like an AI which can help humans in living a better life? In the 1970s, a very famous artist created a program by the name 'AARON' who could create paintings as creatively as human beings. In fact, it worked better than human beings and never failed to surprise its viewers with its perfect combination of colours and sketches. Its creator, Cohen had invested years in his workstation to compile the codes, arrays and algorithms which were processed to instill creativity in AARON. AI researchers work endlessly to come up with that perfect combination of chances which can make its machine creative, and it is then that an AI is created. [15] There is no denial of the fact that the creators of the AI play a major role in making the AI but do they play the major role in creating works which their AI create? The same can be explained by an analogy where two human beings give birth to another human being, but can they deprive the same of having its own identity? It might seem a little weird but as a child learns on their own capabilities which are definitely based on the DNA structure of his body given to him by the parents, the child develops and grows. The child is credited for works created by the child. Likewise, can it be said that a human being creates an AI as a parent to it and shall not deprive the AI from its rights over its creations? It is pertinent to note that back in the 19th century, corporate laws were drafted where a company or corporate body created by human beings received as its own personality, name, address, stamp and seal. It has its own rights, liabilities and identity most importantly. When a corporate body can be given copyright over its work, isn't it unfair to not consider AIs fit for copyrights?

Authorship is a very important element in the field of intellectual property rights. The Copyright Act, 1957 defines the word "author". In relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created shall be the author of the work. When Google's AI is creating 'trippy' and 'pricy' art, isn't the AI the one who causes the work to be created? [16] It is undisputed that the AI has been created by someone but does creating it give it rights over all its creations? It would then be interpreted that

15 Matthews Robert, Computers at the Dawn of Creativity, IPC Magazines, New Scientist Volume 144 Issue 1955, August 31, 1995, available at http://psych.utoronto.ca/users/reingold/courses/ai/cache/ai_creativity.html

16 Metz Cade, Google's Artificial Brain is Pumping Out- Trippy and Pricey- Art, Wired Business, February 29, 2016, available at https://www.wired.com/2016/02/googles-artificial-intelligence-gets-first-art-show/

the works or creations of children should be in the name of parents or teachers who have 'programmed' their basic concepts and abilities. In such a scenario, it is not possible since a child learns and grows with respect to its external environment. Is it possible for an AI to learn from its external environment similarly? Can a machine have consciousness and the ability to think? Assuming that a machine can be creative and learn from its external environment and grow with the help of its processing, the question of authorship still would remain a dilemma for the world to think about. In the case of Meng v Chu, the dispute was as to the authorship of the work created. The university laboratory leader took credit for creating a superconducting material whereas his research assistant claimed that she is the actual person who invented the process of synthesizing the material. [17]A similar analogy can be drawn where the AI would be the research assistant and its creator will be the leader who provided all materials to the AI and guided her throughout the invention.

Both the worlds of law and technology must bring answers to these questions. As it is said that laws are made for society and is thus dynamic in nature, the law must evolve with the changing technology. Man has seen technology from days when super computers existed and there is about to come a time where man will have friends who would be Artificial Intelligence. They will be more than machines with an intelligence superior to the man but yet its companion. The law would recognize its 'next friends' to represent them and will give legal personality to the Artificial Intelligence who will be an inevitable part of the society. The world might not see such an environment very soon, but it will happen one day, and it will bring several issues along with it. The issues would be concerned with their personality, their duties, their rights, their liabilities and several other aspects.

As far as the copyright laws are concerned, it is time that the law considers the works of creativity of the AIs and adapt to the changing need of society. There are several AIs that work on the coded programming done by their creator and generate works of art and 'creativity'. Let us analyze the authorship of a report generated by an AI out of data recorded and analyzed by it. It is true that it has been programmed in a manner to look through the web and make reports accordingly and interpret it based on the given instructions but isn't the AI using its own creativity to arrive at a conclusion or a report in this case. The creativity of machines has not been established yet but the same has been accepted by several scientists and AI researchers. As explained earlier, creativity has no rigid definition and simply implies

17 Ruling Meng, Pei-HerngHor v Ching-Wu "Paul" Chu, United States Court of Appeals for the Federal Circuit, Decided on April 5, 2016, available on https://www.courtlistener.com/opinion/3191501/meng-v-chu/

to the capability and ability to think out of the box and come up with an idea or creation which has its own charm and is unique.

A change in the copyright laws will affect every other law and its aspect. It will not be limited to that particular sphere. It will further seek amendments in other intellectual property laws, contract laws, torts, criminal laws, taxation laws, insurance laws and every other law one can imagine. Is the world ready for it? Is it the right time to grant such a status to the robots where they will be at par with human beings or is it better than the machines be our slaves and not friends? Will the world be at an advantage when machines master human beings? The advancement in Artificial Intelligence will affect the intellectual property laws to a great extent and the same has to be amended in synchronization with the technology. The refusal of trademark and copyright offices to register AIs as intellectual property rights in the past has raised questions as to the identity and status of the AIs in the world. The definition and purposes of copyright law is to justify the rights of the creators and authors and the definition of the author shall be adapted as per the needs of the technology. This adaptation will definitely raise questions as to the 'personhood' of the AI and will bring changes in many laws across the globe. Is the world prepared for this today? Will the world be prepared for this change in the future? As explained by Kahana in his paper, "Intellectual Property Infringement by Artificial Intelligence Applications", there are four levels of applications where level A applications are the most basic ones and level D are the ones that require a minimal level of outside interference to function.[18]The element of outside interference plays a very important role in studying these different levels of applications and it is interesting to see that level D applications experience very little interference from external sources. Therefore, if the AIs are not controlled by outside forces or instructions at the time of functioning, wouldn't it be a good instance of creativity? The paper by Kahana discusses that the AIs should be given property rights over their creation but the same shall come with duties and liabilities. As jurisprudence teaches that with rights comes duties and with power comes liability, we cannot ignore the fact that the same AIs should have some duties against the rights vested in them. The solution discussed is that there should be a concept of iterative liability where the original developer of the AI would be held responsible for the infringement of laws by the AI but where it can be proved that the application behaved 'sufficiently independent', the developer shall not be liable for the infringement. We are thus discussing a world where cases will be filed against AI and

18 KahanaEran, Intellectual Property Infringement by Artificial Intelligence Applications, Stanford Centre for Legal Informatics, available at http://web.stanford.edu/dept/law/ipsc/PDF/Kahana,%20Eran%20-%20Abstract.pdf

evidence will be required to prove crimes committed. At such a point, contractual laws would be of great importance for maintaining and regulating the laws for AIs.

Artificial intelligence (A I) – intelligent enough to be named an inventor in intellectual property rights?

It is said that artificial intelligence as any task performed by a program or a machine that, if a human carried out the same activity, we would say the human had to apply intelligence to accomplish the task.

Artificial intelligence (AI) a legal inventor?

Legal Position in the US:

In the outcome of a prominent case in USPTO, wherein, AI was named inventor and applicant; and try to understand how USPTO interpreted the law. Further, explores that what happens if a similar scenario arises in India, and more importantly find out if Patent Act 1970 is rightly equipped to deal with it. Recently, an application was made in USPTO, entitled "Devices and Methods for Attracting Enhanced Attention", (16/524,350) wherein an artificial system DABUS was identified as a legal inventor and the applicant. The Court delivered decisions relying upon the listed statutes-

35 U.S.C. § 100(f) provides: The term "inventor" means "the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention".

35 U.S.C. § 100(g) provides: The terms "joint inventor" and "co-inventor" mean any one of the individuals who invented or discovered the subject matter of a joint invention.

35 U.S.C. § 101 provides: "Whoever invents or discovers any new and useful process, the machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent, therefore, subject to the conditions and requirements of this title".

35 U.S.C. § 115(a) provides: "An application for patent that is filed under section 111 (a) or commences the national stage under section 371 shall include, or be amended to include, the name of the inventor for any invention claimed in the application. Except as otherwise provided in this section, each individual who is the inventor or a joint inventor of a claimed invention in an application for patent shall execute an oath or declaration in connection with the application".

35 U.S.C. § 115(b) provides, "in pertinent part: An oath or declaration under subsection (a) shall contain statements that … such individual

believes himself or herself to be the original inventor or an original joint inventor of a claimed invention in the application".

35 U.S.C. § 115(h)(l) provides, "in pertinent part: Any person making a statement required under this section may withdraw, replace, or otherwise correct the statement at any time. USPTO based its decision on the patent statutes, the Federal Circuit case law concerning inventorship, and USPTO regulations and specified that under current law, only natural persons may be named as an inventor in a patent application, hence denied introducing".

Artificial intelligence (AI) as a legal inventor.[19]

Indian Legal Position:

Let us explore the Indian stand by analysing the definitions and interpretations of "patentee and person" and persons entitled to apply for a patent according to the Patent Act 1970. The Patent Rules 2003 also defines "Person other than a natural person".

Patent Act 1970 – Definitions and interpretation

"patentee" means the person for the time being entered on the register as the grantee or proprietor of the patent.

"person" includes the Government; (t) "person interested" includes a person engaged in, or in promoting, research in the same field as that to which the invention relates.

Persons entitled to apply for patents

"Subject to the provisions contained in section 134, an application for a patent for an invention may be made by any of the following persons, that is to say, by any person claiming to be the true and first inventor of the invention; by any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application; by the legal representative of any deceased person who immediately before his death was entitled to make such an application. An application under sub-section (1) may be made by any of the persons referred to therein either alone or jointly with any other person".

Patent Rules 2003

Definitions – In these rules, unless the context otherwise requires, — (day) "Person other than a natural person" shall include a "small entity"

Hence, referring to the Indian Patent Act 1970 and The Patent

19 AI Cannot recognized as an Inventor, US rules, available at https://www.bbc.com/news/technology-52474250

Rules 2003, a wider ambit has been provided to a person, and includes "natural person" and "other than a natural person"; further, other than natural person comprises of a large entity and small entity. As of now, there is no clarification on Artificial Intelligence as an applicant and/or inventor in the Indian jurisdiction. However, if we interpret the definition of a person according to the act and rules, Artificial Intelligence is nothing but a virtual person/intelligence, and both the act and rules have not included such person. So`, it is clear that even in Indian jurisdiction a virtual person/intelligence may not be an inventor or applicant.

Concluding Observations:

Thus, it depends on its creators and the society whether it wants the Artificial Intelligence to be a servant who would serve them as per the instructions and directions or as a friend where both the creators and the AIs can work together to evolve the technological developments to an extent where the world would become a better place to live in. This might show the world the best thing or the worst, but combined training and efforts of the AIs and their creators might take the world to higher levels of development. There are multiple examples of Artificial Intelligence being successful in helping the world and where the works of the researchers and programmers have not shown expected results but the most important aspect here is that nothing should stop this evolution. There might also be cases where there will be disputes as to the liability for any wrong done by Artificial Intelligence. The advent of AIs will also come as a huge storm to this world and will give rise to several issues like unemployment among the masses. The point to be noted here is that computers and other machines need human beings to operate them whereas Artificial Intelligence will not need any human control. It will thus replace jobs and will affect the economy to a huge effect. It will also bring about a lot of changes in society and the attitude of man towards life. AIs might be the best thing or the worst thing for this world, but the law should keep pace with the same. Looking at the brighter side, the intellectual property laws should evolve as well and grant copyrights to the creative works of the man's next friend, Artificial Intelligence. However, the law shall be drafted very well to consider the effects it will have on the other laws as well.

Innovation can be a boon and a bane. Technology is evolving at a rapid pace. It shows us something new every day. Law must evolve with it and amend itself in the interest of the citizens. Innovation is required for the growth of a nation, but at the same time, it has to be acceptable for society. Innovation brings a lot of other changes along with it and they all have their own impacts on the various fields of life. The law has to adapt to the changing technology accordingly and the same shall be pledged for the changing technology.

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Addressing the Invisible: Women and Politics

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Abstract

Men & women both equally participated in the freedom movement and we got independence in 1947. After the independence, women's political partaking is more or less invisible. Globally women are playing a marginal role in world politics. In India, the number of women voters is increasing rapidly but their partaking as a leader is not adequately increasing. Women's partaking in politics is vital because it empowers them socially, economically and politically. Numerous concerns can only be expressed by women like education, employment, health and foreign policies related to them. These concerns are directly or indirectly affecting women. There is necessity to think from women's perspective and it requires their active participation in democracy. By census 2011, women's population in India is 586,469,174[1] which are around 48% of the total population. But their representation in the Indian parliament is only 11%. Poor partaking of women in the Indian politics is raising questions on basics of the democracy which ensures equal participation of all the citizens in the government.

This Paper analyse reasons of lesser participation of women in politics despite having India's name in top countries who has given unconditional voting right to their women just after independence. Paper also analyse the effect to reservation on women's political partaking with need for enhancing women's reservation in area where women has no reservation.

1. Introduction

"यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता:"[2]

"As long as women of India do not take part in public life, there can be no salvation for the country"3

- Mahatma Gandhi.

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1 Census 2011, http://censusindia.gov.in/2011-Common/CensusData2011.html, accessed at 29 June 2019

2 Manusmriti, aadhyay 3, shloka 35

3 Yogendra Narain, Women members of Rajya Sabra, Parliamentary Initiatives of Women Members accessed at 15 July 2019, https://rajyasabha.nic.in/rsnew/publication_electronic/Women_Members_Rajya%20Sabha.pdf

Empowerment is the route of enhancing the choice-making capacity of individuals or groups, total freedom choose from available options and transforming the chosen options into the desired action. It involves the social transformation of common persons through rearrangement of power.[4] Women's empowerment varies from individual to individual on account of differences in her caste, creed, culture, wealth, age and family stability. Women's empowerment is a predicament among all the countries. Women's problems about society, law, policy and governmental action can be described by women better than men. Political partaking is one of the ways for women empowerment.

Politics is the competition between competing for interest groups or individuals for power and leadership[5]. Politics is a process where group of people make decisions through consciences. Political participation of women contains a wide range of activities and approaches; it consists of several kinds of voting rights as well as education of voters, candidacy in both national as well as local elections, giving support to candidates who raise gender-sensitive issues, campaigning against those candidates who support policies which are against women's political development.

Rousseau had a view that women should be excluded from politics. Apart from this *American Declaration of Independence* also didn't recognize the rights of women to equally participate in politics. But everything has its and so finally, *J.S. Mill* raised his voice in favour of gender equality and promoted women's partaking in every field of society including politics.[6] In the beginning, all countries had different set of customs, practices, and rules related to the leadership of women in society. Over the time it was felt essential that women's partaking in politics is vital. The United Nations was formed after the Second World War, which accepted and adopted the UN Charter, 1945 and the Universal Declaration of Human Rights (UDHR), 1948, where rights equal for women was accredited in every field of society. Despite that women are still trailing behind men in the politics in most of the countries. Western counties like the USA have more than 50% partaking of their women in Congress and different ministries whereas the underdeveloped countries are also having up to 10% of women's partaking.

In India, women's partaking in politics is marginally less. Though India has provided women's voting right after getting independence and is also amongst those countries that had recognized women's

4 Dalia Dey and Asis Kumar Pain, Women Empowerment, ed. 1, 2007
5 Merriam Webster dictionary
6 Sabina Begum, Political Participation of Women: Some Issues and Challenges, accessed at 29 June 2019 http://www.allresearchjournal.com/search/?q=Political ParticipationofWomen3ASomeIssuesandChallenges

electoral rights in the early hours as compared to other countries. But still, women are not properly represented in the field of Indian politics. In the election of 2019, 724 women candidates participated and out of that only 78 won the election.[7] On the part of Ministry out of 36, only 8 represents in the central government. Though various policies are framed by the system but they all tare futile to remove the gender gap in politics.

2. Global Overview of Women's Political Participation

"Women must be regarded as agents and beneficiaries of change. Investing in women's capabilities and empowering them to exercise their choices is not only valuable in itself but is also the surest way to contribute to economic growth and overall development".[8]

- Human Development Report, UNDP, 1995

True democracy as elucidated by the Abraham Lincoln is "government of the people, by the people and for the people."

Historical background of women's leadership and political participation stretch out in India. The best example of women empowerment and leadership quality was that when ***Maa Kali*** carnaged the ***Shumbh*** and ***Nishumbha*** on the request of other Devgana. Apart from this Maa Durga carnaged ***Mahisasur***. Other incidences of such a kind were also recorded as a mark of women empowerment. Along with india, when other democracies were evolving, the political partaking of women was limited. In Ancient Greece and Rome, women were debarred from any kind of voting rights till the late 18th century. In 1893, **New Zealand** was the first country which recognized voting rights for their women. Thereafter voting rights of women emerged as a burning issue in western countries, especially in Britain and America. The women of America were the first at the world level who fought for their rights to vote. Similarly, women won voting rights in most of the western liberal democracies after their systematic battle with the system. In 1902 Australia, 1906 Finland and 1913 Norway had given voting rights to their women. In 1920, the USA gave voting rights to their women by the 19th Amendment in August 1920 and in 1928; Great Britain accepted the voting rights of women but it was based on wifehood, property, and education. India is counted in leading countries that recognized women's voting rights. The article 1 of UDHR, states, ***"all human***

7 The Economic Times, Record 78 women Mp's in new Lok Sabha, accessed at 7 July 2019, https://economictimes.indiatimes.com/news/elections/lok-sabha/india/record-78-women-mps-in-new-lok-sabha/articleshow/69484777.cms?from=mdr

8 Jeanne Halladay Coughlin and Andrew R. Thomas, The Rise of Women Entrepreneurs: People, Processes, and Global Trends(first edition)

beings are born free and equal in dignity and rights". And Article 2 provides for equality of sexes. It states that ***"everyone is entitled to all the rights and freedoms without distinction of sex."9***

I. Commission on the Status of Women

In 1947, the United Nation established The Commission on the Status of Women (CSW) for the purpose of establishing parity between men and women at National as well as international level. In 1947, the Commission on the Status of Women held its meeting for the first time in New York and all representatives were women of different countries.[10]

The Commission also framed international conventions related to women's rights, like *Convention on the Political Rights of Women, 1953*. This was the first Law which recognized the political rights of women at the international level.[11] In 1963, UNGA requested the CSW to frame laws to remove discrimination against women. So in 1967, CSW drafted *the Declaration on the Elimination of Discrimination against Women* and it is adopted by UNGA in 1967. Even after these steps, the condition of women concerning the political partaking significant. In 1971, Switzerland granted absolute and equal rights of women relating to voting in both cantonal as well as federal level elections. Similarly in 1973 equal voting rights were recognized in Syria. However, many traditionalist countries in the Arab and the Persian Gulf have still not recognized equal voting rights of their women.

II. Convention on the Elimination of All Forms of Discrimination against Women *(CEDAW)*

In 1979 a historical step was taken by the CSW. CSW framed *The Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), which is legally binding on all member parties.[12] The CEDAW has acknowledged following certain political rights of the women-

1. Women's right to vote in all general elections of their respective states and to be elected as a member of their general assemblies,
2. Women have equal rights to participate, formulate and implement of policies of the state and to hold a position in the public offices.
3. The right to participate in the non-governmental and socio-political organization.

9 UDHR, 1948
10 Commission of the status of women accessed at 1 July 2019, http://www.unwomen.org/en/csw/brief-history
11 *ibid*
12 *Ibid 6*

III. UN World Conference on the Status of Women

In 1975, United Nation organized the **first world conference** status of women, hosted by Mexico. The conference focused on '***securing equal access for women to resources including education, employment opportunities, political participation, health services, housing, nutrition, and family planning'***

Again in 1980, the **Second world conference** on the status of women was held in Copenhagen. The conference focused on the ***'discrepancy between universal legal rights and women's ability to exercise these rights'.*** The Commission found certain issues such as -

- Lack of attention of men on the improvement of women's role in society,
- Lack of political will,
- Inadequate representation of women in decision-making,
- Lack of awareness among women about the opportunities available to them.

IV. Millennium Development Goals, 2000

The Millennium Development Goals (MDG) focused to make an attempt to eradicate all sorts of disparity between men and women in society. The summit held in 2000, adopted 7 goals and one among them was to encourage equal rights and empowerment of women. To encourage then women's participation and leadership MDG focused on basic education, elimination of discrimination at the grass level.

Despite all the above conferences, there are still many countries where the political partaking of women is below 5%. In 1990, the western Somoa and in 1993, Kazakhstan have given voting rights to their women. In the 21st century, Kuwait (2005), United Arab Emirates (2006) and in 2011 Saudi Arabia has given the right to vote to their women. It is anecdotal that though the situations are going in the favour of women in concern to political partaking but are very slow.

3. Political and Electoral Participation of Women in India

According to Manu "A woman must be her father's shadow in childhood, her husband's in her Youth and her son's in her old age." Therefore, even in the ancient period women didn't have an equal position as equal to men. They were just subordinate to men. [13]

13 Anuradha Chadha, POLITICAL PARTICIPATION OF WOMEN: A CASE STUDY IN INDIA, accessed at (7 March 2019, http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html,

There was no concept of political partaking in India in ancient Indian civilization but the leadership concept was there. Political partaking of women more or less originated in India during the Slave dynasty when the Razia Sultan became the ruler of the state after the death of her father Shams-ud-din Iltutmish in 1236. This was the first incident when any women held the top post-in-country. The emergence of political participation and leadership of women can be traced in the 19th century when the freedom movement started in India. In the male-dominated socio-political society, women such as *Rani Laxmi bai, Pandita Rama Bai, Savitri bai Phule, Sarojini Naidu, Vijay Laxmi Pandit, Captian Laxmi Sehgal, and Anni Besant* have played a vital role in the struggle for freedom. Rani Laxmi bai was one of the freedom fighters who initiated the revolt of 1857. She held the top position after the death of her husband *Gangadhar Rao.* During her regime, Jhansi was protected from Britishers.

Captain Laxmi Sehgal held 2nd position after Subhash Chandra bose in ***Azad Hind Fauj.*** She controlled all actions of Azad Hind Fauj in absence of Subhash Chandra Bose and also lead the army in the different freedom movement. Annie Besant was a British woman who participated in India in the freedom movement. She also wrote a book on '***The Political Status of Women'*** in 1874. She holds the position of first lady president of the Indian National Congress. Sarojini Naidu was also the part of the freedom movement in India and directly involved in the politics of India before and after independence. She was president of INC session in Kanpur in 1925.

Struggles for women's electoral right and separates Representation

The right to separate representation and voting rights to women originated from the ***Swadeshi Movement*** in 1905. This was the first instance of women's participation in national movement under English rule. The first official demands for voting rights and women representation arose in 1917 when Sarojini Naidu led committee demanded women's political representation and suffrage in India in 1917. In 1928, **Simon commission** recommended for the women separate franchises for increasing the ratio of women's election and politics. **Government of India Act of 1935** accepted voting rights of a large number of women, but still it has certain limitations like qualifications of women, literacy of women and property owned by the husband of married women.

By the Act of 1935 women got reservation on 41 seats in provincial legislatures and also got partial reservations in the central legislature. By this positive step, women got support to prove them and later on overall 80 women won the elections. Now after having 80 women as legislators, India became a 3rd country that had the maximum women

legislators. Soviet Union was on 2nd whereas USA had the highest no. of women legislators.[14] In 1937 elections were held and women also got representation in the provisional cabinet. ***Vijayalaxmi Pandit*** of Uttar Pradesh appointed as minister for local self-Government and J.T. ***Sipahimalchi*** became Deputy Speaker.[15] Apart from this Hansa Mehta and Begum Shah Nawoy appointed as Parliamentary Secretary in the state of Bombay and Punjab respectively. Women have also represented in the constituent assembly. On the first meeting of the Constituent Assembly, 14 women had participated.

Nonetheless, in power positions and representatives, there was no proportional increase in women. The All India Congress Committee (AICC) meeting of 1922, there were ***only 16*** women out of ***350 delegates***, in 1937's session there were only 13 women delegates. Even the representation of women in Indian politics as president is almost zero percent. From 1895 to 2019 Indian National Congress has seen 87 President out of that only four were women. Though it cannot be denied that the women's participation in the freedom movement was not there but the numbers of women leaders were not equal to men. After 1935 when the separate franchise was given to women, the condition of women's representation in different levels of democracy was increased.

4. Political Participation of Women Post-Independence Era

"Every woman is a creator in the ideals of nationhood. I want the women of India to have consciousness of the great and dynamic nation whose energies have to be mobilized and harmonized for a common purpose".[16]

-Smt. Sarojini Naidu

After Independence the picture became different. The Indian Constitution acknowledged equal rights to men or women. Based on that equality, voting rights were granted to women under the Constitution of India in 1949. But legislators didn't acknowledge any separate representation of women but the women got the right to vote as a legal right under the Representation of Peoples Act, 1951. The Constitution didn't hold seats for women in the parliament as well as State Assemblies. So after the commencement of the Constitution political partaking of women was dependent upon the social norms of that area. The trend of the mass level of involvement of women in the independence movement as well as in the matter of representation was declined post-independence. The involvement of women in politics and

14 Shruti Chandra, Empowering Women through Political Representation in India, accessed at 6 March 2019, https://www.researchgate.net/publication/295908189
15 *id*
16 *id 3*

election remained only in political families rather than as interest in politics and societal encouragement. Even political parties have not shown any interest in women's partaking in Indian politics.

Though some women had actively participated in politics and reached to the top post in the state-level politics or central legal politics, ***Sucheta Kripalani,*** freedom fighter and politician who has participated in the various freedom movements. After the independence, she was elected as Member of Parliament from New Delhi. Later she held the post of Chief Minister of Uttar Pradesh and became 1st women Chief Minister of any state in India. Thereafter, women's representation in politics was increasingly skint.

The following data shows the status of women in the Parliament of India. The women representation in first three Parliament elections increased very slowly. At the end of the 3rd Parliamentary election, the women's representation was 6.7% but in the 4th general election, the women's participation decreased from 6.75 to 5.9%. From 1980 onward the women representation again started with a very slow growth rate. Till 2014 only 11% of women were members of Parliament. Recently in 2019 elections, 78 women hold the position as MP which is the highest women representation in Parliament of India ever. The growth rate was 2.8%. As per the data of the UN, India is falling in 2nd last category as a matter of women's political partaking.

As per the report by the UN, women's representation in South Asian countries is very low. It has only 8% in their respective parliaments. ***Micronesia and Vanuatu*** are the two countries that have never allowed the representation of women in their parliament.[17] Non-representation of women in the politics of the country shows that still many countries and their structure are prejudiced toward women. Countries in South Asia such as India, Pakistan, and Nepal have the lowest representation of women in their legislature and politics.

Data show that in the case where the political parties had the chance to enhance the representation of women, in that case, no political parties had showed any wiliness to do so. In case of Lok Sabha women representation without reservation depends upon the will of the public but in the case of the upper house, there is more chance to enhance the representation of women. Women in India securing nearly 48% of the total population but still, women are not represented in parliament adequately.[18]

17 Murray Llyod, WOMEN'S POLITICAL EMPOWERMENT AND LEADERSHIP, accessed at 2 July 2019, http://asiapacific.unwomen.org/en/digital-library/publications/2018/11/womens-political-empowerment-and-leadership

18 Census 2011, http://censusindia.gov.in/2011-Common/CensusData2011.html, accessed at 29 June 2019

The condition in State legislative Assemblies is also very unfortunate. Some state have women representation up to 14% in their state legislature whereas some state have no women representation at all even they are not nominating women as MLA. On the other part, most of the developed states Karnataka have only 3.5% women representation.

I. Constitutional Provision for women Equality and Political Participation

The Constitution of India ensures equality between men and women. Even it provided certain special provisions for the empowerment of women. The Preamble, Fundamental rights, DPSP and fundamental duties ensure full development of the women. These parts of the constitution prohibit gender inequality.

The **Preamble** of the constitution of India ensures the equality between men and women. Preamble uses the word *WE THE PEOPLE OF INDIA,* which means and includes that all men and women are on an equal footing regardless of their caste, creed, religion, and their sex. The **Fundamental Rights** have been recognized under **Part III of the Constitution.** It acknowledges certain Fundamental rights of Citizens as well as non-citizens of India. Following Rights are recognized concerning equality which endeavours equality of women in the field of society:

i. **Article 14** guarantees the right to equality. It provides equal protection by the law of the state as well as equality in all administrative and legal proceedings to all person whether citizen or non-citizen.[19]

ii. **Article 15** states that neither state nor any Individual shall make any discrimination only based on religion, race, sex, and place of birth. But the Constitution has given special powers to the state to make any kind of laws which is favourable for the women who are the Citizen of India.[20]

iii. **Article 16** abolishes all kinds of discrimination with the citizens of India in public employment. It states that there shall be no discrimination on grounds of religion, race, sex, descent, and place of birth.[21]

The **Directives Principles** of State Policy also imposes a non-binding duty on the state that the state should make provision for the betterment of women. The provisions are as follows-

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19 The Constitution of India, 1950
20 *id*
21 *id at 22*

i. **Article 39(a)** [22]— the state shall make an arrangement which will provide adequate means of livelihood equally for men and women.

ii. **Article 42**[23]—Provision for just and humane conditions of work and maternity relief.

In 1957, Nehru government started to focus on participation of locals at local level governance, for that Balwant Rai Mehta committee was appointed for suggestions.

II. Balwant Rai Mehta Committee, 1957[24]

The Balwant Rai Mehta Committee was constituted in 1957 to lookup the Community development programs. The Committee gave various suggestions for the same and it also laid prominence on women participation at local level and suggested that-

- Members of Panchayats should only be elected, and also recommended for the co-option of two women. Committee also well-thought-out the representation of women belonging to Scheduled Castes and Scheduled Tribes. But also held that there is no need to provide special representation to women.
- Committee also made a recommendation that at least two women must be represented in every level of Panchayati Raj bodies. If in case the bodies consist of very fewer members then at least 1 seat should be reserved for women in each level.
- In case of bodies of small size with membership up to five, there would be only one place reserved for a woman member.

III. Ashok Mehta Committee (1977)[25]

Government in 1977 appointed Ashok Mehta Committee to give suggestions for representation of locals in Local self-government. The Committee has widely acknowledged the women's participation in the Local Self Government and ensures women participation in every level of Local self-government. The committee suggested that at least 2 women should participate at the Zila Parishad level. These women may be who have secured the highest number of votes in their Panchayat level elections. Apart from that, there should be reservation of two seats at Mandal Panchayat. Committee also recommended that-

22 *id at 22*
23 *id at 22*
24 Balwant Rai Mehta Committee Report , accessed at 29 June 2019, https://www.revolvy.com/page/Balwant-Rai-Mehta-Committee
25 Ashok Mehta Committee Report, accessed at 29 June 2019, https://www.panchayatgyan.gov.in/documents/30336/0/Asoka+Mehta+Committee+Report.pdf/41d384c3-bab7-4957-8ea0-69d8d5f4fc08

- Need of special consideration towards representation of women in PRI. It can be only possible when we give a chance to them to participate in the election processes and facilitate them to come and play crucial role decision making.
- To secure their participation in elections, for the two seats reserved for women in the Zila Parishad and Mandal Panchayat, any woman who gets the highest number of votes in the election, even if she does not win, should be taken in as a co-opted member[26]

IV. L.M Singhvi Committee (1985)[27]

In 1986, Prime Minister Rajiv Gandhi constituted a committee on '***Revitalisation of Panchayti Raj Institution for democracy and Development'***. Dr. **L.M Singhvi** was appointed as chairman of this committee. The recommendation of this committee did not diverge from the above reports but has suggested some new recommendations which are as follows-

- Panchayti Raj Institution (PRI) must be constitutionally recognized. So new Chapters for PRI should be added in the Constitution of India.
- There should be Gram Panchayat, consisting of village or villages.

V. 73rd Constitutional Amendment [28]

Rajiv Gandhi, the then Prime Minister had presented 64th Amendment bill on local government in Lok Sabha on May, 1989. The bill was not passed in the Parliament then. Rajiv Gandhi again attempted in the year 1990. But still the bill was not passed because it was not taken for consideration. In 1991, P.V Narsimha Rao, presented the fresh bill on local self-government popularly known as Panchayati Raj bill which was passed in 1992. It is known as 73rd Amendment Act 1992. 73rd Amendment Act came into force on 24th April 1993. Chapter IX was inserted in the Constitution by the name of Panchayats in 1993.

The 73rd Constitutional Amendment is famous due to women's representation in Local self-Government. It provided 33% reservation to women in all the 3-tiers of the rural local governance system. The reason behind this step was to make women empowerment and increase Participation of women in Politics at local level. Some Provisions of

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26 *id at 18*

27 L.M Singhvi Committee Report, accessed at 3 Feb 2020, www.panchayatgyan.gov.in/hidden/-/asset_publisher/LWFdLdY7l9Hs/content/l-m-singhvi-committee-report-1986/20181?entry_id=73956&show_back=true

28 3rd Constitutional Amendment Act, 1993, https://www.panchayatgyan.gov.in/documents/30336/0/Constitution+73rd+Ammendment.pdf/bd9dcfbd-34c3-4d33-bd51-a49c0aa9635d

73rd Constitution Amendment are as follows:

- **Article 243D (3)**[29] Provides that 1/3 of total number of seats filled by direct elections in Panchayat shall be reserved for women (including women of schedule Caste, scheduled Tribes). The reservation to women must be based on rotation basis for each and every Panchayats.
- **Article 243-D (2)**[30] **-** provides special representation of women belonging to Community of Scheduled Castes and Scheduled Tribes in that Panchayat. There shall be 1/3 reservation of SC, ST women within category of 1/3 reservation of women in Panchayat elections.
- **Article 243-D (4)**[31] provides 1/3 reservation to women for the post of total chairmanship of all level of Panchayti Raj institutions. If in case there is no women chairman in all level of PRI's, then post of Vice chairman should be reserved for women.

Post 73rd Amendment the representation of women in PRI's has drastically increased due to compulsory reservation for women. Women then started to play important role in local level government. It proved that we were living under a misconception that women can't discharge a role in politics. But these steps were not sufficient for adequate women representation.

After 73rd Constitutional Amendment 1992 there was new Amendment in constitution made and 74th Constitutional Amendment, 1992 was introduced, which provides local self-government in urban areas. This was added under Part IX-A in the Constitution. It also provided 3 tier systems in urban self-government.

Ministry of Panchayati Raj has stated in its report, '***Basic Statistics of Panchayati Institutions 2019'*** that *more than 13 states having 50% representations of the women in their local self-government. After providing 33% reservations to women in local self-government there was a drastic change in women's political partaking at the local level. Only a few states are having 33% women representation rest of the states having more than 40% reservation.*

VI. The Constitution (One Hundred and Twelfth Amendment) Bill, 2009[32]

After the success of 33% reservation at the local self-government, the government of India introduced a bill in 2009 in the form of

29 The Constitution of India, 1950
30 *id at 32*
31 *id*
32 The Constitution (One Hundred and Twelfth Amendment) Bill, 2009, accessed at 3 July 2019, https://www.prsindia.org/billtrack/the-constitution-one-hundred-and-twelfth-amendment-bill-2009-amendment-of-article-243t-947,

Constitutional Amendment bill which was related to 50% reservation of women in Panchayati Raj Institutions. This Constitution (One Hundred and Twelfth Amendment) Bill, 2009 was introduced in the Lok Sabha on November 24, 2009, by the Minister of Urban Development, Shri S. Jaipal Reddy. The bill provided that the following States have made legal provision for 50% reservations for women in Panchayati Raj Institutions: Andhra Pradesh, Bihar, Chhattisgarh, Jharkhand, Kerala, Maharashtra, Odisha, Rajasthan, Tripura, and Uttarakhand. The bill seeked to amend article-

- Article 243T, provides 1/3rd reservation to women in direct election at municipal level.
- State legislature will provide the manner of reservation to women from SCs and STs Community for the seat of Chairpersons in Municipality. The reservation should be based on population of SCs & STs in that State.
- This bill tried to improve the percentage of reservation to women in Municipality from 33% to 50%. 50% reservation will be applicable in post of all Chairpersons as well as seats reserved for SC/STs.

The above bill lapsed in 2009. Despite this few states have a provision of 50% reservation for women in local Self Government and the rest of the States have the provision of the 33% reservation.

VII. Women Representation Bill, 2008[33]

This bill is popularly known as Women's Reservation Bill. Before this bill many other similar bills had been introduced in the Parliament but none of them were passed in Parliament due to the lack of political will. This bill was introduced as the 108th Constitutional Amendment Bill. The bill seek out following things-

- Bill provided 33% reservation for women in Lower house of Parliament and in all State Legislative Assemblies.
- Bill also provided special representation or Reservation to women belonging to SC &ST communities. So 33% reservation within category women reservation shall also be reserved for SC&ST women. Reserved seats may be allotted by rotation to different constituencies in the state or union territory.
- Above reservation shall terminate after the expiration of 15 years from the date of commencement.

This bill also lapsed in the Parliament. The reason can be a lack of

33 The Constitution (One Hundred and Eighth Amendment) Bill, 2008, accessed at 3 July 2019, https://www.prsindia.org/billtrack/womens-reservation-bill-the-constitution-108th-amendment-bill-2008-45

significant numbers of women representatives in India's Parliament. The Parliament had not shown any enthusiasm to pass it and from 2008 to 2019 none of the government has taken the initiative to reintroduce these kinds of women reservation policies or bill for women empowerment and to increase political partaking of women in India.

5. Barriers to Women's Participation

There is a difference in the political representation of men and women. A man mostly pays concern on public works or developmental works whereas women's priority is on education and health of women and children, cruelty and domestic violence against women. Minority of female in any area hampers their power of bargain as well as negotiation. The best example is lapse of women reservation of bill in the Parliament. Apart from that important ministries in the cabinet are allotted to men as compared to women. Before Narendra Modi government no female was appointed as Defence, Home, or Finance Ministers. Women were getting such ministries which were related to women and child only. So without having women's representation bargaining power of women will never increase. When it comes to representation political parties are not doing equality in distribution of tickets. For political parties to come in to power is more important than women representation, so they are not providing tickets to women candidates. In India, Congress and BSP have its women chairman but still women are marginalized in distribution of tickets. Due to this inequality women are not properly represented in parliament. Women representation is only possible through providing reservation but certain political parties like **SP and RJD always opposed it on the ground that firstly parliament have to provide reservation to OBC category in parliament.**

I. Women are perceived to be subservient to men

In many parts of India (mostly in village) women are still deemed as subservient to male. Low levels of education of women in village area resulting in ability of them to find out good jobs. When women have the ability to take job then family member raise the issue of care of child, and husband is also earning so no need of a job. Restrictions on their movement, early marriages are also major issues which leads perception of women as subservient to men.

II. Violence against women in politics:

UN women organization has published a report on crime against women in politics. The report showcases the reason behind the non-participation of women in politics. The report stated that to a large extent, marginalization continues in the India even in families who has political background. Many women in India, who are the part of Indian politics, have faced some kind of discrimination, marginalization and

harassment. There is a complex link amongst harassment of women, violence against women and women's involvement in politics. The women were asked for sexual favour for increasing their political participation. *Character assassination* during the election is also one of the reasons behind the less participation of women in politics. One BJP leader has passed ghastly comments on the Mayawati in Uttar Pradesh. Verbal Harassment such as the "50 Core rupee Girlfriend" comment by Narendra Modi on Sunanda Pushkar in politics leads a tougher challenge to women than men in politics.

III. Discrimination within Political Parties

Gender discrimination within political parties results marginalization of women within the party. Ms. Mayawati and Mrs. Sonia Gandhi are the two women who hold the top post in their parties even during their chairmanship in Bahujan Samaj Party and Indian National Congress women's participation was nil. During the election hardly 4-5 % of women leaders get ticket and become MP or MLA. During the Congress government in 2004 when Sonia Gandhi was Chairman of INC only one woman was a cabinet minister and six women were state minister. In 2009-14 UPA II term three women were cabinet Minister and four were state minister. During Modi government, six women were appointed as a cabinet minister and one was appointed as a state minister. Though the representation of women in politics increased during the Narendra Modi government but still women's participation in India politics is very unfortunate. It is just 15% earlier it was 9%.[34]

IV. The low political education of women

Apart from above problems there is another problem that is, knowledge and understanding of the political system and its impact on women's lives. There are a large number of women in India whose names are deducted from the voting list and they are dependent on their husband regarding their voting rights. Low political education leads to the incompetence of women to know their rights. The best way to increase the political participation of women is the improvement in women's political knowledge and skills. As per the Election Commission of India due to lack of political knowledge, women are not fully participating in politics therefore, their husband/father or any male member of the family are working on behalf of them. This leads to a proxy position of women in politics which is hampering the concept of women's political partaking.

34 Participation in decision making, accessed at 10 March 2019, http://mospi.nic.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/WM17Chapter5.pdf,

V. Less Interest of well-educated female in Politics

In India well educated women give precedence to Public Sector job or Private Jobs over the Politics reason being these jobs provides security and much more growth opportunity, less hard work to prove their capabilities as compare to Politics. But due to this selective perspective of women no well-educated women is available to tackle their opposite males competitor, those who are available are not well educated to counter their opposite male competitor.

VI. Patriarchal Mindset

Patriarchal values are still prevalent in society which directly or indirectly affects the growth of participation of women in public life. In patriarchal mindset society thinks that certain work is fixed for women and these works must be done by women only. They believe that women should not be allowed in public work as it affects the reputation of family.[35] People also believe that women must follow the old tradition where women worked within the four walls of the house. This kind of Patriarchal mindset is detrimental for the growth of women in modern society so there is a need to curb this mindset for full-fledged development of women in society.

3. Conclusion & Suggestions

"Woman in India has a special role. She is the upholder of tradition and she must also be an usher for modernity. Her task is to be a vehicle for social reform and the bringing in of a new society."[36]

-Smt. Indira Gandhi

The Ancient Hindu religious scripture has also given the highest status to women than men. Religious scripture stated that "***Where Women Are Honored, Divinity Blossoms there***." With time women's social vigour has been decayed. In the Constitutional era, India was on one of the fastest countries which acknowledged women's electoral right in the world. The Constitution of India granted equal rights related to vote and participation in politics to both men and women. Despite having all things women are still trailing behind men in respect of equality, job opportunity and in their full development. Those steps which have been taken by the previous governments are either deficient or their implementations were poor that's why women are raising their voice for their empowerment. *In 1993, the Report of the Committee on Status of Women highlighted the low number of women in political bodies*

35 Praveen Rai, Electoral Participation of Women in India: Key Determinants and Barriers, https://www.jstor.com/stable/27918039, accessed at 20 March 2020

36 *id*

and recommended that seats be reserved for women in Panchayats and municipal bodies. So by the 73rd and 74th Constitutional Amendment women got 33% reservation in local self-government as well as in the municipality. This reservation in the Constitution has given positive results in local politics. The women's representation in some states was more than 50.

