

Volume VI

January - December 2020



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The 'Alma Matters...' webinar platform designed at HNLU aims to invite, honour and get inspired from the Alumni of their turbulence and triumphs, ambivalence and achievements for an intergenerational motivation.

Yes, Alma Mater Matters...

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(HNLU JLSS)

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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!

A handwritten signature in cursive script, appearing to read "Vivekanandan".

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.

The paper entitled **‘Feasibility of a Political Eligibility Test in India’** authored by **Ms Nandini Shenai and Mr Miheer Jain** aims to check the pros and cons of implementing a political eligibility test in India in the light of the elected-related provisions of the Indian Constitution and multiple other legislations. In order to check the effectiveness and ensure a standard qualification approach in the election process, the author has proposed the implementation of a political eligibility test.

Mr Karan Tripathi in his paper **‘Adivasi, Liquor, And the Politics of Law Enforcement in Conflict Zone of Chhattisgarh’** endeavours to deliberate how one such commercial law, the Excise Act, has contributed to the disproportionately high representation of Adivasis in the various stages of the criminal justice system. It uses the thematic analysis to identify the patterns of policing, investigation, prosecution, and incarceration from the said judicial orders and from the in-depth interviews conducted with 40 defence lawyers who have been representing Adivasis in cases under the Excise Act.

The paper **‘Where Does the Press Freedom End and Trial by Media Begin?’** by **Mr Ayush Goyal** attempts to deliberate upon one of the contentious questions that is, “where does the press freedom end and media trial begin”? It describes the various aspects of media trial, while comparing it to press freedom and the fair trial. It raises a genuine concern over unresolved and non-mitigated repercussion of the media trial on an accused person’s character.

Ms Vanathi Krishna K and **Ms Jumanah Kader** in their joint writing under the title **‘Is the Incessant Correspondence Between Law and Literature the Reverberation of Judgements’** is an attempt to establish the interrelation between the two complex and interesting domains i.e., Law and Literature. In this research piece,

the authors have explored the correlation between law and literature, the conceptual interpretation of law in literature and law as literature, and various law and literature movements anent India. Furthermore, we have shaped this paper to throw light on various remarkable judgements incorporating the art of literary citation.

The article **‘Justice Delayed and Denied: Victims of Anti Sikh Riots Still Waiting’** by **Ms Jasmine Kaur** analyses various elements of the riots with a new lens i.e. the ground reality of the incident supported by the statement of testimonies of the victims, that would be followed by what role each tier of justice, the police, the courts, the government had to play in the aftermath.

Ms Astha Dhawan and Ms Samridhi Sanga in their collaborated paper ‘A Comparative Analysis of Abortion Jurisprudence in India, Japan and Netherlands’ attempt to critically analyse the Indian abortion jurisprudence by undertaking a cross-jurisdictional methodology which can be deemed most suitable for research under the given circumstance. The authors have strived to gain a comprehensive outlook by comparing both western and non-western jurisprudence as regards abortion with their Indian counterpart.

The article with the title **‘Virtual Education: Breeding Space for Harassment’** by **Ms. Anusha Jain and Mr. Tushar** attempts to delve into a nascent domain i.e., the concept of harassment over virtual space, a phenomenon which has sprouted recently with the advent of the world wide web. Accessibility to the internet has increased but not the awareness as to the proper and safe way to use it in a way that does not encroach upon the rights of others. This paper seeks to highlight the need of reformation of educational sector and the lack of robust laws to keep the menace of cyber harassment in check and offer appropriate suggestions for tackling this issue.

Mr Abhishek Vats and Ms Shruti Bansal in their joint endeavour entitled **‘Propelling the boundaries of Gender: Surpassing Statutory Limitations through Judicial Activism’** discuss the contemporary development in the concept of gender like gender identity, gender roles, etc. It further dissects the institutional acceptance of Gender binary in the Indian legal system and its repercussions on legal rights of gender minorities. This article also presents how gender neutrality in legal system and education might be the key to liberation and parity.

The paper entitled **‘Caste Bias, Social Discrimination and the Creamy Layer: Should it be applied to the Scheduled Castes and Tribes?’** by **Mr. Vishnu Mohan Naidu** delves into the concept of creamy layer in regards to its applicability to the Scheduled Castes and Tribes in India. The author also seeks recourse to the doctrine of Constitutional Morality to justify the legal basis of the creamy layer.

Mr S Aditya and Ms Anushree Singh under their joint authorship in the paper **‘True Liberty is Yin to the Restraint Yang’** endeavours to resolve the dichotomy while keeping our narrative simple we have used the words ‘liberty’ and ‘restraint’ with a clear caveat that the consensus as to their meanings are to be formed afresh every time, they are pitted against each other. The paradox between liberty and restraint will remain an unresolved deadlock as long as there are no tolerant implementers.

The paper entitled **‘Environment Impact Assessment in India: National Green Tribunal’s Perspective’** is an endeavour by **Dr Manoj Kumar** to explore the perspectives of the National Green Tribunal on Environment Impact Assessment in India. It also attempts to explore how in a short span of time since its establishment in the year 2010 the NGT has strongly influenced environmental litigation in India.

Ms Soumya Singh in her paper **‘Exploitation by Discharge and Dismissal of Fashion-Garment Industry Workers During Covid-19 Pandemic’** paper attempts to understanding the pattern of abuse and the widespread nature of the abuse in the fashion-garment factory and industry workers while delving into the background and root causes of the issue under the backdrop of COVID-19. The paper targets the areas in need of aid and helps formulate means of solution mechanism and methods, focusing on both social security of the workers as well as the sustainability factor for the system.

‘A Cry for Immunity’ is an essay on Medical Negligence during Covid-19 vis-à-vis the Consumer Protection Laws in India by **Mr Yuvraj Singh Sekhon and Ms Somya Virk**. This work takes into consideration the need for a revised system of investigating medical in the negligence suits due to the unique nature of the pandemic and therefore, balances the consumer rights along with protecting the interests of medical practitioners in the light of COVID -19.

Ms Ayesha Choudhary discusses the position of right of Indian married women to deny sexual intercourse to husband by analyzing the approach taken by judiciary in cases where mental cruelty by wife is alleged on the grounds of such denial in the essay **‘Mental Cruelty and Right of Married Women to Deny Sexual Intercourse: The Difficulty in Striking a Balance Under Hindu Marriage Law in India’**. The current law treats the refusal of sexual intercourse by a physically capable person for considerable period without a valid reason as mental cruelty under Hindu law with special reference to Hindu marriages governed by Hindu Marriage Act, 1955.

‘Unravelling the Web of OTT Regulation: Regulatory Requirements & Government Notification’ an essay by

Ms Tulsi Mansingka and **Ms Megha Sahni** presents before us an analysis of various attempts made by our government to regulate online content, their pitfalls and the way ahead against the background that the OTT platforms have trodden smartly into our lives replacing traditional controllers of media service. Although OTT falls under private viewership but the number & age of viewers and easily available content are the areas of major concern.

‘Instruments - A Problematic Word in Amalgamations’, an essay by **Mr Muthu Kumar K** and **Ms Deeksha N**, basically deals with the dispute in interpreting the word instrument which existed in many states as a result of the state governments’ ambitious desire to tax amalgamating companies. However, this dispute was partly solved by many states by making an amendment in their own stamp laws to include court orders within the meaning of instruments.

Mr Rishav Ray, in his **essay ‘An Insight on the Legal Status of Gender Justice in India’**, attempts to answer the emerging questions of gender justice by a detailed analysis of the constitutional framework, the legislative framework and the judicial approach towards gender justice. The paper also addresses various drawbacks of the existing system in context of gender justice and has tried to put forward suggestions for the same.

‘Present Day Relevance of Immanuel Kant’s Perfect and Imperfect Duty: An Analysis’ by **Ms Payal Swar** is revisiting Kant’s ideas of perfect and imperfect duties and tries to prove the relevance of these concepts, not just in theory, but also in practice in today’s day and age. To prove the present-day relevance of perfect duty, the Indian Contract Act, 1872 has been employed by showing how an ordinary promise can be turned into a legally binding contract by backing it with the force of law.

‘The Personal Data Protection Bill, 2019: A Critical Analysis’ by **Ms Gouri Kotwaliwale** and **Mr Sahil Manganani** discusses the meaning, history, and need for data protection laws in India. The need for data protection laws has been elucidated through the Constitutional provisions, practical perspective, and the insufficiency of the existing laws. In this background, the paper analyses data protection regimes in other countries like the United States, Japan, etc.

Mr Athul Vijay attempts to discuss the issues currently pervading the system of representative democracy within India and the system of voting that is being used within the country right now through his essay **‘Democracy in India: The Untapped Potential of a Liquid E-Democracy within the Country’**. The paper advocates for a change in the current voting system, by replacing it with a new voting system wherein blockchain technology can be used for voting.

Case Notes / Legislative Comment

In the case note **‘RTI Amendment and Rules, 2019: An attempt to paralyze the RTI Act, 2005?’** Mr Jatin Khushalani and Mr Prakhar Dixit analyses the amendment and assess whether it is a direct assault on the values of accountability and federalism. The paper covers the dual aspects involved in the amendment, the criticism and the government’s reasoning.

Mr Snehil Ajmera and **Ms Srishti Nigam** in their case comment **‘Settling the Unsettled: An Analysis of the Occupational Safety, Health, and Working Conditions Code, 2020’**, dissect the code and attempts to read between and beyond the lines of the vision and ground reality. It also tries to bring in the discussion the intervention of the Hon’ble Supreme Court of India in the matter.

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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Feasibility of a Political Eligibility Test in India

***Ms. Nandini Shenai**

****Mr Miheer Jain**

Abstract

In order to guarantee true democracy, developing India has had to encounter several problems which need to be addressed. These problems may include poverty and insecurity, socioeconomic inequality, lack of education and ignorance, caste system, communitarianism, mass migration, provincialism, corruption, and extremism, etc. In light of these issues, the elected Representatives of the country are given the task of uniting the people of the country while maintaining diplomatic relations with other states. In order to check the effectiveness and ensure a standard qualification approach in the election process, the author has proposed the implementation of a political eligibility test. This paper aims to check the pros and cons of implementing a political eligibility test in India in the light of the elected-related provisions of the Indian Constitution and multiple other legislations.

Keywords: Election, political eligibility test, implementation, democracy.

1. Introduction

The first general elections of India in 1951-52 marked the awakening of the world's largest democratic setup. Since then, India has been holding free and fair elections every five years with Representatives of the people forming the government. This democratic setup has given Indian citizens the opportunity to contest elections irrespective of their caste, religion, place of birth, or occupation. The election process in India has gone through multiple changes in the last few decades owing to a change in technology and voter demographic. Moreover, this occurrence is especially complex because of the multicultural, linguistic, regional, and religious diversity of Indian society, as well as the federal structure of the Indian nation. Elections provide people with a way of asserting their voice, opinion and choosing the candidate whose interests and ideas best suit them. It took a significant force of vision to turn all adult Indians into voters against many odds over the next twenty months, and after they became citizens with the adoption of the Constitution¹. Indians conceived for themselves the universal

* NMIMS School of Law, Mumbai

**NMIMS School of Law, Mumbai

1 INDIA CONST. 1950.

franchise, acted on this idea, and made it their political practice. A substantial divergence from colonial practice was the implementation of universal adult suffrage, which was decided upon at the outset of the constitutional debates in April 1947. The law described them as Representation of societies and associations, instead of identifying voters solely as individuals. Thus, the background and history of elections under imperialism not only provided minimal representation without independence, but also electoral practices that influenced political mobilization trends².

The very first premise of the theory of political justice by John Rawls is that every individual should have the same opportunity to be elected to every position, including the highest one. Over time, the Indian electoral process has shown a multitude of minor faults. In order to counter these shortcomings and strengthen the governance structure, this article aims to provide a workable alternative. The democratic system was regarded as the most powerful and people-oriented system out of a multitude of governing systems. The age-old scheme, however, suffers from a number of deficiencies that people frequently overlook, deficiencies that can impact the very effectiveness of its operation in the political environment of a region.

In countries in which this inherent need is lacking, efforts must be made to cover up this potentially catastrophic gap before the whole system is weakened and rendered inconsistent. A number of instances showcasing the inefficient working of democracy can be highlighted, focusing exclusively on the Indian political framework. The significant position portrayed by caste, religion and other emotional attractions further disrupts the democratic system because it does not permit the democratic system to be distorted. Parties sorely missing such resources are able to rise to positions of power and control, even if they are able to perform at a better rate. It is an accepted truth that people's leaders accept money³ to fund a specific administration in the age of foreign support and minority administrations, both in the Centre and in the States. Public welfare and well-being remain irrelevant to the leaders of today. Defections and counter-defections by leaders of Indian politics have been frequent in their thirst for influence. Democratic engagement and representation, as interpreted in a substantive context, are necessary elements for a functioning society. Academic debates in this field have cantered primarily on theories of democracy and inclusion in the sense of India, the electoral system, the achievements, and shortcomings of Indian democracy as it has developed through the decades, topics of female participation, Muslim

2 Shradha Devi v. Krishna Chandra Pant & Others, AIR 1982 S.C. 1569.

3 P.V. Narsimha Rao v. State, AIR 1998 SC 2120.

women's or minority representation, etc. The most compelling aspect which can only be given by a democracy is that it gives citizens great powers, such as deciding who can reach a certain governmental title. Nevertheless, with tremendous strength comes tremendous burden. Similar to entrusting a weapon to an untrained individual, vesting those in the hands of individuals who are unable to assess its true worth and making successful use of it will be disastrous.

2. The Indian Democratic Setup

In the administration of the state, its growth and the position of its citizens, the arrangement of a country's democratic system plays a critical role. Over the outflow of time different systems have been built and evaluated, with several ending in failure. The democratic form was regarded as the most powerful and people-oriented system out of a multitude of governing systems. The age-old scheme, however, suffers from a number of deficiencies that people frequently overlook, deficiencies that can impact the very effectiveness of its operation in the political environment of a region. In addition, a fact frequently forgotten is that in any case, a government may not work in the country's best interests. It includes certain requirements which must be constantly met by the public at large and the elected Representation in their continuous service. A number of instances demonstrating the inefficient workings of government can be cited, based largely on the Indian democratic system. The dominant role played by ethnicity, faith and other emotional attractions further disrupts the political system since it does not allow candidates without such wealth to rise to positions of influence and authority, even though they are able to run at a higher pace. Maybe one of the influential and unprecedented characteristics of governance is also the source of its crucial collapse in the Indian framework. The constitution's architects were so focused on embracing democracy for the benefit of the people that they did not examine if India was prepared to continue with such a system. Any citizen's privilege to contest elections is well established, which brings various counter points to this philosophy. While there are apparent flaws in different modes of government, such as elections, legislation and the execution of laws, the general population does not want to accept these faults and seek to fix them. Only for a small society for which conduct of each faction could be closely controlled, was the ancient form of government meant to be used. A representative election would not ensure the best results, since the right to vote is given to any single person, regardless of their age, education and public criteria. While the educated majority are best prepared to make informed decisions when analysing the candidate's personality and their agenda, uneducated electors will also be deceived to cast their ballots on a party undeserving of it using numerous potentially negative characteristics such as caste, faith, etc.

Occasionally, the Election Commission of India, a statutory agency under the Constitution⁴ responsible for holding free and fair elections in the country⁵ has spelled out numerous suggestions to fill the electoral system flaws. The legislators who are busy seeking control, however, have not shown the requisite willingness and commitment they should have to press for democratic reforms.

There is an immediate need, amongst other things, to figure out if it is vital for the political constituencies in India to be redrawn. In addition, it must be checked if any constructive action has to be taken on the topic of reducing electoral expenditure by legitimately eliminating pure waste of money by those participating in the electoral process⁶ and imposing constraints on state financing. Diverse statistics show that the informed electorate accounts for the minority of the overall actual voter base and that in fact, the illiterate portion of society decides on the elections. Although this grants any person the freedom to vote, the results can also be very disastrous. This will mean that the ignorant people who do not realize the importance of their acts will essentially make the bulk of all choices. A large part of the overall voter population would not turn up to cast their ballots for their favourite candidate at their ballot boxes. To this exclusion, each coming from various areas of society, a wide variety of explanations can be related. The mere time constraints to do so is the most frequently cited explanation for the disappearance of many voting public. The explanation widely given by the common man, who claim that approval or off-time to go to their corresponding booths are always not provided.

Many citizens willing to vote nevertheless do not do so because in the whole procedure itself, they are unsure of their voting centre. To overcome this downside, several online forums have been introduced by the Election Commission to provide electors with information about their districts, politicians, and polling stations. While this has tended to minimize the absence of voters to a significant degree, in situations where the electorate is from a middle/lower-middle class background, it has proven unsuccessful. A significant number of people who had just reached the age of 18 may not have enrolled as voters with India's Electoral Commission. Their names will also not exist in the national vote. India does not immediately register all qualifying people as identified voters, unlike most of the European countries⁷. Therefore, where they are competent, a large part of the young generation does not get to participate in the political process in the first place. The effect of these factors is imminent and cannot be contained, which is an immense drawback to Indian democracy. By distributing the money for

4 INDIA CONSTI. art 324.

5 The Representation of the People Act, 1951, No. 43 of 1951.

6 Mohan Raj v. Surendra Kumar Taparia, (1969) 1 SCR 630

7 Jeffrey Haynes, Religion and Politics 188 (2010).

election campaigns allocated by major parties, the longevity in modern times can also be viewed and sponsored. A substantial majority of their spending is allocated to remote regions, where they are assured that on these premises, they will affect the masses and win support in larger number.

3. Qualifications for Contesting the Elections

It is not true that every individual, regardless of factors, can contest in the election. There are certain parameters to judge the candidature of an individual contesting in the election.

- a. Citizenship:** A non-citizen cannot be a contestant in a political race. Unless he is an Indian citizen, Article 84(a) of the Constitution of India⁸ provides that a person will not be entitled to be appointed to fill a seat in Parliament. There is a similar clause in Article 173(a) of the Constitution of India⁹ for appointment to the state legislatures.
- b. Age:** The individual should be 25 years of age on the date of the RO's security of appointment. Article 84(b) of the Constitution of India¹⁰ states that the minimum age required for Lok Sabha candidates to be elected is 25 years. There is a similar clause for a member for the Legislative Assembly in relation to Article 173(b) of the Constitution of India¹¹ read with Section 36(2) of Representation of the People Act, 1951¹².
- c. Registration:** In order to fight an election as a frontrunner, a person must be registered as a voter. Sec 4(d) of the Representation of the People Act, 1951¹³ prevents a citizen from contesting except if in any electoral district he is a voter. There is a similar clause for Assembly Constituencies in Section 5(c) of 1951 Act¹⁴.
- d. Incarceration:** In compliance with Section 8(3) Representation of the People Act, 1951¹⁵ if a citizen is convicted of any crime and imprisoned to a period of 2 years or more, the revocation from contesting elections will be enforced. Even if the candidate is on parole, he is barred from contesting an election according to the regulations released by the Election Commission of India, after the imprisonment and his appeal is awaiting dismissal.
- e. Minority:** In a specific state, an individual is a part of Schedule Caste. He will fight the election for Lok Sabha (House of People)

8 INDIA CONST. art. 84(a).

9 INDIA CONST. art. 173(a).

10 INDIA CONST. art. 84(b).

11 INDIA CONST. art. 173(b).

12 The Representation of the People Act, 1951, S. 36(2), No. 43 of 1951.

13 Ibid.

14 Ibid.

15 Ibid.

from any other state from a seat allocated for Scheduled Castes. In a specific state, an individual is a part of the Schedule Tribe s. Except for Lakshadweep, except for those in independent districts of Assam excepting the tribal areas of Assam, he will contest elections from any other state from a seat allocated for Scheduled Tribes.

- f. Disqualification:** false expenditure accounts, bribery¹⁶, corrupt practices¹⁷, conviction, election agent, government contracts on a personal level¹⁸, disloyalty, holding office of profit¹⁹, etc are grounds under which individuals contesting the election can be disqualified²⁰ by the election commission.

4. Feasibility of the PET

A political eligibility test to filter and pick the best of all people eligible to contest in a democratic election could serve as a feasible alternative to this particular issue. Based on their conduct, leadership qualities, intellect and problem-solving ability, applicants will be tested. In addition, background checks cover their schooling, family relations, criminal history, and social accomplishments. While it will make those candidates unable to compete in elections, such a limitation is necessary in order to guarantee that the high ranks of politicians and ministers successfully carry out the duties necessary for them to execute. This will also bring an end to the dominant hegemony of a few existing government-forming political parties, opening the way for new participants to the political arena. The modern model of democracy provides for a democratic process in which every person can compete in an election. This will decrease, from an economic viewpoint, the overall productivity that can be obtained in terms of consistency. From an institutional point of view, this would mean that an employee with no previous leadership and decision-making background would assume the seat of the head of a whole ministry. A series of assessments, each to be carried out under pre-determined circumstances, procedures and settings and jointly referred to as the Political Eligibility Test, will be the proposed scheme (hereinafter referred to as PET). A fundamental evaluation structure will contain the following:

- a. Psychological Evaluation
- b. Moral choice and a test for governance
- c. Judicial Antecedents
- d. Constituency Awareness

16 Dharti Pakar Madan Lal Agarwal v. Rajiv Gandhi, AIR 1987 SC 1577.

17 Jyoti Basu & Others v. Debi Ghosal & Others, AIR 1982 SC 983.

18 Vishwanatha Reddy v. Konappa Rudrappa Nadgouda, (1969) 2 SCR 90.

19 Keshav Laxman Borkar v. Devrao Laxman Anande, AIR 1960 SC 131.

20 Hobbs v. Moray, (1904) 1 KB 74.

A collection of queries and simulation exercises will be used in the evaluation to assess the candidate's success in addressing grievances, implementing proposals, proposing solutions, and passing qualified legislation. In order to identify his position as a resident and a member of the community, a series of background checks will also be carried out to ascertain his success as a law-abiding citizen. Applicants would also be expected to have knowledge of their electorate, which would be checked orally/written. Primarily, it intended to guarantee that all its residents achieve a high standard of basic education in schooling, to the degree practicable. Secondly, officials in prominent political offices have advisory personnel that should be extremely trained. The concern is whether an instructional course, even though it might be helpful, can improve here. There is much one should understand about ethical behaviour and the risk of government activity breaching it. For instance, certain classes in society do not profit from anything in the short term, but rather have detrimental impacts on the whole of community in the longer run. In fact, this issue has only been posed in Europe since the period of the French Revolution, 1789, and the subsequent era(s) when a republic became a new democratic entity in Europe and other countries in Europe - albeit compensated for with the sacrifice of many innocent citizens - instead of a noble transition to the throne in government for some years.

The author firmly argues that this analysis would serve a two-fold objective. It will mostly show that the candidate is well-equipped with all the skills needed to solve the issues encountered by the citizens of his electorate successfully and to be able to behave appropriately. In addition, it plays a secondary purpose in which future Representation are fully informed of the constituency's issues and demographics, having an awareness of the constituency's requirements. The consequence would therefore entail the candidate's unavoidable preparation, making him a more appropriate and productive choice for the position given to him. However, a multitude of legal and logistical problems must be considered and resolved in order to guarantee the implementing this clause successfully.

5. Legal Validity of the PET

With regards to this proposed study, the underlying problem that will emerge is with respect to the legal legitimacy of this framework as a whole. The need to protect the freedom of a citizen to vote with complete option and in the lack of any sort of intimidation has considerable significance in various constitutional provisions, legislation, and international norms. In a democratic election, every person can openly participate provided he/she meets the requirements needed to do so as set out by the legal mechanism.

It will undoubtedly close the gap between a successful and ineffective government by introducing a system of assessments to determine the fitness of a candidate to compete in democratic elections. The cost of introducing such a scheme, though is significant and has far-reaching effects. Initiating such a strategy would entail drastically restricting the rights and liberties of citizens in some countries, which may be viewed as an unjustified violation of human rights. Implementation of the PET would have to pass the test of legal and constitutional validity.

a. Representation of the People Act, 1951

Chapter III of the Act is much more cohesive and inclusive, but the different qualifications set forth in Chapter II of the Act are somewhat abstract and serve just a specific purpose. This sets down a person's numerous disqualifications from being a member of parliament. A lot of these factors rely on criminal premises, such as assaults, disloyalty, and misconduct. This arrangement is explicitly in line with the third element of the system in discussion: criminal background searches.

The PET will moreover, offer a much more detailed overview of the individual's criminal behaviour and background. It does not serve as an appropriate basis for disqualification to simply commit a felony. The Representation of the People Act accounts for the essence of the crime needed for disqualification by specifying a minimum penalty that the defendant will have to complete.

It is of particular significance not to restrict the individual in question purely on the basis that he/she has a criminal record, as this clause may be misused to obstruct the political career of a potential person by opposition parties. Bearing in mind any single fact and situation included with the legal fee paradigm, the screening procedure of the PET will need to be rigorous and impartial.

b. Constitutional Provisions

Articles 14²¹, 19²² and 21²³ are frequently alluded to as the Indian Constitution's "Golden Triangle"²⁴. Any legal process is expected to comply with the rules of these statutes, which are of the utmost sanctity of the constitutional process. With regard to Article 14, the PET's initial interpretation will impress the reader that the scheme is unfair and refuses any human equal opportunity to compete in an election.

The 'intelligible differentia'²⁵ element, however, allows for an exception to Article 14, in so far as it is possible to explain the unfair

21 INDIA CONST. art. 14.

22 INDIA CONST. art.19.

23 INDIA CONST. art.21.

24 *Minerva Mills v. Union of India* AIR 1980 SC 1789.

25 *Ramana Dayaram Shetty v. The International Airport Authority of India*, AIR 1979 SC 1628.

treatment of two parties if the reasons for such a difference are fair. In this situation, the factor in question is of establishing the government, the biggest and most relevant operating body in the entire nation.

In such a critical matter, it cannot be treated as a grave breach of Article 14 to take appropriate measures to refine the disputed parties, since it affects public policy, leadership and political cohesion. In addition, Article 14 merely places a bar on some type of class law, but not a bar on classification of itself. It is important for a country to have an effective functioning government armed with the brilliant professionals of the free world to lead the nation towards growth and prosperity. Article 19, generally referred to as the 'Right to Freedom,' is a subject of vital significance which cannot in any way or manner, be violated. It allows people the freedom to follow any occupation, career, trade or enterprise of their choosing. The domain of politics does not really, come under the meaning of any of these definitions. The apex of the legal mechanism is enshrined under the terms of Article 21 of the Constitution of India. It provides for each individual's right to life and livelihood. Although the term may sound plain, it covers a broad variety of liberties that, due to constitutional provisions of many accounts, are to be released publicly to the people. The right to openly compete in a fair election is one of many other demands. The Supreme Court in *Jamuna Prasad*²⁶ ruled that the freedom to engage in a campaign is not a common law right, but rather a particular right provided by a statute, pursuant to the limits imposed by that act. In this issue, the element of harmonious construction must also be extended since the free right to compete in an election given to a person could influence the access to high quality governance and the social welfare. The Supreme Court in *Javed and ors.*²⁷ has established that neither a constitutional right nor a common law privilege is the right to challenge an election. It is a privilege granted by a statute. Therefore, the imposition of limits by means of PET does not constitute a violation of a person's civil rights.

c. Global Framework

The implementation of the PET will in the case of international agreements, be subject to a somewhat different strategy. The suitability of an international convention cannot be changed to meet the individual needs of the country, unlike local rules. It may also not be changed according to the lawfulness of a country, but rather follows a uniform scheme of applicability. In addition, the Indian judiciary has always maintained the value and essential role of these treaties in the reform and creation of legislation. It would be an absurdity to fully circumvent the clauses of the International Covenant on Civil and

26 *Jamuna Prasad v. Lachhi Ram* AIR 1954 SC 686.

27 *Javed & Ors. v. State of Haryana & Ors.* (2003) 8 SCC 369.

Political Rights (ICCPR)²⁸. Article 25 of the ICCPR, however, provides a clause providing for such fair limits which are not protected by Article 2 of the same international treaty. The Convention specifically provides that the civil freedom of an individual on the basis of colour, colour, sex, gender, religion, political or other thought shall not be limited. In certain ways, they are used and relied on in situations where the state legislation is silent on the issue. In addition, if any statute that is in dispute with an accepted international law has been made by the Parliament, then Indian courts are obliged to give force to local law. The Supreme Court of India observed that nothing could be imposed under any mask that clashes with the rules of our constitution or statutory structure, whether in the context of customary international law²⁹. To define the prior as a fixed law that is not in blatant breach of any constitutional requirements will be a successful way for the PET to peacefully coexist with the ICCPR. It will immediately obtain an upper hand over signed international treaties upon becoming a municipal rule. The SC recognized³⁰ the binding power of international law and held that the implementation principle recognizes the status of international law unless it conflicts with the law.” It would therefore be inadvisable to rely solely on the terms of those agreements without taking into consideration the community’s needs on a stronger footing. As the Political Eligibility Test would be compliant with Article 14 of the Indian Constitution, the fair relation would serve as an effective protection against its violation of Article 25 of the ICCPR.

6. Disadvantages of the PET

In the background, the politically guiding social classes, mainly the aristocracy, have always identified with the educated — the issue here is that we seriously limit the circle of social aforementioned groups by connecting political leadership to high academic credentials, and thus refute our democratic concept of equal opportunity for the exercise of top political office. It is important to address this “dilemma”. Firstly, decided by the issue of how we should ensure that our national politicians have the best quality of education possible. Second, how do we guarantee that democratic values are preserved and that the ability to hold the highest positions of the state is not only granted to a small elite? Any voter has the voting rights (after 18 or 21 years of age) in a democratic setup and no vote counts more than the other one. Although citizens are of course, not fair (no equal rights and such), the vote of a poor individual counts as much as someone who is wealthy,

28 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, UNITED NATIONS, TREATY SERIES, VOL. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>, last accessed on 02/12/2020.

29 *ADM Jabalpur v. Shivkant Shukla* (1976)2 SCC 521.

30 *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, AIR 1984 SC 667.

the votes of a woman as much as that of her male counterpart and that of an undereducated citizen as that of an educated one according to legislation and political involvement. A person's intellect may be supported by schooling, and education may come with familial money and social standing, but it does not imply that those who were unable to afford higher education are less educated and worthy of doing so than those who embraced it. The same applies for prospects to be elected. How does one refuse the opportunity to be elected of people who have no means of pursuing higher education by chance? It would undermine the aim of democracy if only the wealthy and those of high social status were elected. Assuming that a person who had not experienced university education, who might've been a welder or bookseller or even a menial worker, was chosen. They had not practiced law or politics, but intellectuals had not only elected them to office either.

There is a near connection between well-educated status and greater comprehension of ethical values or theory. This is an essential basis for equal moral behaviour. The willingness to learn to overcome the temptation to resort to corruption in a specific environment, on the other hand, relies on unconsidered involuntary reaction and coincides to a considerable degree with the experienced interaction with child development and parents. It is not feasible for technocrats, if not supported by major political parties, to participate in elections. To participate in elections costs an immense amount of capital. Here the politics of power are very closely related to corruption at various levels. As a result of these causes, decent people feel little involvement in politics. In the bureaucratic sectors, the citizens chosen by the country's public servants are the real decision-makers. Since, from the very start, the essence of democracy must endure a serious test of resilience - because of that same social rupture that it typically cannot endure: its work is evidently severely compromised from the inception. Therefore, in reality, more serious questions about the state of democracy need to be raised and debates held. Perhaps it is important to differentiate between primary and secondary initiatives by requiring and demonstrating that politicians have schooling. In the long run, the solution to the issue lies in the fact that using the public school system, every resident of the government has not only the right but also the obligation to receive a qualified certificate. Civic Service School. The state, however, has the responsibility of supplying public education with classrooms, facilities, teacher instruction and financing.

7. Conclusion

Without sufficient funding and careful preparation, it will be incredibly difficult to deploy a framework with such intricacies on a scale of this magnitude. It is therefore of paramount significance to

describe a governing entity capable of throwing such a feat down. To be able to carry out the necessary operations in defined time periods with adequate record maintenance, this established body will need to have a wide pool of capital, money and qualified staff.

The administration will need to distribute funds and other services in order to make this body strong enough to accommodate and orchestrate such a vast role, specifically for this new body and also transfer Acts as needed. Instead, allocating the role of introducing the PET to the current Election Commission will be the most effective option. Though many would view such an idea as poorly at current valuations, it is the most reasonable and effective alternative open to the Indian government. It will be appropriate for parties inclined to vote in elections to send a document in advance to all parties that they intend to apply for this examination. A specific application for each citizen, including all the important details, such as personal profile, financial assets, tax records and other related details as needed by the ECI, should be provided to the corresponding constituency in charge. The next move will be to perform a screening process of the candidates' applications. A fair referendum acts as a refuge for a civilized community for all the government's ideas and gestures. It covers the philosophies of many great politicians who as a government controlled by the people themselves, invest in the principles of democracy. It would be naive, though to assume that a system is flawless and self-sufficient in itself, requiring no modification or enhancement to combat the translocation of time and to adjustment political possibilities. With respect to the production of funds, in order to accommodate the increased expense of this new mode of voting, it is now important to find additional revenue sources for the ECI. However, comparing the rise in spending with the increase in income is exceedingly difficult. Efforts should be made to close the distance between the two transaction forms, supplying the ECI with a lower degree of failure. It is possible to sell multimedia rights for the transmission of the testing process to personal. The ECI has prior electoral exposure and thus has all the appropriate skills and resources to successfully carry out and track all election-related activities. The commercial analysis of the strategy is another aspect that will need to be factored. As a substantial amount of the taxpayers' profit goes into organising a rigged government at the national level, except the money, elections already have a very big pressure on the economy. The author has also introduced the mechanism by which the system can be integrated by the parliament into the legal structure without breaching the requirements of the Constitution of India and the Representation of the People Act, 1951. The political system of India will theoretically experience a maritime shift in its mark of performance, operating and organization with the proper application of this scheme and its harmonious implementation with other current legislation and agreements.

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Adivasis, Liquor, And the Politics of Law Enforcement in Conflict Zone of Chhattisgarh

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Abstract

Scholarly research and the expert committees have noted how the criminal justice system victimizes Adivasis¹ in the conflict zone of South Chhattisgarh. While the existing literature has primarily focused on the use of hyper-punitive laws under the Indian government's counterinsurgency policy, it has largely ignored the study of rising pretrial incarceration of Adivasis under commercial laws, interpreted as non-punitive by the courts. This study has endeavored to address this vacuum by probing how one such commercial law, the Excise Act, has contributed to the disproportionately high representation of Adivasis in the various stages of the criminal justice system. It begins by analyzing the cases adjudicated against the Adivasis, under the Chhattisgarh Excise Act from 2016-2019, by the trial courts situated in the three designated Left-Wing Extremism (LWE)² districts. The judicial data illustrates an extremely high rate of acquittal due to non-compliance with due process requirements of the fair investigation and the prolonged pretrial incarceration due to denial of bail and inadequate legal aid. It then uses the thematic analysis to identify the patterns of policing, investigation, prosecution, and incarceration from the said judicial orders and from the in-depth interviews conducted with 40 defense lawyers who have been representing Adivasis in cases under the Excise Act. While analyzing the gross procedural violations in investigating excise cases against Adivasis, the study concludes that the amended Excise Act is an imperative tool of the government's politics of law enforcement and counterinsurgency strategy. As commercial

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- 1 This study uses the term Adivasi to refer to the tribal communities inhabiting the State of Chhattisgarh. These communities are also enlisted as Scheduled Tribes under Schedule VI of the Constitution of India. The word 'tribal' is only used in quotes from other sources as the said term has been a contested terminology. The communities of South Chhattisgarh, who are the subject of this study, also use the term 'Adivasi' to refer to themselves.
- 2 In 2006, the Ministry of Home Affairs established a Left-Wing Extremism Division to effectively address the Left Wing Extremist insurgency in a holistic manner. The Division has designated certain districts of South Chhattisgarh as LWE districts, marking them for counterinsurgency measures and security related schemes: Ministry of Home Affairs, Left Wing Extremism Division, https://www.mha.gov.in/division_of_mha/left-wing-extremism-division.

legislations do not entail the strict due process requirements of penal legislation, they are increasingly invoked by the state agencies to deprive Adivasis of their constitutional right to liberty, dignity, and property.

Caught In the Cross-Fire: Placing Adivasis in the Long-drawn Conflict Between Maoists and the Indian State

The Southern belt of the Indian State of Chhattisgarh is marked by an ongoing conflict between the Indian Government and a militant insurgency group that refers to itself as 'Maoists'. The insurgency movement, popularly known as Naxalism, has been recognised as the biggest internal security threat to India³. The brunt of this 'undeclared war'⁴ has been unjustly borne by the Adivasis inhabiting the lands of the LWE designated districts of South Chhattisgarh. The escalation of the armed struggle and the militarized response of the Indian government has led to the gross human rights violations of the Adivasis. The scope of these human rights violations has been recorded in various studies concerning the impact of hyper-punitive⁵ counterinsurgency policy on Adivasis. The existing literature has confined its analysis to the impact assessment of hyper-punitive or preventive detention laws, such as the Unlawful Activities Prevention Act, Explosives Act, Public Safety Act, and offenses against the state under the Indian Penal Code. The common theme that emerges from these studies highlights the political marginalization of Adivasis, resulting in systematic human rights violations in the forms of encounter killings, police brutality, mass incarceration, and arbitrary search-and-combing operations⁶.

Meher has argued that the ongoing Maoist conflict has led to the 'silent victimization' of the Adivasis, who are the worst affected by the counterinsurgency policy⁷. He iterates that the lack of procedural fairness⁸ in policing and counterinsurgency measures has made

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- 3 Manmohan Singh, "Prime Minister's Speech to the 2nd Meeting of the Standing Committee of Chief Ministers on Naxalism," (speech, New Delhi, India, April 13, 2006), GOVERNMENT OF INDIA PRESS INFORMATION BUREAU, (Apr. 05, 2020 12:00PM), http://pib.nic.in/release/rel_print_page.asp?reid=17128.
 - 4 People's Union for Democratic Rights, WHEN THE STATE MAKES WAR ON ITS OWN PEOPLE, p.28, All India Fact Finding Report, April 2006.
 - 5 Mike Rowan, *Punishing from a Sense of Innocence: An Essay on Guilt, Innocence, and Punishment in America*, 20 CRITICAL CRIMINOLOGY, 377-394 (2012).
 - 6 Nandini Sundar, Bastar, Maoism, and Salwa Judum, 41 ECONOMIC AND POLITICAL WEEKLY, 3187-3192 (2006).
 - 7 Rajesh Kumar Meher, *Politics of Maoism, Adivasi Human Rights Issues and the State: A Study of Chhattisgarh*, SHIFTING PERSPECTIVES IN TRIBAL STUDIES, 133-147 (2019).
 - 8 Tom R Tyler, *What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOCIETY REVIEW, 103-136 (1988).

Adivasis vulnerable to the Maoist revolutionary idea of protracted armed struggle. While calling it the 'Politics of Maoism', Meher criticizes the hyper-punitive response of the Indian government in the LWE hit districts, a coordinated and holistic strategy to ensure security which is exercised through modernization of police and up-gradation of their intelligence apparatus.

The concerns of police brutality and search-and-combing procedures under the preventive detention laws are also highlighted by Sundar, who identifies the government's apathy towards Adivasi culture and unfounded prejudices as drivers of such human rights violations⁹. Guha conceives this cultural apathy as a 'failure of representative democracy, citing lack of representation in the police force and outsourcing of law and order as reasons that push Adivasis towards militant insurgency¹⁰. Sharma places this alienation from democratic processes as a continuation of stigma from the colonial period when some of the tribal communities in South Chhattisgarh were 'criminalized from birth' under certain forest and penal legislations¹¹.

Prolonged Pretrial Incarceration of Adivasis Under Hyper-Punitive Laws

The direct impact of hyper-punitive counter insurgency policy on the prolonged incarceration of Adivasis was extensively explored by Grover, where she termed them as 'Prisoners of War¹².' Grover has attributed the rising rate of arrests and incarceration to the indiscriminate militaristic approach adopted by the state to respond to any or all forms of dissent and resistance in the area. She claims that the exponential growth in the number of Adivasi undertrial prisoners is facilitated by how the criminal justice system has functioned in the region. Grover has highlighted that most of the Adivasi undertrials are booked under hyper-punitive laws that mark the counterinsurgency policy - Unlawful Activities Prevention Act, Public Safety Act, Arms Act, Explosive Substances Act, and under the chapter of the Indian Penal Code including offenses such as waging war against the state, sedition, and criminal conspiracy. These cases are cited with the new lexicon, 'Naxal cases', and are frequently invoked in the First Investigation Reports to tag the accused even before the commencement of the court processes.

9 SUNDAR, *supra note 7*, at 3187.

10 Ramachandra Guha, Adivasis, Naxalites and Indian Democracy, 42 ECONOMIC AND POLITICAL WEEKLY, 3305-3312 (2007).

11 Varun Sharma, Pardhi Criminality in Postcolonial Chhattisgarh—of Tigers, Tribals and Misfits, 36 STUDIES IN HISTORY, 98-120 (2020).

12 Vrinda Grover, The Adivasi Undertrial, A Prisoner of War: A Study of Undertrial Detainees in South Chhattisgarh, in Deepak Mehta & Rahul Roy, *Contesting Justice In South Asia*, 201 (Sage 2017).

Grover believes that the use of ambiguous terms in these hyper-punitive laws enables the state agencies to subject Adivasis to the hardship of the criminal justice system. Use of vague terms such as 'unlawful', 'disobedience', 'tendency', and 'encourage', engenders arbitrariness from government action, the brunt of which is borne by the Adivasis who are largely unaware of what many civil society organizations have called 'draconian laws'¹³.

Pandey identifies one such hyper-punitive legislation, the National Investigation Agency Act, whereby textual ambiguity has been exploited by the state for creating an unintelligible classification of offenses related to left-wing extremism, which are tried before a Special Court¹⁴. Pandey's empirical study puts forward two major reasons for growing numbers of Adivasi undertrials under hyper-punitive laws such as the UAPA - distance and language barriers.

The structure and the procedures of the criminal justice system are alien to the Adivasis, which Kannabiran & Gundimeda highlight, leads to their secondary victimization before the courts¹⁵. In the adversarial criminal justice system, Saxena argues, Adivasis are mostly presented as accused who are unaware of their rights with only limited information to share¹⁶.

Understanding the Criminalisation of Adivasis under the Excise Act: The Study

While the existing research has restricted itself to the invocation of hyper-punitive legislations, the present study was conducted to ascertain the impact of non-punitive commercial legislation, the Excise Act, on the increasing criminalization of Adivasis in LWE Districts. To understand the said impact, an analysis was conducted of all the judgments passed under the Excise Act by the district courts between 2016-2019 in three LWE regions: Bastar, Dantewada, and Sukma. The research is focused on section 34 of the Act, which penalizes the possession, transportation, or selling of liquor.

The study has analyzed a total of 187 judicial orders which were retrieved by accessing the official e-courts portal of the district courts in Bastar, Dantewada, and Sukma. All the judicial orders digitally available on the said e-courts portal, under amended section 34 of the Excise Act, have been analyzed. Out of the 187 judicial orders, 176

13 People's Union for Democratic Rights, *The Terror of Law: UAPA And the Myth of National Security*, Coordination of Democratic Rights Organisation 11-77 (2012) <https://puodr.org/sites/default/files/2019-01/terror%20of%20law.pdf>.

14 Shikha Pandey, *Anti-Terrorism Courts and Procedural Injustice: The Case of NIA Special Courts in Chhattisgarh*, 16 *SOCIO-LEGAL REV.* 109 (2020).

15 Kalpana Kannabiran & Sam Gundimeda, *Legal Clinics and Adivasi Rights*, 47 *Economic and Political Weekly*, 21-24 (2010).

16 *Id.*

orders are for cases where the accused was an Adivasi. This study, therefore, has restricted itself to these 176 judicial orders.

The data retrieved from the analysis of the said judicial orders have been categorized under the following heads:

1. **Category of liquor:** imported or locally produced for self-consumption
2. **Nature of investigation:** the reason for apprehension, search, and seizure, compliance with procedural due process
3. **Conclusion of the case:** acquittal/conviction, grounds of acquittal/conviction
4. **Period of undertrial/pretrial incarceration:** whether the time spent in prison as an 'accused not proven guilty' was within or beyond the statutory limit prescribed for

To locate the themes observed from the judicial orders within the socio-political context of South Chhattisgarh, in-depth interviews were conducted with 40 defence lawyers, who have been representing Adivasis in Excise cases in LWE regions studied under the present research. The overall sampling strategy was based on the snowball method, with the author himself conducting the interviews with the participants through video-conferencing mode. All the lawyers interviewed for the study have experience of at least 5 years of providing legal assistance to Adivasis.

Locating the Victimization of Adivasis under the Amended Anti-Liquor Law

In March 2019, the new government in Chhattisgarh had appointed a committee led by a retired judge of the Supreme Court of India, Justice A.K. Patnaik, to review a total of 23,000 cases pending against the Adivasis¹⁷. After 9 months, the said Committee recommended the withdrawal of 313 cases registered against the Adivasis under the State's Excise Act. In its letter to the State's Law Department, the Committee clearly stated that the maximum number of cases that warrant withdrawal is from the LWE districts such as Dantewada, Sukma, and Bastar¹⁸. However, the recommendations of the Justice Patnaik Committee are still awaiting the attention of the State Government.

17 National Commission for Scheduled Tribes, Minutes of the 121st Meeting, (Dec.16, 2019, 1:00 PM) https://ncst.nic.in/sites/default/files/copy_of_minutes_of_meeting/2991.pdf.

18 Press Trust of India, *Chhattisgarh Government To Withdraw Over 300 Court Cases Against Tribals In Naxalism-affected Areas*, Outlook India (Dec. 11, 2019 1:45PM), <https://www.outlookindia.com/newsscroll/chhattisgarh-govt-to-withdraw-over-300-court-cases-against-tribals-in-naxalismaffected-areas/1683301>.

The observations of the Justice Patnaik Committee are a reiteration of what the official prison statistics have been reflecting for years. The overall occupancy rate of prisons in Chhattisgarh is 153.3%, placing it at number 4 in the nationwide rankings. Moreover, Chhattisgarh tops the list of the highest rate of overcrowding in central jails (189.38%). The paradox is such that the majority of the inmates languishing in Chhattisgarh's jails are undertrial prisoners. The evaluation or independent monitoring of what happens in the State's prisons is pushed further towards opacity by an inadequately functioning prison visiting system.

The prison statistics reflect concerning figures regarding the rate of incarceration under the Excise Act. Out of the 280 prisoners incarcerated for violating the regulations of the Excise Act, only 6 are convicts, and 272 are those who are still awaiting commencement or conclusion of their trial. As reflected in the statistics, the overwhelming majority of undertrial prisoners under the Excise Act are Adivasis.

The disproportionately high representation of Adivasis in the incarceration figures under the Excise Act is owed to section 34 which penalizes manufacturing, possession, and selling of liquor beyond the permissible quantity¹⁹.

Section 34, originally drafted during the colonial period, as amended in 2011 to magnify the penal impact of the said provision. The amended provision has drastically reduced the permissible quantity of liquor from 25 to 5 bulk liters. Additionally, the maximum period of imprisonment has been increased from a year to 2 years, while a minimum imprisonment period of 6 months has been introduced. The maximum pecuniary liability, imposed along with the imprisonment, has also been increased significantly to Rs. 50,000, from an earlier figure of Rs. 5000²⁰. The amended provision carries an ambiguity that makes it amenable to exploitation by the police. It doesn't define whether the permissible quantity of 5 bulk liters is per person or household.

The vulnerability of Adivasis to the politics of law enforcement under the Excise Act is closely related to their systematic disenfranchisement and participation in local governance²¹. Laws regarding decision-making in the areas inhabited by Scheduled Tribes prescribe for devaluation of power to the tribal or village communities. The committees constituted by the central government²² have repeatedly pointed out the inadequate

19 Chhattisgarh Excise Act, 1915, S. 32, Act No. 2, Acts of Chhattisgarh Legislature, 1915 (India).

20 *Id.*

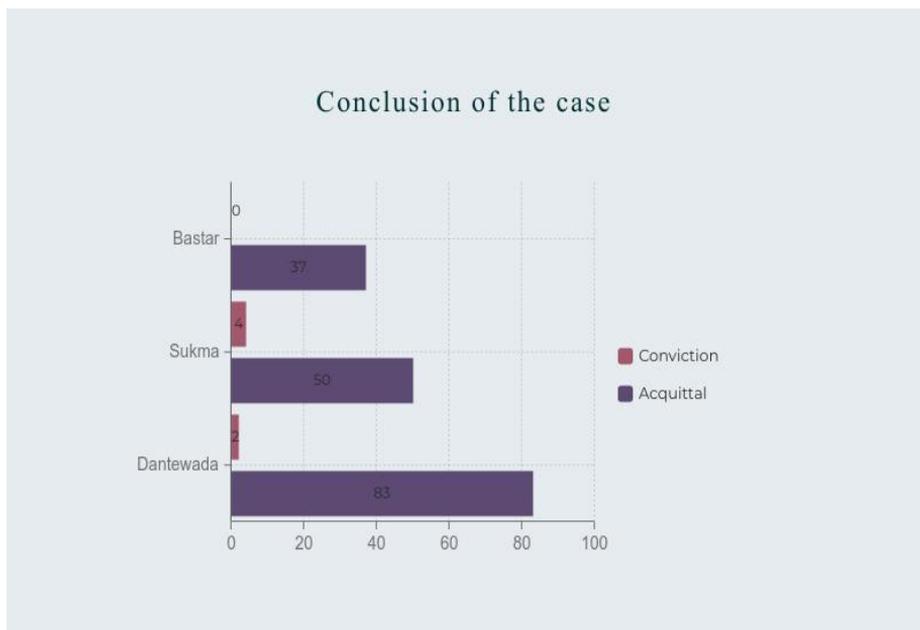
21 1 UN Dhebar, Report of The Scheduled Areas And Scheduled Tribes Commission 5 (Govt Of India 1961).

22 1, DS Bhuria, Report Of The Scheduled Areas And Scheduled Tribes Commission 200 (Govt Of India 2005).

implementation of such laws, especially in areas designated as LWE. For instance, the Panchayat Extension to Scheduled Area Act 1996, which was enacted to institutionalize self-governance of Adivasis on issues such as land and revenue, has witnessed unsatisfactory implementation in Chhattisgarh²³. Section 4(m)(i) of this Act, which empowers the Gram Sabha (village community) to take decisions on matters concerning excise (on local goods and alcohol), has been disregarded at all levels²⁴. Therefore, all the state governments in Chhattisgarh have continued to ensure that Adivasis are alienated from the decision-making process on matters concerning Excise collection; thereby, neglecting the mandate of law and defeating its objectives.

Demystifying the Rising Criminality of Adivasis Under the Excise Act: Observations from the Judicial Orders

a. Conclusion of the case



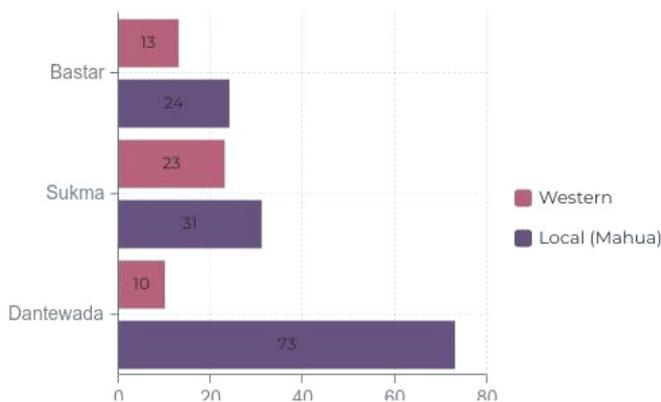
23 CR Bijoy, International Laws Concerning Indigenous And Tribal Peoples In India, UNDRIP, (Nov. 25, 2010, 10:00am), https://www.researchgate.net/profile/c_r_bijoy/publication/265539511_international_laws_concerning_indigenous_and_tribal_peoples_in_indigenous_and_tribal_peoples_in_india/links/55330bc90cf20ea0a074c548.pdf.

24 CR Bijoy & Martin Kamodang, *Local Governance in the Fifth Scheduled Tribal Areas: A Study of Maharashtra and Odisha in the Light of PESA Act Of 1996*, 3 Indian Institute of Dalit Studies Working Paper 3-14 (2014).

The analysis of judicial orders from the LWE districts of Bastar, Sukma, and Dantewada, illustrates the extremely high rate of acquittal of Adivasis in cases registered under the amended section 34 of the Chhattisgarh Excise Act. In Bastar, Adivasis were acquitted in all of the 37 cases. In Dantewada and Sukma, there are only a total of 6 convictions out of 139 cases. In all these 6 cases which ended up in convictions, the Adivasi accused had pleaded guilty of the offense, and therefore, no trial took place to contest the merits of the prosecution/complaint.

b. Category of Liquor

Category of Liquor



In all the 3 districts, the majority of cases against the Adivasis involved locally produced liquor (Mahua) as the subject matter of the complaint. Out of 128 cases registered for locally produced liquor (Mahua), in 122 cases the seized quantity of liquor was well within the permissible limit as prescribed under section 34 of the Excise Act. All of these 122 cases concluded with the acquittal of Adivasis. As per the law in force, Adivasis are permitted to possess 5 bulk liters of locally produced liquor (Mahua) for self-consumption.

Locally produced liquor (Mahua) was the subject matter of the complaint in all the cases registered against women in these districts. All the Adivasi women who were accused of possessing the locally produced liquor (Mahua) were eventually acquitted by the courts.

c. Period of Pretrial Incarceration

The Proviso to Section 59A of the Chhattisgarh Excise Act prescribes the maximum period of pretrial incarceration for a person accused of violating section 34 of the Act. As per the proviso, no person accused of an offense under Section 34 of the Act shall be kept in custody for more than 60 days. After the completion of 60 days, the accused is entitled to move an application for 'default bail.'



In 165 out of the 176 cases against Adivasis under the Excise Act, the accused was incarcerated for a period exceeding the maximum limit prescribed for pretrial incarceration. The period of pretrial incarceration was more than double the statutory limit in 87% of these 165 cases. The problem of prolonged pretrial incarceration under the Excise Act was most visible in the district of Dantewada where it was beyond the statutory limit of 60 days in all of the 85 cases.

d. Nature of Investigation

The most striking feature of the data that emerges on the nature of the investigation in cases against Adivasis, is that in none of the cases, the search and seizure procedures were conducted in presence of independent witnesses. This is in complete violation of the law laid down by the Supreme Court which mandates conducting search and seizure procedures under the Excise Act in presence of credible independent witnesses²⁵. All the judicial orders acquitting the Adivasi accused

25 Mukesh Singh v. State, SLP (2019) (Criminal) NO. 5648.

have recorded that the independent witnesses had no knowledge, and thereby, did not support the prosecution's case.

Another predominant theme that emerges from the judicial orders is the failure to comply with procedures for search and seizure, disclosure to superior authorities, and maintaining a record of the chain of custody. In Dantewada, 98% of acquittal orders have recorded that the police failed to prove the unbreakable chain of custody of the recovered sample of alcohol. This indicates that the courts had reasonable doubts regarding the veracity of the evidence recovered by the investigating agency. Moreover, in Sukma, all the acquittal orders have noted that the police officer that recovered the liquor from the accused, failed to inform the Sub-Inspector of Excise Department within a reasonable time, violating the mandatory disclosure requirement under the Excise Act.

The data from judicial orders also reflect the police's reasons for conducting raids and search and seizure procedures in Adivasi households. In 91% of cases in Sukma, and 96% cases in Dantewada, the police had proceeded to conduct raids based on a 'reasonable apprehension or 'an undisclosed information'. In Sukma, in none of the cases where the search was conducted without a warrant, a written record was maintained by the searching officer to show reasons for proceeding with such a search without a prior warrant. These practices, which contradict established law on search and seizure, contributed significantly to the acquittal of Adivasis in excise cases against them.

What Explains Rising Cases Against Adivasis under the Excise Act Despite High Rate of Acquittal: The Discussion

The data illustrated in the last section clearly shows that almost all the cases filed against Adivasis under the Chhattisgarh Excise Act conclude with the acquittal of the accused. The reasons for acquittal are also the same across the board - faulty investigation. The investigation in these cases has shown the same trajectory of violation of due process rights of the accused, as enshrined under the Criminal Procedure Code, and the Excise Act itself. Despite the uniformity that marks the nature of the investigation and the conclusion of cases filed against Adivasis under the Excise Act, prolonged pretrial incarceration remains a concern. This section will delve into the themes that emerged while interviewing 40 defense lawyers that have been representing Adivasis under the Excise Act for five or more years. These themes, just like the data from the judicial orders, also narrate a uniform story of how and why the Adivasis are victimized under the Excise Act.

These narratives from defence lawyers help us in understanding the processes that mark the conclusive observation of 'faulty

investigation²⁶, and reveal the ideological and purposive underpinnings of these processes. The critique that is provided humanizes the inquiry on how the agencies of the criminal justice system exercise discipline and control, positing 'identity' at the center of analyses. This approach has given meaning to the concerning trends that have emerged from the judicial orders, explaining how the politics of law enforcement interacts with the cultural and economic life of Adivasis in the conflict zone of Chhattisgarh. Consequently, it becomes apparent that the statistics reflecting the high rate of criminalization and incarceration of Adivasis under the Excise Act can't be read in isolation. It is isomorphic to how Adivasis in the same region are victimized by the invocation of hyper-punitive and preventive detention laws, under the state's counterinsurgency policy.

The most prominent themes that emerge from these narratives that attempted to explain the trends illustrated by the judicial order are corruption and exploitation by the police officers to meet targets set by the Excise department, lack of awareness among the Adivasis about the amended Excise law, inadequate representation of Adivasis in the lawmaking and enforcement processes, lack of access to adequate legal aid, and lack of judicial activism.

Police officers in theLWE districts have to work under the institutional pressure of meeting the targets set by the State Government's Excise Department. These monthly targets of having a minimum number of registered cases and initiated prosecutions are directly linked to the performance assessment of concerned police stations. The local police handle the burden of meeting these targets by conducting indiscriminate raids in Adivasi households, where they believe they're most likely to find liquor.

'Local police have a nexus with the Inspector level officers of the Excise department to meet a monthly target of cases', advocate Xitij Dubey said. *'Since Adivasis are allowed to have a certain amount of liquor for their self-consumption, they became easy targets of random raids and false cases'*, the advocate from Dantewada continued.

The 'indiscriminate' or 'random' nature of these raids are substantiated by the data emerging from the judicial orders. In 98% of the cases, the prosecution narrative has described *'an apprehensive thought'*, *'feeling of the officer'*, and *'undisclosed information'*, as grounds for conducting raids. The process of selecting Adivasi households for conducting raids is also informed by the existing files on individuals who were earlier prosecuted for violating the Excise Act. Advocate

26 Union of India v. Prakash P. Hinduja, (2003) SC 2612.

Arjun Nag, who has been representing Adivasis for over 10 years in the LWE district of Bastar, submitted that the local police mostly target those Adivasi households who have a member who has already faced prosecution under the Excise Act. This process leads to the secondary victimization of those Adivasis who have already been once subjected to the perils of the criminal justice system. The maintenance of crime data, along with the pictures and addresses of those once prosecuted, condemns an Adivasi to an endless cycle of fear, indiscriminate raids, and false prosecutions. This data, which is heavily relied upon by the police to select targets, continues to retain the personal information of those who eventually get acquitted by the court.

'This increases the possibility of recovering liquor from that household. Police constables simply get their (Adivasis) information from the case files, tracking becomes easier, and these households get easily intimidated by the police due to prior exposure to the system... Once you get trapped in this system, it's near impossible to escape,' Mr. Nag informed.

These indiscriminate and random raids are followed by arbitrary search and seizure procedures. The procedures followed by the police while conducting the search and seizure in Adivasi households were termed as arbitrary by the interviewees as they do not comply with the procedural safeguards laid down in either the Excise Act²⁷ or the Criminal Procedure Code²⁸. The most flagrant violations are the absence of a search warrant, written explanations for conducting seizure of sample without a warrant, absence of independent witnesses during search and seizure operations, doctored search memos, and inadequate documentation to prove chain of custody of the seized sample. In addition to violating procedural safeguards, the local police also indulge in the malfeasance of the procedures that they do-follow. For instance, police manipulate the quantity of the liquor recovered to make it qualify for an aggravated offense under section 34 of the Excise Act. Since the Adivasis are allowed to possess 5 bulk liters of liquor for self-consumption, this act of manipulating the recovered quantity is done to manufacture a case where none exists.

'Sometimes they don't even get the measuring canister during search and seizure (Advocate Dubey, Dantewada) ... Police put 2 or 3 bulk liters of liquor in a 7 bulk liter canister, just to show the court that an illegal quantity of liquor was recovered (Advocate Rao, Sukma)... There's a common practice by the police to mix water in the recovered liquor just to make it qualify for the offense under Section 34 (Advocate Aashiq, Bastar).'

27 Chhattisgarh Excise Act, 1915, S.51-55, Act No. 2, Legislature of the State of Chhattisgarh, 1915 (India).

28 Code of Criminal Procedure, 1974, Act No. 2, Act of Parliament, 1974 (India).

The method of adjoining 'independent witnesses' after the completion of search and seizure operations has appeared across the 40 interviews. These witnesses, who did not witness the search and seizure operations, are contacted by the police days after the registration of the case. These witnesses, then, are threatened to sign the doctored search memo and falsified statements to support the narrative of the police. This claim supports the observations made by the courts while acquitting the Adivasi accused. As it appears from the analysis of judicial orders, in all the cases of acquittals, the courts have cited the inability of the 'independent witnesses to support the case of the prosecution as one of the fundamental reasons for their decision. Advocate Venugopal Rao for Bastar gave the following anecdote during his interview to throw light on how this process of adjoining false independent witnesses takes place:

'These witnesses are picked up days after the registration of the case. They (police) give them (witnesses) those statements to sign which were written in the police station, and these witnesses don't even know what's there in those statements; they don't even know how to read and write.'

The phenomenon of illegal investigations in excise cases against the Adivasis is closely linked to the politics of law enforcement and punishment in the conflict zone of South Chhattisgarh. The militarized response of the government to this conflict, the brunt of which has largely been borne by the Adivasis, has embedded violence and discrimination in the dominant perception of discipline and control. The continuation of militarized counterinsurgency strategy has resulted in systematic othering of Adivasis in their land²⁹. This process of othering has problematized the conceptions of democracy and citizenship for an Adivasi identity³⁰. This is quite evident in the manner in which Adivasis are both excluded and subjected to the discourse on commercial legislations such as the Excise Act. While Adivasis are completely excluded from the policy and enforcement discourse on commercial laws, they are disproportionately represented in the statistics on criminalization under these laws³¹.

The narratives that have emerged from the interviews have grounded the victimization of Adivasis, from illegal investigations to prolonged pretrial incarceration, to their alienation from the political and economic discourse on law enforcement. As per the fact-finding

29 Gajare, Rashmi and Taru, *Adivasi Identity, Haunting and Reconciliation- Negotiating Cultural Memory and Displacement*, ICOMOS 19th General Assembly and Scientific Symposium "Heritage and Democracy", 13-14th December 2017, New Delhi, India.

30 *Supra* note at 11.

31 Kriti Sharma, Mapping Violence in the Lives of Adivasi Women, 53 ECONOMIC AND POLITICAL WEEKLY, (2018).

committee constituted by the union government, more than half of the Adivasi population in Chhattisgarh is illiterate, making it the region with the highest illiteracy rate among Scheduled Tribes in the country³². The alarming rate of illiteracy along with the inadequate implementation of the constitutional provisions for self-governance have made Adivasis extremely vulnerable to exploitation by the agencies of the criminal justice system. This vulnerability extends to their exploitation under the excise law as well:

‘State government made no efforts to disseminate the changes in Excise law to the Adivasis, they don’t even know that they’re allowed to keep 5 bulk liters for self-consumption (Advocate Khandelwal, Bastar) ... how do you expect illiterate Adivasis to read the Excise Act (Advocate Bhuria, Dantewada) ... due to lack of education and knowledge about the law, Adivasis get easily intimidated by the police (Advocate Bhulai, Sukma) ... The lawmakers sitting in the capital don’t know anything about Adivasis, and they don’t want to know; they’re interested in Adivasi land and not in Adivasi person (Advocate Dubey, Dantewada)

The lack of representation of Adivasis in policy and enforcement processes results in the framing of laws that are ignorant of their cultural and economic traditions. This is evident in the decision of the government to include locally produced liquor (Mahua) in the list of prohibited substances under the Excise Act. Mahua liquor has been traditionally produced by Adivasi women for auspicious occasions such as marriages, child-birth, etc. Many who are charged under the Excise Act for producing Mahua liquor are unaware of its illegality. This narrative, which emerged from the interviews, provides an explanation of the theme that emerged from the analysis of judicial orders; where all the cases registered against Adivasi women were for possessing locally produced Mahua liquor.

The most concerning feature of how the Excise Act is invoked against the Adivasis is the rising rate of their pretrial incarceration. As it emerged from the judicial data, an overwhelming majority of Adivasis, who was eventually acquitted by the courts, were incarcerated for a period that was at least double the maximum limit prescribed for pretrial incarceration under the Excise Act. The theme that emerges from the interviews suggests a lack of access to legal aid and inadequate judicial activism as major contributors to this phenomenon. Magisterial courts in LWE have shown great reluctance in granting bail in excise cases, citing the commercial and complex nature of the Excise Act as one of the reasons. Denial of bail by the Magisterial courts has become

32 Report of the Expert Group to Review the Methodology for Measurement of Poverty, Government of India, Planning Commission, 66 (June 2014).

a norm, and the aggrieved accused is expected to approach the High Court or the Sessions Court to seek bail. However, lack of finances and inadequate access to quality legal aid makes it nearly impossible for the Adivasis to travel to the High Court, which is situated in the State's capital, to seek bail. The result is their prolonged pretrial incarceration in a case if the statistics are anything to go by, for which they'll get acquitted due to the false investigation of the police.

'Magistrates are too scared to grant bail in Excise matters; they think they're not empowered to do that. They will not even conduct a proper hearing and will simply ask the accused to approach the High Court. The poor Adivasi, who neither has the money nor sufficient help, is left with no option but to remain in jail', Advocate Dubey from Dantewada pointed out. In Dantewada, in none of the cases, an Adivasi accused was released from custody within the prescribed period of 60 days of pretrial incarceration.

Conclusion

The purpose of this study is to highlight how the Adivasis in the conflict zone of South Chhattisgarh are systematically subjected to the perils of the criminal justice system under the State's Excise Act. The observations made herein foreground the victimization of Adivasis under a non-punitive commercial law, an area substantially ignored by the existing literature which has just focused on the impact of hyper-punitive and preventive detention laws. The themes of illegal investigation, arbitrary policing, and prolonged pretrial incarceration, that have emerged from the study, posit Excise Act as an instrumental tool of the state's counterinsurgency policy in the region. The reasons provided in the study for the disproportionate representation of Adivasis in excise cases despite the high rate of acquittal reflect a flagrant violation of the state's constitutional commitment to ensure Adivasi's right to equality, liberty, dignity, and privacy. Even after 70 years of Independence, Adivasis in South Chhattisgarh who were stigmatized as 'born criminals' by the colonial laws, are still struggling to assert their political and cultural identity, while languishing in prisons for offenses they don't can't even understand.

Where does Press Freedom End and Trial by Media Begin?

***Mr. Ayush Goyal**

“Justice should not be done it should be manifestly and undoubtedly seen to be done”¹

Abstract

The advent of commercially motivated target rating point games has evolved the concept of media trial. The media trial has reincarnated the media house into the public court, which produced judgment in the matter pending before the court. Fascinating media trial is sustaining detrimental effects on the administration of the judiciary. Press freedom is the most imperative section of freedom of expression that is required to function ceaselessly for the preservation of public interest and maintaining the democratic setup. The author will highlight the inimical substances that are contributing to the media’s contemptuous act. The article will draw a fair line between press freedom and media trial. At the end of this research, the author will come out with a clear vision for the institutionalization of free media while holding it apart from the scandalizing practice of media trials.

Introduction

Media is an institution of public voice that inculcates the pitiful plea of the destitute and resonate the unheard voice of people to the authorities and resolve the concerns about social life. The role of media is always being significant in the life of people as it imparts various information through which a person can get acquitted with the ongoing status of world affairs. So, it can be construed as the medium that enables the public at large to exercise their right to know (one of the components of Article 19 1 (a) recognized by precedent law)². Recognition of media as the fourth pillar of democracy signifies its eminence in the life of citizens. The rapidly growing impact of media coverage and evolution of the sources of information such as cable televisions, newspapers, magazines, journals, and the internet has transcended the earlier scope and significance of media into the spheres of people life³. The wide magnitude and target rating point

* Indore Institute Of Law, Indore

1 *R v. Sussex Justices, ex parte McCarthy.*, [1924] 1 KB 256, [1923] All ER Rep 233.

2 *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal.*, (1995) 2 SCC 161.

3 Abstract of the Speech Delivered by Hon’ble Mr. Justice G.S. Singhvi, at Bharti Vidyapeeth Deemed University, New Law College, Pune, MEDIA : A NEED TO

game have evolved the concept of commercially motivated media trial that is persuading media to felicitate information that can misguide the mass. To attract mass attention media, seem to be engrossed in the practice of public sensitization and floating such elements that may cause the hindrance in the court's practice of imparting justice⁴. Media is holding an unrestrained power of publication and is competent enough to formulate a biased public opinion through which a person's character can be assassinated and compelled him to sustain that malice throughout his life. The competitive aspect of media is felicitating the culture of media activism that's not only harnessing one's right to be presumed guilty but also levying impediments in court's proceedings⁵.

Press freedom is not been clearly defined in the Constitution of India; it can be construed through the legal scrutiny of Article 19 1 (a). Encompassment of Freedom of the press by Article 19 1 (a) highlight that reasonable restriction under Article 19 (2) is also applicable to media. Supreme Court. in the case of *R.K. Anand v. Registrar of Delhi*⁶ restrained the right to publication of adulterating information that is closely connected with the pending case. In *Siddhartha Vasishta v. State of NCT of Delhi*,⁷ Supreme Court expounded that the court can proscribe the media trial whenever it is eminent from the circumstances that the trial by media may vitiate the parties right to a fair trial.

Enactment of Free Media as a Medium to Express

Right to freedom of speech and expression first time articulated in "*Constitution of India Bill 1895*" which says that freedom of speech is been provided to everyone, which enable them to express and propagate their views without censorships. Free speech capacitates a person to hold an opinion by way of discussion and propagation. It also felicitates the culture of debate on perplexing issues of public interest, thereby nurturing the participating spirit into the citizens. *Erick Brendth*, in his book, freedom of speech provides that the freedom of expression is suffused with four basic elements. Firstly, it felicitates discussion, that truth can be discovered through the discussion and contemplation of facts and judgment⁸. Secondly, it says that an individual can attain a state of self-fulfilment and self-development by exercising free speech⁹. It further prescribed that freedom of speech is also fostering the citizen's participation in political

REGULATE THE FREEDOM OF PRESS, *Bharti Law Review*, 1, 4-5, Oct-Dec. 2002, www.Manupatra.com.

4 SM Amir Ali & Mohd. Imran, *MEDIA TRIAL: A HINDERANCE IN DISENSATION OF JUSTICE*, Vol 2 Issue 2, *Jlsr*, 88, 91-92, 2016, www.Jslr.thelawbrigade.com.

5 *Ibid*.

6 (2013) 1 SCC 218.

7 (2010) 6 SCC 1; (2010) 2 SCC (Cri) 1385.

8 Eric Barendth, "*Freedom of Speech*" (Oxford University Press 2nd ed. 2005).

9 *Id.*, at 9-13.

events¹⁰. Thirdly, it can enhance individuals' political consciousness and enable them to make a meaningful contribution to public opinion in a democracy. The fourth aspect proposed that freedom of expression can stimulate suspicion of the government¹¹. It alludes that freedom of speech is imbibing democratic values in the country and flourishing the responsible behaviour of government towards the public interest. Freedom of speech and expression is enumerated into the Constitution of India in 1950, after the determination of the essential restriction on free speech. The constitutional assembly was mainly concerned with the determination of essential safeguards by way of restriction to prevent it from wrongful abuse.¹² The *Constitution of India Bill*, 1895 has also if the restriction on the freedom of speech can be levied to prevent its abuse. The advent of media has given an edge to the freedom of speech and supplanted itself as the medium of public voice. Indian Press Commission states that,

*“Democracy can thrive not only under the vigilant eye of its legislature but also under the guidance of public opinion and the press is par excellence vehicle through which the opinion can become articulated”*¹³.

Press freedom is expounded and established by the court through the precedents law which says that everyone is entitled to publish and dispense his thoughts, ideas, and beliefs.¹⁴ In the same way, a person is also being authorized to obtain information, most importantly the particles concerned with the public interest¹⁵. The freedom exercised by the media has equal magnitude that of the freedom exercised by the general citizens under Article 19 1(a) of the Constitution of India. It can be conferred that the freedom of speech and expression has also encompassed press freedom. The matter of separate provision for the regulation of press activities was tabled on the constituent assembly debate, after a thorough contemplation it had been settled that the institution of separate provisions for press freedom is not a requisite thing as the provision of freedom of expression under the Article 19 1 (a) is sufficient for the preservation of press freedom¹⁶. During the constituent assembly debate, *Dr B.R. Ambedkar* said that *“Freedom of the press and an individual’s right of freedom of expression is of the same instinct, Article 19 1 (a) enable a person to convey its thoughts and*

10 *Id.*, at 13-18.

11 *Id.*, 18-21.

12 Hon’ble Mr. Justice G.S. Singhvi, *Supra* Note 3, at 1.

13 Saksham Sharma, THE PARADOX OF LIBERTY: ASSESSMENT OF FREEDOM OF SPEECH AND EXPRESSION IN CONTEMPORARY TIMES, RACOLB LEGAL, November 11, 2018. www.racolblegal.com/the-paradox-of-liberty-an-assessment-of-freedom-speech-and-expression-in-contemporary-times.

14 *Ramesh Thaphar v, State of Madras*. 1950 AIR 124, 1950 SCR 594.

15 *Hamdard Dhabakhana v Union of India*. 1960 AIR 554, 1960 SCR (2) 671.

16 Hon’ble Mr. Justice G.S. Singhvi, *Supra* Note 12, at 1-2.

*opinion from any medium that is closely connected with the functioning of media*¹⁷. An individual's competency to express has equal footing with the freedom of the press hence the restriction levied by Article 19 (2) are also applicable to the functioning of media. *Constituent Assembly Debates* reflect that the framers of the constitution have clear and wide anticipation of both facets of the freedom of the press. Their focus was on the institutionalization of a free press and restrained it from being regulated by the legislature. Former prime minister *Pt. Jawahar Lal Nehru* states that "I should rather have a completely free press, with all dangers involved in the wrong use of that freedom than a suppressed or regulated press¹⁸". It manifests that much emphasis was given on the institutionalization of a free press and restrained it from being regulated by the legislature.

Media Trial - The Culture of Media's Intrusion on Judiciary

Media trial is the reincarnation of media studio into the public court (*Janta Ki Adalat*), which produces public opinion through the circulation of fragmented information that can declare a man guilty or absolve from guilt in the eye of the public¹⁹. The felicitation of commercially motivated sensitization process by the media can generate enthusiasm, among the mass against any suspect whose trial is pending before the court, can leave an unavoidable backlash on his character even after the declaration of his innocence by the court. It is the violation of Article 23 of the Constitution of India which states that a person's guilt cannot be established until there is the existence of any reasonable element that enunciates his innocence²⁰.

Supreme Court in the *State of Kerala v. Poothala Aboobacker* observed that media is hampering the legal proceedings by making special remarks and presenting facts, issues and other information about the legal matter pending before the court by using a distorted method. To sensitize the public, this perverted version is presented to the people by adding extra spices. The misguiding and distorted facts are compelling the naïve audience to hold an opinion on a particular case. The court further says that this practice of media is also pressuring the court and compromising parties of the case from their constitutional right²¹.

Fabrication of publicly biased opinions against any matter pending in the court can levy pressure on the judiciary. Eminent American Jurist *Cardozo* says that "*great tides and currents which engulf the rest*

17 Dr. Ambedkar's Speech in Constituent Assembly Debates, VII,980.

18 Hon'ble Mr. Justice G.S. Singhvi, *Supra* Note 3, at 4-5.

19 SM. Amir Ali & Mohd. Imran, *Supra* Note4, at 94.

20 India Const., Art. 23.

21 2006 (2) KLD (Cr. J 482).

of the men, don't turn aside and pass the judges by"²². It persuades us to believe that the media trial is not only affecting the public views, it also leaves a certain effect on the subconscious mind of the judges. The virtual screening will arise a vehement resentment of the public against a person whose guilt is been purported through the film. Depiction of a purported believes have more intensity to affect the judge's mind to a certain degree. It connotes that the fabricated information which has influencing substance can alter the position of law by circulating a biased opinion.

In *Siddhartha Vashist v. State of NCT of Delhi*²³ the court while raising its concern over the media trial stipulated that media trial can be proscribed after sustaining any imminent threat to the constitutional right of the parties or danger of prejudice by media. *United Nations Basic Principles of Independence of the Judiciary* has also presented the same concern and enumerated it under Article 6 which highlights that the judiciary is levied with the power to ensure the rights of the parties concerning court trial²⁴. *International Covenant on Civil and Political Rights* also confer that the judiciary is authorized to create a periphery in which the parties' rights can be protected from the intrusion of media²⁵. The general public is more entitled to press freedom than press as it has been instituted for the fulfilment of its citizen's right to know and the government's obligations to the erudition of its citizens with the ongoing phenomena²⁶. The Supreme Court's decision enunciates that media activism, which tends to affect the public interest, can be restrained as free media is instituted for the benefit of the general public. Media's interference will take the course of justice at the vulnerable position that would not let the justice to impart manifestly as the court held in the case of *R v. Sussex Justices: exparte Mccarthe* "justice should not be done it should manifestly and undoubtedly seen to be done"²⁷. It put forward that a circumference should be inbuilt by the judiciary after receiving a sustaining threat in the procedure of court to imparting justice be wrong on a particular case.

22 S. Devesh Tripathi, TRIAL BY MEDIA: PREJUDICING THE SUB JUDICE, RMNLU, 16 Dec. 2020, http://www.rmlnlu.ac.in/webj/devesh_article.pdf

23 2010) 6 SCC 1; (2010) 2 SCC (Cri) 1385.

24 Anshit Aggarwal, CRITICAL ANALYSIS OF MEDIA TRIAL UNDER ARTICLE 19(1) (A) OF THE INDIAN CONSTITUTION, LAW CIRCA, Nov. 26, 2020, 6:30 PM, [www.lawcirca.com/critical-appraisal-of-media-trial-under-article-19\(1\)-of-the-indian-constitution/](http://www.lawcirca.com/critical-appraisal-of-media-trial-under-article-19(1)-of-the-indian-constitution/).

25 Canadian Civil liberties association, <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>

26 Views were proposed by court in *Rumapal and Samaraditya Pal* (rev.). M.P. Jain, *Constitution Of India*, 76th ed., 2010, P. 1085.

27 *Supra* Note 1.

