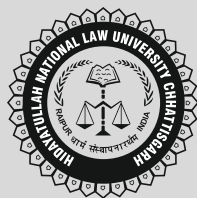


Volume VIII

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# HNLU

JOURNAL OF  
LAW &  
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## 1. Sui Generis

"Sui Generis" is the faculty seminar series at HNLU for the faculty presented online. The platform to be expanded for connecting with the legal fraternity at large in the coming phases will have research topics currently dealt by faculty and also their contributions in various conferences. The format to have 35 minutes of presentation by the faculty led by a discussant followed by interaction with the participants. A total of 31 Sui Generis seminars were conducted between April to September of 2020 and were recorded. The second phase of the programme will also have select invited speakers and will be open to other registered participants.

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The future autobiography of many a 'thought leaders' had their preface inked in a class room, cafeteria, cultural fest or a college dorm. Teachers and class mates are often the inspiration for the future screen play of the alumni in their life and career.

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...

Email id: [alma@hnlu.ac.in](mailto:alma@hnlu.ac.in)

# **HNLU JOURNAL OF LAW & SOCIAL SCIENCES**

**(HNLU JLSS)**

An Annual Journal Published by

**HNLU PRESS**

(A Media Division of Hidayatullah National Law University)

(A Peer Reviewed Journal)



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Raipur, Chhattisgarh

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## **FROM THE EDITOR-IN-CHIEF**

Dear Readers,

It is pleasure again to share my thoughts through this message in 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. In the first place the editorial team deserves due appreciation for coming out with this edition in the expected timeline. As in the past there was an overwhelming response from the contributors across the legal and social science fraternity resulting in a rich tapestry of stimulating articles selected by the Editorial team.

To briefly comment on the rainbow of articles, Dr. Gurujit Singh's article on 'Emerging Legal Issues in E-commerce: Indian Perspective,' analyses the comprehensive relationship of vendors, retail market, supply chain of goods, third parties and related transactions of the E-Commerce space. In the article of 'Indian Firearms Law and Licensing Procedure' by Mr. Rakshit Gupta covers the less explored area of Arms Act and the latest amendments in 2019 with the back drop the Arms Rules 2016 in the backdrop of increasing crime graph. Mr. Animesh Kumar in his paper entitled 'Interplay Of Religion and Politics in Contemporary India' deals with the sensitive and volatile issue of our times in the backdrop of the constitutional vision of our founding fathers. Mr. Kshitij Naikade and Ms. Yashaswi Belani in their joint work of 'Section 9 of the Hindu Marriage Act, 1955 - The Fault is in our Provisions!', deliberate upon constitutional validity of Section 9 of the Act, by analysing Articles 14, 19, and 21 in the back drop of restitution of conjugal rights and marital rape. Mr. Gaurav Nanda in the paper 'The Protection Of Whistle blowers' Human Rights In India: A Legal Analysis With Inputs From Victimology' deals with the contemporary issue interfacing law and victimology from a Human Rights advocacy.

Ms Akanksha in her paper 'Lokpal And Lokayuktas: A Critical Appraisal Of Powers And Functions' attempts to analyse Principal Act of 2013 and the amendments of 2016 and the reforms required. Dr. Constanze Janda in his work 'Social Rights of Refugees in European Union Law' contextualizes the dignified life and standards even for refugees. Ms Jyoti Jindal in her paper of 'A Socio-Economic Analysis of Menstrual Hygiene Practices Among Women of Low-Income Class' through empirical

study of this hugely overlooked and neglected health issue by the society. Ms. Vidhi Chouradia in her work 'A Critical Study Child Protection and Internet Regulation through Cyber Security' maps the fall out of the 'new medium' of cyber space and its underworld of cyber crime focusing on children as victims. Mr. Mohammed Irshad in the article 'Taking Principled Criminalisation Seriously in the Legislative Process' spells out the importance of principled criminalisation and explores the common legislative practice of unprincipled criminalisation.. Mr. Viraj Pratap Khatter in the article 'National Emergency Under Indian Constitution' revisits the issue of emergencies by analysing the procedure, duration, revocation and consequences thereof as a critical analysis,

Dr. Manoj Kumar and Dr. Rana Navneet Roy in their joint work 'Corporate Social Responsibility in India' discuss and analyse the conceptual aspects of the corporate social responsibilities and its Indian perspective.

Dr. Ganiat Olatokun in the article 'Creating a Synergy between Health and Human Rights for Building the Nigerian Nation: The Case for CEDAW'S Women's Right to Choose and Right to Life for the yet to be Born Child' by deals with the legislative policy that will have the power to connect the health of women in Nigeria together with the yet to be born child's inherent right to life. The article AI in Medicine & Healthcare Sector: Analyzing the Implications under Medical Negligence Laws by Ms. Gunjan Arora enumerates the application in Health sector and the underlying legal issues as well as access issues. In his paper 'International and Constitution Law of Israel: How was Israel formed as a modern Nation State?', Abhishek Mishra maps the historical and contemporary issues of the State of Israel in a conflict background.

Regulating E-Commerce through Consumer and Competition Law Framework by Dr. Sushila is a critical analysis of the E-Commerce Rules 2020 as well as the interface of competition law. The paper The Promise of Equality: A Comparison of India's Reservation Policy with Affirmative Action of the United States by Mr. Sangram Jadhav seeks to understand the affirmative action policy in the US and India, attempts to evaluate their systems and propose changes that are required on dire basis.

The authors Mr. Manan Daga and Mr. Samarth Sansar in their article 'COVID-19 & Domestic Violence: Raising Alarm to Counter the 'Constant' Pandemic' deals with the domestic violence issues in the backdrop of COVID. 'Defining Abuse of Dominance in Multi-Sided Platforms' by Mr. Anooj Srivastava deals essentially about dominance of market and the need to address the same.

Deciphering Delhi's Dilemma: 'Special Statehood' an Antidote by Ms. Anukriti Poddar and Ms. Astha Ranjan deals with 'Special Statehood' as opposed to the existing status of 'Special Union Territory' the back drop of 'Delhi' 'Revisiting the Menstrual Leave Legislations and Corporate Policies- The inclusion of 'Gender Difference' and 'Gender Diversity' in Workplace Policies' by Dr. Asha Bhandari deals with 'Menstrual leave' and issues in

the backdrop of workplace politicsShadow Cabinets: The Potential Fifth Pillar of The Indian Democracy by Mr. Nipun Ninad Naphade and Mr. Rohit Rajesh Kulkarni takes note of the effects of unbalanced public governance and an administration without parliamentary opposition, on the rule of law in India.

The paper Gender Equality and Human Rights by Dr. Ayan Hazra attempts to deliberate on how humans differ in terms of their skin colour, gender, height, and even shape yet we still have fundamental human rights because we are still humans. Insider Trading - An Unethical Practice: With Special Reference to Indian Securities Market by Mr. V Suryanarayana Raju and Dr. Y Papa Rao focus on various dimensions of national and international perspective pertaining to the insider trading and related legal issues. Forest Tenure Rights and the Will to Develop in Eastern India by Dr. Amit Jain deals on the mutual development of Forest legislation for individual and community perspectives.

The section of Essays is a veritable treat for contemporary critical thinking contributed by Ms. Shifa Chouhan, Ms. Srishti Gupta & Ms. Akshita Aggarwal, Manimaran R. Ms. Diya Panchori and Ms. Simran Walia. The Case Notes /Legislative comment by Mr. Shiva Verma is again an incisive analysis of the Part XV and IX schedule of the constitution.

Commentary On “Section 114A Of the Indian Evidence Act Of 1872” by Mr. Sharath S Pillai analyses the provision, its relevance and provide recommendations to improve this provision.

I take this opportunity to congratulate and thank all the contributors for their time, effort and critical thinking for this edition. The editorial team deserves a special kudos for sparing their time and energy to bring this on schedule.

Best and regards,

**Prof V.C. Vivekanandan**

Vice Chancellor- HNLU

## FOREWORD FROM EXECUTIVE EDITOR

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.

In the article **‘Emerging Legal Issues in E-commerce: Indian Perspective,’** Dr. Gurujit Singh deliberates on how electronic means of communication has facilitated vendors, retail market or third parties to venture into the possibility of commercial transactions through this medium. Hence, right from initial introduction of this technology, commercial world has explored it for commercial benefit as well as to maintain a robust supply chain of goods and services as per market demands. There has been mushrooming of variety nature of ecommerce entities sprung up at this platform.

**‘Indian Firearms Law and Licensing Procedure’** by Mr. Rakshit Gupta observes that according to crime statistics, crimes are rising in India on a daily basis. The majority of crimes including rape, murder, severe injury, theft, etc. concerned dangerous weapons. One of the pieces of evidence in such crimes is the use of arms and weapons. A crucial part is played by the identification of the same for research. The Arms Act of 1959, which was amended in 2019 together with its rules, i.e., Arms Rules, 2016, governs the use, purchasing, and production of such firearms. One of the safety measures a nation may do is to maintain a legal framework to regulate such arms manufacturing, sales, and purchases.

**Mr. Animesh Kumar** in his paper entitled **‘Interplay Of Religion and Politics in Contemporary India’** discusses that India made the decision to create a secular state having its own standards of religious tolerance, freedom, and equality before the law on the brink of independence. During the long constitutional assembly debate the founding father of India visioned India free from any barriers causing derailment from the development. Religion forms its base on unvarying heavenly principles, Nevertheless, a realistic political strategy demands for society to improve, grow, and adjust to the new issues of the modern period.

**‘Section 9 of the Hindu Marriage Act, 1955 - The Fault is in our Provisions!,’** a collaborated work by **Mr. Kshitij Naikade and Ms. Yashaswi Belani** delves into determining the constitutional validity of Section 9 of the Act, by analysing Articles 14, 19, and 21. It further

discusses the analogous issues in the restitution of conjugal rights and marital rape. The patriarchal judiciary and the emerging constitutional feminism are imperative in the current scenario as the latter is the solution to the issues posed by the former. The paper concludes on the note of transformative constitutionalism and recommends immediate solutions that can be executed to protect the principles embodied by the Constitution.

**The Protection Of Whistle blowers' Human Rights In India: A Legal Analysis With Inputs From Victimology** is a paper by **Mr. Gaurav Nanda** who observes that there is a dearth of research on the protection of whistleblowers' human rights, both in the disciplines of law and victimology. The author contends that the study of whistleblowers' human rights falls within the realm of victimology. Different types or perspectives within victimology are discussed in the present paper, contributing to unique arguments and recommendations for legislative reform and lobbying for whistle-blowers.

**'Lokpal And Lokayuktas: A Critical Appraisal Of Powers And Functions'** by **Ms Akanksha** attempts to analyse the development of the given concept in world with specific reference to Indian legislative framework. Moving ahead an illustrative list of the power, function and structure of Lokpal and Lokayukta as provided under the Principal Act of 2013 as been dealt by this paper. Even the 2016 amendment to the parent act has been briefly discussed and the paper went ahead to substantially Scrutinize the provisions and functioning of this India ombudsman system in light of the 2013 legislation. At the end, a suggestive conclusion has been provided, which is precisely based on a subjective understanding of the writer.

**Social Rights of Refugees in European Union Law** by **Dr. Constanze Janda** observes that people who have been forced to leave their country of origin due of urgent threats to life and limb have a right to protection by their country of residence. This protection necessarily has to include social benefits ensuring an adequate standard of living. This article shows how the social rights of refugees and other forced migrants are regulated in European Union law.

**'A Socio-Economic Analysis of Menstrual Hygiene Practices Among Women of Low-Income Class'** by **Ms Jyoti Jindal** outlays a study of 144 women, done in Ludhiana district of Punjab, wherein information has been obtained through objective as well as open-ended questions. These women belong to lower-income families and menstrual hygiene is not a priority for them due to their lack of awareness of the consequences of poor menstrual hygiene and prevalent taboos preventing them from openly discussing their problems.

**'A Critical Study Child Protection and Internet Regulation through Cyber Security'** by **Ms. Vidhi Chouradia** deliberates on how child safety laws have emerged as a significant problem in light of the exponential growth of technology and the pervasiveness of online

socialisation and information exchange. This is an issue that bothers many nations all over the globe, both rich and poor. However, the problem of child safety seems to have received increased focus during the CoVID-19 epidemic. Despite the internet's many positive effects, studies have shown that it has also become the "new medium" via which frequently recognised kinds of child abuse, such as physical, sexual, and emotional abuse, in cyber world are perpetrated.

The article **‘Taking Principled Criminalisation Seriously in the Legislative Process’** by **Mr. Mohammed Irshad** spells out the importance of principled criminalisation and explores the common legislative practice of unprincipled criminalisation. The article hasn't intended to generalise the existence of unprincipled criminalisation, but rather it is claimed, like any country, the existence cannot be denied in India. The article claims that the Constitution and the existing tests of determining the constitutional validity of statutes don't inhibit the legislature from creating such unprincipled criminal laws.

**‘National Emergency Under Indian Constitution’** by **Mr. Viraj Pratap Khatter** mainly revisits the first of the three emergencies i.e. National emergency and a thorough perusal has been made of various concerned constitutional provisions while analyzing the procedure, duration, revocation and consequences thereof.

**‘Corporate Social Responsibility in India’ a joint work** by **Dr. Manoj Kumar** and **Dr. Rana Navneet Roy** is an effort to discuss and analyse the conceptual aspects of the corporate social responsibilities and its Indian perspective.

**‘Creating a Synergy between Health and Human Rights for Building the Nigerian Nation: The Case for CEDAW’S Women’s Right to Choose and Right to Life for the yet to be Born Child’** by **Dr. Ganiat Olatokun** deals with the legislative policy that will have the power to connect the health of women in Nigeria together with the yet to be born child’s inherent right to life. It was recommended that a legislative policy encompassing women’s reproductive right to choose to reproduce and the yet-to-be-born child’s inherent right to life is key when thinking of ensuring a healthy Nigerian nation.

**AI in Medicine & Healthcare Sector: Analyzing the Implications under Medical Negligence Laws** by **Ms. Gunjan Arora** seeks to understand the nature of AI related medical treatments resorted to by different countries and the prospects for future development. It also discusses the legal implications that may arise under such circumstances and analyze the advantages and disadvantages of investing in AI in so far as the medical and healthcare sector is concerned.

In his paper **‘International and Constitution Law of Israel: How was Israel formed as a modern Nation State?’**, **Abhishek Mishra** briefly lays down the legal and constitutional history of state of Israel and then deals with the uniqueness of state of Israel in the world order. Since, the State of Israel does not have an organic history of its attaining the statehood,

therefore its laws have haphazard growth in the Middle East. Armed conflict has special contribution in the laws of Israel, given that some parts of its territory are occupied territory, which is acknowledged by its Supreme Court and ICJ alike.

**Regulating E-Commerce through Consumer and Competition Law Framework** by **Dr. Sushila** attempts to analyse in detail the recently proposed amendments to E-Commerce Rules 2020 in order to ascertain their efficacy in regulating the unfair trade practices indulged in by E-Commerce entities as also their impact on the sector as such. The paper also seeks to examine the role of Competition Law in E-Commerce and an attempt has been made to study the enforcement interventions made by Competition Commission of India (CCI) in digital economy.

**The paper The Promise of Equality: A Comparison of India's Reservation Policy with Affirmative Action of the United States** by **Mr. Sangram Jadhav** seeks to understand the affirmative action policy in the US and India, attempts to evaluate their systems and propose changes that are required on dire basis.

The authors **Mr. Manan Daga** and **Mr. Samarth Sansar** in their article **‘COVID-19 & Domestic Violence: Raising Alarm to Counter the ‘Constant’ Pandemic’** have tried to understand the issue from a feminist perspective which analyses multiple causes behind the violence taking place in a household, break stereotypes of men and women's roles in domestic violence, and create an atmosphere where speaking against domestic violence is normalized.

**‘Defining Abuse of Dominance in Multi-Sided Platforms’** by **Mr. Anooj Srivastava** endeavours to propose a framework for the analysis of abuse of dominance, an anti-competitive conduct, in the light of multi-sided platforms. The study seeks to identify common artifices of misconduct leading to abuse of dominance and whether the regulatory regimes of the two jurisdictions are equipped adequately to identify, analyze and take a strengthened recourse to curb the issue, in order to ensure fair competition and marketable practices.

**Deciphering Delhi's Dilemma: ‘Special Statehood’ an Antidote** by **Ms. Anukriti Poddar** and **Ms. Astha Ranjan** provides an exposition in order to determine whether granting of this ‘Special Statehood’ as opposed to the existing status of ‘Special Union Territory’ would work as a lubricant between the Centre and the State; further, it attempts to examine the most workable model for National Capital Territory of Delhi.

**‘Revisiting the Menstrual Leave Legislations and Corporate Policies- The inclusion of ‘Gender Difference’ and ‘Gender Diversity’ in Workplace Policies’** by **Dr. Asha Bhandari** is an effort to analyze the journey of such laws that legitimize menstrual leaves in various countries and further the effort is to understand the efficacy of introduction of leaves in India and lastly suggestions are given to introduce such leaves through law as a progressive step for gender equity and future legal reforms.

**Shadow Cabinets: The Potential Fifth Pillar of The Indian Democracy** by **Mr. Nipun Ninad Naphade** and **Mr. Rohit Rajesh Kulkarni** takes note of the effects of unbalanced public governance and an administration without parliamentary opposition, on the rule of law in India. A solution is then considered in the form of a shadow cabinet created out of the opposition members of parliament, as a new check and balance mechanism to monitor the actions of the ministerial cabinet led by the Prime Minister.

**The paper Gender Equality and Human Rights** by **Dr. Ayan Hazra** attempts to deliberate on how humans differ in terms of their skin colour, gender, height, and even shape yet we still have fundamental human rights because we are still humans. Rights are those demands and claims made by a person or a group of people to a good life that are acknowledged by the State and accepted by the neighbourhood or society as necessary for the common good.

**Insider Trading - An Unethical Practice: With Special Reference to Indian Securities Market** by **Mr. V Suryanarayana Raju** and **Dr. Y Papa Rao** focus on various dimensions of national and international perspective pertaining to the insider trading. The authors concentrate on legal framework and enforcement of insider trading in U.K., U.S., and India. Further the researchers want to mention the judicial contours and finally give the conclusive remarks and suggestions.

**Forest Tenure Rights and the Will to Develop in Eastern India** by **Dr. Amit Jain** shows the regional interpretation of the Forest Rights Act, 2006, in north-western Jharkhand. Such an interpretation informs us how individual and community tenure rights are made co-constitutive at the regional levels; both means and ends towards each other, to achieve development in regionally meaningful ways.

## **ESSAYS**

**‘Media and Communication in Relation to Law’ is an essay** by **Ms. Shifa Chouhan** wherein she observes that media and communication perform a vital function in our day-by-day lives as it’s the supply of knowledge we tend to rely on to grasp concerning the affairs of the world. From reading the newspapers to watching the news, without even realising it, we have become addicted to the media world unknowingly. However, this dependency will cause to be dangerous for us because sometimes this source can mislead a person’s mind due to erroneous information.

**The essay ‘Substantive Equity, Social Stratification, and Representation: Empirical Evidence from Communal Manifestations’** by **Ms. Srishti Gupta** and **Ms. Akshita Aggarwal** addresses the unfortunate tendency of idealizing the postulates of equality of a diverse country with historical injustices under the synonym of formal equality. The main course of contention is laid by the averment that reservations defy the principles of equality under the Constitution of India. The

‘privileged’ general category refuses to accept the consequences of being born into a lower stratum of hierarchy in a country that theorizes opportunities on the basis of social standing.

**‘Environmental Impact Assessment and Public Participation For ‘B2’ Projects’** by **Manimaran R** deal with the two very potent assessment tools that are employed in the granting of the Clearance are Environmental Impact Assessment and Public Hearing. Even though Environmental Clearance is a mandatory requirement for almost all industrial projects, in effect, the modus operandi laid for the granting of Clearance varies significantly across different categories of industrial projects, as laid down by the Government by issuing notifications from time to time. It tries to find some new dimensions of the domain.

In the essay **Banker’s Right to Lien Under Indian Contract Act, 1872**, the author **Ms. Diya Panchori** focuses to find the banker’s right to lien, banker’s right to set-off, create a distinction between right to lien and right to set-off and to determine various circumstances where right to lien is not being provided to the banks. the study found that banks have been conferred with many rights, but there is certain situation where the banks cannot exercise their right to lien.

The essay **Mob Lynching, Hate Speech and Vigilantism in India** by **Ms. Simran Walia** analyses the usual pattern of crime noticed in the events of group lynching by studying the distinctive facts of various cases like the Alwar, Nowhatta and Jharkhand mob lynching case; and also as to how important a codified legislation has become in order to protect the minority communities from such violence. A significant contribution in escalating these crimes has also been done by various social media and messaging platforms by tactically spreading hate speech and misinformation against the minority communities.

### **CASE NOTES / LEGISLATIVE COMMENT**

The case comment **‘Analysis of the 39th Constitutional Amendment’** by **Mr. Shiva Verma** attempts to delve deep into its nitty gritty. This commentary covers the amendment in five sub-parts. This commentary initially gives a brief on the background and other necessary details of this amendment under its introduction. In the second part this commentary deals with incorporation of Article 329A to Part XV of the constitution. Thereafter the commentary deals with necessary details of the influence of laws under the IXth schedule and protection under 31B in the third sub-part.

**Commentary On “Section 114A Of the Indian Evidence Act Of 1872”** by **Mr. Sharath S Pillai** analyses the provision, its relevance and provide recommendations to improve this provision.

While this volume reaches your hands, we 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.

Executive Editor

**Prof. (Dr.) Vishnu Konoorayar**

**Mr. Jeevan Sagar**

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<b>Articles</b>	<b>Author(s)</b>	<b>Page No.</b>
Emerging Legal Issues in E-commerce: Indian Perspective	Dr. Gurujit Singh	1
Indian Firearms Law and Licensing Procedure	Mr. Rakshit Gupta	11
Interplay Of Religion and Politics in Contemporary India	Mr. Animesh Kumar	21
Section 9 of the Hindu Marriage Act, 1955 - The Fault is in our Provisions!	Mr. Kshitij Naikade Ms. Yashaswi Belani	28
The Protection of Whistleblowers' Human Rights In India: A Legal Analysis With Inputs From Victimology	Mr. Gaurav Nanda	45
Lokpal And Lokayuktas: A Critical Appraisal of Powers And Functions	Ms Akanksha	59
Social Rights of Refugees in European Union Law	Prof. Dr. Constanze Janda	68
A Socio-Economic Analysis of Menstrual Hygiene Practices Among Women Of Low-Income Class	Ms Jyoti Jindal	81
A Critical Study Child Protection and Internet Regulation through Cyber Security	Ms. Vidhi Chouradia	95
'Taking Principled Criminalisation Seriously in the Legislative Process'	Mr. Mohammed Irshad	107
'National Emergency Under Indian Constitution'	Mr. Viraj Pratap Khatter	128
Corporate Social Responsibility in India	Dr. Manoj Kumar Dr. Rana Navneet Roy	135

Creating a Synergy between Health and Human Rights for Building the Nigerian Nation: The Case for CEDAW'S Women's Right to Choose and Right to Life for the yet to be Born Child	Dr. Ganiat Olatokun	161
AI in Medicine & Healthcare Sector: Analyzing the Implications under Medical Negligence Laws	Ms. Gunjan Arora	174
International and Constitution Law of Israel: How was Israel formed as a modern Nation State?	Mr Abhishek Mishra	187
Regulating E-Commerce through Consumer and Competition Law Framework	Dr. Sushila	213
The Promise of Equality: A Comparison of India's Reservation Policy with Affirmative Action of the United States	Mr. Sangram Jadhav	233
COVID-19 & Domestic Violence: Raising Alarm to Counter the 'Constant' Pandemic	Mr. Manan Daga Mr. Samarth Sansar	252
'Defining Abuse of Dominance in Multi-Sided Platforms'	Mr. Anooj Srivastava	269
Deciphering Delhi's Dilemma: 'Special Statehood' an Antidote	Ms. Anukriti Poddar and Ms. Astha Ranjan	292
'Revisiting the Menstrual Leave Legislations and Corporate Policies- The inclusion of 'Gender Difference' and 'Gender Diversity' in Workplace Policies'	Dr. Asha Bhandari	312
Shadow Cabinets: The Potential Fifth Pillar of The Indian Democracy	Mr. Nipun Ninad Naphade Mr. Rohit Rajesh Kulkarni	332

Gender Equality and Human Rights	Dr. Ayan Hazra	345
Insider Trading - An Unethical Practice: With Special Reference to Indian Securities Market	Mr. V Suryanarayana Raju Dr. Y Papa Rao	358
Forest Tenure Rights and the Will to Develop in Eastern India	Dr. Amit Jain	367
<b>Essays</b>		
Media and Communication in Relation to Law	Ms. Shifa Chouhan	381
Substantive Equity, Social Stratification, and Representation: Empirical Evidence from Communal Manifestations	Ms Srishti Gupta Ms Akshita Aggarwal	388
'Environmental Impact Assessment and Public Participation For 'B2' Projects'	Manimaran R	397
Banker's Right to Lien Under Indian Contract Act, 1872	Ms. Diya Panchori	406
Mob Lynching, Hate Speech and Vigilantism in India	Ms. Simran Walia	414
<b>Case Notes / Legislative Comments</b>		
Analysis of the 39th Constitutional Amendment	Mr. Shiva Verma	423
Commentary On "Section 114A Of the Indian Evidence Act Of 1872"	Mr. Sharath S Pillai	428

# Emerging Legal Issues in E-commerce: Indian Perspective

\* Dr. Gurujit Singh

## ABSTRACT

Electronic means of communication has facilitated vendors, retail market or third parties to venture into the possibility of commercial transactions through this medium. Hence, right from initial introduction of this technology, commercial world has explored it for commercial benefit as well as to maintain a robust supply chain of goods and services as per market demands. There has been mushrooming of variety nature of ecommerce entities sprung up at this platform. Sophistication of technology has facilitated the cost-effective ease of doing transactions. Various methods have been used to authenticate transactions and secure it free from any kind of security issues. While technologically there is commendable improvement in doing online shopping, but substantially certain legal issues remained to be addressed adequately. The paper is an attempt to highlight the issues which are pertinent for overall growth, transparency and accountability of ecommerce transactions from consumer perspective as well as States' interest.