Although above reservation somehow make women empowered but its effect was not that great as expected because of Proxy position. Through proxy position, the husband or male member of the family use women as dummy representation and hold the actual control in their hands. Women representation does not mean dummy representation but full and active participation in national and local politics. There is a need to curb this by providing training for skills development and various kinds of demonstration of working culture to the women representatives at block level in respect of local self-government. Only reservation of seats will not empower women but basic knowledge of working culture and motivation to involve in it actively may make women empowered. Women development is like a crop once its root becomes strong, and then tip will automatically become strong.

In 2008, by getting inspiration from 73rd &74th Constitutional Amendments the UPA II introduced Women reservation bill into Parliament which seeks 33% reservation to women in Lok Sabha as well as in state legislatures and which lapsed in Lok Sabha. As per the report of the Ministry of Statistics and Program implementation of women's representation in parliament is 11% while the position of women in ministries is 15% which is exceptionally low. As per the report of UN women, Out of 193 countries, India is at 149th position in women's political participation.[37] This is an alarm to the Parliamentarian that there is a need to enhance women's participation in Indian politics because without women's full and active participation in the politics, the growth of India will not take place. The political parties especially Samajwadi party and Rastriya Janta Dal have to understand that promotion of women political participation is more important than caste based reservation in politics, There are various other hurdles present in India against women's leadership and political participation such as patriarchal mindset, violence against women in politics and lack of political education. There is a need for women reservations for the representation of women in national politics because the political parties are not showing any readiness to enhance women's representation in parliament and the state legislature. The main purpose of enhancing women's political participation is to reduce the disparity between men and women in society and increasing women's status in society.

37 Women in National Parliament, http://archive.ipu.org/wmn-e/classif.htm, accessed at 20 March 2020

At the conclusion there are few suggestions with regard to enhancement of women political partaking in India. These are as follows-

1. Proportional Representation Electoral Systems-

To enhance political partaking of women in India we can adopt ***Proportional representation systems*** within political party. It will ensure partaking of women in party as well as in legislature or in various portfolios. Suppose any political party got 30% vote shares then at least 3% of seats should be given reserved for women under following heads-

a. Post under political party

b. Houses of legislature

c. Ministries of governments

2. Establishment of Institute like *European Institute for Gender Equality* (EIGE)-

EU has ***European Institute for Gender Equality*** **(EIGE)** whose main task is to coordinate with all member countries of EU and helping them in order to make gender equality in all public offices. Apart from that EIGE collects data related to gender inequality, prepares report and submit it to EU parliament and concern country members. India can also setup its own regulating body that will promote gender equality as well as monitor proper implementation of Proportional Representation Electoral.

That body should be responsible to provide training to women who are new participants in politics and whose name is recommended by women wing of all political parties.

3. Mechanism to track down the Cases of violence against women by male candidates-

In 2003, Justice V.S Malimath committee[38] was constituted for recommendation in regard to criminal law. Committee found that there is no mechanism to track that which candidate has how many criminal charges against them. ECI blindly relies upon the declaration made by candidate even they do not have mechanism to check whether information given by candidate is right or false.

Committee suggested that there should be mechanism to track, verify and maintain record of candidate against whom the criminal cases are pending especially against to women.

38 Justice Malimath Committee Report, https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf, accessed at 20 October2020

Decoding Minority Squeeze-Out: An Analysis in Light of the New Provisions

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Abstract

Squeezing out means the acquisition of remaining shares of a company which the majority shareholders don't own. It has the literal meaning of the term which leads to minorities getting squeezed out, leaving the company under full control of the majority. This paper deals with the evolution of the concept and discusses its significance to both types of shareholders in the merger's transactions. Firstly, it mentions the origin of the principle of majority rule and minority rights in England and how it was implemented in India, which resulted in squeeze out provisions coming into existence. Secondly, the paper examines different options available in Indian law to exercise squeezing out of minority which includes reduction of share capital, compulsory acquisition u/s 236 of the act, and the provisions of Section 230 recently brought into effect a legal provision such as Reduction of Share Capital is discussed due to its wide usage and suitability among majority shareholders to exercise selective reduction and squeeze-out minority. Further, a distinction of every method from other similar-looking provisions is also done to demarcate the differences. Finally, the paper analyses and finds the spaces in law which provide the scope of bettering the transactions of mergers and takeovers. The paper provides suggestions that can change the course of how minority squeeze-out is exercised in India and concludes by mentioning its findings and observations.

Key Words- Squeeze-out, Minority shareholders, Controller, Acquisition, Share capital.

Introduction

Shareholders in general parlance are considered the persons who hold shares of the company. Companies act does not exclusively provide for the definition of the term 'shareholders'. However, under Section 2(55) of the act, 'member' has been defined as the person who has subscribed to the memorandum of the company and every person who holds shares of the company.[1] Thus, the term members and shareholders are more or less the same. When the Act does not cover the definition of shareholders, it is too farfetched to think the act would cover the definition of majority and minority shareholders. For the derivation, Black's Law Dictionary can be resorted to which

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1 The Companies Act, 2013, § 2(55), No. 18, Acts of Parliament, 2013 (India).

defines 'minority shareholder' as "Equity holder with less than 50% ownership of the firm's equity capital and having no vote in the control of the firm"[2]. Majority can still be derived from the majority approval of shareholders required to pass an ordinary resolution in a company, which is more than 1/2th of the shareholders by value. Minority shareholders are mentioned in Section 236 of the companies act where it has been used to denote people holding less than 10% of the shares with persons acting in concert.

A basic principle of equity is that every member of the company will hold equal rights according to the value of shares each holds. Each matter in a company is decided by voting and when consensus is reached, that is considered to be the will of the majority and the company. In case of differences among the shareholders', deciding act is always the votes of the majority. As the will of the majority is always materialized, minorities are often found to be the subjects of oppression. In some circumstances, the company law provides safeguards and favorable treatment to minority shareholders to protect their interests. But the protection of the minority is not generally available when the majority does anything in the exercise of the powers of internal administration of the company.[3] As long as the conduct in the company is within the provisions of law and powers accorded by the AoA (Articles of Association or the articles), the tribunal cannot interfere in the instance of minority shareholders. The articles of the company are considered the 'protective shield for the majority shareholders'[4] who organize the BoD (Board of Directors) to carry out the functions at their instance at the cost of the minority. The basic doctrine of non-interference with internal management is derived from the landmark case of Foss v. Harbottle[5]. It is the landmark case that laid the principle of 'Majority Rule'. When two shareholders of a company filed a suit for the loss caused to the company by doing the wrong sale, the court stated the correct entity to bring the action was the company itself. The damages cannot be granted at the instance of minority shareholders. As the company is the proper entity to bring the suit, the majority is to decide whether the suit will be filed or not. The court observed "If the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about

2 Anushka Sharma, *Squeezing Out the Minority: The Power of a Company to Reduce its Share Capital*, India Law Journal (Jul. 20, 2016), https://www.indialawjournal.org/squeeze out-the-minority.php.

3 Icsi, Company Law (382) (The Institute of Company Secretaries of India 2019).

4 *Id.*

5 Foss v. Harbottle, 67 E.R. 189; (1843) 2 Hare 461.

it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes"[6]. In India, the case was recognized in the Supreme Court case of Rajahmundry Electric Supply Co. v. Nageshwara Rao[7] wherein the court observed, "It is no doubt the law that courts will not, in general, intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company by its directors, so long as they are acting within the power conferred on them under the Articles of Association"[8]. The above ratio is justified with the rationale that when a shareholder becomes a member of the company, he submits to the will of the majority. Any action which is to be brought on behalf of the company can be brought by the company itself by passing a resolution through the majority. It recognizes the principle of separate legal entity of a company and also keeps multiple litigations away.

However, the principle of Rule of Majority is not applicable in its entirety in recent times. As the oppression of minorities has increased, there are huge chances of the majority gaining out of the funds of a company at the cost of minority shareholders. Witnessing continuous exploitation has led to the further development of the principle into 'Majority Rule Minority Rights'. The same was first recognized in India in the case of ICICI v. Parasrampuria Synthetic Ltd.[9] which held that automatic application of the Majority rule would not be proper. Making a remark about the Indian corporate pattern the court held that there are no large numbers of small investors, but certain big financial institutions making big investments and holding a small percentage of shares. Therefore, they can't be rendered voiceless just because their shareholding is less.

Owing to this, the Companies Act also gives various rights to minority shareholders which are of great importance. These rights are exclusively provided to safeguard the interest of minority shareholders. It includes the right to appoint small shareholders' director[10], right to apply to tribunal in case of Oppression & Mismanagement[11] and the Right to bring a class action suit[12]. Squeezing out is the result of the same majority rule. It is 'both visible and palpable manifestations of a controller's raw power within the corporate machinery[13]'. It is a transaction through which the controller forcibly acquires the

6 MacDougall v. Gardiner, (1875) 1 Ch. D. 13 (CA), at 25.
7 Rajahmundry Electric Supply Co. v. Nageshwara Rao, AIR 1956 SC 213.
8 *Id.*
9 ICICI v. Parasrampuria Synthetic Ltd., (2002) 9 SCC 428.
10 The Companies Act, 2013, § 151, No. 18, Acts of Parliament, 2013 (India).
11 *Id.* § 241.
12 *Id.* § 245.
13 Vikramaditya Khanna, *Regulating Squeeze-outs in India: A Comparative Perspective*, National University of Singapore Journal, 2 (2014), at 2.

remaining shares of the company which they don't own. The term has the literal meaning which is to squeeze the minority out of the company and gain total control of the company. Controller is a term to refer to the majority shareholders who control the affairs of the company. On reaching a certain threshold, the controller has the power to undertake a transaction through which he can compulsorily acquire the remaining shares of the company. The law provides for a number of methods. Recently in February 2020, a new method was given effect to squeeze out the minority. This paper aims to analyse all the available methods in law in light of the new provisions.

Selective Reduction of Share Capital

One of the most widely used methods for squeeze out is through reduction of share capital under companies act. Companies limited by share capital can exercise reduction of share capital u/s 66 of the companies act 2013. The corresponding Sections under the erstwhile act (Companies Act 1956) are Sections 100-105. The Section states that "Subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner[14]". The Section is used as a means to squeeze out minority shareholders, though this is not the exclusive purpose it was made for. There are notable case laws decided by the judiciary which were governed under the 1956 Act that is why its comparison with the provision under the 2013 Act is important to the issue. The provisions under the new act have been added with more compliance which the companies are obligated to fulfill. The application needs to be made to National Company Law Tribunal (NCLT) only, which is the exclusive tribunal to decide the company matters for fast disposal.

On careful reading of the Section above, it is evident that the Section authorizes the reduction of the share capital in 'any manner' the company feels. Owing to this, the provision is used to squeeze out minorities and is termed as 'selective reduction of share capital'. It gives the company power to extinguish shares of selected people without interfering with the shareholding of others and is completely within the corners of the law. Compliance also requires NCLT to inform the central government, the Registrar of Companies (ROC), the creditors, and the Securities Exchange Board of India (SEBI) (in case of a listed public company) by serving a notice.[15] A no-objection letter from the creditors of the company is also required to ensure that company has not defaulted in payment.[16] Until the approval of the entities above is

14 The Companies Act, 2013, § 66(1), No. 18, Acts of Parliament, 2013 (India).
15 *Id.* § 66(2).
16 *Id.* § 66(3).

not received, the resolution can't be considered to be in effect.

There are certain pre-requisites for the company to fulfill while making an application under Section 66. The Articles of Association (AoA or the articles) must authorize the reduction of share capital. To materialize this power, a special resolution is required to be passed by the company. And the company shall be able to get a no-objection letter from the creditors to assure the tribunal of no committed default of the company. If all the requirements mentioned above are fulfilled, the reduction of the share capital of the company would get approval from the tribunal. As seen, the provision has minimum procedural requirements in comparison to other methods for effectuating a squeeze-out. A special resolution requires approval by 3/4th of the shareholders in value as opposed to 90% shareholders consent u/s 236 of the companies act. The controllers prefer resorting to Section 66 than any other provision is for one more reason i.e. while extinguishing the shares, the corporate funds are used. The company pays for cancelling the shares saving a huge cost for the majority shareholders or controllers. They pass the special resolution by exercising uniformity and get exclusive control of the company at the cost of the company itself. All these reasons have resulted in the extensive usage of this Section to squeeze-out minorities. It is the most widely used provision till date.[17] On approval of the resolution in the tribunal, a certificate is issued to give effect.

Settling the Buy-Back Conundrum

Section 68 of the Companies Act governs the buy-back of shares by a company. It has been argued in some instances that the process under Section 68 is the same as Section 66. Section 66 first requires buying back the shares and then cancelling them resulting in their extinguishment. Prima Facie both the processes appear quite similar. A similar contention was raised in the case of In re: Reckitt Benckiser (India) Ltd[18] that as the reduction ultimately involves a buy-back, the requirements of the Section of buy-back (under the 1956 act) should be fulfilled, and hence the company should be made to reduce its capital proportionately. Ultimately the petitioner aimed to argue the selective reduction of capital as it mentioned 'in any manner'. To answer this, the court placed reliance on SEBI v. Sterlite Industries[19] to highlight the wording of Section 77 of the erstwhile act 'notwithstanding anything contained in this act'[20] and observed that provisions of buy-back and reduction of capital are two separate Sections and are independent of

17 Anushka Sharma, *Supra note 2*.
18 In Re: Reckitt Benckiser (India) Ltd., MANU/DE/3902/2011.
19 SEBI v. Sterlite Industries (India) Ltd., [2003] 45 SCL 475 (Bom).
20 The Companies Act, 1956, § 77, No. 1, Acts of Parliament, 1956 (India).

each other. Section 66 of the new Act also contains the provision saying "Nothing in this Section shall apply to buy-back of its own securities by a company under Section 68"[21]. The court concluded that there is no obligation to keep it proportional and can be in any manner while reducing the share capital u/s 66.

Evolving Jurisprudence

The issue of Section 66 being used as a squeeze-out provision by providing for selective reduction of capital was raised in many cases. Indian courts have been relying on the British case of British & American Trustee and Finance Corporation Ltd v. John Couper[22] of House of Lords. It was decided in the case that reduction of share capital is a company's internal and domestic concern and when the act does not prescribe the manner the legislature intended it be decided by the company. As the companies act in India is somewhat similar to the law in England, Supreme Court has upheld this judgment in the case of Ramesh B. Desai v. Bipin Vadilal Mehta[23]. In Re: Elpro International[24] also, the court relied on the judgment and went on to lay down the following principles for squeeze out through reduction of capital: "Firstly, the matter of reduction of share capital is the domestic concern of the company. Secondly, Majority has the right to decide the manner of reduction in which selective reduction within the same class is also allowed. And thirdly, the court has to ensure that the transaction is fair and equitable and all the creditors have gotten the right to object or have been paid, secured, or have consented"[25].

A case involving notable observations after Reckitt case was the case of Sandvik Asia v. Bharat Kumar Padamsi[26] in which the court went ahead a little and observed that squeeze out is permissible if the fair value is offered for the shares and is duly approved by the company as per the provisions of the act. The case in which the court made observations concerning the interest of minority shareholders was the case of In Re: Cadbury India Ltd.[27] An issue of fair valuation of shares for the purpose of reduction was raised by the shareholders. To this, the court observed that for the objection to be successful it must be shown that the valuation is unreasonable. The court would approve the scheme if it is not against the public interest, is fair and just, and does not prejudice or unfairly discriminate against a class of shareholders.

21 The Companies Act, 2013, § 66(6), No. 18, Acts of Parliament, 2013 (India)
22 British and American Trustee and Finance Corp v. Couper, [1894] A.C. 399.
23 Ramesh B. Desai v. Bipin Vadilal Mehta, AIR 2006 SC 3672.
24 In Re: Elpro International Ltd., 2008 (86) SCL 47 (Bom).
25 *Supra note 18,* 34.
26 Sandvik Asia v. Bharat Kumar Padamsi, [2004] 50 SCL 413 (Bom).
27 In re: Cadbury India Ltd., (2015) 125 CLA 77 Bom.

Purchase of Minority Shareholding U/S 236

The concept of 'minority squeeze-out' was explicitly introduced in the companies act in Section 236. After the 2013 act was brought into force, the implementation of the act was in a phased manner. All provisions were not brought into effect at once but at different intervals. In the same manner Section 236 was made effective vide notification dated 7th December 2016.[28] The Section provides for majority shareholders to buy shares of minority shareholders. The Section uses the word 'acquirer' in the beginning to denote majority shareholders. The Section is worded like "In the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of ninety percent or more of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares"[29]. The sub-Section talks about the acquirer notifying the company of his intention to buy the minority shareholding if he owns more than 90% with persons acting in concert (PAC). The provision mentions the ways by which the acquirer/majority shareholders should reach 90% shareholding and includes 'amalgamation, share exchange, conversion of securities or for any other reason'. However, the squeeze-out offer is not limited to the majority to give. Minority shareholders may also suo moto offer the acquirer/majority shareholders to buy their shares.[30]

Applicability of the Section

As mentioned, acquiring of shares should be by virtue of the listed acts. Among those, the provision has mentioned 'any other reason' which is kind of vague and may change the applicability of the Section. NCLAT Delhi in the case of S. Gopakumar Nair & Anr. vs. OBO Bettermann India Pvt. Ltd. & Anr.[31] provided clarity for the interpretation of the words 'any other reason'. OBO Bettermann had gradually acquired 99.64% shares of a company from other shareholders by way of Shareholders Agreements. In the pursuit to acquire the remaining shares a 'Put and Call Option Agreement' was executed between the company and the minority shareholders holding the remaining 0.36% shares. A mutually decided chartered accountant was chosen for the

28 Ministry of Corporate Affairs, Notification S.O. 3677 (E), (Dec.7, 2016), http://www.mca.gov.in/Ministry/pdf/commencementnotif_08122016.pdf.

29 The Companies Act, 2013, § 236(1), No. 18, Acts of Parliament, 2013 (India).

30 Rahul Maharshi, *Minority Squeeze Out: A strong new provision under Section 236 of the Companies Act, 2013*, Vinod Kothari, (Jan. 31, 2017), http://vinodkothari.com/wp- content/uploads/2017/02/Squeezing_out_of_minority_Section_236_of_the_Companies_Act_2013.pdf.

31 S. Gopakumar Nair & Anr. vs OBO Bettermann India Pvt. Ltd. & Anr., Company Appeal (AT) No. 272/2018.

job of the valuation of the rate of shares, as opposed to the requirement of a 'registered valuer' for such job. On arising of a dispute between the parties, an application of Oppression and Mismanagement was filed by the minority shareholders. The adjudicating authority dismissed the petition and the same was appealed against in the appellate tribunal. NCLAT Delhi was confronted with the issue of whether Section 236 is applicable in the present case. The tribunal observed that the term 'any other reason' must take the colour of the preceding words of the provision. It should be read along with the other methods mentioned in the Section and according to chapter XV of the Companies Act dealing with compromise, arrangements, and amalgamations. Giving it the colour of the words it is mentioned, other reasons should be related to the subject matter. The court observed "Section 236 deals with the residuary in the event of all assenting shareholders and amalgamation or share exchange or conversion of securities taking place need may arise to those who have become 90% majority or are holding 90% to acquire the remaining minority shareholding.[32] There could not be a one-sided takeover by Respondent No.2 who had by way of agreements got 99% shares in Respondent No.1 and thus was akin to Respondent No.1. Thus Section 236 of the Act was inapplicable to the facts of the matter.[33]"

As mentioned above the provision also requires the valuation of shares by a registered valuer. In the above case, the tribunal held a mutually chosen charted accountant cannot do the job of valuating shares when the provision requires a 'registered valuer'. When minority shareholders are giving a suo moto offer, the exit price needs to be determined as per Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules 2016. The practice of proper valuation is brought in to safeguard the interest of minority shareholders to give them a fair price in consideration for their shares. However, the legislature has failed to provide clarity on the issue whether it is obligatory for the minority to accept the squeeze-out offer given by the acquirer. Other countries like the USA and England provide for compulsory acquisition. When the acquirer crosses the threshold and gives a notice under the relevant Section for squeeze out, it is compulsory for minority shareholders to accede to the offer.[34] The law does provide a safeguard to the minority to realize the fair price of their shares.

32 *Supra note 31*, 25.
33 *Id.* 26.
34 Dr. Sonika Bhardwaj, *Critical Analysis of Section 236 of Companies Act, 2013*, 5 (IV) IJRAR, (Sep.1, 2018), http://ijrar.com/upload_issue/ijrar_issue_20542723.pdf.

Distinction from Acquisition u/s 235

Applicability of Section 235 is often confused with Section 236 and is often termed similar. The Section is more or less similar to its following Section, however, the difference lies in the subject person utilizing the Section and the timing of its utilization. Section 235 is to provide an offer to dissenting shareholders. Whenever a scheme or contract for the transfer of shares of a transferor company to the transferee company is approved by 90% of the shareholders in a value whose transfer is involved then the transferee company may give notice to the remaining shareholders who did not approve such scheme or contract to buy their shares.[35] These shareholders who did not give assent to the scheme or contract are termed as dissenting shareholders in the Section. In the present Section, the transferee company has not become the shareholder of the transferor company yet, at the time of using the provision. The transferee company is in the process of acquiring the shares mentioned in the contract or scheme. They have been provided the assent to acquire the shares by $9/10^{th}$ of the shareholders. When such approval is granted, Section 235 becomes applicable.

The Section also provides for the dissenting shareholders to object to the notice of the transferee company for acquiring their shares.[36] The acquisition of dissenting shareholders can be objected by filing an application in the tribunal and the court may decide to the contrary. However, the Section does not provide ground for the objection to become successful and it has been left for the discretion and interpretation of the courts.[37] The Section also states that the amount shall be deposited in a separate escrow account to keep the consideration of dissenting shareholders secured.

Acquisition of Minority Shareholders: The New Regime

Ministry of Corporate Affairs (MCA) notified yet another provision for squeezing out minority shareholders. Through the notification dated 3rd February 2020, MCA brought sub-Sections (11) and (12) of Section 230 into force from the date of notification.[38] In effect to this, corresponding rules were also amended. MCA added rule 80A in National Company Law Tribunal Rules, 2016 (NCLT Rules) and sub-rule (5) in Rule 3 of the Companies (Compromise, Arrangement and Amalgamation) Rules, 2016 which allow giving of a takeover offer by the acquirer of an unlisted company by way of a scheme of compromise or arrangement.

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35 The Companies Act, 2013, § 235(1), No. 18, Acts of Parliament, 2013 (India).
36 *Id.* § 235(2).
37 Rahul Maharshi, *Supra note 30.*
38 Ministry of Corporate Affairs, Notification S.O. 3822 (E), (Feb.3, 2020), http://www.mca.gov.in/Ministry/pdf/Notification_04022020.pdf.

Section 230 provides for the sanctioning of a scheme of compromise or arrangement. Scheme of compromise or arrangement results in reorganization of company's share capital. The explanation to the Section provides that "arrangement includes a re-organisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods"[39]. Compromise involves a scheme with the creditors of the company whereas arrangement means a reorganization scheme with the shareholders of the company. Any person (creditor or shareholder) or a company can file an application under this Section with the relevant documents prescribed in the Section. On the filing of such application the tribunal, if satisfied, orders the holding of meeting after giving due notice of the agenda of meeting and other relevant details to the shareholders or creditors.[40] The Section prescribes the passing of such a scheme by 3/4th of the creditors or shareholders in value.[41] If the scheme of arrangement concerns a particular class of shares, then voting is required of that particular class and 3/4th majority will be calculated out of that class only. The Section accommodates different types of corporate reorganization like mergers, demergers, and amalgamation.[42]

With sub-Section (11) and (12) brought into effect, the scheme of compromise or arrangement can include a takeover offer to acquire the shares of the minority. 'Takeover offer' is not defined in the provision. But from a simple understanding of the provision, takeover offer means an offer to acquire the shares of minority shareholders. However, the word 'offer' should not be used in the context as it is a kind of compulsory acquisition u/s 236 of act where the minority cannot reject, but can only object through sub-Section (12).[43] Any takeover offer in a listed company needs to be according to SEBI (Substantial Acquisition of Shares and Takeover) Regulations and sub-Section (11) and (12) will have no effect.

This new regime unlike others makes it mandatory to have a registered valuer determine the fair price of such shares for which

39 The Companies Act, 2013, § 230(1), No. 18, Acts of Parliament, 2013 (India).

40 King Stubb, *Minority Shareholders – "Squeezed Out?",* Lexology (Nov. 25, 2020), https://www.lexology.com/library/detail.aspx?g=29256ad6-23e6-4e43-9c05-1b5cba18a1bb.

41 *Supra note 39*, § 230(6).

42 Ajay G. Prasad, *Corporate Law Update: New M&A Rules affect Minority Shareholders*, Kocchar & Co. Blog, (Feb. 2020), http://www.kochhar.com/pdf/Corporate_law_update-Feb2020_KBGL.pdf.

43 Indranil Deshmukh, *Takeover Rules for Unlisted Companies: Minority Squeeze Outs Under Section 230(11) of the Companies Act, 2013*, CAM Blog (Dec.2, 2020), https://corporate.cyrilamarchandblogs.com/2020/03/takeover-rules-for-unlisted-companies-minority-squeeze-outs-under-Section-23011-of-the-companies-act-2013/.

the takeover offer is incorporated in the scheme. There are certain valuation parameters while determining the fair value such as earnings per share, shares' book value, return on net worth, etc. The report needs to consider the highest price paid for the concerned shares in the preceding 12 months. The Section also requires 50% of the amount of the shares to be deposited in a bank account, details of which need to be mentioned in the scheme submitted to the tribunal. The new squeeze out method specifically mentions that any transfer as a result of a contract or succession, or in pursuance of an operation of law shall not be subject of a takeover offer under the scheme of compromise or arrangement u/s 230.[44] With respect to the scheme containing the offer, any objection to be raised by the minority shareholders may be made to the tribunal by filing an application as per Rule 80A of NCLT Rules, 2016.

Analysis from Acquirer's Perspective

Another provision requires approval of 90% of shareholders in order to give a takeover offer to dissenting shareholders u/s 235 or to minority shareholders u/s 236 of the Companies Act. This kind of comes as a relaxation for the majority to initiate a takeover of the minority. When analyzing the Section with the perspective of an acquirer in a private company, the acquirers are already burdened with the problems of restrictions placed on the transfer of shares like pre-emptive rights. It is easier to reach the threshold of 75%, but under the big obligations of private companies, the acquirers have to surpass further 15% from the erstwhile regime.[45]

In the case of AIG (Mauritius) LLC v. Tata Televentures (Holdings)[46] the Delhi High Court made a constructive interpretation of the provision saying "In my view it is extremely important that the 90 percent majority should comprise of different and distinct persons since this would then fall in line with the rationale of the Section and justify overriding the rights and interests of the dissentients. It is also imperative that this majority should not be the same as the party seeking to acquire the shares. The offerer must be substantially different to the majority"[47]. The judgment looks to be upholding the principles of corporate democracy but has brought serious trouble for private and unlisted companies which have fewer shareholders controlling the whole company, each having a substantial portion of shares.

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44 Companies (Compromise, Arrangement and Amalgamation) Rules, 2016, G.S.R 368(E), Rule 3(5).

45 Anurag Shah, *Ease of Minority Squeeze Out: An Analysis of the New Squeeze-out Provision*, The CBCL Blog, (Jun.30, 2020), https://cbcl.nliu.ac.in/company-law/ease-of-minority-squeeze-out-an-analysis-of-the-new-squeeze-out-provisions/.

46 AIG (Mauritius) LLC v. Tata Televentures (Holdings), 43 SCL 22943 Del 2003.

47 *Id.* 37.

Analysis from Minority Shareholders' Perspective

The provision comes up with compliance required in respect of valuation of shares for which takeover offer is provided in the scheme. This issue has been an issue of contention in various cases including the Sandvik case[48]. Relying on this judgment, the courts give the majority shareholders power to squeeze-out the minority on their terms and provide a little scope to the minority to negotiate the exit price of shares.

However, the landmark ruling of Bombay High Court in the case of In Re: Cadbury India Ltd. where the court observed the importance of fair valuation and provided the principles for such valuation which went on to be called as Cadbury principles. The principles are upheld in the new regime of squeeze-out protecting the interest of the minority.[49] The present regime which is newly notified is inspired from and the result of evolved jurisprudence making notable observations. Inclusion of sub-Section (12) giving the minority an option of filing their objection the scheme of takeover offer is a move trying to strike balance between the interest of minority and majority.

Suggestions

On analysis of the regime in place for minority squeeze-out, there is found to be an imbalance between the interests of the majority and minority shareholders. Keeping in mind the principles laid down by the courts, the following suggestions are made:

- Review by independent directors to pass the scheme of takeover offer shall be provided in special circumstances. Similar to practice in some other jurisdictions[50], independent directors would try to achieve a balance between the interests of both parties and whatever decision reached upon will be acceptable to both parties as independent directors are not interested parties and are free from biases.
- More control of a regulatory body like SEBI will help the regime flourish. Certain entities go un-listed in order to be out of the purview of SEBI so that their ulterior motive is not on anyone's radar. A law providing the timeline for regulatory control such for example, till one year from the time company is delisted the SEBI should have the power to exercise control. The control of SEBI will

48 *Supra note 26.*

49 Divya Mundra, *Takeover Rules for Minority Squeeze-out under the Companies Act, 2013*, AZB Blog (May.14, 2020), https://www.azbpartners.com/bank/takeover-rules-for-minority-squeeze-out-under-the-companies-act-2013/.

50 Selina Williams, *Essar Global Unit Fails to Improve Offer for Essar Energy*, The Wall Street Journal, (Mar.14, 2014), https://www.wsj.com/articles/essar-global-unit-to-acquire-essar-energy-minority-shares-1394818522.

not get over immediately once the company gets unlisted but will be able to exercise control for considerable more time on selected matters vulnerable to exploitation, in order to check the ulterior motive of the company to get de-listed.

- Clarity regarding the compulsory nature of Sections 236 and 230 (11) is required. The provisions are silent with respect to whether minority shareholders are bound to accede to the takeover offers given through the Sections. Legislature clarity or judicial interpretation is the need of the hour to not keep the rights of the minority on the fence.
- A provision should be added providing for holding a separate meeting of the minority shareholders to vote against the proposal of minority squeeze out. Legislature can provide for a threshold or just majority of minority shareholders, which if reached would render the takeover offer of the controller null. This way minority shareholder rights will be safeguarded.
- When filing an Oppression & Mismanagement application, a certain leeway shall be provided to the minority in fulfilling the onus of burden on them. If an apprehension of a certain degree or reasonable proof is established by the applicant, the onus should be on the majority to prove otherwise. Its execution is demanded in line with the regime in the criminal law which is provided to certain exploited subjects.

Conclusion

The newly notified regime provides yet another method of squeezing out minorities. There is already a dilemma regarding whether the methods have compulsory nature of minority acquisition. The new provision suffers from the same flaw as there is no explicit mention of compulsory nature. It is open to judicial interpretation and depends on the way courts deal with it. However, from a plain reading of the Section, it does point towards a compulsory acquisition once the scheme is passed. It also tries to strike a balance between the interests of majority shareholders and minority shareholders. As the most followed regime right now is the selective reduction of capital, this new regime might change the pattern of majority shareholders to resort to Section 66 for squeeze-out. Prediction from various scholars points towards less application of minority squeeze-out u/s 236 of the act in the future period.

Newly notified sub-Section (12) also provides for the minority to raise objections to the tribunal against the scheme approved by the majority. It does not provide stiff grounds for approval or rejection of the application which is a suitable move as that might lead to

oppression and injustice. Application of courts discretion which will be somewhat governed by the precedents set is the best possible option as the practice of squeeze out is evolving. There has not been much time for the implementation of the provision. The effectiveness of the new regime depends on how the shareholders use it and how the courts exercise their discretion in deciding the cases.

Widowhood Practices and Human Rights Violation in India: An Appraisal

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****Mr.Vaibhav Suppal**

"For many women, becoming a widow does not just mean the heartache of losing a husband, but often losing everything else as well"[1]

- Cherie Blair

Abstract

In a patriarchal Indian society, women have been subjected to numerous horrific atrocities that have distressed them physically, emotionally, morally and economically. This gruesome treatment becomes worse, when a woman goes through an unfortunate state of widowhood, which is perceived as a social stigma since time immemorial. On one side, they had to go through this unbearable pain of losing their spouse and on the other; they are subjugated and browbeaten at various levels due to the blind faith of people over some callous customs. In the context of this line of thought, the present paper is an earnest attempt to address the issue of marginalization of widows in India. This paper is principally based on secondary literature, reports and works are done on the condition of widowhood in our society. It focuses on the reasons behind the vulnerability of widows and elucidates the atrocities faced by them in different eras of Indian national. It also discusses the human rights violations with regards to the prevalence of various barbaric widowhood practices, and at the same time, addresses the post-colonial advancement taken place in the domain of inheritance and succession laws for the upliftment of widows in our country. Lastly, it throws light on the recent developments in the domain of widowhood and advocates for an urgent need for stringent legislation for the well-being of widows in India.

Keywords: Customs, Human Rights, Social Stigma, Widow and Widowhood.

1. Introduction

Inching towards the 74th year of Independence from colonial rule, there can't be a more conscientious time to critically scrutinize the

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1 Gender Desk, *The plight of widows: Invisible women, invisible problems*, GHANA WEB (Jun. 24, 2018), https://www.ghanaweb.com/GhanaHomePage/features/The-plight-of-widows-Invisible-women-invisible-problems-662911.

position of widows and the never-ending hardships of their life. Since time immemorial, the existence of women has always been perceived to be negligible after the death of their husbands.[2] The widows are generally recognized to be 'de-sexed' living beings and are jabbed with the vernacular of 'husband eaters' by numerous people of Indian society.[3] The misfortune of losing her spouse is tragic, but it is the long term struggle for necessities, human rights, and self-esteem which makes the life of a woman far more devastating. In the life of women, Widowhood symbolizes termination of her colorful life and commencement of a period full of darkness and inhumanity. They are denuded of all forms of joy and happiness, and are made to live a life distinct from normal human beings. As rightly affirmed by a social activist, Ms. Mohini Giri that, "*Widowhood is a status of social death in an Indian society*"[4].

The increase in cultural anticipation and supposition which collides with the economic factors places women in a position of disadvantage due to their sexuality. The societal norms make her over-dependent on the family of her husband and put her in a vulnerable situation.[5] This led widows into the world where she faces social rejection or exclusion. A woman who has achieved everything that society has asked like marriage; bearing children, raising and edifying them; but she still found herself in a space of social rejection due to the absence of a marital bond.[6] She loses her social identity after the death of her husband and is converted from 'she' into 'it' by the same people, who once used to respect her in the presence of her husband.[7] It can be ascertained that widows are perceived to be burdens in Indian society and are often uglified to divest her to the core of her femininity.

2. Rationale behind the Dehumanization of Widows

One can think of numerous reasons for such inhumane condition of widows in Indian Society, but the most pertinent and appalling one is the perusal of numerous atrocious and callous customs.[8] After the demise of her husband, the ritual for the surviving wife can be

2 Eva Corbacho, *The ongoing tragedy of India's widows*, WOMEN UNDER SEIGE (Jun. 22, 2012), https://www.womensmediacenter.com/women-under-siege/the-ongoing-tragedy-of-indias-widows

3 Id.

4 Vivian Emesowum, *The Plight of widows in India*, WORD PULSE (Nov. 17, 2013) https://www.worldpulse.com/community/users/vivian/posts/29199

5 *Id.*

6 Shilpa Kannan, *India's abandoned widows struggle to survive*, BBC NEWS (Oct. 14, 2013), https://www.bbc.com/news/business-24490252

7 Showkat Shafi, Widows in India: My children threw me out of the house, ALJAZEERA (Mar. 7, 2016), https://www.aljazeera.com/indepth/inpictures/2016/03/windows-india-children-threw-house-160303111807076.html

8 *Id.*

saddening. In usual cases, the hairs of the widows are cut.[9] The clothes and jewelry bought during the lifespan of her husband are taken away.[10] In numerous families, the widows are even made to wear rough clothes for weeks and are kept in one room without giving any food to eat.[11] She is tagged as a holder of misfortune and impurity. The widows are also confined to houses and restrained from participating in any joyful events like festive gatherings.[12] They are treated as a curse on the family and oppressed at various levels. The general notion of the society towards the widows is itself worse because of the presence of several inhumane traditions, which has only perceived women to be a shadow of their husbands.[13] The widows of the country not only face economic problems after the death of their husbands but are also victims of violence in the country. The widows are treated to be like an object by many communities and are raped by men. The worst part is that society also makes these widows marry their rapists in order to put the burden off their shoulders.[14]

> The dignity and existence of women dies with the death of the husband, is a notion believed by the people since time immemorial. The femininity of widows is snatched from them and is often uglified in the most unexpected ways. It is rightly affirmed by Gita Mehta in her book 'Raj' that *"The woman ... has neither husband nor son to keep her in her old age. What shall we give the widow?' 'It is written in our ancient scriptures that we owe the widow nothing - not the food from our cooking vessels nor the water from our wells*"[15]. The underlying reason in believing and following such horrific rituals against widows is a common belief that the demise of the husband before the wife can only be possible if done with illegitimate means like black magic, etc. and widows are labeledlabeled as the culprit behind it.[16] In certain instances, the possessions of widows given to her during marital years are also being snatched by the family of the

9 Annideshuka, *'Lonely' not a powerful word to describe 'Widowhood'*, OPEN TO HOPE (Jul. 16, 2015), https://www.opentohope.com/lonely-not-powerful-enough-word-to-describe-widowhood/

10 MRS. MARCUS B. FULLER, THE WRONGS OF INDIAN WOMANHOOD (Flemming H. Revil Company, 2016).

11 *supra* note 5.

12 *supra* note 10.

13 Dr. Radhika Kapur, *Widowhood in Indian Society*, 6 INTERNATIONAL JOURNAL OF MUTLTUDISCIPLINARY AND CURRENT RESEARCH 192 (2018).

14 Shuani, *Top 5 Problems faced by widows in India*, YOUR ARTICLE LIBRARY, http://www.yourarticlelibrary.com/society/indian-society/top-5-problems-faced-by-widows-in-india/47645

15 GITA MEHTA, RAJ (Simon & Schuster, 1989).

16 Wittyfeed India, *These Tragic Conditions of Widows in India are Truly Heartbreaking*, DAILY HUNT (Sep. 24, 2018), https://m.dailyhunt.in/news/india/english/wittyfeed+india-epaper-witty/these+tragic+conditions+of+widows+in+india+are+truly+heartbreaking-newsid-73795387

deceased husband.[17] She is even prohibited to marry again and forced to live a life in a particular way – such as intaking specific food, wearing less shining or white clothes, performing religious rituals on daily basis for the welfare of the deceased spouse, etc.[18] Taking into consideration these aspects, it is not wrong to concur with the assertion of Meera Khanna, a social activist, who affirms that, "The life of Indian widows can be defined as living Sati"[19].

It shall be noted that India has more than 40 million widows living in the country with the highest percentage of them found in the state of Andhra Pradesh and West Bengal.[20] It is not the state of widowhood that comes under the purview of crime but an unbearable and inhuman life led by these women that make this not less a state of misfortune.[21] This mindset of people hides the sorrow of women and makes their living darker with each day. Therefore, it can be believed that the horrific treatment of women after the death of their spouse is a lack of societal values inhabited by the people of the society.

3. Status of Widowhood in Different Epochs

The transition of widowhood has advanced diversely at different time frames of the country. About the condition of widows, these time frames are further divided into different periods; namely - The vedic Period, the Medieval Period, and the Modern Period. The detailed assertion of numerous atrocities faced by the widows during the aforementioned periods and the advancements in the condition of their life at the later stage is as follows:

3.1 Vedic Period

During this period, one of the significant primeval texts, which talked about the condition of society, was *Rig Veda*. Although, there was very little inscribed about the status of widowhood in it, the absence of the horrific practice of *Sati*[22] was assured. This can be further evident from the following passage of Rig Veda, which also confirms the prevalence of remarriage of widows:

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17 Prateek Pathak, *Tragic Widow Traditions that will shock you!*, SPEAKING TREE (Dec. 30, 2014), https://www.speakingtree.in/allslides/tragic-widow-traditions-that-will-shock-you

18 Kate Young, *Widows without Rights: Challenging Marginalization and Dispossession*, 199 Oxfam GB 200 (2006).

19 Dr. Chandrakant Jamadar, *Quality of Life among Widows*, 3 THE INTERNATIONAL JOURNAL INDIAN PSYCHOLOGY 56 (2015).

20 *Id.*

21 Katia Sarla Mohindra, *Debt, shame, and survival: becoming and living as widows in rural Kerala, India*, NCBI (Nov. 6, 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3517387/

22 The widow who immolates herself on her husband 's pyre is called Sati.

"Rise woman (and go) to the world of living beings. Come, this man near whom thou sleepest is lifeless: thou hast enjoyed this state of being the wife of thy husband, the suitor who took thee by the hand."[23]

The re-marriage of widows was mostly done with the living brother of the deceased husband.[24] In addition to this, the widows didn't have any right over the property of her deceased husband but were entitled to maintenance.[25] Hence, the status of widowhood during this period was not so appalling, as the widows were given respect and treated as *Sanyasi* if they desire to be one. In other cases, they were re-married for their welfare.