Conflicts between the Freedom of Expression and Trial by Media

Media is the recognized source of citizens' right to know.²⁸ It is expected from media not to be devoted towards commercially gain as media is obliged to operate an informative sector that presents factual exposure of any matter instead of fostering publicly biased opinion to gain public attention and accrue its target rating point²⁹. Investigation on the administration, organization of debates and the criticism are the components through which media properly comprehend any matter to the people but there is a very thin line between the press freedom and media trial. Promulgation of information through the media platform which tends to generate an unavoidable malicious perception against the accused or any suspect in the eye of the public irrespective of the verdict of the court is ascribed as the media trail³⁰. It has been witnessed that sub juices' matters mostly related to corruption, rape, murder, sexual harassment, terrorist activities can be easily prejudiced by the comprehending method of media. Prejudice created by the media trial in the sensitive case by organizing a separate investigation and the interviews of witnesses and victims and their publication in retorted manner is quite enough to create a public opinion that can impose impediments on the legal proceedings and constrains the fair trial³¹. Media has transformed itself into justice delivery machinery; it has been found that if any person is going through the media trial can never be eligible for seeking any type of remedy or injunction³². In *R.K. Anand v Dehli High Court* Hon'ble Supreme Court states that a media trial is felicitating irrationality among people and regarded it with a lynch mob which has made fair trial an impossible event³³.

Right to a fair trial has a wide magnitude and its encroachment may curtail various other components of a fair trial, such as the right to presumed innocent until the guilt declared by the court, not to be a witness against himself, right to public trial and right to legal representation³⁴. Hence it has become a requisite thing that media should take precautionary measures while exercising its right to freedom of speech as the media's reporting is very much essential to make the judiciary accountable towards its duties³⁵.

28 Satnam Deshpandey, Priyank Jagawanshi, CRITICAL ANALYSIS OF MEDIA TRIAL AND ITS EFFECT ON INDIAN JUDICIARY, Vol 6, Issue 1, IJRAR, 173, 175 -176, Jan - March 2016. www.ijrar.com.

29 Arpan Bannerjee, JUDICIAL SAFEGAURD AGAINST TRIAL BY MEDIA: SHOULD BIAS'S CHECKING VALUE. Theory apply in India? Vol. 2 P.2, P. 28, Journal of Media Law&Ethics, (2010).

30 Henry Campell Black, Black's Law Dictionary, West Publishing co. (4th Edition 1968).

31 Satnam Deshpandey, Priyank Jagawanshi., Supra Note 29 at 175.

32 Shabnam Saidalvi, MEDIA TRIAL:FREEDOM OF SPEECH V. FIAR TRIAL, [www.lawctopus.com/academica/media-trial-freedom-of-speech- v.-fair-trial](http://www.lawctopus.com/academica/media-trial-freedom-of-speech-v.-fair-trial), 2 Nov. 2020, 5:45 P.M..

33 (2013) 1 SCC 218.

34 Zahira Habibullah Sheikh & ano v. State of Gujrat & other., (2004) 4 SCC 158.

35 Hon'ble Mr. Justice G.S. Singhvi, Supra Note 19, at 6.

A committee of legal experts including eminent lawyers and judges and media representatives were met at *Madrid*, sprain for the adoption of a framework of media freedom. After a thorough contemplation, the committee has emphasized was given on not to curtailing the media's freedom to publish the review of the judicial functioning and to propagate its practice of cumulating of information regarding any sub judice matter or a matter concluded by the court, while appreciating the one's right of free trial and right not to presume guilty until proven guilty³⁶. It can be concluded that any conduct of the media that is contravening with the proceeding of the court and constraining an individual's right can only be restrained.

A Line should be Drawn between the Fair Trial and Press Freedom

The right to a fair trial is concerned with the circumference under which the equal opportunities of the public hearing are prescribed to both parties under the impartial judge and fair investigating officers³⁷. Article 10 of the *Universal Declaration of Human Rights* envisage that a "public hearing before the independent and impartial tribunal is been furnished to everyone while ascertaining his rights and obligations about the alleged charges levied upon him"³⁸. The fair trial is not been clearly defined in the Constitution of India, it can be articulated through Article 21, which makes it an absolute right that even not be terminated during an emergency.

The fair trial has a wide magnitude and its traces can also be found under the other provision of the Constitution of India. The fair trial includes a sundry essential provision to assign equal opportunities to both parties. Article 20 (3) of the Constitution of India serves as an imperative section of a Fair trial as it prevents a person's dignity and reputation from getting ruined through the allegation levied upon him maliciously or mistakenly³⁹. It provides that a person will construe innocent until he will not be declared guilty by the court beyond any reasonable doubt⁴⁰. There are so many instances of media's extremism that highlight the vulnerable condition of "fair trial" while dealing with the issue of "*Right to Presumed Innocence*". Media seems to be indulged in the treacherous practices under which it felicitates sensitive information that is amenable to create public opinion against pending trial before the court⁴¹. It was witnessed in the *Nanavati case* where the

36 Id .

37 Satnam Deshpandey, Priyank Jagawanshi., *Supra* Note 32 at 176

38 UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948, art. 10, UN General Assembly 1948.

39 Indian Consti, art. 20(3)

40 Anshit Aggarwal, CRITICAL APPRAISAL OF MEDIA TRIAL UNDER ARTICLE 19 (1) (A) OF THE CONSTITUTION, Nov 28, 2020, 6:30 PM.) LawCirca, www.lawcirca.com/critical-appraisal-of-media-trial-under-article-191a-of-the-india-constitution.

41 Prerana Priyanshu, FREEDOM OF MEDIA TRIAL: FREEDOM OF SPEECH V. FAIR

prejudice created by media's report has not only generated the public sentiments but also influenced the jury⁴². The wide encompassment of the influencing media trial can also effectuate the minds of the judge. Perhaps it has emerged as the biggest fragility of justice⁴³.

The right to get defended by the advocate of one's choice is a facet of a fair trial as determined under Article 22(1) Of the Constitution, which has been jeopardized by media activism⁴⁴. Treacherously constructed public opinion is perpetuating intimidation and fear among the lawyers who are going to advocate on behalf of the accused. The cacophony of the media trail is felicitating the publicly biased opinion against the accused and thus the representation of the accused has become blasphemous conduct for an advocate. Sometimes lawyers must go through the imputations by media for representation of an accused as during the pendency of Jessica case media has asserted that the *Ram Jethmalani* is trying to defend the culprit.⁴⁵ The imprudent and incautious behaviour of media is also curtaining the right to legal representation, one of the basic components of the "*principle of natural justice*"⁴⁶. It is the indignation of the fact that media is trying to foster such a culture under which the confidence of the public in the judiciary can be dismantled to such extend, where they will not be ready to enable equal opportunities to both parties⁴⁷.

Media influences the investigating process by pressuring police and maligning their image. It has been witnessed that the Police must end up the investigation hurriedly to extract the extra pressure levied by media coverage⁴⁸. The media is incessantly trying to trace out such sensitive substances of the witness that can be portrayed as the "news headline". Publication of sensitive information about the witness can cause enormous pressure upon the witness and levied a threat to his life⁴⁹.

The deceptive and incautious nature of media trials is constraining every aspect of a fair trial. Article 14 of the *International Covenant on Civil and Political Rights* ingeminate that press freedom and the rights of people can be suspended to preserve the morals, public order or national security or to preserve the rights of parties of the case in

TRIAL, Vol 3, IJLLJS (2015), P.288.

42 *K.M. Nanavati v. State of Maharastra*, 1962 AIR 605,1962 SCR Supl. (1) 567.

43 Zehra Khan, TRIAL BY MEDIA: DERAILING JUDICIAL PROCESS IN INDIA, 1 MLR (2010), P. 94.

44 Indian Consti, Art. 22(1).

45 Prerana Prinyanshu, Supra Note 42, id at 288

46 Id at 288.

47 Id at 287.

48 Devika Singh & Shashank Singh, MEDIA TRIAL: FREEDOM OF SPEECH V. FAIR TRIAL, Vol 20, IOSR –JHSS, 88, 92, May 2015, www.iosrjournals.org.

49 Devika Singh & Shashank Singh, id at 92.

which the court determined the imminent threat to prejudice⁵⁰. In *T Nagappa v. Y.R. Muralidharan*, the Supreme Court while describing the importance of fair trial expounded that Article 21 of the Constitution of India empowered a person to defend himself in such nature, he has been authorised to defend his parts of the body. Hence it is the most critical section of the judiciary and utter adherence with the norms of a fair trial is the requisite thing for the resemblance of fair & independent judiciary⁵¹. In *K. Anbazzhagan v. Suprident of Police*⁵², the Supreme Court expounded that scrupulously adherence with the norms of a fair trial is an imperative feature for holding the belief of the people on Judiciary and Rule of Law incessantly. Senior Advocate *Indira Jaising* while raising her concern over the media's activism made aspersions on the police for leaking sensitive information to the media before charge filling. *Indira Jaising* has taken the reference of the *Kathua Rape case* and asserted that the media has published its opinion before the presentation of the accused to the court and declared that two of the accused are not guilty of any offence⁵³. It resembles that to manifestly impart justice a clear line is required to be drawn between press freedom and fair trial⁵⁴. Fair trial is not only concerned with an individual's interest as it holds pervading impact on the public at large. The confidence of the public can be dismantled by the judiciary.

Contempt of Court and Press Freedom

Contempt of Court legislation was enacted with a vision to constrain the practice which tends to hamper the course of justice or lower the dignity of court and judges⁵⁵. Articles 129 and 215 of the Constitution of India states that the Supreme Court and the High court are levied with the freedom to initiate a proceeding against any person for violating the norms of court⁵⁶. Article 19 (2) of the constitution puts reasonable restrictions on the exercise of freedom of expression and enables the judiciary to impart justice without any interference within the legal process and contempt of court legislation provides extra aides to the judiciary to bestow fair trial. Contempt of Court legislation is mainly concerned with certain aspects that are the maintenance of the court's and judges integrity and reputation, adherence with the order and direction passed by the court and the prevention of interdisciplinary

50 ICCPR, art. 14, UN General Assembly 1966.

51 Criminal Appeal No 707 of 2008, SLP no.(crl). 6933 of 2007.

52 Transfer Petition no. (Cr.) 77-78 of 2003, www.indiankanoon.org.

53 Arunav Talukdar, MEDIA TRIAL AND RIGHT TO FREEDOM OF SPEECH AND EXPRESSION: AN ANALYSIS, UNPUBLISHED ARTICLE, National Law University, Assam, June 2018, docworkspace.com/Apt3vayCvPo8wcfWteWdFa.

54 Id.

55 Juhi P. Pathak, INTRODUCTION TO MEDIA LAWS AND ETHICS, 1st ed. 2014, P.56.

56 Om Prakash, RIGHT TO PRIVACY IN STING OPERATION OF MEDIA, 59, (10), Odisha Review, 56,59(2013), www.magezines.odisha.gov.in/Orissareview/2013/may/engpdf/57-61.Pdf, (5 May, 2018).

behaviour during the court's trial in the court⁵⁷. In nutshell, it is conduct that outrages the dignity of the court and attempts to foster the prejudicing trial and imposed impediments in the administration of justice⁵⁸.

From the ascription of an easily accessible and viable source of erudition with the ongoing phenomena's, media has transformed itself into an authority that keeps checks on the functioning of all organs of government and has been managed to emerge as the medium that is constructing public opinion. This sort of media's evolution is a levying impediment to the judicial process. It has been witnessed that media conduct a separate trial and prescribe it to the public with the evaluation of the evidence about the sub judice matter. He fights the case and delivers judgment based on the decision of Juries (Opinion Poll) or produce prejudice against any subjudice matter⁵⁹. In *Y.V. Hanumantha Rao v K.R. Pattabhiram and Anr.* the court proposed that no one is authorized to indicate anything that may cause prejudice about any sub judice matter⁶⁰. In *Saibal Kumar Gupta v B.K. Sen and another* apex court said that any type of indication made outside the court that can construct a biased opinion against a witness, defendant, prosecutor, and parties to the case is the matter of court's contempt even though it has been made with bona fide intent⁶¹. In *State of Maharashtra v Rajendra Jawanlal Gandhi* – SAGA magazine has published an interview of deceased girl's father which contains such facts that could be considered in advancing trial. There are so many instances that highlight the media's interference with the court's proceeding and indifferent nature of media towards the contemptuous norms⁶²In *Reliance Petrochemical Ltd v. Indian Express Newspaper Ltd* the apex Court prescribed that to preserve the rights and interests of the public we cannot restrain the freedom of the press; however, the contempt proceeding can be initiated when there is sustaining threat of violation of court's contempt norms. It is also imperative to foster the judicial administration free impediment. Freedom of the press should be exercised while making compliance with norms of court's contempt. More emphasis should be on restraining every type of media's practice that tends to interfere with the court's proceeding by creating prejudice⁶³

Contempt of Court legislation is mainly concerned with providing free hands to the judiciary and enables to impart justice fairly while appreciating the press freedom. To construct a balance between the

57 Arnab Talukdar, *Supra* Note 54.

58 Anshit Aggarwal, *Supra* Note 40.

59 Hon'ble Mr. Justice, J.S. Singhvi, *Supra* Note 36, at 5.

60 AIR 1975 AP 30.

61 1961 AIR 633, 1961 SCR (3) 460.

62 Cr. A. No. 838 of 1997. (arising out of SLP No. (Crl.) 1560 of 1997).

63 1989 AIR 190, 1988 SCR Suppl. (3) 212.

press freedom and free and fair administration of justice, the contempt of court legislation provided that the proscription on the publication of such content which tends to prejudice can only be considered as contempt if it had been made during the pendency of the matter before the court⁶⁴. The contempt legislation also contains an exception which says that the reporting which capacities to prejudice against any matter pending before the court will not be considered as contempt, if the person who made prejudice does not reasonable foresees the pendency of trial before the court⁶⁵. The rationale behind the proscription on publication capacitates to prejudice against pending trial by way of contempt is to eliminate the impediments during justice. The pending trial is an indication of the fact that the court is taking the matter's cognizance. However, the criteria for declaring that the case is pending before the court has brought in many discourses.

Press Council of India Act, 1978

Press Council of India Act, 1978 has set up certain norms for media that are required to be taken into consideration while propagating any information to its audience. It is refraining media from the publication of any information without measuring its cascading effect. *Press Council of India Act* is suffused with the sundry provision, that's adherence shall restrain the court's contempt by media authorities and enable the parties to the case to exercise their rights. There are several *Norms* provided by the *Press Council of India Act, 1978* which supports the above view as

Norm 45 - Media is not obliged to present any sort of speculating fact subject to any matter. It should not have to adopt any unbiased manner while presenting the fact. It has been provided that the reporter should be ensured that his reporting will not persuade any prejudice to any matter.

Norm 45 -guided that reporting should not have resulted in the widespread opinion against any person holding the imputation of being a criminal⁶⁶.

Norm 47 - Media trial should not be operated in such a way that would result in prejudice or cause impediment to the judicial proceedings. It further says that the media cannot publish or present the review of the case's evidence after the conviction or arrest of the accused⁶⁷.

64 Arnav Talukdar, *Supra* Note 57.

65 *Id.*

66 PRESS COUNCIL OF INDIA ACT, 1978, Norms 45, Act of Parliament 1978, (India).

67 *Id.* at, Norm 47.

Norm 48– It says that the newspaper while expressing its disapproval with the judicial act cannot persuade such belief that can sustain the derogatory remark on the judges. Newspaper’s report explication should not result in the denigration of the reputation of the court.⁶⁸ *Norm 20* – If any person associated with the accused has no correspondence with the case, then the media is not obliged to interrogate or reveal the identity of that associate⁶⁹.

Norm 14 and 15–It emphasized not publishing the name of women victims associated with the rape, sexual assault or any other matter about chastity or concerning privacy. It is not obliged to reveal the identity of a minor child in a matter related to forced marriage or sexual offence⁷⁰.

Law Commission Report on Contempt of Court Legislation

Article 19 (2) of the Constitution provides that freedom of speech does not encompass the right to court’s contempt. Any sort of impediment in the administration of justice is ascribed as the court’s contempt enshrined under Section 2 of the *Contempt of Courts Act, 1971*,⁷¹. In the context of the press, *such restriction can only be levied if the case is pending before the court. Section 3 (2) of the Contempt of Court Act, 1971* proposed that any type of publication that is capacitated to prejudice will be said to be made during the pendency of the case, if it is being made during or after the charge sheet or Challan filled or summon or warrant issued⁷². These declaring factors of the pending trial are always being a matter of discourse. *Law Commission* has thoroughly contemplated the issue of pendency of the case and proposed his report. Observation and recommendations made by the *Law Commission* can be construed through the following enumerated points.

1. Before the enforcement of the *Contempt of Court Act, 1971* prejudicial publication after the filling of *First Information Report* is considered as the Court’s contempt. Supreme Court in *A. K. Gopalan v. Noordeen*⁷³ made a certain modification on this rule and proposed that prejudicial publication after the arrest of the accused will be considered as contemptuous action⁷⁴.
2. *Law Commission* says that the arrest should be considered as the initial stage of pendency of case as the protection and care of the arrested person is a matter of court’s cognizance. Article 22 (2)

68 Id. at, Norm 48.

69 Id. at, Norm 20.

70 Id. at, Norm 14,15.

71 LAW COMMISSION OF INDIA, 200th Report, Trial by Media, 1 March 2020, www.lawcommissionofindia.nic.in/reports/rep200.pdf.

72 LAW COMMISSION OF INDIA, Supra Note 70.

73 1969 (2) SCC 734.

74 LAW COMMISSION OF INDIA, Supra Note 72.

of the Constitution of India says that within 24 hours the person arrested by the police should be presented before the court⁷⁵. Publication about the conviction, character's persona can result in prejudice. Hence the law commission recommended that the amendment should be made in section 3 (2) of the *Contempt of Court Act 1971* and arrest should be considered as the initial stage of the activation of the court's trial. It recommended that the word "active" should replace the word "pending" from Section 3 (2) of the *Contempt of the Court Act 1971*.⁷⁶

3. It further recommends that the contempt proceeding should be made directly approachable to the High Court without taking the consent of the Advocate General. *Law Commission* states that the provision which requires the subordinated court to act upon the references of the High Court while dealing with the case of Court's contempt should be mitigated⁷⁷.
4. *Law Commission* also provided that the court should be authorized to pass the postponed order on the publication. It further proposed that the "serious risk of prejudice" should be proved while the issuance of postponed orders and the breach of such orders should be declared as a contemptuous act⁷⁸.
5. *Law Commission* proposed that publication after the activation of trial about the character, conviction, and previous conviction resulting in prejudice will amount to contempt even the publication of photographs will be taken into the consideration⁷⁹.

Conclusion

In the initial stage, media did not seem to be engrossed in the judgment delivery process and perceiving such elements that can mould the viewer's point of view into the conclusion against any issue. The game of target rating point has given the birth of a vivid behemoth of media extremism under which the rights of people get trampled. Media trial has become the abstract of justice denial and the consideration upon it is required to be taken. Scrutiny of *Constitutional Assembly's Debates* manifested that the idea of the institution of free media was to abridge the bridge between the governing bodies and citizens and to bring transparency in the functioning of governing bodies. Celebrated scholar *Jeremy Bentham* expounded that the ambiguity suffused its circumferences with iniquitous substances that can curtail public interest. The publication brings transparency that can find the trances

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

of injustice and enable justice to prevail. The publication is having the postulation of the supervisory authority that keeps alive the attentiveness of the judiciary⁸⁰. Media foster the culture of discussion and contemplation on the various issues of ongoing phenomena through which the audience formulated their beliefs and opinions. It has been found that the public holds opinions through the assessments of facts presented to it⁸¹. It alludes that the circulation of distorted facts can easily build a pre and biased public opinion against any *subjudice* matter. It has been established that this sort of media's practice is eliminating or constraining every aspect of fair trial and violating the contemptuous norms. Besides it, there are so many instances that enunciate that media trial is succeeding in bringing justice through arousing public attention. It puts the conflicts of freedom of media and fair trial at a perplexed and embezzling position as both are the components of the fundamental rights of the citizens.

The ascription of media as the "*fourth pillar of democracy*" should be inculcated in terms of federal democracy. The federal structure of democracy endorses the idea of the distribution of power among the organs of government. These organs are conferred with the limited power to perform their functions independently. Intrusion can only be entertained for sustaining accountability through the operationalization of the checks and balance method. Media being the fourth pillar of democracy is required to not transgress its skirts to such extent that can impair the functioning of other organs of democracy. *Mahatma Gandhi* envisaged that every coin has two facets and no one can claim its right without fulfilment of its duties. It is required from the press to pay requests to the constitutional values and institutions.

The Constituent Assembly and Supreme Court have given much emphasis impelling the culture of free media. However, the harsh reality of the present scenario is that the media's devotion towards the commercialized benefit has reached so far from where the social responsibilities of media appeared as the shadowy figure. It has turned to be an essential task to make the balance between the media's practice to accrue its business and social responsibility so that the spirit of being the eye and ear of the public can be kept alive in a true sense.

80 Anil. B. Divan, MAKING JUDICIARY MORE TRANSPARENT, www.thehindu.com/opinion/lead/making-judiciary-more-transparent/article-6277, (May 7, 2018).

81 Valerie P. Hans, LAW AND THE MEDIA: AN OVERVIEW AND INTRODUCTION, Cornell Law Faculty Publications, Vol. 14, 399, 399, 1990, www.scholarship.lawcornell.edu/facpub/325.

Is the Incessant Correspondence between Law and Literature the Reverberation of Judgements?

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Abstract:

Many say our Constitution is a beautiful patchwork of the World's time-tested constitutions. It indeed is and yet we have another writing piece that has the potential to be called a beautiful patchwork since it encompasses story narration, quotes, poems, and borrowed works from the literature. The beautiful patchwork other than our Constitution is the judgement and it does the prime function of delivering justice.

It is a piece of art that exhibits the connection between law, literature, and its nuances. Being students of law, we think, it is more than necessary to learn about literature to equip ourselves in a better way. There is an overlapping relationship between law and literature. In this paper, we make a decent attempt to right the ship by exploring the avenues of law and literature, law in literature, law as literature, and law out of literature. As authors, our goals are modest. In this research piece, we have explored the actual art in a field that is entirely black and white.

1. Introduction

“It is with literature as with law or empire - an established name is an estate in tenure or a throne in possession,” said, Edgar Allen Poe, an American writer, poet, editor, and literary critic. He exquisitely explained the unexplainable relationship between law and literature. The need for communication gave birth to languages. The birth of a language leads to the creation of literature.

The need for civilization brought in the concept of organization and that lead to the framing of laws for having us under control or in other terms, civilized. The link between language and civilization is inseparable, unavoidable, and interdependent. We would like to say that the instant example is parallel to the relationship between law and literature. The upcoming topics in this paper will explore and emphasize the same.

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2. Law and Literature - A Tautology

Law and literature have countless similarities. They both engage in the game of words. One could say, the only difference between law and literature is that the latter has more flavours in it. Expressionism is the brainchild of law and literature. Understanding the intrinsic relationship between law and literature opens doors for out of the box judgments in line with precedents. Plato once said, "A society's law book should, in right and reason, prove, when we open it, for the best and finest work of its whole literature." The consanguinity of law and literature was brought to light by the Greek Philosopher Plato even 2000 years before. It connects the rule of law in a society full of institutions.

Using law and literature as a means of conveying something takes the conveyed matter to the next level. The bridge between law and literature strengthens not just language and philosophy but also anthropology. It is said that literature can make wonders and it is believed that law can make miracles happen, the connection of the two can make wonderful miracles. This paper an attempt has been made to throw light on such miracles which are found interesting and profoundly connected.

3. The Law and Literature Movement

The link that law and literature have led to the initiation of law and literature movement and the same is of much significance when we talk about western countries. Movements like these are one of a kind because they don't meet the road to success at the cost of other's lives. The pre-eminent aim of the Law and Literature movement was to reinforce the interpretation competence and to enhance the scope of looking at things from different possible perspectives. Interpretation of law is an art that demands skills and the same should comply with the norms and circumstances of the society.

The core nexus of law and literature is that both are the languages of the humankind. Ferdinand de Saussure, a Swiss linguist contemplates law as a language and a conventional system of signs that express the values and ideas while ensuring behavioural rules. Similarly, there is no better language than literature which in law has a firm association with the concept of freedom of expression. Literature assists lawyers in framing their arguments and judges in embellishing their jurisprudential thoughts.

3.1 The Pioneers

An American philosopher and a literary critic, James Boyd White is generally credited for being the first among equal in initiating the

Law and Literature movement.¹ His most prominent book *The Legal Imagination*² published in 1973 embarks the Law and Literature movement and to date, it serves as a valuable resource. This book compares the legal texts to the literary texts and explores the language of the law. Nevertheless, the first to generate the embodiment of law and literature movement was the American legal scholar John Wigmore and the American jurist Benjamin Cardozo. They perceived that literature could educate and conceded ‘novels and poets’ as the principal teachers of the law. The law and literature movement rang its bells in the early 20th century by the 1970s and grabbed everyone’s attention and it gathered considerable attention by the end of that decade.

3.2 The People’s Judge

If it is law and literature, then the predominant person to be extolled here is Lord Denning, a phenomenal legendary English Lawyer, and Judge. He is often called the “People’s Judge.”³ It is, however, subject to controversies. Denning is known for interlacing his judgments with literature and he has amalgamated his love of literature with his passion for justice. In one of Lord Denning’s books, *The Discipline of Law*, he has overweeningly enunciated, “When I was called to the Bar, I had to become proficient with words. I did it by drawing on my reserves of English literature...Next, I had to practice continually.

As a pianist practices the piano, so the lawyer should practice the use of words, both in writing and by word of mouth.”⁴ Denning has a peerless unique style of writing judgments that would always start colourfully. In another book, *The Family Story*, he has beautifully written, “I start my judgment, as it were, with a prologue – as the chorus does in one of Shakespeare’s plays – to introduce the story. Then I go on from act to act as Shakespeare does – each with its scenes – drawn from real life.”⁵ One could conclude him to be an ardent espouser of the law and literature movement.

American Jurist, Henry Wigmore, insisted that in order to learn human nature, lawyers must read the great writers.⁶ Initially, the law and literature movement was centred on the law in literature. Later, another perspective of law as literature burgeoned which enhanced

1 Joseph W. Dellapenna and Kathleen Farrell, *Law and the Language Of Community: On the Contributions of James Boyd White* (1991) 21 Rhetor. Soc. Q. 38,58

2 James Bond White, *The legal Imagination* (Little, Brown, Boston 1973)

3 Clare Dyer, ‘Lord Denning, Controversial People’s Judge, Dies Aged 100’ THE GUARDIAN (London 6 March 1999) < <https://www.theguardian.com/uk/1999/mar/06/claredyer1>> accessed 2 May 2020

4 Lord Denning, *The Discipline of Law*, (Butterworths, London 1979)

5 Lord Denning, *The Family Story*, (Butterworths, London 1981) 207

6 —, John Henry Wigmore <<https://law.jrank.org/pages/11311/Wigmore-John-Henry.html>> accessed 5 May 2020

the interpretation of legal writings using literary critics. The 'law in literature' and the 'law as literature' became distinguishable in the 1970s.

Scholars such as White and Ronald Dworkin relied more on Law as literature because they thought that like any other literature, the meaning of legal texts can be uncovered only through interpretation. The degree of association of both the genres of literature is still a debate among scholars. Law and literature, taken together, form an interdisciplinary study. We can also say it to be interdependent to some extent. The language of society knows the need for it and the same is expressed as rights and freedom. To put it the other way, the conscience of every individual is verbalized using language as a tool. There are three dimensions in this interdisciplinary forum, namely, the law and literature, law in literature, and law as literature.

3.3 Law and Literature

The law and literature movement chiefly emphasizes the integrative correlation between law and literature. The expression 'law and literature' analyses the linguistic perception of law, and the tie-up between law and literature in adherence to words, culture, etc., It compares and juxtaposes the meticulous tools of each discipline when interpreting a particular text, whether it be a constitution, a statute, a judicial precedent, or a literary work.

'Law' and 'Literature' are the common domains of study idealizing humans and society.⁷ The stereotypic features are that they both play with words and are subject to interpretation and arguments. Imperatively, these words are transformed into a rule of behaviour which influences human behaviour. With respect to reality, literature and actuality are woven together with the literary texts. Law is not merely a text and indeed, it turns a principle into a reality.

3.4 Law In Literature

'Law in literature' literally means the description of law and order in literature which focuses on the legal motif in novels and other literary works. To be precise, the law in literature deals with the presence of legality in literature.⁸ The theory of law in literature comments on the literary accounts of the law and legal issues. The fictional scenes in literature explore political and social issues and it enables an individual to perceive his own reflection. The literary authors such as Albert Camus, Fyodor Dostoevsky, Charles Dickens, Robert Weisberg,

7 Richard A. Posner, *Law and Literature: A Relation Reargued* (1986) 72 Va. L. Rev 1351

8 Martin Skop, *Law and Literature — A Meaningful Connection* (2018) 4 Filozofia Publiczna i Edukacja Demokratyczna 6,20

etc., believe that literature offers proliferating possibilities of educating legal scholars and practitioners about the legal situations and human environment and the effect of law in literature.

'Law in literature' can be discerned in Kafka's *The Trial* and Camus's *The Fall* in which the literary texts are presented as a narration of a legal story.⁹ Literature has an ingrained value in interpreting the legal texts. According to Richard H. Weisberg, a leading scholar of law and literature, literature should be esteemed for its propensity of being linked with other disciplines like law and for dealing with the political and social contexts. Weisberg in his most popular book *Poethics and Other Strategies of Law and Literature* enunciated that "Poethics in its attention to legal communication and to the plight of those who are 'other', seeks to revitalize the ethical component of the law." The other literary scholars who occupy themselves in voicing their views about the law in the literature highlight the fruitfulness of law in literature and literature's efficiency to enhance the cultural subject of law.

3.5 Law As Literature

'Law as literature' literally means the conception of legal writings as a species of literature. This approach deals with the recurring legal disputes and also explores the use of literature and rhetoric by the legal practitioners and judges in expounding their legal arguments and judgments in their judicial perspective.¹⁰ The scholars who intended to aggrandize law as literature perceive legal texts as a form of literature and apply the techniques of literary criticism to the legal texts. Benjamin Cardozo, an American jurist, and a legal essayist was a proponent of 'Law as literature' who explores the literary returns to judicial labour.

Cardozo explicates the Judicial process in a comprehensive hilarious prose, anecdotes, and practical allusions for which his books are distinguished as a form of literature. While James Boyd White admitted the relevancy of the 'Law in literature' perspective, he observed 'Law as literature' more plausible because of its ability to combine two different disciplines and to define culture via texts. In Ronald Dworkin's article, 'Law as Interpretation', he articulated that the interpretation of literature helps in understanding the cultural environment which improves the interpretation of the law. It is not possible to delineate any one of the two perspectives since they are the twin facets of law and literature having a complementary relation. Both perspectives pay attention to tackling literary words and the meaning of the law.

9 Li- Ching Chang, *The Research of Comparison Between Law and Literature: As Illustrated by Kafka's "The Trial"* (2009)

10 Kimon Celicourt Ma Cris DE Ridder, *The Relationship Between Law and Literature – In Search of Justice and Justification* (PhD thesis, University of South Africa 1999)

4 The Law and Literature Movement in India

Law and literature, in general, has its foundation in the depths of co-existence. The two are like the wheels in a vehicle, one will not run without the other. The philosophy behind Indian law and literature is possible to trace only when we look at the evolution of languages. The heterogeneity in language, culture, tradition, religion, and in all aspects of an individual owes big time for the diversification in Indian literature.¹¹ Dr. Sarvepalli Radhakrishnan, an Indian philosopher, academician, and statesman, once said, “Books are the means by which we build bridges between cultures.”¹²

Indian Literature stands as a benchmark for the same. The abstract idea of equal freedom regardless of divergence - Unity in Diversity, the cardinal framework of the Indian constitution is connoted by the harmonious synchronicity of Indian art and literature ideology. The unity of Indian literature was vaunted by using the slogan “Indian literature is one though written in many languages,” by the former Prime Minister Jawaharlal Nehru. The same has become the motto of the Indian Sahitya Akademi.¹³

There are 22 scheduled languages in our country which were evolved from the Indo-Aryan and Dravidian stocks.¹⁴ Fourteen of which are from Indo-Aryan (Sanskrit-Old Indo-Aryan language), 4 from Dravidian, 2 from Sino-Tibetan, and 1 from Austroasiatic families.¹⁵ Urdu is one of the standardized registers of Hindustani which has its own history of origin. The Indo-Aryan category covers 78.05 % and the Dravidian category covers 19.64 % of the Indian population.¹⁶ Tamil, the world’s oldest and longest surviving traditional language has bounteous literature which has been documented for more than 2000 years.

Although law and literature occupied and it to date is pivotal in every aspect of justice, there is no branding as the ‘Law and Literature Movement in India.’ Therefore, we cannot identify dimensions like the

11 A. P. Shah, *The Links Between Law and Literature* THE HINDU (India 31 October 2017) <<https://www.thehindu.com/opinion/op-ed/the-links-between-law-and-literature/article19951335.ece>> accessed 9 May 2020

12 --, ‘Remembering Sarvepalli Radhakrishnan with inspiring quotes from the great scholar’ INDIA TODAY (India 17 April 2018) < <https://www.indiatoday.in/education-today/gk-current-affairs/story/sarvepalli-radhakrishnan-quotes-1213845-2018-04-17>> accessed 12 May 2020

13 <<http://sahitya-akademi.gov.in/>> accessed 13 May 2020

14 M J Warsi, *Tracing Evolution Of India’s Rich Linguistic History* DECCAN HERALD (Karnataka 12 August 2015) <<https://www.deccanherald.com/content/494692/tracing-evolution-indias-rich-linguistic.html>> accessed 15 May 2020

15 —, *Indian Languages* <https://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/languagebr.pdf> accessed 16 May 2020

16 —, *Languages of India* <https://www.wikiwand.com/en/Languages_of_India> accessed 18 May 2020

law in literature, the law as literature, and law and literature unlike the 'Law and Literature Movement in America.' This movement, in India, was inculcated in the evolution of languages. It bridged law and literature in an unexpressed movement. We have attempted enlisting the literature that fundamentally talks about the law, social ethics, codes, and rules in a chronological order. An understanding of this will summarize the existence of an untold movement.

4.1 The Age-Old Works of Literature

The Ancient literature existed first in oral historic conventions, then in inscriptions, followed by the northern and southern Indian languages. These pieces of literature map the law and literature encounters in a very beautiful way. The Literature in Sanskrit is Indo-Aryan literature that commences with the oral literature of a collection of holy hymns called Rig Veda from 1500 to 1200 BCE.¹⁷ It is claimed as a source of origin for Hindu laws.

The renowned masterworks of Sanskrit literature include Kalidasa's poems and plays, the awe-inspiring epics Ramayana and Mahabharata and the Upanishads. Manusmriti, the laws of Manu, is classically the most accredited Sanskrit text of the Hindus. The paper titled, 'Manusmriti, Macaulay's 1860 Penal Code, Neoliberal India, and Queer Cinematic Subjectivities,' written by Basuli Deb examines the pre-colonial Hindu customary law encoded in Manusmriti.¹⁸ All the said texts convey morals and ethics and are fed in the name of religion.

4.2 Works of Literature in the Golden Age

The period of Gupta reign is commended as the golden age of art, literature, and science. The creative literature of Sanskrit was at its pinnacle during the Gupta era. The ancient time-honoured epic, Valmiki's *Ramayana*, and the world's longest epic Vyasa's *Mahabharata* were composed during the 5th and 4th century BCE of the Gupta period respectively. The *Panchatantra* and *Kamasutra* were also written during their reign. The kinds of literature in the Gupta epoch encompass diverse genres of poetry such as lyric poetry, religious and meditative poetry, drama, fables, and folktales.

These tales became the cornerstone of many Islamic literary works such as *Ali Baba and the Forty Thieves*, and *Aladdin and his Magic Lamp*. Kalidasa, a top-notch poet and dramatist in the Sanskrit language was well known for his classical writing. His epic poem

17 Shivani V, *Literature in Ancient India* < <https://www.historydiscussion.net/history-of-india/ancient-india/literature-in-ancient-india/6274> > accessed 18 May 2020

18 Basuli Deb, *Manusmriti, Macaulay's 1860 Penal Code, Neoliberal India, And Queer Cinematic Subjectivities* (2014) 35 *South Asian Review* 167,183

Raghuvamsa was written in classical Sanskrit.¹⁹ His masterpiece *The Recognition of Shakuntala* play and his lyric poem *Meghaduta* were the most applauded Sanskrit literature work. Other eminent Sanskrit plays that link law and literature include Sudraka's *Mricchakatika*, Bhasa's *Svapnavasavadattam* and *Pancharatra*, Sri Harsha's *Ratnavali*, Jayadeva's *Geeta Govindam*, Chanakya's *Arthashastra* and Vatsyayana's *Kamasutra*.²⁰ All of these are remarkable literary works in Sanskrit that spoke about legal codes in silence during the Gupta period.

4.3 Literature and the Dravidian Languages

The themes and lexicons of the literature of the four Dravidian languages -Tamil, Telugu, Kannada, and Malayalam are glued to the traditional culture. In this instance, we would like to focus on the Tamil literature for its exhaustive collection in this field. The oldest Tamil literature is a grammar treatise called *Tholkappiyam*. The five great epics of Tamil literature are *Silapathikaram*, *Manimekalai*, *Seevaga Sinthamani*, *Kundalakesi*, and *Valayapathi*. Based on Valmiki's Ramayana, *Ramavataram* (Kamba Ramayana) was composed by Kambar according to the Tamil culture in the 12th century.

These are not just tales but are gems that reflect the legacy of Indians. The ancient Tamil literature called the Sangam literature which had been in existence from 300 BCE to 300 CE consists of *Ettuthogai* or *Eight Anthologies* (8 works of literature) and *Pathupattu* or *Ten Idylls* (10 works of literature). The Eight Anthologies consists of a total of 2381 poems composed by 473 authors. The two genres of Sangam literature are *Akam* (internal) which speaks about love and *Puram* (external) which speaks about war, governance, trade, valour, gifts, and deeds of kings. Nayanmars' *Thevaram* (Shaivism) and Alvars' *Naalaayira Thivya Prabandham* (Vaishnavism) are the eminent Tamil devotional poems.²¹

Thirukural is a divine Tamil literature that has been honoured for universality and secularity. The entire book is grouped into 3 books namely Book of Virtue, Book of Polity, and Book of Love, and consists of 133 chapters and 1330 couplets (kural). It phrases pearls of wisdom within a couplet. One such Kural is:

“Orndhukan nodadhu irapurindhu yarmaattum

Therndhusei vagdhe murai”²² (kural: 541)

19 Nalini Natarajan, *Handbook of Twentieth-Century Literatures of India* (Greenwood Press, US 1996)

20 —, *Visual Arts and Literature* < <https://knowindia.gov.in/culture-and-heritage/literature.php> > accessed 21 May 2020

21 Bhadriraju Krishnamurti, *The Dravidian Languages* (CUP, Cambridge 2003)

22 —, 'Thiruvalluvarin Thirukkural' <<https://www.ytamizh.com/thirukural/chapter-55/>> accessed 24 May 2020

**“Search out, to no one favour show; with a heart that justice loves
Consult, then act; this is the rule that right approves.” (English
couplet 541)**

When interpreted it conveys, “an honest regime arises where, in examining a crime, a judge should be impartial and should show no favour.” All of the Dravidian languages exhibit the spirit of law and literature in different shades and are explained in the upcoming topics.

4.4 Progressive Writers’ Movement of India

Progressive Writers’ Movement of India otherwise called the Anjuman Tarraqi Pasand Mussanafin-e-Hind was a revolutionary realistic literary movement in British India before partition. Initially, the Indian Progressive Writers’ Association began in 1932 with the publication of a compilation of nine short stories and a one-act play by Ahmed Ali, Sajjad Zahir, Rashid Jehan, and Mahmuduz Zafar. The association was first launched in London in 1935.

In India, the Progressive Writers’ Association was formed in Kolkata in July 1936.²³ The All-India Writers’ Association was established on 10th April 1936 at the Rifa-e-Aam Club in Lucknow under the leadership of Sajjad Zahir and Ahmed Ali. The prime intention of these writers was to promote equality among the individuals and to tear the strips of social injustice through their writings. They had their own organization with aspiring objectives i.e., to scuffle against the British and their adjutants for securing freedom from the enslavement and to acquire land for the Agriculturists.

The term ‘Progress and Progressive’ has its own history. ‘Progressive’ was the watchword of those who demanded an amelioration in technology and science to lead the movement towards social advancement and it was the same word which created an abhorrence to those who are antagonistic to the transformation of British systems. The ‘movement of progress’ which exemplified democracy and equality was for those passionate writers who had worked tirelessly for Indian freedom. The literary movement was intensified by some insightful writers like Krishan Chander, Ismat Chughtai, Amrita Pritam, Majaz Lucknawi, and others.

4.5 Nationalism and its Reflection in Literature

Literature has played a significant role in inciting patriotic sentiment when India was subjugated by the British.²⁴ The nineteenth-century witnessed a remarkable pace in the literary field. Many writers got down

23 K N Panikkar, *Progressive Cultural Movement in India: A Critical Appraisal* (2011) 39
Social Scientist 14,25

24 Julia M. Wright, *Literature and Nationalism* (CUP, Cambridge 2013) 97-114

to write as they felt that literature was one of the available high-power tools for reaping liberation. The revolutionary writers used literature to condemn the remorseless acts and practices that prevailed in India during the British era which inspires us even today.

Despite being deported, imprisoned, and doomed to death, they never stopped writing and this shows their love for liberty and motherland. Bankim Chandra Chatterjee, Rabindranath Tagore, Bal Gangadhar Tilak are some of the memorable patriotic writers who developed the hope of desire for freedom among Indians.²⁵ They emphasized the revolutionary changes in the Indian economic and political conditions and they expressed their notions about the political fate of India through their writings. Indian writers not only deal with legends but also deal with social and political movements.

Raja Rao's *Kanthapura*, Tagore's *Gora*, Khushwant Singh's *Train to Pakistan* signify the theme of National Identity. The *Vante Mataram*, a Sanskrit poem by Bankim Chandra Chatterjee which is the national song of India and Sarojini Naidu's graceful poem 'the caste mark on heaven's brow' are some of the noteworthy poetic works. Akbar Allahabadi, an Urdu poet who is well known for his humorous verses brought innovation in poetry.

The Telugu literature reviewed the social and political issues and it portrayed the lives of the common man. *Malapalli* alternatively called *Sangavijayam*, a prodigious Telugu novel written by Unnava Lakshmi Narayana which was first published in 1922 furnishes insights about literature and labour laws.²⁶ These novel comments on children's education, the minimum labour hours, the right of labourers to form unions, indemnity during the course of employment and retirement benefits. Only because it depicted the lives of landless labourers and propounded the association of labourers, it was banned for two times in 1922 and in 1936. Finally, a shorter version of this novel was published by Sahitya Akademi in 1976.

Though there was no remarkable progression in the Indian literature during the medieval times, the last quarter of 19th and 20th century was regarded as a rejuvenation period of Indian literature. Mirabai, Kabir, Tukaram, Tulsidas, Ramdas, Tyagaraja and Subramaniya Bharathi are some of the poetic icons who are credited for upgrading the Indian literature.²⁷ Nationalism boosted writings that sounded literature and echoed law.

25 P. P. Raveendran, *Nationalism, Colonialism and Indian English Literature* (1996) Indian Lit. 153,159

26 Unnava Lakshminarayana, *Malapalli-Triumph of Sanga* (Sahitya Akademi, New Delhi 2008)

27 —, *Nationalist Literature of India* < <https://neostencil.com/nationalist-literature>> accessed 27 May 2020

5.6 The Contemporary Pieces of Literature

Contemporary pieces of literature are modern literature that is written after World War II. Globalization resulted in the closure of industries, downsizing of labourers and variation in wages.²⁸ Akkineni also emphasized the devastation of labourers and their livelihood due to globalization in the 1990s. *Karmika Geetham*, a novel written by Akkineni Kutumba Rao published in 1987 highlights the non-implementation of Labour laws in the manufacturing quarters.²⁹ His other novel *Swaraajyam*, written in 1981 speaks about the discrimination, suppression, and unjust treatment of Dalits in Andhra Pradesh. The Dalit movement was kick-started by the brutal slaughter of Dalits in Karamchedu, a village in Prakasam district in Andhra Pradesh. Bhushanam's *Kondagaali* also highlights the exploitation of Dalits.

A paper by Sambaiah Gundimeda also reflected upon the master plans used by the upper caste in the Dalit massacre.³⁰ Telugu writer Raavi Sastry's *Aaru Saru Kathalu*³¹ is a compilation of six stories that discloses the hypocrisy of the elites and depicts the lives of poor people who were forced to commit crimes. He also describes the relationship between criminals, lawyers, and law enforcement administrators. He was completely sympathetic towards the victims and unsympathetic towards the officials.

If the world of law and the world of law violators can be considered as two separate islands, then Raavi Sastry's anthology would be the junction of those two islands. In the novel *Papam Nachaalamma* by Chalam, Nachaalamma, where an illicit liquor seller and a female sex worker, when questioned by the policeman, says that, "Everyone in this world is selling something, the doctor, lawyer, teacher sell their skills, body, mind. Whether I sell liquor or my body why should one justify the sale of body, mind, or skill and classify it as moral or immoral".³²

Train to Pakistan, a historical novel by Khushwant Singh is based on the India Pakistan partition in 1947.³³ Though it does not deal with the politics of the partition, it describes the realistic view of the entire event and the impact of partition in the lives of people. Salman

28 Thomas Storey, *A New Literary Generation: Five Contemporary Indian Writers* (2017) <<https://theculturetrip.com/asia/india/articles/a-new-literary-generation-five-contemporary-indian-writers/>> accessed 29 May 2020

29 Akkineni Kutumba Rao, *Karmika Geetham* (CITU State Committee, India 1987)

30 Sambaiah Gundimeda, *Dalit Activism in Telugu Country, 1917-30'* (2016) 36 South Asia Res. 322,342

31 Raavi Sastry, *Aaru Saru Kathalu* (Visalaandhra, Andhra Pradesh 1961)

32 Pallavi Gupta, National Seminar on Law and Literature- In Honour of K. G. Kannabiran (SEMINAR AT COUNCIL FOR SOCIAL DEVELOPMENT IN HYDERABAD 2012) < <http://kalpanakannabiran.com/pdf/National-seminar-on-law-literature.pdf> > accessed 2 June 2020

33 Khushwant Singh, *Train to Pakistan* (Chatto and Windus, London 1956)

Rushdie's *The Midnight's Children* published in 1981 is a book about a group of children born on the midnight of 15th August 1947, the day on which Indians tasted Independence. The self-reflexive portrayal by the prime mover of the story, Salim also called 'The midnight's child' as a 32-year-old man becomes a metaphor of independent India and the cultural changes followed by independence.

The book *Freedom at Midnight*³⁴ authored by Larry Collins and Dominique Lapierre in 1981 expound all the events from the appointment of Lord Mountbatten, the first Governor-General of independent India in 1947 to the assassination of Mahatma Gandhi in 1948. Bhisham Sahni's novel *Tamas*³⁵ published in 1974 depicts the Divide and Rule policy of the British and its impact on the religious riots among the Muslims, Hindus, and Sikhs, and the ultimate India-Pakistan partition. Shashi Tharoor's satirical novel, *The Great Indian Novel*, published in 1989 re-narrates Mahabharata in the background of Indian history of independence and few years of post-independence (1980).³⁶

These contemporary pieces of literature tell the countless metaphors used by modern writers to exhibit everything about their fight for rights and freedom.

We have enumerated the presence of law in literature by means of hue and cry for rights, freedom, and equality. Writers expressed their needs in this art. The different untold law and literature movements in India unfolded occurrences that took place before and after Independence. This form of expressionism never fails to explain the interrelation between law and literature, or to be more precise, law in literature. However, the presence of literature in law remains as an understatement when there are numerous judgments unveiling interpretations from eminent writers.

5 The Art in Law out of Literature

“A right judgment draws us a profit from all things we see.”

-William Shakespeare

Writing a sound judgment is truly an art. We say so because we believe that anything done with creativity and passion comes under the ambit of art. Literary citation is one of the most valuable and potent tools in judgment writing. Therefore, it is necessary that such a citation

34 Larry Collins and Dominique Lapierre, *Freedom at Midnight* (1st edn HarperCollins, New York 1975)

35 —, *Tamas Summary and Study Guide* < <https://www.supersummary.com/tamas/summary/> > accessed 5 June 2020

36 —, *Why Shashi Tharoor's Great Indian Novel still appeals* < <https://www.bbc.com/news/world-asia-india-29548043> > accessed 11 June 2020

should not be ordinary. Citing literary quotes in judgment amplifies the legal interpretation and educes an emotional response in the mind of the reader. Kafka's *The Trial*, Charles Dicken's *Great Expectations* and *Bleak House*, George Eliot's *Adam Bede* are some of the renowned literary works that are often referred to by the Judges.

Shakespearean plays often contain references to law and justice and hence deemed as a crossroad of law and literature. The popular catchphrases in Shakespeare's eye-catching plays such as *The Merchant of Venice*, *Measure for Measure*, *King Lear*, and *Hamlet* are credited for being used as citations in judgments. Judges unfold their minds through their judgments. Justice V. R. Krishna Iyer and Lord Denning are the most remarkable jurists who have made a rich living contribution to the legal literature through their verdicts. The art in Judgements helps us to see shades other than black and white in a field that is black and white in its entirety.

5.1 The pen is a mightier sword - *Victor Ivan v. Sarath N. Silva, Attorney-General and another*³⁷

In this case, to emphasize that the freedom of the press is not a distinct fundamental right and it is a part of freedom of speech and expression under Article 19 of the Indian Constitution, and to convey that the newspapers are not the prerogatives of freedom of speech and expression, Justice Fernando cited a famous quote from the Shakespearean play *Measure for Measure*,

“O! it is excellent

To have a giant's strength,

But it is tyrannous

To use it like a giant.”³⁸

The Indian Judiciary possesses the strength of a giant. It is the supreme protector and the guardian of the Indian Constitution and the same guarantees immense power to take actions in that regard. But if it were to exercise that power arbitrarily then today's democracy will become tomorrow's dictatorship. The said Justice linked Shakespeare's literature with Article 19 and the Indian Judiciary to highlight the fact that the rights and freedom of the citizens are the supreme privileges bestowed by law and it should never be mishandled.

37 SC (FR) Application No. 23 of 2013

38 William Shakespeare, *Measure for Measure* (First Folio, London 1623)

5.2 The Construction of marriage and parenting to be construed as couples acting as a team - *Hitesh Bhatnagar v. Deepa Bhatnagar*³⁹

In the aforementioned case, the judge dismissed the appeal of divorce and granted the parties another opportunity for reconciliation considering the future of the child born out of their wedlock. The judge concluded the judgment with the words of George Eliot from his book *Adam Bede* and here we quote,

“What greater thing is there for two human souls than to feel that they are joined for lifeunspeakable memories at the moment of the last parting.”⁴⁰

Hon’ble Justice H. L. Dattu gave prominence to the fact that marriage, apart from being a socio-legal contract, is a deep-rooted intimate union of two human souls vowing to live and love each other with mutual respect. He metaphorically linked Eliot’s poetical diction to the dichotomy of child protection laws in the country. He quoted it towards the end of the judgment to beautifully project the relationship between law and literature and to leave behind quite a long-lasting effect of the poetic verses.

5.3 Is dwelling the same as residence? - *Uratemp Ventures Limited v. Collins*⁴¹

The key issue of this case was, “whether a part of a house where cooking facilities are unavailable or cooking is prohibited in terms of letting a person hold as a tenant comes within the meaning of ‘dwelling’”. In order to decipher the meaning of dwelling, Lord Millet has cited *Psalm 104* from the *Book of Common Prayer*,

“..., the fir trees are a dwelling for the storks.”⁴²

Further, he had referred to the words of W.S Gilbert from the *The Mikado act II*,

“to dwell in a dungeon cell”.

Also, he had alluded the lines from John Milton’s *Paradise Lost*,

“To bottomless perdition, there to dwell in Adamantine Chains and penal Fire,”⁴³

The law spotlights on the fact that an inhabitant must cook his solids in a dwelling, but it has never been underpinned by English literature. It is not an imperative legislature requirement that a premise must possess cooking facilities to be qualified as a dwelling place.

39 [2011] 5 SCC 234

40 George Eliot, *Adam Bede* (John Blackwood, England 1859)

41 [2001] UKHL 43

42 The Holy Bible (Psalm 104:17)

43 John Milton, *Paradise lost Book 1: 47,48* (Samuel Simmons, London 1667)

Ultimately, Lord Milton drew a conclusion that the characteristic of possessing cooking facilities does not hold any paramount importance in constituting a 'dwelling'.

5.4 Quoting thrice does not link it with emphasis - *Parhat v. Gates*:⁴⁴

"The court has dissuaded the suggestion of the government that since the assertions are made in three different documents, they are copper-bottomed," while stating this, The Chief Judge Sentelle cited the lines from the poem "The Hunting of the Snark" by Lewis Carroll,

"I have said it thrice: What I tell you three times is true."⁴⁵

To express his view is contrary to the government's suggestion, he brought up this quote to propound that the thrice-made assertions do not imply any first-hand knowledge since they sprang from a single source.

5.5 It's a tale of one state - *Anuradha Bhasin v. Union of India* ⁴⁶

Jammu and Kashmir is a part of the Indian territory which often is made to face terrorism. The new-fangled terrorists pinned their key focus on the internet through which they disseminated false information and raised funds. The moratorium of fundamental freedom, the internet, and free movement could not be implemented by exercising arbitrary powers. While pronouncing the verdict of this case, Justice N.V. Ramana referred to the mesmerizing beauty of Kashmir by citing the opening lines of the historical novel *A Tale of Two Cities* by Charles Dickens,

"It was the best of times, it was the worst of times, it was the age of wisdom for good or for evil, in the superlative degree of comparison only."⁴⁷

Though Kashmir is lauded as the Paradise on Earth, it is the spot plagued by violence and antagonism. By citing this oxymoronic poem, Justice N. V. Ramana stroke a balance between two diametrically opposite picture i.e., liberty in accessing the internet and security while accessing the internet.

5.6 Right to die with dignity - *Aruna Ramachandra Shanbaug v. Union of India*⁴⁸

The Hon'ble Supreme Court dismissed the petition of permitting Euthanasia of a staff nurse, Aruna Shanbaug who had been mercilessly

44 532 F. 3d 834

45 Lewis Carroll, *The Hunting of the Snark* (Macmillan Publishers, UK 1876)

46 2020 SCC OnLine SC 25, 10-01-2020

47 Lewis Carroll, *The Hunting of the Snark* (Macmillan Publishers, UK 1876)

48 [2011] 4 SCC 454

strangled and sodomized by a sweeper. The oxygen supply to her brain was stopped leading to brain damage as a consequence of the strangulation. She had been living in her own world for nearly 37 years. In support of the verdict of dismissing the petition, Justice Markandey Katju began the judgment with Mirza Ghalib's famous lines,

“Marte hain aarzo me marne ki Maut aati hai par nahin aati” (One dies longing for death/but death, despite being around, is elusive).

Death is not something that we give. It guides the path for itself. In the present case, the medical pieces of evidence proved that Aruna lost speech and perception because of the inability of the brain to coordinate the sensory and motor functions and it was clearly not a case of brain death. Euthanasia was considered to be incongruous with the principle of sanctity of life and the right to live a dignified life under Article 21 of the Indian constitution. However, the same has been overturned.

5.7 Professional Ethics is an inherent code of conduct - *Ranjit Satardekar v. Rukmini Raghunath Narvekar and another*⁴⁹

In the instant case, the petitioner, a legal practitioner was held guilty of professional misconduct. In the judgment, Justice R. J. Kochar quoted a Shakespearean line from the historical play *Henry VI*,

“The first thing we should do is let us kill all the lawyers.”⁵⁰

By quoting it, he underscored the prominence of the professional ethics of lawyers. A lawyer must maintain the dignity of his legal profession since he is entrusted with the rights and privileges to serve both the interests of the justice and the humankind. The ethical responsibility of a law practitioner holds statistical significance in law.

5.8 The epitome of rights, Personal Liberty - *Pebam Ningol Mikoi Devi vs State of Manipur and Ors*⁵¹

The right to life and personal liberty is an inalienable right guaranteed under Article 21 of the Indian constitution. One could say it to be the heart of rights. In the instant case, to assert that personal liberty is the first and foremost essential right ensuring human dignity, Justice H. L. Dattu cited the words of Shakespeare from his early humorous play, *Comedy of Errors* and Benjamin Franklin and he also made honourable mention of the words of the famous lawyer Clarence Darrow about the significance and connotation of freedom and liberty.

“A man is master of his liberty.”⁵²

49 Writ Petition No. 398 of 2003

50 William Shakespeare, *Henry VI* (First Folio, London 1623)

51 W. P. (Crl.) No. 111/2009

52 William Shakespeare, *The Comedy of Errors* (First Folio, London 1623)

“Any society that would give up a little liberty to gain a little security will deserve neither and lose both.” – Benjamin Franklin

“..... you can be free only if I am free.” – Clarence Darrow

The supreme quality of human beings is to be a judge of one's conscience but Shakespeare took it to the next level by placing man's liberty in a better rank than his conscience. The statement clearly exhibits the urge for 'unrestricted liberty.' An oxymoron can also sometimes be an irony, laughing at itself. No one can claim against another individual's liberty. If it is done, then chaos occurs not just at the cost of individuals who claimed it but at the cost of an entire society. Liberty between individuals can be restored only if it is available mutually for them. The Justice used the words of the above-mentioned writers as tools for shaping his judgement.

5.9 Sex workers are also human beings - *Budhadev Karmaskar v. State of West Bengal*⁵³

The impoverished sex workers provide sexual services as a means to earn a livelihood. Sex workers are precluded from leading a normal life as an ordinary human being by being labelled as prostitutes. Such workers and their work should be recognized and they must be prevented from being relegated from the society. In the instant case, Chayay Rani Pal, a sex worker was brutally murdered.

The Hon'ble Supreme Court referred to the Bengali novels written by Sharat Chand Chattopadhyay in which the prostitutes were described as women of high character such as Rajyalakshmi in *Shrikant* and Chandramukhi in *Devdas*. Urdu poet Sahir Ludhianvi's poem *Chakle* was also focused since it portrayed the predicament of the prostitutes. Fyodor's Dostoevsky's illustrious novel *Crime and Punishment* was also given in-depth consideration since it spoke about Sonia Semyonova Marmeladov, a character who sacrificed her body for food.

The entire end in view behind using such references was to pinpoint that those sex workers are also entitled to lead a dignified life with personal liberty under Article 21 of the Indian Constitution and no person has a right to assault or kill such workers. The cited literature works profoundly escalate the status of sex workers.

5.10 The uniqueness of Individuality - *Navtej Singh Johar vs Union of India*⁵⁴

The aforementioned is a landmark case in which Section 377 of the Indian Penal Code was struck down and homosexuality was decriminalized. Thereafter, the LGBTQ community received a massive

53 [2011] 10 SCC 283

54 W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

recognition. While pronouncing this historical judgement, to highlight the uniqueness of individuality, Chief Justice Deepak Misra cited the words of Johann Wolfgang Goethe, and Arthur Schopenhauer.

“I am what I am, so take me as I am.”

“No one can escape from their individuality.”

He also borrowed a leaf from Shakespeare’s glorious play *Romeo and Juliet*, and here we quote,

“What’s in a name? That which we call a rose by any other name would also smell as sweet”.⁵⁵

The usage of these literature references supports a cause and stands for it. It is the only art that can break a stigmatized society. The then Chief Justice effectively used the same, broke the barriers, and made everyone to rejoice the rainbow.

The above-mentioned judgments repeatedly remind us of the art that has become the craft of law and literature. Judgement is the only written work that will decide the fate of a concerned individual. When that work is important, it is equally important to refer to literary works that talk about similar and relevant instances. The art in law out of literature is a gem. It is through literature the significance of law and its practicality in the society can be espied.

6. Conclusion

Law and literature play an exceptional role in dealing with humans, law, and order. There could be no reason for exaggeration for romanticizing law and literature. When justice is delivered through a judgement, it can never satisfy both parties. If it did, then it would have done gross injustice to the other party. In order to take any matter in the right sense, it must be conveyed in the right way. In the legal field, the same is done using law and literature as a tool.

Both law and literature work hand in hand in enhancing the society we live in. The history behind the inclusion of law in literature or literature in law is not very fascinating because it was a process that developed eventually when people started to explore and connect matters. Literature conveys histories of the past and wanting of the future whereas law pacifies the laments of the past and guarantees the future. The blending of these two reinstitutes compensation via communication. The art with pens elevated the art in judgments. This paper allowed us to dive into the pool where we learned about the art in the field.

55 William Shakespeare, ‘*Romeo and Juliet*’ (First Folio, London 1623)

Justice Delayed and Denied: Victims of Anti Sikh Riots 1984 still Waiting

***Ms. Jasmine Kaur**

Abstract

Following the Assassination of Indira Gandhi, a spur had started among the people of India. People had come to roads to kill the Sikhs just because the assassins of Indira Gandhi were Sikhs, which took an ugly face, and is now called anti Sikh riots. 1984 anti-Sikh riots were the communal riots where more than 3000 Sikhs were butchered, burnt and man hunted in the streets of Delhi alone. This instance was yet another one adding up to the list of riots that occurred in India since inception. But, this instance, out of all, has been chosen because when such riots occur, justice is delivered by the the judiciary. The victims of this incident are still longing for the justice, that has been delayed and denied for them. Justice is the cure to a victim's wounds, but here, the wounds are deteriorating every day. Following article analyzes various elements of the riots i.e. the reality of the incident supported by the statement of testimonies of the victims, that follows by how each tier of justice, the police, the courts, the government, denied the justice to these sufferers. The article attempts to show, with various evidences, how the government vitiates the justice of the people.

1. Introduction

"There is something like a switch in us that kills the individual in favor of the collective when people engage in communal dances, mass riots, or war. Your mood is now that of the herd. You are part of what Elias Canetti calls the rhythmic and throbbing crowd." - Nassim Nicholas Taleb

Mr. Taleb has mirrored the mind of a communist rioter very well. Well, what is a communist riot? Communist riot is a violence movement spread against a particular ethnic, religious, regional or a cultural group by another group. Mostly the persons are targeted on the basis of their identification with that particular group. There are many countries that have witnessed these communal riots from time to time, and India is also on the same boat.

India is a rich country, in fact it is one of the most diverse countries in terms of culture, ethnicities, religion and so on. The country has witnessed various instances of communal violence post-independence

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in different areas throughout its length. One of such instances of communal riots was the anti-Sikh riots that occurred in the year 1984. The riots occurred nationwide but the most brutally affected areas were Delhi, Punjab, some parts of Uttar Pradesh (Kanpur etc.) and some parts of Bihar. “Across the nation, more than 8000 Sikhs were killed, women were raped, burnt alive, homes brought down, men were forced to cut hair, harassed, tortured”, a victim of riots stated. “It was worse than a nightmare”, another said. According to the official figures, more than 2000 Sikhs were killed in Delhi only¹. In the repercussion, thousands of Sikhs left Delhi to settle somewhere else in India, mainly in the state of Punjab or they migrated overseas.

What happened after that? Whom did they seek justice from? Who was there to save them from that havoc? There must be many answers popping up in the reader’s head. All the answers will be provided in the later sections of this article.

‘As many Sikhs died in India in 1984 than in all the deaths and disappearances in Chile²’ under Augusto Pinochet. The angry mob was like an indifferent butcher killing the Sikhs blindly, without getting the slightest pinch of humanity. Sikhs were also human beings; they were being killed by those people whom they may have greeted a day before. They could recognize the faces in mob. The humanity, the relations, the emotions, all flushed away just because of a single incident. What incidents washed away all the humane feeling of the killers about the people they addressed as neighbors, acquaintances as friends?

The article will try to portray, in addition, the real Image of the scenes, by discussing the stories of various testimonies, share the main cause of these riots, the history of that cause, and will also try to figure out various laws that were violated and try to show how the government affected the court proceedings thereafter. How India, which is the world’s largest democracy, failed to deliver justice to the sufferers of the 1984 massacre. This will be done by showing how numerous committees and commissions were set to bring justice to the sufferers of communal violence, to answer the basic question that who were the culprits? It will also show how none of the committees or commissions could answer this question. There may be chances of improvement and correction.

2. What were Anti Sikh Riots?

At 9.15 am on 31st October, 1984, Indian Prime Minister Indira Gandhi was assassinated by two of her Sikh bodyguards, Beant Singh

1 Ministry of Home Affairs. (2005). Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots) Report (Vol. 1).

2 “It’s Time India Accept Responsibility for its 1984 Sikh Genocide | TIME.” 31 Oct. 2014, <https://time.com/3545867/india-1984-sikh-genocide-anniversary/>. Accessed 8 Apr. 2021.

and Satvant Singh, in the grounds of her home³. and from there onwards, what Canadian government calls “genocide”, began. On the eve of 31st the hunt had began. Huge mobs of people with swords, knives, and iron rods came on roads, searching for Sikhs, vacating them from their shops, workplaces, burning their properties, bringing down their houses, looting their homes, shops and what not. And this was just the beginning, the mobs of people started killing Sikh men, dousing their turbans, chopping their hair, beating them to death, torturing them. They were even dragged out of trains, busses and burnt alive. It was like a hunt, a mob determined to not leave even a single Sikh alive.

2.1 The “Slaughter” of Sikhs

A victim talks about her husband, “my sardar was hit by a bullet whilst he was trying to jump over the small wall. SHO Bhatia was firing from the front of the road. My sons were hit by bullet and were gasping.” She further added that she could recognize the faces in the mob. She knew many faces that she came across with in routine. On that single day, 100s of people were killed and looted.

The next two to three days got even worse. The people had started roaming in packs of wolves hunting the Sikhs killing them. Many Sikhs were subjected with slaughtering and mass murdering. Many Sikhs were slaughtered with a tire inundated in petrol, placed around their neck and burnt. Many youths were kidnapped, shot in heads or beaten to death.

Rahul Bedi, one of the first journalists to reach the affected areas in Delhi says, “*Droves of Sikhs were determinedly hunted down by Hindu mobs from their homes, corralled and slaughtered like animals.*”⁴ Talking about one of the worst affected areas that is trilokpuri, he tells, “*Some 350 Sikhs, including women and children, were casually butchered over in 72 hours.*”

Many Sikhs, travelling in trains, busses etc. were dragged out and shown same fate as the others across the country. “They entered the train, started shouting ‘no Sikh should be left’ and after a few moments they were dragging my husband out of the train. I lay on my husband, begging them to leave him. They slapped me and pushed me aside, killed my husband with swords in front of my eyes”, narrating a victim about her experience. For the next three days, marauding groups of people armed with knives scissors swords, scythes roamed in the streets executing their bloodthirsty mission. The three days were worse than the earlier and the mobs had started targeting the women too.

3 “*The assassination of Indira Gandhi: I was there.*” <https://warwick.ac.uk/newsandevents/features/indira-gandhi-assassination/>. Accessed 8 Apr. 2021.

4 “South Asia | Delhi 1984: *Memories of A Massacre* - BBC NEWS.” 1 Nov. 2009, http://news.bbc.co.uk/2/hi/south_asia/8306420.stm. Accessed 8 Apr. 2021.

2.2 Women Entrapped

When it all started, mostly the Sikh men were being targeted but with the passing hours, women were no safer. The mobs had started looting, raping women. No women were spared. Be it a young female child or old 80-year-old women. In some areas, where the situations had worsened, women's clothes were torn off by large masses; women gang raped, and made to run on the streets naked. A victim of this inhumanity tells, *"after my husband was killed, they dragged me out of my house, gang raped me, ripped, my clothes, and forced me on gun point to run in the streets naked, in front hundreds of men and women, some of whom I used to meet every day. Not even a single person came forward to offer me a duppata."* The inhumanity of the men could be seen on its height.

In a country, where women are treated as goddesses, are revered, were humiliated, ripped, and the spectators didn't even object.

3. Justice

"Justice delayed is justice denied."

This is a very famous quotation used in the field of law. And these riots give the best justification. Thirty-three years have passed, and the victims have not got the answer to the question that who were the culprits. Justice is a faraway concept for them; they don't even know when the law will agree with them about the culprits. The killers were recognized by many victims, their names and identities described, but after all these years, those culprits were roaming fearlessly in the same streets, where once, they had taken the lives of thousands of people.

It is often said that wounds heal with time. According to me, justice is the cure of the wounds of the victim. But here, the wounds have not healed; they are decaying day by day, worsening the victimhood.⁵

Who are the ones to deliver the justice? Is it the government? Or are they the courts? In such cases of communal violence, the government is the most concerned with the victims, but what would happen if the government is itself involved in the chaos?

Until now, and may be in future too, nobody has been, or will be, able to prove direct involvement of the government in all this. But the traces of it can be seen at several places. The speech of Prime Minister Rajiv Gandhi said it all when, upon being asked about the riots taking place, he said:

5 Kaur, R. (2014). Wound, Waste, History Rereading 1984. Economic & Political Weekly, 49(43-44), 34-38.

“We must remember Indiraji. We must remember why she was assassinated. We must remember who could be the people behind it. When Indiraji was assassinated, some riots took place in our country. We know the hearts of Indians were filled with anger, and for some days, people felt that India was shaking.

But when a big tree falls, then the earth does shake a little.”⁶

It doesn't seem to be a very healthy remark made by a prime minister on a deadly situation in his own country. This remark clearly reflects his anguish against the victims.

“A prime minister who justifies the killing of innocent citizens definitely does not deserve Bharat Ratna. We therefore call upon the government to withdraw the Bharat Ratna conferred upon Rajiv Gandhi,”⁷

This was a statement delivered by advocate HS Phoolka, in an interview, on Rajiv Gandhi's remark.

This was an instance where the justification of the riots could be inferred from the executive head of the country. But there are more situations where the congress could be seen hindering the path of justice.

It is evident when the citizens demanded for an investigation committee and the congress government denied to set one, saying that it will be painful for Sikhs. But after continuous demand for investigation by the public, congress set up a committee in 1984 that was abruptly told by the central government to stop its work. In its place another committee was setup and records of the previous committee were selectively passed to the latter. Subsequently, numerous (ten) committees were setup to accomplish the motive of fair investigation that would lead to justice, but none succeeded.

Similarly, the congress party leaders, whose names had floated, and still float in the news related to the riots, were kept away from trial for a long span of time. Until recently, no court was able to punish them fairly, or in a way proportionate to their crimes, that, the court says, can't be proved, despite numerous eye witnesses, because of lack of evidence.

The saviors of law, the police were also equally accountable. The police officials not only ignored what was happening, but also, at some places, instigated the mob to kill the Sikhs. Apart from that, there are

6 Cheeran, J. (2013, December 7). *When A Big Tree Falls, The Earth Shakes*. TIMES OF INDIA. <https://timesofindia.indiatimes.com/blogs/Arrackistan/when-a-big-tree-falls-the-earth-shakes/>

7 Correspondent, H. (2015, November 19). *Take back Rajiv Gandhi's Bharat Ratna* | Latest News India. HINDUSTAN TIMES. <https://www.hindustantimes.com/india/take-back-rajiv-gandhi-s-bharat-ratna/story-1W4ZlDm2cHy6M1ZteeAPal.html>

various witnesses stating that the police failed to register FIRs against the incidents. And out of the cases registered, neither the cases of murder nor those of rape were registered.

The guardians of justice were guarding the accused.

4. The Saviors were the Killers

Three decades later, the culprits are still beyond the “long arms” of justice. Moreover, the people’s “way to justice” (administration and government) were the culprits.

4.1 The Police: ‘Protectors of Law’

“Police personnel never came to the spot. But if at all, they appeared, it was not to save the Sikhs but to point and instigate the mob to kill the Sikhs.”

But there is always someone to save the sufferers from all this, the ‘heroes of law enforcement’, the police force. Not always. At least not in this case. The police force that is always considered as the savior of law was at the other side of the table in this instance. The police not only ignored what was going on, but also, at almost all the places, instigated the mob to kill the Sikhs. “not even a single Sikh should be left alive”, was the statement of a police officer that was witnessed by a lady victim whose brother and father was already killed by the mob, and who was later abducted by a group of men and kept at their home.

The police officials participated, in some cases, in hushing the turmoil going on in the most affected areas of the country. Rahul Bedi, a journalist, shares his experience that on the afternoon of 31st October, two policemen came and announced that everything was normal in the block 32, the residency block of Mrs. Indira Gandhi, and nothing ‘untoward’ had happened there, but it was only hours later when he visited the place himself and saw the terror.

Another case depicting the ‘part of police’ comes from a person, who was, at that time, the head granthi of a gurudwara in Delhi. He narrated about the policemen, “five to six policemen were also with the crowd.... The gurudwara was also set on fire. I was on the upper floor, and the fire did not reach there.” Also, another testimony tells, “The Delhi police facilitated the massacre by driving Sikhs out of the gurudwaras, leaving them to the mercy of mobs.”⁸ “In several places, the police even disarmed the Sikhs before the mob’s overtaking”, another tells. The police, whom the sufferers might had expected to cool this down, or had thought of going to, were there, with the mob, standing

8 Rath, B. (2017, November 1). *India’s Justice System Has Failed Victims of the 1984 Anti-Sikh Massacre*. THE WIRE. <https://thewire.in/communalism/indias-justice-system-failed-victims-1984-anti-sikh-massacre>.

in front of them, supporting them, either passively or the other way, instead of protecting them from the havoc.

At many instances, when the women went to the police stations for reporting murder or rape, they simply tossed the complaints aside saying that already many similar complains had been registered and their complain will also be included I that only. It simply is violation of a right of getting an FIR registered. It was also felt that the Delhi Police was not only negligent in protecting the Sikhs and their properties but probably connived at or instigated such attacks.⁹ Various committees were setup to investigate on the police involvement in the riots.

Failure of investigations

There are evidences that the police failed to not only investigate the cases but also to register the FIRs against the accused. The police avoided registering the FIRs of rape as well as murder cases. There is no case of either rape or murder registered against any person. All the cases are registered under the section 304 of IPC that is culpable homicide not amounting to murder (s. 302).

In addition, only 587 complains were registered in total of three days, for 2733 deaths. Out of these, 241 cases were closed without investigations.

4.2 The Government

There were several independent reports stating that the violence during the anti-Sikh riots was planned indicating the alleged involvement of the members and officials of ruling Congress government in instigating and leading the mob to violence. What was a reaction to this by the government? Instead of setting up a judicial committee quickly, in order to prove its non-involvement, the government delayed the setup of a committee.

In one of his public speeches at Khagaria, Bihar, Rajiv Gandhi said that extremist forces had assassinated Mrs. Gandhi and then attempted widespread communal violence to create disorder and division in the country.¹⁰

However, the committees stared to mention the names of congress party members; they had no mention of the involvement of the higher-level officials.

9 Ministry of Home Affairs. (2005). Justice Nanavati Commission of Inquiry (1984 Anti-Sikh Riots) Report (Vol. 1).

10 "Gandhi Unhurt in Apparent Assassination Attempt - THE WASHINGTON ..." 3 Oct. 1986, <https://www.washingtonpost.com/archive/politics/1986/10/03/gandhi-unhurt-in-apparent-assassination-attempt/06d6ce1a-321d-40e1-927f-779ee66ca6e6/>. Accessed 8 Apr. 2021.

The three names that floated the most were of Sajjan Kumar, HKL Bhagat and Kamal Nath.

When the government itself is involved in the bloodshed, on whom will the victim trust? They would have no confidence left in the executive branch of the country.

Now after the shattered trust upon the police and the government, the next platform to 'maybe' provide justice could be the judicial committees that would inquire into the cases and punish the accused. Longing for justice, people started demanding for the setup of judicial committee to look into the riots. But who knew, the power of politics can blur the path of justice.

4.3 Setting Up Committees: A Road to Nowhere

The government was reluctant to setup committee in the first place, saying that it would hurt the Sikhs. But after continuous demand of the public, the first committee to investigate into riots was established in November 1984. After that a total of 10 committees and commissions were setup to deliver the much awaited 'justice' to the victims. But these committees have in no ways shown the people the path from victims to survivors. However various committees held police officials liable for the riots, none was punished.

The Marwah commission was the first commission was the first commission set-up in November 1984, the commission was directed to investigate police involvement in the riots.

By mid-1985, when the commission was about to wrap up its inquiry, the central government (led by Rajiv Gandhi) had ordered it to stop the investigation. Then they asked the Misra Commission to take over.¹¹

The Mishra Commission inquired the incident and reported that the violence started as an involuntary reaction of deep anguish, grief against the assassins that soon turned into a riotous activity with participation and monitoring of anti-social elements because of passivity of the police. It also said that police were directly and indirectly involved in many cases, and also the congress leaders, local, were involved, but only on their own decisions, but ruled out the overall involvement of congress party in all this. It also gave clean chit to Rajiv Gandhi and another congress leader,¹² HKL Bhagat. However, it did not count the number of deaths, or the persons involved, and recommended for further inquiry.

11 "4 commissions, 9 committees & 2 SITs – the long road to justice for" 16 Nov. 2018, <https://theprint.in/india/governance/4-commissions-9-committees-2-sits-the-long-road-to-justice-for-1984-sikh-killings/150166/>. Accessed 9 Apr. 2021.

12 mini. (1985, April 26). Report Of Justice Ranganath Misra Commission of Inquiry.

After that, three subsequent committees were formed, namely Ahuja committee, Jain-Bannerjee committee and Kapur-Mittal committee. These three committees had different roles to play. They had to record the total number of Sikhs killed in the riots, to look into the cases of riots and to inquire into the role of police in the riots, respectively.¹³

Another committee, Dhillon committee was established to look into the rehabilitation of the victims and their families in the aftermath of 1984. A compensation of barely Rs 10,000 was mandated for the families of those who had lost their lives in the riots.

Companies however rejected the claim on the technical grounds that “riots” were not covered by the scheme.

However, no further action was taken by the government on this.¹⁴

In the next formulated commission, i.e., the Kapur-Mittal commission, Mittal was of the opinion that only available records should be examined, while Kapur wanted to factor in oral testimonies and off-the-record accounts as well.¹⁵

The government accepted the report of justice Mittal because it said that the other report was more sort of a sociological report. 72 police officers were indicted for their lapses in controlling the riots. Of those 72 officers, 13 had retired and 3 had expired before proceedings against them could be initiated. 12 Officials have been exonerated. Of these 32 have been exonerated, 2 have been censored and 1 has been warned. Investigations targeting four officials were pending.

The next committee, led by Justice M. L. Jain, former Delhi High Court Judge, and retired Inspector-general of police A. K. Banerjee, was formed to investigate into registration of cases. In August 1987, the committee suggested that cases be filed against Congress leaders Sajjan Kumar and Brahmanand Gupta. No case was registered.

The High Court later quashed the notification appointing the committee holding that the vesting powers of committee violated the provisions of the Delhi Police Act and Code Of Criminal Procedure.¹⁶

The third committee recommended by the Misra Commission, i.e., Ahuja Committee, it was mandated to assess how many people had

13 “4 commissions, 9 committees & 2 SITs – the long road to justice for” 16 Nov. 2018, <https://theprint.in/india/governance/4-commissions-9-committees-2-sits-the-long-road-to-justice-for-1984-sikh-killings/150166/>. Accessed 9 Apr. 2021.

14 “4 commissions, 9 committees & 2 SITs – the long road to justice for” 16 Nov. 2018, <https://theprint.in/india/governance/4-commissions-9-committees-2-sits-the-long-road-to-justice-for-1984-sikh-killings/150166/>. Accessed 9 Apr. 2021.