**Keywords:** E-commerce, Information Technology, Data, Consumer Protection, IPR

## 1. Introduction

Globally India has proved itself as booming market to envy due to its huge size in terms of population and technological literacy and penetrations. Current report by Internet and Mobile Association of India (IAMAI)<sup>1</sup> reveals that 759 million ie., 52% of current population are active internet users. The number is predicted to grow up to 900 million by 2025. The top three States are Goa, Maharashtra and Kerala with active users of 70%, 67% and 65% of respective State population. 93% of active users are spending average time of around 2 hours on daily basis. 52% of active users have made use of internet for commercial transactions such as bill payment, online shopping, food order, cab booking, ticket booking

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<sup>1</sup> Internet in India 2022, Available at [https://www.iamai.in/thank-you?report\\_id=MzMwNA==](https://www.iamai.in/thank-you?report_id=MzMwNA==), accessed on 10.02.2023

etc..<sup>2</sup> People through mobile are connected to cyber world and the expanding horizons of ecommerce in the remote area of the country and hence part of the bigger market. Many Indian as well international ecommerce entities are available, providing goods and services through ecommerce. There is no iota of doubts that ecommerce has laid to socio economic growth. It has created plenty of employment opportunities in the market and has revolutionised the way commerce happen. The innovative business methods are in the process of evolving to make it more cost effective and customer friendly medium.

Information technology Act 2000 was created in response to UNCITRAL Model Law of Ecommerce 1996. The Model law provided the guidelines for the State to incorporate or develop ecommerce laws to facilitate ecommerce transactions within State. Before 1996, from Indian perspective not much clarity was there as to status of electronic means of communication. The Model law of Ecommerce 1996 was adopted by Indian legislature in 2000 in the form of Information Technology Act, 2000.<sup>3</sup> The initial Act was created exclusively from ecommerce perspective as it provided the basic framework of recognition and validity of commercial transactions created through electronic means of communication.<sup>4</sup> However, it was analysed that the impact of recognition or validity to electronic transactions has impact on other aspects of human behaviour. Hence, in 2008 the Information Technology Amendment Act 2008 was introduced making major significant changes in the original Act. However, there are certain issues which are not properly addressed in the Act. Some of the issues are discussed here.

## **2. A - Jurisdiction**

The issue of jurisdiction is significant one from “authority” or “application” point of view. The concept of jurisdiction empowers the specific authorities to control, regulate, enforce the law. Hence, from legal perspective issue of jurisdiction are categories as legislative jurisdiction, judicial jurisdiction and enforcement jurisdiction. While legislative jurisdiction is exclusive domain of legislature to the define the nature and scope of application of law, judicial jurisdiction confines to judicial power to entertain the case. The enforcement jurisdiction is the domain of administration to enforce the decision, policy of State. Here, we will confine the discussion to legislative jurisdiction and judicial jurisdiction.

**i. Legislative Jurisdiction:** The Constitution of India elaborate on legislative jurisdiction of the State as well as Central legislature in the form of 7<sup>th</sup> Schedule of Constitution. It maintains three list as Central

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<sup>2</sup> Id.,

<sup>3</sup> The preamble of the Information Technology Act 2000 recognise the source.

<sup>4</sup> Information Technology Act, 2000; Section 3,4,5,6,7

list<sup>5</sup>, State list<sup>6</sup> and Concurrent list<sup>7</sup> in the Schedule. Central, State and concurrently both on certain issues are capable of legislating. Further Article 245 defines the nature and scope of legislative jurisdiction. Particularly Article 245(2) states:

“No law made by the Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation.”

It makes ample clear that the legislative authorities can make a law which may be applicable on extra territorial issues. Due to the borderless character as well as omnipresence and anonymity nature of the human presence and their operations in cyberspace, it is imminently required to have a broad legislative jurisdiction of law governing Internet. The Information Technology Act 2000 (Act) was enacted with this broad approach. Section 1<sup>8</sup> along with section 75<sup>9</sup> of the Act reflect on ambit of application of Act. It categorically recognises that the Act is applicable to “any person” who commits contraventions or crime of the nature identified under the Act “anywhere”, can be prosecuted under the Act. Therefore, the application of the Act is to any person irrespective of his nationality, who commits civil contravention as per section 43/43A or criminal offence of the nature under section 65 to 76 of the Act will be prosecuted under this law.

The drawback of such wide extra territorial application of law is that it is difficult to enforce the application of law against the offender or criminal under the Act, if the State doesn't have proper mechanism to bring the person in Indian territory. The traditional mechanism adopted widely among States to bring the offender to the place or country of crime/contravention is extradition. In the absence of any uniformity with regards to the extradition concept by international institutions like UN, the extradition is possible through bilateral treaties only. Hence majority of States have bilateral treaties. India also has number of bilateral treaties on various crimes or

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<sup>5</sup> Central list has 97 items. Only Central Government or legislature has the power to make laws regarding it.

<sup>6</sup> State list has 66 items. State has exclusive power to legislate on the issues.

<sup>7</sup> Concurrent list has 47 items. Central as well as State legislature has concurrent power to legislate on the issues.

<sup>8</sup> Information Technology Act 2000; Section 1(2) “It shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention thereunder committed outside India by any person”.

<sup>9</sup> Information Technology Act 2000; Section 75. “Act to apply for offence or contravention committed outside India. (1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.”

contravention with other consenting States. Though there are sizeable number of regional treaties which allows extraditions among them such as Budapest Convention on Cyber Crime, 2001<sup>10</sup>. This convention is a European Convention; however, they have allowed certain non-European States to be part of the treaty. India is not party to this Convention.

In case the States do not have extradition treaty, the extradition is only possible on the basis of good office and principle of reciprocity. This makes it a tough task for the real application of such wide legislative jurisdiction. Though looking at the nature of dynamic issue in hand, it is inevitable to have to such wide jurisdiction, but at the same it is imperative on the part of State to make enforcement possible in case of cross border nature of crime and contravention.

- ii. Judicial Jurisdiction:** Indian Code of Civil Procedure 1908, prescribe civil jurisdiction of Court. The jurisdiction is broadly defendant centric<sup>11</sup> as it is centred around the presence of defendant within the jurisdiction of Court. In cyberspace it is very much possible to do transactions from outside jurisdiction without diluting the nature of transactions. As already discussed, that cyberspace has the feature of omnipresence, it is very much possible that a person is available everywhere in this medium. Or the person may not be physically within the jurisdiction, but actively provide commercial services within the territory. The traditional rule of jurisdiction will be inadequate to deal with such problem. Hence, judiciary proactively extended its jurisdiction with the help of international development or practices. The Zippo Manufacturing Co. vs. Zippo Dot Com<sup>12</sup> Case and Calder vs. Jones<sup>13</sup> has been incorporated into Indian jurisprudence in many cases. Zippo's sliding scale formula and Calder's effective presence are the test which Indian court also followed.<sup>14</sup>

In case of criminal jurisdiction, the court strictly follow the Criminal Procedure Code rule of place of crime. Section 177, 179 of Cr.P.C. are applicable from Indian perspective. The rule has its relevance with regards to evidence at place of crime.

## **B. Consumer Protection**

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<sup>10</sup> Budapest Convention on Cyber Crime 2001. Available at <https://www.coe.int/en/web/cybercrime/the-budapest-convention>, accessed on 01.12.2022

<sup>11</sup> Civil Procedure Code, 1908; Section 20.

<sup>12</sup> 1124(W D Pa 1997)

<sup>13</sup> 456 US 783 (1984)

<sup>14</sup> India TV Independent News Service Pvt. Limited v. India Broadcast Live Llc & Ors. 2007(35) PTC 177 (Del.); Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy 2010 (42) PTC 361; Super Cassettes Industries Ltd. v. MySpace Inc. & Another IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008.

The success of ecommerce is dependent on the trust, faith of ecommerce entities with regards to the goods or services they sell online. Maintaining trust and faith is in benefit of the ecommerce entities itself. Consumer awareness about their right is very much required. The newly amended Consume Protection Act 2019 to dynamic in this regard as it incorporate the ecommerce aspect of commercial transactions into consideration. Further, the Ecommerce Rule 2020, formulate the rules for the ecommerce entities to follow while providing their services to the consumer.

### **C. Data protection**

Data has been considered as digital gold. Data is instrumental in analysing demand and supply in ecommerce. Ecommerce entities heavily relay on data to analyse many customers and market centric information mostly for their own benefit. Right from selection of product to delivery of specific product, the customer feed plenty of personal and non-personal information. The cookies employed by the seller or ecommerce entity observe the search habits of customer, search behaviour and personalised choice. The algorithm is employed on the online commercial website which analyse your need as per customer search and pop up with the products or services even when customer does not search for it. This is violation of privacy of the customer and wrongful use of data. The data is being used and sold to third party without consent. Hence the privacy and data of the customer need to be protected under this platform.

Two major issues that need attention are with regards to use of regulation of data. First is the quality of data and second is the transparency and accountability in processing data. Quality of data is important for accurate information and analysis. The data mining or use of algorithm in analysis of choice, behaviour or preference of customers may not give accurate result, if the quality of data is compromised or forged and not accurate. Any manipulation with data is going to produce wrong result. Hence quality of data is important. In case of reviews which are instrumental in narrow down the choice is customers are fake reviews, if very basis of data and its processing is compromised deliberately or mistakenly. The wrong data may be uploaded by customers incentivised for it or not incentivised one or third party or manufacture deliberately to misguide the customer. The wrong data can generate negative results for the genuine customer as well as ecommerce entity. Hence, accuracy of data is important for overall usefulness of ecommerce. There are reports from across the globe about deliberate creation of fake reviews or fake rating to influence the choice of customers.<sup>15</sup> From Indian perspective the government<sup>16</sup> has taken a call

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<sup>15</sup> European Parliament Briefing October 2015, Online consumer reviews The case of misleading or fake reviews, available at <https://www.eesc.europa.eu/sites/default/files/resources/docs/online-consumer-reviews--the-case-of-misleading-or-fake-reviews.pdf>, accessed on 01.12.2022

on the issue and Indian Standard has passed one rules named “Indian Standard with regards to Online Consumer Reviews – Principles and Requirements for Their Collection, Moderation and Publication”<sup>17</sup>. The Standard instructs the ecommerce entity to follow certain ethical code and principle to pursue to make data collection more transparent. However, it is not able to resolve the problem of cross border fake reviews and its impact on the Indian customer.

Second issue is the processing, custody and use of data. The issue of transparency and accountability is important for fair use of data. Data should be asked to feed unless it is inevitable required. Only that much data should be asked which is required. Unnecessary unrelated data should not be asked and stored. The data should be used only for limited purpose for which it is collected, consent of the customer is required for collection of data. There should be opt in or opt out choice available to select the nature of data storage. There need to fix time duration for the storage of data, there should be proper mechanism to address the grievances relating to data etc. The current laws with regards to the data protection is insufficient. The rules laid down under the Information Technology Act 2000 need drastic changes. There is a need for clarity with regards to the cross-border sharing of data. Proper mechanism needs to be developed to address any grievances.

#### **D. Capacity to Contract**

One of the basic requirements of contract is that the parties to the contract should be competent to make contract on the day of formation of contract. Contract created by the competent party will be a valid contract. Indian contract Act<sup>18</sup> define the concept of competent parties to the contract. According to it a minor is not competent to make a contract. Further section 11 of the Act identifies that the law of the land to which the person is subjected will decide the competency of the party. However, the nature of cyberspace provides plenty of anonymity to netizens. They can easily conceive their true identity to misrepresent and mislead the other party to enter into contract. In case one of the parties is not a competent one to make a contract, then contract is voidable at the choice of remaining party. Ecommerce entity has no means to confirm the capacity of the party at the time of making of contract. Even the means which are available to ascertain the age of the person concerned can be easily bypassed or circumvented. Hence, there is an urgent need to address the problem legally as well as technically.

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<sup>16</sup> Press Release by Ministry of Consumer Affairs, Food & Public Distribution, Centre to develop framework to check fake reviews on E-Commerce websites, available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1828897>, accessed on 01.12.2022

<sup>17</sup> Online Consumer Reviews – Principles and Requirements for Their Collection, Moderation and Publication, available at [https://www.medianama.com/wp-content/uploads/2022/12/19000\\_2022.pdf](https://www.medianama.com/wp-content/uploads/2022/12/19000_2022.pdf), accessed on 01.12.2022

<sup>18</sup> Indian Contract Act 1872; Section 11

## **E. Intellectual Property Rights**

Intellectual property are intangible property rights attached to goods and services. There are variety kinds of Intellectual Property such as Patents, copyright, trademark, design, trade secret, plant varieties, geographical indication. There are fair chances of intellectual Property rights violation in internet or ecommerce platform.

- i. Patents** - Patent deals with innovations and license is recognised as one way to transfer the right attached to a product or process patent. The electronic means of communication allowed the human imagination to develop new methods of doing business. In patent law the concept is recognised as business methods. The traditional methods of doing business have been revolutionised with electronic means of business model such as B2B, B2C, C2B, C2C. These business methods are human intellectual creativity. The patentability of business methods is not uniform around the globe. The state practice with regards to the business methods differs. In case of the USA, business methods are recognised as patentable subject matter and there are plethora of patents filed on this grounds. Japan recognises business methods as subject matter of patents, however there is more in addition to it in the form of technical aspect which should be in tangible form. Both Europe and India don't recognise it as a subject matter of patents.
- ii. Copyright:** This intellectual property is widely violated in cyberspace. Copyright protects the expression and doesn't need support of registration for protection under the Act. While these two factors are the strength of the concept, it also makes it vulnerable, weak and subject to exploitation. Without the permission of the author or owner of the copyright, the copyright material is reproduced, published, communicated, translated, adapted into other form of work. The digitalisation of the copyright work makes it more vulnerable as it available at the cheap cost to anyone. There is no dearth of supply of these digital copies. Computer software is also recognised as a subject matter of copyright protection. It is frequently reproduced, downloaded without the permission of right owner. Online copies of the newspaper downloaded are frequently shared to the other users freely is a copyright violation.

Ecommerce entities can be seen from two different perspective. Firstly, ecommerce platform is used as platform to violate the copyright of third party such as making available of copyrighted material on sale without the appropriate permission of the author or owner of copyright work. The vendor who provides the goods or service on a particular ecommerce platform may be liable for copyright violation in this case. Counterfeit materials are made available by the vendor through this platform. License agreements are violated by selling the product in territories outside the agreements. In all such nature of cases it is the sole

responsibility of the vendor. As per section 51 of the Indian Copyright Act it amounts to infringement of right of author or owner of copyright material. Secondly, the ecommerce platform may be performing as intermediaries and participate or facilitate in the delivery of the copyright product intentionally. In that case as a contributory infringement the ecommerce platform can be held liable under section 51 of Indian Copyright Act 1957.

**iii. Trade mark:** Trademark helps in identifying the right product and services with the true owner of product or services. Owner, manufacturer or seller of the product and services add a mark to the product to make it distinguish from the other product or services. These trademarks help the customer to identify the right product. This trademark is very much under attack at ecommerce platform. It is easy to deceive the consumer by supplying wrong product with variation in the name of trademark or placing wrong trademark. The counterfeit product may be advertised with identical authentication about the product to deceive or confuse consumer about the true identity of the product.

Now it is almost imperative for every industry to create their space in cyberspace for information as well as commercial purpose. It is easy and effective way of reaching to public and enhance once grip in the market. Hence, all reputed commercial entities or industries have their presence registered in internet in the form of domain name. Mostly these domain names are also the trademark of the company, product or services. These popular domains are under threat by the concept of Cyber-squatting. It is also known as domain squatting where a fake or deceptive similar domain name is created which is phonetically or spelling similarity to original trademark/domain name to deceive the consumer about the originality of the website. The act of cyber-squatting is done purposefully, intentionally to deceive the customer about the originality of trademark or domain name and to cause wrongful gain to deceptive domain name. Indian courts in plethora of cases under Indian Trademark Act have issued injunctions against such domain name and asked them to compensate the original domain name holder for the losses. The problem is more problematic from the cross-border perspective. There are plenty of instances when deceptive domain names are created from across the border. World Intellectual Property Organisation (WIPO) is sensitive to such technical issue. Hence, the WIPO's Arbitration and Medication Centre has devised the mechanism in the name of Uniform Domain Name Dispute Resolution Policy (UDRP) to amicably resolve the issue. The Arbitration and Medication Centre is effective in resolving such matters.

**iv. Design:** The digitalisation of the records makes it possible to reproduce the content endlessly. Sophisticated technology in the form of free app is available online to convert the two-dimensional digital

design to three-dimensional digital design. The three-dimensional creation of pics or design has created threat to design aspect of intellectual property right. It is difficult to maintain the confidentiality of design. It is possible for skilled person of related product to redesign.

## **F. Online Dispute Resolution**

The technological evolution has affected every aspect of human life and behaviour. It has also created new opportunity for experiment with the dispute resolution. One of the grievances against the judiciary is with regards to the pendency of cases at various level of courts in India. Indian courts are overloaded with pendency of cases. There might be various factors responsible for it. There is an urgent need to address this issue as it amounts to loss of faith in justice and corruption. In case of ecommerce activities, it is not feasible to bring small cases before the overburdened court. Hence a mechanism has been adopted to resolve such small cases. The concept of online dispute resolution is in the process of evolution to some extent around the globe. Internationally the Online Dispute Resolution (ODR) has its presence, however in India to some extent ODR mechanism is evolving. This is in the nature of online arbitration, mediation or counselling. Private players are participating in this process. From Indian point of view Niti Ayog had published a working paper on it supporting the ODR mechanism.

Internationally UNCITRAL has prepared Technical Notes on Online Dispute Resolution 2016<sup>19</sup>. The commission appreciate that the traditional judicial mechanism for legal recourse does not offer an adequate response to cross border ecommerce dispute. Hence, they advocate for ODR in cross border ecommerce matter. It defines ODR as

“Mechanism for resolving disputes through the use of electronic communications and other information and communication technology”.<sup>20</sup>

The technical notes advocate the principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency in robust ODR mechanism.<sup>21</sup> It expect the recognition of ODR in cross border low valued sales. There is a need to get the complaint from consumer and communicated to the seller/manufacturer online. Consent of both parties are required to proceed with the matter. First stage of ODR is negotiation between the parties and ODR platform, second stage is to facilitate settlement. To maintain the fairness and due process neutral are required to be

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<sup>19</sup> UNCITRAL Technical Guidelines on Online Dispute Resolution 2016, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382\\_english\\_technical\\_notes\\_on\\_odr.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf), accessed on 01.12.2022

<sup>20</sup> Section V, para 24

<sup>21</sup> Section 1, para 4

appointed by ODR. Neutral is the person engaged or appointed to arbitrate/mediate and resolve the dispute between parties. He has to declare his impartiality and independence to both parties. In case of any doubt during the course of proceedings disclose and clear the doubts.<sup>22</sup>

### **3. Conclusion & Suggestions**

The emergence of ecommerce and its wide acceptability by public and state is reflected in terms of its contribution to socio economic developments. It is contributing immensely to GDP of state. During the Corona epidemic time, ecommerce has been instrumental in maintain the supply chain of goods and services. Hence there is no doubts of its social and economic benefit. However, during the same time it has been used by anti-social elements for narrow objectives like frauds, fake reviews, data theft, privacy violation, IPR violations etc.. The typical nature of functioning of net of network always makes it a challenging task to govern it effectively. In this background national and international major attempts are initiated to regulate it. UNCITRAL is an active international organisation evolving laws, principles for it. From national perspective, legislature has done a wonderful piece of work in terms of Information Technology Act, 2000 and supplementary Rules in support for it. To some extent the challenges has been addressed and, in some cases, there is an urgent need to address the problem to resolve the issue to maintain good faith, transparency, accountability of ecommerce. All this is in the background that now virtual reality is going to dominate the human imagination with regards to every aspect of life. Metaverse as a virtual space provide ample space for creativity and commercial transactions. It will pose new issue and challenges for the States and its subject.

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<sup>22</sup> Section X, para 48(b)

# **Indian Firearms Law and Licensing Procedure**

**\*Mr. Rakshit Gupta**

## **ABSTRACT**

According to crime statistics, crimes are rising in India on a daily basis. The majority of crimes including rape, murder, severe injury, theft, etc. concerned dangerous weapons. One of the pieces of evidence in such crimes is the use of arms and weapons. A crucial part is played by the identification of the same for research. The Arms Act of 1959, which was amended in 2019 together with its rules, i.e., Arms Rules, 2016, governs the use, purchasing, and production of such firearms. One of the safeties measures a nation may do is to maintain a legal framework to regulate such arms manufacturing, sales, and purchases. Due to the terrible situations that certain countries have encountered as a result of the use of these firearms, efforts are being made to establish or tighten gun laws globally. This research paper will provide a succinct analysis of the licencing procedure under the Arms Act of 1959 and the 2016 Rules in a descriptive manner. The world has witnessed a few horrific bloodbaths that claimed many lives. India is ranked second in the world for the usage of such weapons and ammunition, not only domestically. The most significant barrier to the proper and effective application of Indian arms legislation is the use of country-made and unauthorized production. India is ranked second in the world for the usage of such weapons and ammunition, not only domestically. The most significant barrier to the proper and effective application of Indian arms legislation is the use of country-made and unauthorized production. To properly integrate the preventative measures toward such use and manufacturers, it is desirable to look at these components.

## **1. Introduction**

Charges for crimes are surprisingly rising day by day in India. There have been other incidents when the criminals have used a large number of firearms and weapons. The weapons and bullets are prominent guns that are frequently incorporated employing the criminals. It becomes quite simple for the offenders to obtain it because it is so widely available both within the market and the vicinity. Due to the lack of legal frameworks controlling such weaponry and ammunition in India, they are freely available in the market without any bother or legal formality. The need to define and modify legislative frameworks in a way that is helpful in the rigorous management of the flow of firearms and other weapons on the market cannot be overstated.