3.2 Medieval Period

During this period, the evil practice of *Sati* emerged among different groups of people, and there were numerous *Sati* stones present throughout the country.[26] Therefore, the condition of widowhood was recognized to be the worst during this period. The primary reason for this was the invasion of the East India Company. The Britishers used to use Indian women especially the widows as sex objects and the life of these women were made a living hell by them.[27] The people belonging to the group of *'Kshatriyas'* used to put their women on fire to practice the ritual of *Sati* to safeguard their widows from the Mughal emperors ruling during that period.[28] The inhumane and barbaric practice of *Sati* was later adopted by the Sikhs and vastly practiced despite it being prohibited by the Sikh Gurus.[29] However, in the later period of this time frame, the women started refusing to marriage and dissenting against patriarchal customs.[30] They became more inclined towards divine movements and faiths. Henceforth, the country witnessed the origin of the Bhakti Movement and the enhanced devotion towards the deities by the widows of the country. [31]

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23 P. THOMAS, INDIAN WOMEN THROUGH AGES 17 (New York: Asia Publishing House 1964).

24 *Id.*

25 A.S. ALTEKAR, THE POSITION OF WOMEN IN HINDU CIVILIZATION: FROM PREHISTORIC TIMES TO THE PRESENT DAY, 250 (Delhi: Motilal Banarsidas 1959)

26 Dr. Radhika Kapur, *Widowhood in the Indian Society*, RESEARCH GATE (Mar. 2018), https://www.researchgate.net/publication/323825493_Widowhood_in_the_Indian_Society/citations

27 KAMALA GUPTA, SOCIAL STATUS OF HINDU WOMEN IN NORTHERN INDIA 251 (Inter – India Publication 1956)

28 R.S. SHARMA, RETHINKING INDIA'S PAST, NEW DELHI 119 (Oxford University Press 2012)

29 *Id.*

30 Akhilesh Sharma, *Widows in Indian life: From Ancient to Present times*, WOMEN MEDIA CENTRE (Aug. 19, 2010), https://www.womensmediacenter.com/women-under-siege/the-ongoing-tragedy-of-indias-widows

31 *Id.*

3.3 Modern Period

In this period, the atrocities towards widows decreased as various social welfare movements started to eliminate the evil practices against the widows like *Sati,* and uplift their status in society.[32] The Government of India also became conscious of the increasing discrimination against widows based on gender and enacted several legislations for the betterment of their life after the death of their husbands. In the last few years, the country has become well aware of the atrocities faced by the widows and arbitrary customary practices prevalent in India. There are many research scholars, government officials, and non-governmental organizations that promoted the rights of women through the best means and began numerous schemes and welfare programs for the wellbeing of women.[33] However, it is very saddened to perceive that widowhood is not looked at as a separate and distinct issue by the people of the country and is often submerged within the purview of women's rights. It is well-ascertained that various effective steps have been taken to curb this menace and several legislations have been enacted, but the plight of widows had remained the same. As a result, the statistics and facts still convey the social exclusion and economic punishments faced by the widows after the death of their husbands in India.[34]

4. Widow's Human Rights and their Infringement

The prospects of the life of widows have been horrific. They have been subjected to various atrocities leading to the violation of their numerous human rights, which are discussed as follows:

4.1. Humanitarian Right to Inherit

The women after the demise of their husbands have often been restricted of their right to property, which is named under the title of their spouse. It is the economic support that the widows are in dire need of to stabilize their life after the demise of their spouse, but, from ancient times, the property rights of the widows on the possessions of their husband have been snatched and been taken away by the family members of the deceased male. This makes the widow living a life of a destitute as they are thrown out of the house and made to live their life without any economic support. The Government of India has also tried to curb this atrocity against widows through the legislation of various inheritance laws like the Indian Succession Act, 1925, and the Hindu Succession Act, 1956. These legislations have been enacted to secure

32 24 Dipti Mayee Sahoo, *Analysis of Hindu Widowhood in Indian Literature*, 21 IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 64 (2016)

33 *supra* note 19.

34 SHASHI PUNAM, THE ROLE AND POSITION OF WOMEN ANCIENT SOCIETY TO MODERN SOCIETY IN INDIA 127-141 (1ed. Twenty first Century 2017).

the widow's right to inherit the property and the breach of which will be a violation of their human rights in terms of these laws.[35] However, the problem has still persisted as there are many families in India which has havehave continued to forbid a woman's right to inherit the property after the demise of her husband. It has been recorded in the last ten years that after the demise of the husband, approximately 5 million widows are violently purged from their property each year.[36]

4.2. Right to Life vis-à-vis Horrific Customary Practices

The Customary practices like *Sati* and burial of living woman with her deceased husband are some of the many customary practices which violate the women's 'Right to Life', embedded as a human right as well as a fundamental right under Article 3 and Article 21 of the Universal Declaration of Human Rights, 1948 *(hereinafter referred to as the 'UDHR')* and the Constitution of India, 1950 respectively. However, in present times, India has come a long way from the period of *Sati*, where the woman was made to take her life either voluntarily or by coercion after the demise of her husband to prohibit them from remarrying.[37] The practice of *Sati* was forbidden after the enactment of the Bengal Sati Regulation, 1829 in the whole of British India by Lord William Bentinck, who was the Governor General of India at that time.[38] The practice of being buried alive with her deceased husband was one of the many acts of barbarity prevalent against widows in the past, which is very marginally perceived in the present society, especially after the legislation of stringent laws to forbid such horrific customary practices by the Government. However, there are still some states in India like Rajasthan, Utter Pradesh, Madhya Pradesh, and Chhattisgarh, where these practices are still prevalent and raiseraise serious questions over the efficacy of steps taken by the Indian Government to protect the human rights of women.[39]

4.3. Right to have a Dignified Life

The life of all human beings is precious in this world. This is the reason every individual should give respect to the dignity of their fellow beings in their social circle. There shall be no person subjected

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35 WUNRN, *Widows of India – Poverty – Discrimination – Social Exclusion*, WOMEN UN REPORT NETWORK (Dec. 26, 2015), https://wunrn.com/2015/12/india-widows-poverty-discrimination-analysis-for-cedaw-2/.

36 Kai Schultz , *India's Widows, Abused at Home, Have Sought Refuge in This Holy City for Centuries*, THE NEW YORK TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/world/asia/india-women-widows.html.

37 Indian Legal Solution, *The position of widows has changed or not?*, INDIAN LEGAL SOLUTION (Jul. 16, 2019), https://indianlegalsolution.com/the-position-of-widows-has-changed-or-not/.

38 *supra* note 31.

39 Nehaluddin Ahmad, *Sati Tradition - Widow Burning In India: A Socio-Legal Examination*, UNIVERSITY ISLAM SULTAN SHARIF ALI (2009).

to any form of vindictiveness or inhumane act. The whole principle of the right to live life with dignity was originated from the UDHR, which is recognized as the foundational document for safeguarding the human rights of the world.[40] The basic doctrine of UDHR asserts that *"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"*.[41]Apart from this, the provision pertaining to the dignity of human beings is acknowledged under Article 1 of the aforementioned international document. The article ensures that each and every person should live a dignified life liberated from any kind of discrimination and inequality.[42] It also asserts about the essentiality of maintaining brotherhood in the society for world peace and no infringement of personal human rights.[43]

In India, the provision pertaining to the 'Right to live life with dignity' has been acknowledged as a fundamental right under Article 21 of the Constitution of India, 1950.[44] The same has been reiterated by the Apex Court of India in its numerous judgments like ***Olga Tellis v. Bombay Municipal Corporation and others*** [45] and ***Corlie Mullin v. Administrator and Union Territory of Delhi***[46]. However, despite the recognition of such a right under the Constitution of India, the lives of Indian widows have been much more miserable than the prisoners living in the jails of this country. The Supreme Court of India, in the case of ***Environment and Consumer Protection Foundation vs. Union of India & Ors***[47], has observed that, *"There can be little or no doubt at all that widows in some parts of the country are socially deprived and to an extent ostracized……they are not treated with the dignity they deserve."* Therefore, there is no second thought in raising the objection on such a degrading lifestyle of widows in India and terming it to be 'un-dignified'.

4.4. Right to Equality and Non-Discrimination

The primary issue which has been raised pertaining to the widowhood is that it promoted inequality among people based on their gender. The principle rule of equality among individuals and prohibition of discrimination against women is acknowledged in numerous legislations.[48] The Convention on the Elimination of all forms of Discrimination against Women, 1979 *(hereinafter referred to*

40 Ravi Rajan, *Right to life with Human Dignity: constitutional Jurisprudence*, 65 SOCIAL ACTION JOURNAL 26 (2015)
41 Universal Declaration of Human Rights 1948 Preamble.
42 *Id* art. 1.
43 *supra* note 39.
44 Constitution of India. art. 21.
45 AIR 1986 SC 180.
46 AIR 1981 SC 746.
47 2017 SCALE 8 679.
48 The International Convention on Civil and Political Rights 1976 art. 2.

as the 'CEDAW') affirms the rights of women and prohibits any form of discrimination against them.[49] In addition to it, the CEDAW also asserts that the sovereign of the country should take essential steps to forbid any kind of discrimination against women.[50] It shall be taken with respect to all the matters like divorce, marriage and relationships.[51] Apart from this, the Constitution of India also has provision pertaining to the *'right to equality'*[52], and *'right to non-discrimination'*[53] inscribed as fundamental rights in it. However, regardless of the recognition of aforementioned rights globally as well as nationally, 80% of IndianIndian widows are subjected to social discrimination and are forced to live a life as destitute.[54]

Hence, the condition of widows in the country is alarming and the proper implementation of legislation against women's cruelty is required to safeguard them from these inhuman and barbaric atrocities.

5. Legislations Safeguarding Rights of Widows in India

The mindset of Indian society has primarily changed post-independence in terms of treatment towards the widows of this country. The lowering status of women after the death of her husband has been uplifted by the enactment of several laws, which not only protects widows from societal atrocities but also entitles them to certain rights which were frowned upon in the past. Nevertheless, this doesn't lead to the conclusion that there were no laws enacted for the betterment of widows before the end of colonial rule. There were certain personal laws enacted to mitigate the oppression faced by the widows, but the same was severely criticized as well as amended or repealed by the Government of India after the Independence. The evolution of such personal laws enacted to protect the basic rights of widows have been profoundly assessed hereby as follows:

5.1. The Hindu Widow's Remarriage Act, 1856

The Hindu Widow's Remarriage Act, 1856 was enacted during the time period when India was still enslaved under British Rule. As per this Act, the widow belonging to the religion of Hinduism was fostered with the right to inheritance and maintenance, but the same could be waived off, if she gets remarried.[55] The law was misused by numerous

49 The Convention of Elimination of all forms of Discrimination against Women 1979 art. 1.
50 *Id* art. 2.
51 *Id* art. 16.
52 Constitution of India. art. 14.
53 *Id*. art. 15.
54 *Women's Social, Economic Inequality leads to Trafficking, Domestic Violence, Exploitation, Say Speakers in Women's Commission*, UNITED NATIONS (Mar. 5, 2003), https://www.un.org/press/en/2003/wom1390.doc.htm
55 The Hindu Widow's Remarriage Act 1856 s. 2.

Hindu families as the widows' 'right to re-marriage' was denied by them on the ground of customary allowance and the possession of the deceased husband's property.[56] Henceforth, in the early years of the 1930s, the voice was raised against the arbitrariness of this act in the UP Legislative Assembly. As a result, the Hindu Women's Property Rights Act was enacted in the year 1937, which gave an inheritance right to even those Hindu widows, who intended to remarry after the demise of their husband.[57]

After the Independence of India from colonial rule, there was a change in the rights pertaining to the property of widows with the arrival of new inheritance laws for the widows of the country. The Hindu Women's Property Right Act, 1937 also provided provision to the widow of a Hindu male, his widowed daughter and his widowed granddaughter to get a share in the property of the deceased Hindu male.[58] In the case of ***Renka v. Bhola Nath***[59], the court of law affirmed that no objection can be held against the widow pertaining to her possession of deceased husband's property, until and unless the willful squander of property is acknowledged.

Apart from this, it must be noted that the property in possession of the widow will not be subjected to her legal heirs after her demise, but it will be conveyed to the legal heir of former male owner of that property. The same was affirmed in the case of ***Kery Kolitany v. Moneeram***[60]. *Hence, t*he Hindu Women' Property Rights Act, 1937 gave hope to the widows of the country to get some limited interest in the property of their husband after his demise.[61]

5.2. The Hindu Succession Act, 1956

The Hindu Succession Act, 1956 was legislated with certain reforms for governing the people following the religion of Hinduism, Buddhism, Sikhism or Jainism.[62] According to this Act, the properties of the Hindu male after his demise, in absence of the will, goes to his sons, daughters, widow and mother equally.[63] The grandchildren of the Hindu male also have a right to inherit over the property, if the children of the deceased die before him.[64]

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56 Women's Web, Here's All You Need to Know About India's Inheritance Laws for Widows, WOMEN'S WEB (Jul. 26, 2018), https://www.womensweb.in/2018/07/indias-inheritance-laws-for-widows-july18wk4sr/.

57 The Hindu Women's Property Right Act s. 3.

58 DR. VIJENDER KUMAR, MAYNE'S TREATISE ON HINDU LAW AND USAGE 192 (17 ed. Bharat law Publications 2014)

59 (1915) 37 All 177.

60 (1875) 13 BLR 5.

61 Akhil Hussain, *Women's Right to Property*, NEW CENTURY INDIAN LAW (Feb. 25, 2011) http://newcenturyindianlaw.blogspot.com/2011/02/womens-right-to-property.html

62 The Hindu Succession Act 1956 s. 2.

63 *Id* s. 8, cl. 1.

64 *Id* s. 8, cl. 2.

In the case of ***Cherotte Sugathan (Died Through ...) vs. Cherotte Bharathi & Ors***[65], the court of law held that the Hindu Succession Act of 1956 will override the Hindu Widow's Remarriage Act, 1856. The division bench also affirmed that the wife of a Hindu Male could not be prohibited from acquiring the property of her husband after his death.

In the case of ***V. Sampathkumari vs. M. Lakshmi Ammal and Ors***.[66], the High Court of Madras held that the Hindu Succession Act, 1956 consisted of the provision which acknowledges that the widow shall not be conveyed the whole property of the late husband. However, in this case, the court affirmed that this disability pertaining to the widow's embedded under Section 14 of the Act shall be eliminated and they shall be given right to acquire the whole property after the death of their husbands. Hence, the Hindu Succession Act, 1956 initiated gender equality and safeguarded the rights of widows in the property of her husband to a larger extent.

5.3. The Indian Succession Act, 1925 – Christians and Parsis

The Indian Succession Act, 1925 was enacted to govern people belonging to the religion of Christianity and Parsi over the right to property. Under this act, the share of property of the deceased Christian male is distributed as per the identity of the successive relatives of the deceased. When the heirs of the deceased male are his children, then the widow is entitled to only one-third of the share of the property.[67] However, when the heirs of the deceased male are his relatives, then the widow is entitled to one-half of the share of the property.[68] And, in case, there are no children and relatives of the male deceased, the widow is entitled to the entire property of the male deceased.[69] Now, with regards to the Parsi religion, the share of the property is equally divided between widow, children, and parent of the male deceased.[70] However, when the wife of the deceased male has no children and the parent of the deceased male are also no more, then the widow gets half of the share over the property and the rest is given to the relatives of the deceased male.[71] In the case of ***Graham v. Londonderry***[72], the court of law, while interpreting the Indian Succession Act, 1925, has adjudged that the son of the widow has no right to ask for the belongings of his deceased father from his widow mother before her death. It will remain in the ownership of her widow mother only.

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65 2008 142 CompCas 743.
66 AIR 1963 Mad 50.
67 The Indian Succession Act 1925 s. 33, cl. a.
68 *Id* s. 33, cl. b.
69 *Id* s. 33, cl. c.
70 *Id* s. 51, cl. 1(a).
71 *supra* note 7.
72 3 Atk. 393. (A) Cro.

In a country like India, which is known for its secularism, it is very difficult to regulate the rights of all widows especially when they belong to a different religion. The Indian Succession Act, 1925 provides rights to the Christian and Parsi widows which were somewhat absent in the former acts of inheritance pertaining to the widows like the Hindu Succession Act, 1956.

5.4. Islamic Law

The Muslim succession law is an amalgamation of four primary sources, namely - the Holy *Quran*[73], the *Sunna*[74], the *Ijma*[75] and the *Qiyas*[76]. The law pertaining to Islamic inheritance is codified under the Muslim Personal Law (Shariat) Application Act, 1937.[77] The Act does not exclude any Muslim widow from the property rights. A Muslim widow without a child is entitled to one-fourth of the property of her deceased husband after the completion of his funeral ceremony and debts.[78] The deceased Muslim male who has children and parents will have one – eight of his property in the name of his wife.[79] On the other hand, under the Shia law, when a Muslim man solemnizes his marriage with a woman while suffering from a mental disorder and doesn't consummate his marriage before his demise, the widow will not be entitled to any right over the property of her deceased husband.[80] However, in the same case, if the Muslim man dies from mental illness after divorcing his wife, the divorced spouse will acquire right over his property till she gets remarried. [81] In the case of ***Durga Das vs. Mohammad Ali***[82], the court of law held that a childless widow belonging to the religion of Islam do have right over the property of her husband irrespective of it being immovable or movable property. The same was also affirmed in the case of ***AH Zamin v Akbar Ali***[83] and ***Gulbaro v Akbar Khalid***[84].

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73 Sacred book of Islam.
74 Sunna refers to the sayings and practices of prophets.
75 Ijma refers to the agreement of the learned men of community on what should be the pronouncement on a meticulous point.
76 Qiyas refers to the process of an analogical inference of what is correct and just in accordance with the good ideologies laid down by divinity.
77 The Muslim Personal Law (Shariat) Application Act, 1937 s. 2.
78 Damodar Kashinath Rasane vs Shahajsdibi And Ors., 1988 (2) BomCR 339.
79 *Id.*
80 Harsha Ansani, *What are the Rules Governing Inheritance of Property under Muslim Law,* IBLOGPLEADERS (May 17,2016), https://blog.ipleaders.in/rules-governing-inheritance-property-muslim-law/
81 Ramendra Pratap Singh, *Law of Succession in Muslim Law*, LEGAL SERVICES INDIA, http://www.legalserviceindia.com/legal/article-2915-law-of-succession-in-muslim-law.html
82 AIR (1925) All.522.
83 AIR (1928) Pal. 411.
84 AIR (1936) Peshawar 178.

6. The Widows (Protection and Maintenance) Bill, 2015

The Bill was legislated with the objective to establish a welfare board for the wellbeing of the widows who have been ill-treated, abandoned and living without any maintenance or economical support in the country. Some of the essential provisions of the bill are as follows:

6.1. Composition of National Widows Welfare Board

As per the bill, the Central Government through a notification in the Official Gazette shall establish a Board to be called as the National Widows Welfare Board, which will consist of Minister in charge of the Union Ministry of Social Justice and Empowerment as an ex-officio Chairperson.[85] Apart from him, the board shall also consist of a Vice-Chairperson, which preferably has to be a widow appointed by the Central Government of India. It also consists of other members belonging from NGOs and Union Ministry.[86]

6.2. Welfare of the widows

The primary obligation of the board is to promote and provide such measures as they are deemed fit for the safeguard, maintenance, and well-being of the abandoned and destitute widow. [87]

6.3. District-wise register

The board has to maintain district-wise register with all the information pertaining to the widows living in that area for their assistance of them.[88]

6.4. Maintenance

The board shall also provide widows a sum of two thousand rupees, if she is destitute and has children. However, the board will only provide one thousand rupees, in case she has no offspring.[89] The provision of providing accommodation without any fees is also inscribed under the bill along with other benefits like free education etc.[90]

6.5. Inheritance Rights

This bill affirms the share of property in the name of widow after the death of her husband.[91] It also provides that, in no situation, the widow shall dispossess from the house after the death of her spouse.[92] The widow must be given a right over her deceased husband's property

85 The Widows (Protection and Maintenance) Bill 2015 s. 3 cl. 4.
86 *Id.*
87 *Id* Preamble.
88 *Id* s. 5 cl. 2(a).
89 *Id* s. 6.
90 *Id.*
91 The Widows (Protection and Maintenance) Bill 2015 s. 7.
92 *Id.*

and in case of the presence of her in-laws; the combined possession of the property should be provided. [93]

Henceforth, the bill was legislated for the welfare of widows. The establishment of a welfare board, stringent affirmation of widow's inheritance rights and maintenance has made this bill essential legislation in the interest of subjugated widows. However, it is unfortunate that a law that could have safeguarded the widows from atrocities could not seek the light of the day.

7. Conclusion

Women have always played an equally important role in Indian society but their contribution has always been left unnoticed. The patriarchal pressure has made the women suffer from numerous atrocities at the hands of men since time immemorial. They are perceived to be shadows of their spouses and other male members of their family. Taking into consideration the scriptures of the Hindu religion, the disparaged position of Indian women has been highlighted through these texts, but the atrocities faced by 'widows' have never been discussed to that extent. The misfortune of losing their husband is not enough for the society that they have even forced them to live in such an irrational way as to make them feel next to inferior and negligible in the sphere of society. They have been subjected to cruelty and death in the name of traditions and customs. The manner in which they have been treated by the people had been more barbaric than those of animals. However, the post-Independence period of the country has perceived enactment of several acts to safeguard the rights of widows in the country. They have been provided with the rights of inheritance and numerous barbaric customs like *Sati* have been abolished. The deteriorating condition of widowhood has not only been acknowledged in the country but also in the International domain. Several provisions have been incorporated in the numerous conventions to protect widows from the cruelty of society. However, there are still some states in the country like Madhya Pradesh, where the barbaric customs against widows are still practiced, thereby making their lives a living hell.[94] Hence, it is high time for the Indian Government to acknowledge the condition of widows in this country and take proper steps for the efficacious enforcement of legislation to protect their basic rights. Apart from it, the citizens of this country should also scrutinize their customs and start treating widows like any other human being especially in the era of modernization and westernization.

93 *supra* note 87.
94 *supra* note 53.

Ethical Conundrum of Human Gene Patenting: Global Concern and Response

***Amrendra Kumar Ajit**

Abstract

Ethical dimension of biological patent has remained a cause of concern at regional and global levels. Human gene patenting in various jurisdictions has raised the ethical and moral alarm and started a global debate on the issue. Patenting of human gene bears various positive and negative ramifications on social and individual life of human beings. This paper tries to analyse the various dimensions of ethical spectrum originating from human gene patenting. The work mainly focuses on the positive and negative considerations of gene patenting and various arguments have been advanced in the favour and against of these considerations including the Human Genome Project. The paper examines the ethical arguments on different sides in its first and second part. The third part of this paper tries to focus the global behaviour on the ethical issues and further development of some common consensus through international legal instruments. The fourth and last part concludes that there is rapid advancement in human genetics through patenting and likely to have profound social implications. The line of distinction must be drawn between patenting of genes of human and other animal and plants. Exploitation of nature and its resources has always been accepted by the human community but at the same time exploitation of human body and its components for economic gains has never been appreciated.

Introduction

The question of ethics in various fields has been always there since time immemorial, with philosophers like Plato, Aristotle, Kant, etc. discussing the concept of morality and ethics extensively in their various works. However, research on genes- be it humans, plants or animals- is a relatively new concept and protecting under patent regime is one of the most controversial issues in the present time. There are certain kinds of experimentation which are completely prohibited on grounds of ethics, morality, public policy, and danger to humanity. Moral and ethical considerations are also attached to experiments which are allowed and are continuing for the good of humanity.

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DR. DANIEL NATHANS, OVERVIEW OF GENOME RESEARCH IN FEDERALLY FUNDED GENOME RESEARCH: SCIENCE AND TECHNOLOGY TRANSFER ISSUES-PROCEEDINGS OF A PUBLIC MEETING (21SR MAY 1992).

Moreover, nowadays, scientists are not just satisfied with researching. They are looking for patents in the field too, if fulfill the patentability criteria. What we are concerned here with is, these kinds of research projects concerning with gene technology where the intellectual community of the world allows research and from among these, those research projects where patents are asked for and the ethical considerations associated with it. What we are concerned with is the kind of arguments that are raised by activists giving ethical reasons both for the grant and rejection of patent applications.

Recent instances like the US National Institutes of Health allocating five percent of its budget to study the ethical and social implications of its scientific work in the Human Genome Project[1] and the European Union Commission appointing a committee of consultants to examine the ethical aspects of biotechnology advances under the European Union's jurisdiction are showing the world community's growing self-awareness of the need of ethical considerations in genome science.[2]

Various kinds of ethical arguments are raised in case of gene patenting. But what is interesting to note is that not all of the ethics based grounds are against the concept. It seems that even in case of ethical considerations, the views are quite divided. Basically, two types of opposing ethical questions are raised:

1. Is it ethically permissible to patent segments of the human genome when these segments represent part of humankind's ''*natural*" or "*universal*" heritage?

2. Is it unethical to deny patenting of the human genome given the vast economic resources and human effort expended in identifying it?[3]

The patenting of human gene raised many significant legal questions concerning the interpretation and application of patent laws, this paper will discuss the morality of patenting human genes. After examining arguments on different sides of this issue, the paper will conclude that there are, at present, no compelling reasons to prohibit the extension of current patent laws to the realm of human genetics. However, since advances in genetics are likely to have profound social, political, and medical implications, the most prudent course of action demands a continual reexamination of genetics laws and policies in light of ongoing developments in science and technology.

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2 Barbara Looney, *Should Genes Be Patented? The Gene Patenting Controversy: Legal, Ethical, And Policy Foundations Of An International Agreement*, 26 Law & Pol'y Int'l Bus., 231, 231-233 (1994).

3 *Id.*

A. Arguments in Favour

The supporters for patenting of life forms claim that advances in both science and the welfare of human beings in the provision of better health care and diet would be frustrated by a refusal to issue patents.[4] The US Patent and Trademark Office heaved reflective questions on ethics, claiming that it has become important to expand the possibility of patent protection to higher life forms on its own and suggested that such a momentous change in patent policy should have required congressional action.[5] Since the whole system of Patent was designed to promote progress in the society, the USPTO has stated repeatedly that patents do not confer ownership of genes.[6]

Few of potential arguments in favour of Gene Patenting may be summarised as follows:

1. Researchers shall be rewarded for the discoveries they make.[7]
2. Investment of resources is encouraged because a patent provides a 'monopoly' to the inventor by prohibiting competitors from making, using, selling the invention without a licence.[8]
3. Duplication of effort is prevented if the system is used correctly by researchers.[9]
4. Research is required to enter into new and unexplored areas.[10]
5. Secrecy is reduced and thus all have access.

The American constitution has laid down that where 'the progress of science and the useful arts' would be facilitated by providing exclusive rights to the authors and discoverers then they should enjoy the same for a limited period.[11] One of the major justifications in this regard is that if the patenting of human gene is stopped then it would seriously affect the impediments to research and practice.[12] For instance, the pharmaceutical companies claimed that this practice could hold back advances in therapeutic research and practice since

4 M. Rothschild and S. Newman, Intellectual Property Rights in Animal Breeding and Genetics 156 (2002).
5 Daniel J. Kevles, *The Advent of Animal Patents: Innovation and Controversy in the Engineering and Ownership of Life*, in Intellectual Property Rights and Patenting in Animal Breeding and Genetics (S. Newman and M. Rothschild eds., 2002).
6 *Id.*
7 M Bobrow & S. Thomas, *Patents in a Genetic Age*, 409 Nature, 763–764 (2001).
8 *Id.*
9 Kevin Davies, Cracking the Genome: Inside The Race to Unlock Human DNA, 61-63 (2001).
10 *Id.*
11 A.R. Williamson, *Gene Patents: Socially Acceptable Monopolies or an Unnecessary Hindrance to Research?*, 17 Trends in Genetics, 671 (2001).
12 Reiss, *Is it ethical to patent human genes?*, in Innovation from Nature. The Protection of Inventions in Biology, 15-19 (Simmons and Simmons eds., London, 1996) available at <http://k1.ioe.ac.uk/scitech/staff/mn/publications.doc>

the primary objective of such companies is profit.[13] One of the most basic requirements of Intellectual Property Laws is that it allows for a free circulation of data amongst the researchers.[14] Patenting of isolated human genes is acceptable, as long as novel, inventive, useful products or processes are created, but such patents should respect ethical limits, allow for research purposes free use of genetic knowledge, and should exclude ownership or commerce of the human body and human materials.[15]

Equity of benefits of human genetic research demands to include access to health care based on biotechnology, but also allow transfer of these biotechnologies for organized access to genetic resources and respect of biological diversity.[16] The ethical acceptance of genetic research can be positively asserted on the various established theories which justify its workable model with different perspective. The researcher has tried to incorporate some important theories here.

i. Reward Theory

Proponents for gene patenting raise the basic Lockean argument that '*a man should enjoy the fruits of his labour*'.[17] According to them, it would be unreasonable to deny a man rewards of his effort.[18] When one person is doing a work and others are not, isn't it unfair if the person working hard gets the same benefit out of it as the rest, if not less? They say that patents works as sort of an incentive for the researchers to continue with their research.[19] Even if they don't get any benefit out of it, we can in a way expect the scientists to continue researching for the pursuit of knowledge.[20] But even if they want to, how can we expect them to actually work without the sponsorship of money-minded and profit looking entrepreneurs? Who would want to invest money in a project when they have no guarantee of a possible return of their investment? This is exactly what happens when patents are not granted.

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13 M.J. Hanson, *Religious voices in biotechnology: the case of patenting,* Hastings Center Report, 27, 1–19 (1997).

14 Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J., 287, 299-330 (1988).

15 *Id*

16 J. Elizade, *The Patentability of Human Genes: an Ethical Debate in the European Community,* 23(3) J Med. & Phil. (1998).

17 Suzanne Scotchmer, *Protecting Early Innovators: Should Second-Generation Products Be Patentable*, 27 RAND J. Econ., 322-31 (1996).

18 Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, in New Essays in the Legal and Political Theory of Property (Stephen R. Munzer eds., Cambridge University Press, June 18th, 2011).

19 *Id.*

20 *Closely examined, real-property rights also lack the exclusivity Locke attributed to them, but the difficulty is more apparent in the case of property in ideas. See* William Fisher, *Property and Contract on the Internet*, Chic.-Kent L. Rev., 73 1203, 1207 (1998).

ii. Doctrine of Fairness

It is a fundamental principle of justice laid down since the time of Aristotle that equals should be treated equally and unequals should be treated unequally but in proportion to their relative differences.[21] In the words of Beauchamp and Childress, "*in general, rules and laws are unjust when they make distinctions between classes of persons that are actually similar in relevant respects, or fail to make distinctions between classes that are actually different in relevant respects.*"[22] The argument of distributive justice and fairness here are closely related to each other.

Proponents of the fairness argument say that, even though the distributive justice principle ought to be satisfied, the law, as we know, is blind.[23] Therefore, what it looks at is what is fair to the parties concerned.[24] Similarly, in case of gene patenting, it is definitely not fair to the person researching if everyone gets the same incentive out of his research as he does. There should be some extra incentive for him. Hence, patent should be granted.

iii. Efficiency

A very pertinent ethical argument raised in favour of gene patenting is that of efficiency. This simply means that if we want the scientist around the globe to do research in a competent and effective way, i.e., if we want a high degree of efficiency in their research, then we have to provide them with a proper incentive and patent just perfectly suits the job. Especially in case of genome research, if we provide patents, then we can expect a high quality and original report as everyone will be in a race to get a patent and so no one will duplicate another's work.

Patenting genetic sequences provides substantial opportunities for scientific and medical advancements and subsequent medical breakthroughs. This may take the form of new methods of diagnostic testing and treatment of diseases which have found no solution till date.[25] Patent claims to genetic sequences have been a constant motivation factor for costly research and expansion and any off-putting approach would frustrate future research prospects.[26]

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21 Tom Palmer, *Are Patents and Copyrights Morally Justified?*, 13(3) Harv. J. L. & Pub. Pol'y, 817-65, 832 (1990).

22 Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 67 (3rd ed. 1989)

23 Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, in New Essays in the Legal and Political Theory of Property (Stephen R. Munzer eds., Cambridge University Press, June 18th, 2011).

24 Suzanne Ratcliffe, *The Ethics of Genetic Patenting and the Subsequent Implications on the Future of Health Care*, 27(2) Touro L. Rev., (2011)

25 *Id.*

26 *Id.*

iv. Long term incentive

It has also been suggested that patents on genetic material create an incentive for researchers to disseminate information since patent rights protect their discoveries.[27] Without patent protection, the specific details regarding these genetic sequence inventions would most likely be kept as trade secrets by many corporations and individuals, resulting in thwarted research and delayed innovative diagnostic and treatment methods.[28]

The three main criteria for fulfilling the patentability test are: novelty, inventive step and non-obviousness.[29] Human beings can now directly manipulate the characteristics and structure of other organism's genes.[30] This practice can be used for socially beneficial purposes, such as genetically modifying agriculture to increase its resistance to viruses and decrease the need for pesticides or herbicides, thereby generating a higher crop yield.[31] There are powerful market forces driving and financing the continued expansion of biotechnology processes which may eventually be capable of redesigning the human body.[32] Whether or not it is ethical to patent animal and human genomes, courts have issued thousands of these patents, and the patents have provided the capital to finance and greatly accelerate research in the biotechnology industry.[33]

B. Arguments in Against

The "*common heritage of mankind*" is the principle of international law based on ethical concepts. The meaning of this concept is that defined territorial areas belong to all humanity and certain resources are available to everyone without any discrimination and taking into account of the future generations. Immanuel Kant said that the expansion of hospitality with regard to "*use of the right to the earth's surface which belongs to the human race in common*" would "*finally bring the human race ever closer to a cosmopolitan constitution*".[34]

27 Brian Zadorozny, *The Advent of Gene Patenting: Putting the Great Debate in Perspective*, 13 SMU Sci. & Tech. L. Rev. 89, (2009-10)

28 Suzanne Ratcliffe, *The Ethics of Genetic Patenting and the Subsequent Implications on the Future of Health Care*, 27(2) Touro L. Rev., 445 (2011)

29 Edward B. Flowers, *The Ethics and Economics of Patenting the Human Genome,* 17 Journal of Business Ethics 15, Promoting Business Ethics: The Third Annual International Vincentian Conference, 1737-1745 (Nov. 1998).

30 L. Kohlberg, *Essays on Moral Expansion,* 1 The Philosophy of Moral Expansion (1969).

31 Jones, T. M., *Instrumental Stakeholder Theory: A Synthesis of Ethics and Economies*, Academy of Management Review 20, 404-437 (1995).

32 Marilyn Martone, *The Ethics of the Economics of Patenting the Human Genome*, 17(15) Promoting Business Ethics: The Third Annual International Vincentian Conference, 1679 (Edward B. Flowers eds., November 1998).

33 Joseph A. Cioffi, Application of Biotechnology and Transgenic Animals toward the Study of Growth Hormone, American Journal of Clinical Nutrition, 2968-2989 (1993).

34 Immanuel Kant, Toward Perpetual Peace in Practical Philosophy, 329 (1999), at 8:358.

This concept was first time mentioned in the preamble of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 and then after incorporated in several conventions and treaties like Outer Space Treaty, United Nation Convention on the Law of Seas and Convention on Biological Diversity. Importance of this concept may be assumed from these Conventions that it acquired the status of *jus cogens* [35] for all these conventions.

i. Human Gene: Common Heritage of Mankind

The human DNA is of a special nature in comparison to the DNA of another organism. We have exploited various plants and animal species commercially and legally protected them. Human body has never been legally exploited for commercial gains. Many scholars feel very uncomfortable to accept gene and mutation of genes as the subject matter of commercial gain. There has always been a group of voices who disclaim the patentability of human gene and argued that it is very unique and distinctive so it must be given different treatment in comparison from other genomes of animal or plants.

Human gene is biological material which is found in every individual. The basic principle underlying the '*universal heritage argument*' is that segments of human genome are inherent to each individual's personal identity[36] and common to all humanity.[37] David Koepsell says life on earth is bound together by a common heritage, centred around DNA molecule that is present in almost every living cell of every living creature.[38] For any kind of research result to become patentable, it should first satisfy the patentability criteria. It cannot be a mere discovery of a naturally occurring phenomenon. Some degree of human intervention needs to be there.[39] It is very true that naturally occurring gene cannot be patented but the main question here is that what has been patented as a gene was really a patentable subject matter? This question of human gene patenting has given at two assertions; first, human gene is a non-patentable subject matter on the ground of public policy or ethical consideration and second, it does not qualify the criteria of patentability. Here in this chapter, we will analyse the issue from first perspective that whether patent of gene can be prohibited on the ground of public policy and morality.

Human body or body part had never been the subject matter of ownership in legal sense. The Lord Edward Coke writings is one of the

35 The principles which form the norms of international law that cannot be set aside.
36 Mark A. Chavez, *Gene Patenting: Do the Ends Justify the Means*, 7 Comp. L. Rev. & Tech. J. 255, 258 (2002-2003).
37 Patricia A. Lacy, *Gene Patenting: Universal Heritage v. Reward for Human Effort*, 77 Or. L. Rev., 783,786 (1998).
38 David Koepsell, Who Owns You? The Corporate Rush to Patent Your Genes, 20 (2007).
39 Diamond v. Chakrabarty, 447 US 303, 309 (1980)

earliest treatises on the subject of property rights in the human body.[40] Coke wrote: "*the burial of the cadaver (caro data vermibus) is nullius in bonis' and belongs to ecclesiastical cognizance.*"" This phrase recognised as the foundation for the Anglo- American jurisprudence that any part of human shall not be subject matter of ownership.[41] The assertion of Cokes was not questioned for long time. Some body parts acquired the status of commodities with very limited legal intervention.[42] Blood, semen, hair and teeth became most frequently sold item but failed to raise the legal concern about it. Later on tissue gratification and organ donation raised issues at various levels to deal with human body components and parts. Bioscience, particularly molecular and biotechnology science, developed very fast in the latter half of the last century. In 1980, living things became the subject matter of patent if it reaches the patentability criteria and anything made under the sun became patentable.[43]

In *Moore v. Regents of the University of California*,[44] the issue related to human body part and patenting of invention related to that came before the Supreme Court of California. The plaintiff was John Moore treated for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center).[45]

Mr. Moore first visited UCLA Medical Center on October 5, 1976, and diagnosed with hairy-cell leukemia. The diagnosis process included collecting extensive amounts of blood, bone marrow aspirate, and other bodily substances. Dr. Golde, who was treating Mr. Moore, confirmed that diagnosis. Dr. Golde, was aware at the time of diagnosis that some collected samples were of great economic and commercial value in various research activities.[46] A cell line[47] was developed from Moore's T-lymphocytes[48] and obtained a patent with a potential gain

40 Patricia A. Lacy, *Gene Patenting: Universal Heritage v. Reward for Human Effort*, 77 Or. L. Rev., 783,786 (1998).

41 Griffith v. Charlotte, Columbia & AugustaR.R. Co., 23 S.C. 25, 32 (1885). The Court noted that "Coke was understood to say that 'a dead body was the property of no one.' No matter what he did say; this understanding, or misunderstanding, has come down to us as law." Id.

42 Anita M. Hodgson, *The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures*, 26 Ind. L. Rev., 357, 373 (1993).

43 Diamond v. Chakrabarty, 447 US 303, 317 (1980)

44 51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479.

45 *Id.*

46 *Id.*

47 A cell line is "[a] sample of cells that has undergone the process of adaptation to artificial laboratory cultivation and is capable of sustaining continuous, long term growth in culture." Dr. Golde discovered the healing potential in Moore's genetic material and transformed those cells into marketable products. Golde was granted a proprietary interest in the products generated by the cell line rather than in Moore's genetic material.

48 A T-lymphocyte is a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value.

of three billion due to its capacity to be developed in rare drugs.[49] Dr. Golde never disclosed to Moore during the treatment or at the time of taking informed consent about the extent of economic interests of his cells. He sued for conversion, and upon other grounds based on the unauthorized use of his cells, claiming a proprietary interest in each of the products created from his cells or from the patented cell line.

Moore argued that the ownership of removed body part belongs to him at least for the purpose of directing their use or disposal and that he had never consented for doing potentially lucrative research. Thus, defendants' unauthorized use of his cells constituted a conversion[50] . As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

The court said that no court has ever in a reported decision-imposed conversion liability for the use of human cells in medical research.[51] In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to the whole society, involved policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.[52] Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system.[53]

A tort is a violation of a legal duty imposed by statute, contract or otherwise, owed by the defendant to the person injured. Without such a duty there will be only '*damnum absque injuria*'. In case of conversion the possession or ownership of the property is necessary which has been converted but the court here found that what was removed from Moore body was not in his possession and ownership. So there was no conversion. The court further reiterated that we should be hesitant to "*impose [new tort duties] when to do so would involve complex policy decisions*"[54], especially when such decisions are more appropriately the subject of legislative deliberation and resolution.[55] The court left the question unattended in the absence of any policy guideline or rules and regulation.