15 Ministry of Home Affairs. (1990). Report on Kapur-Mittal Commission Of Inquiry.

16 “4 commissions, 9 committees & 2 SITs – the long road to justice for” 16 Nov. 2018, <https://theprint.in/india/governance/4-commissions-9-committees-2-sits-the-long-road-to-justice-for-1984-sikh-killings/150166/>. Accessed 9 Apr. 2021.

been killed in Delhi. It submitted its report August 1987, pegging the number at 2,733 in Delhi alone, and 3,325 across the country.¹⁷

Afterwards, Potti-Rosha committee was formed in March 1990, on the lines of the Jain-Banerjee Committee, with the same mandate, consisting of the retired Gujarat High Court chief justice P. Subramanian Poti, and IPS officer P. A. Rosha.

The committee functioned for a short period before its term expired in September 1990.

The retired Delhi High Court Judge J. D. Jain and retired UP GDP D. K. Aggarwal took over the mantle from the Poti- Rosha committee In December 1990.

The committee re-examined 669 affidavits filed during justice Mishra's tenure, added 415 new affidavits, and reviewed 403 FIRs filed by the Delhi police.

In its 1993 report, the committee recommended the registration of cases against Congress leaders Bhagat, Dharamdas Shastri, Jagdish Tytler and Sajjan Kumar. But no cases were filed, despite the fact that the committee even considered appointing special prosecutors to examine the cases.

After more than 15 years of inaction, the Rajya Sabha passed a unanimous resolution resulting in the formation of a new commission: the Nanavati Commission. It was led by retired Supreme Court Judge Justice G. T. Nanavati.

The commission issued notices to Bhagat Kumar, Shastri and Tytler, as well as adding a new name to the list, former Union Minister and Congress Leader Kamal Nath. It submitted its report in 2005.

"The systematic manner in which the Sikhs were thus killed indicate(s) that the attacks on them were organized," read the report.

"Large number of affidavits indicates that local Congress (I) leaders and workers had either incited or helped the mobs in attacking the Sikhs... There is enough material on record to show that at many places the police had taken away their arms or other articles with which they could have defended themselves against the attacks by mobs."

commission dismissed collusion charges against Rajiv Gandhi, citing 'inadequate proof'. The commission also proposed the creation of an "anti-riot police force, free of political interference, to ensure no recurrence of such an occurrence."

This suggested the police to reopen only four closed investigations.

17 Ministry of Human Affairs. (1987). REPORT ON AHUJA COMMITTEE INQUIRY.

4.3.1 Mathur Committee

The Mathur Committee, led by retired Supreme Court Judge Justice G. P. Mathur, was formed in December 2014. After home minister Singh, the committee declared ₹4 lakh compensation to the victim of 1984 massacre. Senior IPS Officer Pramod Asthana, former district and court sessions judge Rakesh Kapoor, and then additional Delhi Police deputy commissioner Kumar Gyanesh comprised the unit.¹⁸

The committee recommended that a Special Investigation Team (SIT) be formed to see whether any police inquiries could be reopened

The committee noted that “a proper investigation of the offences committed was not conducted”, and that “some kind of sham effort had been made to give it the shape of investigations”.

Upon reading the reports by these committees, it is clear that no substantial conclusion could come in hand. And the handful of people that the committees have mentioned, are not properly taken action upon because of the political will. Most of the committees either delegated responsibilities, or got retired.

Three simple questions, these ten committees and commissions cannot answer:

1. Who were the accused?
2. Why did the persons, against whom the witnesses were present, not considered guilty?
3. In spite of hundreds of females saying they got raped, why isn't there a single case of rape registered? Why the police are not held accountable for this?

5. Conclusion

Where there is a diverse country, there is communal violence. There is no doubt in that. Conflicts arise, they set down, and the justice is served. But what if the justice servers are also fishy? Then there arise situations like the anti-Sikh riots of 1984, where for thousands of deaths, and thousands of rapes, loots, and what not, only a handful of people are held liable. Moreover, for killing someone, no one is held under grave crime. The riots of 1984 changed the definition of violence. Beginning from the ground stage, the police to the highest stage, the government, all were involved in killing thousands of innocent human beings whose sole crime was to be a Sikh!

18 “*Union Government Set Up Mathur Committee to Examine Constitution*” 24 Dec. 2014, <https://www.jagranjosh.com/current-affairs/union-government-set-up-mathur-committee-to-examine-constitution-of-sit-on-1984-antisikh-riots-1419426361-1>. Accessed 9 Apr. 2021.

Many justifications were provided by the advocates of riots. Some said that it was a revenge to kill Indira Gandhi, and it was not a riot but a massacre, they “got what they deserved”¹⁴

Different interpretations were given to the same act of happening. No one can say whether those interpretations were true or not, but it is no way justified to burn even a single Sikh!

The way of addressing the public by Rajiv Gandhi’s after the anti-Sikh riots was very poor. If the government is expected to assure people with justice and rights, Rajiv Gandhi’s attempt was not at all endeavoring.

The judiciary was also seen in a very poor state. The most heinous crimes were committed at a large scale in those three days, but no reports, or a few, were written. Rape, sexual assault, murder, abduction, grievous hurt, torture, are the few acts that happened that are all covered under IPC to protect the country’s citizens, were not even registered, taken action upon is a very distant topic.

Grave human rights violations had occurred during that time.

Everyone knows everything, but the question is still here, why did the action was not taken? After so many years, why are people still looking at the face of authorities to deliver justice? The answer is, the power surpassed the very rights of people, the very justice that had to be delivered, the very morals of humanity.

The power left the laws far behind. It proved IPC, constitution of India, all these are books that are read and left thereof.

The irony is, protectors of the law, ripped it apart.

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- <https://www.outlookindia.com/magazine/story/india-news-no-one-killed-426-people-in-anti-sikh-riots/302711>

A Comparative Analysis of Abortion Jurisprudence in India, Japan and Netherlands

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Abstract

All countries across the globe refrain from confabulating about abortions. This is discernible from the absence of an international framework elucidating about abortion that could have given the member states a yardstick for reference. Thus, an attempt has been made to critically analyse the Indian abortion jurisprudence by undertaking a cross-jurisdictional methodology which can be deemed most suitable for research under the given circumstance. The authors chose Japan and Netherlands for comparison because they are highly developed countries and set a standard for us to achieve. Additionally, Japan has a similar societal fabric as India whereas the Netherlands has an entirely contrasting societal structure. Thus, the authors have strived to gain an all-inclusive outlook by comparing both western and non-western jurisprudence as regards abortion with their Indian counterpart. It is essential to highlight that since abortion is a socio-legal concept, the abortion laws are largely determined by society, religion and culture.

The authors have compared the abortion laws on the parameters of eligibility criteria, grounds for abortion, gestation limit, reproductive choice and confidentiality during abortion. Acknowledging shortcomings in the Medical Termination of Pregnancy Act, 1971, an attempt has also been made to pick out corresponding provisions from the Dutch and Japanese law to fix those apertures of the Indian abortion law which even the Medical Termination of Pregnancy (Amendment) Act, 2021 fails to address. Although, it makes significant strides, yet it is an inconsistent attempt to mitigate the loopholes in the Maternal Termination of Pregnancy Act, 1971.

Introduction

Since time immemorial, abortion has been a bone of contention across the globe. The proponents of abortion or those who are pro-choice, firmly believe that abortion entails a woman's right to 'choose' if she should carry on with her pregnancy or not. They opine that every human being, irrespective of their gender, should have the right to

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her/his sexual and reproductive freedom. On the other side of the coin, the critics of abortion or pro-life supporters make religion as the foundation of their resistance towards abortion. They also propound that the life of a child begins at conception and therefore, the foetus is entitled to her/his right to life.

Notwithstanding the distinct legalities and illegalities associated with every country, women have resorted to myriad forms of abortion and birth control. These practices have sown the seeds for never-ending political, social, ethical, religious and legal discourse since it is the *“fulcrum of a much broader ideological struggle in which the very meanings of family, the state, motherhood and young women’s sexuality are contested”*.¹

Analysing International Position on Abortion

The UN charter affirms that United Nations will not intervene in the domestic jurisdiction unless the member is bound by a ratified treaty.² Unfortunately, there is no international treaty or customary law which guarantees women their “right” to abortion. Thus, the member states take the leverage to formulate domestic abortions laws as per their own interpretations.

International agency like United Nations Population Fund (UNFPA) does not promote abortions and gives emphasis on improving family planning that should not lead to unwanted pregnancy, in the first place. Nevertheless, in 1994, International Conference on Population and Development (ICPD) held in Cairo articulated that reproductive right and sexual health are guaranteed by the human rights. However, the Conference was ‘non-binding’³ in nature. It did not explicitly call for legalization of abortions and recommended the plan only where ‘abortion is not against the law’.⁴

On the other hand, considerably progressive WHO guidelines (Chapter 1) mention that the legal status of abortion is to an extent immaterial to the need of abortions but claim that the women in countries with restrictive laws are more vulnerable to complications from unsafe abortions.⁵ It can be implied that WHO views it from a broad perspective and asks for facilitating abortion that is not only legal but also caters to the needs of women.

1 AMAR JESANI & ADITI IYER, ABORTION-WHO IS RESPONSIBLE FOR OUR RIGHTS? 114 (Malini Karkal ed. 1995), https://www.researchgate.net/publication/258936780_Abortion-Who_is_responsible_for_our_rights.

2 U.N. Charter art. 2, 7.

3 The International Conference on Population and Development, Program of Action, 16.1, U.N. Doc. A/CONF.171/13 (Sep. 13, 1994).

4 Id. at 8.25.

5 World Health Org. [WHO], Safe Abortion: Technical and Policy Guidance for Health Systems, at 17 (2nd ed. 2012).

Thus, no treaty infers “right” to abortion. In the entire framework, there exists only one treaty, formulated by African Union called Maputo Protocol which fits the bill. One of its provisions prescribes a right to medical abortion in cases of rape, incest and to protect the physical and mental health or the life of woman.⁶ However, 16 out of 55 members of the African Union are yet to ratify the provisions and hence, have a conflict with their domestic legislation.⁷

International Covenant on Civil and Political Rights (ICCPR) recognizes right to life of a every human being.⁸ It can be seen that there is no coherent interpretation to the term ‘human being’. A ‘child’ can be defined as a human being below 18 years of age according to the Convention on the Rights of the Child (CRC).⁹ It again has an ambiguous connotation given that it is silent on whether the biological age of a child starts from his/her conception or birth. At the same time, it is important to highlight that Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) having a progressive outlook, calls the state parties to provide the women appropriate mechanism for family planning.¹⁰ Most importantly, CEDAW reaffirms that a woman must be guaranteed to decide the number of children she wants to bear including the spacing she wants to have between them.¹¹ Essentially, it is known that abortion is a procedure to get rid of an unwanted pregnancy due to a variety of reasons and can plausibly be inferred as a tool for family planning. Yet, ICPD in its Action Plan declares that “*in no case should abortion be promoted as a method of family planning*”.¹²

After an analysis of the aforementioned treaties, the authors infer that there is no international framework which enshrines right of abortion to a woman. Even treaties like CEDAW and ICPD fail to rise to the occasion. The authors propound that there should be an effective and robust international framework/treaty which lays down mandatory guidelines and standards which need to be adhered by countries while framing their abortion legislation. Such a treaty will bind the signatory countries and will obligate them to ensure the needs of the pregnant woman and foetus. Since women all across the globe have similar anatomies then laws governing their bodies should also be

6 Maputo Protocol art. 14, 2(c).

7 AFRICAN UNION, <https://au.int/en/newsevents/20180129/high-level-consultation-ratification-maputo-protocol#:~:text=To%20date%2C%20out%20of%2055,have%20not%20ratified%20the%20Protocol> (last visited Sep. 19, 2020).

8 International Covenant on Civil and Political Rights art. 6, .

9 Convention on the Rights of the Child at art. 1.

10 Convention on the Elimination of All Forms of Discrimination against Women at art. 10(h), art. 12, art. 14 2(b).

11 *Id.* at art. 16 1(c).

12 PROGRAM OF ACTION, *supra* note 3, at 8.25.

alike. Hence, there is a pressing need for bringing abortion out of the purview of private international law and positioning it in the arena of public international law.

Rationale behind Selection of Japan and Netherlands for Comparative Analysis

As previously discussed, the international framework does not lay down any touchstone for evaluating the efficacy of an abortion law. Hence, a comparative study of different jurisdictions seems to be a befitting approach for analysis of abortion legislation. While scrutinising the fallacies of Medical Termination of Pregnancy Act (hereinafter, MTP Act), 1971, it was essential to identify countries whose abortion law served as a guide to be followed. Hence, Japan and Netherlands were a prudent choice considering the strides they have achieved in the domain of human development.

Additionally, abortion is a socio-legal concept where the laws are largely determined by society, religion and culture. It is pertinent to highlight that there are striking similarities within the dynamics of Indian and Japanese cultures.¹³ Thus, the authors have vetted the provisions from the Japanese abortion law, Maternal Health Act, 1948 that must be incorporated in India. Both the societal structures are inherently patriarchal and inequality between both the sexes is quite pronounced.¹⁴ Nevertheless, they are undergoing a positive transformation due to increased emancipation of women. Additionally, the relevance of religion and condemnation of abortion is quite conspicuous in both the societies.¹⁵

Furthermore, the authors have also chosen Netherlands to have a holistic perspective of abortion legislation. It is an undeniable fact that the Dutch society is far more attuned to many ideologies and beliefs that are frowned upon in many non-western societies.¹⁶ Most importantly, Netherlands was a torchbearer because it was among the first countries in the West to legalise abortions by enacting the Termination of Pregnancy Act, 1981. Consequently, the flexible and liberal provisions of the Act have aided in easy accessibility of abortions

13 Suchita Tripathi, *Cross-Cultural Similarities between India and Japan (A comparative study of Indo-diffused traits in Japan)*, 2 THE JOURNALIST 100, 101-105 (2013).

14 Reeta Sonawat, *Understanding Families in India: A Reflection of Societal Changes*, 17 PSICOLOGIA: TEORIA E PESQUISA 177, 179 (2001).; CULTURAL ATLAS, <https://culturalatlas.sbs.com.au/japanese-culture/japanese-culture-family> (last visited Aug. 1, 2020).

15 William R. LaFleur, *Contestation and consensus: The morality of abortion in Japan*, 40 PHILOSOPHY EAST AND WEST 529, 533 (1990) ; Abortion: from Religious perspective, Shodhganga available at https://shodhganga.inflibnet.ac.in/bitstream/10603/172165/9/09_chapter%204.pdf (last visited Jul. 29, 2020).

16 CULTURAL ATLAS, <https://culturalatlas.sbs.com.au/dutch-culture/dutch-culture-family> (last visited Aug. 12, 2020).

to the Dutch pregnant women.¹⁷

Thus, the authors deduce that it is essential to compare Indian abortion laws with Dutch and Japanese abortion laws for reformation of the MTP Act, 1971, which is the primary objective of this paper. The authors believe that the selection of the afore-mentioned jurisdictions does not only help in mitigating the shortcomings in Indian law but also in underscoring the appreciable differences in the abortion laws of different countries. These variations exist despite the fact that pregnant women who are the primary beneficiaries of these laws have the same biological anatomies irrespective of the society they belong to and the country they are residing in.

Eligibility Criterion That Reeks of Orthodoxy

According to the MTP Act, 1971, only pregnant women who are married are permitted to have their unwanted pregnancies terminated on the ground of 'failure of contraceptive'.¹⁸ It is unfortunate that the legislation does not cover those women who become pregnant out of wedlock. This provision reflects conservatism and attempts to imply that pregnancy before marriage is inappropriate.

The Japanese legal position is similar to India. According to Article 14(1) of the Maternal Health Act, 1948¹⁹, a pregnant woman has to take consent of her spouse before aborting her foetus. Therefore, it can be inferred that only married women are eligible to have an abortion according to the provisions of the law.

On the other hand, in the Dutch abortion law, all females whether married or unmarried, can seek abortion.²⁰

The authors contend that abortion legislation should refrain itself from prescribing an eligibility criterion. Such criterion dispossesses many pregnant women of their reproductive rights and makes them susceptible to illegal abortions. Only married women are permitted to have abortion as per Indian and Japanese abortion laws. Unmarried pregnant women are bereaved of such critical rights only because of the regressive ideology which stigmatizes sexual intercourse out of wedlock. It must be highlighted that the Dutch legislation doesn't propagate this school of thought and permits abortions for both married

17 Mark Levels et al., Unintended Pregnancy and Induced Abortion in the Netherlands 1954–2002, 28 EUROPEAN SOCIOLOGICAL REVIEW 301, 302 (2010).

18 Medical Termination Pregnancy Act, 1971, Explanation 1 and 2 of § 3, No. 34, Acts of Parliament, 1971 (India).

19 Botai hogo-hō [Maternal Health Act], Law no. 156 of 1948 (Japan) available at <https://abortion-policies.srhr.org/documents/countries/01-Japan-Maternal-Health-Act-1948.pdf>.

20 Wet van 1 mei 1981, Stb. 1981, 257 available at <https://wetten.overheid.nl/BWBR0003396/2011-10-10>.

and unmarried women. Hence, it is asserted that India must scrap the phrase 'married woman' and should make it inclusive of all women.

The Medical Termination of Pregnancy (Amendment) Act, 2021 must be lauded for it allows unmarried pregnant women to have an abortion by taking the ground of failure of contraceptive device or method. This provision comes to the rescue of unmarried pregnant women and recognizes their mental agony by giving them a right to abortion which had been previously denied by the MTP Act, 1971.²¹

Compulsion on Women to Conform to Inflexible Grounds for Having an Abortion

The MTP Act, 1971 stipulates that a pregnant woman can have her pregnancy terminated only if it causes risk to her life, endangers her physical and mental health or if the pregnancy is a consequence of rape. Additionally, failure of a contraceptive device used by a married woman or her husband is also one of the grounds. The pregnancy may also be terminated in case of a significant risk of the foetus's medical or physical handicap, if born.²² It can be observed that each ground is medical in nature and women find themselves helpless within these myopic limits. The policy makers have blatantly neglected the multifarious reasons due to which a woman resorts to abortion.

Under Japanese Abortion Law, the abortion can be undertaken by the person if it is determined that the foetus cannot survive outside the womb of mother.²³ In addition to that, a pregnancy may be terminated if she establishes physical damage in continuing pregnancy or while delivering the baby due to bodily reasons, economic reasons or if the pregnancy is a result of rape.²⁴ It is important to highlight that there is no ground to cater to the 'mental health', equally significant as physical health of the woman which might get affected due to an unwanted pregnancy. Improper mental well-being is detrimental to not only the woman but the foetus, as well. However, considering the fact that the ground of 'economic reasons' has been liberally interpreted, it is highly probable that the mothers undergoing mental discomfort submit to 'economic reasons.' It was observed that a majority of abortions are performed under the said ground.²⁵ It is commendable that the lawmakers wished to allow certain flexibility in the application of the Act by including such a ground with wide ambit.²⁶

21 The Medical Termination of Pregnancy (Amendment) Act, Explanation 1 of § 3(2), No. 8, Acts of Parliament, 2021 (India).

22 Medical Termination of Pregnancy Act, 1971, §3(2) & Explanation 1 and 2, No. 34, Acts of Parliament, 1971 (India).

23 Botai hogo-hō [Maternal Health Act], Law no. 156 of 1948, art. 2(2) (Japan).

24 Botai hogo-hō [Maternal Health Act], Law no. 156 of 1948, art. 14(1) (Japan).

25 Philip Brator & Masako Tsubuku, Japanese laws make abortion an economic issue, THE JAPAN TIMES (May 13, 2012), <https://www.japantimes.co.jp/news/2012/05/13/business/japanese-laws-make-abortion-an-economic-issue/>.

26 Hiromi Maruyama, Abortion in Japan: a Feminist Critique, 10 WISCONSIN WOMEN'S

In the Dutch abortion laws, there are no fixed grounds for abortion and it can be availed 'on-request'. However, it is pertinent to mention that the doctor must ensure that the decision to terminate the pregnancy is taken with 'due care' and that the abortion is only carried out when all the other options have been exhausted.²⁷ This concept of 'due care' may vary in each individual case. Furthermore, a woman can terminate her pregnancy only if there is an emergency situation which makes it inevitable.²⁸ 'Emergency' refers to the psychological state of mind of the woman due to her unwanted pregnancy and hence, it does not require establishing some concrete ground.

It is submitted that abortion should be available 'on-request' so that pregnant women are under no compulsion and obligation to bring their unwanted pregnancy under any of the grounds prescribed in the legislation to be eligible for having an abortion. Dutch legislation can be taken as a paradigm in this aspect. Although, Japan does obligate women to establish grounds but as previously mentioned, provides for a liberal 'economic ground' in the legislation.

MTP Act, 1971 lays down specific prerequisites which need to be fulfilled in order to establish eligibility and come within the purview of the Act. Unfortunately, the 2021 Amendment also mandates the women to establish their multifarious circumstances within those rigid grounds. It is imperative to throw light upon the illegal abortions that take place just because the pregnant woman is unable to establish any of the grounds and therefore, is devoid of legal protection. Even after the introduction of the MTP Act, 1971, there was only a marginal increase in the number of approved abortions.²⁹ The lawmakers must not ignore the fact that the circumstances of the woman are intertwined with many other factors and generalising them lead to impediments in the facility. Thus, the rigid grounds in India should be deleted since that mars the very objective of the legislation and the abortion should be made available 'on-request'.

Inefficacies of the Gestation Limit Prescribed under MTP Act, 1971

Gestation Limit prescribes the point within which termination of pregnancy is permissible.³⁰ It is largely determined by the cultural, socio-economic and jurisprudential factors in a country.³¹ As per the

LAW JOURNAL 131, 139-140 (1995).

27 Wet van 1 mei 1981, Stb. 1981, 257.

28 Wet van 1 mei 1981, Stb. 1981, 257.

29 Siddhivinayak S Hirve, Abortion Law, Policy and Services in India: A Critical Review, 12 REPRODUCTIVE HEALTH MATTERS 114, 115 (2004).

30 CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/law-and-policy-guide-gestational-limits#:~:text=Gestational%20limits%20prescribe%20the%20point,gestational%20limit%20is%2012%20weeks> (Sep. 05, 2020).

31 *Id.* at 1.

MTP Act, 1971, a woman can have an abortion within 12 weeks if one medical practitioner or within 20 weeks if two medical practitioners are of the opinion that any of the grounds as previously discussed by the authors, exist. On the other hand, if the mother is in a critical health condition, pregnancy may be terminated even if it exceeds the 20-week limit.³²

There have been innumerable instances where it has jeopardized the lives of both the unborn child and the mother. In *Dr. Nikhil Dhattar v. Union of India*³³, the petitioner was denied abortion when the woman was in her 26th week of pregnancy regardless of the foetus being diagnosed with a heart defect. They were rendered helpless due to the stringent provisions of the Act. Unfortunately, the mother had a miscarriage in her 27th week but this sensational case did spur the discussion on the validity of the prescribed gestation limit³⁴. It is inferred that a period of 20 weeks is too premature to identify anomalies in the foetus like cardiac defect as in the case of Nikhil Dhattar.³⁵

The Japanese Maternal Health Act, 1948 does not specify any gestation limit for termination of pregnancy. However, through a notification by Vice Minister of Health Welfare in 1991, it was stipulated that the limit will be 'less than 22 weeks'.³⁶ Interestingly, the Japanese government has been reducing the gestation limit because the survival rate of the premature infant has improved with technological advancements. Thus, the gestation limit of foetal viability i.e. the potential to survive outside the womb was made legally shorter.³⁷ Unfortunately, it seems that the lawmakers neglected the socio-economic factors while considering the medical technicalities and statistics. It is important to highlight that every individual case of abortion has variegated considerations associated with it. The procedure of abortion should not be seen from only one side of the spectrum.

In the Netherlands, the gestation limit has not been explicitly stated in the Termination of Pregnancy Act, 1987. Despite the fact that there exists no provision for gestation limit in any statute, the Government of

32 Medical Termination of Pregnancy Act, 1971, § 5, No. 34, Acts of Parliament, 1971 (India).

33 SLP (C) 5334 of 2009.

34 Mumbai abortion case: Niketa Mehta suffers miscarriage, TIMES OF INDIA, Aug. 14, 2008, <https://timesofindia.indiatimes.com/city/mumbai/Mumbai-abortion-case-Niketa-Mehta-suffers-miscarriage/articleshow/3363293.cms>.

35 Neha Madhiwalla, *The Niketa Mehta Case: Does the Right to Abortion Threaten Disability Rights*, 5 INDIAN JOURNAL OF MEDICAL ETHICS 152, 152 (2008).

36 CRITERIA FOR THE TIMING OF ABORTION UNDER THE EUGENIC PROTECTION LAW, https://www.mhlw.go.jp/web/t_doc?dataId=00ta9691&dataType=1&pageNo=1 (last visited on Sep. 20, 2020).

37 Hiroshi Nishida and Izumi Sakuma, *Limit of Viability in Japan: Ethical Consideration*, 37 JOURNAL OF PERINATAL MEDICINE 457, 458 (2009).

Netherlands prescribes 24 weeks limit in its official website.³⁸ Another distinct concept of Dutch abortion law is a 5-day waiting period between the woman's first meeting with the doctor and the day she gets operated.³⁹ It can be observed that despite the doctor's approval, the woman is left to ponder over her decision for 5 days. The authors opine that this waiting period is quite futile and unnecessarily prolongs the mentally taxing abortion procedure.

The crux of the matter is that a higher gestation limit gives a pregnant woman a considerable latitude in having an abortion as it gives a woman more time to reflect upon a decision of such gravitas and helps in detecting defects in the foetus which can be medically discovered only after a certain period since the commencement of pregnancy. As discussed above, Japanese and Dutch abortion legislation are marginally better than India in this respect since both of them have the limit that is more than 20 weeks. Therefore, the gestation limit in India should be increased to make it compatible to the needs of pregnant women.

On a positive note, Medical Termination of Pregnancy (Amendment) Act, 2021 ameliorates the Indian position by increasing the gestation limit to 24 weeks.⁴⁰ It further reforms the present law by stating that in case of a foetal abnormality, the pregnancy can be terminated even after 24 weeks which is currently not allowed under MTP Act, 1971.⁴¹

Denial of Right to Reproductive Choice and Self-Determination to Women

As previously mentioned, our international framework highlights reproductive choice as a human right. It lays down the foundation of the entire human existence and not just of a family. In *Suchitra Srivastav v. Chandigarh Adm.*⁴², the judiciary rightfully said that reproductive choice not only means to procreate but also includes the choice to not procreate.⁴³ The fact that 'Reproductive choice' was interpreted as being under the purview of Article 21 in the *Puttaswamy* judgment⁴⁴ further highlights the gravity of this concept.

38 GOVERNMENT OF THE NETHERLANDS, <https://www.government.nl/topics/abortion/question-and-answer/what-is-the-time-limit-for-having-an-abortion> (last visited Sept. 24, 2020).

39 Wet van 1 mei 1981, Stb. 1981, 257.

40 The Medical Termination of Pregnancy (Amendment) Act, § 3(2), No. 8, Acts of Parliament, 2021 (India).

41 The Medical Termination of Pregnancy (Amendment) Act, § 3(2B), No. 8, Acts of Parliament, 2021 (India).

42 *Suchitra Srivastav v. Chandigarh Adm.*, (2009) 14 SCR 989.

43 *Id.* at para 11.

"There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating."

44 (2017) 10 SCC 1

Under Indian abortion law, the decision of terminating pregnancy entirely depends upon the discretion of one/two medical practitioners who rely on the statutory gestational limit.⁴⁵ Thus, it is contended that the Act deprives the pregnant women of their freedom to choose about their own bodies. The procedure of abortion heavily depends upon the practitioner's opinion who may intend to impose his/her decision on the distressed woman.

Under Japanese law, women do not have an absolute reproductive choice either. The decision to abort the child has to be confirmed by the spouse.⁴⁶ The premise to this provision can be found in the perceptions ingrained within the patriarchal Japanese society as discussed previously in the paper. However, unlike MTP Act, 1971 the ultimate discretion doesn't rest with the doctor.

On the other hand, Dutch abortion law guarantees women reproductive choice to have an abortion. The medical practitioner only performs an advisory role and does not transcend the medical boundaries. The ultimate discretion of aborting a foetus lies with the pregnant woman.⁴⁷ She can evaluate her decision keeping into consideration all medical, personal, social and financial factors.

The authors opine that pregnant women should have the right to their bodily integrity and reproductive autonomy. Their reproductive choice to have an abortion should be of paramount consideration while framing abortion legislation. Both the Indian and Japanese laws lag in this regard. At the same time, the Dutch Termination of Pregnancy Act, 1981 truly upholds the reproductive rights of a woman and affirms the right to take decisions and control over her own body. Even the Medical Termination of Pregnancy (Amendment) Act, 2021 fails to address this crucial inconsistency. It continues to bequeath the power to take decision vis-à-vis a woman's womb and her pregnancy upon the medical practitioners.⁴⁸ Therefore, the authors contend that denial of reproductive choice to a woman is one of the most inherent flaws of Indian abortion law. It is suggested that the only factor that must be entirely relied upon is the woman's free and voluntary consent to the abortion procedure.

45 Medical Termination of Pregnancy Act, 1971, §3 and 5, No.34, Acts of Parliament, 1971 (India).

46 Botai hogo-hō [Maternal Health Act], Law no. 156 of 1948, art. 14(1) (Japan).

47 Wet van 1 mei 1981, Stb. 1981, 257.

48 The Medical Termination of Pregnancy (Amendment) Act, § 3(2), No. 8, Acts of Parliament, 2021 (India).

Incompatibility between MTP Act, 1975 and POCSO Act, 2012 as regards Confidentiality

The need for confidentiality about the details of the pregnant woman undergoing an abortion arises from the regrettable yet undeniable stigma associated with abortion. The abortion law should impose a mandate upon the abortion clinics to safeguard the personal information of its patients.

As per the Indian position, there is a major inconsistency between the provisions of MTP Act, 1971 and Prevention of Children from Sexual Offences (POCSO) Act, 2012 as regards confidentiality that needs rectification expeditiously. The MTP Regulations, 2003, enacted for aiding in effective implementation of MTP Act, 1971 prescribe the maintenance of a secret register with the names of the patients in a hospital or an approved place. The information of this register is not to be disclosed to any person and can only be inspected under the authority of law.⁴⁹ However, under POCSO Act, if any girl below 18 years seeks abortion from a healthcare professional, it is mandatory to register a complaint of sexual assault with the police⁵⁰, regardless of the wishes of the girl. The authors view this as a downright denial of right to privacy of the girl.

On the other hand, the Japanese Abortion law safeguards confidentiality of pregnant women opting for abortion. The Maternal Protection Act imposes a mandate on the persons related to performance of induced abortions that they should not reveal any confidential information that becomes known to them during the course of their work⁵¹. It goes a step further by stating that the said persons cannot reveal such information even after retirement.⁵² The Japanese lawmakers underline the gravity of ensuring privacy of the pregnant women by stipulating penal provisions for the infringement of the aforesaid provisions.

Abortion clinics in Netherlands ensure absolute confidentiality of the pregnant women as well. The act places an obligation on the medical director to ensure that confidential information about the pregnant women is provided to him in a timely manner and in such a form which cannot be tracked back to individual patients.⁵³ Therefore, the abortion treatment is completely anonymous.

49 Medical Termination of Pregnancy Regulations, 2003, Gazette of India, pt. II sec. 3(i) (India).

50 Protection of Children from Sexual Offences, 2012, § 19, No. 32, Acts of Parliament, 2012 (India).

51 Botai hogo-hō [Maternal Health Act], Law no. 156 of 1948, art. 27 (Japan).

52 *id.*

53 Wet van 1 mei 1981, Stb. 1981, 257.

Assurance of confidentiality enables a woman in taking a decision about having an abortion without getting worried of the possibility that her personal details might get leaked. In a patriarchal societal structure like ours, it is likely that the reputation of the pregnant woman may be denigrated after she has an abortion. Henceforth, strict stipulations regarding confidentiality in the abortion law become all the more significant and imperative. As discussed above, both the Japanese and Dutch laws sufficiently cater to this issue. In the Indian law, there's a pressing need to reconcile the provisions of the MTP Regulations and POCSO Act to ensure strict confidentiality so that the pregnant women can have abortions without any fear of social stigma.

The seemingly progressive Medical Termination of Pregnancy (Amendment) Act, 2021 partially allays these concerns by introducing punishment of imprisonment of 1 year or fine if a medical practitioner reveals the name or other personal details of a pregnant woman. Nevertheless, the doctor won't be liable if these particulars are disclosed to a person authorized by law.⁵⁴ Since, police officers come within the purview of 'persons authorized by law', the incongruence between the MTP Act and POCSO Act still remains unresolved. Therefore, the Amendment undoubtedly makes notable headway by criminalizing infringement of privacy of a woman but it doesn't extend the same protection to girls below 18 years of age, having an abortion.

Conclusion

In this paper, authors undertook cross-jurisdictional analysis and compared Indian abortion legislation with its Japanese and Dutch counterparts given the absence of such an international framework. This approach gave the readers an insight into not only the Indian position but also got a glimpse of western and non-western abortion law. Having said that, the selected jurisdictions do not represent regions, per se but legally highlight how their respective societies perceive the concept of abortion.

The authors also wish to throw light upon the fact that a pregnant woman who's mentally and physically unready for motherhood would not be able to nurture the child meticulously. Such a forced pregnancy would be detrimental to the well-being of both the mother and child. Henceforth, the significance of the right to choose when and whether to have children cannot be emphasized enough.

54 The Medical Termination of Pregnancy (Amendment) Act, § 5A (2), No. 8, Acts of Parliament, 2021 (India).

Virtual Education: Breeding Space for Online Harassment

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Abstract

The concept of harassment over virtual space is a phenomenon which has sprouted recently with the advent of the world wide web. As the internet has become an extremely important part of our daily activities, with it rises those who exploit it knowingly or unknowingly. Accessibility to the internet has increased but not the awareness as to the proper and safe way to use it in a way that does not encroach upon the rights of others. One should be aware of the boundaries and limitations that need to be set on their actions otherwise descent into lawlessness is inevitable.

In our world's current state, where social distancing has become the norm due to the pandemic, we as a society have come to rely on the world wide web for completing our duties and jobs. Sectors like education have become completely virtual. And with such a surge of internet usage, we have identified the problem of people using the anonymity that the internet provides to harass others. This problem has always existed, but it was amplified during the pandemic.

This paper seeks to highlight the need for reformation of the educational sector and the lack of robust laws to keep the menace of cyber harassment in check and offer appropriate suggestions for tackling this issue. The structure of the research paper is twofold, firstly dealing with problems faced in the education sector, and secondly, an analysis has been done of the laws that exist to deal with cyber harassment in India as well as other countries that have been trying to curb it. After the careful perusal of the two, appropriate suggestions have been made to tackle the same.

1. Introduction

Unprecedented times of coronavirus has pushed the whole world to a halt and a state of uncertainty. While the effects of this pandemic remain discernible in fields of economy, polity, society etc.¹ technology

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1 Amin R. Yacoub & Mohamed El-Zomor, *Would COVID-19 Be the Turning Point in History for the Globalization Era? The Short-Term and Long-Term Impact of COVID-19 on Globalization*, SOCIAL SCIENCE RESEARCH NETWORK (Dec. 17, 2020), <https://ssrn.com/abstract=3570142>.

is not far behind either. Since most of the world's population is compelled into isolation, reliance is being placed on online platforms more than ever. The definition of workspace is changing. Work from home has become the new normal.² with the educational sector is no exception. With the future of our children at stake, schools and universities all across the world have found refuge in remote access teaching. Video conferencing apps like Zoom, Skype, etc. have seen a surge in usage and popularity (zoom alone has seen a surge of users from 10 million in December of 2019 to 300 million in April 2020)³. While the cause is noble as well as necessary, the rising unwanted implications have become a cause of concern worldwide. One of them is online harassment.

Online harassment is admittedly, not a new phenomenon in virtual space. Trolling, passing lewd comments, infringement of privacy are daily occurrences all across social media. But with the pandemic and blurring boundaries between workplace and home, these vices have started creeping their way in and educators are becoming an easy target. Technology knows no boundaries, thus making it a global issue. The developing, as well as developed nations, are struggling alike.

Posting extreme pornography in chat box during online lectures, making degrading and offensive comments, racial slurs, uninvited guests 'bombing' the lectures are a few instances at UK schools/ universities that have teachers baffled.⁴

With unemployment rates soaring (the overall unemployment rate of India was 23.52 percent in the month of April 2020)⁵ and a significant amount of time to spare during and post lockdown accompanied with a cheap, readily available internet⁶, in India also, situation has aggravated manifolds. Complaints are pouring in with questionable behaviors from the employers via online medium.⁷

While many countries have laws relating to sexual harassment at the workplace, this paper aims to analyze the question of whether the present legal framework addresses harassment at virtual workspace in the educational sector in the Indian context.

Part II of this paper analyzes the meaning of harassment in virtual space by navigating through related definitions in dictionaries, Indian and International laws and cases. Part III delves deeper into the social problems faced by educators while dealing with online education system. Subsequently, Part IV tries to analyze the sufficiency and efficiency of present Indian laws to battle the present claims and their subsequent loopholes and grey areas. After elaborating on the best practices at the International level in Part V, Part VI aims to provide insightful recommendations to make up for the gaps found in Indian legislative system for virtual harassment in the educational sector.

2. Meaning Of Harassment in Virtual Space

The term 'Harassment' is defined by Black Law's Dictionary as "*words, conduct, or action (usually repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.*"⁸ It threatens, demeans the victim resulting into a revolting environment for them. It can be of different types – mental harassment, physical harassment, psychological harassment, cyber harassment etc.

Harassment in Virtual space or Cyber Harassment can be defined as causing emotional distress to a person using electronic means⁹ like messaging apps, emails, blogs or social media sites. Further, it may take different forms like doxing where private information of individual or organizations is identified and posted on online mediums, without consent, for harassment in real life¹⁰ or cyberbullying where individual or group of individuals engage in aggressive and intentional act, targeting individuals who cannot defend easily defend themselves using electronic means¹¹ or identity theft where for the purpose of economic gain through fraud or deception, one tries to wrongfully procure and further uses the personal data of another person and so on and so forth.¹² Cyberstalking is also one of the most common and prominent means of online harassment which is defined as the act of threatening, harassing, or annoying someone using online mediums.¹³ Perpetrators use popular social media sites like Twitter, Facebook, Instagram to harass their targets.¹⁴

While foreign laws like New York Penal Code lays down definition of harassment in varying degrees – first degree harassment¹⁵, second degree harassment¹⁶ and aggravated harassment in first degree¹⁷,

8 *Harassment*, Black's Law Dictionary (8th ed. 2004).

9 Van Laer, Tom, *The Means to Justify the End: Combating Cyber Harassment in Social Media*, 123 J. BUS. ETHICS, 85 (2014), www.jstor.org/stable/42921476.

10 Maura Conway, Ryan Scrivens & Logan Macnair, *Right-Wing Extremists' Persistent Online Presence: History and Contemporary Trends*, INTERNATIONAL CENTRE FOR COUNTER-TERRORISM, (Dec. 17, 2020), www.jstor.org/stable/resrep19623.

11 Cotter, Pádraig & Sinéad McGilloway, *Living In an 'Electronic Age': Cyberbullying among Irish Adolescents*, 39 IRIS EIREANNACH AN OIDEACHAIS, 44 (2011), www.jstor.org/stable/41548683.

12 Department of Justice of the United States, <https://www.justice.gov/criminal-fraud/identity-theft/identity-theft-and-identity-fraud>, (last visited Dec. 18, 2020, 03:38 PM)

13 Cox, Cassie, *Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation through Prosecutions and Effective Laws*, 54 JURIMETRICS, 277 (2014), <https://www.jstor.org/stable/24395601>.

14 *Id.*

15 N.Y. Penal Law § 240.25 (McKinney 2009 & Supp. 2015).

16 N.Y. Penal Law § 240.26 (McKinney 2009 & Supp. 2015).

17 N.Y. Penal Law § 240.31 (McKinney 2009 & Supp. 2015).

second degree¹⁸ and by an inmate¹⁹, in India, absence of the word itself comes off as surprising. While definition of different types of harassment – sexual harassment and workplace harassment, find their presence in Statutes and judicial precedents, as discussed further in Part IV, the umbrella term ‘Harassment’ remains invisible. Similarly, different forms of Cyber Harassment such as identity theft or transmission/publication of obscene material without consent can be found in the Information Technology Act, 2000. However, the term Cyber Harassment itself is not laid down.

3. Problems Faced by Educators

In virtual space, harassment in the educational sector has become a common nuisance. In a news article by Times of India, a teacher of a famous school on Kanpur Road came forward with evidence of a student’s father texting and video calling at odd hours.²⁰ This is not a single incident. Many teachers are coming forward with traumatic experiences of being stalked by fathers online.²¹ Sexual harassment does not end here. Passing lewd comments by students via voice as well as chat boxes, posting pornographic pictures, taking screenshots of educators, giving links to strangers to join the online sessions have made the teacher’s workspace uncomfortable and unsafe.

The internet platform gives a sense of anonymity to people and they often end up doing things online that they would not do offline. There is less accountability and they do not have to take responsibility of the behaviour. This is supported by Dr. John Suler’s article on “online disinhibition effect” where toxic disinhibition refers to behavior one would not exhibit in offline spaces like rude language and threats which are often considered as major characteristics of online behavior.²² Them not being physically visible allows them to take any identity. This powerful veil of invisibility often makes students/ parents more susceptible to committing crimes like cyberstalking. Often education platforms allow the students to attend via pseudo names/IDs or remain anonymous. It makes it more difficult to trace them, let alone being reported and the mistreatment via chat boxes continue.

Authority comes via dressing sense, body language or position in society. The internet facilitates as a catalyst for minimization of status

18 N.Y. Penal Law § 240.30 (McKinney 2009 & Supp. 2015).

19 N.Y. Penal Law § 240.32 (McKinney 2009 & Supp. 2015).

20 Mohita Tewari, *Lucknow: Teachers face lewd comments, stalking during online classes*, THE TIMES OF INDIA (May 3, 2020), <https://timesofindia.indiatimes.com/city/lucknow/teachers-face-lewd-comments-stalking-during-online-classes/articleshow/75512888.cms>

21 *Id.*

22 J Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOL. BEHAV. 321, (2004) https://pdfs.semanticscholar.org/5f93/a22e95319608ca25f8ef28ce1a3a299055af.pdf?_ga=2.246876995.656299097.1595435082-1199867009.1595435082

and authority.²³ One doesn't have to keep their body language, their manner of speech in mind as against physical spaces. In India, teachers are greatly respected in schools and universities, thus, students tend to indulge less in harassing behaviours. The teachers' authority deems to become less with the remote access as they are less likely to feel intimidated. The educators are 'expected' to ignore all this in name of students 'having fun' or teachers keeping their composure and respect and delivering their lectures. The onus is put on them to self-police and ensure that private information is not leaked. Also, less reporting, as well as legal punishment coverage, tends to make perpetrators believe that they would be left off the hook very easily. This has distressed teachers to the level that they have decided to quit their jobs. According to Indian Express, at least 14 teachers in a school in Mysuru quit the profession citing being unable to bear the harassment from children.²⁴

4. Analysis of Existing Indian Laws

This part aims to analyze the existing legislative framework related to virtual harassment in educational sector by stating the law, examining their strengths and inadequacies in providing protection to our educators.

Legislations

a. Prevention of Sexual Harassment at Workplace Act, 2013

Vishaka²⁵ guidelines of 2013 were a game changer against sexual harassment which paved the way for prominent legislation of Prevention of Sexual Harassment at Workplace Act, 2013. It defined sexual harassment as *"unwelcome sexually determined behaviour (whether directly or by implication) as: (a) physical contact and advances; (b) a demand or request for sexual favours; (c) sexually-coloured remarks; (d) showing pornography; (e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature."*²⁶

This time was the crescendo of flooding discourse on sexual harassment which gave the courts the opportunity to develop more jurisprudence. Post Vishaka²⁷, judgements like Apparel Export Promotion Council v. A.K Chopra²⁸ and Medha Kotwal Lele v. Union of

23 *Id.*

24 Karthik K., *Lewd texts, bullying during e-classes leave teachers helpless*, THE NEW INDIAN EXPRESS (Oct. 15, 2020), <https://www.newindianexpress.com/states/karnataka/2020/oct/15/lewd-texts-bullying-during-e-classes-leave-teachers-helpless-2210363.html>

25 Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

26 Prevention of Sexual harassment Act 2013, § 2(n), No 14, Acts of Parliament, 2013 (India).

27 *Supra* note 27.

28 Apparel Export Promotion Council v. A.K Chopra (1999) 1 SCC 759.

India²⁹ gave clarity as well as perception to the already wide definition. It includes direct as well as implied sexual conduct which need not be physical only and the highlighting words being conduct which is 'unwelcome and unwanted' by the recipient emphasizing feelings of the victim.

For a woman to make a complaint under this act, it is necessary that the incident should have taken place at the 'workplace'.³⁰ The question arises, is the act broad enough to cover the virtual spaces? The answer lies in the section 2(o) of the Act of 2013 which is inclusive of the term 'dwelling place or house' within the definition of workplace. The argument presented is, the act has not expressly barred the inclusion of virtual space. Keeping in mind the legislative intention behind this act which is the promotion of a sense of safety amongst women to promote equality at workplaces as well as the adaptable nature of our laws, it would be inhibitory to construe otherwise.

While taking a liberal interpretation approach would be appropriate as well as beneficial to construe 'working from home at virtual spaces' included under the definition of the workplace,³¹ lack of precedents does leave room for doubts. Another problem is the focus on a single gender. India was not afraid to recognize the third gender³² and assert their rights and duties. Thus, it is the need of the hour to make all laws inclusive of all identities and neutral. Anyone can be the victim as well as the perpetrator of the cybercrimes regardless of their identities.

b. Information Technology Act, 2000

Section 66E deals with violation of privacy. It states "*Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished...*"³³ making online voyeurism felonious. Being an enabling provision and inclusive of all genders, if any educator feels that their obscene images without their consent are being transmitted or published, recourse to this section can be taken.

Section 67 that states that "*Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material*

29 Medha Kotwal Lele v. Union of India, (2013) 1 SCC 297.

30 Bhumesh Verma, *Decoding Posh: Analysis of India's Regime Against Sexual Harassment*, SCCONLINE (Dec. 18, 2020, 9:30 pm), <https://www.sconline.com/blog/post/2018/12/29/decoding-posh-analysis-of-indias-regime-against-sexual-harassment/>.

31 Rishabh Chhabria & Abhigyan Tripathi, *Prevention of Sexual Harassment at 'Online' Workplace*, THELEAFLET (Dec. 18, 2020, 10:00pm) <https://theleaflet.in/prevention-of-sexual-harassment-at-online-workplace/>.

32 NALSA v. Union of India AIR 2014 SC 1863.

33 I.T. Act, 2000, § 66E, No. 21, Acts of Parliament, 2000 (India).

*which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished.....*³⁴ and 67A that states that *“Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished.....”*³⁵ both deal with publishing or transmitting obscene, sexually explicit material via online text, chat, email etc. without the person’s consent. ‘Any material’ in section 67 would include video files, audio files, text files, images, animations etc. These may be stored on CDs, websites, computers, cell phones etc.³⁶ Lascivious is something that tends to excite lust and prurient interest is characterized by lustful thoughts.³⁷ These days it is very easy to superimpose someone’s face over photos and videos. Since educators have to show themselves during online sessions, they become vulnerable to getting clicked without their permission. This section would render the screenshots or pictures of the educators that get published after editing into obscene pictures, videos etc. punishable.

Section 66A of IT Act, 2000 was struck down in much celebrated *Shreya Singhal v Union of India*³⁸ by the Hon’ble Supreme Court upholding the freedom of speech and expression as the paramount of democracy. The apex court not only described liberty of thought and expression as cardinal, but also refused the pleas of the government to reshape the law, thus, granting freedom to the citizens from the clutches of power exploiting politicians.³⁹ But as every coin has two sides, this section did provide aid to genuine victims of cyber abuse and expeditious relief could be sought against the remarks that may be insulting.

Section 66A states *“any person who sends, by means of a computer resource or a communication device,– (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable.....”*⁴⁰

34 I.T. Act, 2000, § 67, No. 21, Acts of Parliament, 2000 (India).

35 I.T. Act, 2000, § 66A, No. 21, Acts of Parliament, 2000 (India).

36 ROHAS NAGPAL, COMMENTARY ON INFORMATION TECHNOLOGY ACT 276 (Asian School of Cyber Laws 2014).

37 *Id.*

38 *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

39 *Id.*

40 I.T. Act, 2000, § 66A, No. 21, Acts of Parliament, 2000 (India) invalidated by *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

While the courts have aptly recognized the vast and arbitrary meaning that could be conferred to the words ‘grossly offensive’ or ‘menacing characters’ were vague and the corresponding incidents of youth being arrested by politicians over harmless posts under this draconian law had to be stopped, the complete abrogation of this section has rendered the Police officers helpless in dealing with the growing problems of cyber harassment. The educators under this section could have easily reported for personal messages of harassing nature, posts published on public forums or sent with malicious intentions to insult or cause injury by students, parents or anyone else. This section would have also covered the emails, another easy source to harass the people engaged in educational sector. There is not an ounce of doubt that the S.66A was poorly construed and unconstitutional but by completely discarding the provision on the pretext of its potential misuse and the absence of a substitute provision, the Court has given rise to inadequacy in providing legal remedial mechanism to its common citizen while dealing with cyber-crimes.⁴¹

c. Indian Penal Code, 1860

Section 354C renders Voyeurism as a punishable offence- *“any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image1 shall be punished.....”*⁴² This section is corresponding to the section 66E of Information Technology Act, 2000, though the latter one enjoys broader spectrum as section 354C of IPC, 1860 only caters to female victims. Neither victims of other genders engaged in the educational sector find any relief nor can any offender other than a man be held liable under this section. Also, screenshots/videos do not fall under the definition of voyeurism under IPC⁴³ which has led to many incidents like that of a Kerala teacher whose screenshots were distributed and people used sexual innuendos and harassed the teacher.⁴⁴

Cyberstalking finds its remedy in 354D. It states that *“any man who (a) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; (b) monitors the use by a woman of the internet, email or any other form of electronic communication, commits*

41 S. K. Ali, *Examination of Section 66A of the Information Technology Act*, SOCIAL SCIENCE RESEARCH NETWORK (Dec. 17, 2020), <https://ssrn.com/abstract=2209119>

42 Pen. Code, § 354C, No. 45 of 1860, Acts of Parliament, 1860 (India).

43 RAJDEV, *Supra* note 6.

44 Raghav Bahl, *Enough is Enough: Kerala’s Women Teachers Harassed Online*, THE QUINT (Dec. 18, 2020, 10:11 PM), <https://www.thequint.com/neon/gender/kerala-women-teachers-harassed-online>.

*the offence of stalking....*⁴⁵ While this section does help the women educators against people infringing upon their privacy, it again fails to be gender neutral both for victims as well as perpetrators. Also, there is no elucidation on 'method of monitoring'. The actions may still amount to stalking despite lack of intention on part of the other person.⁴⁶

Section 507 states that "*Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished....*"⁴⁷ It prescribes that if a person who conceals his/her identity and threatens the victim, will be held liable.⁴⁸ The words 'anonymous communication' can be construed as being inclusive of communication via electronic mode. The stalkers online often engage in persistent yet anonymous communication. So, if an educator remains unaware of the source of harassment, the culprit can be held liable. But often typical cases of bullying and trolling online which involve insulting, injurious, annoying speech may not fall within the purview of defamation or criminal intimidation, especially when the communication contains angry, grossly teasing, insulting remarks between two persons; one of whom may be attacked by the other with such remarks, and not particularly grossly offensive comments which may lower the reputation or morale of the victim in front of a third party.⁴⁹

Even a word, gesture or act intended to infringe privacy of a woman will be held liable under section 509 stating "*Whoever, intending to insult the modesty of any woman, utters any words, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman shall be punished...*"⁵⁰ Though gender insensitive, this provision does include privacy infringement via messages, emails any other online mode punishable. Any educator aggrieved of harassment may take recourse to remedies provided in the abovementioned sections. But they are subject to interpretation and leave room for many lacunas.

Issues

After analyzing the current legislative framework for addressing the present issue, the obvious lacuna is the lack of consolidated legislation. The laws present are all scattered and subject to interpretations. There

45 Pen. Code, § 354D, No. 45 of 1860, Acts of Parliament, 1860 (India).

46 Heena Keswani, *Cyber Stalking: A Critical Study*, 5 Bharati Law Review, 131, (2017), http://bharatilawreview.com/uploads/9Heena_Keswani_131-14811.pdf

47 Pen. Code, § 507, No. 45 of 1860, Acts of Parliament, 1860 (India).

48 HEENA, Supra note 46.

49 Mst. Ramdhara v. Mst. Phulwatibai, 1967 SCC OnLine MP 67.

50 Pen. Code, § 509, No. 45 of 1860, Acts of Parliament, 1860 (India).

are no profound precedents in form of judgements either, despite increasing number of complaints. The present laws are insufficient to hold the culprits liable.⁵¹ The lewd comments which are the most common form of harassment in the educational sector escape the liability under the IT act very easily. Other acts also do not provide any concrete laws to address the cyber harassment faced by the people engaged in the educational sector.

Secondly, jurisdiction in cybercrimes is a never-ending issue. The perpetrator and victim can be in different parts of the country or the world, which makes it very difficult to determine which police station would have the power to take cognizance of the offence. In the educational sector also, teachers either use the internet facilities of the place of the educational institution or of their own place and the offender with anonymous identity or under pseudo names or even the students may be residing or using internet from a completely different area. Though many sections of the IT Act, 2000 like sections 46, 48, 57 and 61 where the process of adjudication and the procedure related to appeals and allied process are mentioned and section 80 that encapsulates the power of the police officers to enter and conduct a search of a public place in the relation of a cyber-crime etc. do mention the jurisdiction but still there is a lack of clarity which often results into police officers avoiding taking such complaints into account rendering victim helpless.

Thirdly, the laws fail to take all the genders into account. The educational sector may be dominated by the female gender, it does not mean that men or people from the LGBTQ community cannot be the victims and the same is true for perpetrators. An offender is a wrongdoer and the victim needs justice regardless of their gender. While one witnesses better steps in this direction through the provisions of the IT Act (example section 66E of IT act and section 354C of IPC both deal with voyeurism but only former addresses victim as 'any person' instead of a woman⁵²), Indian Penal Code and Sexual Harassment at Workplace Act has miles to go.

Fourthly, there exists a fine line between freedom of speech & expression and sexually harassing words/gestures. Article 19(1) (a) is a fundamental right bestowed upon us by our constitution. Our courts have always tried their best to preserve its integrity which is evident by the declaration of section 66A of the IT Act as unconstitutional by the Supreme Court as it was being used as a tool to curb government dissent.⁵³ While it was appreciated that the poorly worded provision

51 RAGHAV, *Supra* note 44.

52 HEENA, *Supra* note 46.

53 Anonymous, *Submission on Online Violence Against Women to the Special Rapporteur*

was got rid of, it opened a hell hole for the scope of online harassment to go unpunished.⁵⁴

With rights comes responsibility. This message is very clear by the fact that with every provision for Article 19, there exist certain restrictions simultaneously. What may feel like a joke to one, may be harassment for other. The words of Delhi High Court on this issue as “conduct that many men consider unobjectionable may offend many women... Men tend to view some forms of sexual harassment as harmless social interactions...”⁵⁵ accurately puts this idea into words. Jokes colored in sexually harassing remarks are ‘expected’ to be taken as jokes, trying to dismiss the feelings of the victim by describing them as ‘oversensitive’. This entitlement often leads to people charged with sexual harassment taking a plea of this defense. But no one’s right is above someone’s reputation and mental well-being. The untimely video calls, the stalking, the comments by parents/students towards educators do not grant them any protection under the said provision as it is not an absolute right.⁵⁶ It has to be exercised responsibly and does not entitle anyone to make comments/gestures to harass the victim.⁵⁷

5. Best International Practices

a. Foreign legislations that deal with online misconduct

Sameer Hinduja and Justin W. Patchin in their Criminal Justice Program conducted a study at the University of Wisconsin-Eau Claire which showed figures regarding instances of cyberbullying and the reporting of such cases. The figures were 36.5 % for the first and 17.4 for the latter.⁵⁸ There has been a 100% increase in these figures since they have been reported in 2007 and both represent an increase from 2018-2019, suggesting that we are handling the situation in an ineffective way when it comes to stopping harassment on virtual platforms. The same report also has recorded that 87 percent of the test groups have seen harassment occur on a virtual platform.

The question we need to ask is, if cheap and readily available internet has created a vast influx of users on many platforms, including access to education in an unprecedented time as this global pandemic, should

on Violence Against Women ITFORCHANGE (Dec. 18, 2020, 10:20 PM), https://itforchange.net/submission-on-online-violence-against-women-to-special-rapporteur-on-violence-against-women#footnote31_036kk1t.

54 *Id.*

55 Punita K. Sodhi (Dr.) v. Union of India (2010) 172 DLT 409.

56 Earle, Beverly & Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BJELL 282, (1997), <https://www.jstor.org/stable/24050742>.

57 Teggart v TeleTech UK Ltd (2012) 11 NIIT 00704 (UK).

58 Patchin, J. W. & Hinduja, S. It is Time to Teach Safe Sexting. 66 Journal of Adolescent Health 140, (2020).

there exist regulations for the conduct of individuals on these said platforms. India has approximately 560 million internet users which is second highest recorded, second only to the most populous country in the world, China.⁵⁹ And to leave such a vast demographic without any accountability of their actions will be an entirely regressive step and should immediately be corrected by introducing precise legislation to deal with matters regarding the conduct of individuals on virtual platforms.

b. International legislative measures

Being a progressive state is imperative for the protection of the rights of citizens from the ever-growing lawlessness. This lawlessness is not necessarily related to the existing laws, but rather the scope of laws. The phenomenon of cyberbullying as an offence that falls in line with harassment, such a phenomenon is still at a nascent stage and is likely to grow in the future, we should draw inspirations from USA where most states have school/college sanctions (with the inclusion of criminal penalties for the extreme cases) for cyberbullying or harassment over a virtual space. A major drawback, that being, sanction for such harassment when committed off-campus, is still to be implemented. Legislations such as California Code, Education Code, known as the “Safe Place to Learn Act” establish a student’s “inalienable right to attend classes on school campuses that are safe, secure, and peaceful.” The use of “an electronic communication device” to cause someone to fear for their life is charged as a misdemeanor, punishable by up to one year in jail and/or a fine of up to \$1,000.⁶⁰

In the state of Florida, USA, the legislation on virtual harassment/cyberbullying also encompasses the staff members in its protection. The said legislation is “Florida Statutes Title XLVII, K-20 Education Code” which puts restriction on bullying of any student or staff member from kindergarten till 12th standard, putting special emphasis on cyberbullying which is stated as “bullying through the use of technology or any electronic communication.”⁶¹

In the United Kingdom, the first instance of protection offered in cases of harassment in virtual space is from a legislation of the year 1988 which was later amended to include online communications in its ambit. The legislation is the Malicious Communications Act 1988. The act in its very first section describes as to what form of communication falls under its ambit, it reads “offence of sending letters etc. with intent to cause distress or anxiety.”⁶² And any person who has indulged

59 INTERNET USAGE IN INDIA, <https://www.statista.com> (last visited Dec. 18, 2020).

60 Cal Education Code, § 234 (West 2011).

61 Fla Education Code, Title XLVIII, § 1006.147 (West 2011).

62 Malicious Communications Act 1988, § 1 (UK).

in communication in form of a “letter, electronic communication or article of description which conveys a message” and its nature has to be “indecent or grossly offensive, a threat or information which is false” and the objective of such a communication has to be to cause

“distress or anxiety” to the intended recipient or any other. Electronic communication, as per this section, will cover any form communication made orally or by speaking through a network like a zoom or teams call; any communication that is sent through electronic means like a message or email. Also, emphasis is on when liability starts, that is, when the sender has made the transmission on his end, completion of transmission is not necessary.

In the aforementioned legislation, it is clearly and precisely stated that any distress or anxiety caused by electronic communication is punishable, and the term “electronic communication” itself is also explicitly defined, hence leaving no requirement of interpretation of existing laws (laws pertaining to civil or criminal offences) to include harassment in virtual space.

In the United Kingdom, harassment over virtual space is an offence of criminal nature. The citizens of that state can report such cases to the local authorities, whose role then is to launch an investigation and compile and submit their report to the Crown Prosecution Service (CPS), then the CPS if they deem the matter is worthy of being administered in the court of law. The conduct of the local authorities like the police force is of prime importance in their role of dealing matters of cyber-harassment. Though there have been many instances of victims reporting that the investigating authorities were of little to no help.⁶³

Such perpetrators in the UK can be prosecuted under two acts, these are the Protection from Harassment Act 1997 (PfHA) and the Protection of Freedoms Act 2012 (PoFA). Even though cyber-harassment has not been defined or explained anywhere in the PfHA, still it is within the scope of the act to prosecute such offences under it. Not having explicit authority over such matters under this act have resulted in uncertainty and vagueness in regards to matters concerning cyber-harassment. The PoFA, which was enacted after the PfHA somewhat corrects the situation as it explicitly states actions that will result in cyber-harassment. Though the major lacunas remain, offences committed by unidentified individual/s and offences committed from outside the jurisdiction of the UK courts.⁶⁴

63 A. Burgess W. & T. Baker, *Cyberstalking and Psychosexual Obsession: Psychological Perspectives for Prevention, Policing and Treatment*, West Sussex (2002).

64 M. Salter & C. Bryden, *I can see you: harassment and stalking on the Internet*, 18 Information & Communications Technology Law 99, (2009).

6. Proposed Solutions

The educators are not the only people that compose the whole educational sector. Government, management of institutions, students as well as parents are also part of the same system. The problem may be new but the consolidated efforts would gradually bring the change. Therefore, following are the recommendations:

Firstly, even though there are many laws in our country that can be interpreted by the courts to give punishment for the commission of cyber harassment and redressal or compensation to the victim, but the lack of actual legislation has left the matter to be dealt on a case-by-case basis without any solid ground to fall back upon. Even as academicians of law, we cannot positively say that the said action committed will most definitely be punished as it amounts to some form of cyber harassment. It is at the discretion of our county's judicial officers to determine that.

As a common law country, judicial precedents hold significant standing in terms of laying down law, or better yet the interpretation of the law, but the idea of introducing specific legislation or legislation as the need be, cannot be overlooked. Cyber harassment is not a newer phenomenon and the law shall adapt to it. The structure of the legislation to be introduced should be two-fold. First, the legislation should focus on definitions of certain phrases, the most important among them will be "harassment", "cyber harassment" (this will be the wider ambit that deals with all the relative terms), "cyber stalking", "sender", "receiver" and "electronic communication".

These terms and phrases will lay down a solid foundation for this legislation. The inspiration for these should be drawn from the existing laws that deal with the physical form of such abuses. The caveat would be the inclusion of "electronic communication" which will encompass every mode from simple text messaging to application-based communications, basically covering every form of communication that is not physical.

Second, the legislation should cover specific instances regarding the issues. For example, the applicability of such in educational institutions, school and higher education should be dealt with differently as in the case of schools almost everyone is a juvenile. "Cyber bullying" should be an aspect of this part of the act. Express protection of such should also be extended to the staff of the said institutions. To sensitize teaching staff as well as the students, online/offline sexual harassment prevention training at educational institutes is also recommended. It will be a chance for students to better understand the struggles of the educators and what may construe as fun in their youth days for them, may be harassment for their teachers. This will also educate them about appropriate behavior in their future workplaces.

Third, proper dress codes for teachers when teaching via online mode are also advised like Hon'ble Supreme Court have made appropriate dress code compulsory for online hearings.⁶⁵ It gives a more formal setting to the environment. The conversations should have strictly adhered to the professional work. Compulsory recording of the lectures/meetings is also suggested. It would mitigate verbal harassment via microphone.

Fourth, the online platforms can also be advised to add certain features to minimize this issue like the banning of the practice of allowing anonymous entry/entry with pseudo names to online lectures. Either use of software like Microsoft Teams with automated accounts of the students should be used or there has to be a mechanism to compulsorily give the real ID/names to attend classes. This would make it easier to track the perpetrators. Group chat boxes should have regulations that prevent use of certain words/uploading media to minimize sexually harassing remarks. Also, the software should have the provision of screenshots being disabled.

Fifth, educational institutions themselves should have strict anti-sexual harassment policies accompanied with a welcoming atmosphere for the victims. Even during situations like pandemic, there has to be an online internal complaint committee. This would help the teachers to come forward with their complaints and act as a deterrence towards students. Parents also must keep a check on their children during online classes.

Sixth, another important aspect is the amendment in the existing laws, such as "Vishaka Guidelines" dealing with sexual harassment at the workplace to include the electronic communications aspect to it. Punishment as applicable in the vast array of cases should have a notion of creating deterrence as only redressal and compensation will not prevent the commission of such offences. Spreading awareness about the same is critical in successfully tackling this menace as not everyone is aware enough to look up these things by him/herself. It should be the duty of the government to make people understand the severity of these offences and the consequences of committing them.

Lastly, a stronger redressal mechanism is recommended. With courts embracing online hearing as a new norm, cyber courts/tribunals to address these rising issues for speedy delivery of justice is not a far-fetched idea, rather is the need of the hour.

65 Supreme Court of India, F. No.06/Judl. /2020, issued on May 13, 2020.

7. Conclusion

Cyber Harassment in the educational sector is witnessing a surge due to recent times under the Corona pandemic. While the legislative mechanisms in the form of Sexual Harassment at Workplace Act gives scope to address this issue at virtual workplaces, if interpreted liberally, different sections in Indian Penal Code, 1860 as well as Information Technology Act, 2000 scattered throughout leaves a bitter taste and longing for consolidated legislation for better implementation. Veil of internet encourages people to exhibit behaviors they would not offline, thus, increasing the chances of cyber harassment online. The battle of right of speech & expression against harassment at virtual workplace does not choose the former as winner as speech cannot be protected at all costs.

Thus, it is strongly recommended to protect the educators through sensitization and training at the school levels itself, both for teachers and students. The use of better technology and reducing anonymous interference would further help the educators. Legally, stronger redressal forums both at the institute as well as societal level will create a welcoming atmosphere for victims. The present legal framework definitely is insufficient to handle this increasing problem and changes will be brought only with the consolidated efforts of authorities at the governmental, educational as well as legal level.

Propelling the Boundaries of Gender: Surpassing Statutory Limitations through Judicial Activism

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Abstract

Indian Judiciary has kept its oath of being the custodian of fundamental rights, exercising judicial activism to surmount the obstacles to an egalitarian society and safeguarding women's rights in various fields like employment, bodily autonomy, marriage etc. However, in the contemporary world gender equality is not limited to the gender binary, with the evolution of the concept of gender identity, and since 2014 Indian Judiciary has pronounced judgements which have expanded the scope of gender in India. However, despite these progressive judgements, gender minorities require special and explicit protections to overcome the stigma and discrimination. This article discusses the inception of gender, gender identity, gender neutrality etc. across the Indian legal system, identifying the institutional acceptance of gender binary and its repercussions on legal rights of gender minorities and how gender neutrality in the legal system and education might be the key to liberation and parity. This article also discusses the Special Rapporteur reports on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 2018 & 2019, to stimulate dialogue on gender neutrality as the catalyst to achieve gender equality.

KEYWORDS: Gender Identity; Gender Equality; Gender Neutrality; Feminism.

1. Introduction

The idea of gender as a separate entity independent of sex, joined the sociological discourse categorising male-female differences by the end of 1960's. This concept was the product of the materialization of the feminist ideology; with the rise of the women's liberation movements. Women historians from the past who wrote about the conceptualization of feminism often talked about it as a movement recognised as a rebellion by some, against the patriarchal pillars upon which the social structure existed in those times. The movement of feminism started

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with a diligent and stern appeal for suffrage during the late 19th and early 20th century, also termed as the “first wave feminism”, this era helped mobilization of feminism and allowed it to catch momentum in the prevailing political scenario.¹ Having said that other feminist scholars have opined that resistance against male domination isn’t a new phenomenon. Our history is full of instances or incidents which fall beyond the demand for political autonomy. However, those movements are not considered “feminist movements”. Thereby discouraging the acknowledgment of rich feminist and equality-oriented movements which have thrived through history and across nations. The feminist waves were “revived” in the late 1960s and early 1970s, described as the “second wave” and the “third wave” respectively, the agenda was simple, the inclusion of women into the mainstream including, jobs, political power, rights and liberties.² Though in today’s common parlance feminism must strive to end all the oppression that affects women that would lead to gender parity.

Julia Gillard, the former Prime Minister of Australia once said “Gender equality is not a Women’s issue; it’s good for men too.”³ The editors of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*⁴ gave an encyclopaedic statement, “*Feminism is both a movement and a mode of inquiry. In its best and most capacious form, feminism embraces justice for all and seeks to ally itself with rights-based movements for people of colour, the poor, immigrants, refugees, religious minorities, disabled individuals, LGBTQ+ people, and other historically marginalized groups.*” Gary Barker, CEO & founder of Promunda while expressing his opinion on feminism to UN women stated, “*Feminism is not men against women, it is not women against men, it’s all of us in this together. That to me is what gender equality means.*”⁵ Therefore, today the international community urges that Feminism as a phenomenon should strive for holistic gender parity by not confining itself to a battle between women and men, but emerging as a battle against the social and political structure which supports gender-based oppression in all factors of life and uplifting every gender howsoever recognized or ambiguous.

1 “History and Theory of Feminism”, GWAnet Central Asia, available at: http://www.gender.cawater.info.net/knowledge_base/rubricator/feminism_e.htm (accessed on June 5, 2020).

2 Rekha Pande, “The History of Feminism and Doing Gender in India”, vol. 26, (2018), SciELO, available at: <https://doi.org/10.1590/1806-9584-2018v26n358567> (accessed on June 5, 2020).

3 Pascual Martinez, “Being a man in a woman’s world: gender equality should also involve men”, (2020), COFACE Family Europe, available at: <http://www.coface-eu.org/work-life-balance/gender-equality/being-a-man-in-a-womens-world-gender-equality-should-also-involve-men/> (accessed on June 5, 2020).

4 Kathryn M. Stanchi, Linda L. Berger, Bridget J. Crawford, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016).

5 Gary Barker, “Ask an activist: What does it mean to be a man and a feminist?”, UN Women, available at: <https://www.unwomen.org/en/news/stories/2019/6/ask-an-activist-gary-barker-men-and-feminism> (accessed on June 5, 2020).

1.1 Gender and Sex: Two sides of the same coin

Keeping the works of early 'gender historians' in mind, one can understand that the concept of gender is different from sex as it's a social phenomenon, sex is purely biological, defined at the birth of a child.⁶ The idea of gender sprouts when people begin to feel or condition themselves to be "masculine" or "feminine"⁷; gender is thus conditioned by socialization, mental and cognitive growth and awareness. Gender as a phenomenon has not been defined anywhere, it can be understood with regard to its distinctions from "sex" and further, gender cannot be studied or defined in isolation. Gender encompasses a kaleidoscopic entourage of social behaviours, self-expression and conduct, social interaction, etc. **World Health Organization has understood gender as** "Gender refers to the roles, behaviours, activities, attributes and opportunities that any society considers appropriate for girls and boys, and women and men. Gender interacts with, but is different from, the binary categories of biological sex."⁸

According to **Canadian Institute of Health Research (CIHR)**, gender has been described as the roles one plays or how they socialise, thereby putting emphasis on social interaction, CIHR has clearly stated it as:

The socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people; It influences how people perceive themselves and each other, how they act and interact, and the distribution of power and resources in society. Gender identity is not confined to a binary (girl/woman, boy/man) nor is it static; it exists along a continuum and can change over time. There is considerable diversity in how individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, relations with others and the complex ways that gender is institutionalized in society.⁹

1.2 Development of Gender: Evolution of Gender Identity:

The **American Psychological Association** in 2009, described Gender identity as "the person's basic sense of being male, female or

6 "Understanding Sex and Gender", University of Minnesota, Libraries, available at: <https://openlib.umn.edu/sociology/chapter/11-1-understanding-sex-and-gender/> (accessed on April 4, 2021).

7 "Understanding Sex and Gender", University of Minnesota, Libraries, available at: <https://openlib.umn.edu/sociology/chapter/11-1-understanding-sex-and-gender/> (accessed on April 4, 2021).

8 "Gender", World Health Organization, available at: <https://www.who.int/health-topics/gender> (accessed on June 1, 2020).

9 "What is gender What is sex?", CHIR, available at: <https://cihr-irsc.gc.ca/e/48642.html> (accessed on June 1, 2020).

of indeterminate sex.”¹⁰ This definition seems a little restricted and doesn’t really encompass the concept of gender identity in its true sense. Gender identity refers to the personal perception of being male, female, transgender etc. It is self-determination of one’s own gender, regardless of their sex. When an individual has a similar gender identity as their sex, they’re termed as ‘cis-gender’ individuals¹¹. Gender identity is a wide concept and propagates liberation in terms of gender determination.

According to Justice K.S. Radhakrishnan, as stated by him in the **NALSA (2014)**¹² case, Gender identity is a fundamental aspect of life and he opined that:

Gender identity is one of the most fundamental aspects of life which refers to a person’s intrinsic sense of being a male, female or transgender or transexual person. A person’s sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.¹³

Another striking feature of this judgement is how Justice Radhakrishnan carefully distinguished between gender identity and sexual orientation and he carefully mentioned that:

Sexual orientation, on the other hand, refers to an individual enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals and asexual, etc. Gender identity and sexual orientation are different concepts. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.¹⁴

10 Carla Moleiro and Nuno Pinto, “Sexual orientation and gender identity: review of concepts, controversies and their relation to psychopathology classification systems”, *frontiers in psychology* available at: <https://www.frontiersin.org/articles/10.3389/fpsyg.2015.01511/full> (accessed on 1 Jun, 2020).

11 “Definitions” Free & Equal UN, available at: <https://www.unfe.org/definitions/> (accessed on 1 Jun, 2020).

12 5 SCC 438 SC (2014).

13 5 SCC 438 SC (2014).

14 5 SCC 438 SC (2014).

While many might not agree with the manner how Justice Radhakrishnan has defined sexual orientation or gender identity, the judgment is one of a kind to provide explicit recognition to gender diverse people and is a part of a long trial of subsequent judgments which expanded the scope of gender and sexual liberty in India. On a holistic inspection of our legal system, we notice that little is gender neutral especially in literature, laws and actions etc. Subsequently, this has caused a divide in our markets, education system, laws and other pillars of the society, amplifying the ordeal experienced by people who are gender-based minorities.

1.3 Gender Equality: The Recognised Sustainable Development Goal

The UN in its Gender Equality: Glossary of Terms and Concepts, November, 2017, expounded “Gender Equality” as a concept which entails holistic development of Men and Women by stating:

The concept that women and men, girls and boys have equal conditions, treatment and opportunities for realizing their full potential, human rights and dignity, and for contributing to (and benefitting from) economic, social, cultural and political development.¹⁵

The document further elaborates:

Equality does not mean that women and men will become the same but that women’s and men’s rights, responsibilities and opportunities will not depend on whether they are born male or female.¹⁶

The **ILO** considers gender equality a key element of its vision of decent work for all, toward social and institutional change to bring about equity and growth.¹⁷ The SDG- 5 deals with achieving gender equality and empowering all women and girls; somewhere leaving other Gender identities behind. The purview of the word gender has a wide interpretation and it should not restrain itself to one gender or a few, its ideals should be growth and empowerment of all the gender simultaneously. Gender equality is at the very heart of human rights and United Nations values.¹⁸

Gender equality calls for holistic inclusion and isn’t limited to women empowerment only. India is a signatory to various Human Rights oriented international covenants like ICCPR, CESR to name

15 “Gender Equality”, UNICEF, available at: <https://www.unicef.org/gender-equality> (accessed on June 7, 2020).

16 “Gender Equality”, UNICEF, available at: <https://www.unicef.org/gender-equality> (accessed on June 7, 2020).

17 “ILO Vision on Gender Equality”, ILO, available at: <https://www.ilo.org/public/english/bureau/gender/newsite2002/about/index.htm> (accessed on June 7, 2020).

18 “Women’s Human Rights and Gender Equality”, OHRC, available at: <https://www.ohchr.org/en/issues/women/wrgs/pages/wrgsindex.aspx> (accessed 7 June, 2020).

some. These instruments have contributed to the development of gender equality over the years. Despite being an active player in the international community, India is yet to promulgate gender neutral laws.¹⁹ Gender equality talks about all the genders to be treated on an equal footing. Nevertheless, it is not talking about any specific gender (irrespective of the fact special emphasis can be given to one), gender neutrality does not mean abrogation of the protective legislations, giving to women in particular but advocates for inclusion of every gender – minority or majority into the sphere of protective legislation.

2. Judicial Activism in India to achieve Gender equality:

2.1 Concept of Gender in India: Microscopic Examination of the Fundamental Rights:

Article 14 of the Indian Constitution extends “equality before the law and equal protection of the law, to every person and that the state shall not deny the same to any person.”²⁰ In the **NALSA** case, the Supreme Court vehemently held that “transgender persons should be understood to mean persons under article 14 of the Constitution”²¹, Article 15 of the Constitution talks about the prohibition of discrimination on various grounds like sex, race, religion, etc.²² However, this article has failed to expressly include the term “gender”, confining the meaning of gender as synonymous to sex.²³ Hence, one can say that Article 15 does not protect identities beyond the gender binary.

Further, Article 15(3)²⁴ enshrines, the sensitivity of the State illustrates towards “women and children”, explicitly extending the idea of “protective discrimination”, a blanket of extra care and protection to persons who are vulnerable to exploitation, discrimination and abuse. Under this particular clause, we see that women of all ages and all children (according to the Indian Majority Act, a person below the age of 18)²⁵ are protected. While, women and children are susceptible to heinous violence, abuse and discrimination, not extending this blanket of protection to gender-based minorities is a huge miscarriage of justice. Through Article 16, we notice that the Government has envisaged a society with “equal opportunities for all persons in employment under public sector”²⁶, Article 15(2) expressly prohibits discrimination on the basis of “race, sex, place of birth, caste”²⁷ but does not include “gender”

19 Rebecca Rajan, Gender Equality and Gender-Neutral Laws: The Future of Social Justice in India, *IJLLS*, 19, (2017).

20 India Const. Art.14.

21 5 SCC 438 SC (2014).

22 India Const. Art.15 cl.2.

23 *Ibid.*

24 India Const. Art.15 cl.3.

25 The Majority Act, Act 09 of 1875, § 9, (1875).

26 India Const. Art.16.

27 India Const. Art.15 cl.2.

as a factor, further, most of the gender minorities, face exclusion from the social discourse, discrimination in employment, etc. A report by the **World Economic Forum from 2017** cited that India experiences a loss of about \$32Billion (USD) in GDP every year because of the discriminatory treatment towards gender minorities and specifically the LGBT community.²⁸ Article 21, is the all-golden fundamental right which bestows upon “every person, within the territory of India, the Right to life and liberty.”²⁹ Further, in the landmark judgment of **Arun Kumar v. The Inspector General of Registration**,³⁰ Justice Swaminathan said, there are as many as 58 gender variants beyond the man-woman “binary”. Enlightening with a broader approach he stated:

When a child is born, it is usually endowed with male genitalia or female genitalia. But there are children who are born with genitalia that belong to neither category. They are known as intersex children. They must be given their time and space to find their true gender identity.³¹

The freedom of being identified as male, female or transgender or any other gender is one’s personal right enshrined under Article 21 of the Indian Constitution. Living a life of dignity coupled with recognition of individual identity forms the crux of the Right to Life.