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The **Indian Arms Act of 1959**<sup>1</sup>, which provides guidelines for possessing arms, governs the control of firearms in India. An act of parliament that was passed in an effort to reduce the risk of illicit firearm possession and the potential for violence that could arise from it removed the earlier legislation of 1878. Additionally, the sale, manufacture, acquisition, possession, export, import, and shipping of weapons and ammunition are all prohibited under the strict Arms Rules of 1962<sup>2</sup> in India. This was done to ensure that any Indian insurrection would be considerably less strong. Except for a few breeches loading easy bore shotguns, which may be made and imported in a limited number of different configurations, the Indian Government has exclusive control over the manufacture and marketing of firearms.

## **2. Indian Arms Law's Historical Traces**

The Indian Arms Act of 1959 establishes standards and relevant legal requirements for the possession of guns in India. The Arms Act of 1959 aims to lessen the illegal purchase of firearms that might lead to threats and violence that could obliterate social peace and order.

As the British empire grew in India in the middle of the 1800s, incidents of racial discrimination, poor pensions, low pay, and cultural differences increased owing to the ruthless English authorities directly to the populace and various regions of the nation. In order to defeat the British colonial presence in the Indian Subcontinent in 1857, Indian infantrymen joined forces with ordinary citizens and local authorities. This was done with the intention of involving the British in Indian politics. Even though the revolution was put down, it left Britishers worried that they would lose their colonial generation in India in the near future and that a similar revolt might come from elsewhere, shocking them even more. The Arms act of 1878<sup>3</sup> was passed in response to the unauthorized and unlawful use of rifles, guns, and other weapons. This statute ensured that only those people who had proven their loyalty to the Crown were eligible to possess any type of weapon with the proper authorization. After twelve years of independence, this rule came to an end in 1959.

As a result of the Indian Arms Act, 1959, which established guidelines for the ownership of guns and other arms, a new law governing firearms was implemented in India. The Arms Act of 1959 aims to reduce the illegal purchase of firearms that might lead to threats and violence that could undermine social order and peace. New clauses were added to this legislation in 1962, outlawing the manufacture, sale, purchase, and transportation of ammunition without a valid licence as well as import-export.

## **3. Indian Legal Framework for Arms Regulation**

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<sup>1</sup> Indian Arms Act, 1959, Acts of Parliament, 1949 (India).

<sup>2</sup> Indian Arms Rules, 1962, Acts of Parliament, 1949 (India).

<sup>3</sup> Indian Arms Act, 1878, Acts of Parliament, 1949 (India).

Through the Arms Act of 1959, the Arms Act of 1878 was repealed. The Act of 1959 was more comprehensive than the British-enacted law and also reflected the government of India's misgivings about its people. The Indian Parliament passed the Act of 1959 to codify and update the laws governing firearms and ammunition, therefore lowering the use of illegal weapons and the resulting violence. The Arms Rules of 1962 were used to expand the Act of 1959, and both sets of regulations severely restrict the ownership, sale, acquisition, manufacturing, importation, exportation, and transfer of guns without a valid licence, which can take months or even years to obtain. The Act granted the licencing authority arbitrary power, allowing them to deny any application for a firearms licence without providing any justification. The Act also brought to light India's lack of transparency concerning firearms laws.

India's Arms Act categorizes firearms into the following groups<sup>4</sup>:

**A. Prohibited Bore (PB)**

**B. Non-Prohibited Bore (NPB)**

The term "bore" refers to the diameter or width of the bullet, as well as the hollow in the middle of the barrel from which the bullet emerges.

Guns with a prohibited bore size include **9 mm** pistols, handguns with **0.38**, **0.45** calibre, and **0.303** rifles<sup>5</sup>. They also include fully automatic and semi-automatic weapons. Outside of defence sector personnel and personal family treasures, obtaining a licence for the Prohibited Bore class has become all but impossible. However, the Indian Government amended its gun ownership rules over time, notably after the 2008 Mumbai Terror Attack. Therefore, those citizens who are detained in fear for their life or those who reside in terrorist-friendly locations and have made themselves targets in the eyes of terrorists by working in nature, or MPs or MLAs, locals involved in anti-terrorist programmes, or even their own relatives, might be at risk. However, only particular types of weapons, as announced by the government in the Official Gazette, are eligible for the issuance of licences for prohibited bore guns, while other types continue to remain off-limits to civilians.

Non-Prohibited Bore weapons include handguns with calibres of 0.35, 0.32, 0.22, and 0.380. All citizens may verify their possession of a non-prohibited bore using the procedures outlined in Chapters II<sup>6</sup> and III<sup>7</sup> of the Arms Act of 1959. The Act's "Acquisition, Manufacture, Possession, Sale, Export, Import and Transport of Arms and Ammunition" is covered in Chapter II. "Provisions about License" is presented in Chapter III.

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<sup>4</sup> Team, M., *Arms Act (Amendment) Bill*. JournalsOfIndia. (2021, February 21).

<sup>5</sup> Team, M., *Arms Act (Amendment) Bill*. JournalsOfIndia. (2021, February 21).

<sup>6</sup> Indian Arms Act, 1959, Chapter II, Acts of Parliament, 1949 (India).

<sup>7</sup> Indian Arms Act, 1959, Chapter III, Acts of Parliament, 1949 (India).

- ✓ Justice Katju ruled in the matter of **Ganesh Chandra Bhatt v. District Magistrate**<sup>8</sup>, Almora that Article 21<sup>9</sup> of the Indian Constitution protects the right to self-defense if the government does not accept or reject a request for a licence to possess a non-prohibited firearm within three months.
- ✓ The Arms Act of 1959 is the only law governing the possession of weapons today; it is not constitutionally protected. But this decision was made before the 1993 Bombay terror assault. The judgment has been overturned since then.

The **Arms (Amendment) Act, 2019**<sup>10</sup> (the "Amendment"), which among other things reduced the maximum number of approved weapons one could possess from three to two, was passed by the NDA authorities in December 2019. The primary goal of the aforementioned Amendment, according to the Statement of Objects and Reason, is to lessen the growing proliferation of illegal and illegitimate firearms. In particular, it claims that law enforcement agencies have identified a link between the use of illegal firearms and the severity of crimes. In the same manner, it will immediately establish harsher penalties for Act violations and provide a few fresh offences, such as forcibly stealing a handgun from a police officer or military officer and firing celebratory gunfire. The Arms Act will now serve as the principal law defining "*organized crime*" as a result of the Amendment.

#### 4. Licensing Procedure in Indian Law

For the proper implementation of a licensing system under Section 3<sup>11</sup> of the Arms Act of 1959 below the Arms Rules of 2016<sup>12</sup>, Indian Arms Laws include separate rules and procedures. On July 15, 2016, Arms Rules, 1962<sup>13</sup>, as amended by Arms Rules 2016, went into force. The licensing procedure was outlined in Chapters III and IV of the regulations<sup>14</sup>. Additionally, it outlines the requirements for those applying for the licence in question. A licensing authority, who is most likely a government representative with the authority to award or renew licenses in compliance with the rules made under this Act, administers the licensing procedure under this Act.

##### 4.1 Licensing Procedure

As stated in Section 13<sup>15</sup>, the licencing authority completes the licence provision process. For the issuing of a licence to them concerning firearms and ammunition, an application from the applicant must be presented

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<sup>8</sup> Ganesh Chandra Bhatt v. District Magistrate, Almora, AIR 1993 All 291.

<sup>9</sup> Constitution of India, 1950, Article 21, Acts of Parliament, 1949 (India).

<sup>10</sup> Arms (Amendment) Act, 2019, Acts of Parliament, 1949 (India).

<sup>11</sup> Indian Arms Act, 1959, S. 3, Acts of Parliament, 1949 (India).

<sup>12</sup> Indian Arms Rules, 2016, Acts of Parliament, 1949 (India).

<sup>13</sup> Indian Arms Rules, 1962, Acts of Parliament, 1949 (India).

<sup>14</sup> Arms Rules, 2016 - CRIMINAL LAWS - Acts. (n.d.).

<sup>15</sup> Indian Arms Act, 1959, Section 13, Acts of Parliament, 1949 (India).

inside the required documents, Form A-1 to Form A-12. Using the NDAL, or National Database of Arms License, verification is required<sup>16</sup>. A few formal requirements must be met by the applicant, such as the submission of identity proof, housing proof, medical certifications attesting to the applicant's intellectual and physical fitness, and an undertaking by the applicant for the safe and secure storage of the same.

❖ Licensing Authority's Power

According to Chapter III<sup>17</sup> of the Act, the licencing authority has specific authority over the issuance of licences, especially when combined with the requirements pertaining to the software used to award licences to licencing authorities. It may go through the programme and demand the documents from the managers of the nearest police station. Following consultation with the document licencing authority, a licence may be granted or denied. The granting of an arms licence is currently a privilege rather than a right.

❖ Within the following restrictions, the licencing authority may refuse to issue the licence<sup>18</sup>

- License for weapons and firearms that are not allowed.
- If the licencing authority believes that the character's ability to obtain, own, or carry weapons and ammunition is prohibited by any applicable regulations.
- Refusal of such licence may be carried out in case the character is of unsound mind.
- If the licencing body determines that the character isn't always fit for the licence, it may decide not to provide the licence.

## 4.2 License Restrictions in Certain Situations

Chapter II<sup>19</sup> of the Arms Act of 1959, provides for a certain circumstance in which the granting of a license for firearms and ammunition is forbidden. These are some instances:

- Prohibition on the purchase, possession, use, manufacture, or sale of certain prohibited firearms and ammunition: In accordance with Section 7 of the Arms Act of 1959, both men and women are completely prohibited from carrying, purchasing, possessing, using, manufacturing, or promoting specific prohibited firearms and ammunition. It can only be done effectively with the prior consent and approval of the significant government.

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<sup>16</sup> What documents are required to be submitted for obtaining a new arms Licence? – Police Commissionerate. (n.d.).

<sup>17</sup> Indian Arms Act, 1959, Chapter III, Acts of Parliament, 1949 (India).

<sup>18</sup> *Driving Licenses & Other Related Provisions of MV ACT* – Police Commissionerate. (n.d.).

<sup>19</sup> Indian Arms Act, 1959, Chapter II, Acts of Parliament, 1949 (India).

- Prohibition on the sale and transfer of firearms that are no longer marked with identification: Any ammunition or firearms that are not marked with identification cannot be sold or given to anyone. Section 8<sup>20</sup> of the Arms Act of 1959 recognises complete prohibition.
- According to Section 9<sup>21</sup> of the Arms Act of 1959, the following classes of people are barred from purchasing, possessing, or delivering firearms and ammunition:
  - ✓ Any person who is under the age of 21.
  - ✓ Any person who has served a sentence for a crime involving violence or an ethical breach at any point during the five years following the sentence's expiration.
  - ✓ Any person who offers security or a bond in order to keep the peace and act in a manner that is below Cr.P.C.
  - ✓ Individuals who get notifications from important authorities on the import and export of firearms.

### **4.3 Firearm Identification Marks**

The licencing authority must place seals and marks on the firearms to distinguish them from one another. Anyone who keeps or owns such firearms is required to obtain these identity markings from the licencing authority with permission. One of these magnificent letters that the national government has prescribed, a number, the trial licensee's arm number, the year of stamping, etc. are examples of such identity marks.

### **4.4 Authorities Appointed to Issue Licenses**

Before 1987, the District Magistrate or State Government may provide licenses for the acquisition and ownership of both non-prohibited bore and prohibited bore weapons. Following that year, however, the central government was given the power to issue licences for guns with Prohibited Bores. The licences granted under this Act are good for three years, after which they must be renewed. This rule also applies to the sale of firearms.

### **4.5 Permissible Gun Types**

The most frequent firearms issued to citizens who qualified for the right to keep and bear arms under this Act are double-barreled shotguns of 12 gauge, sometimes known as DBBL 12 Bore, 0.32 Smith & Wesson Long revolvers (6 rounds Chamber Capacity) and 0.315 Bolt Action Rifle (5 cartridges Magazine Capacity) are among of the usual armaments issued to licence holders under this statute<sup>22</sup>.

## **5. Punishment Under Arms Act, 1959**

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<sup>20</sup> Indian Arms Act, 1959, Section 8, Acts of Parliament, 1949 (India).

<sup>21</sup> Indian Arms Act, 1959, Section 9, Acts of Parliament, 1949 (India).

<sup>22</sup> *Law on Firearms in India - HelplineLaw.com*. (n.d.). Help Line Law.

The Arms Act of 1959 contains provisions for offences and penalties under Chapter V<sup>23</sup>.

Anyone who uses a firearm recklessly or carelessly, or for celebratory firing activities, may be penalized with years in prison and a fine of up to Rs. 1 lakh.

According to the proposed amendments to the Arms Act, those who carry firearms that have been taken from the military or the police, participate in illegal trade, or use them carelessly or rashly are subject to jail terms that can last a lifetime.

## **6. Stiff Regulations and The Expansion of The Illicit Firearms Trade**

There is no benefit to amending the supply that specifies the prohibition on licensed firearms. Less than 2% of the total number of seized firearms were licensed firearms, according to information based on the National Crime Records Bureau. The other 97% of firearms are illicitly manufactured or firearms that were unlawfully brought into the country. This data shows that licensed firearms are not being employed in criminal activity; instead, the development of the illegal firearm industry is a result of stringent laws<sup>24</sup>.

The combination of strict legislative restrictions and a low market for quality firearms has been disastrous. The market for illegal firearms is both profitable and almost untraceable. These characteristics make it a completely profitable and practical trade. These illegal businesses, some of which have existed for generations, supply outfits with firearms made in the country while mockingly abusing the strict laws. For a considerable amount of time, factories in Uttar Pradesh, Jharkhand, and other states have been adapted to the excessive need for firearms<sup>25</sup>. In colonial times, locations like Munger in Bihar were centers of arms production. Later, gunmakers of future generations outperformed these skills.

In terms of demand and supply, the demand for foreign firearms may be very high, mostly because their manufacture—which is primarily European or American—is of higher quality than that of Indian origin. However, due to strict import regulations and high import requirements for firearms, the delivery of such firearms is second to none. The ultimate effect is that consumers turn to the illegal firearms market, which offers a variety of options, including country-made pistols, cheap Kalashnikov replicas, and previously acquired, extremely high-quality European firearms. The most important thing that the grey and black markets provide their customers is non-traceability. Due to the nature of those sales, it is impossible to link the origin or source of those guns with

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<sup>23</sup> Indian Arms Rules, 1959, Chapter V, Acts of Parliament, 1949 (India).

<sup>24</sup> Karthikeyan, S., *Explained | Guns and gun control laws in India*. The Hindu (2022, June 12).

<sup>25</sup> Anwar, T., *The illegal “Make in India”: What makes Munger a favourite destination of criminals-India News*. Firstpost (2015, April 6).

certainty. This feature proves to be wonderful for almost any business or employer who regularly engages in illegal or illicit activities. There is no way to estimate the number of Indians who now hold illegal weapons due to the unchecked proliferation of these weapons. However, these sectors continue to operate even after these regulations have been in place for almost 60 years.

Even while those laws may have been passed with the intention of reducing gun crimes, they unintentionally sparked the emergence and growth of the illegal trade in firearms. Thus, furthering the tightening of such laws, as in the case of the 2019 Amendment, will no longer assist in the reduction of illegal activity. Additionally, it will no longer be very helpful at all in addressing the issue of the black market. Over the past few years, we have seen that the fear of illegal hands has had little effect on those legal restrictions.

## **7. International Relations and Firearms**

### **7.1 Firearms legislation in the United States of America**

The United States has strict laws governing the purchase of weapons for personal use, which are outlined in certain national and federal regulations<sup>26</sup>. American legal restrictions are unambiguous regarding every aspect of the production, possession, sale, import-export, maintaining records, transit, and destruction of firearms, ammo, and related accessories.

National organizations and the Federal Bureau of Alcohol, Tobacco, Weapons, and Explosives enforce these rules regarding firearms.

Additionally, to state and federal laws, several municipal authorities in the United States has its own restrictions on guns<sup>27</sup>. The freedom to own and carry weapons is protected under the Second Amendment of the US Constitution. Its residents are safeguarded from the possibility of domestic repression by the Second Amendment in dispute to the US Constitution.<sup>r4</sup>

### **7.2 Law Concerning Firearms in The United Kingdom**

In comparison to other European countries, the UK has stricter firearms laws (outlined in the European Firearms Directive), making it more difficult to obtain a firearm there because of the country's strict legal restrictions<sup>28</sup>. In the UK, firearms are strictly regulated by law, making it difficult to obtain a firearm. Surprisingly, Northern Ireland has fewer onerous rules than other nations, making it the nation with the lowest

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<sup>26</sup> Parker, K., Horowitz, J. M., Igielnik, R., Oliphant, B. J., & Brown, A. *America's Complex Relationship*

*with Guns*. Pew Research Center's Social & Demographic Trends Project (2022, February 5).

<sup>27</sup> Schaeffer, K., *Key facts about Americans and guns*. Pew Research Center (2021, September 13).

<sup>28</sup> Skopeliti, C. *What are the rules on firearms licences in the UK?* The Guardian, (2021, August 13).

incidence of gun homicide globally. In regions with more than 100,000 persons, there were just 0.05 deliberate firearm murders in the five years before to 2011 (15 - 38 humans according to yr.). Only 2.4 per cent of all homicides during the year 2011 were committed using a firearm.

There might be some tension, though, over how easily guns can be obtained illegally. According to data from the Office of National Statistics, a total of 7,866 crimes involving weapons were reported through the end of March 2015, representing the first gain in over 10 years and a 2% increase from the prior year<sup>29</sup>. 19 fatal accidents occurred out of the total 7866, which was 10 fewer than the previous year and the lowest since statistics have been kept since 1969.

Though considerably slower than the all-time high of 24,094 in 2003–2004, there has been a steady rise in offences, with the number reaching 8,399 at the end of March 2016. This is the highest number in four years. Of them, 26 sustained fatal injuries.

### **7.3 Indian Firearms Law Differ from that of The United States of America**

The world witnessed the massacre that resulted in at least 50 fatalities occurred at an Orlando, Florida nightclub. When it comes to experiencing such sporadic shootings, the USA has a terrible track record<sup>30</sup>. Over the previous 50 years, comparable shootouts have occurred more than twice a year in the USA, with 12 of these shootings in 2016 alone. In these killings, the perpetrators killed four or more people.

Currently, American weapons regulations continue to be remarkably loose and unregulated despite various legislators' repeated requests to limit the simple access to gun permits.

Omar Mateen, the Orlando shooter, had lawfully purchased the assault rifle he used to carry out the atrocity. After successfully completing a 28-hour course on gun safety, Florida residents are permitted to carry concealed guns.

Owing of this, India has far stronger restrictions and regulations that must be adhered to in order to legitimately obtain a gun when the laws and regulations of India and the USA are compared. For this reason, owning a gun is not prevalent in India.

Recent Small Arms Survey results shows that only 4.2 firearms for every 100 citizens, India is ranked 108th globally in terms of civilian

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<sup>29</sup> Culbertson, A. *Plymouth shooting: The UK's gun laws - who can have a firearm and which types are legal?* Sky News. (2021, October 6).

<sup>30</sup> Mridul, A. *Buying guns: How does India compare with the US?* cnbctv18.com, (2019, August 22).

firearm ownership. The USA, on the other side, is in first place with 88.8 firearms per 100 citizens<sup>31</sup>. This illustrates that there are fewer civilian gunshot fatalities in countries with lax gun laws.

Even though India has tighter gun laws than the US, these regulations are undermined by the ease with which illegally procured guns can be bought.

## **8. Conclusion**

The current regulations, which establish a law for the manufacture, purchase, and use of hands and firearms, may be highly rigorous in their present form. Implementation of the acquisition and storage of hands and weaponry is not effectively regulated. Execution is lacking in cases where crimes are committed utilizing unregistered manufacturers. It is important to identify unlicensed manufacturers because most crimes were carried out with the help of country-made tools. Offering the unique identity numbers to each licensee through the National Database of Arms License has been a proactive move toward the safety measures a country can use. Concerning tight adherence and implementation of the act, implantation and consciousness are some necessary things. To increase productivity, harsher penalties must be applied to illegal producers or companies involved in it. In accordance with the instructions and regulations outlined in the Rules 2016 at the side of the act, full and thorough supervision is required with regard to the storage and use of the firearm.

The firearms laws in India are currently some of the strictest in the entire world. Despite these stringent laws and the measures taken to reduce gun and ammunition-related violence, it should also be mentioned that India continues to record the second-highest number of gun-related fatalities worldwide. Legal requirements must be followed properly, flaws or loopholes found inside the gift item, and the origins of illegal firearms must be tracked out in order to prevent this.

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<sup>31</sup> *Bloomberg* – Americans Have More Guns Than Anywhere Else in the World and They Keep Buying More (n.d.).

# Interplay of Religion and Politics in Contemporary India

\*Mr. Animesh Kumar

## ABSTRACT

India made the decision to create a secular state having its own standards of religious tolerance, freedom, and equality before the law on the brink of independence. During the long constitutional assembly debate the founding father of India visioned India free from any barriers causing derailment from the development. Religion forms its base on unvarying heavenly principles, Nevertheless, a realistic political strategy demands for society to improve, grow, and adjust to the new issues of the modern period. Post four decades of independence religion have no interventions in national politics, however, for last three decades there has been shift in the political culture of India. In this backdrop through this piece author seeks to look into the interplay of religion and politics in the contemporary India.

**Keywords:** Religion, Politics, Development, Secularism, Constitution

## 1. Introduction

India is a nation with a vast history that is home to many different religions and cultures. It is considered to be the world's largest democracy which has co-existed diverse religions for generations. A personal deity or other supernatural being that one believes in and worships as a supreme being, is the focus of many organised concepts, rituals, and systems that make up religion in India. No matter what the religion is, it is evolved for the governance of its followers. The co-existence of diverse religions in India may be described as peaceful in general, but there are significant historical and ideological disagreements that have resulted in several problems in recent past.

What is religion? This is a straightforward question that comes in mind of any prudent person, doesn't usually need giving it much thought.<sup>1</sup> Though, it is difficult to define the religion but it may be referred as different meaning in different ways for different people across the society. Different sections of theologians, philosophers, and sociologists have different viewpoints to understand religion. The majority of the view is that religion is primarily a social phenomenon and, as viewed, it is related to the political affairs in inextricable manner. Since, it is a social phenomenon and part of the culture of society which we inherit and, or succeed; very often we grow up being socialised into

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<sup>1</sup> Anthony Giddens & Philip W. Sutton, *Sociology*, 708 (Wiley, New Delhi, 8<sup>th</sup> Edn. 20, 2017)

the religious practices, values, and beliefs of our society. Religion exists objectively and has real effects on individuals<sup>2</sup> resultantly somehow in country like ours it effects the polity.

The dynamic process of progression has offered India's politics with a fresh set of complications and the encounters. However, this not something new, India has a history of bitter partition of the country in 1947 on religious lines. Hence religion has always been the highlight of politics India: national, provincial, or local. The contemporary politics in India seems to be hijacked by the politics of religion. Riots,<sup>3</sup> dietary restrictions<sup>4</sup>, clothing restrictions<sup>5</sup> have occupied popular narrative in Indian politics side-lining issues of grave international<sup>6</sup> and national<sup>7</sup> concerns. The recent assembly election in Uttar Pradesh present an appropriate example on how elections in India are contested and won on the agenda of promoting a particular religion as opposed to the other or others. It is pertinent to note that In study conducted by Ashoka University revealed that 'religious belief' was the biggest motivating factor for making donations by Indian households.<sup>8</sup> It was discovered that during COVID-19, Indians donated the majority of their money to religious organizations based on their religious beliefs.<sup>9</sup>

This article aims to comprehend the importance of religion in Indian electoral politics against this background the article examines the constitutional requirements for secularism in India and evaluates the use of religion in electoral politics in a secular country in the light of the constitutional provisions and the contemporary issues at hand.