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49 Moore v. Regents, 51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479
50 A kind of property tort, where a person converts the property of others for his own use.
51 *Id.*
52 *Id.*
53 *Id.*
54 Nally v. Grace Community Church, 253 Cal. Rptr. 97, 47 Cal. 3d 278, 763 P.2d 948 (1988)
55 *Id.*

The debate on this issue started in the early 90's of last century. The main question in debate was that whether it is ethical to patent segments of the human genome which is inherent in every individual and common to all. The French Minister for Research and Technology, Hubert Curien, said categorically in a 1991 letter to the journal, *Science: "It would be prejudicial for scientists to adopt a generalized system of patenting knowledge about the human genome.... such a expansion would be ethically unacceptable. A patent should not be granted for something that is part of our universal heritage."*[56]

The debate of universal heritage under patent law is mainly based by making distinction between mere discovery of naturally occurring substance or method, and a true invention.[57] The distinction between naturally occurring object and human intervene invention was made clear to some extent the U.S. Court of Appeals for the Federal Circuit in *Amgen Inc. v. Chugawe Pharmaceutical Co., Ltd.*[58] U.S. Patent 4,703,008, entitled "DNA Sequences Encoding Erythropoietin" was issued to Dr. Fu-Kuen Lin, an employee of Amgen, for a purified and isolated DNA sequence consisting essentially of a DNA sequence encoding human erythropoietin. A purified and isolated DNA sequence consisting essentially of a DNA sequence encoding a polypeptide having an amino acid sequence sufficiently duplicative of that of erythropoietin to allow possession of the biological property of causing bone marrow cells to increase production of reticulocytes and red blood cells, and to increase hemoglobin synthesis or iron uptake.[59] Another U.S. Patent 4,677,195, entitled "*Method for the Purification of Erythropoietin and Erythropoietin Compositions*" was issued to Dr. Rodney Hewick. The court differentiated between the real gene and the substitute gene invented to perform the same function. The court held that conception (discovery) and reduction to practice (invention) occur simultaneously.[60] The court assigned priority to the first inventor who reduced the invention to practice. The court held that when an inventor is unable to envision the detailed constitution of a gene so as to distinguish it from other materials, as well as a method for obtaining it, conception has not been achieved until reduction to practice has occurred, i.e., until after the gene has been isolated.[61] The test articulated in *Amgen* is that natural substances are patentable if they are "*novel, purified and isolated.*"[62] The concept of patenting of isolated

56 Hubert Curien, The *Human Genome Project and Patents*, 254 SCIENCE, 1710, 1710 (1991).
57 Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980)
58 Amgen, Inc. v. ChugawePharm. Co., Ltd., 927 F.2d 1200, 1203 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 856 (1991).
59 *Id.*
60 Amgen, Inc. v. ChugawePharm. Co., Ltd., 927 F.2d 1200, 1206 (Fed. Cir. 1991).
61 *Id.*
62 *Id.*

and purified gene accepted by all patent office of the world and became universal principle but in a very recent decision of the Supreme Court of the United States has come heavily on isolated and purified genes and declared its as non-patentable subject matter on the ground of product of nature and merely isolation does not make it novel and inventive.[63] This discussion will be analysed in the next chapter which covers the patentability criteria.

In the same way, various organisations including committees and institutions for bioethics and human rights have criticised the genetic patent trend vehemently. The Council of Europe's Committee on Legal Affairs and Human Rights called its member states to strive to amend the law and practices regarding to the ownership of human body part, tissues and genes at regional and international level such as European Union and WTO and set the standard to treat it as the non-patentable subject matter.[64] In addition to it, the Parliamentary Assembly of the Council of Europe has announced two recommendations on IP and biotechnology.[65] Both of these recommendations unease the concept of the patenting of livings, as well as shows the dissatisfaction regarding the existing patent regime, particularly about the patenting of genetic material, specially human genes.[66]

The Council also proposed that the member states should come forward to establish the universal acceptance of a new patent system as 'World Patent Convention'. It also suggested that the proposed system must be based on the principle of common heritage and should incorporate the language of Universal Declaration on the Human Genome and Human Rights (1997) defining the human genome as the 'common heritage of humanity'.[67]

The conception of the utility based special nature of the human genome is harder to elaborate in all aspects but nonetheless many of the people feel that it warrants special treatment. It should come under the domain of private property and commercialized by the private players rather all rights related to it should be of public nature.

People always have the universal duty to respect the life of others and can't make anyone the object of ownership for self-economic interest.

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63 *Id.*

64 Nuffield Council on Bioethics, *The ethics of patenting DNA: A Discussion Paper,* 21 (2002), *available at* <http://nuffieldbioethics.org/wp-content/uploads/2014/07/The-ethics-of-patenting-DNA-a-discussion-paper.pdf> (last visited 14th Jan 2015).

65 Parliamentary Assembly Recommendation 1425 (1999) and Recommendation 1468 (2000) *available at* <https://wcd.coe.int/ViewDoc.jsp?id=375167&Site=COE> (Last visited 14th Jan 2015).

66 *Id.*

67 Nuffield Council on Bioethics, *The ethics of patenting DNA: A Discussion Paper,* 21 (2002). *available at* <http://nuffieldbioethics.org/wp-content/uploads/2014/07/The-ethics-of-patenting-DNA-a-discussion-paper.pdf> (Last visited 14th Jan 2015).

It suggests that people can't be the subject matter of ownership i.e. as slave. It is generally assumed that in liberal democratic society, self-ownership is the central part of morality.[68] Self-ownership is well entrenched in our moral thinking and deeply rooted in our shared moral consciousness.[69] It is always claimed that the right of self-ownership is inalienable right including the rights over the components of human body like genes, cells and tissues etc.[70] In this way it suggests that no one will have property rights over another person's genetic material. This principle is widely recognized under the Article 5 (i) of EC Directive 98/44/EC2. It says "*the human body, at the various stages of its formation and expansion, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.*"[71] This provision very cogently debarred the ownership of genes or fragment of gene found in natural form i.e. as found in human body but at the same time Article 5 (ii) of EC Directives allows the isolated genes or otherwise produced by means of a technical process as patentable subject matters. It says, "*An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.*" It is very difficult to encapsulate these two principles in combination. Presently it is legitimate to claim ownership over genetic material, for example, genetic diagnostic test which give the owners of patents control over the way in which use is made of knowledge about genes which are common to everyone.[72]

The Nuffield Council paper refers this distinction between genes *in situ* in the human body and isolated and purified DNA molecules produced by tailoring natural genes or copying gene sequence and making it synthetically. Directive 98/44/EC is the result of ten years' debate with Government representatives in Europe, with critical observers and civil society's members. It also roughs passage twice through the European Parliament[73]. Netherlands, Italy, and Norway challenged the directives in the European Court of Justice (ECJ) on

68 Carole Patemen, *Self ownership and property in the Person: Democratisation and A tale of two concept*, 10 J. Political Phil., 20, 23 (2002)

69 *Id.*

70 B. Björkman and S.O. Hansson, *Bodily rights and property rights*, 32(4) J Med Ethics., 209 (April 2006).

71 EC Directive, art. 5(i) 98/44/EC2

72 It should be noted that under most patent systems, an individual could use knowledge about their own particular genes when those genes had been patented by others, without infringing, provided that it was done in private and for purposes which were not commercial. See for example, the UK Patents Act, 1977, Section 60, Meaning of infringement.

73 R. Stephen Crespi, *Patenting and Ethics--A Dubious Connection*, 85 J. Pat. & Trademark Off. Soc'y, 31, 34 (January 2003) available at <https://hinxtongroup.files.wordpress.com/2010/10/crespi_j-pat-trademark_20031.pdf>

various grounds including that the directive amounted to the reification of the human material, and in that way, it does not respect the human dignity. In its decision, rendered on October 9th, 2001, the ECJ held that the directive framed patent law in such a rigorous way that the human body remained inalienable, and thus, human dignity was preserved.[74] Ultimately it survived its legality in the European Court of Justice so it deserves a bit more credit.[75] But the judgement was heavily criticised by various groups. We should consider that this judgement was delivered in 2001 and since then there has been long list of expansion in the genetic engineering and consequential debate also became extensive. In this debate the human genome project has played an important role and initiated new dimension of genetic debate.

ii. Human Genome Project

The planning of the mapping human genome was started in 1984 and it was properly drafted in 1988 to be completed within 15 years.[76] It was the largest international collaborative scientific research which was completed in 2003.[77] Most of the government-sponsored sequencing was performed in twenty universities and research centres in the United States, the United Kingdom, Japan, France, Germany, and China.[78] This project generated the blue print of human genome. The HGP represented the first foray into 'Big Science' by the medical and the biological science communities.[79] This has not sequenced all DNA of the human cell but only "*euchromatic*"[80] regions of the genome and covers 90% of the genome. The "*heterochromatic*" region is not sequenced.[81]

The HGP was regarded as '*the moon shot of the life sciences*', the '*holy grail of man*', '*the code of codes*' and '*the book of life*'.[82] Francis Sellers Collins [83] observed:

> As you will hear today, this Book of Life is actually at least three books. It's a history book: a narrative of the journey of

74 Kingdom of the Netherlands Italian Republic and Kingdom of Norway v. European Parliament and Council of the European Union, ECJ decision of case no C-377/98 on 9th October 2000 , *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0377(Last visited 25th Aug 2015).

75 *Id.*

76 Max Rothschild & Scott Newman, Intellectual Property Rights in Animal Breeding and Genetics, 130 (2002)

77 *Id.*

78 *Id.*

79 The term was popularized by A.Weinberg *Impact of large-scale science on the United States*, 134 Science, 161 (1961).

80 International Human Genome Sequencing Consortium, *Finishing the Euchromatic Sequence of the Human Genome*, 431(7011) Nature, 931 (October 2004).

81 *Id.*

82 R. Cook-Deegan, Hype and hope, 89 American Scientist, 62 (2001).

83 He is an American physician-geneticist noted for his discoveries of disease genes and his leadership of the Human Genome Project. He is director of the National Institutes of Health (NIH) in Bethesda, Maryland.

> our species through time. It's a shop manual: an incredibly detailed blueprint for building every human cell. And it's a transformative textbook of medicine: with insights that will give health care providers immense new powers to treat, prevent and cure disease. We are delighted by what we've already seen in these books. But we are also profoundly humbled by the privilege of turning the pages that describe the miracle of human life, written in the mysterious language of all the ages, the language of God.[84]

Such high appreciation also received severe criticism. Richard Lewontin sought to debunk the pretensions of the Human Genome Project.[85] He suggested that the publication of the Human Genome Project was a terrific anti-climax: 'Now that we have the complete sequence of the human genome we do not, alas, know anything more than we did before about what it is to be human.'[86] He wondered whether to trust calls for new 'Big Science' initiatives: 'The reaction to the discovery that human beings do not have much more genomic information than plants and worms has been to call for a new and even more grandiose project.'[87]

That the gene is common heritage has long been supported in developed countries itself and there is an interesting story behind this game. This story is of early 90's of last century when genetic research was becoming a movement due to huge participation by public and private funded research institutes. As we know the HGP was the main project of National Institute of Health, USA. Nobel Laureate James Watson was appointed as the Head of the Human Genome Project in 1990. He and the director of NIH, Bernadine Healy had acrimonious altercations on the patenting of expressed sequence tags (ESTs)[88]. ESTs were achieved by J. Craig Venture in 1991.[89] This resulted in the resignation of James Watson from Human Genome Project. The United States Patent and Trademark Office (USPTO) rejected the ESTs patent in 1992 saying that the claims failed on patentability criteria of novelty,

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84 Collins, F. *Remarks at the press conference announcing sequencing and analysis of the human genome*' (12th February 2001), *available at*:< http://www.genome.gov/10001379> (Last visited 17th May 2015).

85 Richard Lewontin, It Ain't Necessarily So: The Dream of the Human Genome and Other Illusions, 1 (2nd 2000).

86 *Id.*

87 *Id.*

88 An EST is a short nucleotide sequence that represents a fragment of a cDNA clone. It is typically generated by isolating a cDNA clone and sequencing a small number of nucleotides located at the end of one of the two cDNA strands.When an EST is introduced into a sample containing a mixture of DNA, the EST may hybridize with a portion of DNA. Such binding shows that the gene corresponding to the EST was being expressed at the time of mRNA extraction': Michel CJ, In re Fisher 421 F.3d 1365 at 1367 (C.A.Fed.,2005).

89 Kevin Davies, The Sequence: Inside the Race for the Human Genome 55 (2001).

non-obviousness and utility because they were '*vague, indefinite, misdescriptive, incomplete, inaccurate, and incomprehensible*'.[90]

After this scandal, Venter left the National Institutes of Health due to personal criticism. James Watson, categorised his patents as 'monkey work'.[91] Venter established his own company Celera Genomics in 1998, with the help of the Parker Elmer Corporation to map the human genome by using high powered sequencing machines. The motto of the company was 'Speed matters. Discovery can't wait.[92] The approach of the company was severely criticised.[93] In response to such criticism Venter emphasized that:

> Since its founding we have said that Celera will seek to develop on its own 100–300 medically important genes for use by pharmaceutical and biotechnology companies from among the 100,000 human genes. We will give preference in licensing these potential therapeutic targets to our subscribers and we will license them on a non- exclusive basis. As we said at the earlier hearing, we are not attempting to patent the human genome, any of its chromosomes, or any random sequence.[94]

Venter reiterated that the company appreciated the approach of the USPTO: "*Fundamental patent requirements of utility, novelty, and non-obviousness are complete and effective protections to the fear propagated that the human genome will be patented or that the revolution will be slowed.*"[95] He insisted: "*Consistent with long-established principles of patent law, we do expect that patents and other protections for subsequent inventions using the genome alphabet and showing utility, novelty, and non-obviousness are not only appropriate, but required to assure that incentives continue to fuel the genomic revolution.*"[96]

Venter and Celera Genomics approach to file gene patent caused annoyance to the British counterpart John Sulston, the leader of the British component of the Human Genome Project. It is evident in his book, *The Common Thread*, that he was of the firm view that genomic

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90 *Id.* at 63.
91 *Id.*
92 *Id.* at 62.
93 The approach of the company was described by company's patent attorney, Robert Millman, in the following way, "What we do first is go for the low-hanging fruit. Celera's business strategy is based on the fact that we have the largest gene pipeline on earth. The first product of the company is the database itself, which we sell to subscribers. But our second core asset is internal gene discovery, beginning with the stuff within easy reach. The low-hanging fruit.; James Shreeve, The Genome War: How Craig Venter Tried to Capture the Code of Life and Save the World (2004).
94 J.C. Venter, *Prepared statement*, The Subcommittee on Energy and Environment, United States House of Representatives Committee on Science, (6 April 2000) *available at* <http://www.ostp.gov/html/00626_4.html>,. (Last visited 4th Jan 2014).
95 *Id*
96 *Id.*

information should not be patented because it was part of the common heritage of humankind: *'The genome sequence is a discovery, not an invention.'*[97] Sulston was concerned that J. Craig Venter wanted *'to establish a monopoly position on the human sequence*'.[98] Francis Collins contended that the USPTO should have a more stringent application of the patent criteria of novelty, inventive step and utility:

> "*We think everybody agrees that the raw fundamental genome sequence of us folks ought not to be the subject of constraints on its accessibility and, so, it ought to be in the public domain and it ought to not be patented. When it comes to a gene that has a function then, in fact, patenting makes a lot more sense. But the raw fundamental information, the stuff that we're putting on the Internet every 24 hours really just ought to be out there because the public is only going to benefit if scientists put their best energies to figuring out what it all means. And that will most likely happen if there are no constraints on their ability to do.*"[99]

In another event, President Bill Clinton and British Prime Minister Tony Blair made a joint announcement on 14 March 2000, stating that the human genome should remain in the public domain:

> "*To realize full promise of the research, raw fundamental data on the human genome – including the human DNA sequence and its variations – should be made freely available to scientists everywhere. Unencumbered access to this information will promote discoveries that will reduce the burden of disease, improve health around the world and enhance the quality of life for all human kind. Intellectual property protection for gene-based inventions will also play an important role in stimulating the expansion of important new health care products. We applaud the decision by scientists working on the Human Genome Project to release raw fundamental information about the human DNA sequence and its variants rapidly into the public domain, and we commend other scientists around the world to adopt this policy.*"[100]

This joint statement resulted into crash in biotechnology stocks.[101] Latter Clinton and Blair clarified their positions saying that patenting of specific human genes would be legal and appropriate.[102] The USPTO

97 John Sulston and Ferry Georgina, The Common Thread: A Story of Science, Politics, Ethics and the Human Genome, 266-67 (2002).

98 *Id.*

99 F. Collins, *Mapping the genome,* Online Newshour with Jim Lehrer *available at* <http://www.pbs.org/newshour/bb/health/jan-june00/extended_collins.html>

100 Matthew Rimmer & Alison Mclennan, Intellectual Property And Emerging Technologies: The New Biology 141 (2012).

101 James Shreeve, The Genome War: How Craig Venter Tried To Capture The Code Of Life And Save The World, 322–326 (2004).

102 F. Gaglioti, *Wall Street and the commercial exploitation of the human genome,*

issued press release and emphasized that '*genes and other genomic inventions remain patentable so long as they meet the statutory criteria of utility, novelty and non-obviousness'*.[103]He added: '*Genes and genomic inventions that were patentable last week continue to be patentable this week, under the same set of rules.*'[104]

The full sequence of human genome was completed and published in April 2003.[105] It suggested that there are approximately 20,500 genes in human body.[106]

C. Global Response

The apprehensions of the misuse of genetic resources are so dreadful, far-reaching and long lasting that the whole globe would be affected, and it emerged as a global cause for which all nations should give importance to it. In the globalised era, the negative effect of science and technology reaches must faster than its positive prospect. Science is becoming more globalised under IPR regimes and creating global challenges. In the light of this, there must be global efforts to minimise the negative effects. So international cooperation is required to harmonise and standardise the law relating to it. This situation has been perceived by some international bodies — particularly the United Nations Education, Scientific and Cultural Organization (UNESCO) and the Council of Europe —— that have made significant efforts over the last few years to reach a consensus on some basic principles relating to biomedicine including the use of human genes.[107] Presently there are two important international instruments which directly cover human genome – (i) The UNESCO Universal Declaration on the Human Genome and Human Rights (UDHGHR) and (ii) The UNESCO International Declaration on Human Genetic Data (IDHGD). Another two instruments indirectly deal with human genome are– (i) The UNESCO Universal Declaration on Bioethics and Human Rights and at the European level, (ii) the Convention on Human Rights and Biomedicine.

(April 10th 2000) World Socialist Website available at <https://www.wsws.org/en/articles/2000/04/gene-a10.html>; Glyn Moody, Digital Code of Life: How Bioinformatics is Revolutionizing Science, Medicine and Business (2004).

103 *Id.*

104 *Id.*

105 An Overview of the Human Genome Project *available at* <http://www.genome.gov/12011238>

106 *Id.*

107 Roberto Andorno, *Biomedicine and International Human Rights Law: In search of a global consensus, Bulletin of the World Health Organization*, 80(12) Bulletin of the World Health Orgnaziation (2002) available at <http://www.who.int/bulletin/archives/80(12)959.pdf> (Last visited 7th Feb 2015);

Universal Declaration on the Human Genome and Human Rights (UDHGHR)

UNESCO's General Conference adopted the Universal Declaration on the Human Genome and Human Rights in 1997.[108] Subsequently it has been adopted and endorsed by the United Nations General Assembly.[109] The UDHGHR is an extension of human rights perspective in the field of biology. Proprietary rights in gene affect the individual in many ways which ultimately result in to the violation of individual rights like right to health, right to privacy and other human rights as well. The mad race of gene patenting compelled UNESCO to make certain declaration about it. Declaration was the result of anticipation of various implications of HGP. It lays down very basic and broad statement of universal bioethical principles. Throughout its text it postulates a priority for the respect of human rights, fundamental freedoms and human dignity of individuals over research and research applications.[110]

First and foremost, declaration made in the documents is that "*the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.*"[111] This is the first international document which declares the gene as common heritage of entire humanity. This heritage of common cannot be appropriated by anyone. The human genome, which by its nature evolves, is subject to mutations. It contains potentialities that are expressed differently according to each individual's natural and social environment, including the individual's state of health, living conditions, nutrition and education.[112] The human genome in its natural state shall not give rise to any financial gains.[113] While Article 24 of the UDHGHR proclaims that:

"*The International Bioethics Committee of UNESCO should contribute to the dissemination of the principles set out in this Declaration and to the further examination of issues raised by their applications and by the evolution of the technologies in question.*"

The International Bioethics Committee (IBC)[114] submitted many

108 Universal Declaration on the Human Genome.
109 *Id.*
110 See for example Articles 2, 3 and 5 of The Universal Declaration on the Human Genome, 1997
111 Art. 1.
112 Art. 3.
113 Art. 4.
114 The International Bioethics Committee (IBC) of UNESCO was created in 1993. It is a body of 36 independent experts from across the globe consisting of different disciplines (mainly medicine, genetics, law, and philosophy) to follow progress in the biomedical science and its applications in order to ensure respect for human

reports on human genome issues since its inception. It also issued advisory on human genome patenting on 14th September 2001 titled "Advice of the IBC on the Patentability of the Human Genome".

In a very recent Review Report of ICB, "Report of the IBC on Updating Its Reflection on the Human Genome and Human Rights" published on 2nd October 2015. This report updated its reflection on various fundamental and topical issues. Five ethical principles and societal challenges have been addressed:

- ***Respect for autonomy and privacy:*** *an individual's genetic data are among the most "personal" data. They have to be protected;*
- ***Justice and solidarity:*** *genetics promises to offer an unprecedented contribution to improve health care. These advancements should be shared with society as a whole and with the international community; any discrimination has to be avoided;*
- ***Understanding of illness and health:*** *it might be emotionally relieving or, on the contrary, upsetting for an individual to know about his or her genetic endowment. At the same time, behavioural, social, and environmental determinants of health play a crucial role. Underestimation of the complexity of factors influencing health should be avoided;*
- ***Cultural, social and economic context of science:*** *globalization, access to information and growing pluralism strengthens the necessity of deeper reflection on the value, meaning, and direction of science as well as of a legal framework complying with the respect of fundamental human rights;*
- ***Responsibility towards future generations:*** *great and specific attention is required in the field of genome editing.*[115]

The International Declaration on Human Genetic Data (IDHGD)

This is another declaration of UNESCO which was adopted unanimously on 16 October 2003 at the 32nd Session of the General Conference of UNESCO.[116] This Declaration mainly recognises that

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dignity and human rights. In 1993, the IBC was entrusted with the task of preparing an international instrument on the human genome, the Universal Declaration on the Human Genome and Human Rights, which was adopted by the General Conference of UNESCO in 1997 and endorsed by the General Assembly of the United Nations in 1998.

115 International Bioethics Committee, *Report of the IBC on Updating its Reflection on the Human Genome and Human Rights*, Unesco (October 2nd 2015) available at <http://unesdoc.unesco.org/images/0023/002332/233258e.pdf> (last visited 24th Dec 2015)

116 International Bioethics Committee, *Report of the IBC on Updating its Reflection on the Human Genome and Human Rights*, Unesco (October 2nd 2015) available at <http://unesdoc.unesco.org/images/0023/002332/233258e.pdf> (last visited 24th

genetic information is part of the overall spectrum of medical data and that the information content of any medical data, including genetic data and proteomic data, is highly contextual and dependent on the particular circumstances. The main objective of this Declaration is to ensure the respect of human dignity and protection of human rights and fundamental freedoms in the collection, processing, use and storage of human genetic data, human proteomic data and of the biological samples from which they are derived.[117]

Universal Declaration on Bioethics and Human Rights (UDBHR)

This Declaration was adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in October 2005 which addresses ethical issues relating to medicine, life sciences and associated technologies as applied to human beings, taking into account their social, legal and environmental dimensions.[118] The main aim of this declaration is to promote respect for human dignity and protect human rights, by ensuring respect for the life of human beings, and fundamental freedoms, consistent with international human rights law.[119] The Declaration covers various aspects of the human freedom and dignity like respect for human vulnerability and personal integrity,[120] privacy and confidentiality,[121] equality, justice and equity[122] non-discrimination and non-stigmatization,[123] respect for cultural diversity and pluralism[124] and social responsibility and health[125]. It also talks about the constitution of Ethics Committee. Independent, multidisciplinary and pluralist ethics committees should be established, promoted and supported at the appropriate level in order to assess the relevant ethical, legal, scientific and social issues related to research projects involving human beings[126] and provide advice on ethical problems in clinical settings as well as assess scientific and technological expansions, formulate recommendations and contribute to the preparation of guidelines on issues within the scope of this Declaration[127]

D. Conclusion

Human genomic material is common to all individuals and should be

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Dec 2015)
117 *Id.*
118 The Universal Declaration on Bioethics and Human Rights, art. 1 (1997)
119 Art. 2(c).
120 Art. 8.
121 Art. 9.
122 Art. 10.
123 Art. 11.
124 Art. 12.
125 Art. 14.
126 Art. 19 (a.)
127 Art. 19 (b) and (c).

available in the public domain for research and expansion as opposed to being under the exclusive control of only one entity.[128] Moreover, it is seen that in most developed and developing countries, genetic research is essentially public funded. Hence there exists no rationale as to why rights should be conferred over one specific individual or corporation as patent holder. This defies the concept of benefit sharing particularly when every individual has a right to accrue benefits from genomic research.

The theological aspect of most religions raised several questions about the gene patenting. It is well known concept that genes are the product of nature and part of human body which is common to all. Thus, this can't be the subject matter of ownership in any form. The basic reason applied for the isolated and purified genes is that it is not natural product but isolated in the laboratory but the main component of isolated genes come from natural genes itself. The main concern of gene patent is the concern human health.

The character of gene patents and its implications on right to health calls for a prudent and vigilant approach. What needs to be understood is that it is not only the modern-day patents, but rather the inventors' moral and material interests that are protected under human rights law. There, thus, arises need to fortify the rationale as laid down in the Myriad judgment which expressly excludes genes from patentable subject matter. This need should however be appreciated in light of appreciated practical difficulties in excluding genes from patentable subject matter *per se* on its *propensity* to infringe right to health.[129] Moreover, cue may be taken from the express exclusion of business methods from patentable subject matter considering policy repercussions and exclusion in various jurisdictions.

As we have seen throughout this chapter, ethical considerations arise against gene patenting in various ways. The principles of ethics and morality also say that genes should not be patented. If we grant patent, we are restricting access to knowledge which basically should be in public domain while at the same time, if we reject patent, we are discouraging scientists from continuing research on the field.

The meeting ground of ethical consideration to gene patenting and the actual working of it is '*right to health'*. The concept of patenting in biotechnological invention promotes advancements in medicine and genetic engineering that justifies the practice of granting such patents. However, in light of the ethical arguments regarding patenting of

128 Suzanne Ratcliffe, *The Ethics of Genetic Patenting and the Subsequent Implications on the Future of Health Care,* 27(2) Touro L. Rev., 443 (2011).

129 Mathews P. George & Akanksha Kaushik, *Gene Patents and the Right to Health*, 3 Nujs L. Rev., 323, 335 (2010).

genomic material, what needs to be seen is whether there is a balance between public and private interest in the current gene patenting framework. The general public's interest lies in securing new medicines and modes of treatment at affordable prices while the private interest lies in securing adequate return on the investment by the investors and patent holders. It is to be noted that the patent framework was initially designed to promote inventions and not investments.[130] Thus different considerations have to be weighed by the patent framework before it proceeds to grant exclusive rights to researchers over there medical research. It needs to be seen that health and safety of the country does not suffer due to granting of patents on DNA or uses of it.[131]

The line of distinction must be drawn between patenting of genes of human and other animal and plants. Exploitation of nature and its resources has always been accepted by the human community but at the same time exploitation of human body and its components for economic gains has never been appreciated. The patenting of human gene is against the religious norms and established principles of philosophy and ethics.

130 Amanda S. Pitcher, *Contrary to First Impression, Genes are Patentable: Should there be Limitations*, 6 J. HEALTH CARE L. AND POL'Y, 284, 300 (2002-2003).

131 *Id*

Agricultural Reforms: A Step Towards a New Era for the Farmers?

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Abstract

This article contains an overview of the Indian agriculture sector starting from the time of Independence. Since the time the British left our country, they had provided us with the legacy of our agricultural sector which was in complete shambles, the small and marginal farmers and the farm labourers were barely making their ends meet. With little or no infrastructure for irrigation or be it storage of the crop produce. It was really a herculean task for India to rise up to the challenge and take out our agricultural sector from such disdain. Initial Five-year plans focused solely on this requirement but the tradition of Zamindari, Tenantship was such complex that it required slew of other measures along with it to cater to this sector such as Land Reforms and change in tenancy rules which were undertaken by the government along with. After the opening up of the Indian economy in 1991 which certainly boosted agricultural sector too with increase in exports of our produce much was still left to be done and these new farm laws are the reforms which our agricultural setup was desperately vying for since long.

Introduction

Ever since the three agricultural bills intending to revolutionise our agricultural sector and to bring about substantial lifestyle changes in the lives of our farmers, it has been subjected to many controversies and debates across the country. Cutting across the political spectrum the newly bought acts was appreciated by many political parties and agricultural experts while having its own fair share of criticism also. Are these acts really going to have an everlasting affirmative impact on farmers and if its objectives happen to be really met then will it be a gamechanger for the agricultural industry which had been vying for structural overhaul for decades now. Let us have a look at all the three acts that has been passed by the parliament.

The Long-Standing Need for Structural Changes Finally Being Met?

After our country got independence from the colonial rule, two third of India's population was depended on agriculture to sustain their livelihoods and this was the reason India was called as an agrarian state. Though large amount of population was engaged in agricultural

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activities any effective rules or laws was absent to regularise the whole ecosystem and to administer growth in this sector. First attempt in this direction was bringing of *Zamindari abolition Act* by the various state governments which Supreme Court held as unconstitutional but the legislature thereafter amended the article to correct their actions. During the British era Zamindars or the intermediaries were the owners of the land. They use to collect rent from the farmers (it would be preferable to call them as farm labours). The farm labours use to put their heart and soil into the crop cultivation but was charged exorbitantly by the zamindars who use to keep their share of commission and send the remaining amount to the British. This way the farm labours who were the actual force behind the produce grown was forced to live in shatters. The Zamindars were also not interested in looking after the efficacy of soil as a result the quality of the soil was also degrading gradually which was severely affecting the quality of the produce. Sensing this and in a bid to meet the objective of social justice and to improvise the quality and the quantity of the produce grown by the farm labours, many state governments brought Zamindari abolition Act. The purpose of which was to make the farm labours the owners of the land and to end this Zamindari Raj. With the coming of this legislation the farm labours were now owners of the land which they use to cultivate, this resulted in two very positive Observations: a.) The lifestyle of the farm labours changed and they were now living in a far better living conditions then earlier. b.) The quality and the amount of the produce rose to manifolds in quick succession of time as the farmers after attaining sense of entitlement to the land started investing in soil and would spend more to sow good quality of seeds which were earlier neglected by the Zamindars.[1] However this did a quality job but was not enough to bring the agricultural sector out of disdain. Subsequently many state governments brought Tenancy Regulation Acts to regularise the rents paid by the tenants to the government. During pre-independence era it was around thirty-five to seventy five percent of the gross produce.[2] It is not difficult to imagine how harsh it would have been on the cultivators. Now this tenancy regulations limited the rents to be paid by the cultivators to the land owners up to anything between twenty percent to thirty five percent. Not only this the tenants were also given ownership rights up to the certain period so that they can engage in their farming activities without the fear of being evicted anytime by the landlords. The First Five Year plan prescribed the procedure to be followed during eviction which prescribes notice to

1 Published by Oxford University Press on behalf of the Agricultural and Applied Economics Association

2 https://www.gktoday.in/gk/tenancy-reforms-in-india/#:~:text=Tenancy%20reforms%20aim%20to%20regulation,them%20directly%20under%20the%20state.

be given six months before and also guaranteed fixed compensation.[3] This legislation helped to achieve the goal of social justice up to many extents. This helped to raise the living standards of the tenants but to increase the efficiency of the land and to enhance the production of the crops National Policy for Land Ceilings and Consolidation of lands was formulated by the government of India in 1972. Before this many states on their own had started with this practice wherein ceiling of land was fixed for an individual and surplus lands were redistributed to the landless.[4]Consolidation of Land was also one of the major steps which helped to increase the quantity of produce, people with fragmented lands were provided land at one place. The objective behind this was to eradicate the barriers which use to be there to mark the land boundary as it used to consume a wide range of area which was left unutilised and also to save the farmers from unwanted litigation. This also reduced the transportation costs these small farmers use to bear while moving their equipment from one part of the fragmented land to the other while reducing their hardships subsequently.[5] One more revolutionary changes in the agricultural setup happened in 1951 when Acharya Vinobha Bhave undertook the national movement to encourage the landlords with large lands to voluntarily give the lands to the landless labours as a Gift. The veteran Gandhian appeals slowly started yielding results with many big landlords started donating land to the farm labourers on their own.it gain massive popularity and became a talking point across the country when Nizam of Hyderabad gave large share of his land to the farmers.[6]

Now all these measures with a slew of other policies and initiatives lit a wafer-thin fire to cook a meal of agricultural advancement in India. Though a lot was done but far more on the platter was left to be done. These measures if we see was somehow instrumental in shaping the life and habitats of our farmers and also in increasing the quantity of the produce up to many folds while also significantly improving their quality. Soil was also nurtured to grow crops in between sowing of fresh crops and harvesting of the old. The clear result of these soon became evident in the lives of farmers from the states like Punjab, Haryana, Western Uttar Pradesh and Rajasthan. Having security of land and a concrete house being built their children started moving towards big cities for higher education. Tractors had now replaced bulls to till the farm and tube wells got setup for irrigation, now they need not wait for monsoons. But when we come to states like Bihar, West Bengal,

3 First Five Year Plan of Govt. Of India
4 National Policy for Land Ceiling and Land Consolidation 1972
5 National Policy for Land Ceiling and Land Consolidation 1972
6 https://mrunal.org/2013/11/land-reforms-bhodan-gramdan-jan-satyagraha-2012-other-non-governmental-movements-achievements-obstacles-limitations.html (last visited on 05/10/2020

Madhya Pradesh and Odisha not much change was visible upon the farmers. Primary reasons being failure of the state governments of the respective states in the proper implementation of these acts in their true spirit. When we don't have a blanket legislation which covers whole of the country then to expect uniformity in results would be unfair. If you have aspersions that having a uniform legislation for this diverse country with varied demography and geography then perhaps more flexibility to the state government could have been given while keeping enact the true essence and the objective of the law. That could have very well managed to subside this disparity which possibly might have arisen just because of lack of mechanism to keep a check on the rolling out of these policies in these states.

After all this not much was done to the agricultural sector till New Economic Policy (NEP) of 1991.NEP has far reaching impact on:

- Agricultural Exports and Imports
- Investment increased in new technologies for agricultural activities
- Infrastructural Development relating to agri-sector
- Paradigm shift in patterns of growing produce
- Sharp rise in income
- Rationality came in the prices of crops
- Food security both for the country as well as for the farmers

The new economic policy was enacted on the pillars of liberalisation, privatisation and globalisation. Its impact on the agricultural sector could have been huge in a positive way nevertheless it was to a far greater extent. With a greater production of the crop produce we began exporting many such produce. This was exemplary and really unthought of by many of the agri-experts and even the ordinary sections of the society. With the advancement in the informational technologies in the late nineties due to the foreign investments coming in agricultural sector also received few benefits like with the new mapping devices the quality of the soil was evaluated as to what it suits best for and what need to be done to further enhance it qualities. Weather reports were easily available to the farmers with the help of which they could plan their sowing and cultivation and many more such kind of benefits which were significant. Crop research was also undertaken to study the diverse pattern of the Indian agricultural produce. But it was somehow restricted to only certain segments. Realising these various institutions like Open GIS committee, National bureau of soil survey and soil use planning and various projects like Agro climatic regional planning (ACRP) project, Agro Ecological mapping project, Land records computerisation project, Drought prone area development program,

National wastelands development program and many other such type of missions to facilitate the agricultural sector.

These however did the required job till quite an extent but still much was left desired. After the New Economic policy (NEP) of 1991 nothing concrete was done for the agricultural sector and for our farmer brothers or annadatas until recently when the three farm bills was brought by the government.

The New Farm Laws which lead the Agricultural reforms

With the aim to double the income of farmers and to bring a significant transformation in our agricultural sector the government brought three farm bills in September 2020 and got it passed by the both the houses of the parliament amidst the hue and cry made by the opposition. These bills then received assent from the president on 27th September 2020 to became acts and thus consequently known as the farm acts. The prime minister of India described it as the Watershed moment in the history of the agricultural sector. Now let us discuss in detail these three acts passed by the parliament first.

The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act 2020

Since independence farmers use to sell their produce to their nearest Agricultural Produce Market Corporation (APMCs) under the state governments which use to levy tax on the produce. In addition to this there were licensed middlemen (Arhatiyas) registered under the state government who use to charge commissions from the farmers in order to facilitate bargain of their produce. Imagine how torturous this would have been to the farmers. Do the income of the farmers from those produce be so high so that they can pay the tax to the state government and also pay commission to the arhatiyas or the licensed middlemen and not to forget the exorbitant transportation prices to be paid by them to bring their produce from the remote farms to the mandis. One wonders what would have been left with them in the end. How would they be running their family, fulfilling out their essential household chores and this after they put their life and blood into cultivation. One more hurdle which generally small and marginal farmers have to face is that middlemen are biased towards few of the farmers who bond well with them and are generally affluent. Even if their produce is of secondary quality they were being offered good prices in comparison with farmers with the produce of high quality use to get far less price then what they deserved. They were purposefully made to wait for long time out in the open in intense heat, rain and bone chilling cold just to satisfy the egos of big farmers or the middlemen. This act has

been brought with this very objective of befreeing the farmers from the clutches of these middlemen and to stop their mental torture. This act provides the liberty to the farmers to sell their produce wherever they want across the country, not just restricting to the nearest APMC as was the case earlier. They can sell their produce wherever they get the best suited price for their crops be it interstate or intrastate. Most importantly this relieves them off the tax and commission to be paid to the state government and the licensed middlemen respectively. This is bound to make their lives much easier.

The Farmers (Empowerment and Protection) Agreement and Price Assurance and Farm Services Act

With the coming of this act farmers are now open to contract with any agri-processing firms, big retailers. Vendors or any private investor who offer them the price which they had quoted. This act basically provides for contract farming in the agricultural sector having put in place the required safeguard for our farmers. Now any investor can directly approach the farmers even before the crops are sown and contract for it. This will benefits the farmers manifolds. Small and marginal farmers who face the shortage of initial working capital before sowing of the crops will receive advance payments from the buyers, apart from stopping the farmers from falling into debt traps this will also enhance the quality of the produce as the farmers will be in the position to buy fertilisers and good quality seeds easily. Farmers need not slate their foots by going to the banks for loans or begging to the big landlords for credit and mortgaging their lands to them. They will be saved from paying interests which robs them of their net earnings. This act only empowers the buyers to make contracts for the crops and not of land under any circumstances, hence farmers land will always be secured for him.

Dispute Resolution

In chapter three of this act the dispute resolution mechanism is provided in three layers:

- The conciliation Board appointed by the SDM

  Under section 8 of the act the farmers and the buyers can approach the SDM in case of any dispute by filing an application for mutual reconciliation before the sub divisional magistrate who will then form a board with an officer under his control as a chairman and representatives from both the parties. If within thirty days the board is not able to resolve the dispute then SDM will take a cognizance of the matter and will himself adjudicate acting as the sub divisional authority (SDA).

- Appellate authority (Collector or additional Collector)

If any of the parties is not satisfied with the order of the SDA or the Board appointed by the SDM then within thirty days. Every order passed by the SDA or the board appointed by him or by the appellate authority shall have the force of a decree of civil court.

- Appeal to the officer of Joint Secretary Level

  Still if the dispute persists then an aggrieved party can Within sixty days from the order of the appellate authority can approach the officer of Joint Secretary level to the government of India nominated for this purpose.

THE ESSENTIAL COMMODITIES (AMENDMENT) ACT

The government has now removed food commodities like potato, pulses, cereals, edible oil, oilseeds from the list of essential commodities. This has been done to attract the private as well as foreign investments in this sector. With regulation now been restricted to only limited items private investors will not be hesitant to invest fearing lots of unnecessary regulations and this would provide them an open field. This has a bright positive side too that this will boost up our agricultural infrastructure which is the need of the hour. Big retailers will build their own cold storage and will put in place their own supply and distribution system which will reduce the time of the produce to reach the consumers and farmers will also not have to invest in transportation.

Conclusion

After having a glance at the agricultural sector right from the period of independence cutting across the era of 60s and of new economic policy of 1991 until the Agricultural reforms of 2020, it can be said that these reforms were very much needed for India's agricultural sector and to raise the living standard of our farmers working in his farm in a remote village far away from the lives of mainstream society, it is our duty to provide them with a ordinary life which every citizen deserves. Not to forget contribution of every single farmer counts when it comes to the question of food security for our country. Now coming back to these newly undertaken reforms one must admit that this is a step in right direction. Though there is bound to be few contentions as these are the new laws but it will gradually become foolproof in a passage of time after its implementations once the problems from the ground are received. But overall, these are the reforms which even the National Commission on Farmers best known as Swaminathan Commission has also recommended in the year 2006. We must understand this very clearly that if there is anyone going to be the beneficiary of it is going to be any ordinary consumers like you and me and our farmer brothers. These laws are making both the consumers as well as the

farmers the king. Now let me tell you how? We all go the supermarkets or the departmental stores of various brands for shopping. There we see a segment dedicated to the agricultural produce like fruits, vegetables and dairy. The prices of those produce kept there with a price tag quoting a value sky-high is going to be reduced. Yes, you read it correct prices of the produce there is going to be reduced. Suppose a supermarket named Kig Bazaar directly going in the farms of the states like Uttar Pradesh, Bihar, Punjab, Rajasthan or West Bengal and striking the deals with the farmers there. What price farmers will want from them? Let us say even if they demand the price what they were getting earlier in APMCs (we are considering the least) Now Kig Bazaar gets it in the APMC price and even after keeping their profits they will be selling in around the rates at which these Arhatiyas use to sell to the vendors or to these supermarkets. This means us Consumer is getting the produce at the price at which arhatiyas use to sell to the vendors and these supermarkets like Kig Bazaar. And now what benefit does the farmers received? Firstly, their crops got insured even before it was sown. Secondly, when the deal was finalised, they got advanced payment which gave them the initial working capital saving them from debts. Thirdly, they were saved from paying tax levied by the government. Fourthly, they were saved from paying commissions to the Arhatiyas (licensed middlemen). This apart from being saved from undergoing mental tension that whether their crops will be sold or not once it is cultivated .and not to forget here we have taken into consideration the least amount quoted by them to the buyers like Kig Bazaar. Now after this even ordinary citizen will agree that these reforms are in the best interest of both consumers and the farmers. Now after this one of the few arguments left with the people opposing these reforms are if large scale privatisation happens APMC will be forced to close and middlemen will lose their jobs. Here we need to see the precedence in our country private investments in any industry have only made it better. Had private investment not been there in telecom sector can one imagine India looking forward to 5th Generation internet services with only BSNL being there likewise had private airlines like Indigo, SpiceJet, Air Asia not enter the fray in aviation sector would Air Asia alone could have catered to the needs of the growing demands in the industry, certainly not. This is how it works; Foreign and Private investments only increase the fair competition and enhance the quality of services for the consumers. This is how agricultural sector is also going to flourish in the times to come.