2.2 Statutes on Recognition of Gender identities

Section 13(1) of the General Clauses Act, 1897 asserts “words importing the masculine gender shall be taken to include females.”³² This definition has given a tunnel vision to view gender as a binary concept, thus satisfying the societal norms and restricting the scope to two sexes- male and female. The declaration by the Ministry of Law in 2017, to include the transgender persons under the definition of “persons”³³ broached in the GCA, 1897 stands in non-compliance with the NALSA judgment of 2014. The remarks of the Ministry of Law were a response to the special legislative changes proposed by the Ministry of Labour & Employment as a positive move to recognize transgender people in the mainstream, introducing special clauses for recognizing the rights of transgender workers in all four labour codes. The NALSA judgment encompasses the transgender persons to be treated as third genders. Justice Sikri was more vehement, in his separate judgment: “As TGs in India are neither male nor female, treating them as belonging to either of the aforesaid categories is the denial of these constitutional

28 Charles Radcliffe, “The real cost of LGBT discrimination”, available at: <https://www.weforum.org/agenda/2016/01/the-real-cost-of-lgbt-discrimination/> (accessed June 1, 2020).

29 India Const. Art.21.

30 Writ Petition (MD) No. 4125 of 2019 decided on 22.04.2019 by Madras High Court.

31 Arunkumar v. The Inspector General of Registration, Writ Petition (MD) No. 4125 of 2019 decided on 22.04.2019 by Madras High Court.

32 The General Clauses Act, Act 10 of 1897, § 13(1), (1897).

33 The General Clauses Act, Act 10 of 1897, § 3 cl. 42, (1897).

rights. It is the denial of social justice which, in turn, has the effect of denying political and economic justice.”³⁴Therefore, the Government showed hesitation in expressly recognising Transgender persons in progressive legislations, which is an antithesis to progressive and expressive protection and care to gender minorities.

Section 8 of IPC, 1860, explicates “gender” as “the pronoun “he” and its derivatives are used for any person, whether male or female.”³⁵ This compartmentalization of “any person” stating as either male or female has overshadowed the wider scope of gender, correlating this to section 10³⁶, we find something similar, extending recognition to men and women only and thus, have kept other gender identities out of the purview of the penal code. The argument arises on the platform of the provisions of IPC, 1860, pertaining to Rape, Sexual Harassment, Sexual Abuse and so on, to be gender specific. These offences have elucidated a presumption that it is always a woman who is the victim and a man to be the sole perpetrator, keeping the whole arena of other genders out of the purview. It cannot be denied that such legislations were enacted keeping in mind the women’s freedom which has been in a trampled state through ages, while women are definitely prone to sexual, economic and other dimensions of violence, the presumption that such skewed power equations can only be over a woman is the restricted view of reality.

When we give a preliminary reading to POCSO Act, 2012, unlike rape, a victim under the POCSO Act can be any child irrespective of gender, thus, making it gender inclusive, and giving priority to the protection of dignity, health and innocence of children irrespective of gender. However, at the same time, the definition under section 3³⁷ only recognises “penetrative sexual assault”, thus, completely turning a blind eye to the fact that even women can sexually assault children of any gender.

Coming into force 10th January, 2020 onwards, **The Transgender Persons (Protection of Rights) act**, 2019 is hailed as a progressive and inclusive attempt by the Government to afford protection to Transgender community, however, it was also subjected to scrutiny and disfavour by the said community. U/s 2(k) plainly put any gender identity not being “cis gender” is termed as “transgender person”³⁸, thus putting the entire gender minority which doesn’t conform to “cis- gender” inside a cage made out of regressive bars. S. 4(2) of the act states that a transgender person shall have the right to a self-

34 NALSA v. U.O.I, 5 SCC 438 SC (2014).

35 Indian Penal Code, 1860, Act 45 of 1860, § 8, (1860).

36 Indian Penal Code, 1860, Act 45 of 1860, § 10, (1860).

37 The Protection of Children from Sexual Offences (Amendment) Act, Act 25 of 2019, § 3, (2019).

38 The Transgender Persons (Protection of Rights) Act, Act 40 of 2019, § 2(k) (2019).

perceived gender identity³⁹, however, u/s 6(1) the District Magistrate will issue a certificate of identity, “recognising the person’s gender a transgender”⁴⁰, thus limiting the freedom of gender determination and identity. Further, in order to be recognised as a man/woman, a proof of compulsory medical procedure for transition is required to be identified as a “man or woman.”

Furthermore, The Transgender Persons (Protection of Rights) Act, 2019, categorically deals with the rights of transgender people, u/s 18 the act provides certain protections to transgender persons like-compelling or forcing a transgender person into forced labour, forcing them out of their home, obstructing the right to passage and/or injuring/hurting/ causing physical/sexual abuse against their person is punishable with imprisonment ranging b/w 6 months to 2 years.⁴¹ The government has failed to provide any logical reason as to why, sexual abuse on a transgender person is not treated the same way as of a woman, while the rape of men also remains taboo, and extending such menial protection seems satirical. An eye-opener to it is that as per IPC, 1860 if the victim of rape is a woman, then the punishments are quite stringent, extending from 7 years up to imprisonment for life with a fine.⁴²

2.3 Judicial interpretation and gender equality

The Apex Court in **Vishaka V State of Rajasthan**⁴³ imbibed the ideals of CEDAW, and examined Part IV of the Constitution with a feminist lens, providing consideration to the provisions envisioned under Article 15(3)⁴⁴. It paved the way for judicial activism and law making and the Vishaka guidelines continued for very long to address harassment at work place even when legislations continued to be mute on the issue, the judiciary recognised the importance of livelihood and a safe place to earn it and accordingly giving prominence to Article 21 constructed guidelines to protect women in the workplace. The judicial activism, infused with feminist ideology also addressed the issue related to child prostitutes and children of prostitutes. **In Gaurav Jain**⁴⁵, The Supreme Court ordered the government to establish Child Development Centres to rehabilitate children of prostitutes and child prostitutes so that they can get access to education, medical care etc. In this case, Justice K. Ramaswamy observed that:

The prostitute has always been an object and was never seen as

39 The Transgender Persons (Protection of Rights) Act, Act 40 of 2019, § 4(2) (2019).

40 The Transgender Persons (Protection of Rights) Act, Act 40 of 2019, § 6(1) (2019).

41 The Transgender Persons (Protection of Rights) Act, Act 40 of 2019, § 18, (2019).

42 Indian Penal Code, 1860, Act 45 of 1860, § 376, (1860).

43 6 SCC 241 SC (1997).

44 India Const. Art.15, cl.3.

45 8 SCC 144 SC (1997).

a complete human being with the dignity of a person; as if she had no needs of her own, individually or collectively. Their problems are compounded by coercion laid around them and tortuous treatment meted out to them. When they make attempts either to resist the prostitution or to relieve themselves from the trap, they succumb to the violent treatment and resultantly many a one settle for prostitution.⁴⁶

In the case of **NALSA v Union of India**, the Hon'ble Supreme Court made various recommendations for the upliftment of the Transgender Community and the bench consisting of Justice K.S. Radhakrishnan and Justice A.K. Sikri collectively declared:

Hijras, eunuchs, transgender persons should be treated as “third gender” for the purpose of safeguarding their rights under part III of the Constitution and the laws made by the State and Central legislature. Transgender persons’ right to decide their self-identified gender is upheld and the State and the Central legislature are directed to grant legal recognition of their gender identity as males or females or third gender.⁴⁷

Further, the court directed the Centre and State legislature to consider transgender persons within the meaning of “socially and educationally backward classes and to extend to them all the necessary reservation policies to increase their participation in educational institutions and public appointments. These directions further extended to making laws and policies to prevent the use of slurs to shame the transgender persons, to make policies and schemes to spread public awareness so that people do not mistreat the transgender community and consider them as “untouchables.”⁴⁸ Also, the Hon'ble Supreme Court directed that separate toilets should be made for transgender persons and that government should undertake measures to provide them proper medical care and also address their mental health because the community is prone to suicide and depression due to societal oppression.⁴⁹ Further, In the case of **Delhi Domestic Working Women's Forum**⁵⁰, the Judiciary in clear words opined that the ramifications of rape on a victim are heinous and long term such an act may cause detrimental harm to a person's relationships and impair their emotional well-being. Relating this to the protections extended under the Transgender Persons (Protection of Rights) Act, 2019, a clear picture of the lack of sensitivity towards the rights of gender-based minorities can be drawn.

46 8 SCC 144 SC (1997).

47 5 SCC 438 SC (2014).

48 5 SCC 438 SC (2014).

49 5 SCC 438 SC (2014).

50 1 SCC 14 SC (1995).

In **K. Puttaswamy v UOI**,⁵¹ the Apex Court considered the question of the right of privacy and its extent and in its judicial opinion found that the grounds on which homosexuality was criminalized in the case of **Suresh Kr. Koushal v Union of India**⁵², most of those arguments revolved around the minority position of transgender persons and persons same-sex sexual orientation, the bench in Puttaswamy case held that the view of the bench in Suresh Koushal case was erroneous as, even if people are in the minority when it comes to a certain class, alienation of their human rights is still a heinous act which the judiciary ought to remedy.⁵³ The bench in K. Puttaswamy case, rejected the grounds on which the Koushal judgement stood high, citing the concept of “constitutional morality”, how morality is enshrined in law and how morality is often the touchstone to check the validity of a law, the bench also recognised how the Suresh Koushal judgement violated various fundamental rights especially the right to life⁵⁴.

In the case of **K. Puttaswamy v Union of India**⁵⁵, a person’s sexual orientation was held to be inclusive in their right to privacy was held to be a fundamental right and implicit under Article 21 as an essential ingredient to the right to life. This judgment played a pivotal role in the field of Gender justice for Indian society.

The Hon’ble Supreme Court decriminalised consensual homosexual relations in 2018 by their gregarious verdict in **Navtej Singh Johar v Union of India holding** “Section 377 to be unconstitutional and in violation of Article 14, 15, 19 and 21 of the Indian Constitution” and therefore overruled the judgement dispensed in **Suresh Koushal and ors. v Naz Foundation and ors**⁵⁶. This judgement recognised the need of sexual orientation as a part of a person’s existence and associated it closely with a person’s right to life.

In **Joseph Shine v. Union of India**⁵⁷, on 28 September 2018, It was also observed that “a law that treats women differently based on gender stereotypes causes a direct affront to women’s dignity, violating Articles 14 and 21. Necessarily, such a law would also result in the non-fulfillment of India’s obligations under Article 5(a) and 16(1)(a) of the CEDAW.” Laws were enacted to eradicate the inequality faced

51 10 SCC 1 SC (2017).

52 3 SCC 220 SC (2014).

53 Alast Najafi, Voelkerrechtsblog, “On decriminalization of homosexuality in India”, available at: <https://voelkerrechtsblog.org/on-the-decriminalisation-of-homosexuality-in-india/> (accessed June 17, 2020).

54 India Const. Art.21.

55 10 SCC 1 SC (2017).

56 3 SCC 220 SC (2014).

57 2 SCC 189 SC (2018).

by women existing in the patriarchal society as a result of the voice raised through the feminist movement and activists. Owing to the most recent judgment of ***Vineeta Sharma v. Rakesh Sharma***⁵⁸ which has paved the way for gender equality by recognising the equal claims and rights of daughters over Hindu Joint family property with retrospective effect, thereby eliminating centuries old discriminatory ideals in Hindu coparcenary. We witness that over the years, through the involvement of the Judiciary and their critical analysis of the specialised cases, we're able to add more feathers in the cap of gender equality.

2.4 Analysis:

Post-independence we noticed that India was the first nation to experiment with “Universal Adult Franchise”, where every citizen who attained majority could exercise their right to vote, this was at a time where even many Western countries were hesitant to spread the right to vote to the masses.⁵⁹ Through a plethora of cases we notice that the feminist struggle in post-independence India was crystallized into our Constitutional framework and enforced and developed by Judicial activism, in this way, the feminist wave in India can be said to be more successful than the ones in the West for the simple reason that from the inception of the nation, the liberties were extended to all into the framework of an intricately crafted Constitution, the feminist demands for equality have been assimilated time and again by the judiciary and the legislature like - Maternity Benefit Act, 1961, Equal Remuneration Act, Prevention of Sexual Harassment Act, Domestic Violence Act, The Criminal Law amendment (2013) etc.

Through the hesitance on the part of the government to afford civil liberties and matrimonial and other related rights to people belonging to the LGBT community, they are promoting a form of “institutional discrimination” and are causing gender-based societal fatigue, the failure to provide them with rights and liberties does not vanquish their existence but only increases the suffering in the society which is cross-sectional and interactive of every facet of our society. In India various social groups have been putting up the demand for an egalitarian system, the government seems to be “gender deaf, gender blind and gender mute”, therefore while the struggle for gender-neutral laws continues, their words seem enigmatic to the political leaders. Thus, since independence, the social structure has often been streamlined by judicial activism and the protective legislations deriving merit from the fundamental rights, so whenever the rule of law became the rule

58 6 SCC164 SC (2019).

59 Rekha Pande, “The History of Feminism and Doing Gender in India”, vol. 26, (2018), SciELO, available at: <https://doi.org/10.1590/1806-9584-2018v26n358567> (accessed on June 5, 2020).

of men/women, the judicial activism stood to protect the individuals, however, now we notice that this “bi-polarity” in gender is not the reality and we require an all-inclusive approach in legislations and judgments.

3. Gender Neutrality: The New Norm

The UN in its Gender Equality: Glossary of Terms and Concepts, November, 2017, describes that gender neutrality is a concept that has no association with gender, however, it should not be mixed with gender-blindness. Gender neutrality could mean an entity or a style of language free from the constraints or biases of gender.⁶⁰ As per the definition provided in the Oxford Dictionary, we notice that Gender neutrality includes attributes which are acceptable and applicable for both the sexes- men and women.⁶¹

It initiates to explain that all the policies, languages, should come out of the restrictive gender norms stated by the people on the basis of sex and throws light on the equal treatment of men and women. The visibility given by these platforms is still wrestling against the concept of third gender and gender-inclusive language.

The concept of neutrality is a relatively new concept and many view it as the new approach to achieve gender equality. Gender neutrality does not aim to remove gender from people but to remove the gender-based distinctions in legislations which often reinforce the gender roles and inequalities in the minds of the public. While the concept of gender neutrality is coming into vogue, less is known about its practical application, while the UNO and the EU have adopted guidelines to use a gender-neutral language in legislation, to make the benefits of laws far-reaching and inclusive. We find that various developing nations are still constructing gender within the “gender binary” vision and are only focusing on “women-centric” laws. While, protection to women is definitely of eminence, the need of the hour is to spread the protections of such law to a wider audience from their inception, to socialise the society with the reality that exists out of the “gender binary”.

Justice Verma Committee on Amendments to Criminal Law, 2013 came forward as a ray of hope and out of concern for public order and gender equality conveyed that:

Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality the provisions have to be cognizant of the same.⁶²

60 “Gender Neutrality”, UNICEF, available at: <https://www.unicef.org/gender-equality> (accessed on June 7, 2020).

61 “Gender Neutrality”, Oxford Dictionary.

62 Justice J.S. Verma, Justice Leila Seth, Gopal Subramaniam, Reports of the Committee on the Amendments on Criminal Law, January 23, 2013.

The Committee in this way brought a significant legal lacuna to light and advocated for legal protections against grave crimes like rape against men and transgender persons. Neutrality does not only mean “similarity in treatment” but most importantly, recognition of minorities and their assimilation into the mainstream. There is a dire need on the part of the legislators to become effective players and contribute to realise gender equality goals and streamline policies with a gender-neutral perspective to attain sustainable development goals.

4. The Special Reports on Gender Identity by United Nations:

United Nations recognised the plight of persons of different sexual orientations and gender identities and entrusted the Special rapporteur Mr. Victor Madrigal-Borloz with the task of preparing carefully planned and researched reports on the issue of discrimination on the basis of gender identity and sexual orientations.

4.1 The UN Special Rapporteur Report on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (2018).⁶³

The stereotypical notions framed by the society with regards to the gender identity of a person have accounted for tears of the marginalized sections of the society, leading to harmful consequences. These harmful consequences pertain to gender-based discrimination and gender-biased violence. Such discrimination extends to the employment and throughout the employment cycle, health, social recognition; and in extreme cases the heinous act paints the picture of bullying, mobbing, sexual assaulting.⁶⁴ Often the trans persons and other gender-based minorities are rejected attributed to the societal gender identity and pre-conceived notions about sexual orientation. Owing to these pre-conceived notions and the societal norms, people begin to negate the idea of gender identity. Gender identity is one’s autonomous choice; their own personal experience or self-determined identity, which can be different from their biological sex.⁶⁵ By virtue of Article 6 of UDHR and Article 16 of ICCPR, a person is entitled to equal recognition before law; this may also include freedom to pick their gender identity.⁶⁶

The Special Repportuer Report on “Protection Against Violence and

63 UN General Assembly, Report of the special rapporteur on Protection against violence and discrimination based on sexual orientation and gender identity, 12th July 2018, A/73/152, available at: <https://undocs.org/A/73/152> (accessed June 20, 2020).

64 UN General Assembly, Report of the special rapporteur on Protection against violence and discrimination based on sexual orientation and gender identity, 12th July 2018, A/73/152, available at: <https://undocs.org/A/73/152> (accessed June 20, 2020).

65 UN General Assembly, Report of the special rapporteur on Protection against violence and discrimination based on sexual orientation and gender identity, 12th July 2018, A/73/152, available at: <https://undocs.org/A/73/152> (accessed June 17, 2020).

66 *Ibid.* at Para 20.

Discrimination Based on Sexual Orientation and Gender Identity”⁶⁷ hones into the series of misconceptions in relation to the gender identity and has successfully attempted to stab these preconceptions, uttering the dire need of challenging them if the whole of humankind is to enjoy human rights.⁶⁸

The report mentions that transgender persons and gender minorities are subjected to gruesome physical and psychological torture.⁶⁹ This report has emphatically fixed attention towards the discrimination and violence against transgender persons; as recorded by the UN human rights mechanism, when it comes to non-matching of official documents with their gender identity, transgender persons have no opportunity for legal remedy as even law enforcement officers like police officers subject them to violence and discriminatory treatment which often includes arrest or victim blaming. Thus, the report emphasizes upon the need of gathering the data and the State’s duty to issue the legal identity documents in line with the person’s self-determined identity.

4.2 The UN Special Rapporteur Report on: Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (2019).⁷⁰

The special rapporteur report highlights the difficulties faced by LGBT and gender non-conforming people in the education system—bullying, physical and mental pain and violations, including self-harm and social isolation. This abuse prevails under the nose of the educational institutions and they often stay as silent spectators as the abuse continues out of fear that in case they try to support LGBT pupils, they will also be chucked out of the social discourse and will invite aggressive backlash.⁷¹ The report also highlights how the lack of gender-neutral language in the study material impacts socialization of a class of pupils who exclude various gender types and are unable to understand them and thus, contribute to the abuses faced by the LGBT community and other gender minorities. Due to all these factors, the youth suffer with self-identification and struggles to accept themselves and end up with mental health issues, often resulting in suicide⁷².

67 *Supra* note 68.

68 *Ibid.*, at Para. 6.

69 *Ibid.*, at Para. 18.

70 UN General Assembly, Report of the special rapporteur on Protection against violence and discrimination based on sexual orientation and gender identity, 17 July 2019, A/74/181, available at: <https://undocs.org/A/74/181> (accessed June 17, 2020).

71 UN General Assembly, Report of the special rapporteur on Protection against violence and discrimination based on sexual orientation and gender identity, 17 July 2019, A/74/181, available at: <https://undocs.org/A/74/181> (accessed June 17, 2020).

72 *Ibid.* at Para 6,7,8.

The report further elaborates on the forms of discrimination witnessed by LGBT persons in particular and the same discriminations are also meted out to gender minorities, highlighting the issue of homelessness as a result of prejudicial treatment by public and private landlords, the report highlighted that 24% of LGBT persons were unable to rent a house in Sri Lanka, in Angola in the year before the report was being drafted, around 23% of trans women were reported to be homeless.⁷³ There are no shelters specifically for LGBT persons and they're often turned away from general shelters, further they have to hide their identities while accessing public services or interacting with authorities. Homelessness results in further alienation from the social discourse and employment and opportunities to make a better life.⁷⁴ The report further discussed the disparities in health treatments and how persons belonging to gender minorities including women in some areas are unable to get access to these facilities as and when necessary.⁷⁵

The report also highlights how the medical practitioners often discriminate against people of different gender identities and refuses treatment altogether, and sometimes are unable to understand the needs of a certain gender type to assist them accordingly.⁷⁶ The report further discusses the issues related to LGBT youth and how they're often victims of religious and cultural intolerance. The report cites the findings of the National Human Rights Commission of India, which mentioned that a transgender child is abandoned as early as at 12 years old and also highlighted how around 40% of homeless persons are often LGBT youth.⁷⁷ The report further enlightens us about the similar struggles faced by disabled and old persons belonging to gender minorities and how they're often struggling to live through their days.⁷⁸

The report also successfully brought about the implications of one's sexual orientation and gender identity when it comes to seeking asylum and discussed how the hardships faced by people belonging to the LGBT community are harder if they're a migrant, they witness discrimination and violence at every stage of their journey by migration officers, smugglers etc.⁷⁹ They face hardships in accessing food and acceptance in a new society and thus have to conceal their identity as a tactic to survive, often it gets difficult when the very reason they seek asylum is due to the criminalization of their sexual orientation or gender identity and may lead to failure in achieving asylum, this also

73 *Ibid.* at Para. 14 & 15.

74 *Ibid.* at Para. 16 & 17.

75 *Ibid.* at Para. 19 & 20.

76 *Ibid.* at Para. 20.

77 *Ibid.* at Para. 45.

78 *Ibid.* at Para. 43,44,45.

79 *Ibid.* at Para. 51,52,53.

limits their capacity of seeking reprisal of the human rights violation that they witness.⁸⁰

4.3 Recommendations of the Special Rapporteur:

The prime recommendation put forth by the special rapporteur calls for decriminalization of homosexual activities, and to adopt legislations which prohibit discrimination based on a person's sexual orientation and gender identity, it further recommends that special guidelines should be framed for public servants to take extra care of LGBT persons and gender minorities.⁸¹ A change in public policy is recommended to enable good governance by designing and implementing community outreach and rehabilitation programs to provide room for gender minorities to unite within the existing social discourse.⁸²

The report further recommends that to ensure effective participation of various gender minorities, they should be included in the decision making process and to extend sufficient resources to human rights institutions to assist the governments in the earnest attempt for social inclusion.⁸³ The report also recommends that the States ought to ensure that there are special legislations to protect the gender and sexual orientation minorities in housing opportunities and landlords should not deny them shelter on grounds of their sexual orientation or gender, further the report calls for effective punitive provisions to be meted out in case of contravention by the landlords of these guidelines and that the States should ensure that women's needs are taken into account especially of sex workers to equip them with necessities to prevent the reproduction of patterns of discrimination⁸⁴.

Further, the report expresses concern over the lack of opportunities when it comes to access to justice and calls upon the States to remedy that, to ensure that social, economic and political justice is administered.⁸⁵ Lastly, the report recommends that the States should celebrate human diversity and make sure that they're able to rehabilitate gender minorities into the mainstream and to ensure that they're normalised by means of cultural and educational programs.⁸⁶

Conclusion:

The paper advocates for the need of a 'gender inclusion' movement, drawing inspiration from the feminist movement and how this gender inclusive movement can help achieve gender equality through the means

80 *Ibid.* at Para. 54 &55.

81 *Ibid.* at Para 98.

82 *Ibid.* at Para 98.

83 *Ibid.* at Para 99.

84 *Ibid.* at Para 100.

85 *Ibid.* at Para 101.

86 *Ibid.* at Para 102.

of gender neutrality, imbibed in the legal spirit and system of a nation, which will allow various gender identities to redress their grievances and to reinstate their human rights, and the same time gender neutral laws and policies, will lead to a higher level of social participation, growth of human resources, development of personality, etc. The authors recommend that gender neutral language in legislations, educational material, etc. is of eminence, further, the government should extend protective legislations to protect the rights and liberties of gender minorities, strict actions to prevent discrimination should be taken, sex workers of all genders should be given access to jobs and health benefits and the immaculate recommendations by the UNGA special rapporteur should be followed by all countries in verbatim.

Caste, Social Discrimination and the Creamy Layer: Should it be applied to the Scheduled Castes and Scheduled Tribes?

***Vishnu Mohan Naidu**

Abstract

The creamy layer principle was initially introduced only for OBCs. But in recent times, the Supreme Court has approved its application to the Scheduled Castes and Scheduled Tribes on matters of reservation in promotions. While changing the previously held narrative that the creamy layer concept was not envisaged for Scheduled Castes and Scheduled Tribes, the extension of creamy layer to SCs/STs raises three important questions. They are: (a) whether creamy layer should be applied in reservations for the Scheduled Castes and Scheduled Tribes? (b) what are the challenges that are faced upon such application? and, finally, (c) what can be the arguments to counter public opinion? Testing the concept of 'creamy layer' constitutionally in the context of 'equality' enshrined in Article 14 of the constitution, the first part of the paper attempts to establish creamy layer as a part of the broad constitutional theme, i.e. the Basic Structure Doctrine. Secondly, the paper aims to bring about the challenges of its application to SC/ST reservation by discussing stigmatisation, lack of suitable criteria for creamy layer, adherence to Judicial precedents and the constitutional bars on its application. Arguing that the concept of 'creamy layer' applied should not be categorically lifted from the reservation for OBCs and strictly applied to Scheduled Castes and Scheduled Tribes, the paper examines if the concept of creamy layer could be addressed by applying the Doctrine of Constitutional Morality.

1. Introduction

In order to curb the social evils and injustice that have plagued this nation for over centuries, 'reservation' was brought in as a tool to ensure the empowerment of weaker sections of society.¹ It was brought in to allow the weaker sections of society, access to education and employment amongst other things, to help them compete with the forward/privileged sections in the society.² The logic behind it is that

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1 CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS) - 30th November, 1948, Vol 7. (Lok Sabha Secretariat 2014). Also see Prakash Louis, *Scheduled Castes and Tribes: The Reservation Debate*, 38 EPW (2003); K. C. Suri, *Caste Reservation in India: Policy and Politics*, IJPS 37 (1994).

2 SEEMA PASRICHA, *CASTE BASED RESERVATION IN INDIA: CONSTITUTIONAL SAFEGUARDS, GANDHI'S VIEWS, AMBEDKAR'S VIEWS, MANDAL COMMISSION, CASTE RESERVATION IN THEORY AND PRACTICE*, (1st ed. 2006).

India has had a history of discrimination and social prejudice against certain social groups which has severely marginalised them in society.³

Although the definitions of reservation are varying, it is seen as an affirmative action aimed at bringing about a level playing field to the members of society to compete irrespective of their social disadvantages so as to promote the essence of equality.⁴ To many, reservation is a glimmer of hope that the disadvantaged section of society are not weighed down by their social status and lack of education.⁵ This measure was meant to offset the years of discrimination faced by the weaker sections in India such that employment and education possibilities could be made more readily accessible to them. The paper concerns itself around the reservation of the SCs and STs who fall under the protection of Article 16(4) of the constitution.⁶

On the other end of the spectrum, we have the 'creamy layer' principle evolved from judicial precedents, which in all forms is an antithesis to the system of reservation. This implies that those who belong to the weaker sections of society, but have crossed a certain income threshold which puts them at par with forward members in the society, should be denied the privileges of reservation.⁷ The fundamental logic for the excluding the 'creamy layer' is to ensure that only the truly weak members of society get the benefit of reservation and the same should not be snatched away by those who are not hindered by social and economic barriers. Having introduced the concept of 'reservation' and the principle of 'creamy layer' in introductory section, in Part II, the paper presents a comprehensive understanding of what the 'creamy layer' is and further continues to test this principle on the grounds of 'constitutionality'. Part III of the paper aims to bring about the challenges that might be faced if this principle is applied to these weaker sections of society. Part IV of the paper attempts to see whether this principle tinkers with the Article 341 and 342 of the constitution and, lastly, the Part V examines whether the 'constitutional morality' can be presented as an argument to settle the issue.

2. What is the Creamy Layer and why it could be necessary to apply it to the Scheduled Castes and the Scheduled Tribes?

The 'creamy layer' principle essentially believes that amongst the weaker sections of people there are those who can compete with the general classes of the society and, therefore, they can reap the

3 Ishwar Modi, *Social Exclusion and Inequality: Challenges before a Developing Society*, 64 Sociological Bulletin (2015).

4 Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1.

5 M.R. Balaji v. State of Mysore, AIR 1963 SC 649; *See* V. Hariharan Pillai v. State of Kerala, AIR 1968 Ker 42.

6 Indra Sawhney v. Union of India, AIR 1993 SC 477.

7 *Id.*

benefit of reservation leaving the actual downtrodden members of the weaker sections deprived of any opportunity to emerge from their backwardness. The benefits of reservation which are taken by the 'creamy layer' members of the society use this reservation only to secure an employment even though they have the chance to compete with the general population. Therefore, the creamy layer principle prevents the wealthy few belonging to the weaker sections from accessing reservation benefits as they are considered to be on par with the forward class of the society. In *N. M. Thomas*⁸ as well as Chinappa's J. judgement in *K.C. Vasanth Kumar*⁹, the courts observed that the "benefits of reservation are snatched away"¹⁰ by those belonging to the creamy layer, thereby leaving the backward amongst them helpless. Similarly, in the *Railways Case*¹¹, the court did not refute the argument of wealthy and affluent Harijans who often grabbed the prospects of reservation leaving the weak to remain as weak, thereby recognising the observation laid down in *N. M. Thomas*. Therefore, it was necessary to weed out the creamy layer for the SCs and STs.

The Supreme Court in the case of *Jarnail Singh v. Lacchmi Narain Gupta*¹², held that for the benefit of the SCs/STs, the creamy layer would apply to them in matters of reservation in promotion. Though the court in the *Mandal Commission Case* observed that the creamy layer principle would only have relevance to the OBCs and not the Scheduled Castes and Scheduled Tribes, this observation created a sense of disagreement between the government and the courts on the idea of applying creamy layer to the SCs/STs.¹³ However, previous court precedents have given the broad outline that creamy layer is part of an overall principle which is enshrined in the essence of equality¹⁴. In *M. Nagaraj*, the Supreme court opined that creamy layer among other things was integral to Article 16 and absence of the creamy layer principle would break the pillars that holds it upright.¹⁵

Creamy Layer is enshrined in 'Equality'

Article 16(4) provides for reservation to backward classes, and to further ensure the safeguard of their interests, the Supreme Court

8 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

9 *K.C Vasanth Kumar v. State of Karnataka*, 1985 Supp. SCC 714 at 734. See also Om Prakash Sharma, *Right to Reservation as an Emerging Fundamental Right: A Study under the Indian Constitution*, 4 I.J.L.&J. 124 (2013).

10 See *K.C Vasanth Kumar*, at 734-735.

11 *Akhila Bharatiya Soshit Karamchari Sangh (Railways) v. Union of India*, (1981) AIR SC 298.

12 *Jarnail Singh v. Lacchmi Narain Gupta*, AIR 2018 SC 4729.

13 Krishnadas Rajagopal, *Why does Government want Supreme Court to reconsider stand on SC/ST creamy layer?* The Hindu, December 8, 2019: *See No Need to Determine Creamy Layer in SC/ST says Law Minister*, Hindustan Times, December 11, 2019.

14 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

15 *Id.* at 278.

has affirmed that creamy layer principle is enshrined in Article 14 and Article 16(1) as an essence of equality. However, reality clearly shows that there are some people belonging to the depressed classes who are wealthy enough to afford good education and other opportunities which may not be possible for all members of their community therefore suggesting “*inequality within equals*”.

In *Indira Sawhney v. Union of India*¹⁶, the apex court held that if we were to include the creamy layer it would only lead to bare discrimination and violation of Article 14 and Article 16. It was envisaged that Article 14 treats those of similar status equitably, and would not discriminate between them by treating equals as unequals and treating unequals as equals.¹⁷ This “twin test of Article 14” formulated by the courts over the years was applied in context of *Indira Sawhney*. It was realised that if the creamy layer were to be included in reservation, it would violate the “twin test” of Article 14 as the affluent and rich members of the SEBCs would be treated on the same platform as the downtrodden SEBCs suggesting that unequals would be treated as equals. Therefore, the inclusion of creamy layer in the reservation would be a blatant violation of Article 14.

It is assumed that it is the Government’s responsibility to bring forth ample opportunities to the underprivileged members of society for them to enable them to excel and bring them at par with the forward members of society. Thus, by including the creamy layer, it defeats the entire purpose of ‘affirmative action’ using reservation as a tool to strive for equality. In the case of *R. S. Garg v. State of Uttar Pradesh*¹⁸, the court held that affirmative action involves the classification of people into backward and non-backward. Those groups who have risen above such backwardness in the passage of time should not come under the purview of reservation and they should be given the creamy layer status.¹⁹ The court in this case wanted to lay down that there is an existing constitutional scheme that no group can be held to be more equal than another group. By using the previous cases as precedents, to abide by the constitutional scheme of “reservational equality”, the creamy layer principle should apply to the reservation for the SCs/STs. The reasonable classification on the basis of financial status, which is the essential requirement for creamy layer identification, was affirmed in *Society for Un-Aided Private Schools of Rajasthan case*²⁰.

16 *Indira Sawhney v. Union of India*, (2000) 1 SCC 168 (*Indira Sawhney II*).

17 *Id.*

18 *R.S Garg v. State of Uttar Pradesh*, (2006) 6 SCC 106.

19 *Supra* note 12.

20 *Society for Un-Aided Private Schools of Rajasthan v. Union of India*, AIR 2012 SC 3445.

Through judicial decisions especially *Indira Sawhney*, the court has broadened the interpretation of creamy layer. With the intention of arguing the constitutional assumption of creamy layer at a greater level, it is pertinent to understand how the court has identified creamy layer as a part of the Basic Structure.

Creamy Layer within the boundaries of the Basic Structure of the Constitution

The basic structure postulates were laid down in the historic 13-Bench judgement of *Kesavananda Bharti*²¹ whereupon the apex court laid down that any legislation or constitutional amendment should not alter the basic structure/basic features of the constitution and any offending action would be ultra vires of the constitution.²² The Judges themselves listed many principles and themes as a part of the basic structure including ‘democracy’ which happens to be an integral part.

In *Minerva Mills*²³, the Supreme Court held that Article 14 and 19 are fundamental concepts of democracy whereupon “*they do not confer fanciful rights.*”²⁴ Instead, these rights are *beneficial* for the “*effective functioning of democracy.*”²⁵ The achievement of democratic goals which the State has laid out for itself is only possible through Article 14 and 19. If these rights were absent, it would mean the destruction of democracy where political pressures would tear apart the country, paving the way for preferential treatment of the privileged classes by the State.²⁶

Citing the importance of ‘equality’ in the constitutional way of life, the Court in *M. Nagaraj* held that the principle of equality is the very “*essence of democracy*” and is “*a part of the basic structure of the constitution.*”²⁷ Thus, ‘equality’ forms the bedrock of the constitution which at any point of time, should not or cannot be altered.

Whether creamy layer is a part of the basic structure or not, it is to be noted that the court in *Indira Sawhney* opined that excluding the application of creamy layer principle would not only violate ‘equality’ under Article 14, but also the basic structure.²⁸ Such exclusion would be “*totally illegal*” and this ‘illegality’ would offend the constitutional roots.²⁹ The Court clearly expressed that “*in the decision-making process*

21 *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

22 *Id.*; *I.R. Coelho (Dead) v. State of Tamil Nadu*, (2007) 2 SCC 1.

23 *Minerva Mills Ltd v. Union of India*, (1980) 3 SCC 625.

24 *Id.* at 656.

25 *Id.* at 656.

26 *Id.* at 656.

27 *Supra* note 14.

28 *Indira Sawhney v. Union of India*, (2000) 1 SCC 168.

29 *Id.* at 202.

*which enables the creamy layer to grab the benefits of reservation, it appears to us that the voice of the really backwards, namely, the voice of the non-creamy layer, is nowhere heard.*³⁰

The courts have clearly expressed their opinion that creamy layer is a part of the basic structure even if the course of discussion was confined to the reservation for the OBCs. Accordingly, it would be offending if the same principle was not applied to the SCs and STs. In fact, creamy layer being a part of an overall constitutional arrangement, the same principle should apply to them. This notion was observed in many Supreme Court and Tribunal judgements. In *M. Nagaraj*, the court held that creamy layer among other things, formed the pillars of Article 16, which if removed would collapse as it is seen as a constitutional requirement under it.³¹ Similarly, in *Nair Service Society*, the court observed that the creamy layer was within the constitutional arrangement and it should be observed through the interpretation of that statement that it would also extend to the SCs and STs.³² Lastly, in *All India Equality Forum* the Delhi Administrative Tribunal observed that it would be ideal to apply this principle to the SCs and STs.³³ It would imply that on the basis of the previously stated paragraphs, the creamy layer should apply to these classes as a part of equality and as a part of the overall constitutional scheme, although it is only in strict adherence to the postulates governed by Article 14 of the constitution.

3. Challenges to the ‘Creamy Layer Principle’

Although the constitution guarantees equality as stated above, there may be several challenges when we apply this principle of creamy layer to the SCs/ST’s. The first problem we must look at is stigmatisation.³⁴ The creamy layer was originally envisaged for its application only to the Other Backward Classes as was observed in Mandal Commission case.³⁵ However, unlike the OBCs, The Scheduled Castes (Dalits) and the Scheduled Tribes are victims of centuries of social stigmatisation and exclusion, which have made them historically marginalised communities. Often pushed away, they have been victims of social abuse and discrimination even to this date.³⁶ From this evidence, we see that there is a stark difference when it comes to the OBCs who have been categorised based on educational and economic backwardness as opposed to the SCs/STs who have faced a more severe social and

30 *Supra* note 28 at 203.

31 *Supra* note 14.

32 *Nair Service Society v. State of Kerala*, AIR 2007 SC 2891.

33 *All India Equality Forum v. Union of India*, (2012) (3) SLJ 195 (CAT).

34 Ira Chadha-Sridhar & Sachi Shah, *Caste and Justice in the Rawlsian Theoretical Framework: Dilemmas on the Creamy Layer and Reservations in Promotions*, 10 NUJS L. REV. 171 (2017).

35 *Supra* note 6.

36 *Supra* note 2 & 3.

economic censure. We should not be hesitant to point out that the Scheduled Castes and Scheduled Tribes are given reservation owing to their social backwardness whereas the OBCs are given reservation due to their educational and economic backwardness.³⁷

One of the main roles of the state is to ensure that the discriminated sections of society are prevented from any form of social injustice and reservation is one such measure used to protect these classes.³⁸ This is governed by Article 46 of the constitution which entails a directory role towards the State. The SCs and STs are the most underprivileged classes within our country who are still dealing with the burden of social prejudice. Thus, reservation should be seen as a means of 'protection from discrimination' and this will fulfil the role of the state as directed by Article 46.

The definition of reservation as applied to the Scheduled Caste and Scheduled Tribes should not only be limited to accessing employment and educational opportunities but also meant for the general social upliftment of these classes so as to integrate them with the mainstream society. This would mean that although certain members of the SC/ST community have gained affluence in recent times, the possibilities of them facing social discrimination have not been entirely wiped away. Therefore, the application of this principle to the SCs/STs would expose the above sections of the community to social prejudice.³⁹ The child of a wealthy Scheduled Caste or Scheduled Tribe can still face discrimination when applying for a job, irrespective of his economic status. Therefore, the state has the role to protect them from such social injustice by virtue of their status as SC/ST community irrespective of their economic standing. This discrimination can take place in initial employment as well as in promotions. There is no dearth of evidence to support this.

As per the National Crime Records Bureau Statistics, the number of cases of crimes against the Scheduled Castes have risen to a total of 44654 cases in the year 2018. Similarly, the Scheduled tribes have a lesser but stagnant number of 6849 cases in 2018.⁴⁰ This, coupled with the fact that there may be a number of cases which go unreported,

37 CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS) – Volume 9, 25 August, 1949 (Lok Sabha Secretariat 2014).

38 Article 46 of the Constitution of India: "The State shall promote with special care the educational and economic interests of the weaker sections of people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

39 Sukhdeo Thorat, Nitin Tagade & Ajaya K. Naik, *Prejudice against Reservation Policies: How and Why?*, 51 EPW 61 (2016).

40 Total Cases against Scheduled Castes & Tribes, National Crime Records Bureau Report 2018, Ministry of Home Affairs, Government of India.

depicts a very grim situation.⁴¹ Statistical measures have also shown the extent of discrimination that Scheduled Castes and Scheduled Tribes face other than workplace discrimination. It was indicated that other classes of people were far better off as compared to the SC/ST in education and social backwardness. Even with the prospect of modernisation, reports on Indian companies only come to show how the “inegalitarian sacred tradition of caste” still has a strong base in recruiters’ mind.⁴²

In terms of labour market, a clear indicator of diminishing caste bias would imply that human capital and wage gaps should be narrower.⁴³ However, even in the urban labour market, the reports have indicated a growing gap between wage differentials proving that caste bias is still prevalent.⁴⁴ Empirical data also indicates that there is an absence of caste diversity in corporate boards, wherein 65% of the corporate members belong to the forward social groups.⁴⁵ In public sectors, it was affirmed that the Scheduled Castes earned 8% less than members of the forward classes and this difference was even higher at 20% in terms of the private sector.⁴⁶ Therefore, discrimination on the basis of caste still exists in both private and public sectors and any notion to the contrary can be easily negated through the aforementioned evidence.

Caste identity is a major factor in determining access to opportunities as the under privileged classes are still treated in accordance with their caste backgrounds.⁴⁷ The disparities in labour is evidence of discrimination of Scheduled Castes and Scheduled Tribes.⁴⁸ Although such discrimination is relatively lower in the public sector as a result of public laws, employment is still very much dominated by the upper classes.⁴⁹ Therefore, stripping the creamy layer of the SC/ST

41 EPW Engage, *Why Do We Need a specific law to safeguard Dalits against caste violence?* ECONOMIC AND POLITICAL WEEKLY ENGAGE, (August 30, 2018) <https://www.epw.in/engage/article/why-do-we-need-specific-law-safeguard>. accessed 1 August 2020.

42 C. Vijaylakshmi, Kamalpreet Dhaliwal & Rajen K. Gupta, *Discriminatory Practices in Indian Companies*, 41 IJIR, 41 329 (2006).

43 S. Madheswaran & Paul Attewell, *Earning Differences by Caste in the Urban Labour Market*, 42 EPW 4146 (2007).

44 *Id.*

45 Ajit, D., Han Donker, and Ravi Saxena. *Corporate Boards in India: Blocked by Caste?*, 47 EPW 39 (2012).

46 S. Madheswaran, 'Is Affirmative Action Policy for Private Sector Necessary', (2014) Institute of Social and Economic Change, A Discussion Paper, Bangalore.

47 David Mosse, 'Caste and Development: Contemporary Perspectives on a structure of discrimination and advantage' (2018) 110 WD <<https://doi.org/10.1016/j.worlddev.2018.06.003>> accessed 2 August 2020.

48 Deshpande, Ashwini, *Quest for Equality: Affirmative Action in India*, 44 IJIR 154 (2008).

49 Sukhdeo Thorat and Paul Attewell, *The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India*, 42 EPW 41 (2007); See S. Madheshwaran, S. Singhari, *Social Exclusion and Caste Discrimination in Public and private Sectors in*

community of their reservation privileges in employment would expose them to greater possibilities of social discrimination in the workplace irrespective of their eligibility and prospects.

People belonging to the SC/ST community constitute a special class for themselves with added constitutional protection under Article 335, Article 341 and Article 342. The legislatures themselves have created a difference between the SCs and STs as against the OBCs. Is it possible that by mere economic elevation of a SC/ST, their social status is also elevated? This may not be true as casteism and its associated notions still persists in modern day India. The theoretical application of economic criterion does not necessarily wash away the possibility of discrimination. The Mandal Commission judgement opposed the use of economic advancement as the underlying factor in applying the creamy layer which in a sense buttresses the above views.⁵⁰ A very good example of this would be the racial prejudice that is prevalent against the Black community in the United States of America, suffered even when they are relatively wealthy. Several reports have shown that even when Black Americans are raised in wealthy households, they still face racial prejudices and their job prospects greatly differ as compared to wealthy white Americans although they are better off as compared to other Black Americans.⁵¹ Thus, in deciding this issue, the courts should recognise the disparities that can be faced by the prejudiced communities even when economic advantages have been given.

The next issue would be the already existing precedents. Both the 11-Judge Bench of *Indira Sawhney* and the constitutional bench of Ashok Kumar Thakur expressed that it would not be correct to apply this principle to the SC and ST community⁵². Believing that there is an intrinsic difference for reservation between the Scheduled Castes / Tribes and the OBCs, the courts have taken upon themselves to enforce the observation in *Indra Sawhney*.⁵³ Such difference of opinions of different courts have given rise to uncertainty with what is the true position of the law.⁵⁴

India: A Decomposition Analysis, 59 IDJE 175 (2016).

50 *Supra* note 6.

51 Emily Badger & Ors, 'Extensive Data Shows Punishing Reach of Racism for Black Boys,' N.Y. TIMES (March 19 2018), <<https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html>> accessed August 2020.: See Raj Chetty, Nathaniel Hendren, Maggie Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective* 135 (2) QJE 711 (2020).

52 See *Indra Sawhney*, AIR 1993 SC 477; *Ashok Kumar Thakur v. Union of India* 2008 6 SCC 1.

53 M.P Singh, "*Ashok Kumar Thakur v. Union of India*": A Decided Verdict on an undivided Social Justice Measure, NUJS L. REV. 13 (2008).

54 See *M. Nagaraj v. Union of India* AIR 2007 SC 71, *BK. Pavithra (II) v. Union of India* AIR 2019 SC 2723, *Jarnail Singh v. Lachhmi Narain Gupta* AIR 2018 SC 4729.

To summarise this point, stigmatisation and prejudice against the SCs/STs is still prevalent. Discrimination by upper castes weigh down the prospects of wealthy SC/ST even if they have good educational qualifications. The contradicting judgements also create vagueness on the application of the law. Going by the laws of precedent, this dispute should be dealt with a bench of larger strength to formally lay down the clarity on the issue.⁵⁵

4. Whether the application of the Creamy Layer Principle ‘Tinkers’ with the ‘Presidential List’?

Article 341 and 342 are collectively referred to as the Presidential Lists (*Herein referred to as the ‘Lists’*), are constitutional recognition of communities which are identified as Scheduled Castes and Scheduled Tribes.⁵⁶ This power to notify members of the Scheduled Castes and Tribes lies solely with the President and the power to include and exclude such communities lies with the Parliament. A Sub-classification of the Presidential List is said to happen when there is a “micro-distinction” or further classification within the List which may include the grouping of particular class within the List coupled with preferential treatment of that particular group.⁵⁷ The imposition of creamy layer implies the grouping of certain persons, belonging to the Presidential Lists thereby preventing these persons from claiming the benefit of reservation. However, the court in *E. V. Chinnaiah v. State of Andhra Pradesh* had adopted different reasoning in their approach to the validity of sub-classification in the Lists.⁵⁸

In *E.V. Chinnaiah*, the court examined the validity of a State legislation⁵⁹ that grouped SCs into four classes relying on certain factors. ⁶⁰ *Chinnaiah* proposed the theory that the SCs and STs were homogenous and their sub-classification by the State Government was constitutionally impermissible. They interpreted Article 341 of the constitution to mean that only Parliament has the sole authority to include or exclude classes from being considered as a Scheduled Castes or Scheduled Tribes and that the further sub-classification by the State Government would ‘tinker’ with the presidential list. Furthermore, the court observed that the Article 341 did not permit the sub-division of

55 Siddharam S. Mhetre v. State of Maharashtra, (2011) 1 SCC 694; See Sudeep Kumar Bafna v. State of Maharashtra AIR 2014 SC 1745; State of Madhya Pradesh v. Mala Banerjee (2015) 7 SCC 698; Zenith Steel Tubes and Industries Ltd. v. SICOM Ltd (2008) 1 SCC 533.

56 MAHENDRA PAL SINGH, VN SHUKLA’S CONSTITUTION OF INDIA, 1012-1015 (13th edn. 2017).

57 *E.V. Chinnaiah v. State of Andhra Pradesh*, AIR 2005 SC 162.

58 *Id.*

59 Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, No. 20 of 2000, INDIA CODE (2000).

60 *Id.*

SCs/STs within the list. *Chinnaiah* did not reject the Government's ability to exclude members 'per se'. When imposing the creamy layer, the sub-division if done by the Parliament would not in effect, tinker with the list. However, the court did not explain whether imposing the creamy layer would effectively remove the 'creamy layer' people from Article 341. The court also erred in their reasoning when they assumed that the Scheduled Castes and Scheduled Tribes formed a homogenous community as it failed to recognise the inherent differences amongst these classes including the creamy layer. This is the fundamental reason as to why the courts in *Jarnail Singh* and *Davinder Singh* departed from *Chinnaiah*.

In *Jarnail Singh v. Lachhmi Narain Gupta*, the apex court rejected the notion that the creamy layer 'tinkered with Article 341 and 342'.⁶¹ Here, the court opined that by conforming to the principles in Article 14 and 16, the creamy layer would merely exclude the wealthy from the object of reservation, however it would not exclude them from the List itself and that "*they would continue exactly as before*". Relying on the *Doctrine of Harmonious Construction*, the court believed that when Article 14 and 16 is read with Article 341 and 342, it is the Parliament's "*freedom to include and exclude*" anyone from the Presidential Lists and therefore this would not amount to tinkering with the said Lists.

This was re-affirmed recently by the apex court in *State of Punjab v. Davinder Singh*, where it was recognised that "*Reservation was not contemplated for all the time by the framers of the constitution. On the one hand, there is no exclusion of those who have come up, on the other hand, if sub-classification is denied, it would defeat right to equality by treating unequal as equal.*"⁶²

The aforementioned observation was Jarnail's ratio in a nutshell wherein it appeared to lean towards a violation of Article 14, if sub-classification of the SCs and STs, to remove the 'cream' was not permitted. The court in *Davinder Singh* accepted the reasoning in *Jarnail Singh* where the sub-group would 'continue' exactly as before the List. It also departed from *Chinnaiah* where it observed that "*the basket of fruits*" cannot be provided to the "*mighty*" at "*the cost of others*" under the ambit of homogeneity.⁶³ The court went on to hold that there was a 'constitutional directive' which imposes a duty upon the State towards the 'upliftment' of Scheduled Castes and Scheduled Tribes. Since *Jarnail Singh* and *Davinder Singh* clarified that the creamy layer would not be removed from the list, therefore there is no constitutional bar on the states to achieve further affirmative action under Article 14, 15 and 16, which would not violate Article 341 and 342.

61 *Jarnail Singh v. Lachhmi Narain Gupta*, AIR 2018 SC 4729.

62 *State of Punjab v. Davinder Singh* 2020 (3) SCT 284 (SC), (2020) 8 SCC 1.

63 *Id.*

It can be thus concluded that the creamy layer does create a sub-classification within the list. However, it is in furtherance of the objects of reservation laid out in Article 14 and 16. This along with the basic structure postulates indicate that there would not be any legal or constitutional bar for its extension to the SCs and STs and this would not result in the overstepping of powers of the state legislature; nor it would tinker with the Presidential list. *Chinnaiah*, therefore, appears to be an incomplete judgement whose fate now rests on a 7-judge bench to decide its correctness.⁶⁴

5. Balancing constitutional principles with social realities – The ‘Constitutional Morality’ argument

Many a times, the courts have identified the contours of fundamental rights through the perspective of the public’s viewpoint.⁶⁵ In this instance, we see that on the one hand, the creamy layer should be extended to the Scheduled Castes and Scheduled Tribes under the principles of equality. On the other, we see the social subjugation and discrimination faced by these people, irrespective of their economic elevation. Therefore, the question that arises here is whether the protection against discrimination of creamy layer SCs/STs overrides the equality of a truly downtrodden member of the same community? To answer this, we may look at the concept which the Judiciary has evolved over the past few decades, i.e. the doctrine of *Constitutional Morality*. Constitutional morality has been cited as the essential moral precepts which are enshrined in the constitutional texts which ‘guides the law’.⁶⁶ This judicial doctrine has seen several definitions and has been interpreted in several different ways but it rests on those values which are enshrined in the constitution.

Through numerous decisions, the court has identified different facets to constitutional morality, i.e. (a) it is an adherence to constitutional morals as opposed to public morals, and (b) it is also inter-changeable with ‘Rule of Law’.⁶⁷ It is also an important “*reflection of the transformative, revolutionary*” constitutional vision which supersedes archaic and parochial traditions.⁶⁸ However, the underlying notion is that when the two values of morality deviate from each, the

64 See Davinder Singh, (2020) 8 SCC 1.

65 State of Bombay v. R.M.D Chamarbaugwala AIR 1957 SC 699. See Mr ‘X’ v. Hospital ‘Z’ (1998) 8 SCC 296.

66 As per Indu Malhotra J.J in Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690 & as per Dipak Mishra C.J in Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501 and D.Y Chandrachud J.J in Joseph Shine v. Union of India, (2019) 3 SCC 39.

67 Salman Khurshid, ‘*Constitutional Morality and the Judges of the Supreme Court*’ in JUDICIAL REVIEW: PROCESS, POWERS AND PROBLEMS (ESSAYS IN HONOUR OF UPENDRA BAXI) 384-410 (Salman Kurshid et al. eds., 2020).

68 *Id* at 408.

courts should adhere to the constitutional values in resolving any disputes that are brought to it.⁶⁹ When constitutional morality is being ascertained, a distinguishing feature is that it is free from majoritarian beliefs which may undermine the values it so protects.⁷⁰

The Delhi High Court's judgement in *Naz Foundation* observed that there are moral precepts that govern the society which are different from 'constitutionally inherent' morals.⁷¹ For this issue, observing the varying notions of right and wrong which are subject to the interpretation by a devise few, the High Court held that the test of *Gobind*⁷² where "*fundamental rights should be restricted on the basis of compelling public interest*"⁷³ can only be done if it is through the principles of 'constitutional morality' as against 'public morality'.⁷⁴ Furthermore, they also stated that in no way can public morality justify the encroachment upon an individual's right.⁷⁵ Justice A. P. Shah used the concept of 'constitutional morality' as an argument against 'popular' morality whenever the court was required to test a government's action, thereby believing that the constitution must prevail over popular morals.⁷⁶

Even if the argument of constitutional principles may oppose social perception, or whether the outcome is undesirable, it would be important to follow constitutional principles strictly as constitutional morality runs parallel to the 'spirit, soul or conscience' of the constitution.⁷⁷ It was only in *Naz Foundation v. NCT of Delhi*, where the court recognised that popular morals were often fleeting and had subjective notions of right and wrong.⁷⁸ Even if Social realities prove that a thing to be followed, it is necessary to follow strict constitutional values to protect the constitutional rights of the people. This concept was reaffirmed in *Navtej Singh Johar*⁷⁹, *Joseph Shine*⁸⁰ and used as argumentative factor in the *Sabrimala Judgement*⁸¹ where it was held that constitutional vision cannot be substituted for societal beliefs.⁸²

69 Ronald Dworkin, *The Moral Reading of the Constitution*, The N.Y.REV.BOOKS (2016)

70 Vikram Aditya Narayan, 'Matters of Morality', 3 CALQ 6 (2016).

71 *Naz Foundation v. NCT of Delhi* 160 DLT 277 (2009).

72 *Gobind v. State of Madhya Pradesh*, AIR 1975 SC 1378.

73 *Id*; See Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgement*, NUJS L: REV. 445 (2009).

74 *Naz Foundation v. NCT of Delhi* 160 DLT 277 (2009).

75 *Id*.

76 *Id*.

77 *NCT of Delhi v. Union of India*, (2018) 8 SCC 501.

78 *Supra* note 6.

79 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

80 *Joseph Shine v. Union of India* (2019) 3 SCC 39.

81 *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1.

82 Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (2020). Available at <SSRN: <https://ssrn.com/abstract=3521665> or <http://dx.doi.org/10.2139/ssrn.3521665>>

Constitutional morality has also been observed as a form of 'rule of law' by the apex court in *Manoj Narula v. Union of India*, which cited the speech of *Dr. Ambedkar's* speech on constitutional morality in the Constituent Assembly.⁸³ In his speech, he implied that one should bow down to the values of the constitutions and not to violate such norms or rule of law, adding that "Commitment to the constitution is a facet of constitutional morality."⁸⁴

The *Sabrimala Judgement*⁸⁵ is crucial in the interpretation of this doctrine as there are two distinctive approaches taken by the apex court. In this Judgement, Justice Chandrachud elaborated at large what constitutional morality meant, believing that it has four prominent dimensions i.e. Justice, individual liberty, equality of status and of opportunity, and fraternity interwoven with human dignity.⁸⁶ These foundational norms govern constitutional morality and thus for the survival of the constitution, these norms require firm presence and whenever in conflict, it is this the "over-arching sense of constitutional morality" which shall succeed.⁸⁷ In his opinion, Justice Chandrachud follows the dicta in *Naz Foundation* by observing that constitutional morality requires 'permanence' as against the fleeting changes of public morals through the passage of time. Interestingly, Justice Indu Malhotra, in her dissent, warns us about the overpowering nature of constitutional morality interpreted by the previous courts. Justice Malhotra opines that rather than keeping constitutional morality as a tool of conflict resolution, it should instead be seen as a guiding force for the state to strike a balance of liberties. Justice Malhotra's approach is therefore inclined towards a nature of 'balancing' contrasting with the majoritarian view of 'conflict settlement.'

There appears to be a repetition by the courts that constitutional morality is an anti-thesis to public morality when they are in conflict and this is resolved by observing that constitutional principles, being similar to the 'grund norm', will always prevail.

Reservation, Equality and Constitutional Morality

Equality was read in the context of constitutional morality by the court in the *Sabrimala Judgement*. The court, in Justice Chandrachud's opinion, presents equality of opportunity as the third postulate of constitutional morality, which in essence is the underpin to Article 16. It was further opined that to be free from undue discrimination is one

83 *Manoj Nerula v. Union of India* (2014) 9 SCC 1; *See Supra note 60*.

84 *Supra Note 66* at 11, 12. See Andre Bételle, 'Constitutional Morality', 43 EPW 35 (2008); CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS) – Volume VII, 4th of November, 1948, Lok Sabha Secretariat (2014).

85 *Supra note 80*.

86 *Supra note 81*.

87 *Id.*

postulate of the 'Principle of Equality'. Justice Chandrachud further introduced "*equality before law and non-discrimination*" in *Joseph Shine*. Hence, it can be inferred that the notions of equality enshrined in constitutional morality is one which undergoes the twin test of equality and its violation would be constitutionally impermissible.

As the equality principle is seen as one of the fundamental norms of constitutional morality, let us presume that the discrimination faced by the creamy layer would fall under the ambit of public morality. Supporting the constitutional spirit under constitutional morality and following its values to the strictest degree gives us the argument that the creamy layer argument should be followed as a safeguard of constitutional values which overrides any notion of social acceptance. This is due to the fact that the creamy layer would in effect, offend the spirit of inherent 'equality' of constitutional morality if the 'creams' are still given the benefit of reservation. This boils down to the question of what is truly the reason for reservation and whether Article 16(4) in this instance prevails over Article 14. In *E. P. Royappa v. State of Tamil Nadu*, the court clearly enunciated that Article 14 is the "genus" and Article 16 was merely one of its "*species*".⁸⁸ As Article 16(4) is subservient to Article 14, Article 16 is subject to its parent provision and therefore the twin-test of equality must still be satisfied in providing reservation under Article 16(4).⁸⁹

Although the social realities may suggest that the 'creamy layer' principle should be avoided as a means to protect the communities and shield them from further social injustice, this being the society's argument, the morality of the constitution prevails over what social realities consider 'populist notions or popular morality.' This also being inter-changeable to rule of law, the state is not permitted to strike at the roots of this morality by allowing inequality within the Scheduled Classes. This constitutional morality argument therefore insists on the exclusion of creamy layer as a constitutional directive of Article 14 under the realm of 'equal protection of the laws.'

6. Conclusion

The above arguments present a conundrum. The notion of equality being a part of the overall constitutional scheme and notions of constitutional morality invoking Article 14 to protect its inherent values casts a responsibility upon the state to ensure that the creamy layer is to be removed when providing reservation to the SCs/STs. However, this does not give satisfactory results as the 'creamy layer' itself faces social discrimination in matters of opportunities by the upper classes. Therefore, the tussle between the two should not be addressed through constitutional means at the current moment.

88 *E.P Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.

89 *Supra* note 6.

Reservation has not completely eradicated the stigma that hold back the depressed classes. When reservation for the SCs and STs is itself 'social' in nature, economic factors should not be the basis of such exclusion as belonging to the creamy layer does not eliminate the problem of caste discrimination.⁹⁰

Although *Jarnail* had it in good intentions to protect the truly downtrodden members of the SC/ST communities, the court should not have imposed this principle on a mere presumption that the creams take away reservation benefits. It is necessary for us to gather more evidence on this issue before it could be dealt in a constitutional claim. Legal and economic scholars have expressed their concerns when the court applied the creamy layer principle in *Jarnail Singh*.⁹¹ They have put forth their point that due to a lack of adequate research studies on this matter, it would be wrong to make a constitutional presumption. Prof. Ashwini Deshpande believes that a research study should be conducted to see whether these communities lose their stigma as their income increases.⁹²

It is also pertinent that in observing the contours of constitutional morality, we must look at the social consequences faced when this principle is applied. Although the courts have argued for constitutional morality as an opposition to societal beliefs, this may set a dangerous precedent which fails to recognise these social issues at large that plague several communities. As *Salman Kurshid* argues that as the courts have interpreted constitutional morality doctrine on the same lines as the basic structure doctrine through its open and undefined nature, the lawyers are conflicted with this doctrine as it may enter a realm of judicial legislation.⁹³

The author is of the opinion that although it is important to protect the truly downtrodden members of the SC/ST community, it should not be done at the cost of another SC/ST member. The issue of creamy layer should be addressed as it would be difficult to allow the cream to retain their benefits as violative of Article 14. At the same time, concessions can be made which can balance their interests as well

90 Reva Yunus, 'Caste, quotas and discrimination in India: Insights from interdisciplinary quantitative research. An interview with Ashwini Deshpande', 2 LSJGD (2016). See Gautam Bhatia, 'The Nagaraj/Creamy Layer Judgment and its Discontents,' INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (September 30 2018) <<https://indconlawphil.wordpress.com/2018/09/30/the-nagaraj-creamy-layer-judgment-and-its-discontents/#:~:text=On%20September%2026th%2C%20a%20Constitution,judge%20bench%20judgment%20in%20M.>>.

91 *Id.*

92 Pranav Dhawan & Ishaan Bansal, Community Identity and Reservation: LSRP in Conversation with Ashwini Deshpande, Law School Policy Review (June 24, 2020), <<https://lawschoolpolicyreview.com/2020/06/24/community-identity-and-reservation-lspr-in-conversation-with-ashwini-deshpande/>>.

93 *Supra* note 67 at 394.

as the interests of the truly downtrodden. The creamy layer principle initially envisaged for the OBCs must not be verbatim applied to the SCs/STs.

There have been propositions made by scholarly articles which suggest the use of complaint mechanisms parallel with the Vishaka *Guidelines*. However, these were focused at the promotional level or when it occurs within the organisation and not at the entry level of employment.⁹⁴ To curb this at the entry level, it may be suggested to implement the same proposed complaint mechanism, while allowing independent authorities to check the veracity of dismissals that appears to be discriminatory. As other institutional measures have been introduced through the SC/ST (Prevention of Atrocities) Act, 1989⁹⁵, it is important to strengthen these institutional safeguards for the interests of the SCs/STs as a protection from discrimination. At the same time, it is our duty to overcome these conservative ideals of caste to acknowledge the historical marginalisation suffered by the SCs/STs and to proactively bring them at par with the rest of the community.

94 *Supra* note 28. See *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

95 Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, INDIA CODE (1989).

True Liberty is Yin to the Restraint Yang

*Mr S Aditya

**Ms Anushree Singh

Abstract

This article aims to capture the dichotomy of Liberty and restraint inherent in the Freedom of Media, taking into consideration the Indian constituent assembly debates, the judicial pronouncements, various philosophies, and jurisprudence behind freedom of media and speech. Comparative analysis of freedom of speech as enshrined under the Constitution of India and the Constitution of the United States shall be undertaken. This article shall further analyze the constitutional protection granted to the sacrosanct concept of free media and independent judiciary. An Analysis of Section 66A of *Information Technology Act, 2000* with special reference to the Shreya Singhal case, we will be analyzing the principle that vagueness renders provisions void. This article also expounds on the intelligible differentia, between the expressions made on the Internet versus expressions made on print media, as elucidated by the Supreme Court of India. The article discusses the philosophy of the Supreme Court of the United States which places “Liberty” at the highest pedestal while discussing the concept of “*Market place of Idea*” as a necessity for a thriving democracy. This article further expounds on the rationale in distinguishing the precedent value from the United States America on freedom speech jurisprudence, taking into consideration the conspicuously different legislative language. This article delves into the evolving tests of obscenity as applied by the judiciary. This article further illustrates how vagueness in legislative language may lead to non-standard interpretation by the judiciary having the potential to cause a loss of faith in the judiciary. This article also aims to expound the Interpretation of the term “public order” taking into account the *Romesh Thappar vs State Of Madras Case*¹. This article also analyses the contempt jurisprudence concerning the press and media, with special reference to the *S Mulgaonkar v Unknown (1978)*.

1. Introduction

*“It was the best of times, it was the worst of times,
it was the age of wisdom, it was the age of foolishness,*

* HNLU, Raipur

** HNLU, Raipur

1 1950 SCR 594

*it was the epoch of belief, it was the epoch of incredulity,
it was the season of Light, it was the season of Darkness,
it was the spring of hope, it was the winter of despair,
we had everything before us, we had nothing before us,
we were all going direct to Heaven, we
were all going direct the other way in
short, the period was so far like the
the present period, that some of its noisiest
authorities insisted on its being received,
for good or for evil, in the superlative
degree of comparison only.”*

-Charles Dickens in A Tale of Two Cities

Technology and media have more often than not proved to be a double-edged sword. On one side it has brought the whole world together and on the other, it has put an end to every one-on-one interaction. It has proved to be the largest gateway to knowledge and at the same time things like ‘dark net’, ‘cyber bullying’ etc. have cropped up a few of the many nefarious outcomes. Now this development in the field of global communication has unleashed a whole bundle of opportunities, both good and bad. Now, the media facilitates the freedom of speech and expression and fortifies the liberty of every man to express himself before as many people as he chooses to. Expression of oneself is most fundamental to human existence but the question that arises over here is whether this liberty should be unchecked. Since the inception of human civilizations on earth, liberty has been at loggerheads with restraint.

2. Liberty Whether Truly at Variance with Restraint?

To be in a position to answer this question, what is required is to have a consensus on the true meaning of liberty. We have two extreme opposite opinions given by *John Locke* and *Karl Marx* both of whom had a libertarian ideology.

John Locke believed that ‘*True liberty*’ is the yin to the ‘*restraint*’ yang’. He said - “...*the end of law* is not to abolish or restrain, but to *preserve and enlarge freedom*: for in all the states of created beings capable of laws, *where there is no law, there is no freedom*: for *liberty* is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, *a liberty for every man to do what he lists*: (for who could be free when every other man’s humour might domineer over him?) but a *liberty* to dispose

and order as he lists, his persons, actions, possessions, and his whole property, which the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.”²

On the other hand, *Karl Marx* while summing up the character of the French Constitution, about the bundle of rights contained therein, stated: “. . .from beginning to end it is a mass of fine words, hiding a most treacherous design. From its very wording, it is rendered impossible to violate it, for every one of its provisions contains its own antithesis-utterly nullifies itself. For instance: ‘the vote is direct and universal,-’ *excepting those cases which the law shall determine*’.”³

Those who were inclined towards *Marx*’s ideology regarding liberty and restraint said in our Constitutional Debate on Art.19 that-

“Freedom of speech and expression is the very life of civil liberty, and it is through them that we can make our voice felt by the government, and can stop the injustice that might be done to us. For attaining these rights the country had to make so many struggles and after a grim battle succeeded in getting these rights recognized. But now when the time for its enforcement has come, the government feels hesitant; what was deemed undesirable then is being paraded as desirable. What is being given by one hand is taken away by the other. Every clause is being hemmed in by so many provisions⁴.”

In contrast, one among those who concurred with Locke’s line of reasoning, Seth Govind Das contended in the light of geopolitical circumstances that ...if we consider the present national and international situation as also the fact that we have achieved freedom only recently and our government is in infancy, we shall have to admit that the government needed to retain the rights it has done after granting the fundamental rights. We should see what is happening in our neighbouring country, Burma. We should also keep in view what is happening in another great country of Asia-I mean war-torn China. Because of what is happening in our neighbouring country and the situation in our own country, we should consider how necessary it is that the government should continue to have these powers.⁵ On

2 John Locke, *Two treatises of government*, p. 234 (1689).

3 Hal Draper, *Karl Marx on Democratic Forms of Government*, Vol 11, Socialist Register 1974.

4 Banerjee, D. N. (1950). SOME ASPECTS OF OUR FUNDAMENTAL RIGHTS : Article 19. *The Indian Journal of Political Science*, 11(4), 26–36. <http://www.jstor.org/stable/42743253>

5 Seth Govind Das, *The Constituent Assembly Debates*, 2 nd December 1948, para 7.65.16, (1948) available at:

https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02.

the same note, Algu Rai Shastri who also was a participant in the constituent assembly debate reaffirmed *Locke's* ideology. He argued that Freedom is great art- even greater art than music and dancing. One who is adept in music and dancing keeps his voice under control and maintains restraint and control over his bodily movements, and on the movement of his feelings. Full freedom is being conferred upon us but it can never mean that we should not be under any restrictions whatsoever. Freedom of speech does not mean that we can give expression to whatever comes to our mind without observing any limitation or rule in this respect.

In the light of how matters stand in the present day, with due consideration to the political scenario, the technological developments, and the fact that the Constitution of India is a living document, there is a need to ensure that every provision meets its epitaph with the efflux of time and growing constitutional precepts. In respect of the liberty that media is supposed to be entitled to, this can only be achieved if the pendulum of preference doesn't swing in the direction of either of the above-mentioned two opinions. We, therefore, put forth the idea that a middle ground between these two conflicting approaches would best serve the purpose. The attenuated line of reasoning at this point suggests that there is a need to press upon that part of the constitutional debate which helped the constitution-makers strike a balance between the two. The Draft Article 13 (i.e. present Art. 19) brought the drafters to a crossroads. Das Bhargava asked in the debate on 1st December 1948 - "what would happen to the Fundamental Rights if the legislature has the right to substantially restrict the Fundamental Rights?... *Are the destinies of the people of this country and the nationals of this country and their rights to be regulated by the executive and by the legislature or by the courts?*". If you consider clause (3) to (6) of Draft Article 13 you will conclude that as soon as you find that in the Statement of Objects and Reasons an enactment says that its object is to serve the interest of the public and protect public order, then the courts would be helpless to come to the rescue of the nationals. Thus, he concluded that adding the word "reasonable" before the restrictions would solve the question thereby making the Supreme Court have the final say in respect of the destinies of our nationals.

3. Art. 19(1)(A) of Constitution of India Vis-A-Vis First Amendment to the US Constitution

Freedom of speech and expression is of paramount importance under a democratic Constitution and must be preserved.⁶ There is no dispute that democracy entails the free flow of information. Democracy is genuine insofar as it means popular control from below.

6 Sakal Papers Ltd. & Ors. v Union Of India, AIR 1962 SC 305

The difference between hollow rhetoric about “liberty” and a real revolutionary-democratic struggle could only be spelt out in terms of concrete issues. One of the most elementary was the issue that had been the first subject of *Marx’s* political pen, freedom of the press. For anything that contravenes its safety is not “in the interest of public safety”.⁷

In the *Natyashastra* *Brahma* explains the importance of freedom of expression which is granted to the Actors of *Nataka* and also laid importance on the objective approach that must be undertaken while seeing the play enacted whereby granting the Actors the immunity to express themselves with complete freedom. *Indra* and later *Brahma* granted that the stage would be a protected environment from all miscreants in *Chapter 1 verses 55-121*.

• **Freedom of Speech and Expression under the Indian Constitution**

It was a symbol of the colonial era where the ruler ruled over the subjects and vanquished concepts of resistance. Article 19(1)(a) is basic and vital for the sustenance of parliamentary democracy, which is a part of the basic structure of the Constitution. The significance of the fundamental guarantee of freedom of speech and expression is too loud and clear to be ignored. The fact that this right of free speech and expression emanates directly from the Preamble to the Constitution of India bolsters the idea of it being kept on a high pedestal, high enough that it is not easy for anyone to subdue the vigour and might of the entitlement that it offers.

Art. 19(1)(a) states - “all citizens shall have the right to freedom of speech and expression”. The use of these two words, ‘speech’ and ‘expression’ is no constitutional accident. There has been a conscious decision taken by the framers to put the word ‘expression’ after ‘speech’. It very clearly signifies that they left no opportunity to exhibit that rights as guaranteed under Art. 19(1) (a) cannot be put in watertight compartments. While speech refers to verbal communication, the word ‘expression’ independently has no boundaries. Going down to its root word, we come to know that the Latin word means “to press out”.

As per *Black’s Law Dictionary*, Expression means anything which is not left to inference or implication. The constitution-makers instead of simply restricting themselves to speech went ahead to use the word expression, thereby making the right guaranteed therein to be the widest.

7 Hal Draper, Karl Marx on Democratic Forms of Government, Vol 11, Socialist Register 1974.

8 https://archive.org/stream/NatyaShastra/natya_shastra_translation_volume_1_-_bharat_muni#page/n95/mode/2up

- **Freedom of Speech and Press under the US Constitution**

First Amendment to the United States Constitution states - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” This provision is one of the most cherished values of the US constitution and it has time and again been reiterated by the United States Courts that freedom of speech and the press needs to be realized in the maximum possible dimensions, lest it shall be contrary to the letter and spirit of the Constitution. It has been made explicitly clear through the interpretations of the *First Amendment* that speech includes both direct words and symbolic actions. The liberty of the fourth pillar of democracy was also guarded by adding the word “...of the press” to the *First Amendment*. The United States of America is often seen as the pivotal source of global inspiration for media, though lately the prosecution of journalists covering the pandemic news has indeed caused waves of dissatisfaction amongst the media professionals.

4. Constitution and Media

It has been rightly said, “Independent judges and noisy journalists are democracy’s first line of defence”. Now and again, both in India and in the United States, the media has taken the limelight and has fomented litigation on constitutional grounds. Sliced any way, the fact of the matter is that independence of media is what reflects the fecundity of a true democracy. On the previously mentioned plinth, a mansion of argument can be built. But we have tried to instantiate this through three textbook cases where liberty enjoyed by the press or social media has been at odds with ‘reasonable restriction’ under the Constitution.

- **Democracy can’t fare better by clinging to the rocks (of the fourth pillar) falling with it.**

Print media and press are very impactful in this era. Despite this fact, it is undisputed that the news industry is in deep crisis. The conflict between liberty that journalists relish and standards that are to be maintained by them has been hauled in courtrooms nine out of ten times whenever any controversy crops up. There is no escape from referring to the landmark decision of the *House of Lords* in the 1987 *Spycatcher case*⁹, where a prominent newspaper published as its headline “*You Fools*” while explicitly naming the sitting judges of the court. The courts in this matter refrained from considering the

9 Attorney General v Guardian Newspaper Pvt. Ltd,(1987) 1 WLR 776

headline for initiating contempt proceedings.

On one hand, so that journalism preserves its legacy, it must draw a clear line of demarcation between ‘news’ and ‘views’. On the other, it becomes quintessential that courts keep intact the ideology of the constitution-makers that ‘it is the right that is fundamental and not the restriction’¹⁰

The position that India holds in the *Press Freedom Index* of 2020 is very disparaging. It is at rank 142 out of 180 countries. An assessment must be made to analyze how things are at the coalface and thus work to pave the way forward.

- **Section 66-A of the Information and Technology Act, 2000 drove coaches and horses through the concept of freedom of speech and expression.**

The question of freedom of speech and expression has been brought before various high courts and the Supreme Court of India from time to time. We shall now analyze one of the landmark judgments in the field of Digital freedom of speech and expression: *Shreya Singhal vs Union of India*¹¹. *Shreya Singhal*, a law pursuant of Delhi University, felt deeply for the plight of the two girls¹² from Maharashtra who were booked for their tweets under Section 66-A of the *Information Technology Act, 2000*, having made tweets against the Maharashtra bandh in the year 2012, the bandh was called after the death of *Balasaheb Thakhre*.

This Public Interest Litigation Writ, filed under Article 32, was heard by the bench of *Justice Rohinton Fali Nariman and Justice Chelameswar*. The meanings and scope of the terms “grossly offensive”, “annoying” & “of a menacing character” were analyzed by the Apex Court as they were used in the disputed provision Section 66A. The summary of the said provision is produced herewith for the reference of the readers:

It punishes sending of offensive messages through any mode of the communication services: Any person who sends by computer or any such device:

- a. message grossly offensive and of a menacing character;
- b. False information is known to him to cause annoyance, danger, obstruction, etc. persistently by the utility of a computer

10 Ram Singh V State of Delhi AIR 1951 SC 270 ; Maneka Gandhi v Union Of India AIR 1978 SC 597; T.M.A Pai Foundation v State Of Karnataka AIR 2003 SC355

11 *Shreya Singhal v Union of India* MANU/SC/0329/2015

12 Kaustubh Srivasatava(2020) SHREYA SINGHAL v U.O.I. (FREE SPEECH ON DIGITAL PLATFORM) with Ms. Shreya Singhal[Podcast] THE ONE TAKE SHOW: Law, Logic and Life with Kaustubh. Available at: <https://open.spotify.com/episode/2Gj8hUd2DJ03LDxVNCzru2?si=V5xAdGfGRtmFTMwgpPeDe7g> [Accessed 08 Dec. 2020].

resource;

- c. sends mails to cause annoyance or inconvenience or to deceive the receiver of the mail

Shall be punishable with fine and maybe imprisoned up to 3 years.

It was contended that there was no need for the amendment since similar actions were defined under the Indian Penal Code, it was also contended that Section 66A of the *Information Technology Act* was violative of Article 19(1)(a) as the restrictions imposed were ultra vires to restrictions enshrined in the Article 19 (2), it was also contended that the language employed in the provision suffered from the vice of vagueness, whereby the petitioner raised the plight of an innocent citizen who could not identify the ambit of the law and also no guidelines were laid down regarding the procedure to be adopted by the authorities while executing the provision.

It was contended in this case that there was no necessity for bringing an amendment for introducing Section 66a, 66b-66d & 67A-C the Petitioner alleged that the provision of Section 268, 294, 510 dealt with the same offences. We shall herewith produce the summary of said provisions so that we gain a better understanding of the Petitioner's contention and Supreme Court's reasoned denial of the above said contention:

The Court observed an underlining degree of specificity in a) Section 66B wherein punishment has been fixed for dishonest retentions and receipt of stolen computer resources and communication devices; b) Section 66C which incriminates the use of identification of another person; c) Section 66D Dishonest Impersonation has been criminalized; d) Section 66F punishes the act jeopardizing the state security, integrity and sovereignty of India; and e) Section 67- 67B which aims to punish the publishing and distribution of obscene material also punishing depiction of child pornography.