## 2. A Secular Constitution

After getting independence following the ouster of the British Raj in

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<sup>2</sup> *Id.*

<sup>3</sup> Press Trust of India, "Hindus, Muslims Exchange Hugs in Delhi's Violence-Hit Jahangirpuri", *NDTV*, Apr. 24, 2022; available at: <https://www.ndtv.com/delhi-news/hindus-muslims-exchange-hugs-in-delhis-violence-hit-jahangirpuri-2911755> (last visited on: 22.04.2022)

<sup>4</sup> ANI Correspondent, "Sale of meat banned in Ghaziabad during Navratri, shopkeepers stare at losses", *ANI*, Apr. 02, 2022; available at: <https://www.aninews.in/news/national/general-news/sale-of-meat-banned-in-ghaziabad-during-navratri-shopkeepers-stare-at-losses20220402173000/> (last visited on: 20.04.2022)

<sup>5</sup> Taniya Dutta, "Hijab row: India's Karnataka state bans religious dress in education institutions", *The National News*, Feb. 02, 2022; available at: <https://www.thenationalnews.com/world/asia/2022/02/18/hijab-ban-indias-karnataka-state-prohibits-religious-dress-in-education-institutions/> (last visited on: 19.09.2022)

<sup>6</sup> Jen Kirby, "Why India isn't denouncing Russia's Ukraine war", *vox.com*, Mar. 18, 2022, available at: <https://www.vox.com/22982698/india-russia-ukraine-war-putin-modi> (last visited on: 27.04.2022)

<sup>7</sup> *Id.*

<sup>8</sup> Swati Shresth & Shaiva Verma, Centre for Social Impact & Philanthropy, Ashoka University, "How India Givers 2020-21" (2022); See also, Taniya Roy, "In India, 'Religious Belief', Not Humanitarian Crisis, Triggers More Charity", *The Wire*, Sept. 22, 2022; available at: <https://thewire.in/society/in-india-religious-beliefs-and-not-a-humanitarian-crisis-trigger-most-charity> (last visited on: 25.09.2022)

<sup>9</sup> *Id.*

1947 India went to adopt, enact and give itself new Constitution establishing a secular republic without a rigid separation of faith and state but rather a *principled distance* between religion and the state.<sup>10</sup> No religion was designated as the State religion or as an additional favoured faith tradition by the architects of the Indian Constitution. It said that non-discrimination based on religion was one of the fundamental rights<sup>11</sup> of the people enshrined in part III of the constitution, and that equality of status and opportunity is one of the fundamental objectives of the future polity. Secularism is one of the basic tenets of Indian constitutional morality and hence the term 'secular' finds mention in the Preamble to the Constitution inter alia words like sovereign, socialist, democratic, republic.<sup>12</sup> The Hon'ble Supreme Court, while deciding the case of *S. R. Bommai & Others v. Union of India & Others*<sup>13</sup> it was held that the constitution's fundamental structure is secularism and it goes beyond merely tolerating other religions passively. The court viewed secularism as a beneficial idea that would treat all religions equally, asserting, "*when the State allows citizens to profess and practise religion it does not either explicitly or impliedly allow them to introduce religion into non-religious and secular activities of the State.*" There is no prohibition against permitting religion to play a ceremonial role in State functions and official events, even though it has no functional role to play in the business of the State. The State, on the other hand, has always played a significant role in this sphere of social life and is not at all constrained from doing so by legislation.<sup>14</sup>

People have a right to religious freedom and the freedom to practice, profess, and spread their faith under Part III of the Constitution<sup>15</sup> illuminating that These liberties are not unassailable and may be curtailed by the State for reasons of morality, public morality, public health, and other constitutional protections. Additionally, it does not prevent the State from passing social reform laws or from controlling or restricting any political, financial, economic, or other secular activity that might be connected to a particular religion.<sup>16</sup>

The Indian Constitution establishes a distinction between a religiously protected space and a secular one that is subject to state

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<sup>10</sup> Milan Vaishnav, "Religious Nationalism and India's future", *Carnegie Endowment For International Peace*, Apr. 04, 2019; available at: <https://carnegieendowment.org/2019/04/04/religious-nationalism-and-india-s-future-pub-78703> [last visited on: 20.09.2022]

<sup>11</sup> The Constitution of India, art. 14, 15, 16, 25, 26, 29, 30

<sup>12</sup> The Constitution (Forty-Second Amendment) Act, 1976

<sup>13</sup> AIR 1994 SC 1918: (1994) 3 SCC 1: MANU/SC/0444/1994: JT 1994 (2) 215: 1994 SCALE (2) 37: (1994) 2 SCR 644: 1897 1 QB 498: JT 1994 (2) SC 215: LNIND 1994 SC 318: AIR 1994 SCW 2946

<sup>14</sup> The Hindu personal law has been codified, e.g. Hindu Succession Act, Hindu Marriage Act, etc.

<sup>15</sup> The Constitution of India, art. 25

<sup>16</sup> e.g. Abolition of Triple talaq, The Muslim Women (Protection of Rights on Marriage) Act, 2019

regulation but not interference.<sup>17</sup> However, It does not directly ask the State to work with religious communities to respect their faith and views, nor does it instruct the State to be impartial towards religious matter. The only categories of discrimination prohibited under the constitution are those based on race, sex, and religion. Nothing in it implies that state law should be based on or derived from religion. In a recent move, a public interest litigation petition asking for limitations or a ban on the advertising of meat and meat products in electronic and print media has been filed in Bombay High Court<sup>18</sup> wherein bench of Chief Justice Dipankar Datta and Justice Madhav Jamdar observed that the matter is under the purview of the legislature, and it cannot create laws or rules that impose bans.<sup>19</sup> Court was of the view that by requesting such a prohibition, the petitioner was infringing upon the rights of others. As the protector of the Constitution, the judiciary frequently distinguishes between religious practises that are necessary and those that are not, asserting that the former are always protected by the Constitution while the latter are not.<sup>20</sup>

### 3. Religion and Politics: The Present Forces at Play

Religion forms a focal point of national and regional vote bank politics in India. This blending of politics, religion, and public administration has majorly two reason to effects. One, it has elevated religious authorities like 'imams', 'sants', 'priests' and 'mahants', in the public sphere. They have begun actively participating in governmental decision-making. The interference though indirectly has got acceleration since 1980s. Second, festivals and rituals have begun to seriously encroach onto public life. As a result, the Hindu religious community has undergone a profound shift, as have its interactions with other groups. The Indian government was described by Swedish economists as a soft state, by 'soft' author meant when India had political benefits, the Indian state not only continued to be tolerant of communalism but also actively supported it.<sup>21</sup> One of the most famous writers on Indian religion and culture, Louis Dumont, saw sadhus as the driving force behind the evolution of Indian religion and philosophy, "the maker of values," in charge of "creating and maintaining

<sup>17</sup> Daniela Berti, Gilles Tarabout, *et.al* Eds., *Filing Religion State, Hinduism, and Court of Law*, XV (Oxford University Press, New Delhi, 1<sup>st</sup> Edn. 2016)

<sup>18</sup> Neha Joshi, "Jain bodies move Bombay High Court seeking ban on advertisement of non-vegetarian food/ products", *Bar & Bench*, Sept. 25, 2022; available at: <https://www.barandbench.com/news/jain-bodies-bombay-high-court-ban-advertisement-meat-non-vegetarian> [last visited on: 26.09.2022]

<sup>19</sup> Neha Joshi, "Why are you encroaching on others' rights: Bombay High Court on plea by Jain Bodies to ban ads of non-vegetarian food", *Bar & Bench*, Sept. 26, 2022; available at: <https://www.barandbench.com/news/litigation/bombay-high-court-plea-jain-bodies-ban-ads-non-vegetarian-food> [last visited on: 27.09.2022]

<sup>20</sup> Amrit Dhollon, "India court in Karnataka upholds ban on hijabs in colleges", *The Guardian*, Mar.15, 2022; available at: <https://www.theguardian.com/world/2022/mar/15/india-court-in-karnataka-upholds-ban-on-hijabs-in-colleges> (last visited on: 15.0.2022)

<sup>21</sup> Gunnar Myrdal, "Asian Drama: An Inquiry into the Poverty of Nations", (Kalyani Publisher, 2008)

sects,” as well as the principal thinkers and social innovators.<sup>22</sup>

In the constituency, political parties and candidates appeal to voters’ religious sentiments depending upon the strength of religious votes and it has become the de facto rule in our country. For instance, as per 2011 census data the population of adult Hindus stood at around 81% of the total population in India.<sup>23</sup> Today the Indian national politics seems concerned only with turning this 81% of majority Hindu population into their vote bank. Although, the Bharatiya Janta Party (BJP) has time and again criticised the Congress and Trinamool Congress (TMC) of appeasing the Muslim minority and using them as a vote bank, the BJP in its current capacity is playing the same vote bank politics with the majority Hindu community. Following this trend the second largest national party i.e. Congress has also started following suits which have been identified as ‘soft hindutva’.<sup>24</sup>

Religious institutions are exploited as platforms for political propaganda, and people’s religious sensibilities are stirred up in an effort to seize political control of the State. When religion joins politics, boundaries become more rigid and awareness is limited to just you and the believers.<sup>25</sup> Religion shows to be an unavoidable haven for ‘we’ against ‘them’ mentality which facilitate the politicians to gain out of it. One thing is quite clear that once a party comes to power by mobilising a particular religious group, the promises made by such political party in the election has to reflect in the policies they formulate later. This is a simple give and take. As a result, religion starts playing a massive role in the way the policies<sup>26</sup> are framed by a government in order to please the said vote bank. For instance, the pro-hindutva leadership in Uttar Pradesh have time and again framed policies that either directly or indirectly target the minorities such as the hype around the phenomenon of love jihad<sup>27</sup> followed by *ghar wapasi*<sup>28</sup>, cow vigilantism<sup>29</sup> and the Uttar

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<sup>22</sup> Dr. Raj Kumar Singh, “The use of religion in Indian Politics”, *The Daily Star*, July 04, 2019; available at: <https://www.thedailystar.net/opinion/perspective/news/the-use-religion-indian-politics-1766164> [last visited on: 27.09.2022]

<sup>23</sup> Neha Sahgal, Jonathan Evans, et.al, “Religion in India: Tolerance and Segregation”, *PEW Research Centre*, June 29, 2021; available at: <https://www.pewresearch.org/religion/2021/06/29/religion-in-india-tolerance-and-segregation/> (last visited on: 26.04.2022)

<sup>24</sup> Vikash Pathak, “Soft and Hard Hindutva: Where Has the Category Communalism Gone?”, *The Wire*, Feb 25, 2022; available at: <https://thewire.in/communalism/soft-hard-hindutva-communalism-bjp-aap> (Accessed on: 27.04.2022)

<sup>25</sup> Deepak Chopra, “Religion and Politics”, *The Times of India*, June 24, 2011; available at: <https://timesofindia.indiatimes.com/religion-and-politics/articleshow/8142045.cms> [last visited on: 26.09.2022]

<sup>26</sup> Citizenship (Amendment) Act, 2019

<sup>27</sup> The Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020

<sup>28</sup> Dharendra Kumar Jha, “Yogi effect: RSS men convert 43 Muslims in Uttar Pradesh to Hinduism”, *Scroll.in*, May 23, 2017; available at: <https://scroll.in/article/838416/yogi-effect-rss-men-convert-43-muslims-in-uttar-pradesh-to-hinduism> (last visited on: 17.04.2022)

<sup>29</sup> Shreya Maskara, “Cow protection legislation and vigilante violence in India”, *Arm Conflict Location Event Data Project*, May 3, 2021; available at:

Pradesh Population Control Bill.<sup>30</sup> Consequently, religion is also dictating the distribution of party tickets, party manifestos, and representation in the legislature, cabinet portfolios and the policy to charm the voters.

The legislature in order to safeguard the rights of people at large and forbid the role of religion in political activities came up with the provision which specifically bars the politicians from campaigning and contesting elections referring the religious theme.<sup>31</sup> The apex court in numerous of cases upheld that the fundamental structure of the constitution is secularism, which cannot be altered or amended.<sup>32</sup> The Apex Court in case of *Abhiram Singh & Others. v. C.D. Commachen (Dead) by Legal Representative & Others*<sup>33</sup> observed, “for maintaining the purity of the electoral process and not vitiating it, Sub-section (3) of Section 123 of the Representation of the People Act, 1951 must be given a broad and purposive interpretation thereby bringing within the sweep of a corrupt practice any appeal made to an elector by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate on the ground of the religion, race, caste, community or language of (i) any candidate or (ii) his agent or (iii) any other person making the appeal with the consent of the candidate or (iv) the elector.” It is considered a way forward to attain the objectives of the founding fathers visible to preamble to the constitution. The legislation also bars inducing the voters to elect or reject an individual candidate and or political party under the threat of spiritual, and or, community censure. Nonetheless, the rampant use of religion to attract votes continues. In such a scenario, the lack of effective implementation of the Apex Court’s judgment by the Election Commission seems problematic.<sup>34</sup>

#### 4. Conclusion

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<https://acleddata.com/2021/05/03/cow-protection-legislation-and-vigilante-violence-in-india/> (last visited on: 25.04.2022)

<sup>30</sup> State Law Commission Lucknow, “Proposed Draft Bill The Uttar Pradesh Population Control Stabilization and Welfare Bill 2021” *Live Law*, July 19, 2021; available at: [https://www.livelaw.in/pdf\\_upload/up-population-control-bill-draft-396420.pdf](https://www.livelaw.in/pdf_upload/up-population-control-bill-draft-396420.pdf) (last visited on: 26.04.2022). See also, Mayuri Gupta, “Assessing the constitutionality of Uttar Pradesh Population (Control, Stabilization and Welfare) Bill 2021”, *Vidhi Centre for Legal Policy*, Sept. 02, 2021; available at: <https://vidhilegalpolicy.in/blog/assessing-the-constitutionality-of-the-uttar-pradesh-population-control-stabilization-and-welfare-bill-2021/> (last visited on: 19.04.2022)

<sup>31</sup> The Representation of the People Act, 1951, Sec. 123

<sup>32</sup> *Supra* note 13.

<sup>33</sup> MANU/SC/0010/2017: (2017) 2 SCC 629; AIR 2017 SC 401; (2017) 2 SCC (Civ) 68; 2017 SCC OnLine SC 9; 2017 (1) BomCR 710; 2017 (1) RCR (Civil) 927; 2017 (1) SCALE 1; 2017 1 AWC 652 SC; AIR 2017 SC 401; ILR 2017 (1) Kerala 89; (2017) 1 MLJ 522; LNIND 2017 SC 8

<sup>34</sup> Express News Service, “Supreme Court bans religion in politics: Why SC’s order needed to be more nuanced”, *Financial Express*, Jan. 04, 2017; available at: <https://www.financialexpress.com/opinion/supreme-court-bans-religion-in-politics-why-scs-order-needed-to-be-more-nuanced/495840/> (last visited on: 19.09.2022)

Despite religiously based partition, India decided to be a secular state assuring equal protection of law for all its citizens irrespective of caste, creed, or race. Indeed, it marked a noteworthy move but in the society as complex as India consists of, it was difficult to put the constitutional ideas into action. Religions have always dominated the politics in India, and the contemporary political scenario in India is not different. With the resurgence and development of religiously inclined political parties in the nation, secularism in India started to experience rough seas. It is true that without acknowledging the pluralist ethos, the idea of secularism cannot succeed in a country like India, which has a long history of pluralism. Today, nationalism in India has been reduced to the idea of nationalism supported by the majority community. The majoritarian nationalism and its ideology have wreaked havoc upon the political and everyday lives of various religious communities in India resulting religious polarisation in elections and tension in the society. Religion has long dominated the vote bank politics resulting in biased approaches in the policy making of the country. Due to lack of constitutional literacy or voter responsiveness and implementation by the Election Commission of India (ECI), the dictum in the judicial pronouncements regarding the separation of religion and politics have unfortunately been reduced to the paper only. The secular democracy of India may be at peril if religious leaders meddle in administrative processes. There is a need for the ECI to strengthen its stands to counter the use of religious force in several aspects electoral politics in India. A step towards this will pave the way in promoting the ideals of fraternity, unity, and integrity in the Indian democracy.

# Section 9 of the Hindu Marriage Act, 1955 - The Fault is in our Provisions!

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## ABSTRACT

The nature of marriage in the 21<sup>st</sup> century has undergone a drastic change from the times when it was looked at as a sacrosanct bond which was used to bring peace and stability in a patriarchal society. Today, an individual is the master of one's own fate and cannot be forced to be in any form of a societal bond, even if for orthodox reasons. The degree of restitution provided under Section 9 of the Hindu Marriage Act, 1955 which prohibits the dissolution of marriage because of some unreasonable precedents needs to be reviewed in the light of contemporary societal changes. This article analyses the right to restitution in the light of contemporary feminist arguments, modern social jurisprudential and constitutional precedents. It delves into determining the constitutional validity of Section 9 of the Act, by analysing Articles 14, 19, and 21. It further discusses the analogous issues in the restitution of conjugal rights and marital rape. The patriarchal judiciary and the emerging constitutional feminism are imperative in the current scenario as the latter is the solution to the issues posed by the former. The paper concludes on the note of transformative constitutionalism and recommends immediate solutions that can be executed to protect the principles embodied by the Constitution.

**Keywords:** restitution, conjugal rights, autonomy, privacy, equality, association, patriarchy, feminism

## 1. Introduction

In India, the institution of marriages holds a pristine value between the two people that emanates rights and duties between them. These rights and duties are called conjugal rights. According to Kautilya's Arthashastra, *Amoksha Dharmabibahanam* was the apex impression, that Hindu marriage is a perpetual union. It would be a sin to violate, dissolve, or terminate this eternal union. If either of the spouses breaks through this social construct of marriage without any reasonable cause, the other spouse will have the option of invoking S.9 of the Hindu Marriage Act, 1955<sup>1</sup> ("**the Act**" or "**HMA**").

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<sup>1</sup> Hindu Marriage Act, 1955, § 9, No.25, Acts of Parliament, 1955 (India).

According to Hindu customs, marriage is a union through which the husband and wife become as if they were one person. The duty of providing food, home, shelter, basic amenities and comforts is cast upon the husband, while Manusmriti provides that a wife, neither by sale nor by dissertation can be freed from the society of her husband. The reciprocal duty of the wife is to venerate and be obedient to her husband.

The term, 'conjugal rights' can be defined as rights and privileges that arise from the marital relationship that includes companionship, cohabitation, and sexual relationship.<sup>2</sup> Thus, it can be inferred that losing conjugal rights would amount to losing the consortium of the spouse.

Litigation regarding matrimonial obligations was forbidden and that they could not part from one another till death for any reason whatsoever. Before the 1890s, litigation on the subject matter of matrimonial obligation was prohibited because husband and wife could not separate from each other till death. Subsequently, in the case of *Binda v. Kaunsilia*,<sup>3</sup> Justice Mahmood addressed whether a suit for "*restitution of conjugal rights*" was maintainable under Hindu Law. While analysing this question, the Court observed that the civil judicial institutions have taken the position of the Kings and thus, their jurisdiction is extended to enforce the matrimonial rights and obligations. The rights of conjugal cohabitation, placing the wife under the control of her husband fall within the ambit of rules of law. Thus, a suit for "*restitution of conjugal rights*" or for "*recovery of wife*" who has abandoned her husband can be entertained by the Civil Court.

Owing to the hegemonic claims of patriarchy in determining the legal, social, and moral codes, the possibility of conferring justice to women can be explored only through infringing the vacuous notions of so-called neutrality and impartiality.<sup>4</sup>

The Hindu Shastras do not provide for restitution of conjugal rights. The origin can be traced back to Jewish law that intended to keep wives as the chattels of their husbands. The Indian Lawmakers and the Judiciary accepted this notion which is reflected in S.9 of HMA and through the catena of judgments.

In the case of *Tirath Kaur*<sup>5</sup>, the Court held that it is prime duty of the wife to "*submit*" herself to the authority of her husband. Living under the roof of her spouse is indispensable for her protection. While in the *Saroj Rani* case<sup>6</sup>, it was held that the rights vested within the spouses to the society of each other are not restricted to statutory rights, rather it is an inherent right.

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<sup>2</sup> West Group, BLACK'S LAW DICTIONARY, (7th ed. 2000).

<sup>3</sup> *Binda v. Kaunsilia*, 1890 SCC OnLine All 58.

<sup>4</sup> Flavia Agnes, *Family Law Volume I: Family Laws and Constitutional Claims* (OUP 2011) xxiii.

<sup>5</sup> *Tirath Kaur v. Kirpal Singh*, 1962 SCC OnLine Punj 264.

<sup>6</sup> *Saroj Rani v. Sudharshan Kumar Chadha*, AIR 1984 SC 1562.

Further, the application of scriptures of Manusmriti that prescribed that “*neither by sale nor by desertion is wife released from the husband*” was specifically attributed for women. Thus, it can be observed that the Hindu wives have been subjected to injustice, inherently. It is interesting to note that the Act was incorporated in order to curb such disparities and resolve the disputes of Hindu married couples. S.9 of the Act provides for restitution of conjugal rights. Prima facie, this remedy would be seen in a positive light as it ensures that the sacrosanct marriage is maintained by invigorating cohabitation (voluntarily or forcefully). The vehement misuse of the remedy has raised the question if the provision in fact is a remedy.

For example – This provision is grossly misused, mostly for monetary purposes, such as to avoid paying alimony to the wife under S.125 of CrPC<sup>7</sup>. In the case of *Darshan Ram v. Maya Bai*,<sup>8</sup> the husband filed the petition wherein the wife had withdrawn from the society of the husband because she was subjected to dowry harassment. Although the Court sided with the wife, this is an example wherein such provisions are grossly abused.

## 2. Section 9 of the Act

Restitution – The word in its definition itself is a problematic perspective when it comes to marriage as a social institution. Restitution refers to the recovery or restoration of something that is lost or stolen from its original owner. Hence, in the word itself, there is a sense of ownership and a feeling of being bound by an uncomfortable bond which is not necessarily equal but hints at a master-slave or an upper-lower relationship. Using the word restitution to explore the realm of conjugal rights, which are basically rights that a husband and wife may exercise with or against each other when bound in a matrimonial alliance refers to something that existed, but has been lost and is being made to restore.

In legal parlance, the restitution of conjugal rights involves the involvement of the Court in order to ensure that the parties to the marriage do not withdraw from the society of another without a just cause. In the instance wherein the aggrieved party approached the Court, the withdrawing party can be forced to return to the society of the partner.

Although the Act provides essential elements to invoke a rigid provision, the elements in themselves are ambiguous. The term, “reasonable clause” does not find its definition which leaves it open to interpretation by the judges which can always be justified by citing differences or similarities in the “facts and circumstances” of the case.<sup>9</sup> There will always be myriad interpretations of looking at the “reasonable excuse” and that can stem from inherent biases, prejudices and preconceived notions. The way a judge looks at this excuse may have

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<sup>7</sup> The Code of Criminal Procedure, 1973, § 125, No.05, Acts of Parliament, 1973 (India).

<sup>8</sup> *Darshan Ram v. Maya Bai*, 1996 SCC OnLine P&H 27.

<sup>9</sup> LAW COMMISSION OF INDIA, 59<sup>th</sup> Report, Hindu Marriage Act, 1955 and Special Marriage Act, 1954 (1974).

nothing to do with legality or statutes. It creates a wide dark spot which may lead to the fundamental rights of the wife being snatched away if the judiciary is not convinced about the same, which may, by the way, come from experiences, shared trauma, and discomfort which is impossible to be sensitively looked at from a predominantly male judiciary. This avenue of vague interpretation is the reason why various benches of the High Courts in the country over the years and the Supreme Court have given contrasting judgements. The regular flip flops make it even clear that the devil is in the vague details of S.9. This devil in the detail needs to be repealed and women should be given their rightful fundamental rights.

The case of *Ela Dasu*<sup>10</sup> is a classic example wherein the Court played the role of a mediator in domestic family issues. Herein, the wife had abandoned the house of the husband due to the harassment over the non-bearing of children. However, the courts opined that the objective of a matrimonial relationship is cohabitation, and with that lens, the spouses are entitled to society and to the comfort of each other. Hence, they decided that the reasons cited by the wife to withdraw from the society of the husband are not “reasonable” enough and urged the wife to reconstitute their married life. This is a rather dangerous verdict as after the wife moves back with the husband against her wishes and if there is any domestic violence or mental or physical harassment, it will only be the court which will be responsible for the aftermath.