Analysis of Draft Environment Impact Assessment (EIA) Notification, 2020: More harm than good?

***Mr. Abhishek Iyer**

Abstract

Environment Protection Act, 1986 is the statutory pillar behind India's Environment law governance. In a bid to efficiently address and take cognizance of activities that directly or indirectly utilise, affect, or pollute natural resources, the Environment Impact Assessment norms are a powerful tool to identify environmental hazards and social impacts of any projects including infrastructural or industrial projects before granting its clearance for construction. This method of predicting environmental impacts at an early stage of a project helps reduce the adverse environmental impacts that can possibly arise at a later stage. The 1994 Environment Impact Notification was a first centralized baby step towards achieving sustainable development which was followed by a fresh 2006 notification that provided for a very systematic overhaul thereby ensuring even the smallest projects got their environmental clearance but this time, from their respective state governments. On 23rd March 2020, the Draft Environment Impact Assessment Notification, 2020, was issued which when notified subsequently, shall permanently replace the existing 2006 norms. The proposed norms in this particular draft of 2020 have certain key and very monumental changes that aim at 'ease of doing business. Through this paper, the author shall discuss the 2020 Draft notification in detail including the key highlights and important points as proposed, and critically analyze it in the light of India's environmental law parent legislation and international obligations. The author shall also briefly trace the evolution and intention behind the EIA norms and how it has developed. Lastly, the author shall compare the proposed norms with the existing norms to understand if this overhaul through Environment Impact Assessment, 2020, shall do more harm than good.

1. History and Background:

Environment (Protection) Act, 1986[1] [Hereinafter 'the 1986 Act'], grants the Central Government with the powers to impose certain restrictions and prohibit undertaking of certain projects or expansions which are primarily seen as to be suppressing the Environment Impact Assessment Notification(s) [Hereinafter 'EIA'] norms as issued

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1 Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India).

by the government and its subsequent amendments. *Section 3(1)* of the Act[2] allows the government to *"protect and improve the quality of the environment"*. India is a signatory of the Stockholm Declaration[3] through which the larger obligation of ensuring total control over environmental damage arises. Following its obligation, India passed efficient laws to control water[4] and air pollution[5]. The incumbent need to have an umbrella law that covers the widest ambit of environmental exploitation was realised when the infamous *Bhopal Gas Tragedy* happened in 1984. Within two years, the 1986 Act was passed which defined 'environment' as a very wide term to facilitate efficient coordination of the existing water and air pollution laws in India. The 1986 Act was an umbrella framework that established a systematic mechanism for coordination of central and state authorities by issuing notifications, rules, and directions that ensure that any non-compliance or contravention to the Environmental law framework in India shall lead to adverse consequences.

In furtherance of the abovementioned powers with the government and its objectives towards sustainable development, India's first EIA notification was issued on 27th January 1994[6] which made Environmental Clearance [Hereinafter "EC"] mandatory for any expansion activities and modernisation projects. Schedule 1 of the 1994 EIA notification had a list of projects which mandatorily needed the EC from the central government. This was a momentous occasion as India fulfilled its International environmental obligations of putting in place a stringent framework to check on unruly exploitation of natural resources and other environmental violations. Despite its few shortcomings, this EIA notification of 1994 held its feet till 2006.

In September 2006[7], a fresh EIA notification replaced the 1994 norms and had a more detailed approach towards classifying industries and also particularly covered small scale industrial units amongst others for compulsorily obtaining EC. A new categorical classification for projects was introduced and divided into *Category A* and *Category B* projects. The first category of projects as specified in Category A had to mandatorily get the EC and need not undergo a screening process for separate determination. On the other hand, Category B projects

2 Environment (Protection) Act, 1986, § 3(1), No. 29, Acts of Parliament, 1986 (India).
3 IPCCH, https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6471 (last visited 26th Oct., 2020).
4 The Water (Prevention and Control of Pollution) Act, 1974, No. 06, Acts of Parliament, 1974 (India).
5 The Air (Prevention and Control of Pollution) Act, 1981, No. 14, Acts of Parliament, 1981 (India).
6 Ministry of Environment and Forests, http://extwprlegs1.fao.org/docs/pdf/ind4656.pdf (last visited 26th Oct., 2020).
7 Ministry of Environment and Forests, http://www.environmentwb.gov.in/pdf/EIA%20Notification,%202006.pdf (last visited 26th Oct., 2020).

underwent initial screening and were further classified into *B1 Project* (Mandatorily require EC) and *B2 Project* (Did not require EC). Apart from this, another noticeable change can be remarked through the decentralization of powers that now allowed state governments to give EC to industrial units depending on the size and capacity of the industrial project. The 2006 EIA notification had a 4-stage established process which included *Screening, Scoping, Public Opinion*, and *Appraisal*.

Although the EIA norms and the process of obtaining an EC are defined into a stage four-stage process but for a comprehensive understanding, this multi-faceted cycle broadly involves the following steps/stages:

- Screening: The initial project plan is scrutinized to understand the location and feasibility of the proposed industrial project. The authorities herein also look to examine if the said project needs a statutory Environmental clearance.
- Scoping: The impact of the project is quantified to understand the possible risk involved and the mitigation possibilities.
- Collection of environmental data of the said area where the project is proposed.
- EIA report: This comprehensive data report will include the actions and steps to minimize probable risk and also determine the compensation matrix for all the probable environmental loss and damage as an outcome of the project.
- Public opinion: The above-mentioned EIA report is made public so that the relevant stakeholders, environmental focus groups and, the public in general around the proposed development area can be consulted for their grievances/feedback.
- Final decision: At this stage, the Impact Assessment Authority usually in consonance with the project-in-charge will take the final decision keeping in mind the EIA and the management plan for the said project.
- Implementation of plan and monitoring of the plan
- Lastly, the mitigation measures are calculated in case there is any specific delineation from the proposed plan of a particular project. Risk assessment and hazard probability are also taken into consideration with the Environmental Management Plan which promotes environmental improvements.

Following the 2006 EIA norms, the Ministry of Environment, Forest and Climate Change [Hereinafter "MOEFC"] proposed the updated

EIA norms for 2020. To promote the larger objectives of sustainable development and saving the environment, the MOEFC in March 2020, published the Draft EIA.[8] The MOEFC had sought comments and feedback till the 11th of August, 2020. Although the feedback process seemed simple at face value, the time span given for the comments was extremely less and the public visibility of the Draft EIA, 2020 was second to none which indirectly meant that many important stakeholders weren't given a satisfactory time period to share their comments and feedback to the MOEFC. The Draft EIA 2020 has its share of some major shortcomings raised by several stakeholders, reputed scholars, and other organisations. While the government is caught amidst the chaos of COVID-19, the lack of response to such feedback raised by the citizens is rather problematic.

2. Key Highlights of Draft EIA 2020:

Ever since the Draft EIA 2020 was notified the larger opinion from the stakeholders has been contrary to what the government intends to pursue through the changes introduced in this particular notification.

The following are the key highlights of the Draft EIA 2020 which intends to replace the 2006 norms and establish a fresher dimension of industrial projects and sustainable development:

- Rule 5(1) – Projects are divided into three categories – Category *A, B1*, and *B2*.

  The determination of category is based on the environmental impact that the project is potentially seen as to be having.

- Rule 4 - Two kinds of approval are introduced by the EIA 2020. The first one is *Prior Environment Clearance* (EC) depending on the project category either to be obtained from the ministry or the regulatory body. Secondly, *Prior Environment Permission* (EP) for certain *B2* categories of projects as specified in the EIA 2020.

- Rule 14 - Projects such as those relating to irrigation, halogen production, chemical fertilizers, acids manufacturing, biomedical waste treatment facilities, building construction, solar projects, and all other projects classified as *B2* are exempted from public consultation. This is an important development since the room for objection and feedback for a proposed project is ruled out because of this express exemption.

- The Draft EIA 2020 also broadly exempts close to 40 different projects from any requirement of obtaining prior EC or EP.

8 Ministry Of Environment, Forest And Climate Change, Draft Environment Impact Assessment 2020, http://environmentclearance.nic.in/writereaddata/Draft_EIA_2020.pdf (last visited 26th Oct., 2020).

- The Draft EIA 2020 also brings in *Ex-Post Facto* clearance for projects. Going back to March 2017[9] notification which legitimised all environmental violations. This essentially means that industrial units and other projects that are operating as of now illegally, without any environmental clearance, can now submit a remedial plan to turn their illegal project into a legal one. This clearance allows projects to go back in time and obtain their EC or EP by merely paying penalties. However, there is no substantial reasoning behind the intent of such a provision which aims to allow illegal businesses currently without an EC or EP to get the same by merely paying penalties.
- Another important change that has been introduced is that any scope of reporting a possible environmental law violation arising out of the development of any project has been limited to only the project proposers themselves or the appropriate government/ regulatory authorities.
- Draft EIA 2020 aims to promote 'ease of doing business' by not hindering the already functional businesses merely on the ground of non-compliance. Such projects are allowed to pay penalties and get their remedial plans approved so that they are promptly given the EC and their older liabilities can be cleared as per the dues charged. This is a visionary move trying to promote easy business doing in India.

3. Critical Analysis of Draft EIA 2020:

Protection of the environment and improving its overall existence is a primary duty of every citizen of India[10]. Time and again, citizens are being made aware of different tools and methods to protect and save our environment.

The proposed EIA 2020 is yet to be officially enforced but since the comments/feedback stage is over and it's been quite sometime now, the enforcement of EIA 2020 is not too far away. Only time will tell if the critical comments raised by several important stakeholders have been regarded by the government before its final version is made public.

The following are some critical issues that the government has perhaps not elaborately dealt upon and when critically thought upon, enrages the people at large:

9 Ministry Of Environment, Forest And Climate Change, http://www.moef.nic.in/sites/default/files/S.O.804(E)%20-%20Violation%20of%20EC%20Cases.pdf (last visited 26th Oct., 2020).

10 India Const. art. 51A(g).

3.1 *Ex-post Facto* grant of EC

- This is a matter of big concern which ultimately legitimizes the illegal businesses that are operating thus far without requisite EC. The government has not justified its stand on the introduction of such a clause which totally disregards the environmental damage and converts that into a monetary penalty. Damage to natural resources cannot be undone nor can it be calculated as penalties to replace the actual damage. Illegal industries and projects now get a lifeline which was never sought by the environment. We can also say that this damage to environment has been overlooked by the government who now focus on the revenue part of it through levying penalties.
- The Hon'ble Supreme Court of India has earlier dealt with *Ex-Post Facto* clearance in the context of Environmental jurisprudence. In *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors.*,[11] Hon'ble Supreme Court had reiterated that any attempt to grant *Ex-Post Facto* clearance would be void. It held that, "*ex post facto clearances are unsustainable is law and void.*" Supreme Court was examining the findings of the Hon'ble National Green Tribunal and reiterated its findings which had categorically disallowed any environmental clearances in a retrospective manner.
- Even in *Common Cause v. Union of India*[12], it was a settled proposition that "*the concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence.*"
- Not just this, there have been instances of projects being approved and their violations of environmental laws have been remedied by merely levying fines. Recently a coal mining project got approved[13] in Assam's Dhing Patkai region. The Assam Forest Department after approving the project slapped a fine to the tune of 43Crore rupees for illegal mining in that very region since 2003. So essentially, the 16 year old track record or illegal mining was overlooked by slapping this penalty. Now, the mining project lives on despite being blatantly illegal and continuously violating Environmental norms.

4.2 Reclassification, exemptions and exclusions of projects from certain categories:

- Forty different projects have been exempted from the need of applying for a prior EC or EP. *Clause 26* of the EIA 2020 allows several thermal plant projects, extraction, maintenance, digging,

11 Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors., Civil Appeal No. 1526 of 2016.

12 Common Cause v. Union of India, W.P (C) No. 215 of 2005.

13 Editorial Outlook India, *Coal India slapped Rs 43.25 cr fine for illegal mining in Assam forest*, Outlook India (May 06, 2020), https://www.outlookindia.com/newsscroll/coal-india-slapped-rs-4325-cr-fine-for-illegal-mining-in-assam-forest/1825791.

work relating to construction of buildings etc. without having the need to obtain any prior EC. Community works no longer need any EP or EC. Further, construction below 150000 sq. mtr are also exempted from seeking EC.

- ***B2*** category of projects that are also classified in the RED category, basically meaning the potential impact of such projects on the environment to be high can now operate without the need of any public consultation.
- As mentioned earlier, any violations of environmental norms or the clearances can only be reported by the authorities incharge or the proposer of the project himself. Realistically speaking, no proposer shall report a violation of environmental norms of his own proposed project.

4.3 Other Aspects

- Earlier the compliance reporting obligation on the proposer of the project was kept half-yearly meaning which, once in every 06 months the proposer had to file his environmental compliance report. The EIA 2020 aims to extend this period of filing the compliance report from 06 months to one year. There has been leverage given to the industrial proposers who surely are investing lot of money. But this lethargic approach is coming at the cost of our environmental resources and this unjustified extension for filing reports is totally uncalled for.
- The Draft EIA 2020 norms do not justify international environmental principles and favouring projects at the cost of the environment is contrary to the intent of any environmental law in India. The National Green Tribunal in *Society for Protection of Environment & Biodiversity v. Union of India*[14] had rightly stated that *deregulation of environmental legislation favours development at the expense of the environment*. Looking at how the provisions of the proposed EIA 2020 turn up, it is evident that the government is emphasizing more on promoting business which unfortunately is coming at a deep environmental cost.

"Polluter Pays" is an internationally recognized principle whereby the promoter of a project in this case who pollutes or reasonably foresees any possible environmental damages has to pay for it[15].

14 Society for Protection of Environment & Biodiversity v. Union of India, No. 677 of 2016.

15 LSE and Grantham Research Institute on Climate Change and environment, *What is the polluter pays principle?*, LSE GRICCE (May 11, 2018), https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle/#:~:text=The%20'polluter%20pays'%20principle%20is,human%20health%20or%20the%20environment.&text=This%20principle%20underpins%20most%20of,affecting%20

EIA 2020 has a very distinct approach where it has quantified the possible environmental damages into a capped penalty limit. While a reasonable economic analysis will make us better understand that the costs incurred or levied as penalty should be proportionate to the environmental damages. The polluter here does not pay not even close to what the possible damage is foreseen due to the proposed project or development work sans proper clearance.

Although the government seems to be pro-development but so exemptions from EC or EP for medium sized projects shall lead to higher carbon emissions.

India ranks at a bottom worst of 168th position[16] in the 2020 Environmental Performance Index (EPI). Despite have a shoddy environmental maintenance record, India's pro-money EIA 2020 norms are doing more bad than good. The government's systematic refusal to listen to key stakeholders and consider their opinion shall sure pay off negatively in the times to come.

4. The long list of pending litigations against Draft EIA 2020:

As stated earlier, a critical analysis of the draft raises several important questions that are creating a disbalance between economical benefit and the larger aim of saving the environment. While many continue to argue that the EIA 2020 is in the hindsight overlooking the basic aspect of saving the natural resources for some substantial monetary benefit, doors of the judicial bodies have been knocked to seek proper relief. Ever since the draft was opened for comments and made public, there has been a host different litigation proceedings initiated at various forums across the country.

The following are some important petitions that are been heard currently, challenging various aspects directly or indirectly connected with the proposed EIA 2020:

- EIA draft has been published in English and Hindi while there is no provision for any other linguistic version of the same to be made available publicly. Hon'ble Delhi High Court in *Vikrant Tongad v. Union of India*[17] had not only ordered extension of the timeline for filing public comments but also directed the Union to upload translated version of the draft EIA 2020 within 10 days of the order. While the time frame for public consultation/comments was increased promptly to August 11th but the government failed to upload any translated versions of the EIA draft 2020 until late

land%2C%20water%20and%20air.

16 Environment Performance Index – Yale Edu, 2020 *EPI Results*, YALE (*Jan*, 2020) https://epi.yale.edu/epi-results/2020/component/epi.

17 Vikrant Tongad v. Union of India, W.P. (C) 3747/2020 & CM APPL. 1342/2020.

September[18] when a final ultimatum was given.

- The centre instead approached the Supreme Court which directed the centre to file a review before the Delhi High Court first. Supreme Court had agreed in spirit that the translation was necessary. In the review petition[19], the centre objected from publishing the draft in any other languages as sought by petitioners because it did not have any duty to acknowledge any languages other than those under Official Languages Act, 1963.
- *United Conservation Movement*[20] approached Karnataka High Court to seek time extension for comments which was rightly extended by the High Court till 7th September. Centre was again called up for non-publication of the same in vernacular languages. However, the publication of final EIA 2020 has been stayed till the time translated versions are uploaded, which happened in late September almost 6 months after it was first released.

A slew of other important petitions are currently pending are listed to for hearing in various High courts including in the states of Tamil Nadu, Karnataka, etc. The centre is failing to understand that any industrial project or infrastructural project is a participatory process where the public in general and other environmental stakeholders have a bonafide interest. Draft EIA 2020 in its basic sense is curtailing this right of people to opine about the proposed projects. Bureaucratic interferences and rules that do not allow public participation is an antithesis to development. Even the Hon'ble Delhi High Court in *Samarth Trust Case*[21] had noted that public participation through EIA for decision making which involves large scale projects and development is "*a part of participatory justice which gives voice to the voiceless*".

5. Conclusion:

The government's role is under severe scrutiny after the Draft EIA 2020 was published. Never ending criticism and the government's non encouraging responses have posed a difficult question as to whether the government's job is to be a pro facilitator of development projects or a very cautious environmental regulator. This is the same government that can perhaps promote hardcore public interest and ensure that people in general or stakeholders of a particular project

18 Editorial Tribune, *Centre translated draft EIA 2020 in all 22 languages after HC deadline*, Tribune (September, 2020), https://www.tribuneindia.com/news/nation/centre-translated-draft-eia-2020-in-all-22-languages-after-hc-deadline-145516.

19 Aditi Singh, *Delhi HC issues notice in Centre's review petition against direction to publish Draft EIA Notification 2020 in regional languages*, Bar and Bench (04 Sept., 2020) https://www.barandbench.com/news/litigation/delhi-hc-notice-centre-review-draft-eia-notification-regional-languages.

20 United Conservation Movement v. Union of India, W.P. NO. 8632/2020 (PIL).

21 Samarth Trust and Anr. v. Union of India, Writ Petition (Civil) No. 9317 of 2009.

are not dissatisfied with the way a project has been cleared. It is deeply problematic to see government granting multiple exemptions to certain bracket of projects purely to ease the business part of it. While it is important to note that depleting natural resources cannot be re-remedied even by levying extraordinary penalties.

To conclude, the Draft EIA 2020 is problematic and needs critical attention at legislative level due to the following points:

- Systematic exemptions and exclusion of various category of projects including small time construction work till 150000 sq. mtr., irrigation, community construction and several other RED category of projects. The other forty odd project types also excluded from the need to obtain prior EP or EC.
- *Ex-Post Facto* clearance to all projects irrespective of them operating illegally for howsoever long. Multiple High Courts and even the Supreme Court of India have observed how this type of retrospective clearance is fatal and not subservient to the larger goal of sustainable development and protection.
- Removal of public participation in key development of projects that are frequent and categorised as *B2 Projects*. Public scrutiny is of utmost importance since wherever or however the project is executed there are certain amount of people who will be directly affected as a consequence. The government cannot simply overlook these aspects and grant EC or say there is no need for an EC. The current framework gives unbridled powers to the proposers to make and approve his projects even though they might be potentially harmful for the environment.
- The non-publication of Draft EIA for the longest time until September when the general public consultation phase was already over since a long time. Even if the same is promptly published, the 20 day period for public consultation is very minimal.
- Compliance to EC and the norms as cleared is of primary importance. The way in which a proposer shall justify his work is by filing a report. The Draft EIA 2020 aims to increase the 6 month period for compulsory filing of Compliance report to a full one year period. This draft gives extra 06 months' time whereby the proposer need not apprise the authorities of their compliance and due procedure according to the EC obtained or Environmental laws.

Thus, there are some extremely important aspects that can be construed from a critical analysis of the Draft EIA 2020. It is only fair to expect the government to listen to the raised objections and large public outcry so that the future changes will be a win-win for all three stakeholders including the proposers of the project, the government and people.

Artificial Intelligence Mimicking Human Intelligence: Can AI Ever Lead the Fight Back?

***Mr. Dhananjay Bhati**

Abstract

The mysterious year 2020 has puzzled various countries across the globe to deal with various issues during the outbreak of the Covid-19 pandemic. However, much to their attention, a growing concern impacting human civilization at large is the interface between Artificial Intelligence and Human Intelligence. The modern advancements in technologies have already started augmenting human capabilities such as integrating information, analyzing data, and complex decision-making through learning and self-reasoning. It is generally accepted by the tech-experts around the world that smart machines have the tendency to supplant human activities in many ways. It has the power to fill almost every lacuna that humans cannot, through its immense transformative capabilities. The developing ubiquity of computerized reasoning because of its quality and proficiency has raised numerous questions regarding whether this rising innovation can imitate or surpass human knowledge in the coming future? The opportunities offered by AI can lead us in a variety of directions, however, the principal question encompassing is the place where the humans fit, with the condition if robots and machines can carry out the responsibilities all the more viably and proficiently in the coming future. AI can amplify human intelligence but it additionally endangers human authority and autonomy simultaneously. This paper is aimed to analyze the true potential of AI and the inconceivable revelations it can bring to society. The paper will also comprehend the challenges this emerging technology could pose to mankind if the deficiencies will be underestimated or taken for granted. The author's motivation through this study is to give an exhaustive overview to the audience on how AI is changing humanity and raising significant questions for the society, economy, and governance that need radical policy attention around the globe.

Keywords: Artificial Intelligence, Human Intelligence, Technology, Machine Learning, Language.

1. Introduction to Artificial Intelligence

'AI' or 'Artificial Intelligence' was first coined by John McCarthy, a scientist considered to be the father of AI in the year 1956, as,

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"*the science and engineering of making intelligent machines."*[1] It is the science and engineering of making machines to demonstrate intelligence, especially visual perception, speech recognition, decision-making, and translation between languages like human beings.[2]AI is essentially a science and a collection of computational rationales that are closely associated with how intelligent beings such as humans use their nervous system, which eventually helps the body to feel, learn, reason, and finally, react. Since its inception, AI has emerged as an important aspect of human life and has continued to change human life drastically over the years. It has not only changed the human lifestyle, but also the various domains of life, such as health, medical, education, and safety.[3] Looking at its growing ubiquitous impact on society, AI is admirably becoming more intelligent in the manner it would have been thought. Depending on how and if we use it, the future of businesses in the workplace and human intervention can be potentially affected and disrupted by AI systems.

AI components include machine learning, deep learning, speech recognition, vision, natural language processing, and big data. While machine learning self-learns and adapts its approach to maximize specified goal by using algorithms, deep learning is a subset and a more advanced version of machine learning that tries to replicate the human brain using neural nets.[4] Since the rise of AI during the 1950s up to the furthest limit of 2016, pioneers and scientists recorded applications for almost 3,40,000 AI-related innovations and is developing steadily, with the greater part of the recognized inventions published since 2013.[5]Some leading scientists, technical tycoons, and researchers propose that AI will probably be the greatest advancement in the 21st Century as it can possibly change mankind. It has just been contacting our lives in manners that we probably won't notice. Each time we go to Google, AI is being utilized to show you the most ideal outcomes, each time we ask Siri an inquiry, common language preparing, and discourse acknowledgment is being utilized as AI.

With the emergence of these emerging technologies, the main issue revolving is where does human intelligence vary and stand if the

1 John McCarthy, *What is AI?*, (November 12, 2007), http://www-formal.stanford.edu/jmc/

2 Dinesh G. Harkut, Kashmira Kasat, *Introductory Chapter: Artificial Intelligence – Challenges and Applications,* (March 19, 2019), https://www.intechopen.com/books/artificial-intelligence-scope-and-limitations/introductory-chapter-artificial-intelligence-challenges-and-applications

3 Gagan Pabby, Neeraj Kumar, *A Review on Artificial Intelligence, Challenges Involved & Its Applications,* 6 Int'l J. Adv. Res. & Tech. 1569 (2017)

4 Georgios I. Zekos, *Economics and Law of Artificial Intelligence,* Springer Science and Business Media LLC, 2021.

5 WIPO, Technology Trends 2019- Artificial intelligence (2019) (e-book), https://www.wipo.int/tech_trends/en/

decision-making, self-reasoning, and automation are done by the AI itself.

2. Human Intelligence: Where does it differ from AI?

It is made clear that AI is optimally utilized to develop computer-controlled robots or machines that have human scholarly attributes and qualities behaviors like learning from past experiences, enormous abilities to detect, and then to make predictions, and finally decide the meaning of certain situations.[6]However, AI may bomb out sooner or later because of certain distinctions in the biological brain and computers. Human intelligence works naturally on its own and makes decisions through cognitive thinking in contrast, AI carries out tasks that are not associated with feelings or emotions. The rapid progression of AI can terrify the humanity such that a robot or machine is unable to effectively transmit the emotions that are innate in humans.[7] Undisputedly, AI does perform various tasks that enlist the human-intelligence, such as decision-making, but at the same time with the self-learning and self-reasoning abilities, AI machines may threaten the humanity by learning things which may be destructive to the mankind in a drastic way.

One of the things that can lead to a destructive situation is where rational emotions are required and due to the lack of machine emotion to think what is positive and what is negative, the computer machines are found inaccurate in the behavioural test. Secondly, apart from thinking ability, AI also somewhere lacks in planning ability that they do not possess consciousness and shrewdness as precise as human intelligence possesses. Thinking and planning constitute the AI to act in a certain way but when thinking and planning are not precise then action-taking ability also lacks somewhere as desired. The action-taking ability in humans works in the form of signals, whereas in AI is based on hardware and software. The apparent absence of sentiments and examinations between good and bad expands danger.

The provided wisdom in the ongoing debate between AI and Human Intelligence has been that AI will amplify human targets, but would not supplant them in the near future, still leading scientist and researchers suggest that AI is a very powerful tool and there is no such significant qualification between what can be accomplished by a natural mind and what can be achieved by a computerized machine.

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6 Mehmet Turan, Yasin Almaliogluet *al., A Deep Learning Based 6 Degree-of-Freedom Localization Method for Endoscopic Capsule Robots*, Deep AI (May 17, 2017), https://deepai.org/publication/a-deep-learning-based-6-degree-of-freedom-localization-method-for-endoscopic-capsule-robots

7 Jahanzaib Shabbir, Tarique Anwer, *Artificial Intelligence and its Role in Near Future*, Dblp (April 1, 2018), https://dblp.uni-trier.de/rec/journals/corr/abs-1804-01396.html.

3. AI Domains and the Opportunities they bring:

AI is a machine that shows savvy conduct, for example, thinking, learning, and tactile handling. It includes assignments that have truly been restricted to people and keen creatures, for example, dynamic and critical thinking. Computerized reasoning is as of now ubiquitous and is generally utilized in manners that are very self-evident.[8] In the following decades, AI will aid in giving humanly assistance and fully automated mechanisms, which will eventually help in checking and observation, performing substantial outstanding tasks at hand, and many others.[9],[10],[11],[12]AI has a wide scope of capacities that makes it conceivable to use fake neural organizations in numerous areas. A portion of the areas that are on the need list but are not restricted are as per the following:

1. **Machine Learning:**

It is a subset or a version of AI that provides the systems the ability to naturally learn, investigate, comprehend, and improve from experience without being unequivocally customized to mimic things or tasks.[13] Humans provide data and specify the overall goal for a machine. In human computer programming where, bad outcomes are attributable to bad code, machine self-learns, and adapts its approach to maximize the specified goal. As a result of such development, frameworks that are performed at recognizably below human-levels would now be able to go superior to humans at some definite tasks.[14]One of the most popular examples of machine learning is 'AlphaGo Zero': Google's DeepMind supercomputer, where it learned 3,000 years of human knowledge in just 40 days and boarded 100:0 victory over the Go world champion *Ke Jie*. The machine learning process involved analyzing millions of moves made by human go experts and playing many, many games itself to reinforce what is learned.[15]

8 Harkut, *supra* note 2.
9 M. F. Rooney and S. E. Smith, *Artificial Intelligence in engineering design*, 16 Computers & Structures 279, 288 (1983).
10 Yan Duan, Xi Chan et al., *Benchmarking Deep Reinforcement Learning for Continuous Control,* ArXiv (May 27, 2016), https://arxiv.org/pdf/1604.06778
11 Sergey Lavine, Peter Pastor et al., *Learning hand-eye coordination for robotic grasping with large-scale data collection*, 37 Int'l J. Rob. Res. 421, 436 (2017)
12 Yezhou Yang, Cornelia Fermuller et al., *Grasp type revisited: A modern perspective on a classical feature for vision*, IEEE International Conference on Computer Vision and Pattern Recognition (CVPR) (2015), https://ieeexplore.ieee.org/document/7298637 .
13 *What is Machine Learning? A definition*, Expert.ai (March, 2017), https://expertsystem.com/machine-learning-definition/
14 Pabby, *supra* note 2.
15 Larry Greenemeier, *AI versus AI: Self-Taught AlphaGo Zero Vanquishes Its Predecessor*, Scientific American (October 18, 2017), https://www.scientificamerican.com/article/ai-

2. **Deep Learning:**

Deep Learning is a more advanced version of machine learning that attempts to replicate human brain using neural nets. It is a form of machine learning that has networks capable of learning unsupervised from data that is unstructured or unlabelled also known as deep neural learning or deep neural network.[16]

The best application to the point where deep learning transcends human brains in some tasks is such as safety-critical applications in driverless cars and classifying objects in images. Other than automated driving, Deep Learning is used in aerospace and defense to identify safe and unsafe zones for army battalions by identifying objects from the satellite. Deep Learning is also having a positive impact in medical research as it is good at combining through mounds of data to find connections that make it a little easier to determine what kind of treatments could work or which experience to pursue to next. It is strongly inferred by some scientists and researchers that AI could be the best hope in fighting the next future corona-virus.[17]

3. **Speech Recognition:**

A machine or program can receive, analyze, and decipher the words/phrases in spoken language and afterwards convert it onto a machine-readable configuration to carry out spoken commands. The speech or voice recognition facility helps the consumers to interact with the technology simply by communicating to it without the need for any physical interaction. Initially, this technology was originated in PC's but in the present time, it has continued to gain popularity in both business and consumer spaces on smartphones and in-home assistance. From Google (Google Alexa) to Amazon (Amazon Echo) to Apple (Apple's Siri) all major tech companies have undertaken such voice recognition software to interact with their users more clearly and fairly.

4. **Natural Language Processing (NLP):**

NLP is a branch of AI that is concerned with the interactions between computers/machines and humans by utilizing the natural language.[18]It is the ability to read, decipher, understand,

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versus-ai-self-taught-alphago-zero-vanquishes-its-predecessor/

16 Marshall Hargrave, *Deep Learning*, (2019), [Online], https://www.investopedia.com/terms/d/deep-learning.asp

17 Michael Cogley, *AI could be our best hope in fighting the next corona virus,* The Telegraph, https://www.telegraph.co.uk/technology/2020/02/22/ai-could-best-hope-fighting-next-coronavirus/.

18 Dr. Michael J. Garbade, *A Simple Introduction to Natural Language Processing*, Becoming Human (Oct 15, 2018), https://becominghuman.ai/a-simple-introduction-to-natural-language-processing-ea66a1747b32

and make sense of the natural language as it is outwardly spoken by humans to a computer program. It is associated with machine perception and undertaking tasks such as sentence translation, sentiment analyzation, and speech recognition. One of the best examples of Natural Language Processing is when we search on Google and it shows the best suitable result through speech recognition and natural language processing based on our text input.

5. **Machine Vision:**

Machine vision is the science of a machine's ability to see. They can go beyond human visual acuteness. Machine vision catches and examines visual data by utilizing a camera, analog-to-digital conversion, and computerized signal handling.[19]Through machine vision, complex tasks like inspections can also be undertaken and they can increase the efficiency and productivity in automated inspection. They separate information from advanced pictures or recordings and afterward change the visual pictures into depictions that can interface with other perspectives and bring out reasonable and fitting activity. It is used in a variety of industrial applications such as event detection, object recognition, 3D pose estimation along with signature identification, motion recognition, and image restoration.

6. **Internet of Things:**

AI is becoming incredibly valuable in IoT applications and implementations, and it's making a huge statement in the realm of IoT.[20]Internet of Things (IoT) is a term used to define the modes that can connect and transfer data via the Internet. "Things" can be vehicles, appliances, medical devices, clothes, monitors, smart meters, fitness trackers, apps and buildings, etc but not computers, smartphones, and tablets. Federal Trade Commission defines IoT as "Devices or sensors sold or used by consumers that connect, store, or transmit information with or between each other."[21] It is a machine-to-machine interface. Due to the M2M interface, IoT-based systems generate a huge amount of data having information that can prove to be highly useful. This big data information can be highly useful for the researchers in healthcare, Information Technology, bioinformatics, and in

19 Harkut, *supra* note 2.

20 Harkut, *supra* note 1.

21 Hongmei He, Carsten Maple et al., *The Security Challenges in the IoT enabled Cyber-Physical Systems and Opportunities for Evolutionary Computing & Other Computational Intelligence*, 2016 IEEE Congress on Evolutionary Computation (CEC), http://eprints.bournemouth.ac.uk/24677/1/He_et_al_IoT_Challenges_CEC_2016.pdf

policy and decision making for government and various public sector undertakings.

7. **Robotics and Automation:**

Robotics is a branch of AI that deals with the study of creating and designing intelligent and efficient robots. They are designed to perform tasks that are sometimes difficult to perform by the humans, so, they are created to perform consistently through automation. Robots can be modified to perform high-volume, everyday assignments. With the advancement of computer engineering, robots are becoming smarter and more efficient in carrying various activities because of their flexibility and learning capabilities. The world's leading retail companies such as Walmart and Amazon are trying to build robotic shopping carts and various fulfilment centres that will serve as delivery between stackers and pickers.[22]

The vehicle ventures like Morris Garage and Tesla Motors are contributing a huge amount of money to implant AI frameworks in vehicles. Tesla Motors has just presented AI frameworks in their vehicles, for example, auto-driving mode and lane changing features. The transportation industry, that further includes autonomous vehicles, is now one of the industries with the highest AI-related growth rates.[23]

8. **Big Data:**

Within a technical framework, big data refers to broad, complex, and abundant sets of data and information that develop at ever-increasing rates.[24] The said human job is lessened because of the multiplication of AI and this thought has been separated and changed by big information contribution. AI is considered as a serious adaptation of AI through which various machines can send or get information and learn new ideas by investigating and analyzing information. Big data assists organizations in dissecting existing information and draw important insights from the same.

Big data has turned a central theme in various ventures and research teaches and also for society as a whole on the ground of its capacity to create, gather, convey, prepare and examine exceptional measures of differing information, having practically

22 Amit Tyagi, *Artificial Intelligence: Boon or Bane?* 11 The IUP Comp. Sci. J. 43, 56 (2017).
23 Catherine Jewel, *Artificial intelligence: the new electricity,* Wipo.int https://www.wipo.int/wipo_magazine/en/2019/03/article_0001.html
24 Troy Segal, *Big Data*, Investopedia (Updated July 5, 2019) https://www.investopedia.com/terms/b/big-data.asp

widespread utility and serving to essentially change the way businesses works, in carrying research and how individual lives and utilizes present day innovation.[25]

4. AI to Humans: A Revelation or Curse?

In recent years, due to exponential growth in AI and its applications, career opportunities have expanded in AI to meet the rising demand of digitally transformed industries. Due to its accuracy and efficiency, it is replacing human intelligence in carrying out various forms of tasks in the market. Artificially intelligent machines can filter through and decipher gigantic measures of information from different sources to complete an assortment of errands. With AI giving tremendous opportunities for automation and digital transformation, it is supposed that AI won't eliminate jobs of humans, it will rather upgrade them. Indeed, it will give us more freedom to apply our intelligence and creativity to build this AI system to remove mundane tasks. AI for robotics and control methods to manage the behavior of devices is the AI application areas with the most tremendous growth.[26]Through the rapid advancement of the AI domains, agricultural productivity has increased, healthcare has been improved, climate-related predictions have broadened, and marine ecosystems have enhanced.

AI has also contributed to enhancing the lifestyle of humans by simplifying the tasks by the use of an intelligent assistant, better healthcare, and smartphones with energy efficiency and the use of IoT, etc.[27]While some great scientists like Stephen Hawking quote that, AI can, in theory, emulate human intelligence and can exceed it, some big tycoons like Elon Musk believe that AI can be a fundamental risk to the existence of human civilization. It is well known that every emerging technology comes with certain pros and cons. AI is a wellspring of both excitements just as skepticism when looking into different perspectives and dimensions. Before making AI equivalent to human insight and reform the genuine potential and massive ground-breaking abilities of this rising innovation, we have to conquer certain difficulties that this innovation stances to the world.[28]

5. Challenges in supporting AI to be considered as equal to Human Intelligence:

The most primitive challenges AI brings in businesses, as well as society at large, are as follows:

25 Mashooque Ahmed Memon, Safeeullah Soomro et al., *Big Data Analytics and Its Applications*, Annals of emerging technologies in computing 1 (2017), http://aetic.theiaer.org/archive/v1n1/P6.pdf

26 James Nurton, *The IP behind the AI boom*, Wipo (2019)

27 Nakul Subramanyam, Basanna Patagundi, *Automation and AI: Boon or Bane: A Humanistic perspective,* Docplayer, https://docplayer.net/135512915-Automation-artificial-intelligence-boon-or-bane-a-humanistic-perspective.html

28 Harkut, *supra* note 1.

1. **Building Trust**

The most basic challenge related to AI is building trust in this technology, which is automated and fully based on algorithms. With the framework having no opinions and enthusiastic sentiments, this amazing innovation raises a few issues, for example, its capacity to settle on a significant choice such that people would see reasonable, to know and adjusted to human qualities that are pertinent to the issues being handled, and the ability to clarify its dynamic working.[29] The technology which has almost no emotions and makes decisions on its own without any human intervention can't be fully trusted on the mere fact that it can carry mundane and repetitive tasks efficiently. Building trust in AI is almost impossible as they act without consciousness and vigilance towards their assigned task. They simply function for the purpose of what they are created without looking up for the complexities that may incur during the completion of a particular task.

2. **Software Malfunction: Accountability and Legal Responsibility in Case of Harm**

One of the main challenges AI poses to humanity is that, when an AI system causes harm, how and to whom do we allocate legal responsibility? It is easy to believe that an employer will be liable for the autonomous system such as workplace robots, but will a human operator of an AI system have the capability and the duty to prevent unexpected harm? Autonomous vehicles can greatly reduce traffic accidents and fatalities, but some accidents will still inevitably occur; so, in that case, would the driver be liable, or the autonomous vehicle manufacturer will be liable is still enigmatic and debatable. In the age where AI is replacing physicians and beating doctors in prediction of what standard of care applies to a machine is still a search in progress.

3. **Challenge in Ascertaining Authorship/Inventorship**

Intellectual Property Rights law aims to protect the creative fruits of humans. World Intellectual Property Organization refers Intellectual Property as creation of mind, inventions, literary and artistic works, and symbols, names, and images used in commerce.[30] These rights are a set of limited exclusive rights allotted to only 'persons', either natural or legal. In both

29 Francesca Rossi, *Building Trust in Artificial Intelligence*, J. Int'l Aff. (Feb 06, 2019), https://jia.sipa.columbia.edu/building-trust-artificial-intelligence

30 *What is Intellectual Property*, WIPO.INT, https://www.wipo.int/about-ip/en/

US and EU, to qualify as a 'work' and 'invention', the author or the inventor must be a human. The US court in *Naruto et al v. David Slater*[31] held that "non-humans do not have standing in a court of law and therefore, can't sue for copyright infringement." Similarly, AI naturally challenges these traditional well-established legal notions.[32]The legal question that arises is: can an AI-generated work or invention attract IPR protection under current rules?[33] With AI generating self-answers, how do we ascribe authorship or ownership of property rights either in the field of tech or in the field of creative industries? It is remaining a healthy burden on courts to interpret authors and inventors as natural persons, given rapidly expanding AI.

4. **Algorithm-Biased Systems**

The AI systems are all about data and algorithms. Bias can sneak into calculations in a few different ways as this AI frameworks figure out how to settle on choices on preparing information that is how accurately it has been trained, which can incorporate one-sided human choices reflecting recorded social disparities regardless of whether sensitive variables like sex, race, or sexual direction are eliminated.[34]As a result of biasness, AI potential reduces for various creative businesses and industries by encouraging the mistrust and producing bad outcomes. The paradigm shifts to human accuracy on how the AI systems can be trained to ensure that the systems can work on improvisation of human-decision making and to build standards that can reduce biases in AI.

5. **Big Data Challenges**

In recent years, the amount of data availability has been growing exponentially due to immense growth in the availability of devices recording data as well as connectivity facilitating through the internet-of-things. No doubt, AI is very efficacious as far as finding patterns and in interconnecting relationships within big datasets is concerned, however, it is still lacking to use this interconnection in a meaningful way. Most of the AI systems, such as machine learning and deep learning, depend

31 Naruto et al v. David Slater, No. 16-15469 (9th Cir. 2018)

32 Ballardini, R, He, K & Roos, *AI-generated content: Authorship and Inventorship in the age of artificial intelligence*, Edward Elgar; University of Helsinki (2019), https://researchportal.helsinki.fi/en/publications/ai-generated-content-authorship-and-inventorship-in-the-age-of-ar

33 *Id.*

34 Eleftherios Charalambous, Robert Feldmann et al., *AI in production: A game changer for manufacturers with heavy assets* (March 7, 2019), https://www.mckinsey.com/business-functions/mckinsey-analytics/our-insights/ai-in-production-a-game-changer-for-manufacturers-with-heavy-assets#

on the data that is often sensitive and personal.[35]Sometimes, the computational techniques also find it difficult to process and analyze big data. As these systems collect data and learn by themselves through systematic learning, they can become prone to problems such as:

1. Data Privacy and Security

   In big data analysis, a huge amount of data is being correlated, analyzed, and processed for undermining meaningful purposes. This massive amount of data contains many personal and sensitive information that ought to be protected and not be disclosed. Preserving and protecting this sensitive data is becoming a big data analytics issue. There is a huge security risk associated with big data, therefore, there is a deeper need for different organizations to draw attention in developing privacy-preserved data models for big data that can work as multi-level security for preserving and protecting personal and sensitive data. Many regimes have undertaken data protection rules, one of them is EU's GDPR[36] Policy that aims to foster personal data protection.