The Justices of the Supreme Court observed the contention of the petitioner, claiming that Section 268, 294, 510 of Indian Penal Code preempted the need of *Amendment Act of 2009*. The above said claim of Petitioner was held unjustifiable as Section 268 of Indian Penal Code outlaws Acts of "Public Nuisance" and the provision elaborates the essential ingredients that constitute a wrong under the said provision, but the learned judges observed that in the case of Section 66A the very ingredients of Section 268 were declared illegal making it a blanket ban unsustainable under law. The Supreme Court hence concluded that vagueness of the provision amounts to unconstitutionality.

The Supreme Court while dealing with the question of the necessity of the *Amendment Act 2009* was also posed with the question regarding

the intelligible differentia of the provisions of the *Amendment Act of 2009* made, taking into consideration the medium change of expression to the internet from print media/television/films, etc. Since similar actions were already punishable under IPC, the Learned Additional Solicitor General laid out the following contentions and satisfied the Supreme Court regarding the intelligible differentia behind the making of separate provisions for expressions made on the Internet against the print media/television/films:

1. Outreach of print media is local in nature while the outreach of the internet is global.
2. Audience of the print media must be literate while the audience of the internet may also be illiterate since with a click of a button various information may be accessed intentionally or unintentionally.
3. The option of pre-censorship is available in print media while the same is unavailable in the case of the internet due to the sheer number of individuals having internet access.
4. The print media stays in the same form as originally telecasted/published but the expressions shared on the Internet may be changed and morphed.
5. Due to the sheer reach of the internet, rumours may spread like wildfire and may consequently cause a state of public disorder to a large territorial extent.
6. In print media the vulnerability of one's privacy is lesser in comparison to the Internet where the fundamental right to privacy as enshrined under Article 21 is extremely vulnerable.
7. It is difficult to publish material in press media in comparison to publishing derogatory Media on the Internet.
8. The print media has inbuilt limitations regarding readership as well as distribution but the Internet does not have the above said drawbacks.
9. Anonymity cannot be maintained in press media but on the Internet, one may remain anonymous.
10. Institutional restrictions are present in print media whereas on the Internet there are no institutional restrictions.
11. Logistical shortcomings may come in the case of print media/television/films but in the case of the Internet, there is no such shortcoming of logistics since all one needs is a device.

Citing the above-said contentions made by the Additional Solicitor

General the Supreme Court justified intelligible differentia inherently present between the expression made in print media and expressions made on the internet. Upholding the validity of legislation specifically made for offences in the cyber world the Supreme Court thus rejected the contention of the petitioner, who were claiming that there were no grounds for making new law.

The Supreme Court having negated the Petitioner's contention of lack of necessity for the very legislation of the amendment proceeded to analyze the importance of freedom of speech and expression. The honourable justices of the Supreme Court signifying the sacramentally fundamental nature of the right to freedom of speech went further ahead and drew an analogy of the freedom of speech with the *Ark of Covenants*. This analogy makes one wonder about the characteristic's traits of the *Ark of Covenant*. The *Ark of Covenant* was built by *Moses* on the command of God and it held tablets in which the holy *10 commandments of Judaism* were inscribed, hence freedom of speech is to the constitution as *10 commandments* are to *Judaism*.

The judgments of the Supreme Court of United States of America were cited to introduce the idea of free communication of opinions leading to the concept of 'marketplace of ideas. Freedom of speech as existing in the United States of America has resulted from the long struggle for independence fought by the revolutionaries who fundamentally believed in the idea of liberty of thought and expression being the foundational ground of their independent nation. *Thomas Jefferson* the 3rd president of the United States of America rather beautifully and succinctly expounded these ideals of freedom in his letter dated 16 January 1787 addressed to *Edward Carrington*, said that "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter..."¹³. The letter talks about the importance of an opinionated and knowledgeable citizenry to keep the government in check.

- **Inapplicability of American Precedents upon the Indian case involving interpretation of freedom of speech and expression**

The learned justices referring to an earlier precedent of the Supreme Court of India¹⁴ analyzed the difference between the American freedom of speech and Indian freedom of speech and expression. Legislative language of freedom of speech guaranteed to American citizens calls

13 "From Thomas Jefferson to Edward Carrington, 16 January 1787," Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-11-02-0047>. [Original source: The Papers of Thomas Jefferson, vol. 11, 1 January–6 August 1787, ed. Julian P. Boyd. Princeton: Princeton University Press, 1955, pp. 48–50.]

14 *Kamleshwar Prasad and others vs State of Bihar MANU/SC/0410/1962*

it Absolute freedom and also guarantees that no law by Congress shall abridge the thus provided freedom. But the legislative language of Indian freedom of speech and expression as enshrined in the constitution of India also mentions reasonable restrictions that may be applied under Article 19 (2) thus Displaying an intrinsic and very perceptible difference. The court observed the conspicuous absence of the term expression in the American guarantee of freedom of speech and they further observed the intentional absence of the term freedom of the press in the Constitution of India as against its presence in the American constitution. The court went forward to understand and expound the virtually absolute freedom of speech mentioned in the Constitution of the United States versus the freedom of speech as enshrined under the constitution of India.

The absolute freedom of speech as provided under the constitution of the United States takes into consideration the exposition of ideas of essential nature and does not protect lewd, obscene, profane, hurtful speech having the potential to cause an immediate breach of peace. The language of the United States law suggests that no law could be made by the Congress abridging the freedom of speech but, whenever it is necessary for state's cause, necessary restrictions may be imposed by the Congress. The learned judges of the Supreme Court of India further observed that any restriction if we're to be imposed upon the freedom of speech in India, it had to fit the 8 listed restrictions which are also exhaustive in nature. Hence taking into consideration the sheer flexibility with which one could abridge freedom of speech in the United States of America in contrast to the exhaustive list of grounds for restricting the freedom of speech in the Indian constitution thus renders the precedent value of the American Supreme Court merely persuasive. This elaborate ratio renders all the American jurisprudence on freedom of Speech distinguished hence not applicable in binding form.

Scrutiny of the legislative language of Section 66 A of the Information Technology Act by the Supreme Court of India

The learned judges of the Supreme Court while analyzing the language used in the impugned Section 66(A) looked into the restrictions with the lens of compliance of the Article 19(2) and also analyzed the petitioner's claim suggesting that the language employed was very vague and hence the provisions must be declared unconstitutional.

The Supreme Court while analyzing the reasonable restrictions as provided under Article 19 (2) has from time to time evolved various principles which were taken into aid in the instant dispute of digital freedom of speech and expression. The Supreme Court stated that the state is prevented from placing restrictions on otherwise permissible

freedoms also stating the necessity of the restrictive legislation to fit into the box of 8 restrictions provided under Article 19 (2). The Supreme Court also took into consideration the language of the legislation must be reasonable in substance and must provide reasonable and clear-cut guidelines as to the procedure¹⁵ to be undertaken by the authorities while executing the said provision.

In this case, while looking into the judicial approach to be undertaken while analysing the essentials of freedom of speech and expression, The Supreme Court propounded the constituents of freedom of speech and expression. The freedom of speech and expression essentially includes discussion, advocacy and may lead to incitement which must be restricted. Learned judges of the Supreme Court of India to better illustrate the difference between freedom of speech employed for advocacy of an idea and freedom of speech used to incite the public to affect state security, took the example of the speech of *Antony* from the play *Julius Caesar* known from its iconic line “*but, Brutus is an honourable man*” Wherein the words of *Antony* had a crescendo effect on the public and led to the final outcry of mutiny by the public in unison. This Urgent immediacy of the imminent public disorder should be visible in the alleged speech or expression of incitement it should be as crucial as to prevent ‘*a spark in a powder keg*’¹⁶.

The honourable justices observed that if censor was to be imposed upon the people then the censors must be better shielded against the errors than the censored¹⁷. While discussing the necessity of provisions to be precise the learned justices observed that for any penal provision to be reasonable and valid it must provide clear distinction to the innocent public regarding the action considered as a crime and actions not considered as a crime; and provide precise guidance to the authorities regarding the scope and procedure of execution of the provision¹⁸. When the Supreme Court of United States in the year 1950 was faced with legislation which had outlawed ‘sacrilegious’ writing and utterances it was very well observed that the term ‘sacrilegious’ was far from definite as it may be interpreted to be hurtful by any of the numerous Sect of the nation and further basing the wisdom upon the history it was observed that “history does not encourage reliance on wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men”¹⁹. Perhaps the access to this wisdom came handy when additional Solicitor General

15 Khare’s Case MANU/SC/0004/1950

16 S.Rangarajan v P. Jagajivan and Ors. Manu/SC/0475/1989

17 American Communication Association v Douds 94 L Ed. 925

18 Federal Communication Commission v Fox Television Station MANU/USSC/0066/2012

19 Burstyn v. Wilson MANU/USSC/0107/1952

in Shreya Singhal case claimed that the state assures that it shall administer Section 66A in a reasonable manner to which learned justices precisely replied that unconstitutional provisions shall not be saved by the Assurance of Administration as “government may come and government may go for Section 66A goes on forever”.

• **The meanings and scope of the terms “grossly offensive”, “annoying” & “of a menacing character”**

The interpretation and analysis of the terms such as “grossly offensive”, “annoying” & “of a menacing character” come from the understanding of morality and decency as interpreted by the judiciary. The interpretation of the term “obscene” has also been evolved with time starting from *Hicklin’s*²⁰ test to the evolved *Miller’s*²¹ test. While in *Hicklin’s test* the English Court while interpreting the term obscene concluded that any material which has the potential to corrupt or deprave open minds of such people who might happen to come to possess such material. This Victorian test of obscenity was all-pervasive and left very little scope of literary or artistic expression of work. Thus in America in the year 1973 *Miller’s* test was evolved wherein to term something as obscene a) one needs to apply community standard test by applying common man’s perspective; b) If the work depicts *prima facie* offensive sexual conduct which was specifically prohibited under the law of the Land; and c) if the work, when interpreted as a whole, lacks serious literary, artistic, political, educational or scientific value. Hence this new test allows the expression of works meant for literary, artistic, political, educational, or scientific value.

The moral compass of society is a very dynamic concept and the same may be interpreted differently in different contexts. In Britain, in *Collin’s case*²² the term “grossly offensive” was under consideration, as the accused had made a telephonic call to the office of the Member of Parliament and conveyed his strong views on immigration by using racial slurs referring to the immigrants. The Leicestershire justice dismissed the case stating that the communication was merely offensive and not grossly offensive lacking such magnitude. The *Queen’s Bench* was convinced of the reason pleaded before it and dismissed the appeal filed by the director of public prosecution. But when the question came before the *House of Lords* the impugned decision of the *Queen’s Bench* was reversed. The *House of Lords* propounded that, to determine the question “whether the message was grossly offensive”, such message shall adhere to the standards of an open and just multiracial society. The contemporary standard to determine if the message constitutes a gross offence is to check whether the message addressee feels gross

20 Regina v Hicklin L.R. 3 Q.B. 360 (1868)

21 Miller v California MANU/USSC/0238/1973

22 Director of Public Prosecution v Collins MANU/UKHL/0071/2006

offence by the same or not.

Later in *Chambers case*,²³ the Queen's bench was posed with the fact, wherein the defendant on realizing the fact that due to bad weather airport was to be closed made a tweet in anger asking the airport to get proper or he would "*blow the airport Sky High*" this tweet was perused by the Airport Authority security department and the bomb suspicion was reported to the police. The question before the magistrate Court was whether the threat of the defendant amounted to a message of menacing character under Section 127 (1)(a) of the *Communication Act, 2003* (this English law was *pari materia* to the disputed Section 66A of *Information Technology Act, 2000*). The magistrate court found the defendant's tweet to be menacing and this decision was upheld by the Crown Court. But when this question came before the Queen's bench division the decision of the Crown Court was reversed the Queen's Bench observed that the concern of the Crown Court regarding the terrorist attack is not relevant in the instant case as the tweet was mere addressing of grievance regarding the closed airport. Since, if it was to be a terrorist threat It would not be made so many days in advance and not on such a public portal.

Taking into account the non-standard results in the judicial interpretation of the open-ended terminologies by the learned judicial minds, it rather seems impossible for the general public to understand the standards behind the provision of commission of an offence and simultaneously it shall be difficult for the authorities to enforce such vague provisions. Hence the learned Supreme Court Judges concluded that Section 66A is unconstitutionally vague.

- **Legislation Going Overboard in the Garb of "Interest of Public Order"**

The learned justices while interpreting the phrase "in the interest of" Came to observe that any legislation that claims to put restrictions on citizens' rights under the above-said phrase needs to have proximity to the object of applying the reasonable restrictions and not any hypothetical or farfetched rational²⁴. In the *Romesh Thappar Case*²⁵ where the State of Madras had prohibited the "crossroad" magazine distribution in the state-based upon Section 9(1)(A) *Madras Maintenance of Public Order Act, 1949* claiming that the distribution of the magazine might affect the tranquillity of the state and hence adversely be affecting the security of the state. The Supreme Court denied the contention stating that the alleged effect on the public tranquillity is not of similar gravity as the alleged claim of protection

23 *Chambers v Director of Public Prosecution* MANU/UKAD/0597/2012

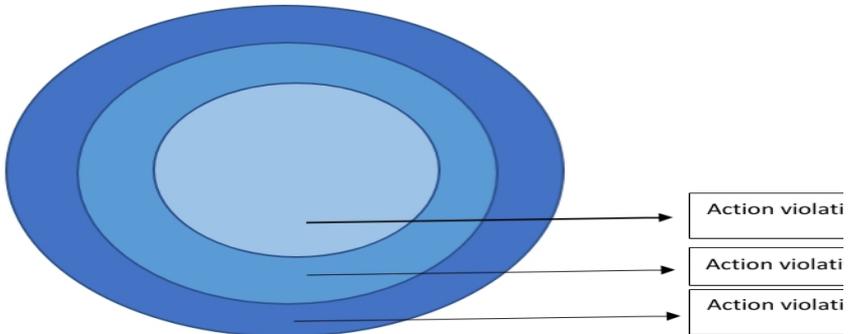
24 *Central Prison Fatehgarh v Ram Manohar Lohiya* MANU/SC/0058/1960

25 *Romesh Thappar v State of Madras* MANU/SC/0006/1950

of the security of the state. Similarly, a magazine called RSS(*Rashtriya Swam Sevak Sangh*) was prohibited from distribution by Section 7(1)(c) of the *East Punjab Public Safety Act*, 1949.

Since the Supreme Court declared both *Madras Maintenance of Public Order Act*²⁶ and *Punjab Maintenance of Public Order Act*²⁷ as Unconstitutional for imposing Ultravires restriction on the freedom of speech. The word “public order” was inserted in Article 19 (2) by the 1st Constitutional Amendment. The Supreme Court in its subsequent decisions propounded that an action might be violative of “law and order” but its gravity may not affect “public order/ public tranquillity” and further went on to suggest that an act affecting the public order may not be grievously affecting the “security of the state”. Hence the gravity of the action must objectively be analyzed and must not be read indiscriminately to curb the freedom of speech.

The Supreme Court illustrated the above-said approach of magnitude-based interpretation by taking an example of a man stabbing another man versus a man stabbing a man of another community in a communally charged environment. While in the earlier example the action of the stabbing is violative of “law and order” but has no bearing on Public tranquillity but in the latter example the act of stabbing has the potential to disturb state tranquillity and hence the magnitude of the same crime may change with a synergy of context it is placed in.



- **Importance of freedom of speech for a democratic society**

The Supreme Court in the *Shreya Singhal* case went forward and compared the people publishing their opinion on the internet with German religious renaissance leader *Martin Luther* who had stood

26 *ibid.*

27 *Brij Bhushan and Anr v State of Delhi MANU/SC/0007/1950*

against the Roman Catholic Church and its practices. He had even written the first popular German translated copy of the *Holy Bible*, he had used the printing press technology to mass-produce the same whereby he led the formation of the Christian religious group called the Protestants. The ripples of his work also could be seen in the script development of the German language. This comparison made by the Supreme Court speaks volumes about the importance of freedom of speech and expression in any society.

The learned judges of the Supreme Court observed that the language of the legislation restricting freedom of speech and expression must be very precise and must not be all-inclusive. the administrative authority executing the provision must not catch under the net of the wide ambiguous provision innocent people.

- **Contempt of Court jurisprudence and adjudication by the Courts with Special reference to Press and Media**

The standards to impose contempt upon the media house or any individual are very high because of judicial restraint. Since in the contempt proceedings the judges themselves are the prosecutor and the judge, the act of mercy is rather seen as stronger than a whimper of weakness²⁸. Contempt may be of civil or criminal nature, generally, contempt proceedings make the headline of news is criminal in nature. The essentials of criminal contempt are expressions that: a) reduce the authority of court b) Prejudices the judicial course of proceeding c) interferes with the administration of justice. The importance of media in a society is elucidated by the very fact that no individual can obtain information for the necessary discharge of their political duty without the various modes of media and press present in society. Thus, the media acts as an agent of the public and society at large while seeking out news. The court in many instances has claimed freedom of the press to be the arc of the covenant of democracy²⁹ as it channels the criticism necessary for the working of the constitutional institution.

This power of contempt jurisdiction must be used very sparingly as *Lord Denning* had observed in a rather enlightened manner, “we will not use the jurisdiction as a means to uphold our dignity”. As that must rest on a surer foundation. Nor will we use this to suppress those who speak against us. We do not fear criticism nor do we resent it, for there is something far more important at stake. It is no less than freedom of speech itself³⁰.

28 Re: S. Mulgaokar MANU/SC/0067/1977

29 Bennett Coleman and Co. v Union Of India and Ors. MANU/SC/0038/1972

30 Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn (1968) 2 All ER 319 (CA)

5 Conclusion

All goes well until man remains his mastery over his creations but as soon as his creations gain mastery over him, it creates havoc. Media today has a powerful impact on the audience which is compelling enough a reason to set standards of conduct. Truly, there ain't any tussle between '*your liberty*' and '*your captivity*', instead, it is a clash between '*your liberty*' and '*his captivity*'. The attenuated line of reasoning suggests that in the latter case the parliament and the courts both are required to ensure that there is a balance of convenience. *Lord Acton* had rightly said that -" *Power tends to corrupt and absolute power corrupts absolutely*". That being so, none of the above said four pillars of the democracy must be vested with any power which is absolute in nature. In a constitutional democracy like ours, all need to be well within the framework of the Constitution. However, it is important to note that this framework is not a static structure; rather it is a dynamic and evolving building.

Environment Impact Assessment in India: National Green Tribunal's Perspective

***Dr Manoj Kumar**

Abstract

Environment protection is essential for human subsistence with dignity. In order to ensure environment protection and ecological security it is utmost important that the impacts of development projects are assessed prior to giving effect to them and they are implemented only if they are environmentally sound. Environment impact assessment (EIA) is an instrument through which this prior assessment could be done. EIA acts as a potential formula for ensuring ecological sustainable development. The National Green Tribunal (NGT) is a specialized forum for effective and expeditious disposal of cases pertaining to environment protection, conservation of forests and other natural resources and for seeking compensation for damages caused to people or property due to violation of environmental laws. In a short span of time since its establishment in the year 2010 the NGT has strongly influenced environmental litigation in India. In the light of this backdrop, this paper is an attempt to explore the perspectives of the National Green Tribunal on Environment Impact Assessment in India.”

1. Introduction

A clean and unpolluted environment in which human beings could lead a healthy and meaningful life is an integral facet of right to life. Big developmental projects cause harmful impact on environment and result into ecological disasters and this phenomenon is gaining concern the world over. The interface of development with ecological security is for better protection of humanity. Environment protection is essential for human subsistence with dignity. In order to ensure environment protection and ecological security it is utmost important that the impacts of development projects are assessed prior to giving effect to them and they are implemented only if they are environmentally sound. Environment impact assessment (EIA) is an instrument through which this prior assessment could be done.

The mechanism of EIA was introduced in Indian legal system at national level through the Environment Impact Assessment Notification 1994 which was re-engineered and replaced by a fresh Notification in 2006. The Environment Impact Assessment Notification, 2006 has also undergone several amendments and in recent past a draft EIA Notification 2020 has been issued by the Government of India which is

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shrouded in controversy. During these years of EIA Notifications being in force several violations of the regulations made therein have taken place and the same have been brought before different courts and tribunals over which significant rulings have been made by courts/tribunals. This paper is an attempt in that direction to explore the perspective of the National Green Tribunal on the Environment Impact Assessment in India.

2. Concept of Environment Impact Assessment

EIA has developed as a successful environmental policy for environmental conservation in the 20th century. It is an important participatory technique that has emerged as an effective antidote to the reckless adventurism in environment. Its genesis may be traced to the innovative application of the principle 'prevention is better than cure'. It is basically a cohesive and a comprehensive document, concisely spelling out the possible spin-offs of a particular project/plan/ program. It is a potent weapon in the hands of the public/environmentalists and an exhaustive exercise for the proponent, the expert and the decision maker to put across their view points in a systematic and forceful manner. It is a common forum or a melting pot of converging and diverging interests and the final nemesis is in the form of an environmentally correct decision.¹

EIA is an interdisciplinary decision-making tool for the alternative routes for the development. The concept of EIA has its origin in science which has developed as a management tool and in due course has acquired the status of a legal proposition. It is viewed as a potential formula for ensuring ecological sustainable development. This requires systematic identification and management of cumulative trend of all environmental variables on a regional basis.² The concept of EIA implies a systematic and integrative process through which evaluation of the potential impacts of a major project is done which may significantly affect the environment.³

In other words, it can be said that "EIA is an exercise which is carried out before undertaking any project or major developmental activity in order to ensure that it will not result in any harm to the environment either on a short term or long-term basis." Any developmental activity requires the analysis of its need, the costs and benefits involved as well as consideration of detailed assessment of the probable impact

1 Bharti, *Environment Impact Assessment- A Compulsory Mandate*, 2 INDIAN JOURNAL OF CONTEMPORARY LAW 73 at 76 (1998).

2 B. R. Manjunatha and D. Venkat Reddy, *Application of Remote Sensing Techniques for EIA* in B. B. HOSETTI & A. KUMAR (eds.), ENVIRONMENTAL IMPACT ASSESSMENT AND MANAGEMENT 316-324 (Daya Publishing House 2014).

3 Yuhong Zhao, *Assessing the Environmental Impact of Projects: A Critique of the EIA Legal Regime in China* 49 NATURAL RESOURCES JOURNAL 486 (2009).

which it may cause on the environment. The basis of EIA lies in the precautionary principle which emphasizes upon avoiding probable dangers. It is the practical part of the precautionary principle which anticipates the probable adverse environmental effect and also the advantages of developmental activities. It takes into account 'ecological', 'socio-cultural' and 'aesthetic components' into consideration.⁴ It has also been stated that "an ideal EIA involves an absolutely impartial collation of information produced in a coherent, sound and complete form and allows the planning authorities and members of the public to scrutinize the proposal, assess the weight of predicted effect and suggest modifications or mitigations wherever appropriate."⁵ It is viewed as an instrument the object of which is to attain sustainable development.⁶

EIA is essentially a 'look before you leap' exercise, to evaluate the possible adverse impact of an anthropogenic activity on the environment.⁷ It is a study to "evaluate the possible adverse impacts on the ecological, socio-economic and bio-physical characteristics of the environment which may result from an impending activity, project, program or even legislation". The purpose is to minimize the possibility of unexpected damage being caused to the environment by human activity. The study report would then help planners to look at the costs and benefits of a project and give it clearance only if the benefits sufficiently exceed the costs. It is thus recognition of the fact that environment and development are not mutually exclusive issues but are inexorably linked.⁸

EIA can broadly be defined as "a study of the effects of a proposed project, plan or program on the environment." It is held as an important instrument for "understanding and managing the impacts of a developmental activity" on the environment. It is a procedure that is required to be complied with in relation to some of developmental activities before they can be proceeded with as they may pose potential danger to environment. The process consists of a systematic assessment of likely significant environmental effects of the developmental activity. Therefore, "EIA is a procedure that identifies, predicts and evaluates potential impacts of a proposed project or activity on the environment as well as describes means of mitigating significant impacts prior to major

4 Phillip M. Kannan, *The Precautionary Principle: More Than A Cameo Appearance in United States Environmental Law* 31 WILLIAM AND MARY ENVIRONMENTAL LAW AND POLICY REVIEW 409 (2007).

5 SIMON BALL & STUART BELL, ENVIRONMENTAL LAW 235 (Blackstone Press Ltd. 1996).

6 *Ibid.*

7 Rahul Balaji, *Has Environment Impact Assessment Finally Come of Age?*, 10 THE LAWYERS 14-16 (1995).

8 *Ibid.*

decisions or commitments are made.” It provides a ‘clear’, ‘impartial’ and ‘transparent’ basis for taking appropriate decision and avoids the possibility of stumbling blocks that could be caused by unanticipated adverse environmental impacts of the developmental activity.

3. Environment Impact Assessment in India

The Rio Declaration has held that “EIA is a national instrument and the responsibility to conduct an EIA on any proposed developmental activity that has potential to cause a significant adverse environmental impact and to take a decision in this regard lies with a competent national authority.”⁹ The environmental history of India provides a testimony that “the foundation of EIA in India was laid way back in 1976-77 when the Planning Commission asked the then Department of Science and Technology (DST) to examine the river-valley projects from environmental angle. A beginning was made in the country with the impact assessment of river valley projects in 1978-79 and the scope was subsequently enhanced to cover other development sectors such as industries, thermal power projects, mining schemes etc. which required the approval of the Public Investment Board. However, these were administrative decisions, and lacked the legislative support. In these days EIA was carried out under administrative guidelines, which required the project proponents of major irrigation projects, river valley projects, power stations, ports and harbors, etc. to secure a clearance from the Union Ministry of Environment and Forests. The procedure required the project authority to submit environmental information to the MoEF by filling out questionnaires and checklists with their detailed project report.”¹⁰ The environmental appraisal of the developmental activity was then done by the Ministry’s ‘Environmental Appraisal Committees’. These committees discussed and deliberated with the project authority and either approved or rejected the proposed developmental activity. When approval was given, the same was generally made subject to certain conditions on specific safeguards.¹¹

EIA was purely administrative decision in India till 1994. Prior to promulgation of EIA Notification, 1994, it was discretionary model which was in operation and was based on administrative exercise and monitoring. There were many shortcomings which were inherent in the process of impact assessment which was so carried out. The publication of environmental information regarding project under consideration was barred under this process. It also did not seek assistance from scientists and environmentalists outside the

9 Rio Declaration on Environment and Development, 1992, Principle 17.

10 SHYAM DIWAN ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 277 (Oxford University Press 2015).

11 *Id.* at 418.

government on technical details. It also did not take into account views of members of general public who were likely to be affected or benefitted by the projects.¹² Allegations were being made that the “site of industrial projects in India were often decided on parochial, regional and political considerations rather than taking environmental factors into account.”¹³ This allegation seems to be true in situations where the site was in relation to a dam/ such project that was likely to destroy virgin forest and displace tribal habitat. The mystery shrouding the procedure, apathy to public scrutiny, preclusion of judicial review, influence of extraneous considerations, lack of trained and expert inputs and delayed assessment after site selection, was considered as glaring defects of the Indian system in the past.¹⁴ Other obstacles being systemic constraints and the inefficiency of pollution control agencies, lack of environmental orientation in licensing and planning processes at the regional level, and absence of statutory compulsion for impact assessment.¹⁵

The United Nation’s Conference on Human Environment held at Stockholm in 1972 is held as a landmark in the history of world’s environmental initiative. Pursuant to this conference world as a whole showed its concern towards protecting environment and taken the required steps for the “protection and conservation of the earth’s natural resources”; “prevention, control and abatement of environmental pollution”, and “evolving principles of liability and compensation to redress the grievances of the victims of environmental pollution”. India was a signatory to this Conference and has not lagged behind and it has enacted certain Acts, Rules and Notifications in consonance with the objectives of the conference.¹⁶ The Environment (Protection) Act, 1986 was enacted which reflects the commitment of India in Stockholm Convention 1972. It constitutes an umbrella legislation that streamlines the framework within which pertinent environmental

12 O. P. Dwivedi & B. Kishore, *Protecting the Environment from Pollution: A Review of India’s Legal and Institutional Mechanism* 22 ASIAN SURVEY 897-98 (1992).

13 DARRYL D MONTE, TEMPLE OR TOMBS? INDUSTRY VERSUS ENVIRONMENT: THREE CONTROVERSIES 216-221 (Centre for Science and Environment 1985).

14 *Ibid.*

15 Shyam A Diwan, *Making Indian Bureaucracy Think: Suggestions for Environmental Impact Analysis in India Based on the American Experience* 30 JOURNAL OF INDIAN LAW INSTITUTE 280 at 281, 282 (1987).

16 For example, Through the Constitution Forty Second Amendment Act, 1976, Arts., viz., 48A and 51A(g) were added to the Constitution of India. Art. 48-A: “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.” Art. 51 A(g): “It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.” Also, a whole gamut of statutory enactments pertaining to environment has cropped in post-independence India especially after Stockholm Conference.

issues may be taken to task and fine-tuned.¹⁷ The power under the Act to protect and improve the environment is a “power coupled with duty”. It means that it is the duty of the State to make sure that the conditions or directions under the Environment (Protection) Act are complied with.¹⁸

After enactment of the Environment (Protection) Act, 1986 it was realized that it is necessary to make EIA statutory in order to achieve the objectives of the Act. Therefore, on 27th January 1994, the MoEF, GoI, promulgated the EIA Notification, 1994 under the Environment (Protection) Act 1986, and provision was made for obtaining Environmental Clearance (EC) mandatory “for expansion or modernization of any activity or for setting up new projects listed in Schedule 1 to the Notification”.¹⁹ Pursuant to this Environmental Clearances were given based on EIA Study under the EIA Notification, 1994 issued under the Environment (Protection) Act, 1986. However, over the period, certain constraints were experienced in smooth implementation of the Notification. Since its enactment there had been 13 amendments in the EIA Notification of 1994 resulting into dilution of its impact.²⁰ Through all these amendments dilution has been made of the rigors of the notification instead of strengthening it more and critics say that it has remained only a formality for the industries to obtain an environmental clearance.²¹ It was also expressed at times that the EIA Notification 1994 did not address all the environmental concerns and several inherent lacunas were there in it which weakened the entire environmental clearance process.

A need, thus, was felt for a new and re-engineered notification and pursuant to the recommendation of the Govindarajan committee the GoI notified the EIA Notification, 2006 on September 14, 2006 superseding the EIA Notification, 1994. The object of EIA Notification 2006 was to make EIA more effective and to address the lacunae in the earlier Notification. The 2006 Notification required to obtain environmental clearance mandatory for 32 categories of developmental projects. These were broadly classified under industrial sector such as “mining,

17 This legislation takes a comprehensive view of air, water, noise pollution etc. as also management of hazardous substances. It also incorporates several new measures such as citizens' suit, stringent penalties, power of state agencies to shut down polluting industries, mandatory workers' participation in public safety, public insurance cover in case of accidents etc.

18 P. LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 178 (LexisNexis 2016).

19 It should also be noted that the Coastal Regulation Zone Act, 1991 also requires environmental clearance in relation to certain developmental activities. And also, funding agencies such as the World Bank and the ADB have also provided for certain requirements for granting environmental clearance to projects that are funded by them.

20 Amendments made on 04/05/1994, 10/04/1997, 27/1/2000, 13/12/2000, 01/08/2001, 21/11/2001, 13/06/2002, 28/02/2003, 7/5/2003, 4/8/2003, 22/9/2003, 7/7/2004 and 4/7/2005.

21 Sunita Dubey, *Disarming the Law*, INDIA TOGETHER, (July 1, 2018) <http://www.indiatogether.org/environment/articles/eia1202html> .

thermal power plants, river valley, infrastructure (road, highway, ports, harbors and airports) and industries including very small electroplating or foundry units.” The 2006 Notification decentralized the environmental clearance procedure and has given power to grant environmental clearance to state governments too depending on the categorization based on the size/capacity of the project.

The 2006 EIA Notification has also undergone substantial changes over the years which have also weakened the rigors of the notification. Therefore, a need has been felt by the Ministry to re-engineer the 2006 notification in view of the “amendments issued, OMs and Circulars issued from time to time and the experience gained over the years in the implementation of EIA Notification.” Consequently, the Central Government, the Ministry of Environment, Forest and Climate Change (MoEFCC) has issued the draft EIA Notification, 2020 dated March 23, 2020 “in exercise of the powers conferred by Section 3(1), Section 3(2)(v) and Section 23 of the Environment (Protection) Act, 1986, read with rule 5(3)(d) of the Environment (Protection) Rules, 1986” and in supersession of the EIA Notification, 2006 read with subsequent amendments. This has been done in view of the fact that “there have been several amendments issued to the EIA Notification, 2006, from time to time, for streamlining the process, decentralization and implementation of the directions of Courts and National Green Tribunal” and “the Central Government seeks to make the process more transparent and expedient through implementation of online system, further delegations, rationalization, standardization of the process, etc.”²² The Draft Notification includes certain problematic and contentious changes in existing rules due to which it has received massive opposition, “a series of nationwide digital protests have been going on backed by student unions, environmentalists, and other stakeholders, condemning the stance of the government on environmental sustainability.”²³

4. National Green Tribunal

The National Green Tribunal (NGT) was established by the “Central Government on October 18, 2010 under the National Green Tribunal Act 2010.”²⁴ The objectives were “to provide a specialized forum for effective and expeditious disposal of cases

22 See, Draft EIA Notification, 2020, preambular para 2.

23 See, *Draft EIA Notification 2020: Delhi HC extends time for filing objections till august 11*, LETMEBREATHE (Sept. 18, 2020) <https://letmebreathe.in/2020/06/30/draft-eia-notification-2020-delhi-hc-extends-time-for-filing-objections-till-august-11/>.

24 The Parliament of India, recognizing the need for the speedy and expeditious disposal of environmental cases, especially in light of the burden of pending litigation, established the NGT in 2010, which has superseded National Environment Appellate Authority. The National Environment Appellate Authority Act, 1997 had established National Environment Appellate Authority that mainly dealt with environmental clearances and was always under MoEF's thumb.

pertaining to environment protection, conservation of forests and other natural resources and for seeking compensation for damages caused to people or property due to violation of environmental laws or conditions specified while granting permissions".²⁵ The Principal Bench of the NGT is established in the National Capital – New Delhi, and regional Benches are established in Pune (Western Zone Bench), Bhopal (Central Zone Bench), Chennai (Southern Bench) and Kolkata (Eastern Bench). Each Bench has a determined territorial jurisdiction covering specified States in the region. A mechanism is also provided for circuit benches.²⁶ The Chairperson of the NGT is a retired Judge of the Supreme Court, Head Quartered in Delhi. Other Judicial members are retired Judges of High Courts. Each bench of the NGT comprises of at least one Judicial Member and one Expert Member. Expert members are required to have a professional qualification and a minimum 15 years' experience in the field of environment/ forest conservation and related subjects. The NGT has the power to hear all civil cases relating to environmental issues and questions that are linked to the implementation of laws listed in Schedule I of the NGT Act. It has been vested with powers to entertain matters with respect to seven prime laws related to the Environment.²⁷ The jurisdiction of Civil courts is barred with respect to the "matters related to environmental issues under these seven laws which the NGT is empowered to deal with".

The NGT is guided by the "principles of natural justice and not bound to follow the technical rules of procedure provided in the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872." It is easy and convenient now for the environment protection groups "to cite facts and issues before the NGT" and also "to point out technical flaws in a project", or "to propose alternatives that could minimize environmental damage but which have not been considered." The NGT relies on the principle of sustainable development, the precautionary principle and the polluter pays principle while passing orders/ decisions/ awards.²⁸

25 See, the National Green Tribunal Act, 2010, NGT (Sept. 23, 2020) https://greentribunal.gov.in/sites/default/files/act_rules/National_Green_Tribunal_Act_2010.pdf.

26 For example, the Southern Zone bench, which is based in Chennai, can decide to have sittings in other places like Bangalore or Hyderabad.

27 These laws are: The Water (Prevention and Control of Pollution) Act, 1974; the Water (Prevention and Control of Pollution) Cess Act, 1977; the Forest (Conservation) Act, 1980; the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1986; the Public Liability Insurance Act, 1991; the Biological Diversity Act, 2002.

28 See, *Environmental Justice in India: The National Green Tribunal and Expert Members*, CAMBRIDGE (Sept. 24, 2020) <https://www.cambridge.org/core/journals/transnational-environmental-law/article/environmental-justice-in-india-the-national-green-tribunal-and-expert-members/2E26B50742FFB8BB743557132DC7DD66/core-reader>.

5. National Green Tribunal's Perspective on EIA

In a short span of time since its establishment in the year 2010 the NGT has cast deep impact on environmental litigation in India. All the five benches of NGT have wide ranging powers to adjudicate upon environmental issues involving questions of importance. The power and technical expertise possessed by it has strengthened the environment protection regime in India. There are great number of judgments through which the NGT has showed its effectiveness in resolving environmental issues. Some of the landmark decisions in cases related to EIA/ EC issues delivered by the various NGT benches are discussed below from which the trends in environmental jurisprudence in India could easily be discerned.

In *Jeet Singh Kanwar v. Union of India*,²⁹ the petitioners had challenged the "EC granted to the respondents' proposal to install and operate a coal-fired power plant." The petitioners contended that "the mandate of the various guidelines in the Public Consultation Process had not been complied with and had even been flouted in granting the clearance." It was also contended that "neither the executive summary of the EIA report in vernacular language nor the full EIA report had been made available 30 days prior to the scheduled date of public hearing as required." The NGT observed that "the EC should not have been granted by the MoEF by following the precautionary principle." It further observed that "the economic benefits of the project would have to be deferred to the environment if the project involved continuing and excessive degradation of the environment." The Tribunal held that prior to granting the approval the MoEF had "failed to anticipate probable ill impact of the project in conjunction with the pollution level caused due to the other projects already existing in the surrounding area." In this case, "the proposed power plant was in close proximity to three other power plants, five ash ponds, in the industrial town of Korba which had been declared the fifth most critically polluted industrial cluster in India. Neither the EAC in its appraisal, nor the MoEF before granting approval, considered the cumulative impact of all these developments along with the proposed project." Accordingly, it was held by the Tribunal that the "impugned order of the MoEF granting EC to the power plant was illegal and liable to be quashed."

In *Adivasi Majdoor Kisan Ekta Sangthan v. MoEF*,³⁰ the petitioner challenged the "EC granted by the MoEF to certain projects of Jindal Steel and Power Ltd. located in the Raigarh District of Chhattisgarh." It was contended that the "EC had been granted to the project without properly conducting a public hearing as stipulated by the EIA

29 Appeal No. 10/ 2011(T) Judgment delivered on April 16, 2013 (New Delhi, Principal Bench, NGT).

30 Appeal No. 3 of 2011 (T) (NEAA No. 26 of 2009) Judgment delivered on April 20, 2012 (New Delhi, Principal Bench, NGT).

Notification 2006.” It was emphasized that “the evidence of persons who voiced their opposition to the project was not recorded and no summary of the public hearing was prepared in the local language nor was it made public.” The NGT observed that “this was not a case where there had been a few insignificant procedural lapses in conducting the public hearing. This was, rather, a mockery of a public hearing, one of the essential parts in the process of deciding whether to grant an environmental clearance. It was, in fact, a classic example of violation of the rules and the principles of natural justice.” Accordingly, the public hearing conducted in the case was held invalid by the Tribunal.

In *Gau Raxa Hitraxak Manch & Gaucher Paryavaran Bachav Trust v. Union of India*,³¹ the NGT has emphasized the “need for a detailed analysis of facts and reasoning at appraisal stage.” It was held by the Tribunal that the “appraisal is not a mere formality and it requires detailed scrutiny by EAC or SEAC of the application as well as the documents filed, the final decision for either rejecting or granting an EC vests with the Regulatory Authority concerned viz., MoEF or SEIAA, but the task of appraisal is vested with EAC/SEAC and not with the regulatory authority.”

In *Samata and Forum of Sustainable Development v. Union of India*,³² the Tribunal held that “in order to demonstrate the threadbare nature of discussions while considering a project for giving its recommendation, it is essential that the views, opinions, comments and suggestions made by each and every member of the committee are recorded in a structured manifest/format.”

In *Sarpanch Gram Panchayat, Tiroda v. MoEF*,³³ the NGT expressed its concern on lack of cumulative impact assessment. This case was with respect to “an iron ore mining project in Maharashtra”, wherein the contention was that “there were four mining projects proposed in the same area and the mine in question was in close proximity to a school, a temple and human habitation however, the impact of the four mines cumulatively had not been considered.” The NGT directed the “EAC to re-examine the viability of the project in light of a fresh impact assessment report on the basis of the cumulative environment impact of all the mines.”

31 Appeal No. 47/2012, Judgment delivered on Aug. 22, 2013 (New Delhi, Principal Bench, NGT) available at: <https://indiankanoon.org/doc/174943745/> (last visited on Jan. 20, 2019).

32 Appeal No. 9 of 2011, Judgment delivered on Dec. 13, 2013 (Chennai, Southern Zone, NGT).

33 Appeal No. 3 of 2011, Judgment delivered on Sept. 12, 2011 (New Delhi, Principal Bench, NGT). available at: [http://www.greentribunal.gov.in/judgment/32011\(Ap\)_12sept_final_order.pdf](http://www.greentribunal.gov.in/judgment/32011(Ap)_12sept_final_order.pdf) (last visited on Feb. 14, 2015).

In *V. Srinivasan v. Union of India*,³⁴ the Tribunal conducted strict scrutiny of the “role of private expert bodies and consultants conducting the EIA” and held that furnishing of false information by the consultant amounts to professional misconduct. The Tribunal recommended strict actions against them in such cases.

In *M.P. Patil v. Union of India*,³⁵ the Tribunal scrutinized the “factors on the basis of which EC was granted to the National Thermal Power Corporation Ltd. (NTPC)” and found that NTPC had misrepresented the facts in order to obtain the EC. It was found that the project involved ecological risk and also it had potential to cause “great social impact since the project affected persons were very large” i.e. the group to be resettled and rehabilitated. The Tribunal reiterated the need to balance environmental and developmental perspective as enshrined in the principle of sustainable development, and stated that “given the considerable impact of the project on human displacement, the Resettlement and Rehabilitation scheme would be one of the most pertinent aspects to be considered by the EAC. Following from this, the Resettlement and Rehabilitation scheme had to be elaborately deliberated upon by the project proponent and considered by the EAC and the views of the general public should be heard on this issue specifically during the public hearing.” The needs of those affected by the project were adequately taken into consideration by the Tribunal and it laid emphasis on the importance of a Resettlement and Rehabilitation scheme. It preferred to assign broader meaning to the term “affected persons” in determining the persons who could be said project affected persons rather than restricting its meaning only to the “land owners in the region”. The NGT made a “passionate plea for consideration of factors such as the impact on the livelihood of those who are primarily dependent on natural resources sourced from their immediate environment”. It observed that “in the framework of Indian economy, there is a relation between poverty and environment. Poverty and degraded environment are closely inter-related, especially where people depend primarily on natural resources based on their immediate environment for their livelihood. Restoring natural systems and improving natural resource management practices at the grass root level are central to a strategy to eliminate poverty.” It held that the “burden of proving that the proposed project is in consonance with goals of sustainable development is on the project proponent”.

34 Appeal No. 18 of 2011 (T), Judgment delivered on Feb. 24, 2012 (New Delhi, Principal Bench, NGT). available at : <https://www.informea.org/sites/default/files/court-decisions/COU-159210.pdf> (last visited on Jan. 14, 2020).

35 Appeal No. 12 of 2012, Judgment delivered on March 13, 2014 (New Delhi, Principal Bench, NGT).

In *T. Murugandam v. MoEF*,³⁶ the EC granted to the Tamil Nadu Power Company Ltd. by the MoEF was challenged and it was contended that the “cumulative environment impact assessment (CEIA) undertaken was not adhering to universally accepted scientific parameters and therefore bad in law.” It was defended on the ground that “under Indian Environmental Legislation scenario there are no known “universally accepted scientific parameters” for CEIA study.” The Tribunal emphasized the “importance of proper analysis and collation of data and application of mind by the EAC.” It was observed that “CEIA was required as per the precautionary principle and sustainable development.” The Tribunal held that the “value of foreign judgment depends upon the persuasive force of their reasoning.” The Tribunal considered the “principles of sustainable development and precautionary principle and forcefully held that international standards may be applied in the Indian context if so required.”

In *Antarsingh Patel v. Union of India*,³⁷ the project affected persons challenged the Maheshwar Hydro Power Project. The NGT tried to secure “the legal rights of the project affected persons” and observed that “it is no longer *res integra* that the benefits of developmental activities must go to the local people and their quality of life must improve instead of driving them to a disadvantageous position. Depriving them of the facilities which they were already enjoying, but are likely to be deprived of due to the proposed Hydro Electric project would be contrary to the law. Citizens are at the centre of development and as such all efforts are required to be made to avoid any hardships to the affected persons.” However, the project was given approval since the “project had been constructed at a huge cost of public money and therefore it was considered pragmatic to allow it to function.” The NGT observed while securing the interests of those affected by the project that “the aim would be to mitigate their losses and consequently a strict adherence to the Resettlement and Rehabilitation plan was absolutely essential, and failure of which could become a ground for the cancellation of the environmental clearance granted.” Thus, although the policy matters such as Resettlement and Rehabilitation policies are not the concerns of NGT, it was observed that “since they are mentioned as one of the conditions for the grant of EC, they will fall within the ambit of consideration of the NGT.” Therefore, this judgment initiates a debate on social justice aspect of the sustainable development.

36 Appeal No. 50/2012 Judgment delivered on November 10, 2014 (New Delhi, Principal Bench, NGT).

37 Appeal No. 26/2012 Judgment delivered on August 9, 2012 (New Delhi, Principal Bench, NGT).

In *Sunil Kumar Chugh v. Secretary, Ministry of Environment and Forests*,³⁸ the NGT held that “open spaces, recreational grounds and adequate parking facilities in buildings had an important bearing on the right to life of people”. The appellants challenged the environmental clearance (EC) on the ground that it was illegal and prayed for quashing the same. It was contended by the appellants that the builder has not followed the mandate of the EIA Notification, 2006 and started construction without EC in 2009 and the construction continued for five years without EC. It was also contended that the SEIAA of Maharashtra did not pay heed to the violation of EIA regulation and granted EC to the developer.

The principal bench of NGT held that “the developer had violated the EIA Notification, 2006 and the Environment (Protection) Act, 1986 by commencing construction without prior EC.” It is interesting to note that the developer had contended that “prior EC was not required as the FSI Area (Floor Space Index or Floor Area Ratio) of the project was less than 20,000 square metres, the prescribed statutory limit.” He also contended that the “lift lobby and staircase area were exempt from the computation of built-up area under the EIA Notification.” The NGT strongly rejected these arguments and held that the “term built-up area includes the entire construction area, saleable and non-saleable and that the 2011 amendment to the EIA Notification that clarified the term built-up area was clarificatory in nature and thereby, would have a retrospective effect from 2006 itself.”

In *S.P Muthuraman v. Union of India*,³⁹ the applicant, a former member of Indian Forest Services and presently the convener of “Yamuna Jiye Abhiyan” filed an application challenging the validity of office memoranda⁴⁰ issued by the MoEFCC based on EIA Notification, 2006 and the Environmental Protection Act, 1986. It was argued that the said memoranda provided for EC even after the project has been completed or started. The notification states that prior EC is required not only for new projects but also for any changes in such projects. And also, under para 7 of the said notification a process for granting EC has been described involving Screening, Scoping, Public Consultation and Appraisal. In the light of these provisions, the applicant argued that the office memoranda issued are in complete violation of the notification and should be struck down.

The NGT made detailed deliberations on its jurisdiction and powers and observed that “the legislature in its wisdom worded the provisions

38 Appeal No. 66 of 2014, Judgment delivered on September 3, 2015 (New Delhi, Principal Bench, NGT).

39 Original Application No. 37 of 2015 Judgment delivered on July 7, 2015 (New Delhi, Principal Bench, NGT).

40 The MoEF Office Memoranda dated 12 December, 2012 and 27 June, 2013.

relating to the jurisdiction of the Tribunal (Sections 14 to 17 of the Act of 2010) very widely, and with a clear intent to provide this Tribunal with jurisdiction of a very wide magnitude....it is quite clear that this Tribunal is having all the trappings of a Court and is conferred with the twin powers of judicial as well as merit review.” The tribunal held that “prior environmental clearance was a mandatory requirement under the EIA Notification, 2006 and any developmental project commenced without such clearance is antithetical to the principles of sustainable development.” The tribunal also advised the government that “in exercise of their powers they cannot negate the provisions of the principal Notification and defeat the entire essence of environmental protection.” The tribunal observed that “if this approach and procedure is allowed to be followed then any builder/ project proponent would complete his project causing irreversible damage to the environment and will then seek *post-facto environmental clearance from the authorities making it a fait accompli situation.*” Hence, the Tribunal held the office memoranda *ultra vires* and quashed them. The tribunal also stayed all construction activities, imposed environmental compensation of 5% of the project cost and appointed an expert committee to examine the construction projects.

In Prafulla Samantray v. Union of India,⁴¹ popularly known as Posco project case, the EC granted by the MoEF was challenged by Orissa-based activist Prafulla Samantray, on the ground that the “comprehensive EIA report of the Posco project was not made available to the public in the project area. Instead, a rapid EIA was placed on the basis of which the first clearance was given”. The petitioner has claimed that the “rapid EIA was grossly inadequate to appraise such a big project as it failed to take into account the harmful impacts the project will have on the ecology of the surrounding area.” The Tribunal observed that “a close scrutiny of the entire scheme reveals that a project of this magnitude particularly in partnership with a foreign country has been dealt with casually without there being any comprehensive scientific data regarding the possible environment impacts. No meticulous scientific study was made on each and every aspect of the matter leaving lingering and threatening environmental and ecological doubts un-answered”. The NGT suspended the EC granted to the project and directed the MoEF to review the clearance afresh and attach “specific conditions” to be followed by the Posco in a “defined timeline”. It is to be noted that the Posco project could not come into existence due to certain changes in Central law and policy.⁴²

41 Application No. 8 of 2011 Judgment delivered on March 30, 2012 (New Delhi, Principal Bench, NGT).

42 The central amendment in the Mines and Minerals Development and Regulation Act in January, 2015 sealed the fate of the project. The amended Act made it mandatory for Posco to go through the auction route to get captive mines, dashing its hopes of getting an iron ore mine on a preferential basis according to the agreement. To make matters worse, the government did not renew the tenure of the agreement, which expired in 2010. See, Posco closes last chapter in Odisha project, available at: https://www.business-standard.com/article/companies/posco-closes-last-chapter-in-odisha-project-117031700810_1.html (last visited on Sept. 27, 2020).

In *Save Mon Region Federation v. Union of India*,⁴³ the appellants challenged the EC on the grounds of “faults in the EIA report and a lack of close scrutiny of the project by the EAC”. It was contended that “the proposed location of the dam is one of two wintering sites for the endangered black-necked crane, which is revered by the local Monpa community as the incarnation of the 6th Dalai Lama. This material information was not revealed in the scoping process and accordingly was not discussed or evaluated in the EIA or properly considered by the EAC. The EIA also lacked any discussion of the cumulative impacts of other projects being proposed within the river basin.” The NGT observed that “it is true that hydel power project provides eco-friendly renewable source of energy and its development is necessary, however, we are of the considered view that such development should be ‘sustainable development’ without there being any irretrievable loss to environment. We are also of the view that studies done should be open for public consultation in order to offer an opportunity to affected persons having plausible stake in environment to express their concerns following such studies. This would facilitate objective decision by the EAC on all environmental issues and open a way for sustainable development of the region.” The NGT suspended EC until the MoEFCC undertakes an “environmental flow study to determine how to protect the black-necked crane and its habitat”. It held that “all studies must be provided to the public for consultation. Thereafter, the EAC must make a fresh appraisal of the dam project with the new information and public comments in mind.”

The Supreme Court in *Hanuman Laxman Aroskar (I) v. Union of India*,⁴⁴ while suspending the EC granted by the MoEFCC directed the EAC to “revisit its recommendation for the grant of EC”. The Supreme Court overturned the decision of the MoEFCC and also of the NGT which allowed the project to go ahead. The court emphasized on the foundation of the EIA process by observing that “for project proponents, the environment may not possess a human voice. But the purpose of prescribing an EIA report is precisely to undertake a baseline study on all aspects of the environment and to anticipate the impact of a projected activity on the environment. Ignoring any component of the environment amounts to a serious dereliction of duty which detracts from the rule of law in matters of environmental governance.”

The Apex Court also observed that “the mix of judicial and technical members envisaged by the statute is for the reason that the tribunal is called upon to consider questions which involve the application and assessment of science and its interface with the environment.” The

43 Appeal No. 39 of 2012 Judgment delivered on March 14, 2013 (New Delhi, Principal Bench, NGT).

44 2019 SCC OnLine SC 441.

Court held that “the NGT has failed to comprehend the true nature of its role and power... In failing to carry out a merits review, the NGT has not discharged an adjudicatory function which properly belongs to it. The NGT, despite nearly three years of adjudication, failed to consider any of the substantial issues related to livelihoods, flora and fauna, eco-sensitive zones, the Western Ghats.”

The Supreme Court very categorically stated that “all actors in the EIA process, including the NGT, have abdicated their roles under the statute and acted contrary to public interest. Engineers India Ltd., as the EIA consultant had provided false information and did not undertake the required study. The EAC, headed by a former union power secretary, did not act like an expert body and the State of Goa as the project proponent submitted false information. At the end of the day, one must remember, a wrong and illegal decision is not just an issue of rule of law, but has the potential to destroy a natural entity which is a creation of millions of years of evolution. This can never be compensated, either punitively or monetarily.”

The court delivered the judgment on 29th March, 2019. As per the direction of the Apex Court the EAC ‘revisited’ the project on 23rd April, 2019, and gave recommendation for the grant of environmental clearance. The approval granted by the EAC on 23rd April, 2019 was again challenged in *Hanuman Laxman Aroskar (II) v. Union of India*.⁴⁵ However, the Supreme Court in its order lifted the suspension and observed that the “EAC had completed its task to the court’s satisfaction.” The Supreme Court reiterated the necessity to balance the need for development and the protection of environment.

In *Re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village in Andhra Pradesh*,⁴⁶ the NGT took “*suo motu cognizance of the Vizag Gas Leak incident.*” *The Respondent went in appeal to the Apex Court and “challenged the exercise of suo motu powers by the NGT.” The court directed the respondent “to raise the issues of jurisdiction before the NGT itself.” However, the NGT said that it had the power to exercise suo motu jurisdiction. It referred to section 19 of the NGT Act and held that the “power to regulate its own procedure, in appropriate circumstances, includes the power to institute suo motu proceedings”. The Tribunal also referred to Rule 24 of the NGT Practice and Procedure Rules, 2011 which has entitled the Tribunal to “pass any order or direction as may be necessary or expedient to give effect to its order, prevent the abuse of the process and secure the ends of justice.”*

45 MANU/SC/0039/2020. See also, M.A. No. 965 of 2019 in Civil Appeal No. 12251 of 2018, decided on Jan. 16, 2020 available at:

https://main.sci.gov.in/supremecourt/2019/17588/17588_2019_8_1501_19510_Judgement_16-Jan-2020.pdf (last visited on Sept. 25, 2020).

46 Original Application No. 73 of 2020 with Review Application No. 19 of 2020 Judgment delivered on June 1, 2020 (New Delhi, Principal Bench, NGT).

The SC on April 1, 2020 dealing with an appeal against NGT judgment, pronounced a landmark judgment in Alembic Pharmaceuticals Ltd. v. Rohit Prajapati,⁴⁷ and held that “the concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January 1994. It is detrimental to the environment and could lead to irreparable degradation. The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed. Requirements such as screening, scoping, conducting a public hearing and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development.”

The Apex Court while noting that “Section 3(1) of the Environment Protection Act 1986 is an enabling provision for the Central Government to undertake all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution” observed: “for an action of the Central government to be treated as a measure referable to Section 3 of the Environment (Protection) Act 1986 it must satisfy the statutory requirement of being necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environment pollution”.

In the light of the above observation the court held that “the administrative circular is not a measure protected by Section 3.

47 2020 SCC OnLine SC 347. In this case, the Supreme Court considered an appeal against a judgment of the NGT, Western Zone which held a circular issued by the MoEFCC dated 14 May 2002 as contrary to law which envisaged the grant of *ex post facto* ECs. The circular allowed industries which had commenced operations without obtaining EC in terms of the EIA notification of 1994, to obtain the same by an extended date in 2003. The NGT had issued a slew of directions including the revocation of EC and for closing down industrial units operating without valid consents.

Hence, there was no jurisdictional bar on the NGT to enquire into its legitimacy or vires. Moreover, the administrative circular is contrary to the EIA Notification 1994 which has a statutory character. The circular is unsustainable in law.” Thus, the Apex Court upheld the order of NGT.

6. Conclusion

The NGT is the most consistent and progressive environmental authority in India for conservation and protection of the environment. It is endowed with power to do “merit review” as well as “judicial review.” Unlike the Supreme Court, which exercises jurisdiction on whole range of laws and executive that has to look into the whole range of pressing issues, the NGT has privilege to deal with environmental issues only. The emerging environmental jurisprudence in India in view of the landmark judgments of NGT is setting up a benchmark and is a guiding light for the rest of the world. In the circumstances where it is often alleged that EIA reports are mostly “copy and paste” work, public hearings have become “mockery” and there are frequent violations of environmental laws, the role of NGT becomes vital. The NGT’s docket is dominated by disputes relating to EIA amongst which disputes regarding grant of EC forms the basis for majority of cases. In many such cases, the NGT has held the EC invalid on the ground of “procedural non-compliance” or “non-application of mind” or “failure to take into consideration the relevant facts.” Since its inception, the NGT has been delivering orders/ judgments having profound impact on environmental issues in India. In a brief period of nearly one decade, the NGT has developed an impressive environmental jurisprudence in India. The tribunal through its varied judgments has proved time and again that procedural hurdles cannot be in the way of facilitating substantive environmental justice.

Exploitation By Discharge and Dismissal of Fashion-Garment Industry Workers During Covid-19 Pandemic

***Ms. Soumya Singh**

Abstract

The COVID-19 pandemic has spread its reach in various ways across various industries. The fashion and garment industries are not above it, and have faced some serious issues as the impact of the same. The challenging aspect is that this industry has faced new issues and has had to deal with the prevalent issues that emerged, as highlighted, while dealing with the pandemic.

Unfair dismissal and discharge of factory and industry workers has been a major issue that came up tagging along some big fashion brands and names that were involved in the mess. Case study is based on these issues and the practices adopted to get a peek into the working of the system. Comparative analysis is also attempted with other countries that have experienced the same, to identify a pattern and thus help formulate a solution mechanism.

The paper goes through the problem and the reasons for the same. It also analyses the root cause, delving into the background to understand the existing problems in the industry and the unfair treatment of workers and such practices that exist in this industry.

The paper also aims to target solution areas and formulate the methods that can be incorporated to bring about a much-needed change in this exploitative system. Special focus has been emphasized upon sustainable measures to be adopted by the industry and social security of the workers.

Keywords: Labour laws, discharge, dismissal, exploitation, sustainability, social security

1. Introduction

The world is facing the brunt of a global pandemic, and not a single sector has been left untouched by the impact of it. Various industries, people from different job sectors, have all faced hindrance and are constantly trying to overcome them in the best possible manner.

The fashion industry and its backbone – the garment industry and factories — have not been left untouched either. The companies have faced their own set of problems; however, the workers are impacted in a much worse degree and manner. Loss of jobs, reduction in incomes is now normalized.¹ However, the problem is not just at this surface level, it is a result of a complicated web of issues that has been plaguing this industry and now has resurfaced in an amplified manner along with the complimentary issues of the pandemic and its nature.

Unfair dismissal and discharge² of factory and industry workers has been a major issue that came up tagging along some big fashion brands and names that were involved in the mess. Case study is aimed to be based on these issues and the practices adopted to get a peek into the working of the system. Comparative analysis is also attempted with other countries that have experienced the same, to identify a pattern and thus help formulate a solution mechanism.

2. Aim and Objectives

To comprehend the whole issue in a systemic manner; first the concept of dismissal and discharge as a concept will be analyzed. The presence of provisions of labour and employment laws which are in place, their role in governing that aspect for the workers and employees will initiate the shape for the paper.

Second, the current instances and issues in this field that have arisen will be looked into. Multiple cases have emerged where garment industry and related factory workers have been *wronged* and have come up in the news voicing their opinions, unrest, issues, and the grave problematic behavior of the superiors calling the shots. This is going to be made clear with the help of a case study of one of the biggest names in the fashion industry and their infamous behavior and functioning with respect to the workers at the lowest level of the chain.³

Third, to provide a clear view of the extent to which the problem exists — comparative analysis with case studies from different countries will be incorporated. Other places – cities, countries are all prone to the same issue, although at varying degrees, but irrespective of being a third world country or a first world country. Exploitation

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- 1 Soumya Singh, *COVID-19 Impacts the Fashion Industry, Surges Need for Season's Freshest Trends- Ethics and Sustainability*, LIBERTATEM MAGAZINE, (Nov 11, 2020, 9:00pm) <https://libertatem.in/articles/covid-19-impacts-the-fashion-industry-surges-need-for-seasons-freshest-trends-ethics-and-sustainability/>
 - 2 Anshul Prakash, *Kruthi N. Murthy, India: Employment & Labour Laws and Regulations 2020*, ICLG, (Nov 11, 2020, 9:05 pm) <https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/india>
 - 3 Simon Glover, *H&M accused over 1,200 job losses*, ECOTEXTILE NEWS, (Nov 11, 2020, 8:09 pm) <https://www.ecotextile.com/2020062426257/materials-production-news/h-m-accused-over-1-200-job-losses.html>

of the people working at the lowest level have faced harsh realities especially during the added issue of the pandemic and it is prevalent across the world which is undeniably a concerning issue. Therefore it'll further emphasize the existing problems and the pressing concern to address them.

The necessity and the compelling reason to be proactive about this issue⁴ will be established by now, and thus the need to form or find a solution mechanism — the ultimate purpose of the paper, will be too. To be able to do so, understanding of the background causing such issues is mandatory. Only then can an efficient and effective solution be formed. Thus, the next section will focus on the background and the root causes of the issue at hand.

Finally, the paper will attempt to form and/or find a solution mechanism where important points of consideration will be framed and pointed out. It will focus on integrative approaches, of rules and laws, and also successful models which can be used for inspiration or a base level idea to form a basis for ethical and fair implementation model.

3. The Status of Garment Industry

The statutes, laws, rules and regulations in place with respect to labour and industrial laws are plenty.⁵ Despite that the exploitation, on a vast scale at that, is still very much prevalent. With the onset of the pandemic, the rate of exploitation has only increased at a steeply inclining manner and the need to step into the field and understand the whole sector and the issues has become more important than ever.

The paper focuses on the exploitation linked with discharge and dismissal of the garment industry workers, and so step by step the whole link of exploitation will be decoded.

In the most standardized understanding, *discharge* is a termination of contract by notice or payment of wages in lieu of notice, whereas *dismissal* implies not merely a termination without notice or payment, but essentially indicates a measure of punishment.⁶ Sensing the highly unregulated garment industry, the scope for exploitation is extensive. Unfair discharge and dismissal practices by the employers have particularly peaked during the pandemic.

4 Anuradha Nagaraj, *Coronavirus threatens Indian garment workers stranded in factory housing*, THOMSON REUTERS FOUNDATION, (Nov 11, 2020, 8:30 pm) <https://news.trust.org/item/20200330115141-jaq9i>

5 Industrial, Labour and General Laws (The Institute of Company Secretaries of India 2016) <https://www.icsi.edu/media/website/IndustrialLabour&GeneralLaws.pdf>

6 H.L. Kumar, *Discharge and Dismissal of an Employee*, Labour Adjudication in India 164, 164-176 <http://14.139.60.114:8080/jspui/bitstream/123456789/731/13/Dismissal%20%20and%20Discharge.pdf>

Unfair dismissal is termination of employment of the employees on irrelevant and unfair grounds.⁷ The problem is that conceptually understanding unfair grounds of termination is easy, however defining it and utilizing the same for the protection of the employees and the workers that are harmed by the same is extremely difficult. This is because the same can vary from organization to organization, nature and work ethics, contracts, actions of employees, and many other case/situation-based circumstances.⁸ The primary mark of reference is that in fair dismissal it is equally applicable in a uniform manner to all the workers.⁹ In situations of such unfair practices, if identified and proved properly, protection under a lot of laws are available in India.¹⁰

Can employees be terminated during the pandemic?¹¹ Why is this issue of importance right now? Why is the issue in need of addressal currently?

The impact of such unfair practices has plagued the garment industry workers all across the world, and especially in countries like India where most of such retail work is outsourced to. New challenges of pandemic have reinforced these practices at a stronger scale and many have tried to pass these practices under the garb of *fair dismissal* of workers citing the reasons of the pandemic. Many more such problems, and deep rooted in nature have come up which the paper will be dealing with in the following chapters. However, analyzing the problem, the extent of it, the various dimensions of it, is attempted in this chapter.

Exploitation of garment industry workers has become a matter of concern. Yes, the laws governing their pay, working conditions and working hours exist¹² but they have not been enough which brings the need of addressing the problem. Direct impact of the pandemic has

7 Shrutika Lakhota, *Monica, What is Unfair Dismissal? Are There any Laws Relating to Unfair Dismissal In India?*, iPLEADERS, (Nov 12, 2020, 7:09 pm) <https://blog.ipleaders.in/unfair-dismissal-laws-relating-to-unfair-dismissal-in-india/>

8 Id.

9 Id.

10 Sulekha Kaul, *Labor Laws in India - (Indian) Industrial Disputes Act, 1947*, MONDAQ, (Nov 11, 2020, 7:51 pm) <https://www.mondaq.com/india/employee-rights-labour-relations/625206/labor-laws-in-india--indian-industrial-disputes-act-1947>

11 Jidesh Kumar, *FAQ's For Indian Employers: Can Employees Be Terminated During COVID-19?*, MONDAQ, (Nov 11, 2020, 7:52 pm) <https://www.mondaq.com/india/employment-and-workforce-wellbeing/923218/faq39s-for-indian-employers-can-employees-be-terminated-during-covid-19?type=mondaqai&score=68>

12 Sulekha Kaul, *India: Indian Laws Relating To Working Hours, Conditions Of Service And Employment*, MONDAQ, (Nov 11, 2020, 10:59pm) [https://www.mondaq.com/india/employee-rights-labour-relations/626390/indian-laws-relating-to-working-hours-conditions-of-service-and-employment#:~:text=The%20Factories%20Act%2C%201948%20\(the,of%20workmen%20working%20in%20factories.&text=It%20covers%20all%20workers%20employed,contractor%2C%20involved%20in%20any%20manufacture.](https://www.mondaq.com/india/employee-rights-labour-relations/626390/indian-laws-relating-to-working-hours-conditions-of-service-and-employment#:~:text=The%20Factories%20Act%2C%201948%20(the,of%20workmen%20working%20in%20factories.&text=It%20covers%20all%20workers%20employed,contractor%2C%20involved%20in%20any%20manufacture.)

been in the form of mass cancelations. It is the direct result of closing down of markets, shops, lockdown imposed on countries, and most importantly the travel hiatus that came upon all at once.¹³

The routine of oppressive behavior of the brands and companies to pay up only after receiving the goods has enabled these people in power to avoid paying up the workers in total. This is because the orders have been cancelled, have not been able to reach the desired places to receive the wages. Many goods that were completed, were also cancelled and unpaid for.¹⁴ Many factories and suppliers were also forced into insolvency.¹⁵ While it is evident that the times are tough, the brand behavior is undeniably making it all tougher.

In India, approximately 300,000 garment factory workers have been left stranded without job, social, or health security. The workers have been asked to not come to work, not stay in their 'factory hostels' since it is getting very difficult to maintain social distancing, the primal requisite.¹⁶

Considering and analyzing all the points have established the need to delve deeper into the research to find a way out of the worm hole of despair for the workers.

4. Case study

Case study or case analysis always helps with an in-depth analysis of the situation. It provides an insight into the problem with the help of an example. To enable the research and the quest for solution, the same is required. For the very same purpose, the fashion brand *Hennes & Mauritz*, popularly known as '*H&M*', and their treatment of the garment workers and the industry in India is taken into study here.

It is not to be misinterpreted that there is just one company targeted in the scenario here, multiple top fashion brands and the fashion industry in general has been accused of, and has been caught involved in unethical practices and varying degrees of exploitation.¹⁷ *H&M* however has had an infamous string of incidents and reports criticizing their method of functioning, and therefore the focus of this

13 Soumya, supra note 1

14 Naimul, infra note 28

15 Soumya, supra note 1

16 Id.

17 "A report by an international watchdog group is alleging that retailers including *H&M*, *Abercrombie & Fitch*, *Columbia Sportswear*, and *Benetton* have largely ignored reports of violence and other serious abuses against workers at an Indian factory making their clothes."

Marc Bain, *H&M*, *Columbia*, and others are accused of ignoring disturbing abuses at a large Indian supplier, *QUARTZ*, (Nov 11, 2020, 8:02 pm) <https://qz.com/1313585/hm-gap-abercrombie-and-others-are-accused-of-ignoring-disturbing-abuses-at-a-large-indian-supplier/>

section of the paper lies with analyzing their behavior with garment industry workers in India.

The story really begins from the chain of reports in 2018, where it came into the spotlight that top international brands (including big names like *Zara*, *Abercrombie & Fitch*, *Benetton*, and of course *H&M*) indulged in ‘violence’ and severe abuse against Indian garment factory workers.¹⁸ Physical abuse, gender and caste based abuse, along with severely manipulating the wages of the workers were all brought into light by *World Rights Consortium*.¹⁹ The same year, India’s ‘textile valley’ in Tamil Nadu, saw protests against ‘death’ of workers. Witnessing more than a hundred deaths in a few years – tracing back to the reasons of plight of workers, grueling and abusive working conditions!²⁰

While it had become clear how these giants were getting away with severe abusive working conditions (physical, verbal, as well as sexual), coercive working conditions, and fractional wages (much lower than the limit of minimum wages);²¹ new wave of additional issues have compounded upon the pre-existing ones and have hit hard at the worker class once again with the onset of the pandemic.

Personal reports of many such workers have been covered by the media, and it is sorrowful to see such a despair filled state. Many of them, especially women: single mothers, sole bread winners, have worked hard and for years, only to be dismissed without any prior notice or information.²² Many on-spot dismissals and discharge of workers have led to a widespread issue of unemployment – which has been steadily peaking up since the onset of the lockdown.

Another very important aspect to look into this exploitation angle is discharge of employees based on their affiliation to worker unions. Appalling. The big names, including our case study subject *H&M*, have all been accused of using the pretext of the pandemic for union busting.²³ Report from *Business and Human Rights Resource Centre* (BHRCC) states and shows concern towards “*emerging and widespread pattern of supplier factories appearing to target unionized workers for*

18 Id.

19 Id.

20 Ashutosh Pandey, India: *Walmart, H&M in spotlight after string of textile workers deaths*, DW, (Nov 11, 2020, 8:05 pm) <https://www.dw.com/en/india-walmart-hm-in-spotlight-after-string-of-textile-workers-deaths/a-44714948>

21 Id.

22 Arpita Raj, *Why Garment Workers Making H&M Clothes Are Protesting Mass Layoffs*, THE QUINT, (Nov 11, 2020, 8:07 pm) <https://www.thequint.com/coronavirus/why-scores-of-garment-workers-are-protesting-layoffs-in-karnataka>

23 Harriet Grant, Joshua Carroll, *Covid led to ‘brutal crackdown’ on garment workers’ rights*, THE GUARDIAN, (Nov 11, 2020, 8:12 pm) <https://www.theguardian.com/global-development/2020/aug/07/covid-led-to-brutal-crackdown-on-garment-workers-rights-says-report>

dismissal".²⁴ The reports have expressed the disproportionate targeting of the workers due to union membership and organizing. *Thulsi Narayansamy*, senior labour rights lead at BHRRC, has stated, "*Workers face a brutal crackdown when exercising their most fundamental rights, and brands aren't stepping up enough to ensure workers in their supply chains are protected. Threatening the right to organize collectively and be part of a trade union at such a critical time ... stops them from being able to ensure they are paid wages, are safe at work and free from harassment.*"²⁵

Additional background content substantiating such claims came in light with the news of *H&M* closing an entire factory, wherein the workers and the unions claimed that it was targeted specifically for a reason — it was the only one with a worker union.²⁶ The trade union has since then repeatedly called *H&M* to take up the responsibility, own to discriminatory and unfair practice of discharge of workers based on their union affiliation.²⁷

The unfair practices didn't end at one mode of exploitation. In many parts of India, exclusively as reported from southern cities, workers were *coerced to resign*.²⁸ Subsequently many were evicted from their 'work hostels', left stranded without jobs, place to live, any wages, or any livelihood. Immediate laying off of workers, dismissed without proper pay, without the mandated requirement of one month notice period, has led to widespread agitation in the workers. *H&M* maintains a stance of 'unprecedented times', being above the regional obligations and globally complying with their standards and protocols.²⁹

It is, inevitably, a wake-up call for strengthening worker protection laws and regulations!

5. Comparative study

Comparative analysis or study of the issue with different countries help provide a wide ambit of understanding. It helps in analyzing,

24 Id.

25 Id.

26 Id.

27 *India: Unions accuse factory producing for H&M of union busting after dismissal of 1,200 garment workers during COVID-19; Incl. comments by H&M*, Business and Human Rights Resource Centre, <https://www.business-humanrights.org/en/latest-news/india-unions-accuse-factory-producing-for-hm-of-union-busting-after-dismissal-of-1200-garment-workers-during-covid-19-incl-comments-by-hm/> (last visited Nov 11, 2020)

28 Prajwal Bhat, *One month after closure of garment factory in Mandya, workers continue protest*, THE NEWS MINUTE, (Nov 11, 2020, 8:20 pm) <https://www.thenewsminute.com/article/one-month-after-closure-garment-factory-mandya-workers-continue-protest-128329>

29 James Crump, *Indian factory workers protest after 'H&M cancels orders' leaving 1,000 jobless*, INDEPENDENT, (Nov 11, 2020, 8:22 pm) <https://www.independent.co.uk/news/world/asia/h-m-garment-workers-factory-india-jobs-a9579856.html>

understanding the presence or the degree of the problem, the way to deal with it, and other such insights. Successful models often help to derive inspiration from successful models, as will be dealt in the suggestions section of the paper. Countries which face the same issues, at varying degrees help provide a global perspective and elevate the issue at a platform to be considered at an important level.

Bangladesh

The first comparison will be done with the country – Bangladesh.

While we know that China leads the world as a garment supplier, Bangladesh is the world's second largest garment supplier. It is also known to rely heavily on top fashion brands and the export industry that is also reliant on the same.³⁰

The pandemic caused a great havoc in the functioning of the industry and deeply impacted the workers involved. A report by *Thomson Reuters* states that factory workers in Bangladesh could go hungry for months considering how global fashion brands have cancelled orders worth \$138 million due to the pandemic. As a result, more than a hundred factories have lost their source of livelihood.³¹

The situation had become so grave, especially immediately after the imposition of lockdowns that the government had to intervene on behalf of the workers. Senior employment ministry official acted as a medium to communicate from the government - factory owners to not cut down jobs.³²

To have a peek into the level of crisis – atleast 10,000 garment workers have been sacked!³³

The government did announce a help package (worth \$588 million), however the labour leaders still say that this won't be enough – further hinting at the level of crisis.

While Bangladesh and Bangladeshi workers face job market crisis, and loss of livelihood majorly; some issues with the developed nations have also come into the forefront.

Leicester, United Kingdom

Developed countries, with strict respect for labour laws, have also had to face the cruel impacts of the pandemic on their industry as well as the workers.

30 Naimul Karim, *Job cut fears as fashion brands slash orders in Bangladesh with coronavirus*, THOMSON REUTERS FOUNDATION, (Nov 11, 2020, 8:27 pm) <https://news.trust.org/item/20200319190509-6de6x>

31 Id.

32 Naimul Karim, *Bangladesh unions urge government to act as garment workers lose jobs*, THOMSON REUTERS FOUNDATION, (Nov 13, 2020, 10:31 pm) <https://news.trust.org/item/20200414113101-5ta5e>

33 Id.

While job security is not the real threat here, other principal factors of the pandemic have found their way to affect the industry. The spotlight in this area is with regards to the working conditions of the textile industries placed here. The whole situation can be summed up as ‘concerning’.³⁴

The sorry state of the working conditions of the factories with respect to basic hygiene and sanitation, as is of prime importance during the covid-19 pandemic is alarming and definitely first to the picture of ‘concerning’. This again is not the only issue here, even the wages are manipulated. Workers are being paid less than minimum wages, in most cases half the rate that they are to be rightfully paid!³⁵

The unprecedented turn of events has undeniable been a bane for such workers with no near understanding of a solution for the same.

6. Understanding the root of the problem

Laws and regulations, or the lack thereof of their implementation, is the primary concern that will need addressal on the urgent basis to be able to sort it neatly.

While this has been discussed in the analysis chapter of the paper, the current section will focus on some eminent issues that have been prevalent in the system but got really expressed and out in the open for criticism during the pandemic.³⁶

Lack of, rather, absence of *social security for workers* is at an abysmal condition.³⁷ Lack of health and safety of workers, and measures to take care of the same as well as precautions has all led together to exploitation of cheap labour.³⁸

The *structure of supply chains* have emerged as extremely fragile and loosely linked.³⁹ This expresses the problem of tumbling down of consequences from one country to another, even at the slightest off-chance of crisis affecting any part of the world, any step of the supply chain.⁴⁰ When the pandemic struck the world, all of the world experienced the crisis first-hand, and undoubtedly the fragile structure came into the highlight.

34 David Pittam, *Coronavirus: ‘Big problem’ at Leicester factories, say workers*, BBC NEWS, (Nov 11, 2020, 8:58 pm) <https://www.bbc.com/news/uk-england-leicestershire-53311548>

35 Id.

36 Soumya, *supra* note 1

37 GMB Union, <https://www.gmb.org.uk/news/asos-playing-russian-roulette-peoples-lives> (last visited Nov 11, 2020)

38 Id.

39 Meg, *infra* note 53

40 Jessica E. Keegan, *Accountability in the Fashion Industry: Loopholes in the H&M Value Chain*, School of Global Policy and Strategy, UC at San Diego Prepared for Professor Peter Gourevitch Course on Corporate Social Responsibility Winter 2016 (2016) https://gps.ucsd.edu/_files/faculty/gourevitch/gourevitch_cs_keegan.pdf

Lack of accountability. Now this is a grave issue plaguing the functioning of high end fashion brands and the subordinate garment industries. Lack of coming through, by the industry power players, on their legal responsibility and moral obligations.⁴¹

One of the most irresponsible behaviors of the industry has also caught attention amidst the pandemic — *overstocking*.⁴² Plummet of the consumer demand has led to dismissals and discharge of employees from work due to the issue of overstocking. While on one hand the workers are made to extensively work irrespective of the demand, when the same was hit because of the pandemic, the overstock led to negative repercussions for the employees. The superiors could have ensured spaced out working routines, relaxed according to the need and the demand; but no, the lack of consideration of basic decency and the overpowering of the greed has finally showcased this side of the industry.