In a way, this provision is a glorified method of the courts to act like the traditional village senescent or panchayat whose understanding of right and wrong is based on the personal narrative of their life as male adults. The lack of much-needed sensitivity towards the atrocity of the person withdrawing from the society of the partner is evident and discernible. Through the impugned provision, the court is trying to play the matchmaker and strike a conciliatory note between the husband and wife, ignoring the core fundamental freedoms that are getting trampled along the way.

Further, Hindu Marriages, by definition and by theory are an inviolable sacrosanct bond which is legitimised by the state. However, the same definition is silent on the role of the man in preserving this inviolable bond. The onus for the same falls squarely on the women. This unfair provision has existed since the times the colonizers controlled the narrative in pre-Independence India, not wanting to tinker with the traditional practices, for the fear of resistance and revolt. Multiple ancient texts from the time of Manu also refer to the expectations of monogamy from the women, while the man is allowed several leeways to follow polygamy. Draconian provisions like Sati, Refusal to allow widow remarriage, and refusal to implement the Indian Divorce Act of 1869<sup>11</sup> to Hindus were some of the examples of how rigidly patriarchal, and thus unfair the institution of marriage was towards women.

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<sup>10</sup> *Ela Dasu v. Ela Lachamma*, 1989 SCC OnLine Ori 229.

<sup>11</sup> The Divorce Act, 1869, No. 4, Acts of Parliament, 1869 (India).

Moreover, one of the first cases that recognized and brought in the principle of restitution was *Moonshee Ruheem v. Shumsoonissa Begum*,<sup>12</sup> 1867. In this case, the wife withdrew from society of her husband due to his misbehaviour. The husband filed the suit under the Specific Relief Act for specific performance of the contract. Irrespective of the act of cruelty by the husband, the woman was compelled to return to his society indicating the objectification of women by treating them as essential to a contract. With this lens, incorporating restitution of conjugal rights in HMA not only negates the sacrosanct nature of Hindu marriage but also heightens the patriarchal pedestal in society.

Hence, S.9 of the Act, was yet another measure to legally justify patriarchy in society. The theoretical facet of the draconian provision introduced pre-independence could be invoked by both - men and women. However, the catena of judgments over the 7 decades showed us that it has emerged as another tool to coerce/cajole/convince women to cohabit with men, irrespective of their personal wishes. The landmark *Rukhmabai Case*<sup>13</sup> was one of the earliest examples of how the judiciary goes soft when it comes to protecting the rights of men, which have a deep-rooted caste bias.

The so-called remedy neglects the privacy of a woman and despite being a gender-neutral provision fails to account for the prevalent gender disparity in our society, infringing fundamental rights. The contention of violation of fundamental rights would be discussed in a three-fold manner –

### **3. Critical Analysis**

#### **A. Constitutional Validity**

##### **A.1. Violation of Article 21**

This article provides for the “*right to personal life and liberty*” which is inclusive of the right to life with dignity. In simple words, individual dignity can be defined as the right of an individual to be revered for their individual temperament. In the *Joseph Shine case*<sup>14</sup>, the Court observed that individual dignity is an inherently sacrosanct nature of a civilised society. In the case of a woman’s individual dignity, prominence and geniality are attached with greater importance to this principle. The instance wherein the Court legally forces an individual to cohabit with a person against their will, is against the principle of individual dignity.

Further, the “*right to privacy*” is an indispensable part of individual dignity. It guarantees autonomy oneself and includes the right to be alone. The landmark judgment of including privacy in the ambit of Article 21<sup>15</sup>

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<sup>12</sup>*Moonshee Buzloor Ruheem & Anr. v. Shumsoonnissa Begum*, (1867) 11 M.I.A. 551.

<sup>13</sup> *Dadaji Bhikaji v. Rukhmabai*, ILR (1885) 9 Bom 529.

<sup>14</sup> *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676.

<sup>15</sup> *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1.

gives the ray of hope to re-contend the constitutional validity of S.9 of the Act. At the instance of rendering a judgment to reconstitute conjugal rights, the Court intervenes with the privacy, and sexual as well as decisional autonomy of an individual. It was earlier held that this provision is meant to uphold the social norms of society. The tangent of the sacrosanct nature of marriage was given more weightage than the tangent of an individual's dignity. At the cost of trying to prevent the breakups of marriage, even in the 21st century, the expense is the individual's fundamental right. It is high time to revisit the judgment laid down in **"T.Sareetha v. T. Venkata Subbaiah"**<sup>16</sup> by the HC that held the restitution of conjugal rights unconstitutional. In this case, it was observed that this provision snatches the privacy of the spouse as it forces one to reside with another against their will. This would amount to a coercive act.

In this case, the Courts as early as 1983 recognized that giving the remedy of restitution not only includes cohabitation but also the right to consummate. The right of sexual autonomy of a person and exercising the body to carry a child is transferred to the State. The impugned provision unquestionable demonstrates the infringement upon the integrity of a person while violating the right to privacy.

An act of forceful sex on an individual can never be seen in a positive light, be it through a legal vehicle of passing the decree. Sexual force is an act of monstrosity against the dignity and spirit of a human being. The inviolability of marriage cannot be conceivably put on a higher pedestal than the inviolability of an individual, without comprising the morality and rectitude of the society, especially when the remedy finds no origin or roots in Hindu law or customs. Thus, the single judge bench, while refusing to invade personal privacy and bodily integrity, held S.9 as unconstitutional. This case depicted the need to democratize the concepts of private space, relations, and functions.

Further, the Bombay HC in the case of Rukhmabai<sup>17</sup> determined if she can be compelled to cohabit with her husband. It has to be noted that here restitution was asked for consummating the marriage that was arranged during the infancy of the respondent-wife. The case however faced the recourse of settlement and was a century later overturned to bring in compulsion over consent and restrict the scope of privacy within the private expanse of the concerned people. It is ironic that while interfering in the marital space, the frame of consent was kept in a private space.

The regressive approach of the judiciary resurfaced in 1983 wherein in the Harvinder Kaur case opined that the morality and sustenance of the social institution of marriage hold significantly more importance. The respondent-wife in this case left her matrimonial house because she was subjected to ill-treatment by her husband and her mother-in-law. The enquiry in such cases is restricted to determining whether the withdrawal

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<sup>16</sup> T. Sareetha v. T. Venkata Subbaiah, AIR 1983 AP 356.

<sup>17</sup> *Supra*, 32.

was for a just cause. The Court held that S.9 is constitutional in nature and acts as an extension to the ground of divorce. It was insisted that marriage is a part of rich Indian tradition and culture and families need to work to preserve this institution till its last shred. It dismissed the reason cited by the wife for the separation as frivolous and unreasonable. This was a very narrow and conservative attitude towards the fundamental rights of women.

In the case of *Sudharshan Kumar v. Saroj Rani*,<sup>18</sup> the SC “settled” the dispute of constitutionality of S.9. It recognized that, “*conjugal rights are inherent to the institution of marriage and not only a creation of the statute*”. Thus, the impugned section is imperative and non-elective. The prevalence of reasonable cause was highlighted as essential to pass the decree while negating the prevalence of ambiguity in it. It was further opined that the position held in the *Sareetha* case<sup>19</sup> was unacceptable in society as the impugned section is a way of ensuring peaceful cohabitation and preventing separation. The Court believed that petitioners contending the constitutional validity have failed to see the provision from its suitable perspective.

While debating the bill of HMA, staunch politicians like J.B. Kriplani said, “*This provision is physically undesirable, morally unwanted and aesthetically disgusting*” while B.H. Karedkar argued that the provision was, “*uncouth, barbarous and vulgar. That the government should be abettors in a form of legalized rape is something very shocking*”<sup>20</sup>

Thus, the remedy is a channel of welcoming the indirect support of barbarity on dignity under the garb of the sacrosanct nature of marriage. It is imperative for the court to look into the direct and inevitable effect of law in the instance wherein constitutional validity is challenged. The continuous phase of judgment pronounced in favour of constitutionality is paving the way for statutory rape.

The impugned section, adopted by the colonizers is not in line with the feminist approach of modern times. Any legislation is not vested with the authority to divest a woman of her autonomy, independence, or dignity. It is her inherent right. This was progressively noticed in the judgment decriminalizing adultery. The Constitution acknowledged the autonomy of consensual relations in a personal sphere.<sup>21</sup>

Giving liberty to assume consent of the wife to sexual relations in the institution of her marriage or that the woman is disallowed from having sexual relations beyond her marriage without due approval of her husband are anthesis to the liberty of a woman and thereby would infringe Article 21. The principles outlined in this case should be a viewpoint in deciding the consideration of S.9 as cohabitation and concomitant (forceful) sexual

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<sup>18</sup> *Supra*, 6.

<sup>19</sup> *Supra*, 16.

<sup>20</sup> Lok Sabha, PARLIAMENTARY DEBATES, Special Marriage Bill (10th December, 1954).

<sup>21</sup> Restitution of Conjugal Rights: Constitutional Perspective, 45 JILI (2003) 453.

relations cannot be held as an inherent instrument to any social instrument, be it sacrosanct marriage.<sup>22</sup>

### **A.2. Violative of Article 14**

It is contended that this provision violates Article 14. While perusing the bare language of the provision, it confirms Article 14. However, the real question is, did we even allow, permit or create favourable conditions for a woman in a Hindu Matrimonial alliance to even exercise her conjugal rights over the decades? Patriarchy ensured that Hindu marriages remained strictly convenient to the interest of men. It can be amply justified by pointing at the various ‘sacrifices’ that a woman has to undertake in marriage compared to the man. Hence the contention here is that the so-called conjugal rights that we are referring to are nothing but men’s rights in a marriage. Thus, subsequently, when the law talks about the “*restitution of conjugal rights*”, it is a subtle way of hinting at restoring men’s rights resulting from male-dominant entitlement in a marriage and hence ensuring that the status quo of patriarchy, established over centuries of hegemonic dominance continues to remain relevant.

Equality is not required only to be shown on paper but also implemented in practice. Embracing equality in rights conferred in a marriage, but putting a class of society unevenly is against the same principle. This practice cannot and should not be accommodated in the constitutional order. Thus, on delving beyond the blacks and whites of the provision and following the pattern that is followed in the Indian society, one would notice that this provision is used mostly by men – the predominant section. This social reality was first enlightened in the case of T Sareetha<sup>23</sup> by observing the provision as “engine of oppression”. It is the doctrine of “indirect discrimination” that would be applicable here. In this doctrine, the laws that are prima facie “gender neutral”, but in practice have a “discriminatory” effect by enabling a particular group to have disparate effect can be struck down as unconstitutional. Through the case of Navtej Singh Johar,<sup>24</sup> it can be seen that the avenue of constitutional jurisprudence is bracing the notion of equality.

In this case, S.377, though prima facie neutral had disparate effect on the rights of LGBTQ community. Thus, putting a particular section at a disadvantage that is discriminatory in nature is violative of right to equality. Applying the same principle in the application of remedy of the instant subject matter, it is evident that women are at a disadvantage as they have been forced by the way of a decree to give up their employment, considered that it is the duty of a woman to subject herself to her husband and his family, negated ill-treatment by the husband as reasonable excuse. It is misused by husbands to prevent the claim of maintenance against them. Moreover, the law puts the burden of proof to present the

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<sup>22</sup> Pralhad Bhaurao Ghule v. Government of Maharashtra, 2014 SCC OnLine Bom 893.

<sup>23</sup> *Supra* 16.

<sup>24</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

reasonable excuse on the person withdrawing from the society of the other, which is mostly women. The failure to consider the eminent danger to women at the instance of not being able to prove a reason to be reasonable as per the evidentiary threshold and consequently being forced to return to the withdrawn society makes it draconian and regressive at every stage.

It is germane to note that the report of the survey conducted in the family courts of Maharashtra, Karnataka, Andhra Pradesh and West Bengal demonstrates that it is the woman who majorly files for divorce, separation or annulment which is subsequently reversed through the application of restitution of conjugal rights, whereas the interviews of judges show that it is a common practice for men to file such application to prevent themselves from the claims of maintenance.<sup>25</sup> For example, in the case of Jinarthanammal<sup>26</sup> and Vijaykumar Bhate<sup>27</sup>, the wife on being subjected to cruelty left the matrimonial household and subsequently filed for maintenance. The consequent action was the application of restitution by the husband.

In the era of feminism, we are protecting an anti-woman, a disguised gender-biased law. Further, article 14 envisages the concept of “equity”. It cannot be negated that in this male-dominant society where husband and wife have been treated inherently unequal, putting them on the same pedestal for this law is in dissonance with the essence of Article 14.

### **A.3. Article 19**

Article 19 guarantees the right to freedom of association which is inclusive of right to disassociate. In *Kathryn R. Roberts v. United States Jaycees*<sup>28</sup>, the US Supreme Court held that the associations are inclusive of marriage. The Article containing the positive as well as the negative obligation can be interpreted to mean that a party to marriage has the fundamental right to disassociate from such association. The case of *Sukhram Mali*<sup>29</sup> is yet another example of forced union wherein the wife was subjected to harassment by her father-in-law and torture by her husband. By invoking S.9, she was forced to reside in the matrimonial house. In the case of *Atma Ram v. Narbada Devi*,<sup>30</sup> the decree was passed in favour of the woman even when husband refused to cohabit with her, the judiciary has accepted the forceful association as valid and constitutional which in turn violates the fundamental right.

Further, under Article 19(1)(e)<sup>31</sup>, an individual has the right to reside in any part of the country. In the case of *Swaraj Garg*<sup>32</sup>, the application of

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<sup>25</sup> Flavia Agnes, *Family Law Volume I: Family Laws and Constitutional Claims* (OUP 2011) 25-26.

<sup>26</sup> *Jinarthanammal v. P Srinivasa*, AIR 1964 Mad 482.

<sup>27</sup> *VijayKumar Ramchandra Bhate v. Neela Vijaykumar Bhate*, (2003) 6 SCC 334.

<sup>28</sup> *Kathryn R. Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

<sup>29</sup> *Sukhram Bhagwan Mali v. Mishri Bai Sukhram Mali*, 1978 SCC OnLine MP 77.

<sup>30</sup> *Atma Ram v. Narbada Devi*, 1979 SCC OnLine Raj 67.

<sup>31</sup> INDIA CONST. art. 19, §1, cl. e.

<sup>32</sup> *Swaraj Garg v. K.M. Garg*, 1978 SCC OnLine Del 41.

S.9 was filed because the wife refused to resign from her workplace as per the demands of her husband. The Court cannot ideally compel an individual to reside in a particular part of the country. However, in the case of *Mirchumal v. Devi Bai*<sup>33</sup>, the wife was employed in a different city and owing to issues conveyance, she shifted to the city of her workplace. The refusal to resign from her job for the reason of residing with her husband was not considered to be a “reasonable” excuse and thus, the decree was passed in favour of the man and thereby compelled her to live in a particular place in the country. This is in violation of Article 19.

## **B. Patriarchal Judiciary**

The contention that the authors would like to make here is that the judiciary has been predominantly patriarchal in their mindset and outlook. Even in the interpretation of cruelty under S.13(1)(a) of the Act<sup>34</sup> to decide on divorce cases, the courts have been inconsistent in their decision making.

The oppressive and patriarchal setup of families and institution of marriage is historically rooted in the society and thereby it continues to have a significant impact on the opinion of the judicial institution for the purpose of determining if an act amount to cruelty. It is a sad state of affair that even in 21<sup>st</sup> century, we have not moved beyond the patriarchal interpretations of the epics composed millenniums ago. A paradigm of such stagnancy is the judgment of Bombay High Court in 2012 wherein refusal to move to husband’s place of work amounted to act of cruelty which thereby was a valid ground of divorce. The rationale behind such judgment was that a woman in marital institution is required to encapsulate the spirit of Goddess Sita and thus has to follow the husband, literally and figuratively.<sup>35</sup> This could be expected and acceptable setup in 1955, however, it is highly regressive for 2022.

Similarly in the case of *Kailash Wati v. Ayodhia Prakash*<sup>36</sup>, the Punjab and Haryana HC said that if the wife takes employment after marriage at a location away from the husband and her in-laws, and impugned section is evoked by the Husband and his family, then it is her “moral responsibility” to give up her employment and move to her husband’s place to ensure the institution of marriage is preserved. Such regressive opinions have no place in a modern India and are a shameful reminder of the patriarchal undertones of the judgements concerning S.9 of the Act

The important point here is that, if consent is increasingly becoming such an important part of individual autonomy in law, then why should it not be extended to this so-called sacrosanct institution of marriage? Why is the court having this power to ‘force’ anyone to be with a partner without ‘consent’? Why the foremost duty of a woman in marital institution is to

<sup>33</sup> *Mirchumal v. Devi Bai*, 1976 SCC OnLine Raj 34.

<sup>34</sup> Hindu Marriage Act, 1955, § 13(1)(a) No.25, Acts of Parliament, 1955 (India).

<sup>35</sup> *Sreeja V. v. Puliyanalath Rajesh*, 2012 SCC OnLine Bom 2157.

<sup>36</sup> *Kailash Wati v. Ayodhia Parkash*, ILR (1977) 1 P&H 642 (FB).

submit herself to her husband? More importantly, it is counterrevolutionary to witness the judiciary not move with the times and still have an orthodox perspective about individual autonomy in a social institution like marriage.

The restitution of the conjugal rights is an extremely personal private matter of two individuals and it is inherently unethical for the Courts to enter in that space. As opined by the Bombay HC in the refreshingly progressive *Bai Jiva v. Narsingh Lalbhai*<sup>37</sup> judgement true freedom for any individual, whether married or unmarried is to be free from the State's intervention or intrusion in their deeply personal matters. By repeatedly evoking S.9 of HMA and forcing women to cohabit with their husbands against their wishes, the judiciary is doing just that and this goes against the basic tenets of justice. Moreover, if the machinery of justice refuses to intervene into personal space of family or institution of marriage in order to criminalise the social evil of marital rape, the same principle should be adopted for protecting the individual dignity.

### **C. Constitutional Feminism**

The Constitution is the ultimate tenable instrument in order to implement gender-justice. Feminism is the process of recognition and thereby eradicating the reasons of suppression that women have been facing since time immemorial. The equality herein cannot be such that results in inequality. Extending the notion to constitutional feminism, it is the discretionary power conferred upon the institutions of the government at the centre, state as well as local level to redress the atrocities of women. Article 15(3) read with Article 12 of the constitution should be utilised to make specialised provisions for women and uplifting their status to bring them in a position of equality.<sup>38</sup>

Further, the dominance theory clearly shows that it is not the difference in men and women but the widespread conviction of dominance and subordination in the hierarchy of gender. Women are not given the duty of jail officers in male-prisons for the cited reason of security whereas it is the "male superiority" is the actual and ascendant reason.<sup>39</sup> Thus, in accordance with the theory of deep-rooted dominance of men, it is imperative for the State to take up the responsibility of dispensing the disadvantaged section the rights that they were rightfully entitled to, but were not accrued.<sup>40</sup> In the light of constitutional feminism, the governmental institutions should employ the channel of constitutional framework to ameliorate the biasness flowing from so-called gender hierarchy. Following this, the State and its apparatus should pierce the veil of marital privacy to guarantee the human dignity of the aggrieved wife.

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<sup>37</sup> *Bai Jivi v. Narsingh Lalbhai*, 1926 SCC OnLine Bom 30.

<sup>38</sup> P. Ishwara Bhat, 'Constitutional Feminism: An Overview' (2001) 2 SCC J-1.

<sup>39</sup> Catherine A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).

<sup>40</sup> Glanville Austin, *Working a Democratic Constitution* (Oxford University Press 1999) 669.

In the context of HMA, the authors would like to give the benefit of doubt to the courts and the legal guardians in 1955 for enforcing such provision. It will be wrong to retrospectively challenge their intentions as the provision, at least on paper, could be evoked by both the men and women. However, decades later, when we have seen four waves of feminism, women's rights being recognised at a much rapid pace globally, women being granted their justified civil, social, political and economic rights in even the most orthodox countries, it is rather backward for a country like India to hold on to such colonial ideals. So much so that even a country like the UK, from whom most of our legal provisions have derived, identifying the winds of change, had repealed this law on restitution of conjugal rights in 1970.

#### **D. Marital Rape**

The authors contend that upholding the restitution of conjugal rights paves way to marital rape which is not an offence in our country.

In *Tulshidas Kanolkar v. State of Goa*<sup>41</sup>, it was stated that the heinous crime of rape destroys the very being of a person. However, the demise of the very being of an individual is not taken into consideration in the institution of marriage for the reason that the Central Government and the judicial institutions believe matrimony to be an uncrossable boundary falling within the purview of private and personal matter. The Court<sup>42</sup> refuses to enter into the bedroom activities of an individual for contemplating the criminality of marital rape, but it enables such a crime by forcing the aggrieved wife to reside with her husband under the remedy of "restitution of conjugal rights".

The Law Commission in 71<sup>st</sup> report<sup>43</sup> supported the interference of the Courts in the personal sphere of marriage by favouring S.9 of HMA, while in its 172<sup>nd</sup> report<sup>44</sup>, it opposed the interventionist approach for criminalizing marital rape. The patriarchal mindset of the institutions of the government, as discussed in the former part of the paper can yet again be displayed through the contradicting approaches taken in these reports. The forceful cohabitation of wife or accelerating the process by attaching the property at the instance not complying with the decree is a clear attack on the dignity of a woman and an intervention in the private matters of the individual; whereas criminalization of marital rape would subvert upon the societal norms. Although the legislative intent of S.9 is predominantly not to enforce sexual intercourse, however, it is a coherent flow of the execution of the decree. The dominant theory that says that due to inherent inequality, the wife would be subjected to the sexual enslavement.

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<sup>41</sup> *Tulshidas Kanolkar v. State of Goa*, (2003) 8 SCC 590.

<sup>42</sup> *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148.

<sup>43</sup> LAW COMMISSION OF INDIA, 71<sup>st</sup> Report, Hindu Marriage Act, 1955 – Irretrievable Breakdown of Marriage as a ground of divorce (1978).

<sup>44</sup> LAW COMMISSION OF INDIA, 172<sup>nd</sup> Report, Review of Rape Laws (2000).

The authors' statement that S.9 is a tool to enable marital rape can be substantiated through a recent case of Kerala High Court wherein an application was filed by the wife for divorce because the husband was constantly demanding for dowry.<sup>45</sup> She was subjected to sexual pervasion and physical harassment. Moreover, the husband was involved in an extra marital affair. The husband countered the application of divorce by applying for restitution of conjugal rights. The Kerala HC in this case observed that marital rape occurs because the husband is under the belief that body of his wife is owed to him. The system of coverture which was derived by the Anglo-American tradition from the feudal Norman custom was that the woman in the institution of marriage is subordinate to her husband and all her individual rights are suspended. Through various legislations and progressive approach of the law, this notion was disassembled in the United States. This is the same principle embodies in the patriarchal society which has to be disassembled. In the present modern social jurisprudence, it is imperative for both the parties to a marriage be treated as equals by providing them equal rights that are in consonance with the fundamental rights. The instance of treating a woman's body as the personal chattel of husband and thereby committing a non-consensual sexual act would amount to marital rape. The act of the husband was considered as licentious and squandering which do not form a part of normal conjugal life. The voracious desire for wealth and sex that forced the wife to file for divorce was considered cruelty, but it sadly the heinous act does not find its place in the penal law.

The constitutional issues that arise with S.9 are analogous to the subject matter of marital rape. The validity of restitution refusal of criminalisation marital rape are forceful measures undertaken by the State to compel the woman to have sexual relationship with her husband. The Verma Committee of 2013 discussed a 2010 study wherein it was reported that, "*18.8% of women are raped by their partners.*" Thus, the scenario wherein the government believes that it is premature to criminalize marital rape, it should to the last ensure that it does not become a machinery to lay down statutory rape.<sup>46</sup>

#### **4. Evolution of the Institution of Marriage**

Over the last seven decades, after independence, the idea of women empowerment has undertaken multiple matured evolutions. The idea of modernity has evolved and currently encompasses several themes which were unheard of in 1955. This progressionist accentuation on the rights and liberties vested to an individual has redefined the concept of civil union as a contractual relationship. The plug can be pulled on this union at the instance wherein such dissolution is justified by the governing laws.<sup>47</sup>

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<sup>45</sup> XXX v. XXX, 2021 SCC OnLine Ker 3495.