2. Data Ownership

   In the big data environment, the tension often arises between the data subjects wanting to own their data and the third parties claiming ownership over entire datasets. This conflict between data subjects and third-parties often stifle innovation as the data subjects may refrain from providing their data as soon as they realize this would mean renouncing their ownership over such data. Even if they agree to give such data, it becomes very difficult to establish ownership of different data components originating from various sources. Due to competitive concerns and long-standing habits, it becomes very difficult to ascertain ownership in the age where trade secrecy is deployed by enterprises as a policy for the protection of classes of data that has not crystallized into a commercial application yet. However, again, AI and machine learning abilities will be limited and due to this, it will repress the innovation.

35 Mohammed Bahja, *Natural Language Processing Applications in Business*, Intech Open (May 11, 2020),https://www.intechopen.com/online-first/natural-language-processing-applications-in-business

36 General Data Protection Regulation (2016). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679

3. Data Scarcity

At present, it is a mere fact that enterprises have access to big data than ever before. Despite the availability of a huge amount of data, datasets available for AI applications to learn and teach are very rare. Somewhere, due to scarcity of labeled data, AI machines become vulnerable to learn at an optimum level. To face these problems, organizations need to adopt specialized design and learning methodologies that can learn this AI system to work to their fullest.

6. **Transparency and Provability**

One of the most basic issues surrounding the implementation of AI techniques in various organizations is its limited level of explaining ability, provability, and transparency. It is not clear that certain forms of AI that are based on complex machine-learning algorithms, such as deep neural networks, will become more auditable and transparent soon.[37]This AI-based system working in any organization cannot demonstrate their vision and what eventually they want to achieve. As these systems make decisions on their own, it is still doubtful that this so-called intelligent system can make decisions decisively and so these systems will create answers in a transparent manner having enough veracity and provability. To assert that AI decision-making capacity is fine, organizations need to make AI explainable, provable and transparent.

Conclusion and suggested approaches for future research:

Based on the detailed scrutiny of opportunities offered by AI in the present time, it is very definite that technology is here to stay and will have a significant impact on the future in many ways, which we have not even imagined. Undoubtedly, AI is playing an important role in integrating marketing strategies in businesses as well as in the societal manifestation of the technological impact on daily lives. However, despite the technology being potential for carrying out effective tasks, it is still in doubt that it will exceed or even emulate human intelligence.

Human Intervention will always be primeval in shaping and guiding this expert system. The nature of jobs can be improved notably if AI and human creativity synchronize effectively. Having said that AI tends to change humanity and way of living, it is of utmost importance that the change we are embracing will bring a positive outcome with no exceptions or negative repercussions. This paper has comprehended

37 Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L.TECH. 889, 920 (2018).

opportunities as well as challenges in fascinating areas of AI, which includes both social and ethical challenges such as technological unemployment, liability, data security, data privacy, data ownership, etc. This paper has also cleared that AI, though having the capacity to change humanity, cannot certainly be taken for granted as ignoring the shortcomings can be a serious threat to humanity. In the coming years, AI is going to throw some serious questions which need to be addressed by various policymakers around the world which are as follows:

1. As it is fact that, companies filing patents in AI are dominating than any other institution, the question arises is how does an AI feature and what are the challenges associated with the IP policies that encourage innovation and AI and its deployment through the economy and society?
2. One of the major policy questions is how to balance the restrictions that Intellectual Property laws confer on the use of data and concurrently intersections of the policies which encourage the free flow of data that supply the AI?
3. In the age where digital privacy is pressed to be of utmost importance were to draw a line between the free flow of data and data closure due to competitive issues?
4. The question of enormous technological disparities exists in the world. It is indecipherable whether this is deteriorating the disparities that exist at present in technological capacity or whether it has the scope to reduce differences and disparities around the world?

These questions need careful deliberations for future research to address certain areas and mitigate the challenges associated with AI. Indubitably, we need a harmonious legal policy framework that can make the AI more productive and ultimately enhance the quality of life of mankind.

J.S. Mill's Harm Principle: In Relation to Legalizing Sex Work in India

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Abstract

The said paper talks about sex work, i.e., prostitution of both male and female, issues related to its legalisation and stereotypes attached to it. It also introduces and explains J. S. Mill's Harm Principle and sex work in light of this principle. It states an introduction to the topic where sex work and basic mentality towards sex workers are explained, along with it is also explained the harm principle. The paper further deals with the harm principle and at length explains the principle, its background and assumptions. It goes on to establish a link between the foundations on which the principle is laid and prostitution. What Mill's stand on prostitution might have been on legalising sex work (mainly focusing India) might have been going with the idea of the harm principle given by him is also explained. The paper answers as to why the word "harm" cannot be substituted with the word "offence" and how people take it to be "offensive" because of their "moral obligations" for prostitution to be called a "profession" is also pondered upon. An Indian scenario and mind set is also explained regarding sex work and mainly sex workers with explaining India's ambiguous stand on the legalisation of the same. At the end, a conclusion is provided so as to put an end to the paper summing it up to uncover the fact that Mill's principle would have not supported the legalisation of sex work in India although he supports equal liberty, equal enjoyment and in general equality between men and women. But due to reasons such as "harm" for sex workers and making men desirous of sex, Mill's harm principle has other plans for legalisation of sex work.

Keywords: Harm, Sex Work, Prostitution, India

1. Introduction

India has a strange stance on the matter of sex work. It seems like a small kid in a candy shop not knowing which one he wants. For India, we are not as progressive as Denmark or Australia thus, we don't have a legalised sex work system. Here sex workers are not recognised as part of the population, they don't get health insurances or pay taxes.[1] However, we see girls in shimmery glitters and jewellery at night waiting for clients.

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1 Lucy Platt et al., *Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies,* 15 PLoS Med. 1, 38 (2018).

India stands in an area where being a sex worker is legal in India but all the activities related to sex are illegal. Such a situation exists because the moral history and obligations of the Indian population, the mindset that is carried on by the population is such that sex and talking about sex seems like a heinous crime. Like cough, cold, appendix etc are all regular diseases but sexual issues are God's way of punishing one for a sin. It relates to what seems right and what seems wrong, what is harmful and what is not harmful for the society.

John Stuart Mill, a British philosopher, in the first half of 1800s wrote many articles explaining his harm principle. These essays created rules that told people what actions are good and which ones are bad actions harmful for the society.[2]

Various opinions have been composed on what Mill's stance on prostitution may have been, given his undeniably expanding safeguard of the freedom of individuals. The appropriate response regularly given is that he would probably safeguard its decriminalization. Mill's position on the same can be clearly deduced from his vast range of compositions as well as his correspondences, which provide an intense image of reasonableness he's used in his opinions on prostitution.

The point here is to give a reasonable picture of what that position actually is. Mill doesn't portray prostitution as an issue concerning public order or a person's freedom. Instead, he portrays it like any other social relation concerning many people, just like marriage.[3]

2. The Harm Principle

In *On Liberty*, Mill outlines the Harm Principle which states that 'the lone reason for which power can be legitimately practiced over any individual from a civilized community, without the presence of their will, is to forestall harm to other people. Their personal good, either physical or moral, is certifiably not an adequate warrant.'[4]

The only reason that allows an individual or a group of people to interfere with the activities of any other individual is self-assurance. That too, in light of the fact that the reason for which power can be legitimately practiced over any individual from a civilized society, against their will is to forestall damage to other people.[5]

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2 Cinara Nahra, *The Harm Principle and the Greatest Happiness Principle: The missing link*, 55 Kriterion 99, 108 (2014), https://www.scielo.br/pdf/kr/v55n129/06.pdf.

3 Helen Pringle, *Prostitution and the Harm Principle: What Did John Stuart Mill Say?*, ABC Religion and Ethics (Mar. 16, 2018), https://www.abc.net.au/religion/prostitution-and-the-harm-principle-what-did-john-stuart-mill-sa/10094898.

4 John Stuart Mill, On Liberty 23 (2nd ed. 1863).

5 *Id.*

In other words, Mill had propagated an idea, that people have the freedom to do as they like till the time the said actions do not harm anyone else or affect anyone apart from his own self. In such a situation the society, which includes the government, does not have any say in his actions or should not be able to stop him.

But the Harm Principle doesn't apply universally. There are conditions in which society is legitimized in meddling with what somebody is doing notwithstanding when it doesn't hurt others. In the first place, it doesn't make a difference when the individual is a child.[6] Secondly, it doesn't make a difference in 'backward' societies.[7] Both kids and 'backward' social orders have not yet been created to a time when power can be supplanted by 'free and equal exchange'.

But, the Harm Principle by Mill isn't as simple as it looks like. To understand the principle better and to its fullest there are three principles which are the basic skeleton of the Harm Principle and have helped shape it.

1. The utility principle- The idea of this principle is that the actions of people should be such that they bring the most amount of happiness to the maximum number of people.[8] A person should always choose an option that makes most people happy.

2. Difference between harm and offence- According to Mill, harm and offence are two related yet different concepts.[9] Harm is to be something that injures the rights of some person, like not paying taxes is going to harm the citizens of the country as such money is used for their benefit. Offence, on the other hand, is more sentimental in nature. It hurts someone's feelings. Now the point here is that each person reacts in a different way and what may be offensive to one might not be to other and vice versa.

3. Individuality of actions- Mill stated that it is rare that an individual's actions affect no one other than him. It is rightly said that man is a social animal. This means that no person is actually isolated individual. Their actions always affect people around him in direct or indirect ways.

One of the biggest elaborations given by Mill was of 'free speech'. According to him, free speech was necessary for intellectual growth and progress of the society and such an intellect was imperative for the societal development.[10] And if such growth of the society is prevented indirectly by preventing freedom of speech, it would harm the people.

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6 Michael Lacewing, Philosophy for A2: Unit 4: Philosophical Problems 107 (Routledge ed., 2014).
7 *Id*
8 John Stuart Mill, Utilitarianism 93 (7th ed., 1870).
9 Piers Norris Turner, *'Harm' and Mill's Harm Principle, 124* Ethics 299, 299 (2014).
10 Colin Heydt, *John Stuart Mill (1806-1873),* Internet Encyclopedia of Philosophy (Aug. 6, 2020), https://iep.utm.edu/milljs/.

3. Prostitution and Mill's stand on it

Prostitution, obviously, was an extraordinary topic of social discussion in the nineteenth century. It was a fixation for great political battling and dialogues as it drew together an extent of discussions, for instance, the rising role of the state, the advancement of sexual movement, and female activism.[11] It is bound to happen, because even presently in the twenty first century people still refrain from speaking and talking about sex. It is considered a taboo at-least across India, which is by miracle the second largest population of the world. Nineteenth century was a time where feminist movements had started, liberation and equality of women were talked about.[12] Talking of an era where even educating women or giving them a right to vote was seen beyond scope, prostitution was bound be a topic on which eyebrows were to be raised.

In a social mindset where women were seen as objects to satisfy men, objectified on a regular basis and thought to be serving the only purpose of reproduction and house making, prostitution by women was frowned upon and seen with surprise.

Mill said, "Of all the modes of sexual indulgence, consistent with personal freedom and the safety of women, I regard prostitution as the very worst; not only on account of the wretched women whose sole existence it sacrifices, but because no other is anything like so corrupting to the men."[13]

According to Mill, prostitution was a corruption for men, and no male prostitution was even given a glance.[14] Male prostitution was a concept beyond imagination.

The setting inside which Mill expounded on prostitution was a time of escalated practical and scholarly cooperation in English society, wherein inquiries of sexual equality in common life posed a potential threat.[15] This announcement uncovers Mill's shared opinion with the predominant public disposition, which named prostitution a social problem. More than social problem, by many it was called a social evil. It was termed as a concept not fit for women saying it "objectified" women in a period where it was a common household phenomenon

11 Lara Gerassi, *A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work, 42* J. Social Soc. Welf. 99, 99 (2015).

12 Jackie Cavedon, *Nineteenth Century European Feminism*, Guided History (Aug. 7, 2020), http://blogs.bu.edu/guidedhistory/moderneurope/ipek-bilici/.

13 Clare McGlynn, *John Stuart Mill On Prostitution: Radical Sentiments, Liberal Proscriptions*, 8(2) Nineteenth Century Gender Studies (2012), https://www.ncgsjournal.com/issue82/mcglynn.htm.

14 Pringle, *supra note 3*.

15 Helen Pringle, *A Civilized Approach to Prostitution: Re-reading John Stuart Mill*, ABC Religion and Ethics (Mar. 11, 2016), https://www.abc.net.au/religion/a-civilized-approach-to-prostitution-re-reading-john-stuart-mill/10097228.

for women to be objectified. But, women as a species could only be objectified by men who "owned" them (married to them) not by any other men.

4. The paradox of the word 'Harm'

The meaning of the word 'Harm' is subjective in nature and varies from person to person.[16] As an example, the act of prostitution, if done with the consent of the involved parties, may not constitute harm to other. In such cases, it is for the government or the State to ensure that it doesn't go against the wishes of the public as it is the duty of the State to ensure the creation of conditions for the happiness and satisfaction of the public.[17] And protecting the interest of the public (within the ambit of the constitution) is the only way to achieve it.

On the contrary side, such an action by people may leave a negative impact on the public. Such an action may not just to harmful to a single person but would leave a bad impact on the whole society.

According to Mill, "prostitution is not best defined as a 'profession' chosen by individual women, but as a social institution, a central part of which is the law that regulates it."[18]

He says that prostitution as a concept does not support gender equality, where one is in a position to dominate the other and says that there is no "equal enjoyment".[19]

While Mill was very clear regarding the utilization of law to prohibit prostitution, he wasn't similarly clear about the usage of law to 'license' prostitution was in itself an infringement of the right of personal freedom.[20]

The activity (prostitution) as opposed to creating bliss to the most noteworthy number of individuals produces "mischief" or misery, and in this manner, it might be viewed as a bad activity.[21] Mill prescribes that such practices ought to be put under check. In any case, he inquiries why law ought not subdue every single social sick and practices that are harmful to satisfaction, and which establish an obstacle to cultural advancement and the progress of the society.

5. The Arguments

The most critical argument criminalizing prostitution is that it

16 Ogunkoya, *supra* note 9.
17 Julia Driver, *The History of Utilitarianism, in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2014), https://plato.stanford.edu/entries/utilitarianism-history/.
18 Pringle, *supra note 3.*
19 David Brink, *Mill's Moral and Political Philosophy, in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2018), https://plato.stanford.edu/entries/mill-moral-political/.
20 Pringle, *supra note 3.*
21 Brink, *supra note 20.*

harms the people involved in sex trade.[22] Such an argument is put up because sex is seen as something deeply personal and emotional. It involves two people and that too very emotionally involved. Such is the thought process because people do not believe in the concept of casual sex. If casual sex as a concept is taken into consideration and accepted, then selling sex and prostitution are also not illegal and harmful.

All together for criminal laws denying the purchase of sex to be legitimate, it might be important for criminalization to have the contrary impact and really decrease damage to undermined individuals. However, if it is legalized there many issues that can be solved. If reduction of damage to undermined individuals can be said to be a valid reason to criminalize it, reduction of sexual offenses, removal of pimps and middlemen, protection of minors etc. are some of the reasons that can be given to legalize it.[23]

But in case of laws that are inadequate in addressing the concerns of the affected individuals, or worse, they unintentionally expand the damages to the individuals; such laws won't be justified. Any utilization of the criminal law may create unintended outcomes, and idealistic reformers must stay cautious to this probability.

The most critical voices presume that criminalization might expand request among men for whom the danger of purchasing sex is a sexual factor.[24] It would be gullible to believe that criminalization of purchasers, remaining solitary, will have the ideal impact of lessening damage to affected females. Or maybe, the criminalization of the purchase of sex is one piece of a more extensive venture that incorporates the arrangement of social welfare to undermined individuals as a key part. Regardless of whether criminalization has the ideal obstruction impact on potential purchasers it is improbable that total cancelation will ever be accomplished.

6. The Indian Case

Prostitution is one of the oldest professions. In India, it was drilled widely, to such an extent that Kautilya makes reference to it in his perfect work of art 'Arthashastra' composed around the third and fourth century before Christ.[25] 'Indra', the god of rain, called 'apsaras', i.e. dancers, which were the biggest assets of his court.[26] The "Vedas"

22 Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism,* 158 U. Pa. L. Rev. 1729, 1733 (2010).

23 Ine Vanwesenbeeck, *Sex Work Criminalization Is Barking Up the Wrong Tree, 46* Arch. Sex. Behav. 1631, 1633 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5529480/pdf/10508_2017_Article_1008.pdf.

24 *Id., at 1634.*

25 Brijesh Kalappa, *An argument for legalizing Prostitution,* The Times of India (Jan. 14, 2013), https://timesofindia.indiatimes.com/blogs/emphasis/should-prostitution-be-legalized/.

26 Md. Shahbuddin Mondal, *Legalization of Prostitution in India: Need of the Hour,*

which are the supreme book of Hindu mythology mentions many such dancers and courtesans like 'Urvasi' and 'Menka'.[27]

The irony of such a situation is that while the Indian population named their children after the courtesans of the gods, they look down upon the courtesans in real life so much so that the women involved in such a profession do not even step out in a public-spheres in broad day light.

The Indian Government, so as to implement the International Convention by a similar name marked at New York on the ninth May, 1950, presented the Suppression of Immoral Traffic Act[28] in 1956 which condemned Prostitution. This act stated that prostitutes will be arrested for soliciting their services and call girls are not to make their phone numbers public. Such an act would be punishable by imprisonment for a term of 6 months along with certain monetary penalties.[29] As far as clients are concerned, they cannot indulge in prostitution related activities within 200 yards of certain designated areas and any such act can lead to an imprisonment of up to 3 months.[30]

As stated earlier, India does not hold a clear stance in the matter of prostitution. While the Indian Constitution nowhere states Prostitution to be illegal, the brutalities of the Police are yet to stop. Even though the legal framework doesn't condemn the act of Prostitution completely, the regular bust of a new 'prostitution racket' by the police often affect some innocent and honest women.

The Immoral Trafficking Prevention Act, 1956, the primary legislation that deals with sex work in India doesn't directly prohibit prostitution but acts by people encouraging prostitution such as maintaining brothels and living off the profits earned by sex workers.[31]

There is a general understanding that business of prostitution in India is tricky, but there is no agreement on what ought to be finished. There is an ideological contradiction between those who need to see prostitution disposed of and those who are in favour of the practice. The former group sees it either as an exploitative or inadmissible piece of society, and the later group view prostitution as an exchange between

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Legal Service India (Aug. 6, 2020), http://www.legalservicesindia.com/article/2460/Legalization-of-Prostitution-in-India:-Need-of-the-hour.html.

27 *Id.*

28 The Suppression of Immoral Traffic in Women and Girls Act, No. 104 of 1956, *India Code (1993).*

29 The Suppression of Immoral Traffic in Women and Girls Act, No. 104 of 1956, *India Code (1993), § 8.*

30 The Suppression of Immoral Traffic in Women and Girls Act, No. 104 of 1956, India Code (1993), § 7.

31 Ministry of Women and Child Development, Trafficking in Women and Girl Children for Commercial Sexual Exploitation: An interstate explorative study in Jharkhand, Odisha and West Bengal, at 96 (2016).

consenting grown-ups and advocate decriminalization.

In order to prevent prostitution from violating institutions like family and marriage, almost every nation has made laws regarding prostitution.[32] But in India such laws remain ambiguous and an uncanny silence remains as to what is to be done with sex workers and sex work as a profession in India.

7. Sex Work and Human Rights

The Indian constitution provides rights to all its citizens irrespective of their gender, caste, race, birthplace or religion. These rights are specified in part 3 of the constitution, from articles 12-35. Such fundamental rights are the basic rights which are essential morally, spiritually or ethically for every human being for their well-being, development and growth.[33] Such rights include right to life, right to equality, right to freedom, right against exploitation, right to constitutional remedies etc.

The law primarily dealing directly with sex workers in India is the Immoral Traffic (Prevention) Act[34]. Such an act allows sex workers to practice their profession but only "privately".[35] Now this word being added, it makes the profession treated as a pseudo-legal profession. Such a statement is based on the arguments:

A) the sex workers are frowned upon by the law and penalised under IPC for public nuisance and indecency. They are not allowed to profess their profession 200 metres from any public place[36] and are also barred from inducing clients, broadcasting their numbers or any kind of professional promotion.

B) any client cannot seek the services of the said worker within 200 yards of public domain may face imprisonment up to 3 months.[37]

C) no person is allowed to own or manage a brothel[38], they are not allowed to earn any living from a sex worker and an adult male who permanently lives with a sex worker also violates this act.[39]

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32 Md. Sahabuddin Mondal, *Legalization Of Prostitution In India: Need Of The Hour*, Legal Service India (Aug. 4, 2020), http://www.legalservicesindia.com/article/2460/Legalization-of-Prostitution-in-India:-Need-of-the-hour.html.

33 *We the People, We the Citizen*, MyGov Blog (Aug. 7, 2020), https://blog.mygov.in/we-the-people-we-the-citizen/.

34 The Immoral Traffic (Prevention) Act, No. 104 of 1956, India Code (1993).

35 *Prostitution in India,* Racolb Legal (Apr. 9, 2016), http://racolblegal.com/prostitution-in-india/.

36 The Immoral Traffic (Prevention) Act, No. 104 of 1956, India Code (1993), § 7(1)(b).

37 The Immoral Traffic (Prevention) Act, No. 104 of 1956, India Code (1993), § 8.

38 The Immoral Traffic (Prevention) Act, No. 104 of 1956, India Code (1993), § 3.

39 The Immoral Traffic (Prevention) Act, No. 104 of 1956, India Code (1993), § 4.

Such provisions directly hinder with the right to freedom. The basic right of freedom also includes right to profess and practice any and every profession.[40] When provision for the said profession are such that it is not to be declared it makes the essence of the right hollow. It also hinders with right to life as the right to life includes the right to live with dignity.[41] The constitution nowhere dignifies the right of sex workers where people are penalised for even choosing to live with them. Right to equality is clearly denied by the fact that male prostitution is not at all recognised in India.

An average woman in India faces multiple layers of discrimination every day, particularly in areas of education, healthcare and workplace. In such a situation, sex workers become a further more vulnerable group even amongst the discriminated group. Their profession as looked down upon, seen to be unethical, obscene etc. They are discriminated in the provision of health care and facilities all throughout. This also increases the problems of HIV/AIDS in the country. For example, for a general woman an HIV test is prescribed only if they are suffering from diarrhoea, STD, etc. but such a situation for a sex worker changes and for her the test becomes "mandatory" even when suffering from common cold.[42] This leads to sheer discrimination and humiliation.

Most health hazards are prevalent in the sex industry and the major reason for this is the industry being unlawful, pimps smuggling kids and underage girls, and no maintenance of health records or standards.[43]

Most of the sex workers in India are made to join this profession at a very tender age, because of various different reasons. Thus, the consent for joining the profession remains absent. The Ministry of Women and Child Development remarked that their number of female sex workers in the country, back then, was over 3 million of which more than 1 million entered sex trade before acquiring the age of 18.[44] The various reasons for joining the profession range from being illegally trafficked to being sold by their own parents for monetary benefits[45], along with various other reasons.

While trafficking remains prohibited under the Constitution[46], it

40 India Const. art. 19(1)(g)
41 Maneka Gandhi v. Union of India, (1978) AIR 597 (India).
42 Kounteya Sinha, *In India, two out of five female sex workers suffering from HIV,* The Times of India (Mar. 15, 2012), https://timesofindia.indiatimes.com/india/In-India-two-out-five-female-sex-workers-suffering-from-HIV/articleshow/12271596.cms.
43 Ministry of Women and Child Development, supra note 32, at 3.
44 *Id., at 68.*
45 United Nations Office on Drugs and Crime, An Introduction to Human Trafficking: Vulnerability, Impact and Action, at 71 (2008).
46 India Const. art. 23

also prohibits the employment of minors in hazardous occupations.[47] But, the conditions of sex workers in India due to existing laws and the 'neither legal nor illegal' status of sex work in India contravene both the existing laws, thereby going against their basic human rights.

As the profession is looked upon as immoral and derogatory, most sex workers don't have a stable life. They keep on migrating, hiding or running. This results in lack of proper documentation to support themselves. This acts as a negative point for them in availing schemes of the govt of their own country, which are made for them, but due to lack of documentation they are repeatedly exploited and harassed by middlemen, police and pimps.[48]

The pre-existing perception of sex workers being nothing less than criminals leads to another problem with respect to Human Rights – violence. Apart from the stigma attached to their work which leaves them exposed to violence by family, the institutions meant to protect them (police) do contribute to the same violence.

The rehabilitation of sex workers is a cause of concern in the developing nations like India, as per the SR-VAW.[49] Raids by police for noble purposes such as rescue and rehabilitation of sex workers but in a violent and abusive way has been a common practice and the narratives of sex workers post raids have been a testament for the same. One of the major reasons why police resort to violence and physical abuse is because of how immaterial the consent of sex workers for their profession is, in the minds of the officers.[50] Thus, adult sex workers who wilfully consent to the profession are forcefully 'rescued', which often requires police to resort to violent measures. This is one of the major reasons why legalisation and regulation of Sex Work is needed to protect various human rights of sex workers.

8. Conclusion

Mill, while explaining his Harm Principle, had clearly stated that anything that affects the happiness of people at large is harmful and should be condemned.[51] Though, he had struggled for many women rights, equality in liberty, and also against the contagious diseases act, his stance on prostitution still remains negative.

Mill's moral condemnation of prostitution isn't the only thing evident from his writings, but also the dismissal of way followed by

47 India Const. art. 24.

48 United Nations Development Programme, Sex Work and the Law in Asia and the Pacific, at 12 (2012)

49 United Nations High Commissioner for Refugees, Report of the Special Rapporteur on violence against women, its causes and consequences, Doc. No. A/HRC/26/Addl, at 7 (2014).

50 *Why sex work should be decriminalised,* Human Rights Watch (Aug. 7, 2019), https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized.

51 Brink, *supra note 20.*

individuals of comparable moral persuasion, for example, concealment and condemnation of female sex workers.[52]

Mill tested the unassailed rights of men in the field of sex, putting to test the assumptions about male sexual right. While the concept of male prostitutes might have not existed during the said period of time, Mill still supported the view that sex which is sold does not hold equal enjoyment for both sexes.

He summoned a balanced treatment in the structure that is adapted to deal with prostitution, since the better part of prostitution brought to light the desperation of the common labourers who had no other choice. He argued on the issues that included abuse of power through the misutilization of the law by the more elite section of the society.

While Mill denounced the act of prostitution[53], and the predominant methodologies both to understanding its causes and recommendations for guideline, he missed the mark concerning suggesting radical law change not just based on his freedom standards. Mill was extremist in his emotions, however remaining liberal in his expulsions for change in law. He was closer in his examination of prostitution, its causes and demerits, to current revolutionary women's radical instinct, than to any of the different strands of liberal reasoning. Even though the restrictions he supported were liberal, it can't be said without a doubt if his viewpoint would've changed as it was evident that prostitution was not likely to disappear, irrespective of the rise of other means of balance between the two genders.

While, everyone calls prostitution a social evil, calls it a problem, it is imperative to understand its deep-rooted psych. To legalise or to penalise an act can be decided only after one has known the nature of the act completely. What is harmful to the society and what is not can be known after the whole society is taken into consideration.

All the customers are provided with a condom[54] along with the facility of shower before and after the session, in Singapore.[55] The prostitutes in the said country are to maintain health cards and get regular check-ups to not get infected by sexually transmitted diseases.[56] In India however, it is not like such institutes of selling and using sex do not exist. But the "morality" of the Indian population does not allow them to talk about it openly or do it safely. There obviously is a clear reason

52 McGlynn, *supra note 14.*.
53 Pringle, *supra note 3.*
54 Palash Krishna Mehrotra, *Legalisation of prostitution will help protect vulnerable women in India, Daily Mail (Oct. 19, 2014)*, https://www.dailymail.co.uk/indiahome/article-2798508/legalisation-prostitution-help-protect-vulnerable-women-india.html.
55 *Id.*
56 *Id.*

as to why India is the second largest population of the world with the highest poverty rate and health issues.

It is important to note that a majority of people purchasing the services in secrecy are the ones who condemn it citing moral grounds in public.[57]

If prostitution is considered to be immoral and harmful in India, what about the dance numbers that are enjoyed publicly with no hesitation? There is ambiguity in the morals, if I may say of the Indian population. What is moral and what is immoral is to be decided first to finally put a blanket ban on sex work in India or to fully legalise it.

57 Mondal, *supra* note 27.

Human Rights and Access to Justice: An Overview

Mr. Siddharth Baskar
Mr. Atishay Sethi

Abstract

Human rights are those rights that an individual has acquired by birth. A violation of these amounts to interfering with the basic concepts of international law. It aims to protect human beings. It helps achieve peace in the world. Every nation has a duty towards its citizens to protect these basic human rights. If such rights are not provided to the citizens of the country, then it is a shame on humanity. Human Rights are governed mainly by Charter of Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights together known as the Bill of Human Rights. Human rights are the product of mankind and have developed as a result of the very existence of living beings. The term human rights does not have one definition. Human Rights are also known as Natural Rights, Universal Rights. It includes civil, political, economic, as well as cultural rights. Human rights are defined and protected under international law. However, human rights cannot be protected fully under many circumstances, and the violation of human rights leads to the application of effective remedies for seeking justice. These remedies help in protecting the rights of the person or the group whose rights had been violated and translate the dreams of justice into reality.

The field of human rights is a very vast yet unexplored territory, and the following paper is aimed at understanding human rights.

Introduction

> **"There is no man too proud to fight for the rights bestowed upon him by nature."**

United Nations defines human rights as "those rights inherent to all human beings regardless of race, sex, nationality, ethnicity, language, religion or any other status".[1] Rights available to all humans for their protection are known as human rights. The term "Human Right" first period in French for the first time 1763 [2] and it can also be dated back to the era of "Stoics". Humanitarianism has always had ambiguous

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1 Universal Declaration of Human Rights, 1948

2 Lynn Hunt, Inventing Human Rights: A History

consequences and so have these rights.

Human Rights have always existed within humans and humans are born with these rights also known as natural rights. The unique feature of human rights is these rights can never be made or discovered but recognized for the fact that these rights are made by the inner realization of what one's rights should be while on the contrary, all other laws such as Property laws are made.

The need for protection of human rights under international laws:

Under the concept of traditional international laws, the laws governed the relation between nation states exclusively and the subjects of the nation were not covered under the ambit of international law. Rights of humans were not affected under the international law and states treating its nationals in any manner were not regulated by international law.[3] The international laws were criticized heavily for the lack of protection of human rights and the Doctrine of Humanitarian Intervention was created under the International Law.

Doctrine of Humanitarian Intervention:

The doctrine did not acknowledge the rights of human beings under the international law but acknowledged the right of a nation to interfere into the affairs of another state by force in order to stop the abuse by a state to its own nationals if the abuse had the nature of tragic conscience which could affect the community of nations as a whole.[4]

Human Rights are a vast term and violation of human rights can be on an international level where laws of a nation fail due to the lack of jurisdiction. Initially UN was the single organization to implement and protect International Laws and Rights to humans.

Human Rights Timeline:

Human Rights governed under "International Human Rights Law" define human rights. The distinct feature in relation to human beings is that the rights cannot be pinpointed to one specific era or period. Research Scholars, historians among other prominent academicians have been unable to agree on one specific date as to when these rights were recognized.

Babylon Code of Hammurabi or Hammurabi Code, 1754 BC[5]: The Code of Hammurabi was made by the sixth Babylonian king and is considered an important addition to the timeline of human rights.

3 Thomas Buergenthal, International Human Rights in a nutshell, https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1365&=&context=faculty_publications&=&sei-redir=1&referer=https%253A%252F%252F

4 Id.

5 Hammurabi Code of Law, 1754 BC

Hammurabi Code is one of the oldest and well written codes of law and it still finds its relevance in the present society under the following concepts:

Palimony: The concept of palimony where two people cohabiting together as a couple without marriage can also claim `compensation from the other person originated from the Hammurabi Code.

Doctrine of Lex talionis: The laws of retribution also known as "an eye for an eye" are speculated to have been originated from the code of Hammurabi.

Innocent until proven guilty: The laws and punishments under this code were harsh but the code provided a fair form of justice in the fact that everyone was innocent until proven guilty which went on to become one of the main rights of an accused in today's world.

Cyrus Charter of Human Rights, 539 BC[6]: Cyrus Charter of Human Rights was the first charter of human rights and is also known as the Cyrus Cylinder. It is of importance as it was the first charter of human rights ever made and laid down important aspects of the same.

This Charter is known as the symbol of tolerance and freedom and what stood as a distinguishing feature of the Cyrus Cylinder was the freedom of slaves, right to choose religion. All these led to the Cyrus cylinder being recognized as the first charter of human rights.

Art of War, 400 BC[7]: Art of War is an ancient Chinese military treatise developed and written by the Chinese philosopher **Hsun-Tzu.** This book or treatise is one of the oldest well written documents regarding the international humanitarian laws as we know them today and the rights of prisoners were acknowledged by Hsun-Tzu for the first time which led to emergence of laws of warfare as one of the main branches under International law.

Magna Carta, 1215[8]: Magna Carta is often regarded as the charter of rights and it has gained importance as being one of the most important documents that ever existed in the history of human rights. Magna Carta contained several important clauses directly relating to the rights of human beings and those clauses are applicable even today.

Concept of Prisoner of War: Magna Carta had several clauses under it which talks about prisoners of war and their rights applicable in today's world.

Right to Justice and Fair Trial: Magna Carta emphasized on

6 Cyrus Charter of Human Rights, 539 BC
7 Art of War, 400 BC
8 Magna Carta, 1215

the fact that no one can be deprived of his own rights, imprisoned, outlawed/ exiled and the judgment to him can only be pronounced by the laws of the land.

Right of justice to be provided: Magna Carta also focused heavily of the importance of justice and implied that justice can neither be sold nor delayed or denied.

Petition of Rights, 1628[9]: Petition of rights came into existence as a legal constitutional document as the declaration of rights of the subject which a king is prohibited from infringing.

The significance of the petition of rights was the fact that it forced the king to obey certain rights and prevented the violation of these rights of his subjects for the first time.

These four principles were the main rights which were protected by the document of the petition of rights:

Taxation without the consent of Parliament: Petition of rights guaranteed the subjects the right to be taxed only with consent of parliament and king could no longer impose the tax without the consent of parliament which was made to be necessary under this document.

Prohibition of Quartering of soldiers on subjects: Under this document, the king could no longer allow the quartering of soldiers on his own subjects.

Prohibition on the imposition of Court Martial Laws in times of peace: The laws used in wartime could no longer be imposed in peaceful times.

No imprisonment without cause: King could no longer imprison anyone without providing sufficient reasons.

Habeas Corpus Act, 1679[10]: Habeas Corpus Act introduced the writ of Habeas Corpus which empowers rights of the accused to be presented before a court of law and since then has been one of the most used writs in the world.

United Kingdom Bill of Rights, 1689[11]: The United Kingdom Bill of Rights is a declaration of civil liberties and rights it and codified certain rights and liberties of Petition of Rights, 1628 and the Habeas Corpus Act, 1679 as well. Other features include limited powers of king and queen, freedom of speech and separation of powers.

In the Declaration of Independence, 1776[12]: of US, Thomas

9 Petition of Rights, 1628
10 Habeas Corpus Act, 1628
11 United Kingdom Bill of Rights, 1689
12 Declaration of Independence, 1776

Jefferson proclaimed, "We hold these truths to be self-evident that all men are created equal that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

The proclamation by Thomas Jefferson became a piece of reference and a legacy to the revolution of human rights as we know it today.

Virginia Declaration of Rights, 1776[13]: was drawn after the proclamation of Thomas Jeffferson and had similar principles under it as that of the Declaration of Independence.

Declaration of the Rights of Man and Citizen, 1789[14]: was a Civil Document from French Revolution and 17 of its articles served as the preamble to the 1791 Constitution.

Lieber Code, 1863[15]: The Lieber Code of 1863 was the first codified document declaring certain rules of conduct related to wartime and the lieber code served as the foundation of International Humanitarian Laws and Geneva Conventions regulating the laws of warfare.

Emancipation Proclamation of 1863[16]: Emancipation Proclamation of 1863 was issued by the President Abraham Lincoln and it was this Proclamation which abolished the practice of slavery in United States. Later, in 1865 the **13th Amendment to the United States** formally abolished the practice and trade of slavery.

World War I, 1914[17]: was fought between the Allied and Central Powers till 1919. The main causes of World War 1 were Alliance, Militarism, nationalism, imperialism and assassination.

League of Nations, 1919[18]: was formed after the end of World War 1 with the aim of incorporating world order, restoring peace and development of the world. One of the main aims was to prevent the world from witnessing another world war. The League of Nations was established by the **Treaty of Versailles.**

Pact of Paris, 1928[19]: The Pact of Paris was a treaty with declaration of not using war as a means or weapon for resolving disputes between the nations in any nature.

Holocaust, 1933-45: The German-based Holocaust witnessed the largest form of "violation of human rights in the history of mankind"

13 Virginia Declaration of Rights, 1776
14 Declaration of the rights of Man and Citizen, 1789
15 Lieber Code, 1863
16 Emancipation Proclamation, 1863
17 World War I,1914-19
18 League of Nations, 1919
19 Pact of Paris, 1928

and around six million Jews were hunted, tortured in concentration camps and killed.

World War II 1939-45[20]: 1939 witnessed another outbreak of chaos and the world was again divided into 2 parts under Allied and Axis Powers.

United Nations, 1945: United Nations established in 1945 replaced the "League of Nations" when the former failed to prevent the second world war. UN's main aims are to promote security, peace, development in the world and to prevent another outbreak of war.

International Court of Justice, 1945: ICJ was created by the UN and it is the leading court of Justice having the power and authority to oversee international disputes between the nations.

International Criminal Court, 1946: International Criminal Court was established in 1946 for the offences of war crimes, genocides and crimes against humanity at an international level.

Trials for war crimes against humanity, 1945-48: The period between 1945-48 witnessed trials against leaders as an individual for their crimes against humanity in wartime and was established that individuals can be held liable for the war crimes against humanity, genocides and crimes against humanity in general.

Convention on the prevention and punishment of the crime of genocide, 1948[21]: The convention laid down articles and laws for prevention of acts of genocide and punishments available for the crime of genocide.

Apartheid Regime, 1948-1994: Racial Discrimination existed between 1948-1994 in Africa and humans were discriminated on the basis of their color. This form of system was known as Apartheid.

International convention on the elimination of all forms of racial discrimination, 1965[22]: This treaty was adopted in 1965 which abolished any form of racial discrimination.

Declaration on elimination of discrimination against women, 1967[23]: The declaration provided the prohibition of any form of discrimination against women.

First conference on human rights in Tehran, 1968: was held in Tehran, in 1968.

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20 World War II, 1939-45
21 Convention on the prevention and punishment of crime of genocide, 1948
22 International Convention of Elimination of All Forms of Racial Discrimination, 1965
23 Declaration on Elimination of Discrimination against Women, 1967

International convention on suppression of apartheid, 1973[24]: The convention on suppression of Apartheid came into existence to the response of racial discrimination policies in Africa also known as Apartheid.

Convention on elimination of discrimination of all forms on women, 1979[25]: It replaced the 1967 convention on elimination of discrimination against women.

Convention on the rights of the child, 1989[26]: The rights of a child have been established under the convention.

Declaration on elimination of violence against women, 1993[27]: first declaration exclusively talking rights of women to be protected from all forms of violence.

ICJ Statute, 1998[28]: In 1998, The ICJ Statute was established which laid down the norms and guidelines to be followed the ICJ and other court of laws.

Human Rights and Justice:

The fundamental principle of Human Rights is accessing justice. The objective of Human Rights is to create a humane world where everyone can live peacefully. They live without the fear of their basic Human Rights being violated. Human Rights are universal and inalienable in nature which in itself means everyone without being differentiated has a universal and equal right on such basic Human Rights. The objective of law is to create a safe environment where all the basic Human Rights of every individual can be respected. Human Rights and Justice can be classified into three aspects wherein the protection of basic rights of every individual must be kept in mind which includes child, women and universal recognition and protection of everyone which includes man, women and child.

- Child: is a person who is below the age of 18 years of age unless a state prescribes a legal age for adulthood under its laws. Children are the most vulnerable to Human Right violations. They are often are exposed to various Human Right violations like child labour, lack of access to education, clean water and basic health care, child marriage, etc. To protect and tackle these problems of children and respect their Human Rights in the year 1989 the Convention on the Rights of Child was adopted by the United Nations in New York which was ratified by more than 190 countries making it the most widely

24 International Convention on Suppression of Apartheid, 1973
25 Convention on Elimination of All Forms of Discrimination against Women, 1979
26 Convention on the Rights of Child, 1989
27 Declaration of Elimination of Violence Against Women, 1993
28 ICJ Statue, 1998

accepted Human Rights treaty in the history. The convention came into force in the year 1990. Children because of their vulnerability require special attention. There is special emphasis on primary care for such purposes the Convention on the Rights of Child came into force.

In order to protect children under the convention there are basic Human Rights available to children which must be core to upholding the access to justice to children. The four core principles to achieve justice for children under the Convention of Rights of Child are

a. Non Discrimination – *All the rights shall apply to every child without any exception (Article 2).* The convention mandates that it shall be the duty of the government of various nations who are the party to the convention to protect the children from any discrimination. They will promote their rights by taking positive actions.

b. Best interest of the child – *"The state has the responsibility to look after the best interests of the child. (Article 3). This includes adequate care when parents or any parental authority fails to do so."*

c. Right to life, survival and development – *"Every state is under the obligation to ensure the child's right to life, survival and development (Article 6)."*

d. Right to participate – *"The convention ensures that views of every child are respected and that their views are taken into account for any matter concerning and affecting child (Article 12).*[29]*"*

There are 54 articles in this Convention which ensures that every child's rights is protected and given due importance. The state parties ought to ensure the same by incorporating the laws within their municipal framework.