One of the most important issues that is definitely at the root of the problems that have arisen during the pandemic is *no financial buffer*,⁴³ at all! The strict and packed industry has not left any scope for any sort of buffer. Holidays, leaves, wages, no buffer of any sort is provided. *You lag, you lose.* Leeching off of profits and concentrating on that has made sure there are no resources to cover for the current state.⁴⁴

All these issues sum up the root of the problem, and now compels the paper to be directed towards a solution mechanism.

7. Conclusion

It is undeniably clear that the issue is deep rooted in the practice of the big and the major players of the fashion industry. Various problems of logistics, functioning, and behavior is highlighted and that expresses how issues that are not dealt with at the basic level will only add upto create a larger problem⁴⁵ — especially when an unprecedented and unforeseeable problem is imposed upon the world to deal with.

Upon the in-depth analysis done in the paper, it is clear that the problems and issues and the unfair treatment of the workers has peaked in the time of the pandemic. Indian workers have experienced the wrath of the merciless and inconsiderate practice of the big fashion companies. It has also become clear, that the practice and such

41 Id.

42 Colleen Baum, Pamela Brown, Emily Gerstell, and Althea Peng, Perspectives for North America's fashion industry in a time of crisis, MCKINSEY & COMPANY, (Nov 13, 2020, 9:06 pm) <https://www.mckinsey.com/industries/retail/our-insights/perspectives-for-north-americas-fashion-industry-in-a-time-of-crisis>

43 Soumya, supra note 1

44 Id.

45 Soumya, supra note 1

exploitation is prevalent as a result of lack of compliance of labour laws and regulations. It is also clear that the laws are not the only point of problem, it is deep rooted in the rat race of capitalism and profits and greed. The harm to the environment, the lack of consideration for the human capital, the lack of consideration for compliance with basic needs and necessities and human decency has finally started showing the signs of crumbling down.⁴⁶ The people or the human capital are not silent, they are voicing their opinions. The systems are breaking down because of lack of consideration for the environment or the labour and the corresponding laws, and rules and regulations.

Some of the most shocking revelations however were about how the issues were, or are, not centric to any specific part of the world. The economic difficulty, the workers working at the lowest level of the chain, were all similarly affected whether in Bangladesh or in cities of United Kingdom. Multiple questions are also raised/ they come up while delving in with the case analysis – ***why is employing of a functional worker union irking the companies?*** Work ethically, pay the people right, give them fair conditions to work and there will be no need to be scared or precautious of any activities of work unions. Busting work union groups, discharging them from work, unfair dismissal of workers is only adding to the urgent requirement of scrutiny for the people in power or the ones higher up in the hierarchy.

Undoubtedly, the presence of these situations are largely seen in the third world countries, and countries like India and China where the labour market is so cheap and human resource so easily replaceable that the consideration for their basic rights is not heeded and often always ignored.

It is important to explicitly lay down that no one method or *one size fits all* method or approach for solution will work to help this breaking chain of events, or the functioning of the industry. A multi-pronged or multilateral approach has to be looked into and adopted.

To achieve this very purpose, the following section of suggestions will entail some multilateral approaches to be integrated and implemented in the functioning of the industry to ensure the maximum benefits. Following that, the paper will conclude with the section *future scope* which will lay slight emphasis on what the future will look like based on these suggestions.

⁴⁶ Pamela N. Danziger, *Luxury Brands, Get Ready: Wellbeing Will Emerge As A Huge Trend After Coronavirus*, FORBES, (Nov 11, 2020, 8:24 pm) <https://www.forbes.com/sites/pamdanziger/2020/05/03/luxury-brands-get-ready-changing-consumer-priorities-will-result-in-a-trend-toward-the-new-luxury-of-wellbeing-after-coronavirus/?sh=ec499aa3e04d>

Suggestions

The only formal regime keeping the system in place is the legal regime. To govern the industry, its working and its mechanism, laws and related regulations have to be prioritized.⁴⁷ The first and foremost mode of action has to be to strengthen the adherence by regulation, after incorporation and reference to the international obligations — International Labour Organization (ILO);⁴⁸ and of course the Indian labour laws.

Special emphasis on Workmen's Compensation (Occupational Diseases) Convention, 1934⁴⁹ will help create a lot more pressure and obligation on the businesses and companies to adhere to especially in the time of the pandemic.

While all national legislations are in place,⁵⁰ it is still never going to be enough. The need of the hour is strict regulation and surveillance. Periodic/ random checking and surveillance can ensure rigid adherence to the laws enacted for the specific purpose. On one hand when due care and diligence is ensured on surveillance and regulation, the other grey aspect must also be looked at. A significant number of garment factory workers in India operate in the informal economy.⁵¹ This is a challenging area — even where the national and international laws exist to protect the workers, such workers from the informal sector often fall out of the scope of protection from these laws. Therefore, here, widening the scope of protection for these classes have to be looked into.

The important suggestion is formulated here as an approach for the future, with the help of integration of laws, the community, and the ecosystem.

Incorporating a '*regenerative approach*'⁵² along with steps by the authorities that will ensure *radical changes in the system especially by social protection of supply chains*⁵³ has a potential to bring about the

47 Soumya, supra note 1

48 International Labour Organization, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102691 (last visited Nov 11, 2020)

49 Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934, No. 42, International Labour Organization, 1934. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312187:NO

50 S.C. Srivastava, *Industrial Relations and Labour Law*, (5th edition, 2007)

51 Soumya, supra note 1

52 Brooke Roberts-Islam, *Social Sustainability, Overstock And 'Greenwashing': How COVID-19 Is Changing The Fashion Industry*, FORBES, (Nov 11, 2020, 8:35 pm) <https://www.forbes.com/sites/brookeroberthislam/2020/04/21/social-sustainability-overstock-and-greenwashing-how-covid-19-is-changing-the-fashion-industry/?sh=6ee1781b582d>

53 Meg Lewis, *OPINION: The fashion industry must learn from coronavirus*, THOMSON REUTERS FOUNDATION, (Nov 11, 2020, 8:33 pm) <https://news.trust.org/item/20200424064703-2ftug>

biggest substantial change to be witnessed in the system. This method directs the practice of the industry towards sustainability, as well as promoting equality and upliftment!⁵⁴

Again, as previously discussed, one way of approach will not be enough. Multiple corollary steps and tactics will have to be adopted too. The beginner's steps should mandate immediate condemnation of greenwashing and fast fashion. This, without a need for any explanation, makes it clear how it negatively impacts both the environment as well as the workers (daily-wage workers) – working in the garb of 'work fast to keep up with the pace or be unemployed'.

Focusing on the social security of the workers, especially in the wake of a pandemic, to set precedence or a healthy practice for running the factories and the supply chains is the establishment of *emergency relief funds*.⁵⁵ Taking due care of the workers, especially who are always underpaid, emergency funds can help ensure that in such unexpected cases of disasters, at least some sort of relief is going to be available for these workers.

It goes without saying that the ethical and fair treatment, especially keeping in consideration the aspect of respect and basic courtesy towards every human and therefore also the employees, is non-negotiable. Adherence and respect towards laws, is the common duty of the employers. However again, the systemic regulation and inspection of the same can help keep the practice in check.

Future scope

Working upon the suggested suggestions is definitely going to bring about a much needed change in the fashion and garment industry. Respecting workers, labours, and the human capital is basic human courtesy and responsibility of the employers. At the same time, maintaining the system and saving it from becoming toxic and hard and negatively impacting on the ecosystem is also the responsibility of the dynamically expanding fashion industry. All of this becomes more and more clear upon understanding the root cause of the problem of exploitation — of both environmental resources and the human resources.

Adoption of the suggested measures can influence a new wave in this industry. This is not just mere prediction but inspiration from a very successful idea and its implementation — *Community Clothing*.⁵⁶

Community Clothing is an organization formed on an ideal approach which aims and serves to create quality and yet affordable clothes. The unique factor is their method of work, and the process of functioning. They help create good jobs and restore economic prosperity at the same time, to some of United Kingdom's most deprived areas!⁵⁷

Efforts and the change in attitude can make this all a possibility. It is proven with this exemplary example. The governments all across the world, the regulatory authorities, and most importantly the companies have to understand the need and must (with due diligence) help create an ethical, sustainable, and a resilient fashion industry!

Based on statistics, almost 69% of people want the fashion industry to become proactive about the prevalent issues.⁵⁸ Better pay, job security, responsibility of retraining workers if their jobs are under threat or if they are being shuffled from one aspect of the work to another in order to be able to maintain their jobs. Clear and explicit desires of the stakeholders in this are expressed, and therefore must be considered to be able to create an ethical and balanced future scope for the industry.

The present scenario, the result of highlighting the grave embedded issues of the industry, howsoever grave still show a positive side to them. They show or rather provide the world with an opportunity to identify areas of improvement and build a better connection or a foundation to the future of the fashion and garment industry; for the environment, for the workers, for the system.

Love versus Law: The Paradox of the UP Anti-Conversion Ordinance 2020

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Abstract

Freedom of religion is a curious concept, in a culturally diverse country such as India, as such religious freedom has more complex nuances than a simple straight jacket ideological premise. The issue of religious conversions has always been a raw nerve in the political and social debates of the country where proponents of both conversion as a right and anti-conversionist exist. Recently, the Uttar Pradesh government has enacted an anti-conversion Ordinance aiming to curb forceful conversions. This paper argues that such laws are a violation of the right to equality of the people of India and interferes with their right to freedom of religion. It goes to state that, the Ordinance would give unfettered powers to the state machinery to control and determine the reason behind religious conversion. This could lead to such powers being used by a majoritarian government to suppress the minority and thus should be struck down.

Introduction

United States Supreme Court replied to Richard Loving's challenge to inter-racial marriage ban in Virginia by stating that the freedom to marry or not marry is an individual's prerogative and not under purview of state's infringement. The court further stated that restrictions on freedom of marriage on the basis of racial classifications are a violation of Equal Protection Clause's meaning.¹

Most of what is written about Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020, is about the law violating an individual's right to marry a chosen person; furthermore, about the law restricting the fundamental right to life, privacy and autonomy. This ordinance creates a prohibition to any religious conversion due to fraud, coercion, allurements, force, undue influence. It can make such a marriage liable to be declared void and makes this a non-bailable offence.

The application of law equally on all people does not and cannot guarantee equality. The law was not held to be equal by the virtue of it banning interracial marriages by all people of all races, in *Loving v. Virginia*.² The ordinance passed by Uttar Pradesh violates equality as

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1 388 U.S. 1 (1967)

2 Id.

a constitutional guarantee because terming a marriage void due to the sole reason of it being an interreligious union or the many onerous requirements needed by the parties in inter-faith marriage like a prior and post conversion notice. It is a discriminating on the basis of religion.

The paper seeks to understand the interplay of Rights of Freedom, Equality and personal liberty as the modern Indian political atmosphere keeps changing the meaning. It is an academic effort to analyse, what the government can and cannot do with protection's name tag and the amount of interference in personal decision making between two independent individuals with respect to a private matter, Marriage. The paper also seeks to argue and debate that this is a draconian law and a violation of the right to equality in terms of religion. Lastly it will highlight how this and any similar law, will affect liberal India's future and grossly undermine and destroy the vision and farsightedness of the constitutional fathers.

India and its Religious Freedom

Freedom of religion is endorsed in Part III of the Indian Constitution. While it would seem that it is only for the citizens of India, it is all encompassing as it is provided to all who reside in this country. All persons in this country have a equally entitled right to freedom of conscience and a right to freely profess, practice and propagate religion.³ Whenever we discuss about religion other than a personal human experience, such as the public sphere, the centre-stage becomes devoted to secularism, especially the Indian kind. However, before we delve further into the discussion, we have to accept the well-established fact that there is no model of universal secularism as we cannot have a religion which is universal.⁴

According to Donald E. Smith, Indian secularism is unique because it does not essentially mean non-religious. It surely means to signify a non-sectarian and a non-communal approach where the religion and the government is not separated by a wall but the relationship is rather characterised by a lack of preference of one religion over another. Thus, it follows a 'no preference doctrine' in which no religion is given any special preference. The most principal function of a secular state is that it should be non-religious in existence.⁵

India is known for its volatility in matters pertaining to religion. Sentiments and passions run high and often culminate into violent clashes and outpouring among the public. The Anti-conversion law,

3 Article 25, The Constitution of India, 1950

4 Rajeev Bhargava, ed. *Secularism and its critics* (Oxford University Press, New Delhi, 1998), Talal Asad, *Formations of the Secular* (Stanford University Press, Stanford, 2003)

5 Donald E. Smith, *India as a Secular State* 381 (Princeton University Press, New Jersey, 1963).

which forms the basic premise of this article is a perfect example to elucidate the argument. While it has not witnessed much violence as of now, it is about the potential it has to cause unrest in the future. This is separate of the fact that it is arguably against the fundamental tenets of the Indian constitution.

However, the right to religion is not without its limitations. The Supreme Court of India in its own words has said the following:⁶

Religion is not always theistic and most certainly among individuals or societies, is a matter of faith. The right to freedom of religion of people has been provided unrestrictedly in the American Constitution. The same absolute freedom is also reflected in the Australian Constitution as well. However, in other countries including India, reasonable restrictions have been inserted by the constitutions on the grounds such a social and public order, decency and morality. These limitations have been introduced into the legal systems of American and Australian constitutions too, but by the way of judicial pronouncements. These limitations have been incorporated by our constitution makers and the impact of that can be observed in the language of Article 25 and 26. There is substantial clarity on the scope of freedom of religion without necessitating the reference to foreign sources.

The importance of religion in India can be further understood by focusing on the Indian Penal Code, that has a separate chapter on Offences Relating to Religion. It makes it a criminal offence to cause harm by outraging the religious feelings and beliefs of a class of people, punishable by imprisonment.⁷ Therefore, in a country as diverse as India, it is very important to create a mechanism that respects and allows subsistence of a multitude of faiths and practices together. This again brings us back to secularism.

An interesting feature of the Indian form of secularism is that while the government is not permitted to interfere in matters of religion, it is permitted to control and make laws regarding matters incidental to religion. This allows to government to regulate religious practices that result in secular activities. Thus, any activity which has political, economic or commercial implications but arises out of a religion, can be regulated by the government.⁸ This is permitted under S. 25(2)(a) of the Indian Constitution. Nevertheless, religious outfits

6 The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar, AIR 1954 SC 282.

7 The Indian Penal Code, 1860, s. 295 A.

8 Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

and denominations have a vast range of freedoms to self-regulate such secular matters as well. They can create and establish organisations for charitable purposes and in matters of religion, make their own regulations to practice such religions. They also have the freedom to purchase property, both moveable and immovable, in matters pertaining to religion and administer the same in consonance with the law of the land.⁹

To understand the significance of secularism in context of anti-conversion laws, it is important to historically understand the introduction of this concept in Indian constitution. It is to be noted, that secularism was not originally adopted as a provision by the Constituent assembly. It was only a principle enshrined in its Preamble. As a provision, it was what could be called, a late entrant. It was first included into the Constitution by the Forty-Second Amendment in 1976. However, it was only in **S. R Bommai v Union of India**¹⁰, that the Supreme Court declared that India had been a secular country not only after the Amendment but since its inception. Ever since, attempts have been made to strengthen it. But it is easier said than done.

There have been many attempts to strengthen the secular message under the Indian Constitution. A case in point is the Bill¹¹ that was introduced in the Parliament permitting banning any such political party or association, that would use the political platform to fan religious and communal disharmony. It also sought to disqualify such Members of Parliament who sought to indulge in such practices in furtherance of their political ambitions. It however was not passed. The situation has progressively worsened since then. The Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020 on the face of it seeks to prohibit any unlawful conversion of religion of one person to another. This is vaguely defined to be any such conversion that is against the law of the land.¹²

What it seeks to do is to prevent unlawful conversion from one religion to another by any person, if done so by force, undue-influence, fraud, mis-representation etc. and includes such conversion for marriage under its purview. What it really does is, it creates an intrusive and undue scrutiny on any such individual who desires to have an inter-faith marriage. Furthermore, prima facie, there is a heavy burden of proof on individuals who desire to convert their religion to show that it is not unlawful. Therefore, the personal liberty to practice any religion by a person under Article 26 is head-on challenged by this

9 Article 26 of The Constitution of India

10 [1994] 2 SCR 644

11 The Constitution (Eightieth Amendment) Bill, 1993.

12 S. 2(k) of The Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020

onerous legislation.

To conclude the Indian position on secularism and religion, it can be ascertained that while the state refrains from interfering in matters associating to practice of any-religion, it makes or can make laws on ancillary matters that arise from it. This skeletal view of secularism enshrined in the Indian constitution can only work when infused by the life-blood of legislations to support it. It is argued that the Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020, if allowed to remain, will be the first dash of poison causing toxicity in the healthy body of a secular country that the Indian Constitution sought to build.

Religious Conversion and India

The pristine ideals of secularism and religious freedom get muddy over the matter of religious conversion. While the Constitution of India, does not explicitly prohibit it there exists no provision to make religious conversion a fundamental right either. This has created considerable debate where the Supreme Court on multiple occasions has had to consider whether Indians actually do have a right to convert. There exists a right to propagate religion under the constitution. Ideally, propagation of ideas of faith would inherently include propagating it to people who are unaware of the same. If the ones who are being propagated to, they wish to convert, then would that mean right to propagate includes in itself the right to convert? Is there a stance on the persons causing such conversion? Whether it is illegal to preach a religion that would cause conversion? This matter is of grave importance because while propagation is fundamental right, it becomes illegal if it causes conversion forcibly. This is the exact premise which the Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020 seeks to use.

In 1954, by ***Ratilal Panachand Gandhi v. State of Bombay***¹³ the Supreme Court for the first time clarified what possessing freedom of religion really meant in India. It held that Article 25 allows a person to follow and entertain any such belief in matter of religion that his judgement and conscience would permit. This would also include performing any such overt acts or expressions that would allow him to exhibit his belief and ideas. He could do so to propagate his faith to the edification of other fellow members of his society.

In another judgment¹⁴, the Apex court further reinforced the fundamentals of the right to propagate one's religion by declaring that this right clearly includes the right of a person to be able to communicate

13 AIR 1954 SC 388.

14 of Digyadarsan Rajendra Ramdassji v. State of Andhra Pradesh, 1970 AIR 181.

his beliefs freely without any fear of reproach or retribution. It includes the right to expose people to his/her faith but does not permit the conversion of the former's faith. Thus, as a matter of right propagation is permitted, conversion is not. This is the settled judicial principle.

With the UP Prohibition of Unlawful Religious Conversion Ordinance, 2020 we are again required to revisit the laws pertaining to anti-conversion vis-à-vis right to religious freedom. What UP has enacted in 2020, is not novel provision. This trend of enacting laws against conversion began as early as 1936 in the pre-independence era where the sole intent was to prohibit forceful conversion into Christianity. For example, there existed laws such as Udaipur State Anti-Conversion Act of 1946, the Sarguja State Apostasy Act 1945, the Raigarh State Conversion Act of 1936, and the Patna Freedom of Religion Act of 1942 among others.¹⁵

Such a similar law was enacted for the very first time in post-independence India in Orissa as early as 1967. It was known as the Freedom of Religion Act in 1967. In its objectives the law was purported to be used to prevent forceful conversion of people from one religion to another by inducement or fraud etc.¹⁶ The UP Ordinance shares the exact same objective and believes that there exist such urgent circumstances in the state that such ordinance has to be passed to take immediate action. It shall come into force at once.¹⁷

From a comparative perspective, there are eerie similarities between the law enacted by the state of Orissa and the present UP ordinance. If a person was convert or attempt to convert another individual forcefully to a religion not of latter's choosing, then in Orissa he/she would be facing a year's prison sentence along with a fine of Rs. 5000/- or both. In UP, the imprisonment can range anywhere between a year to five years accompanied with a fine of Rs. 15,000/-.¹⁸ Moreover, if such conversion was to occur for a member of a socially and educationally backward class (Scheduled Castes or Tribes) or a woman or a minor, Orissa would fine Rs. 10,000/- along with a two years imprisonment whereas UP would upto Rs. 25,000/- and imprisonment ranging between two to ten years. It was the opinion of many legal jurists that the increased penalty for conversion of women, minors and members of the backward classes was to prevent their exploitation owing to poverty, ignorance and vulnerability.¹⁹ There is a much stricter punishment for anyone attempting mass conversions in UP. The fine would be upto

15 Krishnadas Rajagopal, "Propagation without proselytisation: what the law says", *The Hindu*, 21 December, 2014.

16 The Orissa Freedom of Religion Act, 1967.

17 S. 1(1) of The Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020

18 S. 5(1), UP Ordinance, 2020

19 Lalit Mohan Suri, ed. *The Current Indian Statutes S* (Chandigarh: Law Register Press, 1968).

fifty thousand rupees and imprisonment ranging between three to ten years.²⁰

Similar to Orissa and Uttar Pradesh, there again is an identical law enacted by the state of Madhya Pradesh known as Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968. As it was enacted just after Orissa, the provisions of this Adhiniyam are almost similar to that of Orissa, starting from the objectives to the quantum of punishment. It is only UP that has drawn inspiration from it, but has made the laws much more stringent as seen by the increased quantum of punishment.

The discussion on the Orissa Act of 1967 is relevant because its constitutionality was challenged in the case of *Yulitha Hyde v. the State of Orissa*.²¹ This case at length discussed the connection between propagation and conversion. The contentions of the petitioners were twofold: (a) The first was regarding the power to enact such a law, in which it was said that there was no competency on the part of the legislature of Orissa to enact such a law. It was done in excess of authority. (b) The second contention was the most obvious challenge that such a law would infringe the scope of freedom of religion provided under Article 26 of the Indian Constitution. The pronouncement of the court is significant for many reasons. Firstly, it declared the law to be unconstitutional. Secondly, it also altered the position of the court in saying that the right to convert was inherent within the freedom of religion in India.

In summing itself up, the court majorly gave three reasons to declare it unconstitutional. According to it, state of Orissa had exceeded its authority in enacting such a law. There was no aspect of public order in it and it clearly dealt with religion. There was a garb of colourability in the legislation as the definition of inducement to convert was too vague. Furthermore, in religions such as Christianity, conversion into the faith is an essential part of the religion and thus is protected under Article 25. This makes such a law untenable and thus unconstitutional.

However, this was not the precedent that India was set to witness. Two years after the Orissa legislation was challenged, the law of Madhya Pradesh was also taken to court. As the matters were similar in nature, heavy reliance was placed on *Yulitha Hyde v. the State of Orissa*. But it was to argue against the judgment, and the Madhya Pradesh Adhiniyam was held to be constitutional. The Supreme Court in the case of ***Rev. Stanislaus vs State of Madhya Pradesh***²² changed its position in *Yulitha* and held that the state legislature had every competence to enact such a provision. It held that forced conversions were incorrect

²⁰ Provisio to S. 5, UP Ordinance, 2020

²¹ AIR 1973 Ori 116.

²² Rev. Stanislaus vs State, 1975 AIR M. P 1977 SCR (2) 611.

and matter of serious public order violation going beyond the purview of the religious matters.

The Supreme Court also discussed in great detail on the issue whether right to propagate also includes right to convert into a religion. This was majorly because Yulita gave a strong argument in its favour and the court had to over-rule that ensuing in a different verdict. It gave constitutional validity not only to Madhya Pradesh Adhiniyam but also to Orissa Freedom of Religion Act, 1967, neither of which were considered to be against the religious liberty set out in the constitution of India.²³

This judgment has been criticised multiple times by several legal scholars. The most common argument is that such a legislation can always be misused by a majority government in power with an inclination to a certain kind of religion. This has been never truer than in the present-day political environment, where in states like Uttar Pradesh, there is already some strong polarisation in terms of religion. The Supreme Court has further obfuscated the issue.

H.M. Seervai, a renowned constitutional law expert has written on this that propagation of any idea was properly done, it would definitely result into conversion, irrespective of whether that idea was religious or not. In fact, the purpose of propagation, according to him was wrongly understood by the court. In response to the decision in *Stainislaus*, he observed that when a person wants to propagate religion, he doesn't only mean to spread it widely or merely to impart knowledge, but he does so to induce intellectual and moral conviction towards a changed value in others in the adoption of religion. Propagation cannot be without conversion.²⁴ It is the ultimate form of majoritarian opinion that the Court is providing if it hopes that religious propagation would only be limited to edification of religious tenets sans any conversion at all.²⁵ This also does not also consider the impracticality of such an opinion. Religions such as Christianity and Islam are by nature aimed at conversion, and to hold that freedom of religion only protects propagation when it does not induce conversion, is to directly interfere with the matters of faith. It restricts how people of such religions practice it and goes against the basic tenets of Article 25. Freedom of religion without allowing any conversion, is a hollow freedom.

In the years that have followed this judgment, many other such

23 Id

24 H.M Seervai, *Constitutional Law of India* 1289 (Universal Law Publishing, 4th edition, 2013)

25 Suhrith Parthasarathy, "Conversion and freedom of religion", *The Hindu*, Dec. 23, 2014.

laws have been enacted by different states in India. In 1978, after the judgment there was a considerable amount of violence against the Christian minorities in the north-east India. Another law was enacted in the then Union Territory of Arunachal Pradesh.²⁶ The year 2020, witnessed Uttar Pradesh too drawing its authority from Rev Stainislaus and enacting its own version of Anti-conversion law.

UP Anti- Conversion Ordinance Vis-À-Vis the Right to Equality

The right to freedom of religion is not without the right of equality granted to us under Article 14 of the Indian Constitution. It goes on to provide that anyone and everyone has a right to determine equal protection of laws. This is further supplemented by Article 15 which prohibits discrimination. Under this law, no person can be discriminated on the ground's religion, race, caste, sex, place of birth or any of them. Coming to the UP Ordinance, it permits discrimination in marriage on the grounds of religion and violates Article 14 of the Indian Constitution.

How, one may ask? If a person was to marry in the same religious community, there is no scrutiny on such person under the Ordinance. However, if the same person had a desire to perform an inter-faith marriage, he or she would have to obtain various permissions under the law. If a person wants to convert his/her faith on marriage, a month's notice has to be given to the district magistrate in the region where the ceremony is intended to be performed, showing the intention to convert.²⁷ However, that is not all. The District Magistrate then has the power to inquire into the real intention and purpose behind the proposed conversion.²⁸ This is a draconian provision as it gives unfettered powers to a governmental authority to determine with extreme subjectivity on why a person would convert. It could be glaringly misused by any party in power to curb such inter-faith marriages.

The conversion law further requires that the person who has converted will have to submit a declaration providing the residential proof, details of spouse/father and the religion to which the person originally belonged to and to the one he/she converted.²⁹ Then a personal appearance is required in the next 21 days to confirm the declaration. The religious leader performing such conversion, too has to declare that such conversion was not forceful and has the sole unfair burden of proving the same.³⁰ What this excessive scrutiny does is, it creates a chilling effect on the people desirous of any conversion. With government with such unfettered powers to misuse, excessive scrutiny

26 Brojendra Nath Bannerjee, *Religious Conversions in India* 269-70 (New Delhi: Harnam Publications, 1982).

27 S. 8(2), UP Ordinance 2020

28 S. 8(3), UP Ordinance 2020

29 S. 9(3), UP Ordinance 2020

30 S. 12, UP Ordinance 2020

and stringent punishment, in reality an such conversions which would happen, for marriage or otherwise, would be truly very few in number. There is no longer a freedom to choose the religion in UP.

Our equality jurisprudence also requires that the state can make separate classification if such classification has a reasonable nexus with the purpose of the law. This begs the question towards the purpose of such law. To begin with, inter-faith religious marriages in the country are miniscule. There is no empirical data to show that such marriages have caused any harm to the society and need to be controlled.

There is an argument that such marriages can be conducted another the Special Marriage Act of 1954. However, it has been observed that it is much more onerous to be married under it than under personal laws. It requires that people desirous of performing an inter-faith marriage have to put up a notice, 30 days prior to registration of the marriage. For parties that are from different faiths, communities or castes, such a public notice can be a great source of danger and harm from their family members and the only option would be for one of the persons to convert to the religion of the other and get married. It makes the personal decision of getting married into a public affair, where the parties to the transaction have no say. A similar provision is of the 60-day bracket allowing police verification under the UP Ordinance to verify the legitimacy of such conversion. This would result in much lesser conversions actually taking place than what the people would desire. Therefore, except for personal laws, there is no ease in conducting an inter-faith marriage. This can be particularly misused against the poor and vulnerable people in the society as they are never empowered enough to sustain such tremendous scrutiny by authorities.

Conclusion

Anti-conversion laws therefore should not be supported. They are promulgated usually under the argument that forced conversions do happen and they need to be stopped. However, they can easily be misused by the majoritarian forces in the country. No legislation can ever truly determine the reason behind conversion of religion by a person. It could be a deep rooted personal or even a spiritual experience for some. There are not enough legislative tools available to determine whether the conversion was forceful or a matter of choice. The UP Ordinance gives such power to the magistrate to determine this. It is not necessary that the magistrate is equipped enough to make honest determinations without any personal bias. Political agendas of ruling parties should not determine the matters of faith of people. Religion is attached to emotions and so is marriage. This deep-rooted opposition to inter-faith marriages comes from the misogynistic and patriarchal norms of the society that seeks to control women for their choices. The state by enacting such laws should not encourage that.

A Cry for Immunity: Medical Negligence during Covid-19 vis-à-vis the Consumer Protection Laws in India

***Mr. Yuvraj Singh Sekhon**

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Abstract

The coronavirus pandemic has emerged as a test of the perseverance of the human population. Amidst this international crisis, majority of the population is locked up inside their safe havens awaiting the unforeseeable end of the pandemic. However, the medical community has emerged as the warriors of this pandemic and have gone above and beyond their call of duty to ensure treatment and well-being of the entire country. The doctors of our nation have been hailed as the knights in shining armour and have been showered with appreciation, be it in the form of bashing utensils and clapping to show solidarity or dropping flowers from helicopters as a token of gratitude. While the majority of reactions towards the medical community have been filled with sensitivity, there have been instances of outrage and scepticism due to the increasing number of deaths due to medical negligence. Since, Covid-19 as a disease is relatively infant, there is lack of knowledge with respect its treatment.

The mutation of the virus combined with paucity of treatment methods and abundance of cases has led to controversial deaths of victims. This has led to an increase in medical negligence litigation against hospitals and doctors. The Consumer Protection Act, 2019 has included in its ambit suits of medical negligence. This research paper aims to deduce a balance between the rights of consumers for redressal and the rights of doctors to be safeguarded in case of medical negligence suits. Further, the authors answer some crucial questions relating to the imposition of liability on doctors in this pandemic. The research paper takes into consideration the need for a revised system of investigating medical negligence suits due to the unique nature of the pandemic and therefore, balances the consumer rights along with easing burden on doctors.

1. Introduction

Medical Negligence can be interpreted as the departure from the established standard of care by a medical practitioner while undergoing

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treatment of a patient with whom they have a fiduciary relationship which ultimately leads to significant damage to the health of the patient or even death in certain cases. The medical profession is regarded with utmost acclaim in the society which is attributed to the standard of care and diligence that doctors exercise while treating patients. However, when any doctor departs from this reasonable duty of care, the afflicted patient turns to the law for recourse against the damages done to their health. The foremost of these laws that cover medical negligence cases is the Consumer Protection Act, 2019. Since, a significant number of medical negligence cases are not life threatening, the doctors tend to escape criminal liability. Therefore, the Consumer Protection Act provides recourse for these patients wherein they can claim damages and compensation.

The Consumer Protection Act was first enacted in India in 1986 as a result of compliance with the guidelines of The United Nations General Assembly to protect the interest of consumers in developing countries.¹ Recently, in 2019, it was amended to modify certain provisions and include new laws to keep up with the need of the times. The Act departs from the conventional definition of consumers and includes in its ambit the patients seeking treatment in hospitals as consumers. At the time of enactment, this Act was met with widespread criticism from the medical community which claimed that the patient cannot be a consumer and cases of negligence be dealt by Medical Council of India or courts under existing civil and criminal laws. However, those views were not accepted by the judiciary and the consumers were given the right of filing negligence suits under the Act.

The criteria which is followed in India for determination of liability in medical negligence cases is the Bolam Test. This test was laid out in the case of **Bolam v Friern Hospital Management Committee**.² According to this test, if a medical practise is endorsed by a body of peers, then the doctor undertaking that practise has met the required standard of care. In order to establish medical negligence in India, four key elements need to be proved. Firstly, that there is a duty of care between the doctor and the patient which can be taken for granted also. Secondly, that there was a breach of this duty of care. Thirdly, it must be shown that there was a causal link between the breach of duty and harm caused to the patient. And lastly, it must be shown that the harm was not too remote. Another test which has evolved in the UK courts is the Bolitho Test. This test is a higher standard than the Bolam Test and states that the courts should not take the opinion of a reasonable body of professionals as the adjudging criteria but rather

1 United Nations Guidelines for Consumer Protection, United Nations Conference on Trade & Development, 2016.

2 *Bolam v Friern Hospital Management Committee*, (1975) 1 WLR 582.

should observe whether the common man through rational judgement would find the treatment to be negligent.³

The existence of the Bolam Test has meant that the only the utmost genuine cases of negligence have been entertained by the courts so as to save time and maintain the dignity of the medical profession. However, during the times of the Covid-19 pandemic, there has been a surge in the cases of medical negligence due to the increase in medical interaction. This pandemic has brought the medical sector under the spotlight wherein on one hand, the doctors and healthcare workers are being hailed as the warriors protecting people by putting their lives on the line and on the other hand, patients are being refused treatment and there have been reports of unsanitary and life-threatening conditions in hospitals. This increase in scrutiny can be attributed to rapid increase in cases along with deficient medical infrastructure and inexperienced doctors. Further, adding insult to injury, the Medical Council of India has not prescribed proper regulations in dealing with Covid-19 patients and have rather focused more on absolving doctors of any wrongdoing. Therefore, in order to see justice, the patients have been increasingly filing negligence and misconduct cases against doctors and hospitals.

2. Medical Negligence Remedies for ‘Consumers’

The foremost question which is unearthed while dealing with medical negligence cases is whether a doctor rendering treatment is a service and subsequently, the patient is a consumer. Under Section 2(7) of Consumer Protection Act, 2019, the world Consumer has been defined for the purpose of goods and services. A Consumer means a person who buys any goods or hires any service for consideration.⁴ The Supreme Court had iterated in **Indian Medical Association v. V.P. Shantha**, that the medical profession would fall under the definition of ‘service’ under **Section. 2(42)** of the Act.⁵ The personal nature of services given by a medical professional is not to be confused as a contract of personal service which is not covered under the Consumer Protection Act. The service given by a doctor in furtherance of treatment is a contract for service which is why the doctor can be held liable for medical negligence.

The current system which exists to determine guilt in cases of medical negligence is the **Bolam** test established in 1957. This test solely relies on the principle that the medical practitioner had a duty of reasonable care which was breached and the act performed consequently was not an act of general practice in the medical community. The Bolam test puts immense credibility on the opinion of fellow medical practitioners

3 *Bolitho v City & Hackney Health Authority*, (1996) 4 All ER 771

4 *The Consumer Protection Act, 2019, Section 2(7)*

5 *Indian Medical Association v V.P. Shantha*, AIR 1996 SC 550.

and completely isolates the afflicted patient from the picture while deciding culpability in medical negligence cases. During the duration of the Covid-19 pandemic, there have been many cases of medical negligence which have been reported and subsequently taken to court. The coronavirus is a relatively new disease and its diagnosis and treatment has limited research, the Bolam test would fail in effectively establishing negligence. The method of treatment which is practiced in one hospital would be entirely different from the other which would lead to discrepancies while deciding the standard of care. Therefore, there needs to be a departure from the Bolam test while deciding the standard of care in cases of negligence during the pandemic.

The Montgomery Test is what is proposed in these times to decide the liability of doctors during the pandemic. The Montgomery test is based on the principle of informed consent which basically translates to the patient having adequate information furnished by the doctor to decide the mode of treatment which they wish to receive.⁶ Any doctor-patient interaction involves three steps, namely, diagnosis, advice and treatment. The Montgomery test targets the 'advice' part of the doctor-patient relationship. The core crux of this test states that if a patient is provided adequate information regarding a certain treatment and its effects on their body and if they decide to go through with the treatment, then the doctor would not be held liable in case of an adverse outcome to that treatment. Similarly, if a doctor fails to furnish the information and educating the patient, then there would be a prima facie case against the doctor for medical negligence. The Montgomery test ensures that the patient plays an equal part in their treatment at the hands of the doctor.

3. Medical Negligence during 'Free Service'

Possibly the most distinct lacunae in the consumer law with relation to medical services is the exclusion of treatment in government hospitals. In current scenario, the service rendered by government hospitals is divided into two categories:

1. Where the service is rendered free of charge to everybody,
2. Where the service has to be paid for but is exempt to people who cannot afford to pay for it.

The view of the courts has been that the treatment given under the second scenario only would be considered as a service. Further, in a recent judgement in 2018, it was reiterated by the state consumer affairs redressal commission that the services rendered by the doctors of a government or charitable hospital do not fall under the ambit of

6 Colin Liew & Tham Lijing, *A New Test for Medical Negligence: The Montgomery Test*, Singapore Medical Association News, 2017.

services under the Consumer Protection Act.⁷ The National Consumer Disputes Redressal Commission had notified that the patients receiving treatment from government hospitals fall under the category of consumers and can file cases under Consumer Protection Act. However, this order of the NCDRC was stayed by the Supreme Court after protest by the Indian Medical Association.

The definition of 'service' in the Consumer Protection Act excludes service provided free of charge.⁸ This absolves the doctors in government hospitals of any liability for negligent acts as there is no recourse to patients under the consumer commissions. Considering the economic status of most consumers in India, the only recourse available to them on contracting a disease like Covid-19 is to approach the nearest government hospital and seek treatment. However, if the doctors in the hospitals do not provide adequate care facilities which lead to damage or loss of life to the patient, it would just be treated as a medical accident. Another argument which has been forwarded is that the government hospitals are funded by tax-payers money which indirectly implies that the patients have paid for the service at the hospital. However, the Madras High Court had opined that the payments made to employ doctors in government hospitals would not amount to indirect payment by the patient for services undertaken. Further, the court was of the opinion that litigation against free service in government hospitals would attract irresponsible litigation and hamper the working of the hospitals.

4. International Scenario – Where Does India Stand?

The coronavirus pandemic is an international disaster which has seen a wide range of responses from various different countries around the globe. The countries which have been worse hit by the pandemic have already undertaken steps to ensure immunity for their doctors and medical staff in order to safeguard them from litigation. In **America**, some states have implemented the Coronavirus Aid, Relief and Economic Security Act (**CARES Act**).⁹ Under this new legislation, the Good Samaritan rule has been established on a federal level which safeguards volunteers and temporary healthcare workers from malpractice litigation. Due to the federal structure of American Constitution, individual states have their own laws relating to medical negligence suits. Unlike India, medical negligence is covered under special statutes in the States and not under any consumer protection statutes. This exclusion of healthcare from the forum of consumer redressal is what has been desired in India from a long time by the

7 *Vidya Bhushan Tiwari v Dr P.K. Singh*, Civil Appeal No. 283 of 1995.

8 The Consumer Protection Act, 2019, Section 2(42).

9 The Coronavirus Aid, Relief & Economic Security Act, 2020.

medical fraternity. The Medical Council of India has constantly pushed the relationship of patient-doctor as a master-servant relation in order to evade the definition of a service under consumer protection laws in India.

The situation in the **United Kingdom** is completely different during the pandemic. The healthcare system of Britain is completely government sponsored from the central taxes which means that medical treatment from the National Health Service in Britain is available for free to British citizens. The majority of healthcare in the UK is covered under NHS and there are very few private hospitals. Due to this, majority of medical negligence claims, especially during the pandemic are paid for by the NHS and not by the doctors, if liability is established. Therefore, the doctors are absolved of all civil liability as they are considered the employees of NHS and the principle of vicarious liability comes into play. This system is extremely beneficial and necessary during the pandemic because the doctors are playing in unknown territory and are constantly experimenting new methods of treatment due to the novel nature of the disease. The Indian public medical infrastructure is in shambles and even the existing doctors incur personal liability even if the negligent treatment is given in a government hospital. The government needs to provide medical liability insurance to doctors employed by it in order to preserve the interests of both consumers and doctors.

The healthcare system of **Japan** is beneficial as well as extremely averse to the interests of doctors. The negligence claims in Japan are covered by a collective insurance pool as most of the doctors are part of the Japanese Medical Association. Therefore, the doctors are free from civil liability. However, if injury or death occurs due to a negligent action of a doctor, it is mostly treated as a criminal matter in Japan. This gives a double-edged sword nature to the Japanese medical malpractice law. The negligence which occurs during treatment should be treated as an accident and dealt with in that manner only and subjecting the doctor to criminal liability for minor injuries would not be justified.

The only other country which included healthcare under its consumer protection laws other than India is **Brazil**. The Brazilian Consumer Protection & Defense Code provides that doctors and hospitals can be held liable for negligence if a patient (consumer) can prove malpractice. Another provision in the Brazilian consumer laws states that the consumers can sue hospitals as well in cases of medical negligence. This provision is absent in the Indian context wherein the hospital cannot be held liable for the negligent act of the doctor.

Mediation is the go-to strategy employed by **Germany** to dispose of medical negligence cases. In Germany, the medical malpractice cases

are referred to expert panels and mediation boards. The case moves to the courts only if there is failure of mediation process. This process ensures that the cases are solved with mutual agreement which is beneficial to both parties. During the period of Covid-19, courts have reduced the burden of care on doctors in lieu of increased risk and negligible knowledge regarding the treatment of coronavirus patients. The new consumer protection act provides for mediation but only if the court directs it. This is a lesson that India should take from Germany while handling medical negligence cases.

5. Conclusion & Suggestions

The Consumer Protection Act, 2019 has added to the confusion regarding the inclusion or exclusion of medical profession from the ambit of consumer laws by removing the word 'healthcare' from the definition of services. The pacifier for the Indian Medical Association has contributed to the burden on the judiciary to interpret the provision and broaden its ambit to include the medical profession under the consumer laws. The law makers are shaky in their approach to this field which is evident from the changing opinion with regards to protection of doctors or preservation of consumer interests. The present research has led the author to disprove of the hypothesis that was initially undertaken while starting the research. The Consumer Protection Act, 2019 majorly tilts in the favor of consumers as it does not provide any penalties for vexatious complaints or harassment of doctors. Rather, it imposes the will of the NCDRC upon the medical fraternity wherein they are not entitled to a committee review by way of right. The risks that the doctors undertake, especially during the pandemic, have been ignored by the legislators. The recent amendment to the Epidemic Diseases Bill was the first respite given to the doctors wherein punishments were prescribed for violent attackers who harassed doctors and medical staff. The small pacifying moves by the law makers are not what we desired in the current scenario. What is required is the drafting of concrete legislations which effectively establish the rights of doctors as well as consumers so that there is no confusion regarding the application. The author would like to forward the following suggestion in furtherance of the same:

- The term 'healthcare' and the medical profession in general should either be placed in a separate exclusion clause or it should be added clearly to the definition of services under the Consumer Protection Act, 2019. This would ensure that there is no confusion regarding the application of law and the consumer can avail speedy redressals.
- The government and charitable hospitals rendering 'free service' should also be brought under the ambit of consumer laws India so as to not exclude the vast majority of poor patients who seek treatment in these hospitals.

- The criteria for judgement of medical negligence should be evolved from the Bolam Test to the Bolitho Test as adopted by the courts in the UK. Further, the principle of informed consent should be established so that the consumers are aware of the risks and the doctors are saved from unnecessary harassment.
- Currently, there is no provision for penalties for false and vexatious complaints of medical negligence. Therefore, a new provision should be added to mandate penalties if there are fake cases of medical negligence so as to add an additional safeguard for doctors and medical staff.
- The stage of diagnosis should be brought under the ambit of medical negligence wherein the consumers have recourse for injuries afflicted due to wrongful diagnosis by doctors.
- Mediation should be made mandatory in cases where the damage suffered by the patient is not life threatening so as to absolve doctors in cases of liability due to medical accidents.

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Mental Cruelty and Right of Married Women to Deny Sexual Intercourse: The Difficulty in Striking a Balance Under Hindu Marriage Law in India

***Ms Ayesha Choudhary**

Recently, the Indian judiciary has recognized the right to sexual autonomy and sexual privacy as Fundamental Rights under Article 21 of the Constitution of India. However, the matrimonial rights of the husbands inhibit the right of women to deny sexual intercourse as a woman's consent is vitiated by the fear of divorce petition. The refusal of sexual intercourse by a physically capable person for a considerable period without valid reason amounts to mental cruelty under Hindu law. The current law disregards factors like matrimonial happiness, the discomfort of a newlywed wife, stressful circumstances, and other psychological factors as 'valid reasons' for such refusal. This paper aims to find the position of the right of an Indian woman to deny sexual intercourse to her husband owing to psychological factors for a reasonable period. The scope of the paper is limited to Hindu marriages governed by Hindu Marriage Act, 1955.

The central argument of this paper is that the standard set by the Indian judiciary for 'valid reasons' for refusing sexual intercourse with a husband should be reasonable, keeping in mind the vulnerable position of married Indian women. Marriage should not extinguish the sexual autonomy of a woman. In India, where the power dynamics are skewed in the favor of the husband, the judiciary needs to actively safeguard the interests of the woman. Apart from examining the extent of this right, this paper will also examine the relevant factors considered while deciding the petitions of a husband seeking divorce on the ground of the wife's refusal of sexual intercourse.

1. Introduction

India is a male-dominated society in which the institution of marriage is inherently patriarchal.¹The Indian Judiciary has acknowledged the

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1 High Level Committee, Ministry of Women and Child Development, Government of India, Report of High-level Committee on the status of women in India, xix-xxi (2015) (Executive summary of the committee on the socio-cultural context of women in India).

importance of healthy sexual relations in a marriage.² At the same time, the right to sexual autonomy and bodily integrity is recognized as a fundamental right by the Supreme Court³ which includes the Right of the wife to deny sexual intercourse. The Justice Verma Committee report stressed that “marriage should not be regarded as extinguishing a legal or sexual autonomy of a wife”.⁴ But, the conjugal rights of the husband clash with the right to sexual autonomy of the wife. The challenge is to strike a balance between them while respecting the vulnerable position of a married Hindu woman⁵ and the impact of divorce on women in India⁶.

Mental cruelty is a ground of divorce under Hindu marriage law⁷. The Apex Court has laid down that, “unilateral decision of refusal to have intercourse for a considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.”⁸ Indian cases on refusal to have marital intercourse due to non-physical factors are sparse. The cases in which the wife rejects sexual intercourse are easy to decide as it amounts to mental cruelty. The issue is with the cases in which the wife denies sexual intercourse for a certain period only and not forever. In such cases, the courts have established that it is a question of fact whether the denial was with a just cause or not. However, what is ‘just’, is left open to interpretation.

The standard set by the Indian Judiciary while determining whether a wife had a valid excuse to refuse sexual intercourse, especially when such denial is not backed by any physical infirmity of the wife is against the interest of women. The current law seems to put the matrimonial rights of husbands on a higher pedestal than the individual rights of women which have been recognized as fundamental rights by the supreme law of the land.

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- 2 Rita Nijhawan v. Balkishan Nijhawan (1973) Delhi 200; Dr. Srikant Rangacharya Adya v. Smt. Anuradha (1980) Kant 8; Shankuntla Kumari v. Om Prakash Ghai (1983) Delhi 53; Samar Ghosh v. Jaya Ghosh (2007) (4) SCC 511; Shashi Bala v. Rajiv Arora (2012) VAD Delhi 493.
 - 3 Navtej Singh Johar & Ors. v. Union of India & Ors. (2018) SC 4321; Joseph Shine v. Union of India, (2018) SCC OnLine SC 1676.
 - 4 Justice Verma Committee, Report of the Committee on Amendments to Criminal Law, 118 (2013).
 - 5 The Indian married woman faces social and economic backwardness, sustained by lack of class conscience. See, e.g., International Institute for Population Sciences (IIPS) and ICF, National Family Health Survey (NFHS-4), 2015-16: *India*, IIPS, 509-517, 521-546(2017) (Data displaying earning power of women, decision making power of women in family and attitudes towards domestic violence of married couples aged between 15-49 years old).
 - 6 Saxena Poonam Pradhan, Matrimonial laws, and gender justice, *Journal of the Indian Law Institute*, 45(3/4), 335, 335-337, (2003) ;Raj Kumari Agarwala, *Changing the basis of divorce and the Hindu law*, *Journal of the Indian Law Institute*, 14(3), 431, 441-442. (1972) (explains the adverse effects of divorce on Hindu women).
 - 7 Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 S.13(1) (i-a).
 - 8 Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511.

The central argument of this paper is that while limiting the Right of the wife to deny sexual intercourse, the position of Indian women must be kept in mind. In Hindu society, where marriage has always been a patriarchal institution, the law should aim at removing the gender biases inherent in this institution. The right to deny sexual intercourse to a husband is a fundamental right⁹. The Supreme Court has laid down that the Court cannot enforce sexual intercourse in marriage¹⁰. But this is not enough to protect the rights of women. The Court has to take an active step, such that a woman does not feel obliged to produce a 'valid excuse' every time she denies sexual intercourse to her husband. The right of the husband to have sexual intercourse is not absolute and should be recognized keeping in mind the purpose and meaning of marriage in India. A strict approach of the judiciary might enable the husbands to use the threat of divorce to obtain the consent of the wife during sexual intercourse, which will violate the sexual autonomy and bodily integrity of women. This possibility increases in Indian society where the power dynamics between husband and wife are already skewed¹¹. The scope of the paper will be limited to Hindu marriages governed by Hindu Marriage Act, 1955.

2. Right to Deny Intercourse Vs. Conjugal Rights

Even though marital intercourse has been recognized as a conjugal right by Supreme Court¹², the Court emphasized the fact that such conjugal rights are not enforceable by an act of either party¹³.

Further Sexual relations are not the sole purpose of marriage¹⁴, especially under Hindu law where marriage is essentially a sacrament¹⁵. In the case of *Harvinder Kaur v. Harmander Singh Choudhry*¹⁶, the court

9 It is a subset of the Right to sexual autonomy and bodily integrity, which has been recognized as a fundamental right of personal liberty in *Navtej Singh Johar & Ors. v. Union of India & Ors.* (2018) SC 4321.

10 *Harvinder Kaur v. Harmander Singh Choudhary* (1984) Delhi 66 7.

11 Saxena, *supra* note 6, at 336 ("In a matrimonial relationship the husband can command superiority and security. The woman hangs on desperately to even an unhealthy relationship of an adequate alternate roof and financial, emotional and social security.")

12 In *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) SC 1562 the conjugal rights were defined as "The right which husband and wife have to each other's society and marital intercourse."

13 *T. Sareetha v. T. Venkata Subbaiah* (1983) AP 356 17 abrogated by *Saroj Rani v. Sudarshan Kumar Chadha* (1985) SCR 1 303 (The Court held that Section 9 for RCR decree under Hindu Marriage Act, 1955 is unconstitutional as Courts could not force women to maintain sexual relationships with her husband. However, the Supreme Court, while agreeing with the view that the Court can't enforce sexual relationships between married couples, clarified that by passing a decree of RCR court only enforces cohabitation, which does not necessarily include sexual intercourse).

14 *Supra* note 10.

15 Sampath, B. Hindu marriage as a samskara: a resolvable conundrum *Journal of the Indian Law Institute*, 33(3), 319-331 (1991).

16 *Harvinder Kaur v. Harmander Singh Choudhary* (1984) Delhi 66 7.

observed that: “Samsara is not sex. Nor sex is end-all of marriage. Marriage is not the mere gratification of animal appetite, nor sheer self-indulgence into the lusts of the flesh.”

Thus, the judiciary has emphasized the fact that marriage does not revolve around sexual intercourse all the time. It has also been held that sexual autonomy is an integral part of a person and sexual activity must be done out of the free will¹⁷. So, the wife must have a right to deny intercourse for a reasonable time, due to psychological reasons. She must not be compelled to produce a solid reason or to fear a divorce petition, every time she feels like refusing sexual intercourse with her husband. Further, as far as the conjugal rights of the husband are concerned, they are not violated unless the denial to have intercourse is done for an unreasonable period or without a “reasonable excuse”. Even in the cases where no party is at fault, the Supreme Court has granted divorce when it is impossible for the parties to coexist, on the grounds of irretrievable breakdown of the marriage¹⁸.

3. Extent of Right of Hindu Married Women to Deny Sexual Intercourse

3.1 ‘Valid reasons’ to deny sexual intercourse: Critical analysis of judicial standpoint in India

The Indian Judgments on cases of mental cruelty where the wife refused to have sexual intercourse can be broadly classified in two categories based on the reason for such refusal:

- Refusal due to physical infirmity not amounting to impotency.¹⁹
- Refusal due to psychological factors

As mentioned earlier, this paper is concerned with the latter types of cases. The number of such cases is sparse. One reason could be that wives in India generally are taught that sex is a right of the Husband. This ideology is so internalized that 25.7% of married women and 28.2% married men (Between the age group of 15-49 years) in India, think that a wife is not justified in refusing sexual intercourse when she is tired or not in the mood²⁰. Further, 13.3 % of married women think that their husbands have a right to beat them on the refusal of sexual intercourse²¹. Thus, many times, wives may not think that they

17 T. Sareetha v. T. Venkata Subbaiah (1983) AP 356 17.

18 Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558 (However, it is pertinent to note that an Irretrievable breakdown of marriage is still not a ground for divorce).

19 Impotency of either spouse is already a ground for nullity of marriage; Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 S.12 (1)(c).

20 National Family Health Survey (NFHS-4), 2015-16: India, supra note 5, at 549-551.

21 Id. at 514.

have the right to deny such intercourse. In rural India, sexual violence and coercion are considered to be normal aspects of married life.²²

Also, in India where marital rape is still not a crime²³, it could be fairly said that the judiciary has not recognized the Right to sexual autonomy and the bodily integrity of a married woman to a full extent²⁴. The stand of the judiciary in marital rape is directly based on the presumption that a woman gives irrevocable consent to sexual intercourse with her husband at the time of marriage.²⁵ The topic of marital rape was consciously avoided by the Indian Judiciary in the *Independent Thought* case. Marriage is considered to be a private affair and the judiciary is reluctant to encroach upon matrimonial rights especially that of sexual nature. The Lower Court order in the case of *Santosh Kumciri v. Surjit Singh*²⁶ passed in 1990, shows judicial bias in favor of the Husband's matrimonial rights, especially to have marital intercourse.²⁷ In the case of, the lower court allowed a second marriage and the learned judge stated in the order that: "[D]ue to ill and weak health of the plaintiff and thereby unable to satisfy the sexual desire of the defendant, the defendant is permitted to solemnize second marriage"²⁸. The High Court set aside this order when the same was criticized by the media.

In the case of *Samar Ghosh v. Jaya Ghosh*²⁹ the Supreme Court laid down that "[U]nilateral decision of refusal to have intercourse for a considerable period without there being any physical incapacity or valid reason may amount to mental cruelty." Terms like 'considerable period' and 'valid reason' were not discussed in detail. In its 59th Report, the Law Commission of India was against the induction of 'willful refusal to consummate marriage' as a separate ground for divorce as it is covered under cruelty if done 'without just excuse'³⁰. However, again what is 'just an excuse' is left open to interpretation.

22 George, A., Differential Perspectives of Men and Women in Mumbai, India on Sexual Relations and Negotiations within Marriage, *Reproductive Health Matters*, 6(12), 87, 89 (1998).

23 However, in *Independent Thought v. Union of India and Another* (2017) 10 SCC 800, the immunity of Husband from having sexual intercourse with underage wife, under Section 375 Exception 2 of IPC, was declared unconstitutional.

24 The Judiciary has recognized these rights on paper in cases like *Joseph Shine v. Union of India* (2018) SCC 1676, but the implementation of these rights in matrimonial law is absent.

25 This common law presumption was overruled in the United Kingdom in the case of *R v R* (1991) UKHL 12, which declared that marital rape is also an offense.

26 *Santosh Kumciri v. Surjit Singh* (1990) CriLJ 1012.

27 Saxena, supra note 6, at 353.

28 *Santosh Kumciri* (1990) CriLJ 1012.

29 *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511.

30 Law Commission of India, Fifty-ninth Report on Hindu Marriage Act, 1955 and Special Marriages Act, 1954, 71 (1974).

Since healthy sexual relations are an important aspect of married life³¹, denial of Sexual intercourse completely or for most of the time during their matrimonial life is a prima facie case of mental cruelty.³² The refusal of the wife to consummate the marriage altogether for the fear of pregnancy is not a valid excuse for denial of intercourse, especially with so many contraceptives available³³. The judicial precedent for the cases where there was non-consummation of marriage, without any valid reason or physical deformity is relatively clear³⁴. Most of the time, Supreme Court held the refusal of sexual intercourse in such cases amounted to mental cruelty³⁵. These cases are easier to comprehend as there is evidence for lack of willingness to deny a spouse to be a part of marriage itself or to lead a normal married life. In its report, the law commission put 'willful refusal to consummate marriage' under cruelty if accompanied by 'willful refusal'.³⁶ The Commission relied on the judgment of *Horton v Horton*³⁷ which defined willful refusal as a "settled and definite decision not to consummate without just excuse". Whether an excuse is just or not depends on the facts and circumstances of each case.

In 2015, in the case of *Vidhya Viswanathan v. Karthik Balakrishnan*³⁸, the Supreme Court held that denial of sexual intercourse by a spouse to his partner for a long time without sufficient reason amounts to mental cruelty to such spouse. Here, the initial reason for wife i.e. fear of pregnancy was not sufficient. However, later she was diagnosed with TB after 8 months of marriage which led to the further denial. The Court didn't answer whether such serious illness was sufficient enough. So, the Indian Judiciary is silent in cases where the initial denial to have sexual intercourse, is extended for some reason by uncontrollable circumstances.

The problem arises when the couples are newly married, or when the refusal is for small periods. For instance, In the case of *Suram Pal Singh v. Savita*³⁹, the Wife refused to have sexual intercourse 'twice'. I would like to point out that the petition of the husband was itself

31 Shankuntla Kumari v. Om Prakash Ghai (1983) Delhi 53; Rita Nijhawan v. Balkishan Nijhawan (1973) Delhi 200; Srikant Rangacharya Adya v. Smt. Anuradha (1980) Kant 8.

32 Smt. Pancho v. Ram Prasad (1956) All 41; Jyotish Chandra Guha v. Smt. Meera Guha (1970) Cal 266.

33 Vidhya Viswanathan v. Kartik Balakrishnan (2015) SC 285.

34 Special Marriage Act, 1954, Act of Parliament S. 25(i) (1954) ("Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage").

35 Usharani Lenka and Ors. v. Panigrahi Subash Chandra Dash (2005) Ori 3; Praveen Mehta v. Indrajit Mehta, Appeal (civil) 3930 of 2002.

36 Fifty-ninth Report of Law Commission of India, supra note 29, at 71.

37 Horton v Horton 2 All ER 871 (1948).

38 Vidhya Viswanathan v. Karthik Balakrishnan (2005) SC 285.

39 Suram Pal Singh v. Savita (2007) DMC 833.

frivolous. A married woman should have the right to refuse sexual intercourse once or twice, without any solid ground. A divorce petition based on the refusal of sexual intercourse should only be entertained in cases where such refusal was continuous for a long time.

In *Rita Nijhawan v. Balkishan Nijhawan*⁴⁰, the court held that “willful refusal to sexual intercourse” by a spouse of a healthy physical capacity amounts to mental cruelty. The Court, however, didn’t state any exceptions where such refusal might be justified; completely ignoring the fact that psychological factors like problems in matrimonial life, stress, workload, etc. may also result in refusal.

Menstruation⁴¹ and pregnancy⁴² are considered valid excuses to deny sexual intercourse to a husband by the Indian Judiciary. But, refusal due to ‘fear of pregnancy’ is not a valid excuse.⁴³

The 2012 judgment of Delhi High Court in *Shashi Bala v. Rajiv Arora*⁴⁴ shows the insensitivity of the Judiciary towards problems faced by married women. In this case, the marriage was consummated after ten days as the wife initially refused to have sexual intercourse. It was also alleged that there was no active participation of the wife in sexual intercourse. The High Court held that refusal of sexual intercourse by a wife on the first life of marriage itself is cruel.⁴⁵

In my opinion, the view of the court that the act of the wife in refusing sexual intercourse on the very first night was cruel is not correct. In India, most marriages are arranged, where the woman might not be familiar with the partner. The woman’s life turns upside down after marriage while the husband enjoys relative stability⁴⁶. A married woman should have a right to refuse sexual intercourse, for a reasonable time, until she gets comfortable in her new home and with her new partner. In my opinion, taking a week to get comfortable is not ‘cruel’. Allowing the husband to get a divorce on allegations like ‘no participation during sex’, which cannot be proved, opens a floodgate of divorce petitions.

3.2 Factors determining woman’s right to deny sexual intercourse to husband

Judiciary is of the view that the intention of the spouse to injure the other spouse is not important in cases of matrimonial cruelty⁴⁷. The Importance is placed on the effect of actions of one spouse on the other

40 *Rita Nijhawan v. Balkishan Nijhawan* (1973) Delhi 200.

41 *Sanjana Sandip Pednekar v. Sandip Sitaram Pednekar* (2014) 4 ABR465.

42 *Suram Pal Singh I* (2007) DMC 833.

43 *Vidhya Viswanathan* (2015) SC 285.

44 *ShashiBala v. Rajiv Arora* (2012) VAD Delhi 493 (The court termed the act of denying sexual intercourse to the husband on the very first night as a ‘cruel act’).

45 *Id.*

46 *Saxena, supra* note 6, at 338(The author explains the psychological and environmental changes experienced by an Indian woman after marriage).

47 *Rita Nijhawan v. Balakishan Nijhawan* (1973) Delhi 200; *Shobha Rani v. Madhukar Reddi* (1988) SC 121; *Vinita Saxena v. Pankaj Pandit* (2006) 3 SCC 778.

and the level of endurance of the spouse alleging cruelty⁴⁸. In my view, in cases dealing with the refusal of sexual intercourse by a wife, the intention of the wife should be taken into account. Otherwise, married women will be left with a negligible amount of sexual autonomy. It is better to avoid 'a Priori assumptions' in cases of cruelty⁴⁹.

In the case of *Maya Devi v. Jagdish Prasad*⁵⁰, the Supreme Court held that "The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society, to which the parties belong, their social values, status, environment in which they live."

The Supreme Court has placed importance on the mental conditions of the parties while deciding a case of matrimonial cruelty⁵¹. So, the mental condition of women should also be considered in cases of refusal of sexual intercourse. A woman can't be expected to say yes to sexual intercourse, even if she is stressed out, tired, worried, not feeling well, uncomfortable as a new bride, or otherwise, as long as the refusal is made without any intention to cause mental cruelty to the husband. A woman should not be held liable for not having sexual intercourse when she is having problems in her matrimonial life⁵². In such cases, her refusal is a result of problems in her matrimonial life and not the cause of her matrimonial problems. The burden to prove the unjustness of the wife's refusal should lie on the husband.

Another factor to take into account in cases of cruelty is the vulnerable position of married women in India. Divorce is not advantageous for a Hindu woman in an Indian setup⁵³. The societal pressure to maintain marital status is high on Indian women which already diminish their ability to 'legitimately' deny sexual intercourse without facing dire consequences⁵⁴. In such conditions, fear of divorce petition from a husband might take away all the sexual autonomy enjoyed by a married Hindu woman in Indian society.

4. Conclusion

In Hindu society, marriage is an institution founded upon patriarchal values. The idea that the Husband has a right over the wife's body is deeply rooted in Indian society⁵⁵. Marriage between two people is

48 Agrawala, *supra* note 6.

49 Gollins v. Gollins 1963-2 All E.R.

50 *Maya Devi v. Jagdish Prasad*, (2007) SC 1426.

51 *Suman Kapur v. Sudhir Kapur* (2008) SC ALL MR 6 937.

52 For women, in contrast with most men, marital happiness and sexual happiness are co-dependent. George, *supra* note 21, at 91.

53 Agrawala, *supra* note 6; also Saxena, *supra* note 6, at 338.

54 The consequences may include loss of economic support, sexual coercion, and possibly violence. George, *supra* note 21, at 91.

55 Marital rape exemption for adult women recognized under Indian criminal law, is based on the presumption that a woman gives irrevocable consent to sexual intercourse with her husband at the time of marriage. Also Justice Verma Committee Report, *supra* note 4, at 114-117. (Highlighting the need for the criminalization of marital rape)

accompanied by rights and obligations. Matrimonial intercourse is considered an important conjugal right, but it is not the sole purpose of marriage, especially in the Hindu community⁵⁶. The Indian judiciary has recognized the importance of sexual intercourse and pleasure in marriage. The recent Judgments of the Indian judiciary have also recognized rights to sexual autonomy and sexual privacy as important Fundamental Rights under Article 21⁵⁷ of the Indian Constitution. However, there is a clash between the matrimonial rights of the husband and the Individual rights of sexual autonomy of women when it comes to marital intercourse.

The judicial interpretation of the concept of mental cruelty as a ground of divorce under Hindu laws has limited the scope of married women's Right to deny sexual intercourse to her husband. The Right ought to be accompanied by 'valid excuses. The validity of excuse is a question of fact, depending on the spouses and circumstances of the case. Persistent refusal or non-consummation amounts to mental cruelty. The problem arises where the refusal is infrequent. The judiciary has recognized temporary physical infirmities as a valid reason for denial. The law is sparse when it comes to refusal owing to psychological reasons. The only two reasons taken as a valid excuse are pregnancy and menstruation. Reasons like matrimonial happiness, the discomfort of a newlywed wife, stressful circumstances are not considered.

The insistence of the judiciary on the effect of conduct rather than intention behind cruel conduct is adverse for the wife's right to deny sexual intercourse. However, the Supreme Court has also recognized the importance of the mental conditions of both spouses in matrimonial cases. This view makes psychological factors a valid ground for a wife's refusal. However, the standards employed by the judiciary while determining the validity of a reason for denial are strict and biased towards the Husband's matrimonial right. There is a need to enlarge the scope of the Hindu woman's right to deny sexual intercourse to her husband in Indian Society.

As progressive as it may sound, a husband cannot be allowed to leave his wife for the mere fact that he has been denied sexual intercourse when it has been done for a reasonable time. Nor can he be allowed to drag his wife to court every time she refuses sexual intercourse as it infringes her right to privacy as well as dignity which are protected under the Indian Constitution. In India, where the power dynamics between married couples is skewed in favor of the husband, the judiciary needs to actively safeguard the fundamental rights of women.

56 *Supra* Note 10.

57 INDIA CONST. art. 21.

Unraveling The Web of OTT Regulation: Regulatory Requirements & Government Notification

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Abstract

Undoubtedly, watching our favorite movies and shows elates us. It is considered as the best stress reliever. Especially as the pandemic has taken over our lives and uncertain restrictions has gotten on our nerves, movies and shows are something that keep us going, making them more relevant than ever. However, the pandemic had forced film and television industry to stall its work. That resulted into unavailability of new episodes from our favorite shows. Further, the cinema halls were closed. All this necessitated something to fill the 'entertainment gap' and thus, the OTT platforms took over the arena. A field that was earlier restricted to only a few sections of the society, primarily youth, has become a household name and has taken over as the perfect substitute to the television. With OTT industry growing at unprecedented levels and BCG declaring, "India's OTT market will touch \$5 billion in 2 years", the industry has caught everyone's attention across the country. However, with vast viewership becoming a feature of OTT, many problems related to these platforms have come to spotlight. This has triggered the urgency for a sound regulation of Online content. In the absence of any statute dedicated solely to OTT platforms, this task seems like a wild goose chase.

The main purpose of this paper is to analyze the domain of OTT regulation. Various statutes, laws, rules, articles, case laws etc. have been analyzed to enhance the research and come up with a meaningful research paper.

1. Introduction

The Entertainment Industry is one of the highest earning industries of our country. Bollywood plays a major role in making Maharashtra the state with highest GDP in India.¹ The magical world of cinema is adored

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1 TV Mohandas, Nisha Holla, India's \$5 trillion GDP journey: Contribution of each state crucial, FINANCIAL EXPRESS (December 1, 2020, 10:09 AM), <https://www.financialexpress.com/opinion/indias-5-trillion-gdp-journey-contribution-of-each-state-crucial/1886918/m>.

by all alike. It has something within its pocket for everyone. Similar is the case with the television industry, which has snowballed with the advent of entertainment channels, primarily those privately owned. The last 4-5 years have seen growth of another player in the arena of entertainment, over-the-top Platforms (“OTT”), also known as ‘*teesra parda*’. An OTT service is a streaming media service offered directly to viewers via the Internet such as Netflix, Disney+Hotstar, Amazon Prime, etc.² However, the prime difference is that while the former two are regulated, the latter is still a free bird unrestricted by any regulation. The field which started as a monopolistic market with limited audience and limited number of screens, received a major impetus with a drastic reduction in internet and mobile data rates and installation of free Wi-Fi’s at a number of public places in the last few years. This also led to entry of new players, Indian and foreigner, in the market and ‘made in India’ content became a desired reality. The fact that Indian web series ‘*Delhi Crime*’ recently won an Emmy Award for Best Drama Series is enough to highlight the recognition Indian OTT content has earned around the world.³ The industry has sky rocketed during the current pandemic. OTT content that was a topic of discussion limited to the college students has now entered daily life household and community conversations, just like television and cinema. With latest smart TVs providing OTT compatibility and major DTH service providers offering a medium to watch OTT applications along with subscription to these platforms within their plans, OTT has become synonymous with TV for a large populace, which watches it with family just like television. A recently published market research report⁴ provides comprehensive statistics on OTT market in India. In 2019, Disney+Hotstar (23.80%), MX Player (41.40%) and Jio TV (34.08%) were the OTT market leaders occupying the top three spots in India. The year 2020 however turned out to be a golden year for OTTs as due to the pandemic approximately 60% growth occurred in March-April 2020 in viewership with average viewership time of OTTs increasing from 20 minutes to 1 hour per day. Amazon prime video witnessed a drastic surge of 83% during lockdown while the time spent on MX Player rose twofold.

The OTT has certain merits over the traditional entertainment industry. The fact that it allows one to watch ‘anything, anytime and

2 Clay Halton, *Over the Top (OTT)*, INVESTOPEDIA (December 14th, 2020, 8:00 PM), <https://www.investopedia.com/terms/o/over-top.asp>

3 Nairita Mukherjee, *Delhi Crime bags Best Drama Series at the International Emmy Awards 2020*, INDIA TODAY (December 1, 2020, 10:18 AM), <https://www.indiatoday.in/binge-watch/story/delhi-crime-bags-best-drama-series-at-the-international-emmy-awards-2020-1743510-2020-11-24>

4 Anonymous, *OTT (Over-the-Top) Market in India 2020*, MARKET REPORTS ON INDIA (December 1, 2020, 3:07 PM), <http://www.marketreportsonindia.com/marketreports/ott-over-the-top-market-in-india-2020/2103101>

anywhere' is what draws the audience towards it. These platforms have come a long way from being a content hosting platform to producing and releasing short movies, feature films, web-series and documentaries. Web-series, which is a concept germane to the OTT, allows certain stories to be told in a better manner and allow exercise of creative freedom without any restraint of regulations or time limit. However, the OTT providers have misused the lack of regulation of this media to a certain length and under the shelter of Right to Free speech, they display content that is not only vulgar and obscene but often hurts the religious feelings of a community. For example, the controversy about Netflix show '*Paatal Lok*' had just been buried and a new controversy related to '*A Suitable Boy*' has surfaced.⁵ Instances of defamation of individuals and groups also irk the concerned people. 'Undue negative portrayal' of the Indian Air Force in '*Gunjan Saxena: the Kargil Girl*' had not only been condemned by the Indian Air Force but also forced them to write a letter to CBFC. A recommendation to take NOC from the Defence Ministry before the release of any movie or show based upon the defence forces has been given as an aftermath of this.⁶

The medium of OTT, which could have played a revolutionary role in bringing a positive social change, has been iniquitous in its practice, which in turn has not only raised eyebrows and caused social media campaigns but has also resulted into filing of certain petitions.

2. Cinematograph Act, CBFC and OTT

To protect the public morality and tranquility from exhibition of objectionable motion pictures, a consolidated law was enacted, the Cinematograph Act in the year 1952. Currently in India, the Central Board of Film Certification (CBFC), as per the Cinematograph Act, 1952, is a body that implements the provisions under the said act.⁷

Films are eligible for public exhibition only after the Board certifies it. The Board also furthers the objectives of the Act⁸ such as keeping medium of the film responsible and sensitive to standards of society,

5 Anonymous, *From 'Laxmii' to 'Paatal Lok': Films, web series that courted controversies in 2020*, THE FREE PRESS JOURNAL (December 12, 2020, 9:45 PM),

<https://www.freepressjournal.in/entertainment/bollywood/from-laxmii-to-paatal-lok-films-web-series-that-courted-controversies-in-2020>.

6 Anonymous, IAF objects to 'undue negative' portrayal in Janhvi Kapoor's 'Gunjan Saxena', writes to CBFC, ECONOMIC TIMES (December 1, 2020, 10:45 PM),

<https://economictimes.indiatimes.com/magazines/panache/iaf-objects-to-its-undue-negative-portrayal-in-janhvi-kapoors-gunjan-saxena-writes-to-cbfc/articleshow/77516333.cms>.

7 Sreejita Mitra, *A Socio-Legal Perspective of the Cinematograph Act, 1952*, Volume 2, Issue 2, IJLMH, 22 (2019)

8 Anonymous, CBFC India (December 14th, 2020, 8:10 PM),

<https://www.cbfcindia.gov.in/main/guidelines.html> .

maintaining creative freedom and artistic expressions etc.⁹ On various occasions, the board has made sure to regulate the films in accordance with the guidelines laid down in the Act, for instance, the CBFC initially declined to certify a film 'Lipstick Under my Burkha' for exhibition in Indian Cinema, on the grounds of it being repeatedly about sexual scenes, audio pornography, abusive words. But later on, the movie was given 'A' certification after making few modifications.¹⁰ Therefore, the board stringently applies the provisions of the Act to keep a harmony between filmmakers and sentiments & morality of Indian citizens. On the contrary, there is no regulation of digital content. Censorship has become synonymous to CBFC and Censor Board, a colloquial term for CBFC. All the OTT providers consider censorship as their biggest opponent and have come together to avoid any censorship on their content. However, the wave in India is turning towards censorship of OTT and hence the relationship between CBFC and regulation of OTT is paramount.

A recent survey by a Britain based research firm called YouGov declared that people in India favor censorship of OTT content.¹¹ A BJP Rajya Sabha Member also urged for censorship of OTT content by CBFC.¹² Even the members of the CBFC have emphatically voiced their views on the role that CBFC should play as far as the online content is concerned. Pahlaj Nihalani, ex-Chairman of CBFC had recommended that all the content including online content should come under one umbrella, pointing out that it should be regulated by CBFC.¹³ Prasoon Joshi, the current CBFC chairman hinted at formation of a Digital Content Complaints Council (DCCC) that would have penal powers against the streaming services. Another member of the CBFC, Vani Tripathi favored self-regulation as the way to manage this media. The set up of Digital Content Complaints Council has found place in self-regulation code by IMAI (Internet and Mobile Association of India) in February 2020.

9 The Cinematograph Act 1952 s. 5b.

10 Anonymous, 'Lipstick Under My Burkha': Times when the controversial film made headlines, THE TIMES OF INDIA (December 14th, 2020, 8:05 PM),

<https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/photo-features/lipstick-under-my-burkha-times-when-the-controversial-film-made-headlines/lipstick-under-my-burkha-times-when-the-controversial-film-made-headlines/photostory/59338187.cms> .

11 Kirubhakar Purushothaman, *Streaming creative freedom*, THE NEW INDIAN EXPRESS (December 3, 2020, 9:18 AM), <https://www.newindianexpress.com/magazine/2020/feb/16/streaming-creative-freedom-2102996.html>.

12 Ajith Athrady, *Censor content on OTT platforms like Netflix Amazon under CBFC*: KC Kamamurthy, DECCAN HERALD (December 3, 2020, 10:45 AM), <https://www.deccanherald.com/national/national-politics/censor-content-on-ott-platforms-like-netflix-amazon-under-cbfc-k-c-ramamurthy-887960.html> .

13 *Supra* note 11.

3. Objections on OTT Content

In 2018, a petition was filed in the Delhi High Court by an NGO, Justice for Rights Foundation¹⁴ alleging that Hotstar displayed soft-pornographic, unethical and religiously inadequate content and seeking for details on the regulation and separate guidelines for OTT platforms like Netflix, Amazon Prime etc. The court dismissed the petition on the grounds that the Information Technology Act, 2000 (“IT Act”) is a robust enough legislation for regulating these platforms and no separate guidelines or regulation is required. Later, Advocate Nikhil Bhalla filed a similar case¹⁵ in Delhi High Court wherein he prayed for guidelines to be framed to regulate “vulgar and offensive” content. However, even this case was dismissed upholding the ground of IT Act being an adequate legislation. The premise on which the OTT providers are avoiding the censorship by CBFC is that OTT comes under private viewership and CBFC regulates content meant for public viewership. However, in the case of *Super Cassettes Industries Limited v. Central Board of Film Certification & Ors*¹⁶, while dealing with DVDs/VCDs, which were meant for private viewership, the Delhi High Court held that “film meant for private viewership would not be exempted from getting certificate by CBFC”.

In another case¹⁷ the candidate – Padmanabh Shankar prayed for set up of an appropriate authority to govern these platforms by bringing them under the province of the Cinematograph Act, 1952 until an appropriate regulation is framed. Nevertheless, the court observed that the application of Cinematograph Act, 1952 is limited to cinematographic films by virtue of Section 2 (dd) of the Act and that it does not cover utilization of Hypertext Transfer of Protocol (“HTTP”) by web servers. Hence, “content on Internet cannot be regulated by Cinematograph Act, 1952”. However, as OTT has become a perfect substitute of television with all key DTH providers not only providing OTT compatibility but also subscriptions of major OTT apps which facilitate viewership of OTT apps on television with family, it is high time that decision in Padmanabh Shankar Case¹⁸ is reconsidered.

a. YouTube-biggest OTT platform

YouTube is one of the biggest OTT platforms around the world with nearly 265 million monthly active users. In addition to the fact that YouTube offers live streaming, it has been hosting user generated content (UGC).¹⁹ YouTube is considered as pioneer of the concept

14 Justice for Rights Foundation v. Union of India, WP(C) 11164/2018.

15 Nikhil Bhalla v. Union of India & Ors, W.P.(C) 7123/2018 & CM Appl. 27132/2018.

16 W.P. No. 2543 of 2007.

17 Padmanabh Shankar v. Union of India & Ors., W.P. 6050/2019.

18 *Ibid.*

19 Alison Robart, Kim Gardner, *Special Feature: YouTube’s Evolution in the OTT*

of web series. It has a vast reach in terms of creators as well as the audience as compared to other OTTs. Further, it allows comments by audiences as well as a mechanism whereby objections can be raised (like reporting objectionable content) and resolved as well, something which other OTTs lack.

b. Film trailers banned on YouTube according to Cinematograph Act

In an intriguing case of *Prem Mardi v. Union of India*²⁰ the petitioners were seeking a ban on screening and revocation of certificate issued by the CBFC to the film “MSG-2-The Messenger”. The petitioner further prayed for appropriate orders to take down the said film’s trailer from “YouTube” as well. The interesting point here is, in order to ascertain whether the said trailer violates the provisions under the Cinematograph Act, it was watched by the court on “YouTube” even though YouTube is not governed by the said Act. This raises a question, “what is the point of watching the movie trailer on a platform which is not bound by the said Act in the first place?” Interestingly, petition prayed for removal of trailer from YouTube as well if found to be contrary to provisions of Cinematograph Act. This has been the scenario in most of the cases wherein a film is challenged before its release²¹ and sometimes after release as well.