<sup>46</sup> MAMTA RAO, LAW RELATING TO WOMEN AND CHILDREN 112 (3<sup>rd</sup> ed. 2012).

<sup>47</sup> LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER, S.P. SATHE 203 (Eastern Book Company 2012).

Equality and Autonomy of women in decision making is central to both professional as well personal spaces. The slogan of the second wave, “Personal is Political” has got deep rooted. Hence, it is absolutely normal for the husband or wife to take a decision about their matrimonial alliance based on practical considerations. On top of that, today, matrimonial alliances are not just restricted to heterosexual relations. Progressive judgements about the LGBTQ rights and same sex marriages have opened up the ambit of conjugal rights beyond the two-dimensional understanding of men and women. The various learned courts of our country need to evolve with the changing times and update themselves to the demands of the 21<sup>st</sup> century.<sup>48</sup> The waves of feminism are supposed to take us ahead in our thought process and make us evolved human beings. The idea of missing women coined by Amartya Sen cannot be addressed if the courts keep taking away the agency of decision from the wife and speak from a higher know it all pedestal about a deeply personal decision about separation in a marriage. These regressive judgements will also impact inheritance, adoption and abolition of cruel practices like marital rape, which is still being debated as we speak.

By dismissing the decision to separate from the spouse and enforcing the couple to work on their marriage, the courts are leaving the women vulnerable to marital rape, harassment from in-laws, mental torture and other such offences which have thousands of cases currently pending. Today, the violence against women is more evolved and defined in its form.

However, Sec 9 is unfortunately, stuck in 1955 and is very Manusmriti like in its form and reeks of colonial hangover. It is important to note that the Manusmriti too was burned by Dr. Ambedkar and was considered a toxic book for societal arrangements. It is the principle of “constitutional morality” that should hold superiority over the societal norms, especially the ones caged in the shackles of patriarchy and entitlement. This principle ensures the adherence to constitutional democracy and is used as a test to ascertain constitutional validity. On applying this test, it should be noted that the impugned provision might be in conformity with the societal norms, but is contrary to the constitutional morality as it does not conform to the fundamental rights.

Latest evolutionary discourses about mental health have put the toxicity of marriage out in the open for discussion. Pop culture references like the movie *Thappad* and *Pink* have emphasised on how even a simple NO is enough to assert a women’s right in a matrimonial relationship. In the midst of such an evolved discourse, S.9 of the HMA strikes out like a sore thumb which has no place in modern milieu. Its outdated interpretation helps patriarchy hang on to the last shreds of control and misogyny. The judiciary should unanimously dismiss its validity and set an example for the generations to come.

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<sup>48</sup> Fanuel Sitakeni Masiya v. Director of Public Prosecutions (Pretoria), 2007 SCC OnLine ZACC 9.

## **5. Recommendations & Conclusion**

- As has been clear through the multiple studies conducted by non-governmental organisations and civil society groups over the last 4 decades, majority of cases demanding “restitution of conjugal rights” are filed by the husband and not the wife. It clearly shows that the rationale cited by the judiciary for upholding the constitutional validity of S.9 and holding it closely to their conscience is not delivering equitable justice. The lop-sided nature of the cases is a clear testament about the misuse of this provision, which needs to be revoked with immediate effect.
- As proved in the paper, it is clearly violative of the basic tenants of Article 14, 19, and 21. Similarly, after the landmark Right to Privacy judgement,<sup>49</sup> S.9 looks even more outdated and archaic. India should take a leaf out of England’s book and analyse the reasons behind them revoking this provision in 1970 itself. However, if the Judiciary really cares for the institution of marriage and feels that this sacrosanct bond needs to be protected, then it should shift the mechanism of mediation wherein an independent body of experts, who would be trained and well equipped to help spouses who have withdrawn from each other’s society. Various independent bodies like the National Commission for Women, National Human Rights Commission and various handpicked civil society groups could be trained and empowered to deal with such critical issues of S.9 on a case-by-case basis.
- The provision to attach property at the instance of non-compliance of the decree passed under S.9 should be revoked with immediate effect. This is extremely unjust as along with the emotional trauma, can also put financial stress on the warring spouses. This, along with being forced to cohabit, can be detrimental to worsening mental condition of women.
- For a very long time in Indian Hindu traditions, the idea of marriage was not just a matter of immediate convenience, but a bond which was supposed to be maintained for the current lifetime and also for the next seven lives. However, it is important to note that in those times, literacy and empowerment of women was extremely low, society was in the grip of various unethical discriminatory practices and the “missing women” were not in a position to put their perspective. Now, the times have changed, female literacy and empowerment are at its zenith and hence, marriage is truly a union of “equals”. In such an instance, it is a well thought of decision based on mutual convenience. Hence, if the same matrimonial relation is becoming inconvenient, the constitution has given the right to the spouse to step out of it and choose one’s personal life, liberty and security. The matrimonial remedies like divorce or judicial separation have evolved within the framework of various personal laws. Hence, the court should recommend to repeal S.9 and

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<sup>49</sup> K.S. Puttaswamy (Aadhaar-5J.) v. Union of India, (2019) 1 SCC 1.

instead focus on strengthening the various ambits introduced over the years for divorce with mutual consent. This will make the process more simplified and reduce the taboo around divorce that would in turn help women deal with social ostracism.

- It is high time to realise that if either of the spouse has taken the decision to separate from the society of the other, or file for divorce, the institutionalized mechanisms should work in simplifying the process for a peaceful separation instead of artificially enforcing the couple to stay together, which might eventually be very awkward, discriminatory and artificial.
- Adding on, HMS and its interpretations over the years has been accused of being unfair towards the union/marriage of same sex Hindu couples. Admittedly, the society in 1955 considered it taboo and was not broad minded to accommodate these liberated diverse orientations. The core subtle emphasis on ‘procreation’ or bearing children in a marriage has kept the marriages of same sex couples out of the HMA. However, after decades of struggle and fight for their rights, the SC gave a very progressive judgement in 2018 by striking down 377 and de-criminalising same sex unions<sup>50</sup>. Taking that into considerations, it is time for the HMA and its archaic provision to be amended for harbouring the diversity of same sex unions in Hindus and pave the way for inclusive personal laws, adoption laws, inheritance laws. Instead of holding on to S.9 and using traditional interpretations of “reasonability”, the courts should use this opportunity to expand conjugal rights to bring same sex unions, transgender unions etc. under its ambit.
- In *X v. Health and Family Welfare Department*,<sup>51</sup> Justice Chandrachud has delivered a stellar judgement on the sexist practice of Registered Medical Practitioners (RMPs) demanding written consent from family or judicial permission to carry out the termination of pregnancy. The three-member bench has clearly opined that if a woman wants a legal abortion, then it is NOT necessary for her to seek consent from anyone in the society. Her decision will be considered final and should be respected. If the perennially contentious issue of abortion is getting such progressive encouragement from the Apex Court, the authors believe that it due season for the law-makers to apply the same rationale in conjugal rights. The decision of the wife to separate from the society of the husband, no matter whatever be the reason, should be enough ground to respect the decision. On this note, it is imperative for the State and its apparatus to address if forcing the restitution of conjugal rights against the spirit of the judgement given by Justice Chandrachud in 2022.

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<sup>50</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>51</sup> *X v. Health and Family Welfare Department*, 2022 SCCOnLine SC 905.

- The remedy of restitution of conjugal rights is available in all personal laws. However, the Directive Principles of State Policy that recommends the assimilation of the Uniform Civil Code under Article 44 would be a measure to eradicate the inequality prevalent in personal laws. The transformative constitutionalism<sup>52</sup> would be the vehicle of bringing the secular code which would be free from prejudice against women. Its purpose is to encircle the ideals of justice, liberty, and, equality in letter and spirit and bridge the gap between the present status and the aimed status of laws. The constitution is an organic document that evolves with time and changes in society.<sup>53</sup> The impugned remedy is based on the orthodoxically motivated proposition of objectifying a woman as the chattel of her husband. The transformative constitutionalism would require placing the individual rights of women at the forefront. This can be achieved by framing a uniform civil code. The secular Code which would be drafted in the modern era of feminism that billets women empowerment and recognizes their rights should ensure that the provisions conferring the rights of individuals do not compromise their dignity, bodily integrity or sexual autonomy. The provisions must be free from discrimination, in theory as well as in practice. On the same lines, the Kerala HC<sup>54</sup> observed that there must not be a difficulty in incorporating uniform code for the purpose of governing the rights of marriage and divorce. The performance of marriage can be done in accordance with the personal laws or traditions of their respective community while not absolving them from the compulsion of solemnizing the matrimony under the Code.

Conclusively, the law in place was supposedly incorporated to be in accordance with the social contract that would, in turn, resonate with the principles of justice. On the contrary, the law in place is not morally motivated. It is under the veil of ignorance. It can be observed that we have been incorporating a positivist approach in law to the extent of interpretation given by Austin and Bentham. One cannot interpret the law without considering morality and social aims. In light of that, we have to re-consider the constitutional validity of S.9. It not only is against the privacy of an individual but also would lead to an increase in the number of marital rapes. This is minacious because the law of our land does not criminalize marital rape.

In the instance of piercing the veil of S.9, one would notice that the impetus is to safeguard the marriage in the patriarchal structure. It is high time to integrate “law as it ought to be” and digress from “law as it is”.

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<sup>52</sup> State of Kerala v. N.M. Thomas, (1976) 2 SCC 310.

<sup>53</sup> Kalpana Mehta v. Union of India, (2018) 7 SCC 1.

<sup>54</sup> XXX v. XXX, 2021 SCC OnLine Ker 3495.

# **The Protection of Whistleblowers' Human Rights in India: A Legal Analysis with Inputs from Victimology**

**\*Mr. Gaurav Nanda**

## **ABSTRACT**

There is a dearth of research on the protection of whistleblowers' human rights, both in the disciplines of law and victimology. Furthermore, convincing people that whistleblowers are victims of crime or abuse of power, or at the very least potential victims, is difficult; it is because whistleblowers do not conform to the concept of an 'ideal victim' of victimology. Consequently, a victimological perspective on whistleblowers' human rights is missing in literature. The author of the current research article aims to fill these gaps and provide a fresh perspective. Freedom of speech and expression, and right to life are the two human rights that the researcher analyses by examining the provisions of the Whistle Blowers Protection Act, 2011 and comparing it with standards laid by the provisions of the International Covenant on Civil and Political Rights, 1966 and the Indian Constitution. The author contends that the study of whistleblowers' human rights falls within the realm of victimology. Different types or perspectives within victimology are discussed in the present paper, contributing to unique arguments and recommendations for legislative reform and lobbying for whistleblowers.

**Keywords:** Whistleblowing, Whistleblowers, Freedom of Speech and Expression, Right to Life, Human Rights, Victimology

## **1. Introduction**

In both the disciplines of law and victimology, there is a dearth of study on the protection of whistleblowers' human rights. Consequently, a victimological perspective on whistleblowers' human rights is absent in existing literature. The author of the present work aspires to remedy this situation by offering a fresh perspective.

Through this paper, the author focuses on two major human rights of the whistleblowers in India, i.e., the freedom of speech and expression, and the right to life.<sup>1</sup> For this purpose, an analysis of the provisions of the Whistle Blowers Protection Act, 2011<sup>2</sup> (hereinafter WPA, 2011) is

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<sup>1</sup> These two human rights are most essential in the author's opinion; there can be other human rights of whistleblowers also like the right to privacy, right to work, etc., but they are beyond the scope of the present research paper.

<sup>2</sup> The Whistle Blowers Protection Act, 2011, No. 17 of 2014, Acts of Parliament (India).

done. Also, relevant provisions of the International Covenant on Civil and Political Rights, 1966 (hereinafter ICCPR) and the Indian Constitution are also discussed, as they are the yardstick (for human rights) against which the relevant provisions of the WPA, 2011 are analysed.

Further, the author also argues that the study of the human rights of whistleblowers does fall within the realm of victimology. Furthermore, analysing whistleblowers' human rights through the lens of victimology has significant advantages because victimology consists of several perspectives (or types), and each perspective brings new arguments and proposals for law reform and lobbying.

The present introductory part of the paper sets the background to the paper and provides definitions in the following lines:

'Human rights' can be defined as inherent rights (entitlements), in the most general sense in these words: *"Human rights are commonly understood as being those rights which are inherent to the human being. The concept of human rights acknowledges that every single human being is entitled to enjoy his or her human rights without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.<sup>3</sup>

Whereas, victimology is a branch of academic research that is relatively young. Its goal is to study and learn about those who have been the victims of crime and/or victims of abuse of power.<sup>4</sup> Though, victimology is not a new concept. Indeed, Benjamin Mendelsohn coined the term in 1947 to denote the scientific study of crime victims. In fact, *"Victimology is often considered a subfield of criminology, and the two fields do share much in common"*.<sup>5</sup> It can also be said that victimology emerged as an antidote to criminology's one-sided focus on the criminal.<sup>6</sup> Since its inception, the subject matter of victimology has been interdisciplinary. Experts from various professions and academic fields have made contributions to victimology, including legal scholars, practicing lawyers, criminologists, sociologists, clinical and social psychologists, psychiatrists, political scientists, human rights activists, social workers and economists, etc. In short, it can be easily said victimology has been recognised as a unique and recognizable area of academic research despite its comparatively short legacy of around 60-70 years.<sup>7</sup>

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<sup>3</sup> UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), HUMAN RIGHTS: A BASIC HANDBOOK FOR UN STAFF 3 (OHCHR 2000).

<sup>4</sup> GURPREET SINGH RANDHAWA, VICTIMOLOGY & COMPENSATORY JURISPRUDENCE 31 (Central Law Publications 2011).

<sup>5</sup> See LEAH E DAIGLE, VICTIMOLOGY: A TEXT/READER 31 (2nd ed., Sage Publications 2018).

<sup>6</sup> Doreen McBarneet, *Victim in the Witness Box – Confronting Victimology's Stereotype*, 7 CONTEMPORARY CRISES 293, 293 (1983).

<sup>7</sup> RANDHAWA, *Supra* note 4.

“Whistleblowers” in the present paper are defined liberally by the author as: persons who possess secret information, and in the public interest, they disclose that information to expose some wrongdoing. This wrongdoing could take various forms like: violation of some law/by-law/rule, an act of corruption, health or safety violation, endangering of environment, human rights violation, some irregular or unethical or dangerous practice, etc.

No doubt that the concept of human rights sounds laudable; however, it is challenging to secure and seek implementation of human rights of vulnerable people, mainly when the interest of these vulnerable people can possibly conflict with the interest of the powerful people. Due to the release of secret information (whistleblowing), whistleblowers end up being vulnerable and their interests conflict with the interest of the powerful people. By ‘powerful people’, it is meant in the present research paper, people who hold considerable political, economic, or social power/influence, like: politicians, lawmakers, bureaucrats, businessmen, religious leaders etc. Therefore, it is natural that the human rights of whistleblowers receive significantly less media attention and possibly less protection from the law. Under such circumstances, it is pertinent to discuss and analyse the human rights of whistleblowers in India.

Moreover, it is difficult to convince people that whistleblowers are victims of crime or abuse of power, or at least they are potential victims. Whistleblowers are also rarely discussed in the literature of victimology or criminology (the mother discipline). Perhaps this is because whistleblowers do not meet the criteria of an ‘ideal victim’. The present paper attempts to fill some of these gaps.

## **2. Methodology and Research Questions**

The methodology of the research paper is doctrinal. The methods used are exploratory, descriptive, critical and especially analytical. The study has two research questions and they are:

First, whether the special law in India for whistleblowers’ protection, i.e., the WPA, 2011 is protecting the human rights of — freedom of speech/expression, and the right to life of whistleblowers? Second, how can victimology be helpful in protecting the human rights of whistleblowers?

## **3. Relationship Between Human Rights and Victimology**

An important issue that arises for consideration at this juncture is the relationship between human rights and victimology. It must be remembered that victim rights are also human rights.<sup>8</sup> Moreover, human

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<sup>8</sup> Jo-Anne Wemmers, *Victims' Rights are Human Rights: The Importance of Recognizing Victims as Persons*, 15(2) TEMIDA 71, 71 (2012).

rights have been analysed in the past from the lens of victimology.<sup>9</sup> On the other hand, looking at victims from the perspective of human rights is not a novel concept. Robert Elias proposed a “victimology of human rights” as early as in the year 1986.<sup>10</sup> *“Elias warned that victimologists risked becoming pawns of abusive governments if they limit their object of study to victims of crime. Instead, he argued, victimologists should study all man-made victimizations, which includes crimes as well as gross violations of human rights.”*<sup>11</sup>

In fact, human rights movement helps in bringing victims’ issues to the limelight. As noted by renowned Indian victimologist and criminologist Prof. G.S. Bajpai, *“The stress on human rights has surely brought the concerns of the victims at the fore”*<sup>12</sup>

Moreover, another notable Indian victimologist and criminologist Prof. K Chockalingam in the year 2010 noted that many scholars in recent decades had expressed the opinion that, while on the one hand, Mendelsohn’s General Victimology is too broad, on the other hand, criminal or penal victimology is too limited.<sup>13</sup> So, victimology should grow as a science of victims of human rights abuses, including crime.<sup>14</sup> In the last decade, it appears that more notice is taken for human rights abuses in victimology and that victimology has grown in its third phase.<sup>15</sup>

#### **4. Freedom of Speech and Expression of Whistleblowers**

The very act of whistleblowing involves receiving and sharing (secret) information, and therefore logically, it could be said that the act of whistleblowing falls under or copes with the principle of freedom of speech and expression.<sup>16</sup> Therefore, it is logical that whistleblowers throughout the world, in defence of their act of whistleblowing, put the argument of their human right of freedom of speech and/or expression forwards.

<sup>9</sup> E.g. Srimal Fernando and Vipin Vijay Nair, *70 Years On: UN Declaration on Human Rights from the Lens of Victimology*, MODERN DIPLOMACY (Dec. 16, 2018) <https://modern diplomacy.eu/2018/12/16/70-years-on-un-declaration-on-human-rights-from-the-lens-of-victimology/> (last visited Sep. 14, 2022).

<sup>10</sup> ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS VICTIMOLOGY AND HUMAN RIGHTS* (Oxford University Press, 1986).

<sup>11</sup> Wemmers, *Supra* note 8, at 78.

<sup>12</sup> G.S. Bajpai, *Victim’s Rights and Criminal Procedure Models* in CRIMINAL JUSTICE SYSTEM RECONSIDERED: VICTIM & WITNESS PERSPECTIVES 11 (G.S. BAJPAI ED., Serials Publications 2012).

<sup>13</sup> General victimology is the study of victimity in the broadest sense, including those that have been harmed by accidents, natural disasters, war, and so on; whereas, criminal or penal victimology is an approach from a criminological or legal perspective, where the scope of study is defined by criminal law.

<sup>14</sup> K. Chockalingam, *Measures for Crime Victims in the Indian Criminal Justice System* in UNAFEI RESOURCE MATERIAL SERIES NO. 81, 100 (UNAFEI, 2010).

<sup>15</sup> See, Hamja Hamja and Faizin Sulistio, *Modus of Girls Trafficking in Bongas Indramayu: Victimology Perspective*, 8 (1) BRAWIJAYA L.J. 132, 135-136 (2021).

<sup>16</sup> See P K DAS, *HANDBOOK ON THE RIGHT TO INFORMATION ACT* 11 (5th ed., Universal Law Publishing 2016).

ICCPR, which is an international human rights treaty, in its Article 19 (2) provides as:

*"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

It is here important to stress that India has ratified the ICCPR, further India has a domestic statute called: The Protection of Human Rights Act, 1993<sup>17</sup> (hereinafter PHRA, 1993), and as per Section 2 (d) read with 2 (f) of the PHRA, 1993 "human rights" in India includes rights guaranteed by ICCPR.

The Indian Constitution also protects freedom of speech and expression of Indian citizens under Article 19 (1) (a), however, under Article 19 (2) of the Indian Constitution, the State through law can impose reasonable restrictions on the exercise of this freedom, if such reasonable restrictions are: *"In the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence"*.

Now let us see how WPA, 2011 deals with the freedom of speech of whistleblowers. As per the initial words in the preamble of WPA, 2011, this Act establishes a mechanism to receive complaints relating to disclosure (of various types of wrongdoings). So, *prima facie*, it appears that this Act is protecting the freedom of speech and/or expression of whistleblowers. However, a deep level enquiry reveals this is not the case so. There is a problem concerning the channel of disclosure.

Channel of disclosure means the platform or the medium through which the disclosure of information (whistleblowing) is to be made. The WPA, 2011 recognises only one channel i.e., the "Competent Authority" and barring a few cases, in most cases, this competent authority is either the Central or the State Vigilance Commission. Further, the track record of vigilance commissions in India has been poor regarding actions upon the complaints and concerning the protection of whistleblowers. In the past, various governments' interference in the working of vigilance commissions is also not a hidden fact. Further, in most cases, the vigilance commissions in India outsource their investigations to the police; this is because the investigational capabilities of vigilance commissions in India are not very developed.<sup>18</sup>

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<sup>17</sup> The Protection of Human Rights Act, 1993, No.10 of 1994, Acts of Parliament (India).

<sup>18</sup> Pankhuri Mehndiratta and Shriyani Datta, *A Comparative Analysis of the Whistleblower Protection Mechanisms in India and USA* in 2 INTERNATIONAL CONFERENCE ON TRANSPARENCY AND ACCOUNTABILITY IN GOVERNANCE: ISSUES AND CHALLENGES 294 (JEET SINGH MANN, SARVATRAJIT SINGH ET.AL., ED., National Law University Delhi Press 2012).

Further, the assistance of police authorities raises questions upon the safety of the whistleblower. This is because often there is a nexus between police, mafia, politicians and other powerful people in India.<sup>19</sup> This is a significant reason to demand multiple channels to release information. Offering whistleblowers more options allow them to judge which option is most trustworthy and most suitable for them. Whereas, recognising only a single channel for disclosure can put the safety of whistleblowers at risk.

It is here vital to highlight that though directly or explicitly the WPA, 2011 does not prohibit disclosing information to someone other than competent authority, indirectly it does so. The WPA, 2011 fails when it comes to providing proper access to whistleblowers for disclosure. Any information to be released (disclosed) has to be made under this Act to qualify as “public interest disclosure”. It appears that only before the competent authority, the whistleblowers can release information or indulge in “disclosure” (as it is called). It is because the word “shall” is used in this Act.<sup>20</sup> So it can be inferred that in the name of access to channels for the release of information, the only channel made available by Indian law to whistleblowers is the competent authority.

Further, at a later stage, the question of “protection” of whistleblowers comes in the picture, but here it is important to highlight that the issue of protection is also conditional and dependent upon the earlier made choice of the platform of disclosure by whistleblowers. The WPA, 2011, through its Section 11 (1), puts an obligation upon the Central Government to protect those who made disclosure under the Act. Since disclosure under the Act is to be made to competent authority only, the message for whistleblowers is clear and i.e., if you want any kind of legal protection from this statute, you must disclose information to the only channel which is made available to you by the law. By linking and making the issue of protection, dependent upon disclosure before the competent authority, the WPA, 2011 leaves practically no other option before the whistleblowers.

Research has shown that before indulging in whistleblowing, a potential whistleblower carries out a mental assessment of the situation.<sup>21</sup> Logically it means weighing of pros and cons i.e., the societal benefits versus the personnel risks. Respect shown towards the human right of freedom of speech and expression of whistleblowers by giving them a choice concerning the channel of the disclosure may inspire confidence among potential whistleblowers (concerning trustworthiness and safety) and encourage whistleblowing. It must be noted that the

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<sup>19</sup> See generally, NN Vohra, *Vohra Committee Report* (Ministry of Home Affairs – India 1993).

<sup>20</sup> The Whistle Blowers Protection Act, 2011, § 4 (2)., No. 17 of 2014, Acts of Parliament (India).