- Women: Human Rights to women are fundamental in nature and they have all the basic right to be educated, respected, treated equally in all spheres of life and earn an equal and fair wage, etc. But most often it has been seen that women's rights have been denied due to their gender. The United Nations on a global stage has however taken the stand for women in protecting and promoting their basic Human Rights. Numerous regional and international instruments have come but the most important one being the Convention on the Elimination of All Forms of Discrimination against Women which was adopted by the United Nations in 1979. The convention has been ratified by 180 states making it one of the most widely accepted international treaties.

29 United Nations Convention on the Rights of Child, 1990.

Under this convention the state parties have to submit a periodic report on the status of women in these countries. It also mandates every state have a complaint authority as per which National Commissions have to be established for protection and promotion of women's rights.

Some important provisions of the convention which are of utmost importance for achieving justice can be summed up as –

a. Policy measures to be taken – *To end all forms of discrimination and abolish all existing customs, laws which are discriminatory in nature (Article 2).*

b. Guarantee of basic Human Rights – *"Advancement of women and to protect their rights on the basis of equality with men (Article 3)."*

c. Trafficking and Prostitution – *To eliminate trafficking and protect women (Article 6).*

d. Equal Rights in education – *Equal access to education must be ensured by the state parties (Article 10)*

e. Employment – *To ensure equal and fair employment to women (Article 11).*[30]

There are 30 Articles in this convention. It is the duty of the state parties to act in good faith and comply with the provisions of the convention to eliminate all discrimination and promote equality among fellow human beings.

Universal recognition – Every human being has a fundamental and universal right to basic human rights. Each person is entitled to equal rights. For the purposes of fair, just and equal rights for every human being, the Universal Declaration of Human Rights was adopted in the year 1948. It sets out the universally recognized standards and rights that ought to be given to everyone. Over the years the "Universal Declaration of Human Rights" has taken the form of customary international law. It has gained importance and these basic rights have been incorporated within the municipal framework of various countries to uphold the principle of fairness and justice to all human beings. Article 2 of the Universal Declaration of Human Rights makes is very clear that *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it*

30 The Convention on the Elimination of All Forms of Discrimination against Women, 1990.

be independent, trust, non-self-governing or under any other limitation of sovereignty".[31] Human Rights regardless of gender are universal and a must for everyone to live a life of dignity.

Ensuring access to justice is the core element of every nation. The laws made at an international level need to be respected to make sure that delivery of justice is upheld.

Case studies:

- ***United States Diplomatic and Consular Staff in Tehran:***

In this case an armed attack took place on the United States embassy in Tehran (1979) by students who were in support of the Iranian revolution. The students overtook the embassy and more than 60 US diplomats and citizens were kept hostage for more than a year. Iran promised protection, but it did not fulfill its promise, nor did it rescue the hostages or make an attempt to stop it. The case was referred to the International Court of Justice the court held that *"wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights". Further court held "Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness".*[32]

- ***Charles Shobraj v. Superintendent, Central Jail, Tihar, New Delhi:***

In the instant case the petitioner contended that he was subjected to intentional discrimination and was hurled of inhuman treatment of prison authorities. *"The court held that such a treatment is a violation of Right to Life guaranteed under Article 21 of the Indian Constitution and even in prison a person is entitled to all the rights mentioned in Article 19 and 21". The court restricted the punishment of solitary confinement and recognized the putting to prisoners in bar – fetters for a usually long period only in those cases where absolute necessity demanded them. The court ordered for the removal of bar – fetters on Shobraj on the ground that he has no right to liberty since he was lawfully detained but he had a right to life.*[33]

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31 Universal Declaration of Human Rights, 1948, General Assembly Resolution no 217 A.

32 United States of America v Iran, [1980] ICJ 1; ICJ Reports 1980.

33 Charles Shobraj v. Superintendent, Central Jail, Tihar New Delhi, 1978 AIR 1514, 1979 SCR (1) 512.

- ***Filartiga v. Pena – Irala:***

The main issue before the court was whether torture was a breach of international law. The United States Court of Appeals for the Second Circuit found that *"the prohibition of torture has become a part of customary international law and as defined by the Universal Declaration of Human Rights no one shall be subjected to torture (Article 5).*[34]"

There have been various cases which have answered the question of protecting Human Rights and maintaining justice, fairness and protection of every human from their basic Human Rights violations.

India and Human Rights:

The Indian Constitution provides for various Fundamental Rights. These Fundamental Rights form a part of the basic Human Rights for every citizen in India irrespective of sex, colour, creed, religion, etc. The Indian Constitution 1950 sets out six Fundamental Rights for everyone. Part III of the Indian Constitution – Articles 12 – 35 provides for the Fundamental Rights.

a. Right to Equality: this ensures that everyone is treated equally and there is a clear prohibition of inequality based on sex, caste, creed, religion etc. Further ensuring equal opportunities in public employment and also ensuring that the State does not discriminate against anyone on the matters of employment.

b. Right to Freedom: ensures that every citizen of India has the freedom to speech, expression, to form an assembly without arms, movement throughout the territory of India, to form an association, practice any profession trade or business and settle or reside in any part of India. But these rights are subjected to certain restrictions to maintain a just system of law throughout the country.

c. Right against Exploitation: prevention of unlawful compulsory labour, child labour and making an individual work beyond the working hours without money is punishable under the law.

d. Right to Freedom of Religion: Every Indian has the right to practice, preach and propagate the religion of his or her choice. The states ought to treat all the religions equally and there shall be no particular religion of a state.

e. Right to Cultural and Educational Rights: are protected and given due importance.

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34 Filartiga v. Pena – Irala, 630 F.2d 876 (2d Cir. 1980).

f. Right to Constitutional Remedies: Every citizen of India has the right to go to the Supreme Court of India to seek for the protection of their Fundamental Rights.

India has further various laws in place to protect the Human Rights of everyone like the Protection of Human Rights Act 1993, Juvenile Justice Act 2015 etc. These laws ensure that if there is any violation of basic rights, then such laws will come into play to help the person in need. The established commissions like National Human Rights Commission, National Commission for Women etc. also ensure that they take complaints from people whose Human Rights have been violated and act to protect the people in need of help. For example, the National Human Rights Commission has the duty visit places like the jail to ensure if basic living standards are provided to protect the basic rights of every citizen. The whole objective of these commissions is to strengthen the Human Rights of people.

Most of the Indian population is covered by villages and these people have no or very little awareness of Human Rights due to factors like illiteracy, backwardness etc. The challenge is to make them aware of their rights through these commissions in place and various Non – Governmental Organizations. It is upon them to help people know their rights along with the government of India taking bold steps towards helping them and assuring them full respect. Human Rights awareness is a step to be taken seriously if India needs to tackle these fundamental right violations.

India has strong laws in place to achieve justice for everyone. The only need is to make sure that the people are made aware and the implementation of these laws is at its best.

Conclusion:

The issue of Human Rights has been ignored more often. This ignorance can lead to a detrimental impact not just on a nation but the entire world if steps and measures are not taken to protect Human Rights. It is suggested that clear initiatives and implementation mechanisms must be decided on the global level to ensure that all the nations are aware of and implement the basic Human Rights that it needs to maintain for its citizens. This will enable them to live in a world of justice. Change does not take place quickly. We need to act now to bring about a positive change in the society and ensure these rights are respected. Every human being deserves these basic rights must be protected at all costs.

Exploring the relationship between Law and Governance in the Indian Context

***Mr. Abhijit Mitra**

Abstract

This paper studies how Governance is a much broader concept than law by exploring the relationship between law and Governance through four typologies viz. i. Governance without the State, where the state is not a party, but instead here it is the non-state actors and contracting parties involved in Governance; ii. Governance through delegation, where the state delegates some of its powers/functions to non-state entities and hence recognized by state through law; iii. Governance by the state outside of the law, which involves unconstitutional events commuted by the state; And lastly iv. Governance by the state through the black letter of the law. All four typologies have been located in the Indian context to comprehend Governance in India, which forces us to rethink upon law's limited ability for transformation and need to refashion the imagination of Governance in innovative ways in today's contemporary political spectrum of globalization and neoliberal ethos.

Introduction

Law, read from a positivist sense, is seen as a set of rules and codes by the State/Sovereign to govern the social conduct of its legal subjects. However, Bradney suggests that the theoretical discourses regarding legal education, whether vocational, liberal, experimental or so on can remain the same, yet how it gets interpreted will always depend upon *"the inter-relationships of three parties viz. practitioners, academics and the state, determined by past political experiences and thus form a unique configuration in every country"*.[1] Governance thus aims to establish foundations corresponding with accountability and the rule of law that sets the threshold of the state's discretion[2], ensure participation, effectiveness, coherence and respect for human rights in order to maximize the common good. Rawls defines common good as *"certain general conditions that are ... equally to everyone's advantage"*.[3] Hence Governance is a much broader concept than law.

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1 Anthony Bradney, *Rethinking the Law School: Education, Research, Outreach and Governance,* 43 J.L. & Soc'y 479 (2016).

2 Due to Mancur Olson's assumption that all states have the potential to be of predatory nature. See Mancur Olson & Satu Kähkönen, *Dictatorship, Democracy, and Development, in* A NOT-SO-DISMAL SCIENCE: A BROADER VIEW OF ECONOMIES AND SOCIETIES 132–150 (Oxford University Press, 2000).

3 Joseph V. Carcello, *Governance and the Common Good,* 89 Journal of Business Ethics 11-18 (2008).

The relationship between law and Governance can be further understood through the following typologies:

1. Governance without the State

In this typology, the state is not a party but instead, here it is the non-state actors and contracting parties involved in Governance. This form of Governance incorporates a surge of private and civil actor involvement, implying a transition from *'government'* to *'governance'*, making the political perhaps much more diffused.

Archibugi and MacDonald talk of non-state governance arrangements (NGAs) to emphasize two significant areas of wide consensus in the literature, i.e. *"governance can in principle be provided without the involvement of state actors"* and *"coherent governance functions can be performed not only by single organizations but also by separate organizations linked in networks or other cooperative arrangements"*.[4]

With the growing inefficiencies in bureaucracies, need was felt for its shedding and hence slimming down of bureaucracy meant more involvement of private entities. Examples are new public management (NPM), corporate Governance and good Governance. From the 1991 LPG Era, even India saw a surge in regulators, limiting the role of government by giving more autonomy to the regulators.

Moreover, Epstein illustrates the changing global information governance of systems like telecom etc., which were traditionally within the prerogatives of state-centric apparatuses. He contends that the influx of internet has displaced the state-driven governance frameworks to include non-state actors framework, established outside of those traditional instruments. However, numerous debates are still questioning the shape of the network itself. It touches upon personal liberties, fundamental human rights, culture, markets etc.[5]

Even in the field of Global environmental Governance, since ecological problems are borderless, ecologically interdependent and even beyond the jurisdiction of nation-states like "the commons[6]", the domain of the environment has been a laboratory for new modes of Governance involving an intergovernmental process with businesses and NGOs[7].

Similarly, in the field of sports, globalization has resulted in a shift of legal regulation of sports from Government to Sports Federation

4 Mathias Koenig-Archibugi & Kate Macdonald, *Accountability-by-Proxy in Transnational Non-State Governance*, 26 Governance 499-522 (2012).

5 Dmitry Epstein, *The Making of Institutions of Information Governance: The Case of the Internet Governance Forum,* 28 Journal of Information Technology 137-149 (2013).

6 Like atmosphere, oceans etc.

7 Example- IUCN, Biodiversity Action Network, WWF, Green Peace, Birdlife International, IPCC etc.

Bodies like FIFA, International Olympic Association, BCCI etc., allowing private autonomous organizations to be free from Government control.

In India, the task of organization of the game of cricket comes under the aegis of "Board of Control for Cricket in India" (BCCI)[8] which comprises a consortium of corresponding state's "cricket governing bodies" like Cricket Association Bengal etc., which also have affiliates at the club level; which in turn elect the BCCI officials. Hence it forms a pyramid, with BCCI at the topmost and the local clubs at the bottom. In the SC case of *BCCI v Cricket Association of Bihar,*[9] a PIL was filed against an IPL spot-fixing investigation panel, in which SC again deliberated on the issue of whether BCCI and the state cricket associations are bodies discharging public functions[10] that amount to "State" u/A 12. After going through the different tests[11] laid down in various cases,[12] SC had upheld the decision taken in the *Zee Telefilms Ltd. case,*[13] where it had laid down that BCCI is not a State. However, SC moved a step ahead from the Zee Telefilms case to transform the sports governance paradigm by allowing judicial scrutiny through writ u/A 226 against BCCI. BCCI being an autonomous body, has the power to regulates itself but has been found to misuse amendments according to its fancies, which was seen in the amendment of BCCI's Clause 6.2.4[14] to *"No Administrators shall have, directly or indirectly, any commercial interest in the matches or events conducted by the Board excluding events like* ***IPL or Champions League Twenty 20.****"* Such biased amendments were brought in to immune the then-incumbent BCCI Secretary, Mr Srinivasan. Since he was also the de-facto owner of the Chennai Super Kings through India Cements Ltd. (a team in a league under the aegis of BCCI), there was a conflict of interest. SC had struck down this clause as it was against the principles of natural justice and which resulted in debarring anyone from the BCCI elections, whoever has commercial interests in any BCCI event. Hence we see that although private bodies have been given autonomy, the court has ensured to keep a check on its misuse.

8 Under the "Tamil Nadu Societies Registration Act, 1975", BCCI is registered as a private club consortium.

9 (2016) 8 SCC 535.

10 Like managing the affairs of players, match officials etc., National Cricket Team selection etc.

11 Financial, administrative government control, Public Function test to determine whether an '*other authority'* u/a 12, would be an instrument of the State.

12 R.D. Shetty v. Union of India AIR 1979 SC 1628; Ajay Hasia v. Khalid Mujib AIR 1981 SC 487; Pradeep Kumar Biswas v. Indian Institute of Chemical Biology (2002) 5 SCC 111.

13 Zee Telefilms Ltd. v. Union of India and Others (2005) 4 SCC 649.

14 Original clause read, "*No Administrators shall have, directly or indirectly, any commercial interest in the matches or events conducted by the Board*".

In the religion domain, *The State of Bombay v. Narasu Appa Mali*[15] holds special significance in which the Bombay HC held that 'personal laws' are not included u/A 13's meaning of "laws in force" and thus making it immune from violation of Part III of the Constitution. It has hence checked State interventions in matters related to Muslim Personal Law. The SC had also laid down the "Essential Religious Practices Test" in the *Shirur Mutt case*[16] to decide whether any religious practice is essential to the religion or not. This test has allowed the courts to touch upon spiritual matters and thus, segregate and discard non-essential parts, e.g. in *Shayara Bano v UOI*[17], SC rejected the practice of Talaq-e-Biddat or Triple Talaq as an essential practice under Islam, allowing SC to hold it unconstitutional, without touching upon Narasu Mali.

But such tests in my opinion, are just transformative judicial innovations to keep up with the times as a direct intervention would have the risk of public out lash from the conservatives of the society. The source of the personal laws is itself shaky since there was no one unified "religious" community but varied practices that went through the complex process of rationalization under the colonial state. Like other statutes/laws in place, the Muslim personal law or the Hindu personal law are too dependent on the "coercive power of the state" for its authority and are being moulded by secular elements to the extent that emerges out of socio-political reflections. Hence the validity of these laws is derived more from the state than religion. The sanction of the Sovereign behind Personal law makes it a law, and that is enforced through Courts. It is not Muhammad or Manu, but the existing Sovereign that makes 'Personal law' enforceable[18].

Even Chandrachud J. in the *Sabrimala case*[19] was of the opinion that Narasu Appa Mali's stance to restrict the definition of "laws in force" which prohibits "customs, usages and personal law from Constitutional scrutiny" is not in par with the transformative vision of the Constitution and that such flawed premises necessitate reconsideration in detail in an appropriate case in the future.

Khap Panchayats tracing their origins to tribal times are informal, deep-rooted social institutions in the Jat-dominated areas from the 14th and 15th centuries. Earlier, Mughals and Britishers made use of the khaps by political overlords for numerous purposes, which further strengthened their position in the society. Although Independence

15 AIR 1952 Bom 84.
16 1954 SCR 1005.
17 (2017) 9 SCC 1.
18 Assan Rawther v. Ammu Umma (1971) KLT 684.
19 Indian Young Lawyers Association v. The State Of Kerala 2018 SCC OnLine Ker 5802.

brought in *"democracy based on secular principles, courts and the principle of the rule of law"* but the social reality of customs, caste and patrilineal customs of tradition along with failed land reforms resulting in an asymmetrical pattern of landownership ensured their survival in many rural areas. Kumar in his study investigates the modern states' failure to tame khap's unwritten powers, which is still prevalent. He finds that the Jats' comprises around 25% of Haryana's population, ensuring a prominent voice in electoral politics results in the election of big Jat landlords occupies important ministerial posts who have been instrumental in endorsement of the diktats of khap panchayats. Hence in this paradox of development, people are guaranteed constitutional rights on one hand and at the same time, there are people with traditional rooted identities of caste or gotras, village etc.[20]

2. GOVERNANCE THROUGH DELEGATION

In this typology, the state delegates some of its powers/functions (like rule enforcement, adjudication etc.) to non-state entities and hence recognized by the state through law. Here the state relies on non-state entities to perform its functions. For e.g. Professional bodies like BCI, MCI, educational institutions like JNU – Parliament has passed an act delegating certain powers.

Nowadays, most acts are formed at the administrative chambers compared to the number of acts made by the legislature. Delegated legislation is quasi-legislative in nature and is also known as administrative rule-making, which simply denotes *"all law-making which takes place outside the legislature and is generally expressed as rule, regulations, orders, bye-laws, directions, scheme, etc."*[21]

Hence the term "*subordinate is legislation*" is commonly used in India since it bears the expression that the authoritative bodies which are formulating law-making functions are subordinate to the legislature.[22] Further, unlike the legislative powers wielded by executive legislation, which are as powerful and similar as those of legislature (for e.g. power to promulgate ordinances by President and Governor u/A 123 & 213), delegated legislation is different in its purpose. There are several reasons for delegation viz. compulsive necessity due to Parliament's incapacity to provide the quantity and quality of law, technical know-how, emergency measures or where government action requires discretion.

Although delegative legislature forms a significant chunk of laws, any further delegation by a delegate to any other agency is not allowed

20 Ajay Kumar, *Khap Panchayats: A Socio-Historical Overview*, Vol. 47, No. 4 Economic and Political Weekly, pp. 59-64 (JANUARY 28, 2012).
21 1 M P JAIN ET AL., PRINCIPLES OF ADMINISTRATIVE LAW (8th Ed. 2017).
22 Id.

legally and is hit by the doctrine of *"delegatus non potest delegare"*. SC in *A.K. Roy v State of Punjab*[23] observed that this doctrine usually is not allowable, although the legislature can always provide for it. However, sub-delegation should not be made in very wide language.

In *RE Delhi Laws Act*[24], the Seven judges bench agreed on two points. Firstly the necessity for such delegative powers to the Parliament was justified in the backdrop of circumstances when the country is facing innumerable problems. Secondly, SC held that with respect to delegation, the Indian legislature does not enjoy the same amount of liberty as that of the British parliament. Unlike the UK, our Constitution is a written one. Hence, there should be limitation on the capacity to delegate. However, it is on this point the judges opinions differed.

Therefore, delegated legislation is advantageous to an extent, provided that the statutory powers are exercised and the statutory functions are performed in the right way. However, Delegated legislation is criticized for inadequate scrutiny by Parliament, legislation not in harmony with public sentiments, practice of passing skeleton legislation (i.e. legislation with only bare minimum general principles which allows the executive not only to lay down the "details" but also to formulate and determine policies and principles) which constitutes a severe invasion of the sphere of Parliament by the Executive, and endangers the civic and personal liberties of the individuals. This is subversive of responsible government and erosive of democratic order.

3. GOVERNANCE BY STATE OUTSIDE OF THE LAW

This typology involves unconstitutional events commuted by the state.

The occurrence of Enforced Disappearances cases in Kashmir had been rampant, defying the guarantee of a right to life and which is also in contravention to fundamental human rights. It deprives not only the victim of these fundamental human rights but also the family, who are flung in a dilemma between hope and misery, forcing a constant state of uncertainty. Further, the inclusion of such injustices as a separate crime in the IPC is yet to be seen, provided India has signed, although not ratified, the "The International Convention for the Protection of All Persons from Enforced Disappearance" (ICPPED). The insurrection in Kashmir from 1989 brought forth the category of "half widows" which includes the spouses of the men who have disappeared and their whereabouts are ambiguous. Such a category is created outside the legal realm from the disappeared man's individuality and hence doesn't

23 AIR 1986 SC 2160.
24 AIR 1951 SC 332.

enjoy the justifiability of law. In this context, the rights of these women are difficult to locate in the conventional justice paradigm.[25]

Ordinance Extensions: The power of Ordinance making has been given to the Executive (President and Governor) in order to pass a law in case of emergencies when the Parliament or state assembly is not in session. But often re-promulgation of ordinances has been misused.

SC in *Krishna Kumar Singh & Anr v State Of Bihar*[26] held that in view of the misuse of re-promulgation of ordinance, such practices to be considered a fraud on the Constitution.

In *D.C. Wadhwa and Ors. v State of Bihar and Ors.*[27], Governor of Bihar had re-promulgated 256 times, keeping it alive for 14 years to which the then Chief Justice of India P.N. Bhagwati observed that,

> *"The power to make an ordinance is to meet an extraordinary situation and it should not be made to meet political ends of an individual. Though it is contrary to the democratic norm for an executive to make a law but this power is given to the President to meet emergencies so it should be limited at some point in time."*

4. GOVERNANCE BY STATE THROUGH LAW

Governance through the black letter of law may not always be the best way to govern. For example, increasing the penalty may on one hand give the effect of nudging, which would increase the law abidingness due to deterrence (E.g. amendment of MV Act, increasing fines can deter people from not wearing seatbelts, helmets etc.) but on the other hand can also risk anarchy due to total rejection of it. (E.g. POCSO Act has imposed death penalty for rape of a minor which is the same punishment as for murder, hence is indirectly incentivizing for murder in case of rape since punishment is the same but the latter has a chance to mute the victim and erase the evidence.

Although democratic decentralization through 73rd and 74th amendments have been made, the expected benefits are yet to be reaped due to several issues in its implementation. Panchayats are not able to function properly since they are dependent on grants from State Government and internal resource generation at the panchayat level is weak. Also, since a significant portion of the grant is scheme specific, panchayats have limited discretion and flexibility. Similarly, PESA Act, 1996 was to extend PRI to "Scheduled Areas" under V Schedule, to

25 Bhattacharya Deya, *The Plight of Kashmiri Half-Widow*s, The Hindu Centre for Politics and Public policy (2016).
26 2017 (2) SCJ 136.
27 AIR 1987 SC 579.

empower the Gram Sabha and provides for "Tribal Advisory Councils" to formulate policies and administer tribal affairs and. However, since these councils are headed by Chief Minister who acts as their Chairperson, it has stayed chiefly a non-assertive institution and remain passive against the State governments policies.

SC in *Samatha v State of Andhra Pradesh And Ors*[28] held that Gram Sabha is the sole body to decide on the resources lying in the tribal areas and on the contrary where state government allows the transfer of land in favour of non-tribals for mining projects, *"would completely destroy the legal and constitutional fabric made to protect the tribal communities."*

Similarly, SC in the *Niyamgiri case*[29] directed Gram Sabha to examine if the mining project in any way affects the religious rights[30] of the STs and other TFDs.

Therefore, it has been seen that in cases of democratic deficiency, SC has tried to bring in Transparency.

CONCLUSION

The above discussion forces us to rethink law's ability for transformation and the need to refashion the imagination of Governance in innovative ways in today's contemporary political spectrum of globalization and a neo-liberal ethos. Menon[31] suggests in her book that the relationship between radical feminist politics and the use of law as a transformational tool is fundamentally at odds. She problematizes the "*Paradox of Constitutionalism*" through a feminist lens in which a tension is felt in between the need to assert various and differing moral visions that comes up against the universalizing drive of Constitutionality and the language of universal rights and citizenship. She gives a feminist critique of law as a strategy by depicting the shift from the 1960s of feminist work focusing on law as a source of equal rights and emancipation of women where law and state were seen as the only agents with power and legitimacy to the 1980s where the experiences of women's movements led to increasingly engagement with legal discourse. Menon argues that despite its successes in the form of legislations, e.g. Criminal Law Amendment Act, 1983; Sati Prevention Act, 1987 etc., why its implementation remain conservative and partial.[32] Hence we see how the language of rights has lost much

28 1997 Supp(2) SCR 305.
29 Orissa Mining Corpn. v. MoEF & Ors. (2013) 6 SCC 476.
30 Customary religious rights of worship in mountain called Niyamraja.
31 NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (University of Illinois Press 2004).
32 Flavis Agnes says since most new laws provides for stringent punishment and thus there are fewer convictions than before. See Flavia Agnes, Draconian and dangerous, Indian Express, 2018, https://indianexpress.com/article/opinion/columns/draconian-and-dangerous-kathua-gangrape-murder-case-unnao-rape-5156437/ (last visited Aug 30, 2020).

of its relevance even in the above instances discussed in various typologies. We see that the extension of this language for all kinds of rights to be fully human, which are to be guaranteed by the state, has raised contradictions in several instances and have not been adequately confronted. Thus, in this context, we need to look elsewhere towards innovative governance involving state, non-state actors, networks and cooperative arrangements.

India's Transformative Constitutionalism: Role Of Indian Supreme Court And Competing Public Morality

***Mr Divyanshu Chaudhary**
****Ms Akansha Ghose**

Abstract

The Constitution of India does not merely lay down the very structure or the essentials of the state but at the same also incorporates those fundamental rights and duties without which the very purpose of having a Constitution fades away. These foundational values remain devoid of any discrimination towards a group of people and rather always further the idea of equality, justice and dignity for all. The Supreme Court of India being the final interpreter of the Constitution has time and again highlighted the significance of these basic features and has therefore upheld the very essence and will of the makers of the Constitution. Furthering the course with its new decisions, principles & doctrines, the Court has paved the way for the idea of transformative Constitutionalism; this is, *in turn*, debated as the taking over of public morality by Constitutional morality (*the supremacy of Constitutional principles over the narrower outlook of the subject-matter*). Through this paper, the authors investigate how the Indian Supreme Court while using Constitutional morality paves the way for transformative Constitutionalism in India. The authors take two landmark judgments of the Court (*Navtej Singh Johar v. Union of India & Indian Young Lawyers Association & Ors v. The State of Kerala & Ors*) critically analyze how the Court while using tools of Constitutional morality and transformative Constitutionalism, contested the claims of public morality. The authors find out that in case of conflict between Constitutional morality & public morality, the idea of transformative Constitutionalism has also to be equally emphasized.

Keywords: Transformation, Constitutionalism, Public morality etc.

I. Introduction

Independence from the lamentable British rule, *inter alia*, introduced India to new issues and challenges— be it in terms of the personal

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rights of citizens or the responsibilities of the future functionaries. It was, then, the Constituent Assembly that was constituted to draft the Constitution of India (hereinafter as COI). The COI, *therefore*, not only provides the framework for the effective governance of the nation but also simultaneously requires the different pillars of the governance, the executive, the legislature, and the judiciary, to protect and preserve the rights (as provided within its organic text) of the citizens. Most importantly, the provisions envisaged within the COI also target the restraining of state power and further the aspirations of the nation[1].

It is, *for this purpose*, that the COI is also termed as a manifesto with an element of social revolution that has a transformative agenda[2]. To realise this manifesto in true essence, the understanding of the idea of constitutionalism that refers to the element of legal limits on the government[3] and adherence to the rule of law is equally important[4]. Purposely, the Judiciary and more particularly, the Supreme Court of India (hereinafter as SCI), is the final interpreter of the COI is considered "the guardian of the Constitution" and therefore is under an unavoidable obligation to protect the very concept of constitutionalism and foundational rights of the people furthering the very essence of the Constitution.

It is, *consequently*, apposite to mention that to fulfil its responsibility as fixed within the COI, the SCI also requires different doctrines, tools, and mechanisms which, *with the passing time*, become indispensable to apply. The idea of *transformation* is also one of such channels that specifically focus on the fulfilment of the ethos of the Constitution. The SCI, therefore, employs transformative constitutionalism as a tool to bring in social change or a change that is democratically necessitated by the Constitution[5].

As Rajeev Bhargava rightly observes that the COI was 'designed to break social hierarchies' and to further the essence of freedom, equality and justice[6]. The idea of transformation is inescapable as far as such a conception is concerned. And it is transformative constitutionalism itself that impresses on the judiciary to come up with such jurisprudence

1 Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism,* 2(7) Asian Journal of Multidisciplinary Studies 135 (2014).

2 Granville Austin, The 1Indian Constitution: Cornerstone of A Nation 51 (Oxford: Clarendon Press 1966).

3 Charles Howard Mcilwain, Constitutionalism: Ancient And Modern 21-22 (Cornell University Press New York 1987).

4 Madhav Khosla, The Indian Constitution 14 (Oxford University Press New Delhi 2012).

5 Sanskriti Prakash & Akash Deep Pandey, *Transformative Constitutionalism, and the Judicial Role: Balancing Religious Freedom with Social Reform*, 4 Indian Journal Of Law And Public Policy 108, 110 (2017-2018).

6 Rajeev Bhargava, *Outline of Political Theory of the Indian Constitution, in* Politics And Ethics Of The Indian Constitution 15 (Rajeev Bhargava ed., Oxford University Press 2009).

that has the vision to transform the existing evils so that the will and spirit of the Constitution can be upheld[7].

Taking the above background into consideration, the authors divide the present paper into three further sections—*firstly*, it focuses on its origin and definition as to what do we mean when we utter the word 'transformative constitutionalism' and particularly in the context of India; *secondly*, it specifically deals with the two landmark judgments, *Navtej Singh Johar v. Union of India8 (hereinafter 'Johar') & Indian Young Lawyers Association & Ors v. The State of Kerala & Ors9 (hereinafter 'Sabarimala')*, of the SCI wherein the Court extensively applied the concept of transformative constitutionalism while dealing with the claims of constitutional and public morality; and thirdly & lastly, a critical appraisal is drawn as to highlight the importance of the transformative constitutionalism as far as the constitutional limits and liberties are respected and protected.

II. Transformative Constitutionalism: Examining The Connotation

The term "Transformative Constitutionalism" has been recurring in judicial decisions of India, in the recent past; with Courts deliberating upon it and civil society as well as legal practitioners goading the judiciary to provide its insight on the same. Most Constitutional decisions pronounced by the SCI that may be branded as "landmark", attempts to interpret the Constitution of India from the lens of transformability. The debate between proponents of two schools of thought becomes imperative in a discourse about Transformative Constitutionalism; one school that propagates sanctity of the Constitution or at least a part thereof and hence necessitates that it be left untouched (such as the eternity clause that protects Chapter(s) on Fundamental Rights from abridgement in the Constitution of Bangladesh) and the other school of thought that believes in attuning Constitutional principles to the needs of the society and hence mandates that it's context must not remain static but must transform following the needs of people; it places an individual in the centre of Constitution. India is propelling towards the latter school and the same can be evidenced through the judicial decisions of *Johar* and *Sabarimala*.

The term *Constitution* itself attracts a myriad of conceptions. The country anointed as the Mother of Constitution is one where the Constitution itself is an abstract form i.e. England. Now when we derive Constitutionalism out of it, it again seems to attract momentous possibilities and meanings. As a conventional rule, Constitutionalism is embedded in the concept of checks and balances on governmental organs. It can also be put in the following words:

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7 Prakash & Pandey, supra note 5, at 112.
8 (2018) 1 SCC 791.
9 2018 SCC OnLine SC 1690.

> *"Constitutionalism is not a traditional subject matter of political science. To the extent that political scientists have been concerned with it, they have either leaned on a previous legal training of the individual scholar, or they have shown a tendency to interplay the role and importance of constitutional checks as compared with social and political pluralistic checks.*[10]*"*

Now, however, the idea of Constitutionalism is drifting towards the individual; the focus is no longer concentrated on governmental organs solely.

i. Origin and Definition

The concept of Transformative Constitutionalism finds its roots in South African Constitutional jurisprudence. Many post-colonial Constitutional projects emphatically those in decolonized Africa, failed at the level of enforcement, with human rights abuses and utter disregard for rule of law being the common sentiment in such sovereigns. Most of these Constitutions had bestowed the responsibility of guarding the fundamental rights of citizens and of upholding the rule of law upon the judiciary. Just as the State(s) failed, to protect the fundamental rights of all its citizens, in such nations, the judiciary's failure in addressing such rights violations must not be overlooked.

One such nation of post-colonial Africa was South Africa; the country witnessed perhaps one of the most abusive and racist regimes of contemporary discourse. After the fall of the apartheid regime, there was a change in the societal ideals; the fall of the regime is itself credited to such an idealistic shift. The transformative culture in South Africa was not confined to its Constitution itself; the post-apartheid country saw a waving shift in the domestic political sphere as well. There was a shift in the demands of its people.

The societal structures also saw a change inspired by the shift from the concentration of powers and draconian notions of supremacy to an egalitarian society, moulded by liberal thoughts and ideas of equality. This socio-political shift was accompanied by a change in Constitutional ideals; it was realised that the Constitution(s) of the sovereign(s) where there have been flagrant abuses of rights and concomitant transgressions, must look at ways not only to ensure that the rudimentary and evolving rights of all citizens of that country is guaranteed but must also make sure that the previous wrongs or atrocities committed against persons or groups thereof are corrected. Therefore, it is also important to note that the *traditional notions of Constitutionalism would be insufficient as far as the requirements to meet*

10 Giovanni Sartoti, *Constitutionalism: A Preliminary Discussion,* 56(4) The American Political Science Review 863 (1962).

the peculiar needs of those transitional societies are concerned whose traumatic pasts are characterised by war, political repression, or deep divisions. This kind of societal set-up requires the Constitution and Law to not only inspire a better future but also to address the past injustices ad crisis. In this context, citing the examples of South Africa's interim Constitution of 1993 and the final 1996 Constitution would undoubtedly be a good illustration. They not only devised delicately balanced mechanisms to end an immoral and oppressive legal and political regime but also a mechanism to usher in a more inspiring future[11].

In South Africa that saw zilch fulfilment of socio-economic rights accompanied by plaguing inequity in access to basic rights, the concept of Transformative Constitutionalism isn't limited to a single realm of rights; it guarantees socio-economic rights to people while striving to ensure equity in access to basic rights such as education[12]. In the case of *Soobramoney v. Minister of Health, KwaZulu-Natal*[13], Chaskalson C.J. opined that "*as long as these conditions* [failure in guaranteeing rights and unequal access to rights amongst people belonging to different social strata] *continue to exist that aspiration* [that is, of substantive equality] *will have a hollow ring*."

While the origin of Transformative Constitutionalism may be traced to South African Constitutional development, there isn't any uniformly and universally accepted definition of Transformative Constitutionalism and the fact that no stable definition can be attributed to Transformative Constitution is itself a description of its character.

ii. Transformative Constitutionalism in India

The Preamble of the Constitution of South Africa states that democracy in the country is founded to safeguard the social and political rights of people, to ensure justice and uphold societal equality; this emphasis on equality must be substantive and not merely formal[14]. This entails that Transformative Constitutionalism aims to correct past abrogation of rights by applying the redistributive method while ensuring that in the future, the rights of individuals are protected[15]. Whether the language of the COI allows the judiciary to interpret it from a transformative angle, has been talked about in India through various Constitutional decisions.

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11 Eric Kibet, Charles Fombad, *Transformative Constitutionalism and the adjudication of Constitutional rights in Africa*, 17(2) African Human Rights Law Journal 2017.

12 Justice Pius Langa, Chief Justice of the Republic of South Africa, *Transformative Constitutionalism*, 17 Stellenbosch Law Review 353 (2006).

13 1998 1 SA 765 (CC), 1997 12 BCLR1996 (CC).

14 Karl E Klare, *Legal Culture and Transformative Constitutionalism*, 14 South African JOURNALS on Human Rights 153-154 (1998).

15 *Id.*

Indira Jaising, a prominent legal practitioner, and jurist say that there are *two key aspects of Transformative Constitutionalism*[16], namely:

1. A commitment to address rights transgressions that happened in the past and ascertain such transgressions in future can be done by going to the root and eradicating inequality or prejudice.
2. Focusing on *positive social relationships* viz horizontal application of rights. Whenever fundamental rights are discussed, the vertical interaction between the State and citizens come to mind; Transformative Constitutionalism mandates respect for fundamental rights in interactions between and amongst citizens as well.

The recent judicial treatise is heavily inspired by the aforementioned aspects of Transformative Constitutionalism. The SCI in the much talked (and disputed) decision of *Sabarimala*[17]., talked about the practice of historically subjugating women through actions coloured as religiously essential. In a landmark move, Chandrachud C.J. attracted Article 17 that abolished Untouchability, in a matter where women of menstruating age were thwarted from entering a religious place. This set wave for decisions that not only sought to eliminate discrimination committed in past but also, plunging into the private sphere and instructed Non-State actors to respect the fundamental right of a section of people.

The paper will focus on two such decisions that set the tide for Transformative Constitutionalism in India, while critically analysing the same.

III. Supreme Court of India vis à vis Transformation: Contesting Constitutional & Public Morality

At the very inception of the Indian Constitution, it was thought to be transformative as it was not only anti-colonial but also was a cosmopolitan document[18]. It was the outcome of uncountable aspirations that people had at the time of independence[19]. These aspirations can well be observed throughout the Part III[20] and Part IV[21] of the organic text of the Indian Constitution. Transformative constitutionalism, therefore, assists the Court to protect and preserving these aspirations

16 Indira Jaising, Senior Advocate, Conference on Transformative Constitutionalism: Exploring Ideas and Possibilities in its Theory and Practice in National Law School of India University (July 20, 2020).
17 *Supra* note 9.
18 Sujit Choudhry, *Postcolonial Proportionality: Johar, Transformative Constitutionalism and Same Sex Rights in India, in* The Global South And Comparative Constitutional Law 1 (Philipp Dann, et. al. eds., Oxford University Press 2020).
19 Austin, *supra* note 2.
20 India Const. Part III, Fundamental Rights, arts. 12-35.
21 Id. Part IV, Directive Principles of State Policy, arts. 36-51.

in a more efficacious manner. Why is the court the best institution to interpret the aspirations in such a manner? Professor Upendra Baxi rightly answers that it is the transformative constitutionalism that is signified by the radical rereading of the Constitution[22] and therefore the Courts are the best medium for the radical interpretation or reading of the Constitution[23].

Hence, it is the judicial organ cast with the role of an interpreter to ensure that the Constitutions continue to have relevance in modern times[24]. Let us, *therefore*, examine how the SCI has in two of its landmark judgments invoked the doctrine of transformative constitutionalism and settled the rights of those suffering from arbitrary practices.

i. Navtej Singh Johar v. Union of India

A five-judge Constitution bench sat to decide the Constitutional validity of Section 377 (*which criminalised consensual sexual conduct of two adults of same-sex*) of Indian Penal Code, 1860 (*hereinafter as IPC*) which reads as:

> *"Unnatural offences. —Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*
>
> *Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section"*[25].

The issue before the Court was whether the above-mentioned provision is violative of Articles 14[26], 15[27], 19[28] & 21[29] of the Indian Constitution. The Court, *while delivering the judgment with the full majority of 5:0*, not only read down Section 377 of IPC but also extensively flourished the jurisprudence of transformative constitutionalism.

Entertaining the claims of those aggrieved by Section 377 of IPC also led the Court to examine the facets of Constitutional and public morality (*in terms of popular will or majoritarianism*). The SCI observed

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22 Vrinda Narain, *Postcolonial Constitutionalism In India: Complexities & Contradictions*, 25 Southern California Interdisciplinary Law Journal 107, 124 (2016).

23 Upendra Baxi, *The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India*, in Human Rights, Justice & Constitutional Empowerment 3, 15 (C. Raj Kumar and K. Chockalingam eds., Oxford University Press 2007)

24 Prakash & Pandey, *supra* note 5 at 111.

25 Indian Penal Code, 1860 (Act 45 of 1860), § 377.

26 *Supra* note 20, Equality before Law.

27 *Id.* Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

28 *Id.* Protection of certain rights regarding freedom of speech, etc.

29 *Id.* Protection of life and personal liberty.

that:

> *"It is the concept of constitutional morality which strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time"*[30].

It further observed that:

> *"The Court has to be guided by the conception of constitutional morality and not by the societal morality"*[31].

The Court went on to conclude:

> *"Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society"*[32].

Targeting the majoritarian practices prevalent in the society, *therefore*, the Court extensively emphasised the relevance of constitutional morality that does not consider a particular ideology of a specific section of society, rather it focuses or flows from the very aspirations behind having a constitution. It is, *for this matter*, the Court invoked the idea of transformative constitutionalism that while carrying forward the constitutional morality brings reformative effects in the society[33].

The Court, *therefore*, held that:

"The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead, they ought to be given a meaningful construction

30 *Supra* note 8, at 77 ¶ 116.
31 *Id.* at 79 ¶ 119.
32 *Id.* at 158-159 ¶ 253(v).
33 Rajat Maloo and Vanshika Katiyar, *Navtej Singh Johar: A Constitutional Analysis*, 5(1) RGNUL Student Research Review 63, 66 (2019).

that is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically, and politically. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future"[34].