4. OTT Regulation Across the Globe

OTTs are known for their controversial content not only in India but also around the world. OTT giant Netflix recently released a list of its content, which has been banned in different countries. Singapore topped the list with an instance of ban on 5 projects at different points of time. Other instances wherein Netflix content was banned are, Saudi Communication and Information Technology Commission asking to remove a controversial episode of a show in Saudi Arabia; Vietnamese Authority of Broadcasting and Electronic Information ordered a ban on “Full Metal Jacket”; German Commission for Youth Protection and New Zealand Film and Video Labeling Body have respectively banned “Night of the Living Dead” and “the Bridge” in Germany and New Zealand.²²

Netflix had also received a setback in Indonesia where the country’s biggest telecom provider blocked Netflix in 2016 for violation of censorship laws. The App was unblocked much later after it was asked to comply with the domestic regulations.²³ All this highlights that the regime of censorship and regulation of OTT content is quite prominent around the world and hence we need to know what kind of laws and

Streaming Landscape, COMSCORE (December 9, 2020, 7:39 AM), <https://www.comscore.com/Insights/Blog/Special-Feature-YouTubes-Evolution-in-the-OTT-Streaming-Landscape>

authorities are there in different countries to regulate OTT.

European Union through European Parliament has established The Body of European Regulators for Electronic Communication (BEREC) in order to regulate electronic communication including anything provided over the Internet and includes OTT content within its ambit.²⁴ USA has an independent federal agency called Federal Communications Commission (FCC) to “implement and enforce communications law and regulations including OTT services”. It was in 2015 only that the FCC, which used to exercise its power over radio, television and telephone providers, increased its ambit to include broadband Internet services under the Communications Act.²⁵ Also, Singapore has a statutory body called IMDA, which regulates OTT content in Singapore with the help of a well-drafted Info-communications Media Development Authority Act, 2016.

With increase in OTT content consumption, it can be observed that many countries have not only already formed special authorities and regulations in order to regulate OTT content but have also used them to ban certain projects in their territories. In such circumstances it becomes apparent for a country like India to have a regulatory Code for its OTT content.

5. Legal Framework in India

a. IT Act

The prime reason why OTT content is not regulated under Acts like Cinematograph Act, 1952 or Cable TV Network (Regulation) Act, 1995 is because it is “content on internet.” Internet is the domain, which is taken care of by Ministry of Electronics and Information Technology. The Information Technology Act, 2000, which regulates the ‘internet’, can thus be used for limited regulation of the videos on demand industry. However, the Act has a limited sphere, as it is not OTT specific. Hence, the Act can be primarily used to punish only the content, which is vulgar, obscene or pornographic. The relevant sections are 67, 67A and 67B.²⁶ The status of OTT platforms as an intermediary also attracts section 79 of the IT Act to determine their liability along with application of intermediary guidelines. This can also become useful in dealing with offences which are not strictly concerned with obscenity, copyright infringement for instance. Though Copyright Act, 1957, especially sections 51 (when copyright is infringed) and 63

24 Anonymous, *The regulatory positions of OTT: a global view*, EVERSHEDS SUTHERLAND (December 3, 2020, 11:53 PM),

https://www.evershedssutherland.com/global/en/what/articles/index.page?ArticleID=en/tmt/Regulatory_Position_of_OTT.

25 *Supra* note 24.

26 The Information Technology Act, 2000.

(punishment) can be useful in such cases, it has been observed that section 79 is very often used for the purpose primarily due to it dealing with domain of internet.

The information Technology Act does not provide any redress for various kinds of problems with the current OTT content. To elaborate, there are instances where religious feelings are hurt like in case of 'A suitable boy'.²⁷ Further, the violence and abusive language has become a characteristic of the OTT content and there is no law in place to deal with it. Hence it is pertinent to have a comprehensive statute, which aims to resolve all such problems.

Self-regulation code

The Telecom Regulatory Authority of India ("TRAI") acknowledged in 2013 that there was a vacuum in statute superintending content which OTT platforms stream. An interview paper welcoming remarks from innumerable stakeholders succeeded this. Parallely, in pursuance of a Right to Information application in around December, 2016, the Ministry of Information and Broadcasting ("MIB"), clarified that it does not possess the power to modify any content available online.²⁸ All of this impelled turmoil regarding which Government body had the authority to regulate content on OTT platforms and repeated objections by various persons made these platforms to succumb to a self-regulatory code of Best practices under the Internet and Mobile Association of India (IAMAI). The code regarded non-exhibition of content which promotes child pornography, hurts religious sentiments, provokes acts of violence against the state, and are also banned by Indian courts. This code also anticipated constitution of a complaint redressal mechanism for redressal of user grievances and to assure the conformity of the code.²⁹ Online streaming platforms such as Netflix, Hotstar, SonyLiv, Voot, etc., signed and adhered to this code, however, some of the big platforms like Amazon Prime, TVF Play, Hungama Play refrained themselves from agreeing to it.³⁰ Unfortunately, the combined unresponsiveness from these platforms towards adhering to this step and from the government towards pushing this step resulted into it becoming futile.

27 *Supra* note 5

28 Anonymous, *Regulation of Content on OTT Platforms A Work-In-Progress*, INDIA LEGAL (December 14th, 2020, 8:32 PM), <https://www.indialegalive.com/legal/regulation-of-content-on-ott-platforms-a-work-in-progress/> .

29 Anonymous, *Code of best practices for online curated content providers*, CYBER BLOG INDIA (December 14th, 2020, 8:35 PM), <https://cyberblogindia.in/wp-content/uploads/2019/12/Consolidated-Draft-14012019.pdf> .

30 Meghna Mandavia, *Netflix, Hotstar and others sign a self-censorship code*, ECONOMIC TIMES (December 14, 2020, 9:19 PM), <https://tech.economictimes.indiatimes.com/news/internet/netflix-hotstar-and-others-sign-a-self-regulatory-code-of-best-practices/67570918> .

b. Government Notification

Presently, as a result of hue and cry demanding regulation of OTT content, a government notification was released in November 2020 declaring the inclusion of online and digital media within the ambit of Ministry of Information and Broadcasting. This happened by an amendment in the Government of India (Allocation of Business) Rules, 1961 whereby “Films and Audio-Visual programme made available by online content providers” and “news and current affairs content on online platforms” now fall under Ministry of Information and Broadcasting.³¹ This move is seen as a precursor to a full-fledged legislation to regulate the OTT sector. However, the form of regulation is still enigmatic. Will YouTube be regulated? Whether the application would be prospective or retrospective and how stringent would the punishments be. Further, the practical aspect is also a point of discussion. Also, if the regulation is not stringent, it will make it vain and futile. If it suggests only guidelines without punishments in case of violation, they would not be sufficient to fulfill the purpose. It is also not clear what regulatory authority would govern the domain of OTT and what would be its powers.

It is believed that regulation might occur by making an amendment to the Cinematograph Act, 1952. It is also possible that a new statute altogether might be enacted along with certain rules. It is anticipated that the new regulatory mechanism would come in operation soon and would provide sufficient parameters to censor the content on OTT platforms in order to avoid any arbitrary actions in the name of censorship.

6. Reasons for Urgency for a Regulation

Apart from lack of a lucid regulation, the problem for urgency is that many of these platforms air content indorsing alcohol and drug abuse, sexually explicit scenes, and other content not appropriate for children. Further, it contains picturisation swaying people towards acts against the State, hatred against a particular class of people or community or instigating violence. Movies containing such scenes and content are generally certified by the CBFC to not be exposed to audience below 18 years of age. However, no such control prevails over the OTT platforms and a person of any age group can easily access such content if he has access to Login IDs and passwords. The premise for urgency is the moral concern of easy, all time availability of soft porn and erotic web series on most of these platforms. It is a fact that Netflix has numerous

³¹ Cabinet Secretariat, MIB has brought has brought all kinds of Digital/Online Media under its ambit, S.O. 4040(E) (Notified on November 10, 2020)

shows like Lust stories and Sacred games which contain sensual scenes. There has been an increase in dedicated genre of erotic and uncensored content on other platforms as well. For instance, in the month of April, AltBalaji witnessed an addition of more than 10,000 users everyday which was nearly 70% rise in streaming along with 150 percent increase in the consumption time by individual subscriber. It has around 8.5 million monthly users and more than 1.7 million direct subscribers.³² This success has been credited to the show *Gandii Baat* and as a result other popular OTTs like Zee5, launched *Virgin Bhaskar* about a virgin porn writer, and MX Player created *Mona Home Delivery*, a show which revolves around the life of an escort named Mona.³³ This issue has been a concern since a long time and as a consequence a plea was filed by an NGO in the Madhya Pradesh High court to resolve the issue of improper and immeasurably indecorous sexual content being streamed unregulated. It was asserted “the media content streamers are broadcasting content that is unregulated, un-certified, vulgar and legally restricted. The platforms portray women indecently and shall be punished under sections 3, 4 and 7 of Indecent Representation of Women (Prohibition) Act, 1986. The streamers shall also be punished under Sections 292-294 of Indian Penal Code, 1860 for publicly exhibiting, distributing and portraying obscene acts, representation, figures, etc. Such content can also be watched by children below 18 years of age, exposing them to sexual acts, terrorist activities and vulgar content”.³⁴ The Court in *Super Cassettes case*³⁵ discussed an intriguing point about the reach of content after being made available to the public and held that, “*Since the maker or distributor of the film, at the stage of offering it for sale or otherwise making it available to the public, is aware of the impending viewing of the film, it would be incumbent on such film maker or distributor, in terms of Section 52A CR Act read with Section 5-A CG Act, to ensure that the film has the prior certification of the CBFC.*” The court further held that, “*Once a film is made or produced in a DVD or VCD or any other format and is made available or distributed to the public or offered for sale to the public, it will amount to publication of such film within the meaning of Section 52A(2)(a) of the CR Act.*” Even though OTT platforms use “http” for broadcasting, they fall under the provision of s. 52A (2) (a) of the

32 Mumbai Live Team, *ALTBalaji witnesses a substantial growth in viewership*, MUMBAI LIVE (December 14, 2020, 10:27 PM), <https://www.mumbailive.com/en/business/altbalaji-witnesses-a-substantial-growth-in-viewership-during-covid19-lockdown-53504> .

33 Aditi Sharma, *Why are Indian Streaming platforms full of Erotic Content*, BINGE DAILY (December 9, 2020, 9:19 PM), <https://www.bingedaily.in/article/why-are-indian-streaming-platforms-full-of-erotic-content> .

34 Bhumika Khatri, *OTT Regulations: MP HC Seeks Response From Govt, Netflix, Amazon Prime And Others*, INC 42 (December 14th, 2020, 8:38 PM), <https://inc42.com/buzz/ott-regulations-mp-hc-seeks-response-from-govt-netflix-others/> .

35 *Supra* note 17.

CR act for communicating it to the public; disregard to the medium. Also, the content regulated by CBFC is extensively made available on these platforms uncensored. The whole point of expanding the purview of Cinematograph Act nullifies if there is an easily available loophole at the behest of audience with varied demography.

The intricacies followed and looked up by CBFC are required to be followed while regulating online content. To elaborate, from the film *Phillauri*, the CBFC censored the recitation of Hanuman Chalisa because ghosts are supposed to be eradicated and not pacified by its recitation.³⁶ It is also a fact that even after movie being banned by CBFC, they are easily available on these platforms.³⁷ Thus, in the case of *Divya Ganeshprasad Gontia v. Union of India*,³⁸ the Bombay High Court has considered the requirement for a similar style to be applied to the online platform as that of television censorship.

Since majority of the content regulated by CBFC is made available uncensored to the audience variably through the OTT platforms, it needs to go through the same level of scrutiny to maintain the interest and objectives of the Cinematograph Act. If the government fails to provide for this level of regulation, then the whole purpose and implementation of the said Act will be negated.

7. Conclusion

Since the advent of mischief played by the OTT platforms under the haven of not being stringently regulated by any specific law in the country, there have been only prolonged discussions regarding the need of regulating online content but no appropriate step towards it. The self-regulation code of the OTT providers seems like a mockery and a tactic to avoid censorship. There were huge number of objections, concerns and petitions filed for speedy redressal of this problem and therefore, the aforesaid government notification is appreciated. However, the notification is vague and there is no certainty as to the form of regulation. The OTT industry is also apprehensive of the kind of censorship that will follow. If the censorship is excessive it might lead to a loss to the industry. Preserving the interest of small content creators is as important as regulating their content as their reliance on these platforms is substantial. Further, on various occasions, the

36 Anonymous, *From Phillauri, Censor Board Deletes Hanuman Chalisa Recital Scene That Doesn't Get Rid Of Anushka Sharma's Ghost*, OUTLOOK INDIA (December 14th, 2020, 8:42 PM), <https://www.outlookindia.com/website/story/from-phillauri-censor-board-deletes-hanuman-chalisa-recital-scene-that-doesnt-ge/298320> .

37 Yash Bharti, *10 movies banned in Indian theatres that you can stream on Netflix, Hotstar and YouTube*, GQ INDIA (December 12, 2020, 8:46 PM), <https://www.gqindia.com/binge-watch/collection/10-banned-movies-on-netflix-hotstar-youtube-watch-movies-banned-in-india/> .

38 PIL No. 127/2018

courts have talked about the importance of expression of a theme through motion pictures and preserving it from censorship.³⁹

Therefore, few possible means for regulating OTT would include providing for requirement of proof of age (e.g., Voter ID) to view content, which is not meant for a specific age group. Further, regulation by way of taxation regime is also possible given the vast economic potential the OTT industry has. Various stakeholders are looking forward to the subsequent steps that will follow the government notification to pull the strings of the OTT sector. It is also suggested that India can learn from various countries around the world and borrow leaves from their OTT regulation books, to come up with an all-inclusive code wholly dedicated to regulating the OTT sector, analogous to how we achieved a comprehensive Constitution. For instance, Singapore has made it mandatory for OTT platforms to obtain a license and they are also required to adhere by a list of prohibited content. A partnership of CBFC and OTT platforms as happened in UK can also be replicated in India for regulation purposes. A code, which not only regulates but also provides with a mechanism to complain, and an authority to hear complaints and redress them with appropriate sanctions, with an appellate authority to avoid any injustice, seems like the need of the hour to help the OTT industry prosper in India.

39 K. A. Abbas v. Union of India & Anr., AIR 1971 SC 481; see also, Bobby Art International, etc. v. Om Pal Singh Hoon & Ors., AIR 1996 SC 1846.

Instruments - A Problematic Word in Amalgamations

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Abstract

Mergers and amalgamations perhaps have been the ventilator for several sick and loss-making units and have also held a pivotal position in its growth strategies. However, plenty of questions arise while giving effect to such court orders sanctioning the scheme of amalgamations, which has significantly affected its efficiency and purpose. One among these questions is the payment of stamp duty for registration of the assets that are transferred after amalgamation proceedings under chapter 15 of the Companies Act, 2013, and the complexity in the payment of stamp duties. When stamp duty is levied on a company based on the total value of shares issued or assets transferred, it carves out roughly 5% of its net worth, making the process of merger a futile experience and causing great concern for almost all entities under the scheme of amalgamation. The paper also critically analyses the legal position in considering whether “a compulsory order of a court or tribunal fall within the meaning of instruments as defined under the act” and if so held, can a state government levy it through circulars overriding previous rulings without amending the Act, to enhance its revenue, as done by the state of Tamil Nadu. The paper also covers the constitutional aspects of the circular and the legitimate way for a state to impose stamp duty on amalgamations.

Keywords: Amalgamation, instrument, Indian Stamp Act, Tamil Nadu Stamp duty notification, Stamp Duty, Registration.

1. The Tussle Between the Government and Companies

As an outcome of changing economic and business environment with intense competition in the market business entities had to look for various strategies to withstand financially and also reduce the competition in the market to a desired level and amalgamation between entities came to be a solution by both increasing its capital and assets, at the same time brought down rivalry between industries. However, with confusing government policy, the process of registering the change of ownership of assets became more and more complex. Registration of deeds and bringing it into effect is under the concurrent

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list of the constitution, where both the center as well as states have the power to legislate¹ and therefore the privilege to levy stamp duty is also enjoyed by both of them. As a settled position in law once the center has legislated law in the concurrent list it shall supersede the state enactment except on the president's approval.² The Indian Stamp Act, 1899 operates throughout the nation except for a few states such as Maharashtra, Karnataka, Gujarat, Haryana, Rajasthan which have specifically passed amendments and obtained the presidential assent. The point in dispute is that once the order of NCLT approving the scheme of amalgamation between companies is passed the same is refused to be registered by the authorities of the state registration department because they involve a transfer of immovable properties between inter vivos and as a consequence, stamp duty is leviable by application of section 17 of the Registration Act read with the stamp Act. Even if a liability to pay stamp duty is accepted by the companies the method of calculation and whether the duty should be paid in all the states where assets lie is left ambiguous and not specified in the act thus making it chaotic and cumbersome process. These questions have resulted in various litigations between the companies and the government. However, the bigger picture is yet left unanswered and the smaller problems forming part of it are resolved by way of orders and guidelines through judicial decisions and no holistic solution is taken by the legislative and no specific statutory provision for computation of the duty is still present under the Indian Stamp Act. The Supreme Court at many times has held that the power to tax is an essential function of the legislature and therefore complete delegation in fixing the rate of tax is not permissible where at least a range must be approved by the legislature and within which the executive can fix it as per the prevailing circumstances³. The government on one side tries to overrule these principles and impose a tax as they act as a strong procedural safeguard and the companies, on the other hand, rely on these technical grounds to avoid heavy-duty on them.

2. Instruments and the Exclusion of Court Orders

The meaning of the term instruments becomes the core of the dispute as only if court orders can be an instrument, a transfer arising out of it can be taxed. The disputes on the meaning of the term instruments under the Indian Stamp Act started way back in 1970 where the Supreme Court in *J.K. (Bombay) Pvt. Ltd. v. M/s New Kaiser-I-Hind-Spinning & Weaving Co. Ltd.*⁴ observed that the nature of the transfer in question will form part of its meaning and whether

1 INDIA CONST. entry 44 list 3 of the seventh schedule Constitution.

2 *M. Karunanithi v. State of Tamil Nadu*, 1979 AIR 898.

3 *Devi Das Gopal Krishnan & Ors. v. State of Punjab & Ors.*, 1967 AIR 1895.

4 *J.K. Pvt. Ltd. v. M/s New Kaiser Spinning & Weaving Co. Ltd.*, AIR 1970 SC 1041.

is it between inter vivos also is essential in determining whether something is an instrument. The meaning of the word instruments under the Indian Stamp Act, 1899 has a wider scope by use of words 'every document that creates or changes any right or liability of an immovable asset'⁵ and therefore the plain understanding will lead to infer a view that all court orders and documents are within the purview of the term 'instruments'. The Supreme Court took the same view that all court orders including those of a quasi-judicial body will be within the meaning of the term instruments and thus requires to be registered by payment of stamp duty.⁶ However, this particular judgment in question is not problematic or disputable as Maharashtra has amended its stamp duty act and included in the term conveyance, court orders and therefore the demand for stamp duty had a legislative sanction. Similarly, in *Hanuman Vitamin Foods Pvt. Ltd. v. State of Maharashtra*⁷ the court explained the accounting treatment and how stamp duty is to be calculated by holding out what is being transferred should be seen after the effect of amalgamation and thus it is not assets and liabilities distinctively and independently but the complete business as a whole unit thus the stamp duty value will be the total consideration paid or other means that point out the therefore the value of registration should be computed based on the value of shares allotted to the existing companies and by considering factors that will help in finding its net worth. This judgment was also based on the Bombay Stamp Act which has provision for conveyance and legislative sanction for the imposition of the duty, however, to impose a tax on something the charging section and calculation of tax has to be present in the statute itself failing which no tax can be imposed⁸ as it might be very wide and ambiguous for determining the rate of tax and an arbitrary power with the executives which leads to its unconstitutionality, Further the Supreme Court has held that CBDT being an executive body cannot issue circulars even in the exercise of statutory powers under section 119 of the Income Tax Act, 1961 when the nature of circular creates an effect of the amendment to the rules which only legislature can exercise. Therefore, an executive body even when it has powers to clarify and give directions to officers for computation of tax, cannot exercise powers that only legislature can and bring in a mode of computation, determination of the rate of tax through circulars.⁹ Further, even if it is accepted that court orders lie within the meaning of instruments it is unlikely that tax can be imposed without a charging and calculation mechanism. The Delhi High court attempted to give more clarity in

5 Stamp Act 1899, § 2(i), No. 2, Acts of Parliament, 1899 (India).

6 *Hindustan Lever v. State of Maharashtra*, (2004) 9 SCC 438.

7 *Hanuman Vitamin Foods Pvt. Ltd. v. State of Maharashtra*, 1992 (1) Bom CR 568.

8 *Additional Commissioner of Income-Tax v. Bharat Patel*, (2018) 404 ITR 037 (SC).

9 *CIT v. S. V. Gopala*, (2017) 396 ITR 694 (SC).

these questions and held that irrespective of whether an amendment is made to the state act or not, an order of a court is subject to payment of duty as it is covered within the purview of the Indian Stamp Act, 1899¹⁰, contradictory to the views of many high courts including Tamil Nadu and Calcutta. However, this judgment was not appealed and therefore has no binding effect in other states especially when previous decisions of the respective state high courts govern the dispute in many states. The Delhi High court judgment failed to address and differentiate between a consent transfer and a binding transfer of immovable properties in its judgment, it observed that the amalgamation is an order in nature of consent decree as the proceedings simply verify the proposal and assess whether it is in contrary to public policy, therefore, it has the consent of stakeholders which will result to the requirement of registration as it is voluntary. However, it failed to notice the interest of opposing parties and dissenting stakeholders in an amalgamation proceeding and for these members, it is still an involuntary transfer which binds on them only because of the effect of law and failure in this distinguishment leads to the differences between the Delhi High court and the high courts of few other states. The Calcutta High court categorically held¹¹ that an amalgamation is not covered within the term conveyance under the stamp act on the reason that its sanction is caused by the operation of law and unlike a written document that has to wait until its registration for being enforceable can be enforced directly as it is performed with the authority of the court and need not wait until it is registered. Thus, one can safely conclude that court orders are not covered within the meaning of instruments and do not require registration unless when the state has specifically amended the act to cover court orders within the meaning of conveyance.

3. Circular Imposing Stamp Duty and its Constitutionality

The government of Tamil Nadu following various other state governments tried to amend the stamp Act in 2013 and passed the legislation. However, as the subject matter lies in the concurrent list it requires the assent of the president and which is left pending before him. Having this in the background the Inspector General of registration on 20.12.2018 issued a Circular citing the states where the act has been amended and a few other judgments of other high courts have brought amalgamation of companies and court orders within the purview of registration and even specified the duty on them. The circular has been issued in order to circumvent the legal principles enumerated by the Act and thereby, increase the revenue of the state. The circular is based primarily on the Supreme Court's decision in *Hindustan Lever v. State*

10 *Delhi Towers Ltd. v. G.N.C.T. of Delhi*, (2010) 103 SCL 447 (DEL).

11 *Madhu Intra Limited v. Registrar of Companies*, (2006) 130 CompCas 510 Cal.

of Maharashtra,¹² The state of Maharashtra amended the Stamp Act by enacting Act No. 17 of 1993, which added section 2(g)(iv) to include any order issued by the high court under section 394 of the Companies Act (now by NCLT as per companies Act 2013) in respect of amalgamation of the companies. Since the Judgment is founded on the provisions of the amended Act the Tamil Nadu government cannot have relied upon such a judgment as its legal foundations are completely different and cannot be equated with that of Maharashtra and a similar privilege can be claimed by the state only after it receives the assent to the legislation passed in 2013, until then orders of the Hon'ble High Court of Tamil Nadu are binding on the authorities with the state.

Further, it is erroneous for the circular to have relied on the judgment in *Gemini Silk Ltd v. Gemini Overseas Ltd.*,¹³ in which a single bench of the Calcutta High Court ruled that the Indian Stamp Act, 1899, requires that an order sanctioning a scheme of amalgamation under Section 394 of the Companies Act, 1956, be stamped. The division bench in *Madhu Intra Limited & Anr. v. Registrar of Companies & Ors.*,¹⁴ of the Calcutta High Court overruled the decision in the first instance. Furthermore, in *East India Commercial Co. Ltd. v. The Collector of Customs*,¹⁵ the Hon'ble Supreme Court held that a decision of the court is binding only of the authorities and tribunals falling within the jurisdiction of that particular High Court, hence the order is binding only on the authorities within the state of West Bengal and has no application in respect of authorities, not within its jurisdiction.

When the High Court of Madras had settled the dispute in 2015¹⁶ and when no appeals were preferred against it, the opinion of the high court prevails in the state of Tamil Nadu and it cannot be simply overruled by a circular citing the decision of a Delhi High Court. Where it held that,¹⁷ even if the provisions of the Stamp Act is not changed by the legislature, the scheme of amalgamation is liable to be registered and on general aspect court orders falling within the meaning of instrument and conveyance attract stamp duty, however, no contentions were made before the high court regarding the essentials of a fiscal statute and the mandate to have charging and calculation section for the imposition of a tax, consequently, the high court has also not made itself clear with this aspect and in particular, this judgment neither has any binding effect on the authorities in Tamil Nadu nor has an overruling effect on the Madras High Court's decision.

12 *Hindustan Lever & Anr. v. State of Maharashtra & Anr.*, (2004) 9 SCC 438.

13 *Gemini Silk Ltd. v. Gemini Overseas Ltd.*, (2003) 53 CLA 328 Cal.

14 *Madhu Intra Limited & Anr. v. Registrar of Companies & Ors.*, (2006) 130 CompCas 510 Cal.

15 *East India Commercial Co. Ltd. v. The Collector of Customs*, AIR 1962 SC 1893.

16 *Srinidhi Industries Ltd. v. Sub-Registrar*, (2015) 1 CTC 530.

17 *Delhi Towers Limited v. G.N.C.T. of Delhi*, (2010) 159 CompCas 129 (Delhi).

The circular issued by the Inspector General of Registration is merely clarificatory and directory in nature, it is intended for interdepartmental communication and is not binding on a company as it is not issued under the Indian Stamp Act, 1899. This is explicitly provided in the circular itself, as it states that it is only for the purpose of giving clarifications and for removing confusion among the registration office in registering orders of amalgamation and it further orders the sub registrars to return the applications if stamp duty is not paid. Even under section 76A of the Stamp Act, 1899 the registrar does not have the authority to issue orders imposing new tax or duty as under the provisions of the constitution a tax can be levied only through the authority of law.¹⁸

In *T.T. Krishnamachari v. Joint Sub-Registrar*,¹⁹ the Madras High Court referred to the Calcutta High Court's division bench decision in *Madhu Intra Limited's case*,²⁰ which laid down that the Court orders for amalgamating or reconstructing companies do not fall under the scope of 'conveyance' under 2(14) of the Indian Stamp Act, and orders sanctioning a scheme of an amalgamation, whether directed by a high court, NCLT, or BIFR, are not subject to duty or registration charges.

4. Circular Setting Aside a Court Ruling

The Hon'ble Supreme Court in *Collector of Central Excise, Bombay v. Kores Ltd.*,²¹ has categorically held that circulars issued by departments have a binding effect only on the departmental officers and have no binding effect on the Courts or Tribunals. *Commissioner of Central Excise, Bolpur v. M/s Ratan Melting & Wire Industries*²², further clarifies all ambiguity that the circulars issued by departments will not have an overriding effect on the orders of the Supreme Court. It was further decided that a circular is not legally valid if it is in defiance of a statutory provision. Affirming these legal positions in *Min wool Rock Fibres Ltd's case*,²³ the Hon'ble Supreme Court reiterated that the departmental circulars are not binding on assesses, courts, or quasi-judicial authorities.

Following the decision in *T.T. Krishnamachari & Co.*,²⁴ the Madras High Court, after six years, confirmed the position of law it had previously taken in *Srinidhi Industries Ltd. v. Sub-Registrar*²⁵ and

18 INDIA CONST. art. 265.

19 *T.T. Krishnamachari v. Joint Sub-Registrar*, [2009] 2 MLJ 245.

20 *Madhu Intra Limited & Anr. v. Registrar of Companies & Ors.*, (2006) 130 CompCas 510 Cal.

21 *Collector of Central Excise, Bombay v. Kores(India) Ltd.*, [2002-TIOL-414-SC-CX].

22 *Commissioner Of Central Excise, Bolpur v. M/S. Ratan Melting & Wire Industries*, (2005) 3 SCC 57.

23 *Commissioner of Central Excise v. Min wool Rock Fibres Ltd.*, (2012) 3 SCC 518.

24 *T.T. Krishnamachari v. Joint Sub-Registrar*, [2009] 2 MLJ 245.

25 *Srinidhi Industries Ltd. v. Sub-Registrar*, (2015) 1 CTC 530.

ruled that stamp duty shall not apply to orders of amalgamations. As a result, the Inspector General of Registration is bound by these two decisions, as he has no authority to issue any circular that contradicts the Madras High Court's ruling, and such a circular Even if issued has no effect on the high court. Furthermore, the Tamil Nadu Stamp bill, 2013 containing the necessary amendments has not got its presidential assent, till then the Inspector General of Registration is bound by these high court decisions.

5 Conclusion

Keeping aside the disputes and technical differences in the Act that shape the decisions of the court, the government needs to consider that amalgamation plays a significant role as it saves many companies from winding up, promotes running of commercial activities in the society, by saving jobs and by building the economy. The government must realize that this is a crucial area to be addressed and the continuing differences between state governments and companies are only hampering the growth of the economy. To address this crisis, the government must enact the central legislation to bring amicable solutions by registering the transfer in a single central office to avoid the imposition of multiple duties by different state governments and should also consider a reduction in rates as any transfer will be of a huge value like it in involves the assets of a whole company. This practice will balance both the interest of the government in maintaining its treasury and also the interest of the companies in having feasible mergers and amalgamation.

A Critical Analysis on The Legal Status of Gender Justice in India Through the Lens of Political, Economic and Social Justice

***Mr. Rishav Ray**

Abstract

When the framers of the Indian Constitution drafted the *grundnorm* of the nation, they visualized a nation that would hold the spirit of Justice, Liberty, Equality, and Fraternity. To uphold this constitutional morality, it is required that gender justice be established in society. The issues of gender discrimination and gender justice have changed and developed alongside the changes in society over time. As society developed, perceptions about different genders kept changing, thereby morality also changed. Laws congruent with the prevailing moralities were passed to bring about the desired social change. The paper has done an elaborate analysis on the social and historical context of gender equality in India and how it changed throughout history. The concept of a 'third gender' might seem new in India, but it dates back to the time of the Vedas. Women throughout history have been subjected to an unimaginable amount of gender discrimination. Society was gender-discriminatory and so was the law which was in force at that time. How far has the Indian Legal System progressed from that stage? Are there any gender bias laws in force in the present time? The paper aims to answer these questions by a detailed analysis of the constitutional framework, the legislative framework, and the judicial approach towards gender justice. The paper has also addressed certain drawbacks of the existing system in the context of gender justice and has tried to put forward suggestions for the same.

1. Introduction

Linguistically the term 'gender' is a euphemism for 'sex', more simply put, 'gender' is understood to be a substitute for biological sex. This understanding is however a flawed one because gender does not refer to the sexuality of an individual, instead, it is the performative identity that is instituted through a stylization of the body.¹ Gender is how an individual identifies oneself, the orientation one is inclined towards, and associates oneself with. Sex essentially refers to the physical or biological orientation whereas gender refers to the psychological makeup or orientation of an individual. This is the understanding of the term 'gender' which must be kept in mind while discussing the concept of 'gender justice' further in this article.

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1 Sherry C. M. Lindquist, *Gender*, 33 *Studies in Iconography* 113, 114-115 (2012).

The central idea of justice is 'equitable balance'. Interpreting justice in terms of morally right and wrong would be highly ambiguous as what is morally right to one person might be morally wrong to the other. Justice is concerned with giving every person what is his or her own due. Western Philosophy talks about three kinds of justice. The first one is retributive justice, which essentially means providing appropriate punishment to wrongdoers. The second one is corrective justice which deals with rectifying past wrongs. The third one is known as distributive justice, which addresses the fair distribution of benefits and burdens among all the members of society.² Going by its central idea, justice must be applied impartially. Justice would be thus opposed to partiality in the application of rules and to rules which are in themselves partial or arbitrary and involve discrimination based on irrelevant grounds.³ Thus gender justice is entailed impartiality in the treatment of individuals irrespective of their genders. It refers to the equitable distribution of power, knowledge, resources, and opportunities among individuals belonging to every gender. Gender justice seeks to have a society in which individuals would be free from all forms of privilege, oppression, repression, and violence based on gender.

2. Social and Historical background

Society since the early ages has been infested with the problem of gender inequality. It is not a problem exclusive to India but has been present all around the world over the ages. However, in this paper, the discussion shall be kept confined to matters within the Indian society. The root of gender inequality in India is the structure of the Indian society which has been internalized for ages. Most of India has a strong patriarchal structure, where men hold the apex authoritative position. Going through the pages of history, one shall find the contrary situations of the status of gender equality in the Early Vedic and Later Vedic periods. In the initial parts of the Rig Veda, it is found that women enjoyed a measure of freedom which was quite evident from the hymns. Rig Veda also mentioned women's active participation in battle. Mudgalini, Vishpala, Vadhrimati, and Sasiyasi were women who were glorified as war heroes in Rig Veda.⁴ But the scenario changed in the Later Vedic period, the women lost their importance in society. Performance of religious rites, property inheritance, and education became privileges exclusive to men. Women became the property of men, used for sexual pleasure and child bearing. Manusmriti which is

2 Alison M. Jaggar, *The Philosophical Challenges of Global Gender Justice*, 37(2) *Philosophical Topics* 1, 2-3 (2009).

3 Morris Ginsberg, *The Concept of Justice*, 38(144) *Philosophy* 99, 103-104 (1963).

4 Sukumari Bhattacharya, *The Position of Women in Vedic Society*, 19(4) *India International Centre Quarterly* 40, 40-41 (1992).

regarded as the first Indian legal text has contributed to a great extent in bringing down the status of women in society. There developed a conception of masculinity during that time that has been termed by R.W. Connell as “hegemonic masculinities”.⁵ According to Connell, this conception configured the gender practices which embody absolute patriarchy.⁶ As time passed by, India was ruled by rulers of various dynasties, varied cultures, which turned India into a mixture of various cultures and societal norms. During the medieval ages, religion became the backbone of Indian society. The personal laws developed by the pandits and maulvies were gender-biased. These laws turned the state patriarchal both ideologically as well as in practice.⁷ With the advent of British rule, began the Modern Period of Indian history. During this period several gender-biased superstitions were in practice. It was also during this era that the fight for gender justice began. Sati was a prevalent Indian social practice that involved burning a woman alive in the pyre of her dead husband. This inhumane and superstitious social custom was challenged by the Sati Regulation Act of 1829, passed by Lord William Bentinck.⁸ The widows were oppressed heavily in the Indian society which caused a moral outrage among the British rulers and the Indian reformers⁹ and thus the Act XV of 1856¹⁰ was passed to bring a social change. About the LGBTQA + context, it is to be noted that Indian culture in the pre-colonization era, did not portray homosexuality negatively. Hinduism gave recognition and also celebrated homosexuality, which is quite evident from its texts such as Naradasmriti, Sushruta Samhita, and Kama-Sutra.¹¹ Naradasmriti gives recognition fourteen kinds of pandas who are men who do not indulge in sexual intercourse with females and do not identify themselves as the male gender; these include the “sevyaka (men who are sexually enjoyed by other men), mukhebhaga (men who have oral sex with other men)”.¹² Epics like Mahabharata give recognition to characters like Shikhandi, who despite being a female sexually, identified herself as a man. However, texts such as Manusmriti condemn it. It was

5 McComas Taylor, *Purāṇic Masculinities and Transgender Adventures in the Garden of the Goddess*, 17(2) International Journal of Hindu Studies 153, 155(2013).

6 Id

7 Kumkum Sangari, *Gender Lines: Personal Laws, Uniform Laws, Conversion*, 27 Social Scientist 17, 23-24 (1999).

8 Regulation XVII, A.D. 1829 of the Bengal code (1829).

9 Ariel Glucklich, *Conservative Hindu Response To Social Legislation In Nineteenth Century India*, 20(1)

Journal of Asian History 33, 42-43 (1986).

10 Hindu Widows Remarriage Act XV of 1856.

11 Martha Nussbaum, *Disgust or Equality? Sexual Orientation and Indian Law*, 6 Journal of Indian Law and Society 1,8-9, (2016).

12 Shane Gannon, *Exclusion as Language and the Language of Exclusion: Tracing Regimes of Gender through Linguistic Representations of the “Eunuch”*, 20(1) Journal of the History of Sexuality 1, 6-7, (2011).

actually during the colonization era; the Victorian era that modern societal homophobia was introduced in India. Although the British rulers were fighters for women's rights, they deeply condemned the rights of the third gender. The India Penal Code (1860) was introduced which criminalized homosexuality. Post-independence, the issues of rape, sexual harassment in the workplace, violence against women in the family and public sphere, non-recognition of the rights of the LGBTQA + community have major issues that gender justice in Indian has been battling with.

3. Constitutional Framework

The numerous issues related to gender discrimination were rooted deep within the society and the only way to bring a solution to these problems was by bypassing positive laws. The Constitution of India is the primary law that envisages a new order as to regulation and prevention of discrimination.¹³ The *Grundnorm* by the means of its provisions has laid down a strong foundation for gender justice in India. Article 14 provides for i) equality before law ii) equal protection of laws. It provides that the Rule of law shall be equitable to all, thereby discarding gender bias. Article 15 prevents the State from discriminating “against any citizen on the grounds of religion, race, caste, sex, place of birth or any of them”¹⁴. Article 15(3) entitles the “State to make any special provision in favour of women and children”¹⁵. It is to be noted here that the special provision for women cannot be termed as negative discrimination or unjust as the central idea of corrective justice deals with rectifying past wrongs. The special provisions are to be made so that the status of women which had been pushed towards the bottom of social hierarchy could be lifted and the women would be brought up to the same status which is enjoyed by men. Article 16 ensures that “in matters of opportunities related to employment or appointment to any office under the state shall be equal to all”¹⁶. Article 39(a) and 39(d) direct the State to make policies securing both men and women equal right to adequate means of livelihood¹⁷ and equal pay for equal work¹⁸; respectively. Article 42 urges the state to secure just and humane conditions of work and provide for maternity leave¹⁹. Article 51(A)(e) urges the State to promote harmony and fraternity amongst all the people of India and to renounce the practices derogatory to the dignity of women²⁰. Article 243(D)(3) provides for the reservation of not less than

13 Marc Galanter, *Law and Caste in Modern India*, 3(11) Asian Survey 544,549-550 (1963).

14 INDIA CONST. art. 15. cl.1.

15 INDIAN CONST. art. 15. cl. 3

16 INDIA CONST art. 16.

17 INDIA CONST art. 39. cl. a.

18 INDIA CONST art 39. cl. d.

19 INDIA CONST art 42.

20 INDIA CONST art 59A. cl. e.

one-third of the total number of seats to be filled by direct election in every Panchayat²¹ whereas Article 243(D)(4) provides for the reservation of not less than one-third of the total number of offices of Chairpersons in Panchayat at each level to be reserved for women²². While Articles 243 T(3) and 243 T(4) do the same for Municipality constituencies. These are the basic legal provisions that lay the foundation for gender justice in India. Over the year several legislations have been developed which have paved the way for this concept to grow in our society.

4. Legislative Framework

The legal framework of our nation has been designed in such a manner that aims to secure the rights of women and strike the right balance of gender justice. If we go by the chronological order then we must date back to 1860 which saw the enforcement of the Indian Penal Code (IPC) containing provisions for protecting women from offenses like dowry death, rape, kidnapping, cruelty, etc. The Personal laws in our nation have a bias towards giving men the upper hand and the Muslims Personal laws are no exception to such a feature. Before 1939, it was only the Muslim men, who could initiate divorce. This however changed with the passing of the Dissolution of Muslim Marriages Act (1939). The legal profession itself had been reserved to one gender. The Legal Practitioners (Women) Act (1923) provided for women to take up the legal profession. In 1948, the Minimum Wages Act and Factories Act prevented discrimination between men and women workers especially about wages and prohibited the employment of women between 7 pm to 6 am in mines and factories for their safety, respectively. Changes were also made to the Hindu personal laws to pave way for gender justice. The Hindu Marriage Act (1955) introduced monogamy and brought in equal rights for men and women in matters about marriage and divorce. The Hindu Succession Act (1956) gave women the right to inherit property. Female infanticide is a major problem in India which is still existent in certain rural areas of the country. Medical Termination of Pregnancy Act (1971) and Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (1994) were enforced to tackle this problem. There are several other legislations such as the Protection of Women from Domestic Violence Act (2005), Immoral Traffic (Prevention) Act (1956), Indecent Representation of Women (Prohibition) Act (1986), Maternity Benefit Act (1961), Dowry Prohibition Act (1961), Maternity Benefit Act (1961), Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013), Equal Remuneration Act (1976); which protect the rights of women and try to deliver gender justice.

21 INDIA CONST art 243D cl.3.

22 INDIA CONST art. 243D. cl. 4.

5. Judicial Approach

The Indian Judiciary in many instances has been proactive towards establishing gender justice. Several judgments have been passed by the Apex court, which has reinstated the Constitutional values of gender equality in the Indian legal system; some of them have been discussed here. Before 1965, a Company regulation required an unmarried woman to give up her job after marriage. The Apex Court declared such a regulation be unconstitutional and hence scrapped it off.²³ Justice Iyer and Justice Shingal upheld the working right of a married woman stating that there would be no differentiation between the rules applicable to men and those applicable to women.²⁴ The right of Syrian Christian women in matters of intestate succession was upheld in Mary Roy's case.²⁵ Justice Venkitaramiah dealt a heavy blow to the gender discrimination in the employment sector when he held that "the employer is bound to pay the same remuneration to both of them irrespective of the place where they were working unless it is shown that the women are not fit to do the work of the male."²⁶ The dignity of women was upheld when in 1990, Supreme Court held that "even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes".²⁷ In *Mrs. Neera Mathur v. LIC*²⁸, a woman's right to conceal personal facts such as pregnancy and menstrual cycle details from the company recruiting her were protected. In the absence of any legislation, the Judiciary took a stand in 1997 to protect women from sexual harassment at the workplace, in the landmark case of *Vishakha*,²⁹ which served as a precedent to the 2013 legislation³⁰. In 2003, the Supreme court issued guidelines to prevent female foeticide which is a major problem in India.³¹ The Supreme Court in several landmark judgments protected the rights of Muslim women, in matters relating to divorce.³²³³³⁴³⁵ The Supreme Court broke the gender stereotype by granting women permission for command appointments in the army instead of only staff appointments in 2020.³⁶

23 *Bombay Labour Union v. International Franchise*, (1966) 2 S.C.R. 477.

24 *C. B. Muthamma v. Union Of India &Ors*, (1980) 1 SCR 668.

25 *Mrs Mary Roy v. State of Kerala &Ors*, (1986) 1 SCR 371.

26 *Mackinnon Mackenzie & Co. Ltd v. Audrey D'Costa &Anr*, (1987) 2 S.C.C. 469 (India).

27 *State Of Maharashtra And Another v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57 (India).

28 1992 1 S.C.C. 28 (India).

29 *Vishaka&Ors v. State Of Rajasthan & Ors*,. (1997), SC 3011 (India).

30 *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, No 14 of 2013*.

31 *Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India*, (2003) 8S.C.C. 406.

32 *Mohammed Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945.

33 *Daniel Latifi v. Union of India* (2001) 7 S.C.C. 740.

34 *Shamima Farooqui v. Shahid Khan* (2015) 5 S.C.C. 705.

35 *ShayaraBano vs Union Of India* (2017) 9 S.C.C. 1.

36 *Secretary, Ministry of Defence v. BabitaPuniya&Ors* (2020) SCC OnLine 200.

Section 497 of the IPC criminalized adultery. This provision was gender-biased in many aspects. Firstly, it was only the aggrieved husband who was allowed to bring a charge against the offender. Secondly, it was made on the assumption that a woman is the property of a man and cannot have relations outside marriage. Thirdly, although sexual intercourse takes place with the consent of both the man and the married woman, it is only the man who is punished whereas the woman is considered a victim. In *Joseph Shine v Union of India*³⁷, the Supreme Court struck down Section 497, declaring it unconstitutional.

In *Navtej Singh Johar's case*³⁸, the Supreme Court decriminalized the 158-year-old colonial law which criminalized consensual homosexual intercourse. This overruled a Delhi High Court case³⁹ and established a huge landmark in the establishment of Gender Justice in India.

6. Conclusion and Suggestions

After analysing the Constitutional provisions, the legislative framework, the judicial approach, and getting an understanding of how the social background regarding gender justice was; it can be inferred that India has undoubtedly made strides of progress in the matter of gender justice. Legislations such Equal Remuneration Act (1976) and judicial decisions such as *Secretary, Ministry of Defence v. Babita Puniya & Ors*⁴⁰ have quite precisely delivered distributive justice. Corrective justice has been addressed by many legislations and judicial decisions such as scrapping off Section 497 and Indecent Representation of Women (Prohibition) Act (1986), decriminalizing homosexual intercourse, to name a few. Retributive justice has been delivered by enforcement of many acts such Protection of Women from Domestic Violence Act (2005), Immoral Traffic (Prevention) Act (1956), Dowry Prohibition Act (1961), etc. Gender justice in India has been legally addressed in all three aspects. However, there are still some areas that are lacking, and without addressing them it would be impossible to achieve complete gender justice.

Firstly, there is a need to make the laws related to sexual offenses (IPC, CRPC) gender-neutral. Even though after the *Nirbhaya case*⁴¹ the definition of rape as per Section 375 of IPC started including all forms of non-consensual penetration and insertion and oral sex, it still upholds the distinction of men as the sexual offenders and women as victims. Section 375 has no recognition of the LGBTQA+ community.

37 *Joseph Shine v. Union of India*, A.I.R. (2018) S.C. 1676.

38 *Navtej Singh Johar v. Union of India*, (2018) 1 S.C.C. 791.

39 *Naz Foundation v. Govt. of NCT, Delhi*, (2016) 15 S.C.C. 619.

40 *Secretary, Ministry of Defence v. Babita Puniya & Ors* (2020) SCC OnLine 200.

41 *Mukesh v. State (NCT of Delhi)* (2017) 6 S.C.C. 1

Transgender Persons (Protection of Rights) Bill which was passed in 2019, had a provision stating that if a transgender was sexually harassed then the attacker would face a minimum of two years of imprisonment whereas in the case a women's punishment would be minimum of seven years. The same bill gives recognition to 'transgenders' and prohibits discrimination against them in nine fields like education, healthcare, and employment. However, it fails to provide a remedy for integrating them in public spheres, and in case of discrimination occurs, what action would be taken against the offender.

Another imperative step which is to be given due attention is the lack gender neutrality in the Indian Penal Code. One such section which is to be deliberated upon is the Section 354C of the IPC which considers only males to be the perpetrators whereas including women in the scope as potential perpetrators would naturally increase the scope of protection guaranteed to women and thereby serve the purpose of enacting such a provision.

Marital Rape which is not considered to be an offence in this nation should also be given some attention because anything which is without consent is violative of one's bare human right to dignity and should be barred. Marriage should not be a garb under which such grave violation of human rights shall be given validation.

These are certain lacunas present in the current legal system, concerning gender discrimination. These concerns are needed to be addressed by amending present legislation and enforcing fresh laws. Considering the development that the Indian legal system has made so far, it would not be wrong to say that it has the potential to address and rectify its grey areas and raise the legal status of gender justice to a higher level and uphold the constitutional spirit of equality in its truest sense.

Present-Day Relevance of Immanuel Kant's Perfect and Imperfect Duty: An Analysis

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Abstract

The researcher through this research paper analyses Immanuel Kant's ideas of perfect and imperfect duties and tries to prove the relevance of these concepts not just in theory but also in practice in today's day and age. This paper first delves into understanding, through various available literature, Kant's most fundamental basis of moral philosophy, the Categorical Imperative, and then the dependence of duty on the Categorical Imperative. The researcher then delves into a detailed study of perfect and imperfect duty, one at a time, and then distinguishes between the duty to do charity and the duty to rescue. To prove the present-day relevance of perfect duty, the researcher employs the Indian Contract Act, 1872 by showing how an ordinary promise can be turned into a legally binding contract by giving it the force of law. The innumerable contracts that people form with each other in their day-to-day lives can be, in a way, said to be the materialisation of perfect duties. On the other hand, the Good Samaritan Laws can be seen as a way in which the state promotes the performance of an imperfect duty, i.e., the duty to help others. However, there does exist some limitations to the extent to which Kant's work on perfect and imperfect duties can be employed to answer questions like whether or not is it morally advisable for one to always prioritize perfect duties over the imperfect ones and is not performing one's imperfect duties always acceptable.

1. Introduction

A common man's understanding of the word 'duty' might range from anything from an obligation to pay one's EMIs on time to avoid being subjected to the penalties that would otherwise follow to the moral obligation of giving money to a poor person begging for alms. Not parking one's car in the middle of the road can be said to be one's duty and helping a blind man to get to the other side of the road can also be said to be his/her duty. Now, how do we segregate these various kinds of duties into different categories? More importantly, what should these categories be like in the first place? Which of these duties are more important than the others and why? What happens when we chose to either fulfil or ignore the duties that we have? A detailed

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study of Immanuel Kant's moral philosophy in general and his work on rights and duties, in particular, can help us answer these questions to a suitable extent. Immanuel Kant was a late 18th-century German philosopher and one of the foremost thinkers of the Enlightenment. He was an ardent opponent of utilitarianism and he propounded the idea that the rightness or wrongness of actions does not depend on their consequences but on whether they fulfil our duty.¹ He classified between two kinds of duties, namely, perfect duty and imperfect duty. This research paper will delve into studying broadly Kant's moral philosophy and specifically his work on perfect and imperfect duties. The researcher will begin by reiterating how Immanuel Kant relied on moral law as the basis for duty and then moving on to studying the two kinds of duties in detail. The researcher will then move towards studying the relevance of the concept of these two different categories of duties in today's world with the help of relevant day-to-day examples and try to conclude by giving a critical analysis of the whole study.

2. Moral Law as the Basis for Duty

Immanuel Kant argued that the supreme principle of morality is a standard of rationality that he dubbed the "Categorical Imperative" (CI).² The Categorical Imperative is perhaps the most fundamental unit of Kant's moral philosophy. He described the CI as an objective, rationally necessary, and unconditional principle that one must follow at all times, even when faced with inclinations not to do so. There have been many philosophers before Kant who have laid extreme importance to the rationality that humans possess to be the basis of their morality but how Kant does it through his concept of Categorical Imperative is novel and remarkable. He does not take CI to be a variable but instead, a constant standard of rationality that is unconditional. No circumstantial pressures whatsoever can move a rational being into ignoring the CIs, i.e, no matter whatever the situation is, adherence to CI is compulsory and hence the term 'imperative'.

Further, what makes a good person good, according to Kant, is his/her possession of a will that is determined by the moral law, and this moral law as opposed to the legal codes is not available to us in a written, concrete, and consolidated manner. To be able to determine whether something is in accordance with the moral law, it has to first and foremost pass the test of aligning itself with the Categorical Imperative. A human will in which the Moral Law is decisive is motivated by the thought of *duty*.³ Kant validates this idea by comparing motivations of

1 ObinnaObiagwu & Jude Onuoha, *The Implication of Kant's Moral Philosophy in our Society Today*, 1 Journal of Philosophy and Ethics, 30, 30 (2019).

2 Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, The Stanford Encyclopedia of Philosophy (Oct 10, 2020, 10:04 AM), <https://plato.stanford.edu/entries/kant-moral/>

3 *Ibid.*

duty with other sorts of motives, such as motives of self-preservation, happiness, and self-interest. For instance, if one's actions are motivated by happiness alone, they cannot be said to be in alignment with the Moral law, and in turn, the particular action cannot be said to be an outcome of one's duty. But in contrast, if one's actions are motivated by duty and also fulfil the need for happiness, then such actions can be said to be an outcome of goodwill. What is particular about motivation by duty, is its respect for the moral law.

3. Perfect and Imperfect Duty: Meaning

We will take Kant's paradigm examples that he provided while distinguishing perfect and imperfect duties to gain an understanding of the meaning of the two - the duty not to make a lying promise and the duty to perfect and develop one's natural talents.⁴

A defining feature of perfect duties is the determinate nature of the duty whereby it obliges one to do or refrain from doing a particular act and specifies who must carry the act out and what exactly has to be done and when. Perfect duties are generally negative and owed and conduct that does not conform to a perfect duty is wrong and wrongs someone and these duties are unremitting.⁵ If I promise to pick someone up at 8:00 AM the following day in lieu of her letting me borrow her car, both I and the promisee know exactly how the act has to be done, by whom, and when. But if I make this promise with no intention of keeping it and only with a motive of getting to keep her car for the night, I'll be breaching my perfect duty and depriving her of her perfect right of having her car back within the promised time and her right of being picked up the next morning at 8:00 AM.

On the contrary, the defining feature of imperfect duties is that the agent has latitude in deciding how and when to fulfil the duty.⁶ Non-performance of an imperfect duty does not as such wrong anyone and are "optional" and "meritorious" in nature.⁷ Imperfect duties specify only the ends that one must achieve but don't specify the means to achieve those ends. Developing one's natural talents, for instance, is a mere end that we all have to fulfil. However, none of us is compulsorily obligated to master a specific skill within a given period. We can choose which talent we would want to develop. We are obligated to learn to play the piano no more than we are obligated to learn swimming. Hence, to achieve the end of developing our natural talents, we have recourse to innumerable means and we can opt for any one of them until it defeats

4 IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 422-424 (ed. Mary Gregor, Cambridge University Press, 1997)

5 B. SHARON BYRD ET. AL., *Kant's Metaphysics of Morals: A Critical Guide* 174 (Lara Denis ed., 2010).

6 32 Violetta Igheski, *Perfect and Imperfect Duties to Aid*, 32 *Social Theory and Practice*, 439, 444 (2006).

7 *Supra*. Note 5

the main purpose. For example, we cannot indulge in taking drugs or depriving ourselves of sleep because, in the long run, these habits would obstruct our imperfect duty of developing our talents.

4. Duty to Rescue and Duty to Do Charity

In this section, we are going to analyse if the duty to rescue and the duty to do charity are perfect duties or imperfect duties. After a preliminary reading of the work of Immanuel Kant on duties, what we have concluded so far is that:

- i. Imperfect duties specify only the ends and people have autonomy over deciding when, where, and how to fulfil the concerned duty.
- ii. Perfect duties specify the means, i.e., people do not have autonomy over deciding when, where, and how to fulfil the concerned duty.

Now, when the act of doing charity is concerned, does the agent have the concerned autonomy that we've been talking about? Can the agent decide when/ where/ at what time/ how to indulge in the particular act of charity? The obvious answer would be 'yes'. What the agent has is a duty to help the needy but he/she is not obligated either legally or morally to pay alms to every beggar that he/she comes across. The agent can do so whenever he/she has the appropriate means and resources to be able to indulge in acts of charity. We cannot say that a particular person contradicts or breaks the moral law or is a bad person merely because he/she failed to pay alms to one particular beggar he/she came across at the traffic signal. Therefore, we can conclude that doing charity is an imperfect duty.

However, will people have the same kind of autonomy when they come across a person on the verge of falling off a bridge whose life could be saved by just some help from a passerby? In this situation, where a person's life could be saved by lending him a hand, do the people who pass by him have no moral obligation to help him? I think they do. Moreover, indulging in acts of rescuing someone is not a mere end and they cannot choose not to rescue one specific person but help the other. More than anything else, it is the higher moral law that will obligate one to rescue the falling man. However, we cannot forget that the very concept of morality is a subjective one, and hence, how a person behaves in a given situation would depend on his/her analysis of whether the particular duty is perfect or imperfect. And since there are no written codes that would demarcate each duty to be either perfect or imperfect, we have to keep falling back at Immanuel Kant's idea of the moral worth of an act. A person who indulges in rescuing someone does the act as a rendition to his/her moral laws. And, when a situation is morally determinate, the agent has no latitude to decide how he/she

should act to fulfil his/her duty, so here we should understand the duty as a perfect duty.⁸ Here, a few other circumstantial factors would also come into the picture such as whether or not the agent was the sole passer-by. In such a situation where only the agent alone could save the life of the falling man, it becomes his perfect duty to do so if he has the requisite means/ ability for the same. However, the same agent doesn't automatically get dissolved of his duty if there are a lot of people other than him/her who could save the falling man's life. It'd continue to be his imperfect duty to help the needy. Therefore, we can conclude that there doesn't exist a clear demarcation between perfect and imperfect duties and the same act can be a rendition of the overlapping of both.

5. Indian Contract Act, 1872: Law Recognizing Perfect Duty

The very first moral law that Immanuel Kant mentions in the *Groundwork* right at the Preface is, 'thou shalt not lie' (*'dusollst nicht lu gen'*). It applies to all rational beings and he takes this moral law forward with the duty not to make a lying promise which he says is a perfect duty. Now, let us look at the present-day application of the duty not to make a lying promise. What happens when someone does make a lying promise? Does the promisee have any means by which he/she can ensure that the promisor does not break the promise? And if the promisor does break the promise, what remedies does the promisee have against the promisor?

To make promises enforceable by law, in other words, to give promises a legal backing, one can employ the Indian Contract Act, 1872. By turning ordinary day-to-day promises into legal contracts, the parties to the promise can make the promise legally binding on each other. Now to understand how a promise could be turned into a contract, we'll take an example. For instance, a person named 'Mr. A' gets to know that his neighbour named 'Mr. B' wants to sell his car for 1 lakh rupees. Mr. A is interested to buy the car and hence, he communicates his willingness to buy the car to Mr. B who agrees to sell the car to Mr. A. Legally, through this step of Mr. A of communicating his willingness to buy Mr. B's car, he is said to make a proposal to Mr. B to buy the car from him. This can be said to be the materialisation of Section 2(a) of the Indian Contract Act, 1872, which reads,

*"When one person signifies to another his willingness to do or to abstain from doing anything, to obtain the assent of that other to such act or abstinence, he is said to make a proposal;"*⁹

8 Thomas E. Hill, *Kant on Imperfect Duty and Supererogation*, 62 *Kant-Studien*, 55 (2009).

9 Indian Contract Act, 1872, S. 2(a), No. 9, Acts of Parliament, 1872 (India).

When Mr. B, in turn, agrees to sell his car to Mr. A, he is said to accept Mr. A's proposal. At this stage, Mr. A promises to buy Mr. B's car. Acceptance has been defined in Section 2(b) of the Indian Contract Act, 1872, as follows,

*“When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;”*¹⁰

Now that there is a promise for the buying/selling of the concerned car, the price at which Mr. B agrees to sell his car to Mr. A is called a consideration for the promise. Section 2(d) states as follows,

*“When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called consideration for the promise;”*¹¹

In this case, the consideration for the promise is 1 lakh rupees. At this stage, Mr. A and Mr. B are said to have an agreement between themselves. Agreement is defined in Section 2(e) of the Indian Contract Act, 1872, as,

*“Every promise and every set of promises, forming the consideration for each other, is an agreement;”*¹² and Section 2(h) states that *“An agreement enforceable by law is a contract”*.¹³

To turn this promise into a contract, Mr. A and Mr. B have to make it enforceable by law, i.e., they have to give this agreement the force of law so that if one of them refrains from performing their part of the promise at a later stage, the other party can go to the court and hold him liable. So, if Mr. A was making a lying promise to Mr. B and he had no intention of buying the car from him, then Mr. B can sue Mr. A and claim for damages because he trusted Mr. A and didn't sell the car to anybody else.

Therefore, this is how we can say that Immanuel Kant's idea of perfect duty is still relevant in the context of the innumerable contracts that take place between people in their everyday lives. He says that even though one can at times ignore their imperfect duties, one should never ignore their perfect duties. In today's context, if not merely for the sake of morality, one would try never to fail in performing their perfect duty for the sake of avoiding the legal sanctions that would otherwise follow.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

6. Good Samaritan Laws: State Encouraging Imperfect Duty

An accident occurring on a busy road and dozens of people surrounding the wounded victims of the accident isn't a very rare sight to come across. Thousands of road accidents happen every day all over the world and hundreds of them die as a result of not getting access to adequate medical assistance on time. The Global Status Report on Road Safety, 2018 published by World Health Organisation (WHO) points India as one of the leading countries in terms of road accident fatalities.¹⁴ As per the Ministry of Road Transport and Highway Statistics, 1137 crashes and 413 deaths occur every day or 55 crashes, and 17 deaths happen every hour due to road accidents in India every day.¹⁵ More than 50% of accident victims die because they don't receive medical attention during the Golden Hour. The Golden Hour can be described as the first hour after the occurrence of the accident. Chances of survival of the accident victims rise manifold and the severity of the injures decrease to a good extent if proper first aid is given to them within the Golden Hour. Now, talking about the nature of duty that each of the person driving across the wounded people in the accident has towards them, has to be an imperfect one because none of them have made prior promises to the accident victims saying that they'd stop by and help in case one of them ever face any road accident. Moreover, helping accident victims is an end and not a means to an end and therefore, it cannot be said to be a perfect duty.

Most of the bystanders don't often come to help the accident victims maybe because of the fear of legal intervention, harassment from police, and prolonged detention at hospitals, among others. However, there are a few good-hearted, morally upright people, i.e., Good Samaritans who still choose to lend a helping hand if they have the adequate means to do so. A Good Samaritan can be defined as an individual who intervenes to assist another individual without prior notion or responsibility or promise of compensation. Many countries across the world have adopted Good Samaritan Laws which give their citizens immunity from any future legal intervention in a case arising out of the concerned accident in which the citizen acted as a Good Samaritan. In India, The Ministry of Road Transport and Highways issued the Good Samaritan Guidelines in 2015. India's Good Samaritan Bill was passed by the Supreme court of India and became law on March 30, 2016, and gave the "Force of Law" to the guidelines for the protection of Good Samaritans issued by the Ministry of Road Transport and Highways.

14 Vidya Raja, *Golden hour, CPR, Good Samaritan Law: Life-Saving Lessons Every Indian Should Know*, The Better India, (Oct 15, 2020, 7:30 PM), <https://www.thebetterindia.com/191833/cpr-road-accident-golden-hour-life-saving-lessons-citizen-india/>

15 Accident Statistics, Ministry of Road Transport and Highways (Oct 11, 2020, 11:00 PM) <https://app.powerbi.com/>

In the consecutive months, the state governments passed Government Orders, and later, it was included in the draft of the Motor Vehicle Act 2019¹⁶ The Good Samaritan Laws in India offer the following primary benefits to Good Samaritans to encourage them to come forward and help accident victims in dire need of medical assistance:

- i. Protection from legal intervention to anyone who comes forward to help.
- ii. The Good Samaritan can choose not to disclose his/her identity while filing a police complaint regarding the concerning accident.
- iii. The Good Samaritan faces no civil or criminal liability.
- iv. The Good Samaritans can choose whether or not they want to be a witness and they cannot be compelled otherwise.

Since most of the bystanders choose not to help road accident victims fearing legal intervention and police harassment, the Good Samaritan Laws now leave them with lesser factors to be afraid of since it negates any such possibilities. Hence, we can say that the Good Samaritan Laws in India, if implemented efficiently, can be very effective in reducing casualties resulting from road accidents. Looking at it from a wider perspective, we can say that the State through the Good Samaritan Law encourages people to come forward and fulfil their imperfect duties towards each other by making sure that no legal liabilities are enforced upon the people who choose to do so. This proves that the concept of Immanuel Kant's imperfect duty isn't very redundant even after all these years.

7. Conclusion

Although Immanuel Kant's work has been criticized by different philosophers from time to time in accordance to how he differs from their respective schools of thought, a very basic reading of his work would prove the relevance of his work even today. Most remarkable of Kant's contributions have to be his idea of the Categorical Imperatives and his Formula of the Universal Law of Nature. Kant has been criticized by some for relying too much on morality which is a relatively abstract concept but Kant has nonetheless with the help of the aforementioned tools, conducted an objective study of the various kinds of duties. After delving into a detailed study of the concepts of perfect and imperfect duty put forward by Immanuel Kant, the following are some of the shortcomings that according to the researcher need more thought, research, and understanding.

- i. Immanuel Kant emphasizes moral laws as the basis for duty. However, adhering to moral laws and legal codes can overlap in many instances. How then do we get to know which actions are

done only because they have legal sanctions against them and which are done solely out of respect to moral laws? For instance, in the prior example of the contract between Mr.A and Mr.B, if at a later stage Mr.B defaults in giving delivery of possession of the car to Mr.A even after the paying of the whole consideration amount and then, in turn, Mr.A threatens Mr.B saying that he would file a lawsuit against him if he doesn't deliver the car to him within the next five days, will it be because of his respect towards the moral law that Mr.B will deliver the car within the next five days or will it be because of his fear of legal sanctions?

- ii. Immanuel Kant says that perfect duties are more important than imperfect duties. However, there surely isn't a very clear demarcation between Kant's ideas of perfect and imperfect duties and one can't always tell if a particular duty is more important just because it is perfect and another isn't because it's imperfect. For instance, if I am wearing clothes that I borrowed from a friend, I have a perfect duty to use them without causing any harm to the quality of the product and to return them to her on time. But what if I come across a drowning child and to save the child, I have to walk into the dirty/muddy water? Will I restrict myself from helping the drowning child to keep the promise I made to my friend regarding keeping her clothes safe with me? Will I let go of my imperfect duty because this might come into my way of keeping a promise which is a perfect duty? Certainly not. We cannot say that a piece of clothing has more value than a child's life. Therefore, when Kant says that perfect duties are more important than imperfect ones, I do not subscribe to his idea. To be able to judge whether a particular duty is more important than the other, merely analysing whether the duty is a perfect or an imperfect one would not suffice. It'll depend on a lot of other situational factors as well.

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Personal Data Protection Bill, 2019: A Critical Analysis

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Abstract

Data Protection is the protection of data from any form of misuse, illegal processing, or unauthorized sale or sharing by any means. Presently, the Personal Data Protection Bill, 2019 is presented before the joint committee of the parliament for consideration for the second time after amendments in the bill presented in 2018. This paper aims to critically analyse the bill presented in 2019 along with its impact on businesses. The paper begins with an overview of the concept of data protection. It then goes on to discuss the requirement of the bill in three perspectives: constitutional, practical, and insufficiency of current laws. It also compares the proposed bill with the laws of data protection in the US, European Union, and Japan in terms of enforcement and application of the law to derive what approach the bill has followed and thereafter analyses important provisions of the bill like the jurisdiction, types of data, the special provisions made for children, obligations and restrictions laid down for the data fiduciaries, the rights of the data principals, and enforcement. The paper is not merely a summary of the bill, it also includes the principles and objects behind the provisions. The Srikrishna Committee Report is a major source for identifying the purpose and principles behind these provisions. After critically analysing the bill and pointing out loopholes, suggestions to remedy those loopholes are made by the researchers.

1. Introduction

Technological advancement has always had bi-phased results. It is both a boon and a bane for the global society. With unprecedented growth in technology, concerns regarding the protection of data arose.

Data protection may be defined as “any method of securing information, especially information stored on a computer, from being either physically lost or seen by an unauthorized person.”¹ In simple words, data protection purports to save information from being used in a manner opposed to the law, public policy, or in any manner without the consent of its owner irrespective of whether it actually causes harm or not. This is not limited to online data holders but encompasses all

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1 *Data Protection*, Black’s Law Dictionary (4th ed., 1971).

organizations, irrespective of their nature, which have access to data about individuals.

While the right to privacy was universally recognised in the Universal Declaration of Human Rights,² for a long time, there were no provisions addressing data protection. Later many countries introduced laws dedicated to data protection. Currently, there is no expressed legislation dedicated to data protection in India. In a recent case of *KS Puttaswamy v. Union of India*³, the court held that the right to privacy was encompassed within the right to life provided under article 21 of the Constitution of India. However, the legislation that most closely resembles a law on data protection is the Information Technology Act, 2002 (hereinafter IT Act) along with Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (hereinafter Privacy Rules). Additionally, there are some sector-specific laws like CIC Act and Regulations, Unified License Agreement issued to Telecom Service Providers by Department of Telecommunications, Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, etc.

This research paper analyses the Personal Data Protection Bill, introduced in the parliament in December 2019 (hereinafter the bill). The paper firstly addresses why the bill is required. Secondly, it discusses the approaches of other countries towards data protection laws and identifies whether the approach by the bill is apt or not. Thirdly, it analyses important provisions of the bill. In conclusion, the researchers have discussed the impact of the bill and have attempted a critical appraisal of the important provisions of the bill and have also suggested solutions for the loopholes.

2. Requirement

2.1. Data Protection as a corollary to Right to Privacy

The Preamble of the Constitution of India guarantees certain rights to individuals. One such right is the 'dignity' of the individual, which is further recognised by many articles in the constitution. In the celebrated case of *K.S. Puttaswamy* it was held that "privacy is a postulate of human dignity itself"⁴ and "privacy of an individual is the essential aspect of dignity"⁵ which clearly shows that privacy is so cognate to the dignity of an individual that to ensure dignity, privacy is a must. Along with dignity the judgement also links liberty of belief, faith, expression, and thoughts to privacy, saying that "liberty has a broader meaning of

2 The Universal Declaration of Human Rights art. 12, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

3 *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

4 *Id.* at 498.

5 *Id.* at 498.

which privacy is a subset.” It clearly shows that a breach of privacy will directly affect the liberty and dignity of an individual. The judgement also specifically clarifies that the right to life enshrines the right to privacy, further strengthening it as a fundamental right.

Whenever the apex court has recognised or interpreted the existence of some fundamental right, the enforcement of those rights depends upon the legislative support. When the Supreme Court recognised the right to information as a fundamental right in the case of PUCL v. UOI⁶, in order to enforce this right, the Right to Information Act was passed in 2005. The Right to Education is another example. This right was recognised for the first time in Mohini Jain v. State of Karnataka⁷ and was subsequently affirmed by a larger bench in Unnikrishnan J.P. v. State of Andhra Pradesh.⁸ It was felt that such an important right should be added to the Constitution and thus, article 21A was added. Further, for its enforcement and regulation, the Right to Education Act was enacted in 2009. The reason behind passing these acts is that the job of the court is merely to interpret and recognise the rights. It cannot lay down the specifics as to how the right is to be exercised and how the authorities are to be regulated. The mere existence of a right without proper enforcement and regulatory provisions will serve no benefit to the people. Hence, legislations are required to expound upon the right and carve a law for its enforcement and regulation.

Justice Chandrachud himself recognised the need for a proper law on this subject matter. “Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State.”⁹

2.2. Practical reasons

The practical reason behind introducing a data protection regime is the increasing number of cases where organizations having access to data have misused it without the knowledge of the data owner. According to the data of 2019, the total smartphone users in India were 59.653 crores,¹⁰ out of the total population which is 136.9 crores¹¹ which amounts to more than 43% of the total population of India. This

6 PUCL v. Union of India, (2003) 4 SCC 399 (India).

7 Mohini Jain v. State of Karnataka, (1992) 3 SCC 666 (India).

8 Unnikrishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).

9 *Supra*. note 3 at 437.

10 *Number of Smartphone users in India likely to double to 859 million by 2022*, Business Standard (May 10, 2019, 1:32 PM) https://www.business-standard.com/article/news-cm/number-of-smartphone-users-in-india-likely-to-double-to-859-million-by-2022-119051000458_1.html.

11 *Population of India*, Statistics Times, <http://statisticstimes.com/demographics/population-of-india.php> (last visited Apr. 13, 2020).

information is relevant in light of the following news articles which discuss cases of data breaches in common applications and software. Many people don't even realize these breaches.

With the advancement in technology, we believe that the security of our data is advancing at the same pace, but this cannot be farther from the truth. Modern technology includes biometrics and facial recognition, retinal scans, and voice recognition for higher security, which itself is a form of data being stored in the databases of different companies handling such security measures.

The officials of eminent antivirus companies have warned about the side effects of biometrics. According to the data collated by Kaspersky¹² 37% of the devices, with Kaspersky installed on them, faced various attempts of malware infection 'Q3' in 2019, which was aimed at the extraction of biometric data.¹³ The cybersecurity firm McAfee predicted that "threat actors are also learning to leverage Artificial Intelligence and Machine Learning in increasingly sinister ways."¹⁴ Officials also said that "it will be critical for businesses to understand the security risks presented by facial recognition and other biometric systems and invest in educating themselves of the risks as well as hardening critical systems."¹⁵

To further strengthen this argument, the Economic Times had reported in November 2018 that "[in] New York, scientists have developed an artificial intelligence tool that can synthesise fake human fingerprints and potentially fool biometric authentication systems."¹⁶

Recently the personal data of millions of Indians, collected for the BHIM (Bharat Interface for Money) (a service started by the government for ease in monetary transactions) was exposed online.¹⁷ The data is not

12 *One in three computers facing biometry face attempts to steal data or remote control*, Technology for you (Dec. 05, 2019) <https://www.technologyforyou.org/one-in-three-computers-processing-biometry-face-attempts-to-steal-data-or-remote-control/>.

13 Rohan Abraham, *The dark side of biometric authentication*, Economic Times, (Dec. 13, 2019, 6:57 PM) <https://economictimes.indiatimes.com/magazines/panache/the-dark-side-of-biometric-authentication-hackers-are-using-malware-to-steal-fingerprints-sensitive-data/articleshow/72524307.cms>.

14 Priyanka Sangani, *McAfee Labs threat Predictions 2020*, Economic Times, (Dec. 5, 2019, 1:45 PM) <https://economictimes.indiatimes.com/tech/internet/mcafee-labs-threat-predictions-2020/articleshow/72381495.cms>.

15 *Id.*

16 *Think your devices are safe?*, Economic Times, (Nov. 26, 2018, 6:04 PM) <https://economictimes.indiatimes.com/magazines/panache/think-your-devices-are-safe-new-ai-tool-can-fake-fingerprints-and-fool-biometric-systems/articleshow/66811042.cms>.

17 Binayak Dasgupta, *Personal data of over 7 mn Indians collected for BHIM sign-ups exposed online: Researcher*, The Hindustan Times, (June 01, 2020 08:21 PM) <https://www.hindustantimes.com/india-news/personal-data-of-over-7-mn-indians-collected-for-bhim-sign-ups-exposed-online-researcher/story-NZ8zhAyZootAjeEjsNe6vL.html>.

just being leaked but is also being sold on the dark web in some cases. The data of crores of Truecaller users (a mobile phone application) was available for sale on the dark web.¹⁸ This trend of data leak or data sale is not recent. Last year as well, the big market players such as SBI left its server without any password protection. So was the case with Justdial which had the information of 100 million users on an unprotected server. The personal data leak of the Facebook and Twitter users was also reported.¹⁹

The CamScanner app (an app that had a scanning feature which could be used to scan documents, identity cards, etc on the go) was under critical scrutiny because it was found to be containing malware which, according to the researchers of cybersecurity, could be used to gain the login credentials or show users intrusive ads.²⁰

These are some practical reasons why data protection law has become extremely important.

2.3. Insufficiency of Privacy Rules under IT Act

The most comprehensive law on data protection as of now is the IT Act read with the Privacy Rules. An argument may arise at this point as to why create new laws when there are rules dedicated to the same subject matter. However, these rules are not sufficient for enforcing a full-fledged data protection regime to enforce the right to privacy as a fundamental right. The following are some instances where the rules lack. It has also been shown how the lacunae are filled by the Bill.

Privacy rules were made under the IT act, where the definition of data was limited to that processed by the computer and which exists in the form as given in the IT act²¹. However, under the bill, the information in all forms is considered to be data. The application of privacy rules is therefore limited while that of the bill is wide. An example of the insufficiency of the definition of data in the Privacy rules is its non-application to schools or other educational institutions. Schools and educational institutions have immense data about their students that are collected from the admission till the graduation and sometimes even after it to keep a track of the alumni. The data includes educational

18 *Details of 4+ Crore Indian TrueCaller Users Available on Darknet*, Indianweb, (June 01, 2020) <https://www.indianweb2.com/2020/06/01/details-of-4-crore-indian-truecaller-users-available-on-darknet-report/>.

19 *8 biggest data leaks of 2019 that hit Indian users hard*, Economic Times, (Dec. 17, 2019, 04:10 PM) <https://economictimes.indiatimes.com/industry/tech/8-biggest-data-leaks-of-2019-that-hit-indian-users-hard/what-causes-data-breach/slideshow/72839190.cms>.

20 *Android CamScanner PDF app sent Malware to phones*, Bbc News, (Aug. 28, 2019) <https://www.bbc.com/news/technology-49495767>.

21 The Information Technology Act, No. 21 of 2000, Gazette of India, Extraordinary, pt. II, sec. 3(ii), § 2(1)(o).

qualifications, health-related information, financial information, information about the family, religion among others, all of which are sensitive personal data. The Privacy rules are not applicable since, if not processed via a computer, it will not be called data under the IT act. It is not necessary that all schools and educational institutions feed their data on a computer. However, this will qualify as data under the bill, thus guaranteeing that the students and their families are protected.

The IT act is for the recognition of electronic commerce and allied terms²², the privacy rules are ancillary to the same and are made in pursuance of this objective. The bill on the other hand specifically addresses the issue of data protection and there is no ancillary objective.

The rules do not provide any right to the data principals, which are now provided by the bill.

The Privacy rules apply to body corporate collecting data. The definition of body corporate is given in section 43A of the IT act and is limited to “companies and firms engaged in commercial or professional activities”. On the other hand, the bill is applicable to data fiduciaries which have been given a wide definition and include even the state.²³

The definition of sensitive personal data is also limited in the Privacy rules. It does not include data relating to religious or political beliefs, caste or tribe, intersex status, and genetic data.²⁴ For a country like India, these data form a part of sensitive personal data.

The bill has special provisions for children which are absent from Privacy rules.

These are just a few examples of why the Privacy rules are insufficient to cater to the present needs of data protection and why a separate law is necessary.

3. Comparison with other Countries

The researchers have analysed the laws of three countries that have employed different approaches to the law.

3.1. US: There is no expressed provision of the right to privacy. But it has been recognised by the courts on a harmonious interpretation of the first, fourth, fifth and fourteenth amendments to the US

²² *Id.* at Preamble.

²³ The Personal Data Protection Bill, No. 373 of 2019, Prs Legislative Research (2019), https://www.prsindia.org/sites/default/files/bill_files/Personal%20Data%20Protection%20Bill%2C%202019.pdf § 3(13) [hereinafter *the bill*].

²⁴ Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, Gazette of India, pt. 2, sec. 3(i) (April 11, 2011) § 3.

Constitution.²⁵ The US has sector-specific legislation but the Federal Trade Commission (hereinafter FTC) has been granted enforcement authority for such sector-specific privacy laws like the Controlling and Assault of Non-Solicited Pornography and Market Act, Children's Online Privacy Protection Act, the Telemarketing and Consumer Fraud and Abuse Prevention Act, etc.²⁶ In addition to FTC, there are other supervisory or regulatory authorities like the Department of Health and Human Services, Securities and Exchange Commission, Department of Commerce, etc. which supervise their respective sectors.