<sup>21</sup> SANGHAMITRA MUKHERJEE, *PROTECTION OF WHISTLEBLOWERS IN UNITED STATES OF AMERICA* 52 (Lambert Academic Publishing, 2013).

words “...any other media of his choice.” in Article 19 (2) of ICCPR are wide enough to include multiple channels of disclosure.

A very pertinent question arises here, can restrictions upon the choice of channel/medium of whistleblowing be justified in the name of Article 19 (2) of the Constitution. In the researcher's opinion, such a restriction gives the whistleblower only one option and indirectly puts the whistleblower at the mercy of the government, and it cannot be called a reasonable restriction.

One of the arguments that the researcher would like to give to support this opinion is the decision of the Supreme Court of India in the *Indirect Tax Practitioners Association v. RK Jain*<sup>22</sup> where the court held that when all other options have failed, then for drawing the attention of authorities and the citizenry, whistleblowing through mass media could be used as a channel. Another argument that the author would like to give is that multiple channels of disclosures are allowed in other democratic countries, including Canada, UK, and South Africa.<sup>23</sup>

## **5. Right to Life of Whistleblowers**

Article 6 (1) of ICCPR provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The words “This right shall be protected by law” show that Article 6 has a positive component also. It can be said that the “State must adopt measures that are conducive to allowing one to live”.<sup>24</sup> The positive right to life includes a duty to prevent killings and disappearances by private actors.<sup>25</sup> In the author's opinion, securing of physical safety of whistleblowers very well falls under the ambit of article 6 (1).

Under the Indian Constitution, the right to life is protected by Article 21. This article is drafted in a negative form, and it obliges the State not to deprive any person of his life or personal liberty except according to procedure established by law. However, over the years, the judiciary has interpreted Article 21 to impose positive obligations also. Perhaps the broadest possible judicial interpretation is received by Article 21 of the Indian Constitution. So many rights (which are not explicitly mentioned as fundamental rights in Indian Constitution) have found their shelter, expansion, and nourishment under Article 21.<sup>26</sup>

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<sup>22</sup> (2010) 8 SCC 281.

<sup>23</sup> David Banisar, *Whistleblowing: International Standards and Developments*, in CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET, AND SOCIETY (IRMA E SANDOVAL ED., World Bank-Institute for Social Research 2011).

<sup>24</sup> SARAH JOSEPH AND MELLISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 167 (Oxford University Press, 3rd ed., 2013).

<sup>25</sup> *Id.* at 187.

<sup>26</sup> See Vikasdeep Singh Kohli, *Protection of Life and Personal Liberty under Indian Constitution (Article 21)*, 1(1) INT. J. OF LAW 72, 73 (2015).

Physical protection to a person or a group of persons by State (as a positive obligation) also falls under the ambit of article 21. Leading case law on this is the case of *National Human Rights Commission v. State Of Arunachal Pradesh*.<sup>27</sup>

The ground reality is that the physical attacks upon the whistleblowers are not one or two isolated incidents in India. According to an NGO: Commonwealth Human Rights Initiative, since 2005, 100 whistleblowers have been killed, 182 assaulted, 188 harassed or threatened, and 7 deaths by suicide.<sup>28</sup> These were whistleblowers who used the Right to Information (hereinafter RTI) law to expose scams and corruption. In the past, many whistleblowers working for different organisations were killed like: Satenydra Dubey (In 2003 he was shot dead after exposing corruption in National Highways Authority of India), Manjunath Shanmugam (He was a manager for the Indian Oil Corporation and in 2005 he was shot dead after he ordered to close down two petrol pumps where adulterated petrol was being sold), SP Mantesh (In Karnataka, he was a Deputy Director of Cooperative Audit, he was killed in 2012 because he exposed that a particular Cooperative Society was making improper land allotments).<sup>29</sup> These are only some famous cases that received heavy media attention; the list can go on.<sup>30</sup> However, exact data is not available, since in the knowledge of the researcher, no NGO at present is maintaining the records of organisational whistleblowers who are killed, harassed/threatened etc. In this paper by organisational whistleblowers, it is meant those whistleblowers that are in any capacity (like an employee, client, auditor, intern, etc.) in contact of an organisation, and possess secret information regarding some wrongdoing, not through the use of the RTI law but by virtue of their contact with the organisation. Then there are organisational whistleblowers like Ashok Khemka and Sanjiv Chaturvedi who are transferred and removed from their posts for whistleblowing.<sup>31</sup>

The very title of the WPA, 2011 uses the words “Whistle Blowers Protection”, in its preamble also, the Act says that it aims to provide “adequate safeguards against victimization” to persons making disclosure. Further, the word “victimization” is used many times in the Act. However, it is ironic that the word victimisation is not defined in this Act. Further, the WPA, 2011 does not impose criminal liability on those

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<sup>27</sup> 1996 AIR 1234, in this case, the Supreme Court ordered that the State (of Arunachal Pradesh) shall ensure that the people of Chakma community residing within the State are protected, that their life and personal liberty are protected. Further, any attempt of the organised groups to forcibly evict or drive Chakmas out of the State shall be repelled, if necessary, by taking help of para-military or police force.

<sup>28</sup> This data is obtained from the website: <http://www.attacksonrtiusers.org/> (last visited Sep. 29, 2022).

<sup>29</sup> See, ARSHI PAL KAUR, WHISTLEBLOWERS PROTECTION IN INDIA: AN ANALYTICAL STUDY 249-254 (Swaranjali Publications 2019).

<sup>30</sup> For more examples and detailed discussion on victimisation of whistleblowers in India see *Id.* at chapter 3.

<sup>31</sup> KAUR, *Supra* note 29 at 256.

who physically attack the whistleblowers.<sup>32</sup> Whistleblowers are left to take shelter of the ordinary criminal statute of the land i.e., the Indian Penal Code, for any attacks upon them. A special statute on the subject of “whistleblower protection” must have taken care of the physical safety of whistleblowers, but the reality is that there are no provisions in the Act to secure the right to life of whistleblowers, despite fatalities and dangers faced by whistleblowers in past.

## **6. What Can Victimology Offer to Protect the Human Rights of Whistleblowers?**

In present times, victimology may help other fields, such as law or human rights. Particularly in the context of whistleblowers, the form of help depends on the kind of victimology or victimological perspective used to analyse and/or advocate human rights, and this is accomplished in the following lines: -

### **6.1. Scientific Victimology and Humanistic Victimology**

Renowned victimologist and criminologist Prof. Ezzat A. Fattah has distinguished scientific victimology from humanistic victimology.<sup>33</sup> The former is a scientific and academic discipline, and the latter an activist movement in support of victims. Fattah viewed humanistic victimologists as an ally of human rights activists.<sup>34</sup> Both Prof. Ezzat and Cressey see scientific and humanistic victimology as two opposing sides. However, in present times these two have been seen as complementary to each other. A partnership between these two types of victimology is also suggested for the ultimate benefit of the victim.<sup>35</sup>

The researcher is of the opinion that both scientific and humanistic victimology have great potential in securing and protecting the human rights of whistleblowers. Academicians can analyse the issues of crimes, abuse of power, and harms against whistleblowers; how to prevent them, what changes in the legislation may be required for protecting whistleblowers. On the other hand, activist victimologists can be of great help in lobbying and advocacy for whistleblowers, taking the issue of their victimisation to the common public, and sensitising them. Activists are also required to implement the law properly; otherwise, various laws in India give rights on paper only and not in reality. Fattah has called activist victimologists as a lobbyist and scientific or academic victimologist as a scholar.<sup>36</sup>

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<sup>32</sup> Harish Verma and Ashwani Sharma, *Global Transparency Initiatives with Reference to Indian RTI Act 2005*, 5(1), ADMIN. DEV. - J. OF HIPA 21, 31 (2018).

<sup>33</sup> Ezzat A. Fattah, *Victims and Victimology: The Facts and the Rhetoric* 1 INT. REV. OF VICTIMOLOGY 43, 43 (1989).

<sup>34</sup> *Id.* at 63.

<sup>35</sup> See Jeremy Sarkin, *Why Victimology Should Focus on all Victims, Including all Missing and Disappeared Persons*, 25(2) INT. REV. OF VICTIMOLOGY 5 (2019).

<sup>36</sup> Fattah, *Supra* note 33.

## 6.2. The Legal Perspective of Victimology

Another renowned Indian victimologist and criminologist, Prof. K Jaishankar, observed in the year 2008: “*Victimology at the present is more application oriented and it deals more with the rights and assistance of victims*”.<sup>37</sup> He further observed “*Most of the contemporary research studies look in to the compensation issues of victimization and only focus on psychological and legal issues.*”

In the opinion of the researcher, an Indian legal perspective of victimology may consist of soft international law instrument like the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (hereinafter the UN Declaration, 1985), international treaty like ICCPR, Indian Constitution (especially article 21) judicial pronouncements, and writing of legal scholars. All of them can be very helpful in whistleblower’s protection. It is essential to point out here that the UN Declaration, 1985, is often called the Magna Carta of victims’ rights.<sup>38</sup> Two of the main human rights discussed in the present paper fall very well within the domain of the UN Declaration, 1985. It is important to point out here that the UN Declaration, 1985 contains two parts, Part (A) deals with “victims of crime”, and the second part, i.e., Part (B), deals with “victims of the abuse of power”. When the right to life of whistleblowers is compromised or defeated due to physical attacks, assaults, attempts upon the lives or actual killings of the whistleblowers, then they are victims of crimes and fall within the domain of Part (A) of the UN Declaration, 1985. Whereas, undue restrictions upon freedom of speech and the failure of the State to protect right to life of whistleblowers from non-state actors may qualify as abuse of power under Part (B). It is because even refusal or unwillingness to act by the State also qualifies as abuse of power.<sup>39</sup> According to principle 18 of the Declaration, victims of abuse of power means “...persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights”. The definition is broad enough to include different kinds of harms done through acts or omissions, violating internationally recognised human rights.

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<sup>37</sup> K. Jaishankar, *What Ails Victimology?* 3 (1) INT. J. OF CRIMINAL JUSTICE SCIENCES 1, 3 (2008).

<sup>38</sup> K. Chockalingam, *Some Random Thoughts about Victimological Movement in the World with Special Reference to India*, 1 (1) J. OF VICTIMOLOGY AND VICTIM JUSTICE 25, 40 (2018).

<sup>39</sup> See Pedro R. David, *Measures to Protect Victims of Crime and the Abuse of Power in the Criminal Justice Process* in UNAFEI RESOURCE MATERIAL SERIES NO. 70 95 (UNAFEI 2010), [https://www.unafei.or.jp/english/publications/Resource\\_Material\\_70.html](https://www.unafei.or.jp/english/publications/Resource_Material_70.html) (last visited Sep. 30, 2022).

A glaring and most prominent example of the apathy of the State to protect whistleblowers is that the WPA, 2011, received presidential assent in 2014, but till now (Sep. 30, 2022), it has not come into force. A more upsetting fact is that an Amendment Bill, 2015 was pending in Parliament, which weakens whatever little protections are offered by the provisions of the original parent Act.

The UN Declaration, 1985 has inspired victim-centric laws in many countries. The remedies and rights suggested by the Declaration for both types of victims include access to justice, compensation, restitution, and various types of assistance (psychological, medical, social, etc.). In the researcher's opinion, this UN Declaration, 1985, can be the starting point for any victimological research (with a legal perspective) dealing with whistleblowers. If incorporated (with suitable modification) in the whistleblowing statute of India, then rights and remedies suggested in the Declaration for victims may be quite helpful in preventing victimisation of whistleblowers and in protecting their human rights.

### **6.3. Critical Victimology**

*"While victimology has firmly put victims' needs and rights on the agenda, that concern has not been uniformly applied to all victims. There are still some types of victims that do not gain the same attention as others",* as noted by distinguished law professor Jeremy Sarkin.<sup>40</sup>

According to proponents of critical victimology, traditional victimology fails to challenge the fundamental definition of crime, ignores the issue of why some acts are sanctioned and thus, traditional victimology evolved in the wrong direction. Thus, critical victimology is preoccupied with how and why particular behaviours are classified as criminal and, as a result, how the entire discipline of victimology gets focused on one set of behaviours rather than another. Also, many crimes perpetrated by society's powerful are not punishable under the penal law.<sup>41</sup>

Critical victimology is particularly interested in illuminating how some specific groups who suffer harm are labelled as "victims of crime". To this aim, the critical approach focuses on the structural causes and power dynamics within society that contribute to the official and legal acceptance of certain types of victimisation. This approach necessitates victimologists focusing not just on harms that are formally labelled as "crimes" but also on harms that are not.<sup>42</sup>

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<sup>40</sup> Sarkin, *Supra* note 35 at 3.

<sup>41</sup> See WILLIAM G. DOERNER AND STEVEN P. LAB, VICTIMOLOGY 13 (Anderson Publishing, 6th ed., 2012).

<sup>42</sup> MATHEW HALL, VICTIMS OF CRIME: CONSTRUCTION, GOVERNANCE AND POLICY 8-9 (Palgrave Macmillan Publishers 2017).

The relevance of critical victimology can be appreciated from the fact that critical victimology's emphasis on victims' rights has resulted in a strong victims' rights discourse among victims' movements, which has been integrated into the Council of Europe's discourse on victims, as well as the European Court of Human Rights' jurisprudence in recent years.<sup>43</sup>

This approach could be of great help to advance arguments for the protection of whistleblowers through law reform. Through this approach, there can be a re-look on many of the harms like unjust transfers, demotions, suspension from jobs, and other forms of workplace harassment, which are not recognised as crimes under WPA, 2011. In fact, they are also not considered as civil wrongs with adequate damages. Through law reform, penalties may be prescribed for such kinds of workplace harassment.

Furthermore, an analysis of concepts like "ideal victim" and "non-ideal victim" from critical victimology can provide us insights as to why crimes, abuse of power, and harms against whistleblowers are not treated with sympathy and social outcry. It is essential to point out here that these two concepts were propounded by the Norwegian criminologist Nils Christie in his seminal chapter.<sup>44</sup> According to Christie, the ideal victim is "... A person or a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim". He describes many characteristics of an ideal victim. Two of the characteristics relevant in the present paper are: that the victim is involved in a respectable activity and that victims must be blameless in what happened to them.<sup>45</sup> Whistleblowing is viewed by many not as a respectable activity; instead, it is viewed negatively by many people as an act of disloyalty or treason.<sup>46</sup> So, whistleblowers can be seen as troublemakers and the ones who were provoking retaliation.

Moreover, Christie also gave some attributes of "non-ideal victim" by saying that these persons lack sufficient strengths and their interests are contrary to other people's interests.<sup>47</sup> Unfortunately, whistleblowers do fit in this description of "non-ideal victim", as they being scattered people who have less strength and political

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<sup>43</sup> LORRAINE WOLHUTER, NEIL OLLEY, ET.AL., VICTIMOLOGY: VICTIMISATION AND VICTIMS' RIGHTS 28 (Routledge 2009).

<sup>44</sup> Nils Christie, *The Ideal Victim*, originally published in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM (EZZAT FATTAH ED., The Macmillan Press Ltd. 1986).

<sup>45</sup> See Hannah Mason-Bish, *Creating Ideal Victims in Hate Crime Policy* in REVISITING THE IDEAL VICTIM'DEVELOPMENTS IN CRITICAL VICTIMOLOGY 49-51 (MARIAN DUGGAN ED., Policy Press 2018).

<sup>46</sup> See Paul Latimer and A J Brown, *Whistleblower Laws: International Best Practice* 31(3) UNSW L J. 766, 791.

<sup>47</sup> Nils Christie *The Ideal Victim* republished in REVISITING THE IDEAL VICTIM'DEVELOPMENTS IN CRITICAL VICTIMOLOGY 18 (MARIAN DUGGAN ED., Policy Press 2018).

importance as electorates to make their voices heard. Due to whistleblowing, their interests are also in sharp conflict with the interest of the powerful people.

It must be remembered that law can also bring changes in society.<sup>48</sup> Critical victimology can provide clues through which law can be used to create a positive picture of whistleblowers as heroes and anti-corruption crusaders. For this purpose, reforms such as provisions for rewards, honours and medals with adequate publicity can be introduced in WPA, 2011.

## **7. Conclusion and Suggested Reforms**

The provisions of WPA, 2011 do not align with the liberal interpretation (imposing positive obligations) of the relevant provisions (related to freedom of speech and expression and right to life) of ICCPR and the Indian Constitution. The WPA, 2011 does not protect or support the human right of freedom of speech and expression of the whistleblowers. It instead regulates and puts unreasonable restrictions upon the freedom of speech and expression of whistleblowers. The WPA, 2011 also does not have any provision that affirmatively protects or supports whistleblowers' inherent right to life. Therefore, in response to the first research question of the present paper, it can be said that the WPA, 2011 fails badly in protecting the human rights of — freedom of speech/expression, and the right to life of whistleblowers

The problem is that the whistleblower protection laws in many countries came about through an anti-corruption agenda, not a human rights one.<sup>49</sup> The same is true in Indian legislation (it is evident from the preamble of WPA, 2011), and it is here that the fault lies. There is no direct or implicit reference to the freedom of speech, physical protection or protection of the life of the whistleblowers or any of the human rights of the whistleblowers. Necessary changes in the WPA, 2011 must be done (including the preamble) to include that whistleblowing is justified and protected as freedom of speech and expression. That disclosure is the norm, and secrecy is an exception. Further, multiple channels of disclosures must be recognised by the WPA, 2011, to facilitate the exercise of freedom of speech and expression, which may also create a sense of security in the minds of whistleblowers.

To protect the life of whistleblowers, the word “victimization” needs to be defined to include physical violence, attacks, attempts on life etc. Strict penalty provisions must be created to punish those who attack or commits violence against the whistleblowers. Moreover, penalty provisions must exist for those people also, who resort to workplace

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<sup>48</sup> See KRISHNA PAL MALIK AND KAUSKHI C. RAVAL, *LAW AND SOCIAL TRANSFORMATION IN INDIA* 1 (Allahabad Law Agency 2014).

<sup>49</sup> Wim Vandekerckhove, *Freedom of Expression as the Broken Promise of Whistleblower Protection*, 10 *LA REVUE DES DROITS DE L'HOMME* 3 (2016), <https://journals.openedition.org/revdh/2680> (last visited Sep. 30, 2022).

harassment/victimisation of whistleblowers. Further, special tribunals and a special agency (not local police) should be entrusted with protecting the lives of whistleblowers.

Further, in response to the second research question of the present paper, the conclusion/answer that emerges is that victimology can be very helpful in protecting the human rights of whistleblowers and for this purpose the WPA, 2011 needs to incorporate inputs from victimology, particularly the rights and remedies provided by the UN Declaration, 1985. These rights and remedies include access to justice, compensation, restitution, and various types of assistance. Furthermore, scientific and humanistic victimology both can help in the protection of the human rights of the whistleblowers through research and lobbying. Hence more research and activism for whistleblowers is the need of the hour. Various types of harms like unnecessary transfers, demotions, workplace harassment etc., need to be defined expressly as “victimisatio” in WPA, 2011. Rewards, honours, and medals, when given to whistleblowers, can put whistleblowers in a positive light and closer to the concept of the “ideal victim”. Thereafter, it’s quite possible that any crimes, abuse of power, and harms against them are met with sympathy and social outcry.

Most important of all, the WPA, 2011 with all these necessary changes needs to be notified at the earliest. It should be noted that corruption facilitates human rights violations, and those who speak out against corruption and human rights violations deserve to have their own victimisation avoided and their own human rights protected by the law, and victimology can be a valuable tool in this regard.

# **Lokpal and Lokayuktas: A Critical Appraisal of Powers and Functions**

**\*Ms Akanksha**

## **ABSTRACT**

Administrative functions of a state are one of the bedrocks on which all the concept of Justice, equity and good conscience revolves and maladministration is that termite that engulf the whole identity of a nation. Hence, any development prone nation require a vigilant and independent body like ombudsman.

When it boils down to the Indian Ombudsman framework, Dr. L.M. Singhvi in year 1963 coined the term Lokpal and Lokayuktas as an Indian model of ombudsman that is there to resolve public grievances.

On that line this paper fairly tries to analyse the development of this concept in world with specific reference to Indian legislative framework. Moving ahead an illustrative list of the power, function and structure of Lokpal and Lokayukta as provided under the Principal Act of 2013 as been dealt by this paper. Even the 2016 amendment to the parent act has been briefly discussed and the paper went ahead to substantially Scrutinize the provisions and functioning of this India ombudsman system in light of the 2013 legislation. At the end, a suggestive conclusion has been provided, which is precisely based on a subjective understanding of the writer.

## **1. Introduction**

The concept of Ombudsman in the contemporary era evolved as a Swedish initiative back in year 1713, when the Swedish chancellor of justice was delegated with a power to invigilate into the functioning of a war time government. However, the institutionalization of ombudsman as an administrative concept happened only after its firmly incorporation into the Constitution of Sweden in year 1809. Nonetheless, the transition of this concept was restricted until the 20<sup>th</sup> century until this concept grew significantly and got assimilated in the administrative structure of other Scandinavia countries like Finland in year 1919, Denmark in 1955 and Norway in 1962. Incorporation of this concept in Denmark (1955), provided a glimpses of global interest in the ombudsman.<sup>1</sup>

However, when it comes down to the assimilation of this varied concept in the Indian administrative framework. The origin of this epoch dates back to 1966, when the first ever administrative reform commission advice

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<sup>1</sup> Soumik Chakraborty, "Ombudsman: A Critical Appraisal", LOCTOPUSH, (25<sup>th</sup> March 2022), <https://www.google.com/amp/s/www.lawctopus.com/academike/ombudsman-critical-appraisal/%3famp=1>

to institute two independent authorities (lokpāl and lokayukta) at centre and state level. Further in 1968, the then Law Minister Ashok Kumar Sen proposed the bill of constitutional ombudsman in the parliament. The bill got passed in the lok sabha but eventually lapsed because of the dissolution of lok sabha and since then it lapsed eight times until 2011.<sup>2</sup>

In year 2011, as an aftermath of Anna Hazare lead “India Against Corruption” movement and other recommendations the Lokpal and Lokayuktas Bill, 2013 was passed by Lok Sabha and Rajya Sabha and got presidential assent on 1<sup>st</sup> January 2014. Eventually it came into force on 16<sup>th</sup> of January 2014.<sup>3</sup>

## **2. Structure, Power and Functions.**

In India, the Lokpal and Lokayuktas Act, 2013 evolved as a measure to check corruption and malfunctioning. This act mandated the establishment of two-tier ombudsman structure that comprises of Lokpal at central and Lokayuktas at state level. Under this act both Lokpal and Lokayuktas are the statutory bodies without any constitutional status with an authority to probe into the matter of malfunctioning, corruption and complaints made by individuals or suo motu against any statutory body, organizations, company or any individual, especially public authorities including Prime Minister.<sup>4</sup>

### **2.1 Structures**

Lokpal as per the Act is made up of one chairperson and maximum of 8 body members. Moreover, the eligibility criteria of other the Chairman and other members of the body has been mentioned in the act.

### **2.2 Term and appointment**

The term of the Chairman and the Members of this body is 5 years or until the member attains the age of 70 years, whichever is earlier. Also, the appointment of the Chairman as well as the member of this body is carried by the President on India on the basis of recommendation given by selection committee. The selection committee comprises of the Speaker of Lok Sabha, the Leader of Opposition in Lok Sabha, Chief Justice of India or any Judge nominated by Chief Justice of India, One eminent jurist and prime minister as the head of the committee.

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<sup>2</sup> Ibid.

<sup>3</sup> Lokpal and lokayukta Act, 2013, NO. 1 of 2014 Acts of Parliament, 2013 (India).

<sup>4</sup> Mariya Paliwala, “Lokpal and Lokayuktas under the Lokpal and Lokayukta Act, 2013”, IPLEADERS, (25<sup>th</sup> March 2022), <https://www.google.com/amp/s/blog.ipleaders.in/lokpāl-and-lokayuktas/%3famp=1>

### **2.3 Power and Jurisdiction**

Lokpal being a statutory independent body can probe into the charges levied upon the Prime Minister, other ministers and MPs, Central Government officials and groups A, B, C and D officers.