Consequently, the Court, *in its historic judgment*, held that the Constitutional idea and liberties cannot be made liable to the fancies of a few in society, rather they are accorded such inclusive interpretation to further the very essence of words sewed in the preamble to the Constitution. In this manner, the case not only preserved the ideals of the COI but also recognised the relevance of transformative constitutionalism.

ii. **Indian Young Lawyers Association & Ors v. The State of Kerala & Ors.**

Infamously known as the Sabarimala temple case, women between the age group of 10-50 years of age were restricted from entry in the *Lord Ayyappa* Temple at Sabarimala (Kerala). The reason behind such prohibition was the natural biological phenomenon of menstruation. The Kerala High Court decided in favour of such practice[35] and therefore the aggrieved parties approached the SCI against this discriminatory practice.

A five-judge Constitution bench of the SCI was constituted to examine the said matter wherein Rule 3(b)[36] of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 was challenged being violative of Articles 14, 15, 25[37] and 51A(e)[38] of the Constitution[39].

While delivering a celebrated judgment (*by 4:1, Indu Malhotra J. dissenting*) allowing women's entry to the Sabarimala temple, the SCI extensively explored the contours of Constitutional and public morality and invoked the idea of transformative constitutionalism. The Court observed that:

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34 *Supra* note 8, at 158 ¶ 253(iv).

35 S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthpuram and ors., AIR 1993 Kerala 42.

36 Framed by virtue of Section 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965.

37 *Supra* note 20, Freedom of conscience and free profession, practice, and propagation of religion.

38 *Id.,* Fundamental duties, art. 51A(e), 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.

39 *Supra* note 9, at 5 ¶ 5-6.

> *"We must remember that when there is a violation of the fundamental rights, the term "morality" naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must conform with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution"*[40].

The Court, *furthermore*, while referring to its decisions in *Manoj Narula v. Union of India*[41], *Government of NCT of Delhi v. Union of India and others*[42] and *Johar*[43], observed that:

> *"As regards public morality, we must make it clear that since the Constitution was not shoved, by any external force, upon the people of this country but was rather adopted and given by the people of this country to themselves, the term public morality has to be appositely understood as being synonymous with constitutional morality"*[44].

Dr D.Y. Chandrachud J., more particularly, in his opinion held that "the content of morality is founded on the four precepts which emerge from the Preamble"[45]. These, according to him, are justice, liberty, equality, fraternity; added to them is the fundamental postulate of secularism[46]. Further, he held that these principles are such which must govern our constitutional notions of morality[47].

The above-mentioned reasoning of the Court is indicative of the fact as to how the Court has advanced the essence of the Constitutional principles over the public morality that sometimes result in the majoritarian view or a view which is dominated on the edifice of certain discriminations has happened in this case.

Resultantly, the SCI (*particularly Dr D.Y. Chandrachud J.*) emphasized the idea of transformative constitutionalism and shunned this arbitrary practice of prohibiting women's entry. He held that:

> *"Article 17 is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation"*[48].

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40 *Id.* at 68 ¶ 106.
41 (2014) 9 SCC 1.
42 (2018) 8 SCALE 72.
43 *Supra* note 8.
44 *Supra* note 9, at 70-71 ¶ 110.
45 *Supra* note 8, at 184 ¶ 12.
46 *Id.*
47 *Id.*
48 *Id.* at 263 ¶ 71.

He further held that:

> *"Article 17 is an intrinsic part of the social transformation which the Constitution seeks to achieve*[49]*. The Indian Constitution is marked by a transformative vision. Its transformative potential lies in recognizing its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative constitutionalism, is a recognition of change. What transformation in social relations did the Constitution seek to achieve? What vision of society does the Constitution envisage? The answer to these questions lies in the recognition of the individual as the basic unit of the Constitution. This view demands that existing structures and laws be viewed from the prism of individual dignity"*[50]*.*

What is evident is the legitimate and timely recognition of the transformative character of the Constitution by the Court in this case that not only furthered the virtues of the Indian Constitution but paved a way for future discourse as far as the transformative character of the Constitution is concerned.

IV. Critical Appraisal

The Constitutions are indeed drafted having into consideration the long-cherished legitimate aspirations and ideals of the people it intends to serve. It is, at the same time, considered to be the sponsor, protector, and preserver of foundational rights of the people who have given themselves such a constitution. What it, *therefore*, suggests is that such important tasks cast on the part of the Constitution must always be performed with the highest regards to the basics of that Constitution itself. Its intrinsic values must always belong nurtured to promote the legitimate aspirations of the people in civil society.

The idea of transformative constitutionalism as applied by the Indian Supreme Court has not only cemented this very approach of protecting the principles of the Constitution but also proved the very purpose of having a constitution that is to promote equal rights and justice for all with all facets of human dignity. The idea of constitutional morality as examined by the Supreme Court as against the public morality also reveals that these are the constitutional ethos that requires to be given primacy over individual or popular will in society. The idea of *transformation*, therefore, must be seriously and cautiously applied by the Court to properly adjudicate the matters in consonance of constitutional principles.

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49 *Id.* at 281 ¶ 79.
50 *Id.* at 313 ¶ 100.

Legislative Commentary on Sections 66,67,68 & 69 Of Indian Evidence Act,1872

***Ms. Lavanya Ambalkar**

Abstract

This paper is in crux, a legislative commentary of Sections 66, 67, 68 and 69 of the Indian Evidence Act, 1872. The paper includes a self- interpretation for each of these above-mentioned statutes and has included various pointers relating to the basic principle and scope of such sections. Illustrations and Case Laws have also been included for better understanding. Section 66 deals with rules relating to production of a notice for the purpose of admissibility of secondary evidence for the documents mentioned in 65(a). Section 67 deals with verification of handwriting and authenticity of signature for documents, and Section 68 deals with calling upon an attesting witness for proving the execution of documents. Section 69 suggests an alternative to 68 in case the conditions under 68 cannot be satisfied or if the situations don't permit. The paper will deal with various aspects of these sections and will aim to explain them in the most comprehensive and extensive manner as possible.

A. Section 66

Verbatim of the Statute

"Rules as to notice to produce. —Secondary evidence of the contents of the documents referred to in section 65, clause (a) , shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:— Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

1. when the document to be proved is itself a notice;
2. when, from the nature of the case, the adverse party must know that he will be required to produce it;

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3. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
4. when the adverse party or his agent has the original in Court;
5. when the adverse party or his agent has admitted the loss of the document;
6. when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

Interpretation

The section says that the secondary evidence for the documents referred to in Section 65(a) shall not be given by the party proposing to produce such secondary evidence unless a due notice has been provided to the party in whose power or possession the document is. However, such notice will not be required in order to render secondary evidence admissible in the following cases, or in any other case in which the court may think appropriate to do so: -

1. Where the document itself is a notice to produce served on the opposite party
2. The adverse party is well aware that he/she will be required to produce it;
3. Adverse party resorting to force or fraud in order to obtain the original document;
4. When the adverse party or his agent are in possession of the original document;
5. When the adverse party or his agent has admitted the loss of the document
6. When the person in whose possession the document is out of reach or outside jurisdiction of court.

General Principle and Scope of the Section

- This section states that a notice must be provided with before secondary evidence can be received under section 65(a).[1] Such notice must be in writing. The Code of Civil Procedure, 1908, under Order XI, Rule 15 deals with the kind of notice to produce a document.[2]
- The term "party" refers to just not the adversary but also a stranger "legally bound to produce" the document.[3]
- The Code of Criminal Procedure, 1974 under Sections 93-96 provides with the procedure for the production of such documents.

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1 Ratanlal & Dhirajlal: Law of Evidence, 25th Ed.
2 Ibid.
3 Ibid.

- A notice must comprise of crystal clear, self- explanatory terms so that the person who is served with such a notice does not get the opportunity to plead the inability of ascertaining the document required. However, inaccuracies will not nullify the notice unless it gave a wrong impression to the recipient. The notice should be such as the law prescribes, and if it doesn't, then such notice as per what court regards as reasonably fit according to the circumstances.[4]
- It is essential that that the procedure mentioned in Section 66 should be strictly adhered so that secondary evidence of documents mentioned in section 65(a) can be given. When such notice as per section 66 has not been given, secondary evidence is no more admissible.[5] [6]
- Although the section prohibits the admission of secondary evidence unless and until the conditions are adhered to, it has been held in the case of ***Chimnaji v. Dinkar***[7] and also upheld in the case of; *Lakshman v. Amrit*[8] that "*when in the absence of any objections raised by the opposite party, such evidence has been admitted without proof of notice to produce the documents, the court of appeal should not afterwards exclude the evidence as inadmissible, at any rate without giving the party who adduced it, an opportunity to supply the deficiency.*"[9]

Object of the Section

The object of this section is to provide the party with an opportunity so to enable him to produce the document and thus to secure the best evidence of its contents.[10][11] The object of the notice has been particularly explained[12]: "The reason of giving notice..... was to check a person from giving in evidence what was a false copy"[13] "We see the good sense of the rule which requires previous notice to be given..... that he may not be taken by surprise" The popularly accepted idea is that the object of notice is to provide the adversary with a chance to produce the document if he pleases, and if he does not, to enable the opposite

4 *Supra Note 1*
5 *Nityananda Roy v Rashbehari Roy*, AIR 1953 Cal 456 [LNIND 1952 CAL 30]; *Nami Devi (Smt) v Anupurna Devi*, AIR 1945 Pat 218*; Sulochana Devi (Smt) v Gobinda Chandra Nag*, AIR 1986 Cal 430 [LNIND 1985 CAL 329]; *Kanhiyalal v Jamnalal,* AIR 1950 Raj 47 [LNIND 1949 RAJ 48]; *Narsidas v Ravishankar,* AIR 1931 Bom 33; *Subbarayulu Naidu v Vengama Naidu,* AIR 1930 Mad 742 [LNIND 1929 MAD 332].
6 *Supra Note 3*
7 11 B 320
8 24 B 591, 596
9 *Supra Note 1*
10 *Supra Note 3*
11 *Dwyer v Collins,* 7 Ex 639-647; *Surendra Krishna Roy v Mirza Md Syed Ali,* AIR 1936 PC 15: 63 IA 85, 92
12 *Supra Note 1*
13 ELLENBOROUGH LCJ, in *Surtees v. Hubbard,* 1803, 4 Esp. 203

party to provide with secondary evidence, so as "merely to exclude the argument that the party has not taken all reasonable means to procure the original; which he must do before he can be permitted to make use of secondary evidence"

Where a party sought to prove, by production of the registers of the sub-registrar's office, not by any original entry prepared by the sub-registrar himself but copies of the document, the originals of which were in the custody of the persons in whose favour they were executed, it was held in the case of ***Naresh Chandra Bose v State of West Bengal***,[14] "*that such documents cannot be admitted in evidence by simply producing the registers of the Registration Office without calling for the original documents from the persons concerned.*" in the case of ***Narsidas v Ravishankar***,[15] It was held that "*Issuing of notice to produce some documents not referred to in the opposite party's affidavit of documents as being in his possession, was not a good notice*"

In ***Rogers v. Custance***[16]it was held that "*where enough was stated on the notice to leave no doubt that the party must have been aware the particular instrument would be called for, the notice must be considered sufficient to let in secondary evidence.*"

B. Section 67

Verbatim of the Statute

Proof of signature and handwriting of person alleged to have signed or written document produced. -

> *"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."*

Interpretation

This section states that if a person has made his/her signatures in a particular document, (other than those required by law to attest), or has written/authored the body of the document wholly/in part, it must be proved that the signature or the body of such document has been made in his own/her own handwriting, so has to prove the execution (through proof of signature) and genuineness (through proof of handwriting) of the document.

Principle and Scope

- In order to define the term "proved" reference must be given to section 67 along with the definition given under section 3 of the Evidence

14 AIR 1955 Cal 398
15 AIR 1931 Bom 33
16 2 M & R 179, 181

Act which mandates specific evidence to verify that the executant's signature has been made in his own handwriting only. The court cannot decide upon whether the execution has been proved unless the same has been followed.[17]

- Section 67 does not make it mandatory that direct evidence of handwriting of the person who is alleged to have executed the document must be produced by an individual who witnessed such signature getting affixed. That doesn't seem to be the legislative intent here. It is left entirely upon the discretion of the presiding judge of fact to determine as to what satisfies him about the genuineness of the document. [18]Indirect evidence may be given when direct evidence of the handwriting/mark of the person cannot be produced.[19]

In ***Stamper v. Griffin***,[20] BENNING, J, said: —

"No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing or the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence"

It was held in the matter of *Mr. D & Mr. S*[21] that "*Where merely the signature of a person on a typewritten document was identified by a witness, it was held that what was formally proved was the signature and not the body of the document*"

It was also held in the case of ***Gajraj v Board of Revenue*** UP[22] that "*in order to prove the writing of a person, it is not necessary that the person must know the language in which the document has been written; if he has deposed that the execution has been made in his presence and he had seen the executant putting his signature in his presence, the document stands proved; on the same reasoning, even if a person is an illiterate but he has seen somebody putting his signature on the document in his presence, he must be said to have proved the document.*"

Section 67A deals with verification of electronic signature in this regard. This section has been inserted via an amendment corresponding

17 *Supra Note 3.*
18 MARKBY, J, in *Neelkanth v. Juggabundhoo*, 12 BLR Ap 18; see also *Abdool Ali v. Abdoor Rahman:* 21 WR 429; *Ponnu swami v. Kalyanasundara*, A 1930 M 770
19 *Haria v. Manakchand:* 27 IC 866; *Lahini v. Bala:* 77 IC 798 : 18 NLR 85
20 1856: 20 Ga 312, 320 (Am)
21 (1966) 68 Bom LR 228
22 1966 All LJ 149, **relying on** *Bheek Chand v Parbhuji,* AIR 1963 Raj 84 [LNIND 1962 RAJ 66] ; *Puria Sethi v Khetraonohan Mohaty;* (1975) 41 Cut LT 1272; *Bhanuwar Lal v Ahmed Khan,* AIR 1977 Gau 27

to the provisions of Information technology act, 2000 relating to electronic signature.[23]

Verbatim of the Statute

68. Proof of execution of document required by law to be attested. - "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Interpretation

This section states that when a document is required to be attested by law, such document cannot be used as evidence unless and until at least one attesting witness has been called upon to prove the execution of such document in case such a witness is alive and capable enough to give evidence. However, it won't be necessary to call such an attesting witness in order to prove execution of such document, except a will, if it has been registered as per the provisions of the Indian Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied.

C. Section 68

General Principal and Scope

- "Attested" means that a person has signed the document by way of testimony to the fact that he saw it executed. "*An attesting witness is one who signs the document in the presence of the executant, after seeing the execution of the document, or after receiving a personal acknowledgement of the execution of the document by the executant*" as held in ***Lachman Singh v Surendra Bahadur Singh***"[24]
- The object of attestation is that some person should verify that the deed was signed voluntarily. "*Knowledge of the contents of a document ought not to be inferred from the mere fact of attestation*" was held in ***Nainsukhdas Sheonarayan Shop v Gowardhandas***[25]
- The term "attested" is not defined in the Evidence Act, 1872, but is defined in section 3 of Transfer of Property Act, 1882.[2627]

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23 Ins. by the Information Technology Act, 2000 (21 of 2000), section 92 and Second Sch (w.e.f. 17 October 2000)
24 ILR (1932) 54 All 1051 FB: AIR 1932 All 527
25 ILR (1947) Nag 510: AIR 1948 Nag 1
26 Section 63 of the Indian Succession Act of 1925 also contains a similar definition.
27 Dr. V Nageswara Rao: The Indian Evidence Act, 3rd ed.

- The expression "*required by law to be attested*" means that under some enactment the document has to be attested. This *means "required by the law of the country where the property is situated*".[28]
- "*The word "execution" in the proviso not only means signing by the executant but means and includes all the series of acts which would give validity to the document concerned*" was upheld in ***Amir Husain v Abdul Samad***[29]
- Attestation and execution are two separate terms and acts, execution proceeds attestation. The purpose of attestation is to make sure that the executant was a free agent and was not coerced or defrauded, while executing the document.[30]
- The words "specifically denied" means specifically refused by the party against whom it is sought to be used and not only by the executant. Where, therefore, execution was denied by a party against whom a document is sought to be used, even though the executant does not do so, it is mandatory to call an attesting witness to prove it.[31]
- This section applies to cases where an instrument required by law to be attested bears the necessary attestation. What the section prohibits is proof of execution of a document otherwise than by the evidence of an attesting witness if available.[32]
- The application of this section comes into play only when the execution of a document has to be proved. However, there is no requirement to call an attesting witness if the execution doesn't need to be proved, unless it is specifically contented that the attesting witness has not witnessed the document's execution.[33]
- The principle underlying the section is that at least one attesting witness should prove the execution of a will that it is only an attesting witness who is entitled to prove the execution of the will. It is a concession made by the legislature. *If that concession does not result in complying with the mandatory requirements of this section the only proper method is to call the other attesting witness, so that both the attesting witnesses are before the Court, and the due execution of the will is proved by the two attesting witnesses which are necessary before a will can become a valid document*" was upheld in ***Vishnu***

28 *Supra Note 3*
29 AIR 1937 All 646
30 *Supra Note 3*
31 *Chandra Kali v Bhabuti Prasad*, ILR (1943) 19 Luck 365: AIR 1943 Oudh 416
32 *Veerappa Kavundan v Ramasami Kavundan*, ILR (1907) 30 Mad 251; *Ram Gopal Lal v Aipna Kunwar*, ILR (1922) 44 All 495: 49 IA 413
33 *Komalsing v Krishnabai*, (1945) 48 Bom LR 83: ILR (1946) Bom 146: AIR 1946 Bom 304

Ram Krishan v Nathu Vithal[34]

- The direct evidence of the attestor will be "primary evidence". In case there is no attesting witness alive, then the document must be proved in accordance with the procedure laid down under Section 47 and 73 of the act.[35]

It was held in ***K Laxmanan v Thekkayil Padmini***[36] that "*a will, being a document required by law to be attested, at least one attesting witness must be called to prove attestation and, otherwise it cannot be used.*"[37] In ML Abdul Jabbar Sahib v H Uenkata Sastri and Sons[38], the Supreme Court held: "To attest is to bear witness to a fact. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."[39]

D. Section 69

Verbatim of the Statute

Proof where no attesting witness is found: If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Interpretation

This section states that in case no such attesting witness is found or if the said document has been executed in the United Kingdom, it must be proved that at least one attesting witness has made such an attestation in his handwriting, and also the signature of the person executing the document should be proved to have been made in his own handwriting.

Principal and Scope

- If no attesting witness can be found, *i.e.,* if he is not alive, insane, blind, too sick to attend, under imprisonment, outside the jurisdiction of the court, kept out of the way by the adverse party or

34 (1948) 51 Bom LR 245)
35 *Supra Note 3*
36 AIR 2009 SC 951
37 *Supra Note 26*
38 AIR 1969 SC 1147
39 *Supra Note 31*

cannot be traced after diligent search; or if the document purports to have been executed in the United Kingdom of Great Britain and Northern Ireland, two things must be proved— (*1*) the signature of one attesting witness, and (*2*) the signature of the executant. These things must be proved as per the procedure laid down under Section 67 by taking into account the evidence given by people who were able to prove the handwriting of the executor and attestant. Such proof is determined to be prima facie enough to charge the other party. This is founded on the principle that it must be presumed that everything was rightly done once this proof has been given.[40]

- The section relaxes strict proof of execution and attestation as required in s. 68. The words used in the section is 'signature" and not "execution" and so due execution is presumed when some type of proof is produced for the executant's signature and the handwriting of one attesting witness. Some evidence should also be given to verify the identity of such attesting witness. It has been held in ***Whitlock v. Musgrove***[41] that "*in an action upon an instrument the subscribing witness to which is dead or resides abroad, it is necessary besides proving the handwriting of the subscribing witness to give some evidence of the identity of the party who appears to have executed the instrument.*"[42]
- The Evidence Act was enacted when India was a part of the British Empire. Reference to the United Kingdom in this and other sections still appear. Suitable amendments must remove such anachronisms. Clearly, this aspect has escaped the attention of our legislators.[43]
- Due diligence on the part of the party is required in tracing the attesting witnesses. "*The court must be satisfied that, in spite of diligent search, they could not be found. Then only one can take the aid of this section.*"[44] It was so held in ***Hare Krishna v Jogneshwar Panda***[45]that "*The party should exhaust all the processes of the court to compel the attendance of any one of the attesting witnesses, and only when it is not possible to produce that witness, either legally or physically, this section can be availed of.*"[46]

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40 Sarkar: Law of Evidence, 18th ed.
41 2 Cr & M 511
42 Ibidem.
43 Ratanlal and Dhirajlal: Law of evidence, 25th ed.
44 *Bam Jassa Kunwar v Sahu Narain Das*, AIR 1946 All 178 [LNIND 1945 ALL 3]; *Uttam Singh v Hukam Singh*, 39 All 112: AIR 1917 All 89 [LNIND 1916 ALL 63]; *Venkatramanyya v Kamisetti Gattayya*, AIR 1927 Mad 662 [LNIND 1926 MAD 466]; *Muthuraman v Subramanian*, AIR 1933 Mad 612 [LNIND 1933 MAD 85]; *Bhairon Singh v Ganga Narain*, AIR 1935 All 527; *Yenkataraman Raju v Narasa Raju*, (1966) 2 An WR 134 . (a case of a will)
45 AIR 1939 Cal 688
46 *Supra Note 47*

It was held in ***Sita Dakuani v Ramachandra Nahak***[47] that "*Section 69 can be invoked only when the absence of the attesting witnesses is sufficiently accounted for. If the attesting witness denies the signatures or does not recollect the execution of the document, its execution may be proved by other evidence*"[48]

> *"The force of the rule is not spent until it appears that no attestor can be had; in other words, if there is more than one attestor, all must be shown unavailable before resort can be had to other testimony. This is the ancient and settled doctrine»*[49]

It was held in ***Krishna Kumar v Kayastha Path Shala***[50] that "*the law of attestation of wills is contained in section 63 (c) of the Indian Succession Act, 1925, and the mode of proving the documents required by law to be attested has been laid down in sections 68 to 72 of the Evidence Act. Nothing in these provisions makes it a necessary element in proof of attestation that the signatures of the attesting witnesses of a will should be identified*"[51]

The contention was upheld in ***Bam Jassa Kunwar v Sahu Narain Das***[52] that "*The words "if no such attesting witness can be found" are not very appropriate; they must be interpreted to include not only cases where the witnesses cannot be produced because they cannot be traced, but cases where the witness, for reasons of physical or mental disability, or for other reasons, which the court considers sufficient, is no longer a competent witness for the purpose, as is provided in section 88 of the Evidence Act*"

Conclusion and Suggestions

- It must be mentioned with regards to Section 69 of the Act that the legislators have failed to take notice of the word "United Kingdom" in the section. The section still has the same verbatim when it was enacted by the British Parliament long back. Therefore, legislators must consider amending this section so as to not cause any confusion. This seems like something requiring urgent attention of the legislators.
- The verbatim of Section 69 has another scope of improvement so as to avoid any kind of confusion. It must be clearly mentioned in the section that the alternative method as per Section 69 can only be made use of when due diligence has been carried out and all efforts have been made in order to comply with the provisions of Section 68 first.

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47 ILR 1967 Cut 593
48 *Supra Note 47*
49 Wig s. 1309
50 AIR 1966 All 570
51 *Supra Note 42*
52 AIR 1946 All 178

- With regards to Section 68, the section must include the definitions and distinction between the term's "attestation" and "execution" so as to again not cause any confusion. It is indispensable for legal statutes to be self-explanatory so that a layman can understand its interpretation.
- With regards to section 68, the provision related to requirement of at least one attesting witness in order to prove the execution of a will seems to have a loophole. A lot of senior citizens are abandoned and left alone in these times. Hence, they have to execute their wills alone. Such wills cannot be just invalidated just because there was non availability of an attesting witness.
- With regards to section 67, there is no need of direct evidence only for the purpose of signature verification. In the absence of such direct evidence, the defendant can easily challenge the authenticity of the indirect evidence leading to further added up complications in the case. (For e.g., the defendant can refuse to take into account the expert's opinion for handwriting verification) Therefore, the verification process could become way easier if only the court mandates production of direct evidence in such regard.

In conclusion, it can be said that the legislators must make sure one should be able to derive clear-cut interpretation of a particular statute. The terms used in them must be sufficiently defined, and so should its scope. Statues having a verbatim dating back to the British rule must be changed at the earliest, so as to avoid any kind of confusion. Since the law is for all, the language of legal statutes, especially procedural, must be simple and self-explanatory enough.

Case: Smt. Urmila Devi V. Shri. Narinder Singh, AIR 2007 HP 19: Psychological Impotency as a Ground for Divorce

***Ms Deyashini Mondal**

Abstract

Physical impotency has been a very common reason to appeal for a divorce in the recent times. The provision for the same has been discussed under Sec 12 1(a) of the Hindu Marriage Act 1955. However, a lot of the judgements prior to this have erred by assuming infertility to be synonyms to impotency. The following case also discusses the need for the parties to a marriage to disclose medical history of their son/daughter which prove to be the foundation of a marriage in the Indian culture.

The case also discusses extensively on the topic of psychological impotency and it being a valid ground for divorce. The court in the present case held that even though divorce cannot be awarded under Sec 12 1(a) as such a claim has to affirm 2 questions: First, whether consummation had taken place. Second, if found that the consummation hasn't taken place then was it because of the impotency of the spouse.

Sec 12 1(c) was adopted as a ground for divorce in this matter as the court held the family of the daughter committed a fraud by not informing the other marrying party about her severe health conditions which formed the foundation of their marriage.

Analysis of Decision of the Court

Facts

This is one of the landmark cases decided by the Himachal Pradesh High Court on the subject matter of a marriage being annulled on the grounds of psychological impotency of one of the partners. On many occasions the defendant party has tried to prove the physical impotency of the wife due to various medical reasons, but it was not sufficient.

The parties in question were Hindu by religion, married on 25th November 2001. At the time of marriage, the wife was 31 years of age. According to the husband, after the first 5-6 days of marriage, because of various marital ceremonies they were not able to engage in any

* Symbiosis Law School, Pune

sort of sexual intercourse. When they had the time, the wife was cold and non-responsive to the activity which resulted in the husband not enjoying the intimate situation.

The wife blatantly denied these claims of the husband saying them to be false. She had admitted to the fact that on 7th January 2002, her sister-in-law had taken her to the Kamla Nehru Hospital for getting checked by a gynaecologist. Upon question the doctor, she informed that the wife was of short stature, had no auxiliary hair, pubic hair were scanty and the breasts were also not fully developed. The vagina was unusually small admitting only one finger. She also acquainted the judges to the fact that she had a medical history of caries spines which is the tuberculosis of the spinal cord for which the wife was taking ATT for 3 years. She also was had a history of hemiplegia which is the paralysis of one half of the body. With respect to the record of previous examinations done of the wife's uterus, conducted by the DDU Hospital, Shimla, an ultrasound was done and the doctor was of the opinion that her uterus was

The vagina admitted one finger only. The doctor then referred to the past history and stated that the wife had a history of 'caries spine' and that the wife had been taking 'ATT' for 3 years. The doctor also states that there was history of hemiplegia in the past. The doctor also stated that on the basis of the record of previous examination of uterus as conducted at DDU Hospital Shimla where the ultra-sound of the wife was also done she was of the opinion that the uterus was very small and she was missing one of her ovaries.

Inspite of these physical impairments, the doctor said that the wife was potent and could bare a child striking out the claims for divorce on the basis of physical impotency. Therefore the marriage could not be annulled under Section 12 1(a) of the Hindu Marriage Act which makes a marriage voidable if marriage is not consummated due to impotency of the spouse.

Issues

1. Whether the wife was reluctant to engage in sexual activities with her husband and if she was then could it be termed as physical impotency in the present case under Section 12 1(a) of the Hindu Marriage Act, 1955
2. Whether it was the duty of the wife and the family to disclose her medical history before the marriage and by not disclosing so, did they commit the act of fraud by not disclosing material fact as under Section 12 1(c) of the Hindu Marriage Act, 1955

Approach of the Court

The counsel for the plaintiff i.e. the wife argued that there existed nothing on record to prove the actual impotency of his client. Even if the wife was suffering from medical issues, it was curable and therefore divorce could not be given. At most it could be said that the wife was sterile but not impotent. The counsel also submitted that the wife and her family has not committed fraud by not disclosing these facts as the husband after all these events continued to live with her without any overt act of discomfort. It was also submitted that the husband did not give any evidence that the wife and her family was asked about these health problems before the marriage.

The counsel for the husband on the other hand submitted that there was a clear case of fraud that was committed by the plaintiff as they withheld these vital information of the wife not attaining menses or menarche. She had gotten scanty periods due to some medications but apart from that, never menstruated. If this fact was disclosed, the husband would've never for this marriage as in the Indian culture, having a baby is one of the most important aspects in the life of a couple.

It was additionally submitted by the counsel that even if there doesn't exists physical impotency, there is a concept of psychological impotency where the spouse is aloof and disinterested in the sexual act and the partner is not able to create an emotional connect with them. It is obvious from the facts that wife had told the doctor about her having a scanty period once due to administered medicines. Also, hemiplegia and tuberculosis are major diseases which must have required an ultrasound and the missing ovary must have been discovered then.

The Court had also looked into Section 12 1(c) of the Hindu Marriage Act which states that a marriage is violable if consent of the spouse is obtained by fraud with regard to any material fact or circumstance concerning the wife. However, it was considered that at the time of negotiation or Courtship, parties would try to project themselves in the best possible form. Some amount of exaggeration in representation is often experienced to make him or her acceptable to the other as a spouse. Mere concealment or overstatement of facts by itself does not invalidate a marriage.[1]

As stated above, the birth of a child if an important aspect for an Indian couple. Any information that proves to be the foundation of a married life is left undisclosed, it amounts to fraud. Impotence is defined as the incapacity to consummate marriage for physical or psychological reasons. Thus, even a mental defect or block which

1 P.J. Moore v. Valsa, AIR 1992 Ker 176

results in the barrier of consummation of marriage is a valid ground for annulment of marriage as a physical shortcoming. A marriage can be annulled by the concerned court if the sexual life is virtually impossible reasoning because of permanent mental apathy.

Criticism of the judgement

Taking into consideration the fact that the doctor had clearly mentioned that if though the wife had the above-mentioned medical problems, she could engage in coitus but due was reluctant to do so for a considerable period of time. Also, this fact could not be proved in the Court of Law that they had not consummated their marriage. Instead the Court looked into it on a different perspective declared divorce on the grounds that the wife was psychologically impotent.

It is a known fact that High Courts cannot give decisions which have not been prayed for. In this case the defendant has not asked for divorce on the grounds of psychological impotency but physical impotency. A part of the judgement could be said to be outside the authorities of the High Court and the appellant could have contested on the same.

Appreciation of the judgement

The judgement keeps aside the minor cultural deficiencies in the Hindu religion especially during marriage proposal and gives a decision over it. It is a discussed fact that when a party goes with a marriage proposal to another party, they are bound to exaggerate minorly. For e.g.: the husband is smart and knows how to cook which may or may not affect the decision of the wife. However, if the facts told are false and pose to be a problem to the foundation of the relationship, then the party to said to have committed a fraud. The wife and her family should have informed husband and his family about her medical past instead of keeping them in the dark so that they don't refuse the proposal.

Judicial Approach on The Given Issue in Previous Judgments of Courts

Various precedents were brought forth and referred to by the counsels from parties for annulment of marriage under Section 12 1(a) and Section 12 1(c) of the Hindu Marriage Act, 1955. The counsel for the defendant had referred to the case of ***P.J. Moore v. Valsa*** where the husband was a widower with three children and the wife was unable to get pregnant for thirty months. She was quizzical about the cause of this and upon enquiry found out that the husband had undergone a vasectomy before the marriage. This was not disclosed to the wife. Yet he promised the wife that he would undergo recanalization so that they could bare a child. Later, he refused to do so as it was against his faith and belief.

This was contested to be fraud under Section 17 of the Indian Contract Act where a contract if considered void if active concealment of information which would induce a person to enter into a contract. There have been various explanations that the mere silence of facts which is likely to affect the willingness of the person to enter into the contract does not amount to fraud. However, if it was the duty of the person to inform the individual entering into the contract, then the silence will amount to fraud.

Giving birth to off-springs is a very crucial part of a married life. It is the basic duty of the man to disclose to the other party if he has undergone any operation before marriage which makes him incapable of procreation before joining him in the alliance. If any sort of consent for marriage is given by one of the spouses without being familiar to the basic defect of the other spouse, then the marriage stands vitiated and tainted. It is upto the affected spouse to lodge a petition that his or her consent to this matrimony was taken by fraud.

In another case of ***Anurag Anand v. Sunita Anand***[2] the marriage was arranged through the matrimonials on the newspapers where it was said by the husband and his family that he earned Rs 8500/- per month and had claimed him to be of certain age. This was accepted by the girl and her family and the marriage was fixed and done. However, after marriage it was found out by the wife that they had actually lied about the salary as he earned only Rs 5700/- per month and was much older than the claimed age. It is considered normal for the parties to a marriage to minorly exaggerate while negotiating the relationship. Some concealment is feasible. Only if there is non-disclosure of a material fact will it amount to fraud.

In ***Saly Joseph v. Baby Thomas***[3], the husband had approached the wife's family with a marriage proposal and said that had passed Pre-degree and Diploma in Air Conditioning in A/C Mechanism and that he is employed in Behrain as A/C Mechanic drawing a salary of Rs. 30,000/- in addition to free accommodation. After a month into marriage when the husband was asked about his return to Behrain, he claimed that he had got an extension through one of the Professors of the Calicut Medical College. After the expiry of the said extension, he confessed to his wife that he never resided in Behrein, doesn't have a job there and is a mere tailor.

The wife claimed that her consent for this marriage was obtained by fraud and mis-representation and said that she would have never agreed to the marriage proposal if she knew that the defendant was not an educationally qualified person. The Court in this case granted divorce on the grounds of fraud by the defendant.

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2 Anurag Anand v. Sunita Anand, AIR 1997 Delhi 94
3 Saly Joseph v. Baby Thomas, II (1999) DMC 309

Another significant precedent cited was that of ***Yuvraj Digvijay Singh v. Yuvrani Pratap Kumari***[4], where the Apex Court had held that that a party is impotent if his or her mental or physical condition makes consummation of marriage a practical impossibility.

The counsel for the petitioners had referred to a few cases where nullity of marriage on the grounds of impotency was dismissed. In the case of ***Mst. Shewanti Bhaurao Dongre vs Bhaurao Daulatrao Dongre***[5] the referred medical evidence doesn't prove that the wife incapable of sexual intercourse. Primarily because the wife's ovaries are nor developed and she has never had her periods doesn't make her incapable of sexual intercourse or incapable to consummation her marriage. It has been medically observes that the conical cervix and the non-presence of ovaries, fallopian tube or uterus implies sterility although allowing the person to engage in sexual intercourse. [6]Thus with the given facts it is not possible to hold the wife impotent.

Another important precedent referred to was, ***Harprasad Santore v. Anita Santore***[7] where the husband is the appellant and as seeked for a divorce under Section 12 1(a) of the Hindu Marriage Act claiming that the wife is impotent. The counsel for the defendant submitted that the wife had under-developed vagina. In addition to this it was stated that the vagina of the respondent was not well developed and ovaries were absent. According to him, the respondent was not capable of engaging herself in sexual intercourse because her vagina was not developed. However, this did not establish the fact that wife was impotent. The grounds on which divorce under the aforementioned section can be awarded is whether there was a practical impossibility of consummation of marriage which cannot be done by the mere statement of the defendant.

Considering all the precedents the Court sided with the defendant as any divorce claimed on the ground of Section 12 1(a) of the Act, has to affirm 2 questions: First, whether consummation had taken place. Second, if found that the consummation hasn't taken place then was it because of the impotency of the spouse.

In the present case, the doctor had affirmed that the wife was not impotent to engage in sexual intercourse i.e. she was not physically impotent therefore dismissing the divorce on the ground of Section 12 1(a). The bench instead looked into the aspect of psychological impotency and the fraud committed by the wife and her family.

4 Yuvraj Digvijay Singh v. Yuvrani Pratap Kumari, 1970 AIR 137
5 Mst. Shewanti Bhaurao Dongre vs Bhaurao Daulatrao Dongre, AIR 1971 MP 168
6 Mody's Medical Jurisprudence and Toxicology, p. 308, 16th Edition
7 Harprasad Santore v. Anita Santore, (1993) DMC 27

Approach of legislature on the issue

After analysis the Vedic and post Vedic literature of the Hindu Law, it was observed that these say marriage is a sacrament but there seems to be no evidence of divorce. Marriage is seemed to indissoluble and referred to as a sacrament even in the Samritis.8

It was for the first time that the system of dissolution of marriage was introduced in Bombay, Madras and Saurashtra presidencies by implementing the Bombay Hindu Divorce Act (22 of 1947), the Madras Hindu (Bigamy, Prevention and Divorce) Act (6 of 1949) and the Saurashtra Hindu Divorce Act (30 of 1952).

If the wife is potent while the husband is impotent, there still stands a chance for a child to be born. Under Shastric Law, the above was made possible by the Niyog system, where the son is the called the son of such husband and not the begetter. Such a son is allowed to inherit the property of his parents is called Kshatraja.

Special Marriage Act, 1954

When the people of different caste and religions started to get married, the Special Marriages Act came into picture. Inter caste marriages happen between two people who belong to different castes. In the present people have their own choices in marriage and don't just blindly marry a person decided by their parents. The present generation have their say and choice and prefer to marry someone who is more compatible with them than marriage someone from their religion or caste.

Under Section 24 of the Act, any marriage solemnised under this Act will be declared null and void if the respondent was impotent at the time of marriage and the time of the issuance of the suit. Unlike the Hindu Marriage Act where under the given circumstances the marriage is voidable, this Act considers the marriage to have never legally taken place.

Indian Divorce Act, 1869

There are various legislations which allow the decree of divorce for the reason of impotency of one of the spouses. Under this Act, any husband and wife may approach the District court in order to declare their marriage null and void on the grounds that the defendant in the suit was clearly impotent at the time of marriage and was also impotent during the institution of the divorce suit.

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8 P.V. Kane, History of Dharam Shashastra 619-23 (Bhardarkar Oriental Research Institute, Poona, Vol. II, 1975)

Dissolution of Muslim Marriage Act, 1939

According to Sec 2(v) of the Act, a Muslim woman is entitled to file for a divorce on the grounds that her husband was impotent at the time of marriage and is still impotent when the suit is filed. In any case, the impotency in both circumstances has to be established. The Mohameddan Law lays down some duties of the wife and when the question that what happens if during the grace period, the husband is denied the company of his wife in his own house, then it was said that with the new Act, the duties of the wife did not apply.

Parliamentary stance

The period after the implementation of the Hindu Marriage Act, there were constant debates on what situations can actually be given the term 'impotency'. There existed a misconception about its true definition even till the late 90s. Termed d*ivortium a vinculo matrimonii,* a nullity was recognition that the holy bond of marriage could not exist, and it relied upon proofs of illegality of the marriage either at its origin (through consanguinity) or in its failure to become a full or consummated marriage (because of impotence). There have been various instances where husbands have approached the Court seeking divorce under Section 12 1(a) of the Act as their wives could not bare a child for them. The legislations were misinterpreted by the judiciary and the divorce was granted. The House of People's also did not seems to say much about this issue of spouses divorcing for the above matter.

In one case the High Court overturned their previous judgement given in 1994 after a gap of 18 years. In their initial judgement, they had granted divorce on the ground that the wife was unable to become pregnant i.e. she was sterile and not impotent. After 18 years, the Court realised the erroneous decision made by them as they did not interpret the meaning of impotency correctly. Impotency is defined as physical incapacity of accomplishing the sexual act while infertility is the inability to conceive a child. In law, infertility is no ground for divorce but impotency is a ground for annulment of marriage.

Conclusions & Suggestions for Improvements of Current Situation on Issue

In order to provide a safe lifestyle and environment for the existence and continuation of the human race, the institution of marriage was created. This system was established to deal with responsibilities and safeguarding property rights and family ties, the different units of a family like husband, wife, children born to them in order to maintain and protect morals and ethics. It helps in improving and cultivating out legal, ethical and social codes in addition to our civilisation both implicitly and explicitly.

It has come from history that in all societies the tie of marriage is powerful and it is an irreversible commitment between a man and a woman who go on to become husband and wife. This relationship comes with peripheral legal and personal responsibilities. While the kinetics of matrimonial relationships have changed with the passing time, but the formation of a family unit where a man and a woman are in love and children born out of that marriage, has not changed

Men and women in the present generation by the influence of westernisation, urbanisation and modernisation are resorting to the dissolution of marriage much more easily than before and thereby putting the stability of the institution of marriage and a good happy marital life whose foundation is on mutual love, understanding, faith, belief, affections etc. between the spouses. These are the building blocks of Hindu Law of marriage which shall not deter under any given circumstances.

Only when the present generation cherishes the values of love, affections, understanding and trust among themselves will the future mankind survive properly. Every individual likes certain values and morals such as wealth, respect, rectitude, love, enlightenment and affection in their lives. In order to strengthen the institution of marriage and family, there is a need to value love, trust, affection, respect, rectitude etc. in the relationship and not rely on money and power. This will ensure stability and well-being of the people.

Family counselling is the need of the hour for martial relationships. A family and marriage bureau must be created which will consist of people of all needed professions like counsellors, sociologists, social workers, psychiatrists, lawyers, priests and doctors. Schools, colleges and other institutions in the country must take talk to students sex and marriage along with the institution of family and their importance in the long run. There must exist an open dialogue between the families of husband and wife where a safe space must be established to ask any reasonable questions and those questions must be answered truthfully in order to establish a health relationship between both the parties.

The legislation of divorce should not be misused by any spouse. Restrictions must be applied on the use of these provisions in order to safeguard the interests of families, individuals and communities in a proper manner. Alternative Dispute Resolution can be said to be an ideal form of disposal of divorce matters in a faster manner.

It must be understood that the relationship between spouses in a matter of human life and emotions. Human life for all doesn't all on the same path as laid by the statute. Discussing a woman's private information in front of so many people in itself will affect the mind of the individual. Therefore before granting the prayer of the appellant,

and breaking the marriage ties immediately it must be kept in mind that every attempt must be made in order to protect the sanctity of the relationship which is required not only for the concerned individuals but also for the families in question and the society at large.

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