Further, the laws on privacy are present on both the federal and state level. In addition to the provisions in federal law which are common for all US citizens, each state provides for different laws which may even be in contradiction of each other. This results in some states having more stringent data protection regimes than others. For example, Massachusetts has more comprehensive and strict data protection regulations as compared to other states.²⁷

3.2. European Union: The EU had adopted two directives Directive 95/46/EC, which contained general principles of data protection, supplemented by Directive 97/66/EC which is limited to the telecommunication sector. The former resolution was repealed and replaced with the General Data Protection Regulation (hereinafter GDPR) in May, 2018. A unique factor in Europe is that it recognizes the right to data protection as separate from the right to privacy. The difference between these two rights was found in the case of *Antovic and Mirkovic v. Montenegro*²⁸ wherein the judges while giving two opinions (majority and dissenting) showed that the right to privacy concerns information relating to aspects of the person's private life. However, the right to data protection relates to all information of an identifiable person.

The GDPR is a single consolidated law on data protection and there are no additional sector-specific laws. Europe, therefore, follows an omnibus approach. GDPR is a sort of a base law which is required to be abided by all nations of the EU in their national laws.²⁹

25 *Roe v. Wade* 410 U.S. 113 (1973).

26 Shawn Marie Boyne, *Data Protection in the United States*, 66 Am. J. Comp. L. 299, 301 (2018).

27 Steven Chabinsky and F. Paul Pittman, *USA: Data Protection 2019*, ICLG, <https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa>, (last visited Apr. 13, 2020).

28 *Case, Antovic and Mirkovic v. Montenegro* (Nov. 28, 2017), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-178904%22%5D%7D>.

29 Commission Regulation 2016/679 of Apr. 26, 2016, O.J. 1995 L 281/31; Nicholas F. III Palmieri, *Data Protection in an Increasingly Globalized World*, 94 Ind. L.J. 297, 310 (2019).

3.3. Japan: In Japan, data protection is governed by the Act on Protection of Personal Information (hereinafter APPI), which was originally passed in 2003 and amended in 2017. Japan has employed a slightly different approach from GDPR. It applies to all business operators 'handling' personal data but excludes national and local government agencies or sectors, which are regulated by a different set of rules.³⁰ Japan's approach can therefore be categorised as a partial omnibus approach. Unlike the US's sector-specific laws, Japan has categorised the data handlers into two categories: the state and the business operators.

Based on this, it can be concluded that there are three approaches to data protection laws

- a. Sectoral: where there is no comprehensive law on data protection but each sector has a mechanism of regulating it.
- b. Omnibus: where there is one comprehensive and self-sufficient law which deals with everything related to data protection.
- c. Partial omnibus: where there is a basic law dealing with the general provisions of data protection, but each sector has its additional provisions and some sectors are not regulated by general law.

These approaches have been discussed to analyse which approach the bill has employed. Considering all the provisions, it is clear that India has employed an omnibus approach. The bill applies to all sectors including the state and is intended to be a comprehensive law. Some writers have appreciated the sectoral approach compared to the omnibus approach because it is tailored to the requirements of each sector and hence has proven to be more comprehensive.³¹ The researchers believe that making laws for each sector is not a practical option as of now because the need for data protection has heightened. So, an omnibus approach is a good way to start somewhere. The bill gives power to the authority to make regulations as and when required,³² which shall help solve the problem of making special provisions for different sectors.

Since the approach used by GDPR is similar to that used by the bill, GDPR has been occasionally used by the researchers to compare provisions and look for loopholes.

4. Analysis of the Bill

The bill is analysed on the basis of important provisions.

30 Hitomi Iwase, *Overview of the Act on the Protection of Personal Information*, 5 Eur. Data Prot. L. Rev. 92 (2019).

31 Dac Wiese Schartum, *Designing and Formulating Data Protection Laws*, 18 Int'l J.L. & Info. Tech. 1 (2010).

32 *The bill, supra* note 23, § 50.

4.1. Jurisdiction

The act when enforced will be applicable to the following³³,

- a. Data processed within territory of India
- b. State, citizens, a person or body or person incorporated or created under Indian Laws, which includes Indian companies.
- c. Extraterritorial jurisdiction can be exercised if data is processed within Indian territory in two cases: firstly, if the business is carried out in India or if data principals are systematically offered goods and services and secondly if data is processed in connection with profiling of data principals.

4.2. Personal data

Personal data refers to both online and offline data and includes any data that relates to the identity of the person (only natural) and also includes any inference that can be drawn from any combination of data that is used for profiling.³⁴ The word profiling in simple words is predicting what the data principal may or may not like based on his/her personal data. For example, information relating to one's locations and domicile can be used to predict ethnic background, social strata. Live location data can be used to determine the place of residence, workplace, etc.³⁵

4.3. Sensitive personal data

It is an accepted fact that what is sensitive and what is not depends on different contexts and different sociological factors.³⁶ Taking into consideration India's diversity, the term sensitive personal data is bound to have a wide scope. The term includes eleven types of data that relate to finance, health, sexual orientation, sex life, biometric, genetic, gender (specifically for transgender or intersex), caste or tribe, opinions, and association with certain religions or politics.³⁷ In addition, under section 15, any other type of data may be classified as sensitive. The bill has also provided guidelines for the authority to classify any data as sensitive giving it a prospectivity, which is essential since the term sensitive is dynamic in nature. The following factors should be considered before notifying any data as sensitive. The primary requirement is that the data should be of a personal nature.

33 The *bill*, *supra* note 23, § 2.

34 *Id.* § 3(28).

35 Big data in governance in India, <https://cis-india.org/internet-governance/files/big-data-compilation.pdf>, 08/04/2020.

36 Karen McCullagh, *Data Sensitivity: Proposals for Resolving the Conundrum*, 2(4) J. of Int'l Com. L. & Tech. 191 (2007).

37 The *bill*, *supra* note 23, § 3(36).

- a. Possibility of harm caused due to processing
- b. Data is so personal in nature that confidentiality is a reasonable expectation
- c. An identifiable class or category of data principals will suffer some sort of harm due to the processing of aforementioned data
- d. Whether the protection afforded to such data by ordinary provisions is adequate

The reason for including this term is that even if extensive rules for data processing are laid down, some type of data is so intricately related to an individual that the processing of such data is bound to cause greater harm to the individual. In order to control such harm, special rules will have to be made.³⁸ The sensitivity of data is a relative and variable term. What may be sensitive to one, may not necessarily be sensitive to another. Further, what may be sensitive today, may not be so tomorrow. The bill has tried to incorporate data that are generally considered sensitive in our country. Taking into consideration its variable nature, there is a specific provision for any future additions that may become sensitive.

There is yet another category of data mentioned in section 33 that is critical personal data, which has not been defined.

4.4. Consent

The meaning of 'consent' is provided in section 11 of the bill.³⁹ Without the consent of the data principal, no personal data can be processed and such consent is required to be given before or at the commencement of such processing. The essentials of valid consent are,

- a. Free: the bill has made reference to section 14 of the Indian Contract Act for defining the meaning of 'free'. Section 14 includes reference to sections 15, 16, 17, 18, 20, 21, and 22 of the same act. If the same definition is applied here, it means that the consent should not have been affected by coercion, undue influence, fraud, misrepresentation, and mistake.
- b. Consent should have been given after the data principal was duly informed of all information specified in section 7 of the bill.
- c. Consent should be specifically given for the purpose of processing data.
- d. It should be clear. The bill allows implied consent if there is

38 Ministry Of Electronics And Information Technology, A Free And Fair Digital Economy 31, https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf, [hereinafter *committee report*] (last visited Jun. 4 2020).

39 *The bill, supra* note 23, § 11.

an affirmative action, which indicates towards consent in that particular context

- e. The consent should be capable of being withdrawn.

Clause 3 contains three additional conditions for sensitive personal data.

Obtaining consent before processing in the manner specified under section 11 is an obligation of the data fiduciary. However, there are exceptions to this rule. Data may be processed without consent in the following situations⁴⁰,

- a. A function of the state, which is authorised by law
- b. A requirement under any existing law
- c. Order or judgement of any court or tribunal
- d. Medical emergency (includes threat to life/ severe threat to health)
- e. A threat to public health
- f. Disaster or breakdown of public order

This section encompasses both personal and sensitive personal data. However, personal data not being of sensitive nature may be processed without consent in situations given in section 13. These conditions are related to relationships between the data fiduciary and its employees.

Section 14 allows data to be processed without consent for reasonable purposes which are mentioned in the section. Any other reasonable purpose is to be added through regulations.

4.5. Special provision for children (section 16)

The bill has a special chapter for the protection of the children which has only one section. Section 16 generally states that data be processed in such a manner that will protect the interest of children and will be in their best interest. Additionally, it lays down specific guidelines as to how this data is to be processed. After verifying the age of the child, proper consent has to be taken from the parent or guardian of that child. Further, the section also lays down restrictions upon the guardian data fiduciary, which include those fiduciaries whose services directly impact children and who process large volumes of personal data related to children.⁴¹ Along with the restrictions, this type of data fiduciaries has the power to process data without consent

40 *Id.* § 12.

41 *Id.* § 23 (4).

in circumstances relating to counselling or child protection services. However, the data fiduciaries (not categorized as guardian data fiduciaries) are also required to incorporate mechanisms for proper verification of age and appropriate parental control.⁴²

Section 16 (5) is different from other corresponding sections of the bill (which are applicable to all principals) i.e., S. 4,5 and 11 even though the underlying purpose is the same. Section 16(5) being for the protection of the children exclusively debars the data fiduciaries from “profiling, tracking or behavioural monitoring of, or targeted advertising” and does not even leave scope for the guardian or the parent to give the consent for such practices. There are no such special restrictions in the general provisions under sections 4, 5, and 11.

According to the committee report, almost 1/3rd of the total internet users are children, so this adds to the specific provision with respect to the protection of children.⁴³ The purpose of including such a special provision is that children are a vulnerable group that needs a higher standard of protection and for this purpose, consent of parents or guardians is required or in some cases of very young age, it is even restricted.⁴⁴ Another important purpose is that India is a signatory to the United Nations Convention on Rights of the Child (CRC)⁴⁵ which makes it mandatory for India to provide special protection to children, as in the Preamble itself it is said that due to immaturity (both physical and mental), it is necessary that there be special safeguards for children, including appropriate legal protection, before as well as after birth.⁴⁶

In simple words, this chapter is for the protection of children specifically from the breach of data, as it is presumed under the law that children are not mature enough to know what is good for them, and what is not and they do not understand the consequence of the permission to use their personal data, making them easy targets for cyber-crimes or even general crimes like kidnapping, extortion, child trafficking, etc. If taking consent from a guardian is required, that person will get to know the purpose for which the data of their child is being used, and the law presumes their good faith towards the child.

4.6. Data Fiduciaries and their Obligations

The generally acknowledged meaning of fiduciary is “A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the

42 *Committee report, supra* note 38 at 44.

43 *Id.* at 49.

44 *The bill, supra* note 23, § 23(5).

45 *Committee report, supra* note 38 at 49.

46 Convention on Rights of the Child Preamble, Nov. 20, 1989, 1577 U.N.T.S. 3.

duties of good faith, trust, confidence, and candour⁴⁷ When preceded by the word data, it means that persons entrusted with data who are required to exercise good faith and maintain the trust created by such entrustment and to avoid using the data in a manner prejudicial to the owner which in this case is the data principal. The data fiduciaries can be categorised into two categories: person and state. The term person includes legal and juristic entities. Anyone belonging to these categories becomes a data fiduciary when he/she/it determines the purpose and means of processing personal data.⁴⁸

4.6.1. Principles behind Obligations of Data Fiduciaries

Chapter II deals with the obligations of the data fiduciaries. It was felt that in a fiduciary relationship it is necessary that the prohibitions and limitations of the fiduciary must be clearly laid down, which is why this chapter has been included.⁴⁹ The basic principle on which these obligations rest is the principle of fair and reasonable processing.⁵⁰ Being fair is a positive obligation that requires acting in the best interests of the privacy of the data principal while being reasonable is a negative obligation to ensure that data processing should not be done beyond the reasonable expectations of the data principal.

Another fundamental principle is the principle of limitation. The data principal entrusts information to the fiduciary for a specific purpose and the processing must, therefore, be limited to such purpose (purpose limitation). The principle of storage limitation, which envisages that the period of limitation for which data is stored should be limited to when the purpose is fulfilled, is also linked to the purpose limitation principle. Another principle linked to the purpose is that data quality must be in tandem with the purpose, meaning that it should be “accurate, complete and up-to-date”.⁵¹

The third principle is transparency. The benefit of transparency is twofold, firstly, it ensures fairness in processing and secondly, it holds the data fiduciaries accountable for their activities. Chapter VI of the bill is specially dedicated to transparency and accountability.

The committee report has highlighted that the obligations on data fiduciaries should be in two levels: firstly, general obligations that are to be placed on all data fiduciaries. Secondly, special or heightened obligations for certain significant fiduciaries or for special data principals.

47 *Fiduciary*, Black's Law Dictionary (4th ed., 1971).

48 *The bill*, *supra* note 23, § 3(13).

49 *Committee report*, *supra* note 38 at 51.

50 *Id.*

51 *Id.* at 62.

4.6.2. How these principles are applied in the bill

Section 5(a) contains the principle of fair and reasonable processing. The principle of limitation is enshrined in sections 8(1) (maintaining data quality), 5(b), 6, 9 (purpose and storage limitation). Transparency is discussed in sections 7 (ensuring fairness in processing through notice) and 10 (accountability). Apart from this, transparency and accountability have also been discussed in depth under chapter VI of the bill. With regard to organized obligations, chapter II has all the general obligations on the data fiduciaries. Section 16 is an example of a special obligation.

The penalties and compensation for the breach of these obligations have been discussed in chapter X of the bill.

4.7. Rights of the data principals

This is the part of the bill that has stemmed from the right to privacy judgement. All the rights are derived from articles 19 and 21 of the Constitution of India.

According to the committee report, there are three categories of rights, that is, rights to confirmation, access, and correction, rights of objections and restrictions, and right to be forgotten.⁵²

a. Right of confirmation, access, and correction

It is important to read these words in the same order because this is also the general order in which these rights can be exercised. The words are self-explanatory. The right to confirmation implies the right to inquire about the processing of data by the fiduciary. Secondly, on receiving such confirmation, the principal should be able to gain access to any personal data relating to him or her that is stored with the data fiduciary, which is ensured by the right to access. Thirdly, when such information is accessed, the principal has a right to rectify it through additions, substitutions, deletions, etc to ensure accuracy.

So as to ensure that these rights are not compromised the committee proposed that they should apply to all personal data collected for any purpose. In addition, it will also apply to any persons/entities to whom data was disclosed. Regarding the kind of information, the rights shall apply to information of cross-border transfer, duration of storage, and any other information required by the obligation of notice under section 7.⁵³

b. Rights of objection and restrictions

These rights are more like powers. Under this head, the right to

52 *Id.* at 68.

53 *Id.* at 70.

object processing when the processing is not in accordance with the legal provisions, right to object to direct marketing when data principal has not consented to it, right to object automated decision making, right to data portability which allows the data principal to obtain and transfer data stored with data fiduciary for his personal use.

c. Right to be forgotten

Right to be forgotten originated in the case of Google Inc v Agencia Española de Protección de Datos, Mario Costeja González,⁵⁴ and was codified for the first time in the GDPR. This right requires that data be erased in the following situations⁵⁵,

- i. When the original processing purpose is fulfilled.
- ii. The data principal has withdrawn consent.
- iii. The data principal has objected to the processing.
- iv. The statutory obligation requires such erasure.

The committee report admitted that the right was very important for upholding personal autonomy, but would also be in stark contrast to the right to know and the freedom of the press. Thus, a balance is required to be established between these conflicting rights.⁵⁶

Additionally, it was also felt that unlike the GDPR, where data fiduciaries apply the balancing test, in India, the test should be administered by the adjudicating wing of the DPA. Taking into consideration the enormity of the consequences of the exercise of such a right, only the adjudicating officer can order the enforcement of this right. The reason for taking such a step is because the right to be forgotten stands in stark contrast to article 19. Therefore, to balance both these rights, the enforcement has been made a little stricter.

These rights have been provided in chapter V of the bill from sections 17 to 21. The right to confirmation is provided under section 17 (1) (a). The right to access is provided under sections 17 (1)(b) and (c) and 17(3). The data principal can access the personal data processed or a summary of it and can also access the identities of other data fiduciaries who have got possession of his data by any data fiduciary.

Section 18 of the bill provides for the right to correction. The section however embodies four rights: the right to correct, the right to complete, the right to update, and the right to erase. So instead of referring to

54 Case C-131/12, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González, 2014 E.C.R. 317.

55 GDPR, Right to be Forgotten, Intersoft Consulting <https://gdpr-info.eu/issues/right-to-be-forgotten/> (last visited Apr. 21, 2020).

56 *Committee report*, *supra* note 38 at 80.

it as a right to correction, the term 'right to change' is more apt. The preceding condition to any such changes is that the change sought should be necessary in light of the purpose of processing. This right is exercised by sending a request for the change sought. Rejection of such a request must be accompanied by a proper and adequate justification.

The right to data portability is given in section 19 of the bill. The data principal has the right to portability of data with the data fiduciary even if data is obtained from a secondary source. In this regard, the primary source is the principal himself and the secondary source is when data is obtained or generated in the course of providing services or has been obtained through the profile of the data principal. A precondition for the exercise of the right is that it is exercisable when data is processed through automated means.⁵⁷ In simple words, it means that the data is processed by a largely automated equipment. The principal has the right to receive such data as well as allow its transfer to another data fiduciary. The benefit of this right is that data is available in a "structured, commonly used, and machine-readable format" making it easier for further storage and portability for the principal.

The right to be forgotten is given under section 20.

4.8. Enforcement

The test of the efficiency of any law is recognized when it is enforced. A law may seem very strong and sufficient, but if there is no proper mechanism for its enforcement, then the strength of that law will not be of any use. Thus, the efficiency of the law is directly proportional to its enforceability. Efficient enforcement is thus a tricky aspect of law making.

To ensure proper enforcement, a condition was stipulated that the data should be stored in India itself so that the enforcement of this law will be under the autonomy of the Indian authority and will not be dependent upon the permission of the foreign nations.⁵⁸ Thus, so as to make the enforcement authority more efficient and effective, it was recommended by the committee that the personal data of the individual will have to be stored locally and the consent or consultation from the Authority shall be required for the transnational transfer of data.

Chapter VII of the bill talks about the transfer of personal data outside India. Section 33(1) and (2) specifically talks about the restrictions on the transfer of personal data across borders. Whereas Section 38 provides for the exemptions and these exemptions come with the conditions, which are provided under Chapter VIII of the bill.

⁵⁷ *The bill, supra* note 23, § 3(6).

⁵⁸ *The bill, supra* note 23, § 33.

The committee report said that this law should make a clear distinction between the exemptions provided for the national security and law enforcement and hence we can see in the proposed bill that chapter VIII of the bill specifically mentions the exemptions in this law, and not only this, there is also a condition laid down by the committee that this exemption will be allowed only if it is authorised by any law or procedure laid down by such law. The exemptions which chapter VIII provides are that of state security, investigation and prosecution in contravention of law, for the purpose of legal proceedings and other research and journalistic purposes, only when it is expressly authorised by any law passed by the parliament or it complies with the procedure established by such law.

4.8.1. Structure of DPA

Chapter IX of the bill talks about the Data Protection Authority of India (hereinafter DPAI). Like other enforcement authorities set up under different acts like the Central Information Commission for the RTI act, NCLT for Companies act, etc. DPAI will be dedicated for the purpose of enforcement of the Data Protection Act. This will be in the form of a body corporate so as to acquire, hold, and dispose of the property and to enter into the contract.⁵⁹ The bill also talks about the composition and qualification for the appointment of the members along with the terms and conditions of the appointment in the said authority.⁶⁰ Just like in the case of the Companies act, there is NCLT and NCLAT, there will be a separate appellate body of the Data Protection Authority.⁶¹ If a person is not satisfied in any case he/she can always appeal to the appellate body, proposed under section 72 of the bill, and if dissatisfaction persists he/she can approach the Supreme Court.⁶²

4.8.2. Functions and powers

This authority will not only protect the interest of the data principals, but will also prevent any misuse of personal data and ensure compliance to the act along with promoting awareness about the data protection.

The bill clearly specifies that along with general monitoring and enforcement, the authority will also have to maintain the database on their website, in which they will upload the performance of the data fiduciaries.⁶³ Each and every individual can check the reliability of any data fiduciary. Governing data auditors and monitoring cross-border transfer of personal data are some of the very important functions that

59 *Id.* § 41(2).

60 *Id.* at § 42.

61 *Id.* at § 67.

62 *Id.* at § 75.

63 *Id.* at § 49(2)(c).

the DPA will have to carry out.⁶⁴ The primary functions that the DPA had to carry out which were recommended by the Committee report to be 1. Monitoring and enforcement, 2. legal affairs, policy and standard setting, 3. Research and awareness, and 4. Enquiry, grievance handling and adjudication.⁶⁵ There are certain codes of conduct that are drafted in the bill which the authority itself has to follow so for the safety of the individual and in certain circumstances the authority itself will have to act as data fiduciary.

The bill gives certain powers to the authority to issue certain directions, the power to call for information when required, and the power to conduct an inquiry along with certain conditions.⁶⁶

The Aadhaar Unique Identity system is a notorious topic especially in connection to data protection and privacy. It was suggested by the committee and was also one of the reasons for the imposition of the sanction to the various organizations that the UIDAI itself to be considered as the Data Fiduciary and be liable for any fault or unethical happening on its part if it ever happens.

Everyone has to work together to accomplish a better data protection regime which is in the favour of everyone. It is asserted that even after giving so much power and regulations, the authority alone cannot bring the changes required. To ensure this the committee has suggested categorising data fiduciaries into significant data fiduciaries. These are data fiduciaries but they carry a risk of significantly harming the data principals.⁶⁷ There are certain criteria which are to be laid down to determine whether a data fiduciary can be categorised as significant data fiduciary or not. The parameters which are to be followed are the quantity of personal data processed, the nature of personal data processed, the type of processing activity carried out and lastly the risk of harm resulting from such data processing.

So, it is expected from the significant data fiduciaries to follow certain additional obligations as compared to the non-significant data fiduciaries, like registration with the DPA, Data Protection Impact assessment, record keeping, data audits, and appointment of data protection officer.

5. Conclusion

5.1. Expected impact of the bill

This bill will directly and definitely affect many businesses in India since most of the businesses involve the collection of personal data and

64 *Id.* at § 49(2)(g).

65 *Committee report*, *supra* note 38 at 153.

66 *The bill*, *supra* note 23, §§ 51, 52, 53.

67 *Id.* § 26.

processing. Some of the provisions of the bill especially the requirement of localisation of personal data, will increase the compliance cost of all businesses. However, according to the latest union budget of 2020-21, the government of India provided incentives for the creation of data center parks in India, so that the data can be stored locally and the economy can generate revenue from this source as well.⁶⁸ In addition to this, the classification of the data fiduciaries which the government will do on certain criteria discussed above will add on to compliance costs of some data fiduciaries. Take for example appointment data audit and appointment of data officers under sections 29 and 30. This requires procedural changes to incorporate and decide the working of these new officers as well as financial changes. It will also increase the workload of the company. Moreover, many of the companies being new to the data protection scheme would not have much experience in this regard as a result of which these companies would have to arrange some training as well as invest in new technology or equipment to enable them to comply with all the provisions of the bill. However, on the brighter side, this will generate more employment since there will be a demand for experts in this regard.

As discussed in previous sections, the bill provides for the storage of data within its own territory for the purpose of efficiency and effectiveness. The 2018 bill was opposed by many corporate giants on this point but the same was incorporated in the 2019 bill as well. The corporate giants were resisting this law due to localisation requirements because they are required to take the approval of the DPAI for cross-border transfer of data. Whenever there is any business transaction in which the data is required to be transferred across the border, they will have to take the government's approval which will directly affect the autonomy of the business. Moreover, the power to classify the data into 'critical personal data' is also with the central government thus further decreasing the autonomy.

However, along with the drawbacks, there are certain positive effects of the bill. The consumers' confidence in the company will increase since they will be assured that their data is safe with the company which will automatically strengthen the trust and confidence of a consumer in the company thus adding to the goodwill of the company compared to the companies which are not compliant to the act.

Moreover, the breach of data protection will result in sanctions, because of which there will be improved compliance with the data protection bill which will add to the security of every individual.

68 Iqbal Khan & Paavni Anand, *The New Data Protection Bill, 2019: Impact on Strategic and Financial Investments in India*, Mondaq, (Feb. 6, 2020) <https://www.mondaq.com/india/privacy-protection/891100/the-new-data-protection-bill-2019-impact-on-strategic-and-financial-investments-in-india>.

5.2. Loopholes and suggestions

This section shall discuss certain loopholes that the researchers have found in the bill. Some suggestions to remedy these have also been put forward.

Right to be forgotten is available under section 20 of the bill. The first and foremost point of consideration is the difference between the right of erasure provided under section 18(1)(d) and the right to be forgotten under section 20. In the GDPR, the right of erasure and the right to be forgotten are synonymous terms.⁶⁹ However, section 20, even though it is named as a right to be forgotten, only allows for restriction or prevention of continuing disclosure of personal data, which is much narrower than the right to be forgotten as mentioned in GDPR. Section 20 contains three grounds when the right can be exercised: when the purpose has been served, when consent has been withdrawn and lastly when processing is in contravention of the act or existing laws. On comparing the right to be forgotten with its contemporary GDPR, the researchers have come to the conclusion that the right provided in the bill is very limited. The right to be forgotten is a holistic right that includes the individual's ability to "erase, limit, delink, delete or correct" data.⁷⁰ The right provided under the name of the right to be forgotten is limited to the right to limit. The researchers suggest that either the name of the right be changed so that it corresponds to the content of the right or the actual right to be forgotten be included in the bill. More stress is put upon the second suggestion in light of the rising need for the right to be forgotten all over the world.

Another point of concern with regard to the right to be forgotten is that data fiduciaries are under an obligation to collect data that is essential for the purpose of processing (section 6) and cannot retain data once the purpose is fulfilled and are also required to delete the data. On the other hand, data principals have a right to be forgotten under section 20. However, section 20 stipulates that the principal can "restrict or prevent continuing disclosure of such data". This difference in terms raises an anomaly. If a data fiduciary complies with his obligations, the data will be deleted but if it does not and the principal enforces his or her right, the data can only be restricted or prevented from continuing disclosure. Such anomaly can be corrected by including a wider right to be forgotten.

With regard to section 12, which provides for grounds for processing personal data without consent, it is suggested that some mechanism

69 I-Scoop, *The right to erasure or right to be forgotten under the GDPR explained and visualized*, <https://www.i-scoop.eu/gdpr/right-erasure-right-forgotten-gdpr/> (last visited Apr. 23, 2020).

70 Michael J. Kelly & Satolam David, *The Right to Be Forgotten*, 2017 U. Ill. L. Rev. 1 (2017).

of notice prior to such processing should be added. The reason is that the section includes even sensitive personal data and the grounds provided in the section are wide and open to interpretation. Therefore, it is suggested that any processing activity of sensitive personal data taken up under section 12 should be informed to the DPA prior to such processing. Once, permission is granted only then should the processing begin. A similar suggestion is made for section 16 where guardian data fiduciaries can process data without consent in special circumstances, which remain undefined. In this regard, section 14 which allows for processing without consent for reasonable purposes is much clearer and precise and not prone to numerous interpretations. It contains clear grounds of what constitutes a reasonable purpose and how it is to be determined.

Under section 11(3)(a), there is a provision that data fiduciaries should inform principals about significant harm likely to be caused by the processing. The question here is, why restrict this to sensitive personal data. Such a provision is suggested to be included for all personal data.

The bill has various categories of personal data. Of these, the term critical personal data under section 33 has been left to be defined by Central Government. The problem here is that the purpose behind including this category is unclear.

In the GDPR, the powers of the supervisory authority, defined under article 58, are very systematically divided under three heads: investigative, corrective and advisory. But so is not the case in section 49 of the bill, where there is no bifurcation of powers or systematic arrangement. Moreover, in some cases, there is a very narrow description of the power in the bill. For example, under advisory powers, there is very limited and general power defined for the authority, whereas in GDPR very explanatory and specific powers and functions are defined for the supervisory authority.

In GDPR, the appropriate actions to be taken by the authorities under different breaches are expounded very clearly. Whereas in the bill, the DPAI has to take “appropriate actions”, a term which is vague. Only in very limited circumstances, the appropriate actions to be taken by the authority are laid down. It can be said that the authority has been given discretionary powers in this regard. With this the problem can arise in cases of influential parties where there will be no proper punishment whereas if there will be even a slight chance of biasness, that party will suffer greatly due to the language used in the bill. One more thing that the bill is lagging is that the GDPR provides for the power to warn in case of an anticipated breach. This power is not given to the DPA. In case the authority finds that there is a possibility of a

data breach in any case, it cannot issue a warning to the data fiduciary in advance.

Other than these few loopholes, the act is a good step towards data protection. Some other impediments may arise once it is enforced which the researchers trust the court will resolve.

Democracy In India: The Untapped Potential of a Liquid E-Democracy Within the Country

***Mr. Athul Vijay**

Abstract

Democracy is the founding pillar upon which the system of a country is built upon. India is a country which has a huge number of ethnicities and cultures, each fundamentally different from the other. Voting is one of the best features of a democracy as it gives the voting power in the hands of the people. Therefore, the question arises whether the process of democracy is being executed properly within the country or if a change is required to ensure that the will of the people is directly reflected on the way in which the government functions.

The researcher after adequate research into the system of voting and democracy within the country, has come to the conclusion that the current system of voting has major issues, which may lead to the concept of democracy being watered down and the voting power being concentrated on the hands of a particular group or community within the country. The researcher aims to explore the merits and demerits of the voting systems currently in practice throughout the world, and which voting system would be most beneficial to India, keeping in mind the varied cultural and political beliefs of the people of the nation. Every nation has its own unique form of democracy and have tailored the voting system to suit the needs of the population within their country. Hence, determining a voting system for the world's largest democracy is an important task. After perusing through several authorities which dealt on the matter, the researcher has come to the conclusion that a major change in the current system of voting and democracy is needed to ensure that the will of the people is adequately represented.

KEYWORDS: Liquid Democracy, Borda-Condorcet, Voting, Blockchain, Representative

1. Introduction

Democracy is one of the most important institutions within the country. Today, most countries adhere to the democratic institution to ensure that the liberties of its people are preserved and also to ensure that the will of the people has always been met. The first experiment in

democracy was Athens in 508 BC. Owing to the relatively low population, the Athenians employed a form of direct democracy which had enabled the people to vote directly on matters relating to public policy within their country. Any citizen was eligible to speak in the assembly as long as they were citizens of the country. Following the downfall of the Greek, the Romans took forth the democratic experiment and had devised a new method, representative democracy, wherein citizens had elected representatives to represent their interests in the Roman Senate. This method was devised owing to the relatively low number of Roman citizens eligible to vote and had used their citizenship to ensure the voice of the non-citizens were also heard.

In India, following gaining independence from the British, the democratic institution has been a parliamentary republic from the inception of the Union of India. But today, the population of India has reached 1.38 billion, making it the largest democracy in the world. The huge population of the country will lead to opinions of a vastly varied nature from all sections of society. Ensuring that the voice of each and every citizen is heard without any discrimination in a country with such a humongous population is no easy feat. But it has to be done to ensure that Article 14 of the Constitution stays true.

2. Problems With the Current System of Voting

2.1 The First past the post voting system

The first past the post voting system is the current voting system within the country, where a candidate with the highest number of votes win the election¹. Here, suppose X, Y and Z are three candidates who are fighting for a seat. In the first past the post voting system, if X gets 40% of votes, Y gets 30% and Z gets 30%, then X automatically wins the election. The problem with such a voting system is that 60% of the voters had voted against the said candidate and the wishes of the 60% of people who had voted against candidate X will be neglected. This creates another dangerous trend called vote cutting. In vote cutting, the voters of Y will vote for Z for the sole purpose of defeating X. Here, an anti-democratic trend has begun, wherein the people don't vote for their preferred candidate, thus defeating the purpose of elections.²

2.2 The Instant Runoff voting

An alternative voting system to The First Past the Post voting system would be the Instant Runoff system which are practiced in countries such as Australia. Instant runoff voting (IRV) is a type of ranked voting

1 First Past the Post www.electoral-reform.org.uk (16 December 2019)

2 Blau, A. Fairness and Electoral Reform. *The British Journal of Politics and International Relations*, 6(2), 165–181 (2004). <https://doi.org/10.1111/j.1467-856X.2004.00132.x>.

system used in elections comprising of a single seat involving multiple candidates. Instead of just voting for a single candidate, voters in such elections can rank the candidates in order of preference.³

Ballots are properly counted for each voter's popular choice. If a candidate has more than half of the vote based on the initial choices of the voters, that candidate wins. If not, then the candidate with the least number of votes is taken out from the running.

The voters who selected the candidate who lost as their initial choice then have their votes compiled with the total of their subsequent choice. This continues until one candidate has secured a majority of more than half of the total votes. When the contestants are reduced to two, it has become an instant runoff that allows a comparison of the top two candidates head-to-head. Compared to first past the post voting, such a system can reduce the effect of vote-cutting when multiple candidates earn support from voters who think alike. Here, a majority is fixed and such a majority has to be passed to be declared the winner. A major criticism of the Instant runoff system was that the votes have to be hand counted, and it creates confusion for the local people, plus making it more expensive. A major problem of the instant runoff voting system is that it becomes hostile to multi candidate elections as the precedence of voters is given more consideration than the preference⁴.

2.3 The Borda - Condorcet system

The Borda Condorcet system is an entirely unique system which combines aspects from the Borda count and Condorcet system to create a hybrid vote analysis method. The Borda Count is a single winner political decision strategy wherein electors rank applicants, as in an instant runoff and numerous other political decision strategies⁵. The result is then assessed in two phases: a Condorcet stage where the most grounded applicants are chosen, followed by a Borda stage where we distinguish the victor.

In the Condorcet stage, we distinguish who are the strong candidates. We recognize the solid possibility to be the littlest gathering of candidates with the property that everyone inside the gathering would beat everyone outside the gathering in two-man races⁶(This is

3 Stensholt, Eivind, Anomalies of Instant Runoff Voting. NHH Dept. of Business and Management Science Discussion Paper No. 2020/6 (June 23, 2020) Available at SSRN: <https://ssrn.com/abstract=3633868> .

4 James P. Langan, *Instant Runoff Voting: A Cure That is Likely Worse Than the Disease* *William and Mary Law Review*, volume 46, issue, 4, (February 2005).

5 Emerson, Peter "The original Borda count and partial voting". *Social Choice and Welfare* (1 February 2013) doi:10.1007/s00355-011-0603-9. ISSN 0176-1714. S2CID 29826994 .

6 Gehrlein, William V.; Valognes, Fabrice "Condorcet efficiency: A preference for indifference". *Social Choice and Welfare* (2001) doi:10.1007/s003550000071. S2CID 10493112.

likewise frequently called the Smith set, after the mathematician John H. Smith.) For example, on the off chance that there is a Condorcet up-and-comer X, at that point X is the main solid applicant.

We at that point eliminate all competitors who aren't solid from the voting forms, and proceed onward to the Borda stage. The victor is processed with the decreased polling forms dependent on Borda's strategy that apportions every competitors' points depending on their positioning. For example, on the off chance that there are five applicants, at that point Borda proposes to give a candidate five points for the lead position on a citizen's voting form, four points for second spot, etc.

2.4 The Problems with s Representative Democracy

India is country with more than 1.3 billion people of varying thought process. Every state, every constituency has an untold number of variations between the people and furthermore within the various thought processes of the people. Clubbing the people of the country as constituencies would be extremely unfair owing to the nature of the diversity within the fibre of every state. In a purely representative democracy, a single candidate is being voted by a majority of the people, but what about the people who voted against that particular individual? Their voting power is lost in translation, and hence their will is not directly represented to the House. This can result in a majority of the people losing their say on the issues of law making in the country. Furthermore, the major incentive of the party is to gain as much vote as possible. Therefore, it is human for political parties to have selfish reasons. Political parties cannot be trusted to represent the will of the people, as there will always be a sizable minority who voted against the current political power⁷. Delegating your voting power to a representative will result in an absurd amount of power being in the hands of that particular representative who may or may not execute the will of the voter. In such a system, the individuality of a voter is lost and the concept of democracy being a voice for all the people within the county becomes watered down,

A representative democracy cannot be trusted to execute the will of the people only as it is the party that dictates how the particular representative should act. Since the representative is standing on behalf of a party, there is absolutely no surety that the representative will execute the will of the people. Numerous corruption scandals within governments including unchecked nepotism and party favouritism. This leads to a perversion of democracy. This form of democracy hinges solely on the character of the representative which is a poor backbone

7 Vivek Dhupdale, Problems and Prospects of Indian Democracy: An Analysis of working for designing processes of change (2014).

of any democratic system. Voting power is extremely important in India, owing to the varied nature of the people within the country. Hence, a representative democracy is ill equipped to handle the will of 1.3 billion people within the country.

3. A System Out of Time

A representative form of democracy was viable in the times when transportation and communication was an extremely long and tedious process within society. But today communication happens at ridiculously high speeds, thus building a viable framework in which the will of the people of the country can be registered with ease.. Republicanism was also a key factor which helped the birth of a representative system, as it held the view that a direct rule by the people can amount to a mobocracy where a mob rule would exist which in turn would lead to problems within society, especially for minorities within the country. Furthermore, policy and law making is an extremely tedious process and thus requires an enormous amount of effort if it isn't delegated to certain individuals. People in society cannot be expected to engage all their time in the process of law making as they have their lives and daily occupations to get to. Therefore, a representative system was deemed to be the best possible system to facilitate the needs of the early democracies.

But a major problem with such a system is that too much trust is put on one single person to represent the people of a particular society⁸. Hence, the individuality of a voter is lost, and there is a huge amount of power concentrated in the hands of an individual, which is not very different from an oligarchical rule. Politicians cannot be expected to be people of exemplary character as they are human in the end. Therefore, such concentration of power in their hands would be extremely dangerous if the wrong person is elected for the job. The evolution of media and the rapid exchange of information provides an ample platform for manipulation by parties who wish to serve their own nefarious ends. Corporations and parties team together like advertisers and advertising platforms to accomplish their own goals which the public at large remains woefully ignorant of. Such a symbiotic relationship between corporations, parties and media creates a symbiotic relationship wherein the people involved are not accounted for at all and hence the very purpose of having a democracy is diluted down or in some cases, pushed aside completely.

4. Liquid Democracy: A Democracy for Today

A liquid democracy is a form of democracy that merges features

8 Geethika Sood, Law and Politics, *Facta Universitatis, PARLIAMENTARY DEMOCRACY IN INDIA: LEGAL ISSUES AND CHALLENGES* (No 1, 2017 ed. 2017).

from representative democracy and direct democracy to put forth a hybrid structure, wherein it is up to the voter to delegate his/her power to their representative or not. Here, if any voter does not want their representative to have their voting power, the individual may withdraw their voting power from the representative and vote themselves, thereby giving themselves the power of interpretation of the issues of the country. This can happen if you disagree with the stance of your representative on certain issues or if you feel like your representative may not be the best person to represent your best interests at heart and vote. Hence, the individuality of voters can be maintained and a better form of democracy would be formed, wherein every vote truly counts.⁹ Voters may also allow another delegate to vote on their behalf, thereby keeping the voting power flexible, while completely under the control of the voter. Delegation of votes can be domain specific, wherein voters can transfer their voting power to different people in different circumstances.

In India, such a system would be extremely beneficial, as the voting power is firmly in the hands of the people. Majoritarian politics becomes obsolete as the individuality of the voter remains in all issues of governance. Liquid democracy as a concept have been tried out in places such as Friesland, Germany and in Vallentuna, Stockholm. Although these practices were small and contained through a specific region, it nevertheless has shown promising results in enabling the citizens of the region to have a bigger say in how the voting process is done within their particular region.

5. Combining Liquid Democracy and The Instant Runoff Voting System Within India

The Representation of Peoples Act, 1951 is an extremely important piece of legislation which governs electoral laws within India. Article 245 of the Indian Constitution declares that Parliament has the power to make laws for the entire country of India or just a specific place and the State Legislature has the power to enact laws. Now, in a system of liquid democracy, the Article should be modified such that although the law-making power exists with the Houses of Parliament, the ability to pass such laws should not solely exist with Parliament. Article 105 of the Indian Constitution puts forth the responsibility of defining the responsibilities of an MP and committees on Parliament wherein it is defined that the powers, of each House of Parliament, and of the members and the committees of each House, shall be defined by Parliament by law from time to time ¹⁰. Although the duties and

9 Schiener, Dominik. "Liquid Democracy: True Democracy for the 21st Century" <https://medium.com/organizer-sandbox/liquid-democracy-true-democracy-for-the-21st-century-7c66f5e53b6f> (November 2015).

10 The Constitution of India, https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

responsibilities of an MP is not well defined, two of the major functions of an MP include the legislative and the representative responsibilities. Article 105 should be modified such that the authority to pass laws, should exist with the people of India as well should they chose to do so¹¹. A separate provision within the article containing the ability of the citizens to take back their voting power from their representative, and delegate it to another person or to vote on the topic themselves. Such a change would be effective as the citizens get to maintain a reasonable amount of individuality in the voting process.

The Representation of People's Act, 1951 deals with the voting process, which has been the system determined by the Election Commission of India. The voting system currently in practice throughout India is the First Past the Post voting system wherein voters vote for a single candidate, and the candidate who secures the greatest number of votes, win. As mentioned, previously the candidate with the greatest number of votes does not necessarily have to be the candidate favoured by the voters owing to its rigidity of votes. Hence, employing a system of Borda-Condorcet counting combined with a liquid democratic system will ensure that the opinion of the majority is taken into consideration, and all the preferences of the people are taken into consideration by giving them more flexibility in terms of candidate choices.

6. Blockchain Voting in India

The unprecedented rise of technology today has given new alternative options to the system of conventional voting. Online voting is a popular concept which is starting to become popular in the word right now owing to the rise of blockchain technology and the high encryption it starts to offer. The use of blockchain voting have been highly advocated by states such as Andhra Pradesh, Chhattisgarh, Delhi and Karnataka wherein State governments and legal organizations have begun advocating a change to blockchain voting. All voting practices are detailed within the Representation of Peoples Act, 1961 specifically Chapters IV and V of Part II of the Act and Chapter III of Part VI of the Act. Section 128 of the Act deals with the maintenance of secrecy of voting which is a highly important process in democratic elections to prevent coercion of voting and voting manipulation. In a blockchain based voting system, each vote is given the status of a crypto currency which then would be assigned to a specific address. The voter can then send this cryptocurrency vote to whichever candidate they want to vote for.

11 The Representation of Peoples Act, 1951,

http://legislative.gov.in/sites/default/files/04_representation%20of%20the%20people%20act%2C%201951.pdf

This method is safe and secure due to the encryption practices of such a system which prevent tampering from third party sources. One of the main criticisms of the Borda-Condorcet system was that the voting process is such a system was much too complex for it to be practically implemented, but with blockchain technology, the vote counting process is highly simplified and more robust in nature¹². Section 59 of the Representatives Act will have to include blockchain systems within the purview of ballot voting and Sections 60-67 of the Act will have to be duly amended or should be interpreted so as to facilitate a Borda-Condorcet voting system built upon blockchain. As crypto currency is gaining traction within the country, the implementation of a highly regulated and secure blockchain voting system must be considered as a viable alternative from the current system of physical ballot voting as it will help in higher voter turnouts and would prove to be a cheaper alternative than conventional elections owing to the simplicity of the process. The coronavirus pandemic has made it extremely hard to conduct elections owing to the massive amount of physical presence needed to conduct such a process, and investing in a blockchain system would highly benefit countries to maintain a safe physical distance between its citizens as well as to cut down on the manpower needed to conduct the electoral process.

7. Conclusion

Democracy is an extremely volatile institution which requires constant change according to the times. As Abraham Lincoln said, 'The ballot is stronger than the bullet'. A liquid democratic e-democracy based on a Borda- Condorcet voting system is one of the most viable systems today as it offers a more robust form of voting while maintaining the preferences of the people. Such a system would result the degradation of party politics and would usher in the age of a new form of politics where the freedom of choice of the individual is expounded upon. Such a system will also prove beneficial to ensure that religious differences and regional sentiments do not play a role in the voting process.

¹² Ishaan Srivastava & Shraddha Phansalkar, *Secure and Transparent Election System for India using Blockchain Technology*, Research Gate, (2018).

RTI Amendment and Rules, 2019: An attempt to paralyze the RTI Act, 2005?

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Abstract

The right to information is a fundamental right stemming from democracy's very roots, and it is the bedrock of a stable liberal democracy. Citizens of India who for centuries were under a colonial rule were denied any information regarding the functioning of the state. Even after independence for almost six decades, the culture of official secrecy existed in the functioning of the Indian state. Which in turn hampered the progress of India, recognising this major flaw in governance the parliament of India passed Right to Information Act, 2005 for making the state machinery more transparent and accountable. This was seen as a historic move as this act gave power to ordinary citizens a right to ask questions to the government, evident by the fact that almost seventy-five lakh citizens asked questions from their government every year since this act was passed. In 2019 The controversial RTI Amendment has brought about a change in the functioning of the Chief Information Commissioners (CIC) and Information Commissioners (ICs) by decreasing their Salaries, Tenure and Parity-level. Their allowances are to be decided by the Central government also the rules regarding the individual category have been relaxed. This amendment is seen as an attack on the principles of accountability and the of federalism. This article seeks to critically examine the 2019 Amendment (including rules) to the RTI Act, 2005, by scrutinising the amended provisions of the act and their impact on ordinary Indians.

1. Introduction

“Accountability is the essence of democracy. If people do not know what their Government is doing, they cannot be truly self-governing. The national security state assumes the Government secrets are too important to be shared, that only those in the know can see classified information, that only the president has all the facts, that we must simply trust that our rulers of acting in our interest.”¹

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1 Garry Wills, Bomb Power: The Modern Presidency and the National Security State (2011).

'Transparency' is considered as a strong pillar for good governance by many public administration experts. In India, unfortunately, the culture of secrecy in the affairs of the state has been prevailing since colonial times. The Official Secrecy Act, 1923 which was one of the earliest laws for the protection of secrecy of state affairs. It was enacted by the Crown to increase its influence over its 'colony' i.e., India. This law provided the framework to deal with espionage, sedition, and other potential threats to the integrity of the nation, and if found guilty, a person could be punished for up to fourteen years or fine or both.² The Act was arbitrary because, firstly, it kept the term 'secret information' undefined, and secondly, the Act did not specify the kind of information which falls within the ambit of 'beyond public domain.' This colonial law was not repealed and existed even post-independence, thus continuing the culture of non-accountability and lack of transparency in the functioning of the Indian state. As a result, the Government, especially the bureaucracy began to abuse their powers, which ultimately diluted the democratic structure of the nation. This atmosphere made the life of a common man difficult and there was a public demand for greater access to the information held by public authorities. In 1996, a civil society group called, National Campaign for People's Right to Information (NCPRI), was founded to advance the passing of law on RTI. Subsequently, Tamil Nadu became the first state in India which enacted the law with relation to right to information. Following that, in 2004, the then-United Progressive Alliance (UPA) government established the National Advisory Council, which proposed amendments to the Freedom of Information Act of 2002, and the RTI Bill 2004 was introduced and passed in parliament. 'Right to Information Act, 2005' granted the right to an Indian citizen to obtain and access information from 'public authorities,' making the state machinery more accountable, transparent, and democratic in its functioning. Under Article 19(1)(a), which guarantees freedom of speech and expression, courts have also recognised the Right to Information as an aspect of fundamental rights.³ In *Romesh v State of Madras*,⁴ it was held by the Supreme Court that freedom of speech and press is the foundation for all democratic organizations without which the proper functioning of an elected democratic government is not possible, the same rationale was also recognized in *State of Uttar Pradesh v Raj Narain*⁵. Further, an independent press is a benchmark of a strong democracy.⁶ The Supreme Court in *Prabhu Dutt v UOI*,

2 K. Deepalakshmi, 'All you need to know about the Official Secrets Act', The Hindu, Mar. 7, 2019, <https://www.thehindu.com/news/national/all-you-need-to-know-about-the-official-secrets-act/article26458006.ece>.

3 Ramesh Kumar, 'Right to Information in India: Issues and Challenges', IX C.P.J.L.J. 113 (2019).

4 *Romesh Thapper v. State of Madras*, AIR 1950 SC 124.

5 *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865.

6 M.P. Jain, *Indian Constitutional Law* 991 (Lexis Nexis Butterworths Wadhwa 2009).

7 *Prabhu Dutt v. Union of India*, AIR 1982 SC 6.

propounded that the freedom of the press also includes the right to know the news and information of government's administration.

2. 2019 Amendment

The Amendment bill had been proposed by Dr. Jitendra Singh (Minister of State) in Lok Sabha, under the bill, the amendments were made with regards to the Sections 13, Section 16 and Section 27 of the original acts. Section 13 of the RTI Act, 2005 specifies the Chief Information Commissioner and Information Commissioner's term of office. Section 16 of the RTI Act of 2005 specifies the conditions of service and reappointment of the Chief Information Commissioner and state information commissioners. The primary changes within the amendment are related to tenure, salary, and deductions of Chief Information Commissioners and Information Commissioners. The bill received assent of the President on August 01, 2019.

3. The Criticism of Amendment and Rules

The quote "Power tends to corrupt and absolute power corrupts absolutely"⁸, aptly describes such controversial legislation. This Amendment is also being termed as "RTI elimination bill", 'Designed to kill RTI' by RTI activists and opposition parties.⁹ The RTI Act works upon the Doctrine of Checks and Balances, wherein the citizens have the right to extract information from any public officer and thus, the public officers cannot work arbitrarily. The RTI Amendment Act, 2019 dilutes the application of the Checks and Balances Doctrine. The amendment focused on amending Section 13, Section 16 and Section 27 of the RTI Act, 2005 which is related to tenure, salary, and deductions of ICs. The fixed tenure, salary, and deductions are essential features of an officer's independence from the Government. If the strings of these features are put in the hands of Government, which is the main objective of this amendment, then it eventually encroaches upon the independence of the working of the public authorities. The independence and non-interference of the government bodies in the working of the authorities result in the effective functioning of these authorities and the RTI Act. Further, it is also imperative to note that the ruling party was facing a backlash from the RTI activists and renowned scholars across India for a hasty passage of the RTI Amendment Bill, 2019 as it was not referred to Rajya Sabha's review committee for their views and comments. To end the unrest caused, the Central Government all of a sudden notified the Rules related to the Amendment Act, 2019, which proved to be another nail in the coffin.

8 Lord Acton, 'Acton-Creighton Correspondence', Oil Liberty Fund (Apr. 5, 1887), <https://oll.libertyfund.org/titles/2254>.

9 The Wire Staff, 'RTI Amendment Bill Passed in Rajya Sabha', The Wire, Jul. 25, 2019, <https://thewire.in/government/rti-amendment-bill-passed-rajya-sabha>.

“The Right to Information (Term of Office, Salaries, Allowances and Other Terms and Conditions of Service of Chief Information Commissioner, Information Commissioners in the Central Information Commission, State Chief Information Commissioner and State Information Commissioners in the State Information Commission) Rules, 2019 is applicable on all new appointments”, as notified in the gazette. The government did not ask the CIC’s comments before implementing the Rules. Furthermore, the Rules violate the Pre-Legislative Consultation Policy of 2014, which requires that all drafted rules be made available to the public for suggestions and comments prior to notification.¹⁰ The RTI Act of 2005, Section 4(1)(c), requires the government to reveal and disclose all relevant information while formulating critical policies that impact the public,¹¹ thus, the RTI Amendment also directly affects the citizens and should have been disclosed for public comments. No such information was published by the Central Government, as the drafted Rules were also not published in the public sphere inviting comments and suggestions on the same.

The Amendment and Rules have created a problematic situation as their combined reading makes it clear that the RTI Act, 2005 is now turned into a Toothless Tiger. Despite the fact that the 2019 Rules established the tenure and salary of the CIC and ICs, the Amendment reduced the tenure of the CIC and SICs to three years, which has been opposed by many RTI activists who believe that the longest tenure is required for the ICs to function fearlessly. Further, as per the Rules, salary of CIC is unchanged which is fixed at 2.5 lakh per month, however, the salaries of ICs have been reduced by 25k to 2.25 lakh per month. It is pertinent to note that the Rules are not retrospective, which means there will be ICs of two different pay-scales, which creates an income-based hierarchy in the working of RTI. The RTI, 2005 had placed CIC and ICs at the same level to avoid any hierarchy in the functioning of Act which has now been done away by the means of Rules, 2019.

Another facet of Rules is that it has downgraded the level of CIC from being equal to the Chief Election Commissioner to a Cabinet Secretary. ICs are equated with the Civil Servants of the same pay-scale. This rule hampers the power of ICs in extracting information, as in bureaucracy it is an unlaidd norm to equate different authorities based on their pay-scale. Due to these rules, CIC and ICs will not able to create an authority level on the Senior level government servant for providing the information under the RTI Act.

10 Vivek Bhatnagar, ‘Centre Changed RTI Law and Rules on Salaries, Tenures Without Consulting CIC’, *The Wire*, Nov. 25 2019, <https://thewire.in/government/rti-amendment-cic-consultation>.

11 *Id.*

Rules 21, 22, and 23 of the Rules, 2019 are the most arbitrary and unreasonable rules which directly heads a blow at the objective of RTI Act, 2005. Rule 21 is legally binding, granting the Central Government unrestricted authority to decide on other allowances and service requirements not covered by the Rules. Rule 22 empowers the Central Government to relax any of the Rules that apply to any class or group of people in the future at its discretion. Further, Rule 23 has given the power to the Central Government of being the final and supreme authority for the interpretation of these Rules. Moreover, The Central Government is encroaching on the power of State Government by deciding the allowances and other monetary benefits for the State ICs who draw a salary from the State Consolidated Fund on which the Central Government has no authority. As per these rules, the government can give preferential treatment to the ICs and CIC having lack-lustre or pro-government performance,¹² by re-appointing them or providing them with any other benefits. Therefore, the Central Government is indirectly trying to gain control over the system established by the RTI Act, 2005.

4. Government's View on the Amendment

The amendment, according to the government, corrects an anomaly in the RTI law passed by the UPA government. The Government believed that, the RTI Act, 2005 was passed by the UPA government in a hurry.¹³ The Central Government made it clear in their factsheet that they have no intention to dismantle the RTI autonomy and structure as the amendment brought is amending the Sections 13, 16, and 27 and labelled all the criticisms as “fear mongering”.

The Prime Minister's Office (PMO) stated that the RTI Act did not grant the government any rulemaking authority, and that by amending Section 27 of the RTI Act, 2005, they are simply covering up for that oversight. The reason was given by the government for downgrading the level of CIC and ICs was that they are kept at par with the Judges of Supreme Court but the decision rendered by CIC and ICs could be challenged in the High Courts. The Supreme Court and Election Commission are constitutional bodies while the Information Commission is a statutory body which is an anomaly and needs to be corrected by the means of this amendment. The government cited the case of *Rajiv Garg v. UOI*¹⁴ to create a uniformity in the condition of the service of CIC and ICs.

The government while dismantling the claims of the opposition, announced that they are launching an application for e-filing of RTI application 24x7. Furthermore, the government went a step further by stating in their factsheet that they will appoint the leader of the largest opposition party to the selection committee. The government proactively

published information on all government websites by enforcing Section 4 of the RTI Act; this was a *Suo moto* action taken to reduce the number of RTI applications and to gain the trust of citizens for the amendment.

5. Conclusion

The Right to Information Act went into effect in 2005. It is a beloved piece of legislation because it incorporates the Right to Information into the realm of Fundamental Rights. This administration has been accused of impeding the implementation of RTI legislation. The Central government has not been pro-active in filling vacant positions.

The RTI activists and the opposition criticized the Amendment and Rules, 2019 on merits as the Tenure and Salaries of CIC and ICs have been reduced and even their parity level has been downgraded which will act as a barrier in access to information. As in bureaucracy authority level is equated by the means of pay-scale and public officers having higher parity level and pay-scale will be difficult to extract information from. The Rules demonstrate that the aim of amendment and rules are to provide the Central Government immense power for shifting the RTI legislation in their favour. Additional perks and allowances are now in the control of the Central Government, which directly implicates that pro-government performances by ICs will be able to receive preferential treatment.

The Government, on the other hand, stands stiff on the implementation of Amendment and Rules, 2019. The government released a factsheet that directly termed the protest against the RTI amendment an act of “fearmongering”. The government said that it is an anomaly to consider that the level of CIC and ICs are equal to that of the Supreme Court Judges and Election Commissioner. The Central Government has undertaken various measures to boost the working of RTI which include, an online portal for e-filing of RTI applications, proactively disclosing information to reduce the number of RTI applications, and many others.

According to the authors, this amendment dilutes the objective of the RTI Act, 2005 which is to provide citizens with a structure, which is independent from the intervention of government for accessing the information from public officers. The government has disregarded the intentions, a procedure carried out for the implementation of the RTI Act, 2005 which worked on Doctrine of Check and Balances with independence and non-interference from the government which had been done away by the means of this Amendment and Rules, 2019.

Settling the Unsettled: An Analysis of the Occupational Safety, Health, and Working Conditions Code, 2020

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Abstract

The Constitution of India provides that a life of dignity is a fundamental right which is given to all persons including workers/employees. The life of dignity includes in it the right to work in a safe and healthy environment. This legislative comment is an attempt to critically analyse The Occupational Safety, Health and Working Conditions Code, 2020. Firstly, the comment analyses the historical background and the flaws in the existing 13 laws relating to the health and safety of worker/employees through the lens of judicial interpretations and existing Acts that called for the drafting of the new Code which will replace them. Secondly, the comment attempts to touch upon the objectives and all the new salient features of the Code critically. Thirdly, the comment discusses the international perspective related to occupational health and safety vis-a-vis UK & USA. The comment also identifies the provisions which are present in the UK & USA's Acts but the Code has failed to include them. Lastly, the comment endeavours to critically analyse the Code by pointing out its pragmatic realms and missing locus and their legal impact on the society. The author concludes by saying that it is still to be seen that how far the objectives of the Code would be achieved once the Code will commence.

1. Introduction

“Every limb or faculty through which life is enjoyed is protected by Article 21 and a fortiori this would include the faculties of thinking and feeling.”¹

A healthy and safe environment is *sine qua non* for all the workers. An environment where the workers can work with safety seems to be insubstantial in India regardless of its robust economic growth in the recent years. A safe and healthy work environment is conceded as a fundamental right under Article 21 of the Constitution.² Article

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1 *Francis Coralie Mullin v Administrator, Union Territory of Delhi* 1981 Cri.L.J 306, p 308.

2 *Court on its Own Motion v Union of India* MANU/SC/1094/2012.

39(e) of the Constitution mandates that the State shall direct its policy towards securing health and strength of workers.³ There is a plethora of accidents that transpire at the workplace resulting in the cost of life of poor workers working in the specific establishments even though there is a policy that discerns that it is a fundamental right to work in a safe and healthy environment. It grails at enhancing the welfare of the employees and the society at large by obliterating work related injuries, diseases, etc.

With intent to subsume all the current legislations and to improve the competency and uniformity in labor legislations, the Ministry of Labor & Employment introduced 4 labor codes.⁴ These codes encompass Social Security Code, Industrial Relations Code, Code of Wages, and Occupational Safety, Health and Working Conditions Code (hereinafter the Code). As in the monsoon session of Parliament in 2020, the Codes were passed by both the houses and got assent of the President. Earlier, the Code was introduced in Lok Sabha in July 2019, and later referred to Standing Committee on Labor and Employment for restructuring the existing bill by out casting the ambiguities and withdrawn from the Lok Sabha in September 2019.

The Code replaces the existing 13 centre-made laws regulating safety, health standards, working hours, welfare provisions and working conditions of employees and workers. The principle behind enacting this code is to consolidate and disentangle the provisions of the 13 Acts. An additional rationale for such enactment is that majority of the Central Labor Acts are more than 50-70 years antiquated and archaic. A dire need arose to take the edge off the convoluted, dispense unvarying definitions, and cut back multiple authorities under assorted Acts so as to bring transparency and accountability in the enforcement of Labor Laws.

The Code appertains to all establishments with 10 or more workers and in all mines and docks.⁵ It acts as a regulatory mechanism for the safety and health conditions for the workers. The intent behind reducing the threshold is to create the balance between rights of employee with rights of employers. Further, the establishment with less than 10 workers is regulated by Shops & Establishment Act. The code has enacted to cover nearly all the sectors like trade, business, industry, motor transport undertaking, journalists, newspaper establishments,

3 *Delhi Jal Board v National Campaign for Dignity and Rights of Sewerage and Allied Workers and Ors.* MANU/SC/0794/2011.

4 Aditi Sinha, 'The Occupational Safety, Health and Working Conditions Code, 2020', (*LawBrit* 23 September 2020) <<https://www.lawrbit.com/article/the-occupational-safety-health-and-working-conditions-code-2019/>> accessed on October 13, 2020.

5 The Occupational Safety, Health, and Working Conditions Code 2020, s 2(1)(u) (OSH Code) (IND).

audio-visual productions, beedi workers, manufacturing units, plantation, building and other construction work, mine, dock, and other service sectors.

Need for a New Code

Historical Background

The health and working conditions of the workers and employees are currently regulated by various legislations. In *Occupational Health & Safety v. Union of India*,⁶ a non-profit occupational health and safety organization filed a petition under Article 32 of the Constitution. The petitioner in this case requested the court to issue the writ directing the respondent to frame guidelines vis-à-vis occupational safety and health regulations which need to be perpetuated by the industries. The petitioner argued that though there is a rich profusion of legislations in existence related to the workers and employees but none of them stand on the satisfactory threshold of conventional occupational health services. The dearth of guidelines with regard to occupational safety has led to plethora of functional abnormalities in workers' body. The Supreme Court referred the matter to respective High Courts to examine requisite health delivery systems in their jurisdiction and take indispensable actions required. Notwithstanding the directions of the courts there have been cases where the directions and guidelines related to the safety of the work environment were not adhered to.

The drawbacks existing in various provisions in the broad catena of provisions which are either overlapping or contradicting each other have created a lot of chaos. At present, there are about 100 State Laws and 40 Central laws which regulate the varying facets of labor laws viz. industrial disputes' resolution, working conditions, social security and wages.

The Second National Commission on Labor (2002) recommended the idea of consolidating the multiple labor law legislations because it found the subsisting laws to be erroneous with superannuated provisions and inconsistent definitions.⁷ The rationale behind this was to simplify over the 633 provisions from 13 Acts relating to health, safety, working conditions to only one single code with 143 provisions.⁸

The 13 legislations dealt separately with the welfare provisions of the workers. It resulted in inconsistency among various group of

6 MANU/SC/0076/2014.

7 Report of Second Labor Law Commission, Ministry of Labor & Employment, Ch I, pg. 10.

8 Aditi Sinha, 'The Occupational Safety, Health and Working Conditions Code, 2020', (LawBrit 23 September 2020) <<https://www.lawrbit.com/article/the-occupational-safety-health-and-working-conditions-code-2019/>> accessed on October 13, 2020.

employees or workers working in different sectors. Thus, a dire need was felt by the National Commission on Labor to make all the safety related laws, laws regarding safe working conditions, health of the workers into a uniform way so it can ameliorate efficiency and promote ease of doing business by wiping out intricacies existing in the present legislations. Workers and employees are backbone of an enterprise or an entity, this new Code will cover all types of establishment where ten or more workers are engaged, and the only exceptions are mines and docks where even if one worker is engaged, the Code will apply to them.

Explicating the flaws in current laws

There subsist flaws in the current legislations because of gazillion of the provisions and the complexities are proving to be lethal for the workers because their safety related mechanisms are blurred. The code will address the drawbacks and decipher the solution to their issues. Some of the main drawbacks are discussed below:

- **Registration & Coverage:** The existing laws provide for different thresholds of workers for applicability of the Acts. Several Acts cover establishments which have requirement of obtaining licenses or registrations from the authorities if they have specific number of employees or workers working under them. For example, under Factories Act, if the number of workers exceeds 10 (with power) & 20 (without power), then the requirement of license is a requisite⁹. Meanwhile, the threshold for number of workers in motor transport workers and contract labor is 5 & 20 respectively for mandatory licensing and registration. The new code has tried to eliminate such inconsistency.
- **Authorities:** Under the current provisions, there is no person appointed for carrying out surprise checks, visits, inquires into accidents, etc. and this is usually carried out by inspectors for ensuring the welfare provisions. Advisory Committees are to be constituted to advise government on matters under Mines Act¹⁰, Docks Workers Act¹¹, Contract Labor Act¹², and Building & Construction Workers Act.¹³ Thus, almost 8 Acts do not have the provisions for advisory committee to advise the government regarding any particular issue. The new code will provide single advisory board at national and state levels to advise the government

9 The Factories Act 1948, s 6 (IND).

10 The Mines Act 1952, s 12 (IND).

11 The Dock Workers (Safety, Health and Welfare) Act 1986, s 9 (IND).

12 Contract Labour (Regulation & Abolition) Act 1970, ss. 3 & 4 (Contract Labor Act) (IND).

13 The Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act 1996, Ch II (IND).

- **Duties of employer:** Out of 13 legislations, only 1 Act i.e. Factories Act has provided the duties of the employer. The duties include the employer to provide workers with safety in handling, transporting, and storage of hazardous substances, and to provide proper training and instructions to secure the safety of all workers.¹⁴ Further, the Contract Labor Act and Inter-state Migrant Workmen Act impose duties on contractors to provide welfare facilities to the workers under them.¹⁵ Thus, excluding these three act, there are no provisions dealing and prescribing duties on the employer.
- **Health & Welfare Provisions:** There are no uniform facilities which are provided to every worker under the different Acts. For example, the workers in mines sector are provided with first aid, drinking water, and toilets but such facility is absent for beedi and cigar workers. In contrast, they are provided with facilities like ventilation, canteens and crèches. On one side court holds that the employer should ensure that due regard is given to the health of a worker¹⁶ but on the other side the legislations lack in keeping up with the pace of the courts in implementing the same. The new code provides that all the facilities may be prescribed by Central Government apart of all basic facilities.¹⁷
- **Special Provisions:** We are living in the 21st Century and still women are often not allowed to and do not feel safe to work in night shifts because of iota of safety in sectors like plantations, beedi & cigar establishments, mines, and factories. The legislations related to safe environment to women at workplace should not be in form but in the substance and spirit so that women can work with dignity and respect.¹⁸ The new code ensures to provide a safer environment to the women and also allows women to work in night shifts.
- **Offences:** The current penal provisions for violating any provisions in the respective act are meager in nature, and hardly cause deterrence to any employers who fail to provide the employee with safe, healthy and good working atmosphere. The new code imposes hefty fines to employers and employees for those who violate the provisions of the code.

Salient Features of the Proposed Code

- **Single Registration:** The Code provides for registration for all the establishments that come under this code. The Code mandates that within the 60 days from its commencement the establishments to

14 The Factories Act 1948, Ch III, IV, IV-A, & V (IND).

15 Contract Labour Act, Ch IV (IND).

16 *Kalyaneshwari v Union of India* MANU/SC/0217/2011.

17 OSH Code, ch XIV.

18 *Medha Kotwal Lele and Ors. v Union of India* MANU/SC/0898/2012.

which this Code applies should file an application to the registering office¹⁹. If the registering officer fails to register the establishment within the prescribed time, it will be deemed to have been registered²⁰. The code will make a uniform registration process instead of different registrations under different legislations.

- **Appointment letter made Statutory:** A novel provision has been drafted where it is made mandatory by the government to issue an appointment letter to the employees and workers.²¹ This statutory compliance will formalize the employment sector, and further prevent the employer to exploit his employees & workers because of the stated terms and conditions in the appointment letter.
- **National Occupational Safety & Health Advisory Board:** The Code has the advisory body constituted under it that will advise the Central government in matters relating to standards, rules, and regulations made under this code.²² This board has tripartite representation from State Governments, employees unions/ trade unions, and employer associations. On the same parameters, there is a provision for constitution of State Occupational Safety & Health Advisory Board, which also have same functions on state level.²³
- **Free Annual Health Checkups:** Section 6 of the Code enunciates the duties of the employer which also provides that the employer must have to provide free health check-ups to certain employees those who attained certain age prescribed by the appropriate government. This clause will help in increasing productivity because of the free health check-ups, the employees will develop faith towards employers and also it will be helpful in detecting any disease at its nascent stage.
- **Night Shifts for women:** A revolutionary provision has been added for the first time in the Code that provides the freedom to the female workers to work during night shifts with their consent. The provision aims at upholding the spirit of Article 14, 15, and 21 by providing the opportunity to women to work during the night shift after 7 p.m. and before 6 a.m. which shall be approved by the Central or State government.²⁴
- **Applicability of welfare provisions:** The extant laws provide different thresholds of employees for applicability of welfare provisions. The code will provide uniformity and has revised the thresholds concerning the welfare of the workers like for canteen (100 or more

19 OSH Code, s 3.

20 OSH Code, s 3(3).

21 OSH Code, s 6(1)(f).

22 OSH Code, s 16.

23 OSH Code, s 17.

24 *Punjab and Sind Bank and Ors v Durgesh Kunwar* MANU/SC/0316/2020.

employees including contract labor), separate restrooms or shelter for male, female, and transgender workers (50 or more employees), crèche (50 or more employees), etc.

- **Primary Responsibility of Contract Labor on employer:** The code unlike the existing law imposes the responsibility of giving welfare facilities to the contract labors on the employers and not on the contractors.²⁵ Now, all the rudimentary services like bathing, changing room, crèches, canteen, sitting arrangements, toilets, and first-aid boxes are provided by the employers.
- **Work hours and leave:** The appropriate government has given the power to determine the number of daily working hours as per the needs of the different classes of establishments.²⁶ Thus, it can be done by enacting rules under this code. However, the general provisions prescribe that no worker can be made to work more than 6 days a week except motor transport workers. In case of over time, the employer has to pay twice the amount of normal wage to the employees.²⁷
- **Escalating the domain of ‘inter-state migrant worker’:** As per the extant Inter-state Migrant Workmen Act, the migrant worker means a person hired by or through a contractor in one state for the purpose of employment in an establishment in another state. However, the Code broadened the domain of the term to also include any person enrolled by the employer in one state to work in his establishment in another state.²⁸ Thus, it now covers both contractors and employers unlike the extant laws.
- **Offences and Penalties:** Offences and Penalties for offences are more stringent in the Code when compared to the existing laws. The code specifically imposes the duties on the employer to take care of every employee’s health and safety.²⁹ The employer must be held liable for an imprisonment of 2 years or fine up to 5 lakh rupees in case of death of any person whether employee or not, with or without his knowledge in his establishment.³⁰ Moreover, there are other offences and punishments mentioned in the Code for those who violate the provisions of the Code. However, a residuary provision of fine and penalties for both for employers and employees/workers is stated in the code if they violate any provisions for which no penalty is imposed, in such a case, the employer can be subject to fine

25 OSH Code, s 53.

26 OSH Code, s 25.

27 OSH Code, s 27.

28 OSH Code, s 2(1)(zf).

29 OSH Code, s 23.

30 OSH Code, s. 103.

between 2-3 lakh rupees³¹ and the employee can be fined up to 10,000 rupees.³²

International Scenario & Occupational Health & Safety

The code aims to provide occupational health, and safety mechanisms at par with the international standards. A close study of the Code with the extant laws in United Kingdom and United States will be helpful to understand the scenarios among different jurisdictions.

United Kingdom

The foundation law relating to the occupational safety and health in UK is the Health & Safety at Work Act, 1974 with more than 200 subsidiary legislations. The Act has certain provisions that are *pari materia* with the provisions of the Code but some provisions do not find place in the Code. The Act of 1974 imposes duty on employers of workplaces with five or more employee, different threshold is prescribed in the Code; they must keep a written record of their health and safety policy, as well as consult with employees (or employee representatives) on relevant policies and associated health and safety arrangements, no such provision is in the Code.

The legal duties of employer extend to their employees as well as to people visiting the working premises such as clients, visitors, and the general public.³³ The employer under the UK's Act has other duties that are not comprehended in the Code and such duties encircle health surveillance of workers by the employers in relation to work³⁴, duty to provide personal protective equipments wherever needed³⁵, duty to clinch proper training of workers while working using such equipments, etc

The act has been developed for over 40 years. It is very wide-ranging in its scope because of copious regulations and subordinate legislations. The executive has been given extensive powers to make regulations. The two executive bodies are set-up under the Act, 1974 to regulate the occupational health and safety framework and regulations. One being the Health & Safety Commission and the other being Health & Safety Executive³⁶. Overall, the Code is enacted corresponding to the Health & Safety at Work Act, 1974 but, we will anticipate its efficacy once it comes into force in a full-fledged *modus operandi*.

31 OSH Code, s 94.

32 OSH Code, s 106.

33 Health & Safety at Work Act 1974, s 3.

34 The Management of Health and Safety at Work Regulations 1999, SI 1999/3242, reg 6.

35 Workplace (Health, Safety and Welfare) Regulations 1992, SI 1992/3004, reg 5.

36 Health & Safety at Work Act 1974, s 10.

United States of America

The Occupational Safety & Health in the working place is governed by the OSH Act, 1970³⁷ in United States. It is an act to assure safe and healthy working conditions for working men and women. The Act is very comprehensive with only 34 sections. But, there are gazillions of standards for different sectors like general standards, agriculture, construction, maritime, record-keeping, whistle-blowers, etc. It is surprising to note that the Code has not included agricultural sector, un-organized sectors and IT sectors under its purview.

Occupational Safety & Health Administration (OSHA) is a division of the U.S. Department of Labor that oversees the administration of the Act and enforces standards in all 50 states. In order to establish standards for workplace health and safety, the Act also created the National Institute for Occupational Safety and Health (NIOSH) as the research institution for the OSHA³⁸ This statutory body governs and regulates the occupational safety and healthy working environment by formulating various standards/ regulations. The Occupational Safety & Health Review Commission is established under the code with three members.³⁹ The main duty is to appoint administrative law judge who can hear proceedings before the commission. The report made by the judge shall become final within 30 days. Further, the US Act has been amended only once in 2004 which shows its efficient character.

Analysis of the Code

The Code is drafted with an objective to make the health and welfare related provisions to be more comprehensive, complete, unambiguous, and provides complete safe conditions to the workers and employees. It provides elementary broad legislative framework with enabling provisions for framing rules, regulations, standards, and bye-laws. The unequivocal provisions are drafted to tune them with the changing social, technological advancements.

The code will help the Indian economy to boost because it has the provisions which have less compliance procedures and single registration instead of multiple registrations in different acts, will promote ease of doing business. After its enactment, there will be only one registration for all types of the establishments except some specific registrations provided therein. It has a provision of deemed registration which will help the employers so they get automatically registered after the passage of prescribed time. The appointment letter is made compulsory for the employers.⁴⁰ It will be in the interest of both the

37 Occupational Safety and Health Act 1970, s 1 (US).

38 *ibid*, s 22.

39 *ibid*, s 13.

40 OSH Code, s 6(1)(f)

employers and employees if a specified format with requisite terms and conditions should be provided under the Code.

The Code touches on the safety of each worker/employee. For example, when the crying necessity to protect the interest of beedi rollers was still not fulfilled by the establishment of Factories Act, 1948, then the court interfered and re-opined that it is the employers' duty to secure the workers' safety and health which even extends to providing reasonable instructions, requisite plant and supervision over workers⁴¹. It will serve as panacea for all the workers who risk their lives to earn the bread for their family.

One of the trump-cards incorporated in the Code is the widened definition of the family which now also includes grand-parents of the worker so that they can avail the welfare benefits and compensation in case of death of the worker.⁴² Further, another relief to the family members of the workers is that in case of any causality or accidents in any establishment which results in death of worker or caused any deadly injury, the minimum 50% part of penalty from the employers is to be given to the legal heirs of the victim for rehabilitation and financial support to the family.⁴³

National Occupational Safety and Health Advisory Board has substituted multiple committees under five labor Acts. The National Board is of tripartite nature and has representation from employees, employers and State Governments.⁴⁴ The consequence is the reduction in multiplicity of bodies/committees under various Acts also it helps in simplified and coordinated policy-making. The Code has endeavored to make the employer responsible to all persons whether employees or not for any loss of health in his premises, and also with or without his knowledge as it has been in the UK's Act of 1974.⁴⁵

The definition of Cine workers is amended to include all audio-visual workers and working journalists has been amended to include journalists working in electronic media also. Further, the definition of interstate migrant worker is re-casted on the basis of suggestions received to include migrant workers who have been employed directly by the employer as well as migrant workers employed through a contractor.

The code could have been made more effective if it would have provided with registration of establishments through electronic medium. The alarming provision which can be outright precarious

41 *M/s Bhikuse Yamasa Kshatriya v Union of India* 1964 SCR (1) 860.

42 OSH Code, s 2(1)(x).

43 OSH Code, s 103(1)(b).

44 OSH Code, s 16(2).

45 OSH Code, s 23.

to the employers is the revocation of registration by the appropriate government.⁴⁶ A clear-cut distinction should be there that decides which act of employer will result in revocation of registration and which imposes pecuniary fines on the employer. The Labor Ministry needs to provide clarity in S. 3(6) that can further help the employers.

The definition of 'appropriate government' is vague because it is creating ambiguities as to where to consider State Governments as appropriate government.⁴⁷ Audio-visual production has to be interpreted widely and also should include non-feature films, web-series, reality shows, sports shows, etc. To reduce unnecessary litigation, it has suggested by the producers' association to add the words like 'company, firm, or' instead of only 'person' in the definition of producer in S. 2(1) (zw) of the Code.

The code does not provide for judicial mechanism, it further restricts the applicability of civil proceedings for taking up the disputes under the Code.⁴⁸ The Inspector-cum-Facilitator is bestowed with such power.⁴⁹ The enhanced penal provisions will function as an effective deterrent which will persuade the employers and employees to effectively adhere to the provisions of the Code.⁵⁰

Conclusion

The Code appears to be a pragmatic step towards safeguarding occupational safety, health and better working conditions of workers. In more ways than one, the Code seeks to widen the coverage of the workers and employees – be it audio-visual workers, inter-state migrant workers or sales promotion employees – who would be benefitted from its provisions. The employment of women in night shifts is a constructive step towards ensuring gender equality. A less talked about and yet encouraging move is the power given to the Central Government to require certain establishments to provide sufficient arrangement for toilets as well as locker rooms to transgender workers separately.

From the perspective of the employers, while most of the provisions remain intact, the provisions concerning engagement of contract workers may seem onerous. However, most of the concerns could be allayed if the principal employer exercises due diligence in ensuring that the contractor, as the employer of the contract workers, complies with the applicable Labor laws. Further, the provision relating to deemed registration of establishments may take care of prolonged delays in administrative processes.

46 OSH Code, s 3.

47 OSH Code, s 2(1)(d).

48 OSH Code, s 125.

49 OSH Code, s 35.

50 OSH Code, Ch XII.

Since the implementation of a number of provisions of the Code has been left to the appropriate government, it is yet to be seen how the objective of consolidation and simplification in compliance with the labor laws would be achieved.

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