However, its jurisdiction succumbed in the case of allegation levied on PM in the matter of international relations, Security, public order, atomic energy and space.

Moreover, Under the garb of parliamentary privilege enriched in Article 105 of the Indian Constitution is also out of the Lokpal's jurisdiction.<sup>5</sup>

In addition to all the above-mentioned powers, the lokpal also possess the authority to direct CBI and its actions. It can also impound and attach assets, receipts and benefits procured through corruption. Recommendation pertaining to the suspension or transfer of public servants levied with the charge if corruption can also be made by the Lokpal.

More so, Subject to the provisions of the Act, Lokpal is even empowered to give directions for prevention records destruction during the preliminary inquiry. In simple word the authority enjoyed by the investigation wing of Lokpal enjoy similar power to that of a civil court.<sup>6</sup>

### **3. Structure, Power and Functions of Lokayuktas**

When it comes to the structure, Power and function lokayukta. Both lokpal and lokayukta are on same front. But, the only difference is in the level of its operation and incorporation of members.

It is an independent statutory body operating at state level, which has been established to probe into the matter pertaining to individual's complaints against public servants or any politician with respect to corruption.

According to the act, Lokayukta is a three-member body, which includes a Lokayukta, State Vigilance Commissioner and a jurist. Appointment of the members is done through the recommendation of Governor, and they hold the office for five year or till they attain the age of 70. However, the governor may remove them from the office is any charge of misbehaviour or incapacity is levied and proved by the 2/3<sup>rd</sup> majority in the State legislature.<sup>7</sup>

Moving ahead, as prescribed under the act, the Lok Ayukta possess a power to initiate an investigation against chief minister, his ministers, MLAs, or any member of a Board, committee or authority. If refereed by

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<sup>5</sup> ibid

<sup>6</sup> Advaitar7, "Lokpal", LEGAL SERVICES INDIA, (25<sup>th</sup> March 2022), <https://www.legalserviceindia.com/legal/article-50-lokpal.html>

<sup>7</sup> Sanchar Lochan, "Details about Lokayuktas : its power and function", SANCHAN LOCHAN, (24<sup>th</sup> March 2022), <https://www.sansarlochan.in/en/details-lokayukta-powers-functions/>

state government, they are eligible to keep an eye on the activities of any public servant.

Moreover, the Lokayukta may issue search warrant while dealing with investigation and similar to lokpal they also possess the power equivalent to a civil court when it comes to summoning and enforcing the attendance, examining a person on oath, production of documents<sup>8</sup> etcetera.<sup>9</sup>

#### 4. Lokpal and Lokayukta (Amendment) Bill, 2016

In response to certain criticism, and in order to amend the parent law, this bill was introduced and passed by the Parliament on 27<sup>th</sup> July 2017. This amendment Act intended to bring in certain changes that includes.

1. Recognition of the leader of Lok Sabha's single largest opposition party as the member of selection committee, when the recognized leader of the opposition is absent.
2. Section 44 of the parent Act has also been amended, wherein 30 days limitation for furnishing the report of assets and liabilities by any public servant has been replaced and an authority for the same is handed over on the discretion of the government. The public servant, post this amendment have to furnish those details in the manner prescribed by the government.
3. Moving ahead, this bill also provided, time extension to trustees and board members of an NGO for declaring their assets and those of their spouses if they are procuring more than Rs. 1 crore as funds from government or foreign funding of more than Rs. 10 lakhs.<sup>10</sup>

#### 5. Critical Analysis

**"Law is what law does, not what law says and the moral gap between word and deed menaces people's faith in life and law. The tragedy, then, is that democracy becomes a casualty"<sup>11</sup>**

**-Justice Krishna Iyer.**

The mist of Corruption, ill-administration and malversation possess within the strength to obliterate the principal foundation of any nation including India. Therefore, to cater with the need of an hour, the Indian government time and again bring in different anti-corruption Agencies like

<sup>8</sup> Surbhi S, " *Difference Between Lokayukta and Lokpal*", KEY DIFFERENCE, ( 25<sup>th</sup> March 2022), <https://keydifferences.com/difference-between-lokayukta-and-lokpal.html>

<sup>9</sup> Sanchar Lochan, " *Details about Lokayuktas : its power and function*", SANCHAN LOCHAN, ( 24<sup>th</sup> March 2022), <https://www.sansarlochan.in/en/details-lokayukta-powers-functions/>

<sup>10</sup> Ibid

<sup>11</sup> Kaleeswaram Raj, " *A case for reforming Lokpal and Lokayukta*", INDIAN EXPRESS NEWSPAPER, (30<sup>th</sup> March 2022), <https://www.google.com/amp/s/www.newindianexpress.com/opinions/2022/mar/09/a-case-for-reforming-lokpal-and-lokayukta-2427895.amp>

Lokpal and Lokayuktas. The institution of Lokpal was the imperious transformation in the battle against corruption. Its introduction worked as a sword to curtail the profound corruption in the Indian administrative structure.

Though the finite motive for introduction of these agencies was to render speedy and cost-efficient justice to people. However, somewhere due to one reason or another the objective and the reality of these institutions doesn't seem to meet its end and definitely posses lacunae.

It's been nine years since the enactment of this act, but unfortunately till date, this institution has not played any remarkable role when it comes to tackling corruption and improving misadministration in India.

From the loopholes in the principal Act to the lethargic behaviour and political conflict, everything seems problematic and undesirous.

First of all, when we patiently scrutinize the principal Act, along with the 2016 amendment. It explicitly appears that the present ombudsman institution of India exercise inadequate discretion hence any further legislation is , and future legislation is futile, lest the problem of executive dominance over this institution is cinched. Since the appointing committee itself consists of political and executive members the whole body cannot be exempted from political interference at all.<sup>12</sup>

Moreover, the second issue in the appointing committee arise when the act talks about the composition of the committee, which may consist of 'a person of integrity or eminent jurist'. Since the term a person of integrity or eminent jurist is very subjective, open to interpretation and does not have any straight jacket formula, it can easily be manipulated and abused.<sup>13</sup>

Moreover, this act also lacks in proving protection and concrete armour to whistle-blowers who actually unveil numerous maladministration at governmental levels. The act also lacks behind in providing any constitutional backing to the lokpal.<sup>14</sup>

Further, the act has also exempted the judiciary from the jurisdiction of Lokpal, which could also be submerged in corruption. In fact, the armed form is also exempted from the purview of the Lokpal. More so it lacks concrete provision to challenge and appeals against any action of Lokpal.

Further this act doesn't provide any especial security to the Whistle-blower and increases the probability of investigation against the informant

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<sup>12</sup> Kevin Prsksha, "Critical Analysis of Lokpal", ACADEMIA, (30<sup>th</sup> March 2022), [https://www.academia.edu/28525242/CRITICAL\\_ANALYSIS\\_ON\\_LOKPAL](https://www.academia.edu/28525242/CRITICAL_ANALYSIS_ON_LOKPAL)

<sup>13</sup> Advaitar7, "Lokpal", LEGAL SERVICES INDIA, (25<sup>th</sup> March 2022), <https://www.legalserviceindia.com/legal/article-50-lokpal.html>

<sup>14</sup> *ibid*

in case the accused person is acquitted of all charges eventually would only discourage further complaints.<sup>15</sup>

Adding to that the 2016 amendment brought in certain changes to Section 44 of the Act which actually created a lethargic and discretionary option for the government. On top of that the Central government till date has not formulated any kind of rules and regulations for asset disclosure by public servants and a concrete format for complaint filing.<sup>16</sup>

Further, it can be observed that these institutions are mostly dependent on bodies, like CBI, CVC etcetera for carrying out its investigation and inquiry. This dependence exhibits the need for more autonomous framework for this ombudsman institutions to carry out its function more efficiently and effectively.<sup>17</sup>

Apart from the above mentioned fall out, the incapacity of this whole Indian ombudsman structure can be traced from the number of corruption complaints registered with this body. In 2019, they received total of 1,427 complaints. On the other hand, by 2020-2021 the number of complaints dropped to 110. One may contend that this situation may have arisen due to the decline in corruption rate in India however interestingly this is not the reality. As per the Transparency International's 2021 Corruption Perception Index, India ranked 85 out of 180 countries surveyed. Hence, this reduction might be viewed as the institutional failure and trust deficit.<sup>18</sup>

Moreover, this fact can be well substantiated by the resignation of Justice Dilip B Bhosale, from the position of member in the Lokpal. The reason cited behind his resignation was malfunction in the whole ombudsman institution.<sup>19</sup>

Further, allocation of fund to this body was curtailed by the centre. The appointment of the Chairman was delayed by six year which clearly reflect a lack of political will. Even there was a massive lethargic attitude shown in formulating procedural rules and regulations for the process of complaint. Total of around 6 million were spent on the body but unfortunately no substantial achievement could be credited to this institution.<sup>20</sup>

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<sup>15</sup> *ibid*

<sup>16</sup> Lokpal and Lokayuktas (Amendment) Act 2016, NO. 37 of 2016 (2016)

<sup>17</sup> Advaitar7, "Lokpal", LEGAL SERVICES INDIA, (25<sup>th</sup> March 2022), <https://www.legalserviceindia.com/legal/article-50-lokpal.html>

<sup>18</sup> Press Trust of India, "India Ranks 85 in corruption perception index of 2021, says report", BUSINESS STANDARDS, (30<sup>th</sup> March 2022), [https://www.google.com/amp/s/wap.business-standard.com/article-amp/current-affairs/india-ranks-85-in-corruption-perception-index-of-2021-says-report-122012600002\\_1.html](https://www.google.com/amp/s/wap.business-standard.com/article-amp/current-affairs/india-ranks-85-in-corruption-perception-index-of-2021-says-report-122012600002_1.html)

<sup>19</sup> Shyam Lal Yadav, "Before he quit, Lokpal judge sent 3 letters to chief on lack of work, and gaps in processes", THE INDIAN EXPRESS, (31<sup>st</sup> March 2022), <https://www.google.com/amp/s/indianexpress.com/article/india/lokpal-judge-dilip-bhosale-letters-to-chief-6273154/lite/>

<sup>20</sup> *Ibid*

When it comes to the considerable public good extracted from the functioning of Lokayuktas in different states. The political motive seems to drive the cart in few states and on the other hand few states lacks in appointing one. Once upon a time this institution used to intimidate the corrupt public servants, but now the situation is that in various states the power of this institution has been reduced to a toothless tiger.<sup>21</sup>

Moreover, the parent Act has substantially focused on laying down rules and duties of Lokpal and it lacked behind in elaborating the mandate for the office of Lokayuktas. Consequently, an apparent demarcation of power, function and role of Lokayuktas were not marked. As an aftermath of this loophole, the whole system of Lokayukta is not standard and differs from state to state. It lacks independence both in its functioning and its appointment.

Since the act does not prescribe any standard ways to carry out the functioning of this institution. Different states in India tends to follow their discretion and allocate powers to this institution depending upon its whims and fancies. This irregularities leads to the haphazard execution of this initiative as a whole.

More so, these whole discretionary powers vested with the respective states lead to mismanagement and less effective functioning of this institution for instance. The State of Kerala through its CPI(M)-led LDF government passed a contentious ordinance that tends to amend Section 14 of its Lokayukta. This amendment eventually reduced the influence of the lokayukta report as merely a recommendation.

Further, in Karnataka the Congress government led by Siddaramaiah instituted the Anti-Corruption Bureau in 2016. Further the investigating powers vested with the Lokayukta was transferred to the ACB. Similarly, the Lokayukta in West Bengal, is nothing but a paralyzed institutions.<sup>22</sup>

Moving ahead, the lack of political will to appoint Lokayukta is very prevent in many Indian state. For example, the state of Karnataka had a post of Lokayukta way back in year 1986, however, this post was vacant for two years until Justice K N Phaneendra has been appointed as the Lokayukta of the state in March 2022. Similarly, the post of lok ayukta was vacant in Delhi since December 2020 Until 2022 when Justice H.C Mishra (Retired) swore the oath as the new Lokayukta of Delhi. The situation is similar in other states and Union territories.<sup>23</sup>

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<sup>21</sup> Varunkarthick, “ *Lokpal Act: The Toothless Tiger And The Need For Amendments*”, LEGAL SERVICES INDIA, (31<sup>st</sup> March 2022), <https://www.legalserviceindia.com/legal/article-6581-lokpal-act-the-toothless-tiger-and-the-need-for-amendments.html>

<sup>22</sup> Justice Phaneendra is new Karnataka Upa Lokayukta, (30<sup>th</sup> March 2022), <https://www.google.com/amp/s/www.newindianexpress.com/states/karnataka/2022/mar/24/justice-phaneendra-is-new-karnataka-upa-lokayukta-2433523.amp>

<sup>23</sup> Sparsh Upadhyay, “ *Former Jharkhand High Court Judge Justice Harish Chandra Mishra Appointed As Delhi's Lokayukta*”, LIVE LAW, (31<sup>st</sup> March 2022), <https://www.google.com/amp/s/www.livelaw.in/amp/news-updates/former-jharkhand-high-court-judge-justice-harish-chandra-mishra-appointed-delhi-lokayukta-194553>

Adding to that the legal framework for Lokayukta expect appointment of retired Supreme Court or High Court Judges as the Lokayukta of a state. But interestingly some state in garb of utilizing its discretion made certain amendments that allowed retired judges and even lawyers to hold this post. For example, K.N. Bhattacharjee became the third Lokayukta and the first ever lawyer to hold this post in the state of Tripura.

Nonetheless, only four stated, that is Manipur, Bihar, Tamil Nadu and Odisha have appointed judicial as well as non-judicial members in its respective state Lokayukta.

At the end, it can be ascertained that different states like Madhya Pradesh have proactively formulates initiatives to tackle instances of dysfunctional administration, however on the other hand other states appears to possess limited resources to bring forth even minutiae of transformation.<sup>24</sup>

## 6. SUGGESTIONS

In the case of *Common Cause V. UOI*, the Apex Court proposed to “strengthen the existing legal and institutional mechanism” for ensuring public sanity. It recapitulated the oratory of “zero tolerance against corruption”<sup>25</sup>.

However, the main motive behind the implementation of this act seems to lack behind because of plethora of above-mentioned issues.

To ensure better implementation of these law, simple, autonomous and independent mode of grievance redressal without succumbing to the clutches of the executive is required. Moreover, the laws have to incorporate clear demarcations on powers, position and jurisdiction, especially when it comes to Lokayukta.

Moving ahead, in order to improve India’s ranking in global corruption index, India needs to urgently check in and probe into the matter of corruption through strong institutions. Also, the independence and availability of manpower for this institution has to be insured.

The catchphrase “less government and more governance” which has been embraced by the India, must be implemented in its letter and spirit.

More so, this institution should be designed in such manner that must the financial, economical, administrative and legal autonomy is insured and totally vested in the organization itself. It need to be made free from those who they investigate and punish. More so the appointment

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<sup>24</sup> Chandan Panday, “ *Veteran advocate KN Bhattacharjee appointed new Lokayukta in Tripura*”, EAST MOJO, (30<sup>TH</sup> March 2022), <https://www.google.com/amp/s/www.eastmojo.com/tripura/2021/07/03/veteran-advocate-kn-bhattacharjee-appointed-new-lokayukta-in-tripura/>

<sup>25</sup> *Common Cause v. UOI and others*, ((2017) 10 SCC 1)

procedure should be transparent and right to information should be strengthened in order to maximize efficiency.<sup>26</sup>

Further, it has been ascertained that this institution of ombudsman has been crippled by the virus of red-tapism. This needs to be eradicated by involving better monitoring bodies.

Moreover, the ambit of both lokpal and Lokayukta has to be expanded to include Judiciary, vice-chancellor of an institution, and Indian armed force.

Nonetheless, mere appointment of ombudsman bodies is not enough, it has to provide redressal to the grievances on the basis of which people are asking for this institution. The slogan "less government and more governance", should be adopted in form and functions.

Further, its a need of an hour to have multiple decentralized bodies. This will ensure that no accumulation of power is there in the hands of one institution or authority.

## **7. CONCLUSION**

Eradicating any social evil is not a one day affair, it requires submissive effort, awareness, stringent laws and a reasonable time frame with strong political, moral and ethical will. Since, the present anti-corruption legislation possess numerous loopholes and functional irregularities and on top of that this lacuna has not even been addressed by amendments. The vision of anti-corrupt nation is far fetched.

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<sup>26</sup> Dr. S haikh Ahmad. "Corruption free India and the Lokpal Bill is its necessary forit: A Critical Analysis", ELK ASIA PACIFIC JOURNAL OF SOCIAL SCIENCE, (30th March 2022), [www.elkjournals.com](http://www.elkjournals.com)

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# **Social Rights of Refugees in European Union Law**

**\*Dr. Constanze Janda**

## **ABSTRACT**

Persons who have been forced to leave their country of origin due of urgent threats to life and limb have a right to protection by their country of residence. This protection necessarily has to include social benefits ensuring an adequate standard of living. This article shows how the social rights of refugees and other forced migrants are regulated in European Union law.

## **1. Introduction**

Ever since the formation of nation states in the 19th century, they are responsible for the social protection of their citizens. Belonging to the nation constitutes a right to solidarity by the other members of the nation: “Who says welfare state, says nation state” (Giddens 1994:136). Yet, this assumption leads to social exclusion of all those who are not part of the “nation” – a concept that is in itself complex and difficult to determine. In mobile societies with transnational work biographies it is almost impossible to clearly assign “insiders” and “outsiders”. The shortcomings of the concept of “welfare state as nation state” are particularly evident in the case of refugees. When seeking protection outside their country of origin, they are likely to be classified as “outsiders”, thus being deprived of protection against the vicissitudes of life. Therefore, social security and social assistance rights cannot be understood as an exclusive matter of national law.

In the European Union (EU), all citizens of the member states enjoy far reaching mobility rights. But also third country nationals may enter the EU, e.g. for reasons of employment. European secondary law provides for their (partial) inclusion in the social security systems of the member state they reside in. Hence, workers are not reduced to being a mere labour force, like an ordinary commodity. The directives on highly skilled workers, seasonal workers, researchers or intra-corporate transferees are complemented by provisions on the social protection of persons who were forced to leave their country of origin and who enter the EU as refugees. Distinguishing between forced and voluntary migration does not only refer to the

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motives for migration, but also to the heterogeneous need for social protection of the two groups. Forced migration is characterised by an emergency situation: Leaving the country of origin is essential to protect life and individual freedom. Voluntary migration, on the other hand, is based on a conscious decision, possibly planned for a long time, e.g. for the purpose of study or training, gainful employment or family reunification. While forced migration is about securing existential needs (also) by means of social law, voluntary migration is oriented towards longer-term integration into the society of the host state and thus requires integration into the social security system for reasons of equal participation.

Asylum and refugee law are largely determined by EU law. Article 78 (2) TFEU<sup>1</sup> empowers the European Council and the European Parliament to adopt regulations.

- on a uniform status for asylum or subsidiary protection for third-country nationals, including the procedures,
- on temporary protection for displaced persons in the event of a massive inflow,
- on the determination of the Member State responsible,
- on reception conditions and
- on partnership and cooperation with third countries to manage the influx of persons seeking protection.

Social rights to be granted during and after the asylum procedure are set out in various directives, depending on the stage of the procedure.

## **2. Reception Conditions Directive 2013/33/EU**

The Reception Conditions Directive 2013/33/EU<sup>2</sup> provides for the minimum conditions to be guaranteed for the reception of persons seeking international protection. Member states are free to adopt more favourable rules, as the directive establishes minimum standards only.

### **2.1.1 Personal Scope of Application**

The Reception Conditions Directive applies to third-country nationals and stateless persons who have lodged an application for international protection in the territory, at the border, in territorial waters or in transit zones of an EU member state. This includes the family members – spouses, minor children or parents of minor children – of these persons if their pledge for asylum comprises the protection of them. An application for international protection is defined as a request by a

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<sup>1</sup> Treaty on the Functioning of the European Union.

<sup>2</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26.6.2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96.

third-country national or stateless person for protection from a member state, who can be understood to seek refugee status or subsidiary protection status. The Reception Conditions Directive applies until the decision on awarding international protection has been taken. Once the refugee or subsidiary protection status has been granted, the person falls within the scope of the Qualification Directive 2011/95/EC<sup>3</sup>; if it has been rejected, the Return Directive 2008/115/EC<sup>4</sup> applies. In the event of a so-called mass influx of displaced persons, specific provisions are made in the Temporary Protection Directive 2001/55/EC<sup>5</sup>.

### **2.1.2 Material Reception Conditions**

Member States of the European Union have to ensure that applicants for international protection may claim material benefits as soon as they have lodged their application. According to the European Court of Justice (ECJ), this obligation always falls on the state where the person is de-facto staying, even if it is not responsible for the asylum procedure.<sup>6</sup>

The benefits have to secure an adequate standard of living. To this end, not only subsistence but also the physical and mental health of asylum seekers must be guaranteed, including the health of persons who are in detention. The directive explicitly refers to a “dignified standard of living”. Merely ensuring survival – food, shelter, clothing – does not meet this standard, rather the socio-cultural minimum has to be guaranteed, which has to allow for participating in the society of the state of residence, e.g. by maintaining social contacts or by participating in cultural activities (Haedrich 2010:231). Even if it falls in the exclusive competence of the EU member states to determine the nature and scope of the material benefits, these minimum standards of human dignity must not be fallen short of.<sup>7</sup> However, benefits may be linked to a means test, so that they have to be made available only to those who do not have sufficient resources. Moreover, it is possible to require applicants to (partially) contribute to the costs of the material reception conditions, for example if they have sufficient income from gainful employment. Benefits can be provided in cash or in kind or in the form of vouchers.

The specific situation of vulnerable persons – (unaccompanied) minors, persons with disabilities, older persons, pregnant women, single parents with minor children, victims of human trafficking, persons with serious physical illnesses or mental disorders, and persons who have suffered torture, rape or other serious forms of psychological, physical

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<sup>3</sup> Cf. Part 4.

<sup>4</sup> Cf. Part 5.

<sup>5</sup> Cf. Part 3.

<sup>6</sup> ECJ, 27.09.2021, C-179/11 (Cimade und Gisti), ECLI:EU:C:2012:594, para 39 f.; ECJ, 27.02.2014, C-79/13 (Saciri), ECLI:EU:C:2014:103, para 33. In short, the state to which an asylum seeker has entered the European Union is responsible for the asylum procedures. If a person lodges an application for asylum outside the competent state, he or she will be transferred to this state.

<sup>7</sup> ECJ, 27.02.2014, C-79/13 (Saciri), ECLI:EU:C:2014:103, para 40.

or sexual violence (European Council 2010:9) – has to be considered regarding both material benefits and accommodation.

As for the amount of benefits, the directive stipulates equal treatment with nationals, but allows for exceptions at the same time. In particular, less favourable treatment may be granted if the material support is (partially) provided in kind, or if the level of benefits for nationals is higher than the standard prescribed by the Reception Conditions Directive. Hence, “adequacy” of protection is the key standard – yet this undefined legal concept leaves a broad margin of discretion to the member states when implementing the directive. Therefore, the European Union’s aim of standardising reception conditions among all member states has not been achieved (Janda 2014:436).

### **2.1.3 Accommodation**

Accommodation has to be provided for the entire duration of the asylum procedures. Member states are free to organise accommodation centres, private houses, flats, hotels or other premises that are suitable for housing applicants and that guarantee an adequate standard of living, which comprises the protection of family life. Asylum seekers must be able to interact and communicate with their relatives, but also with legal advisors, counsellors or NGOs. The access of these persons or organisations to the premises may be restricted for reasons of security only – be it the security of the accommodation as such or of the persons living there. Member States are obliged to consider gender- and age-specific needs as well as the specific situation of vulnerable persons. In particular, they have to take appropriate measures to prevent violent attacks and gender-based violence including sexual harassment in accommodation centres or other premises. This includes an obligation to adequate training for persons working in accommodation centres. Adults with specific needs who are dependent on assistance have to be accommodated together with members of their family members who may care for them. However, this presupposes that these family members are already in the country; the Reception Conditions Directive does not confer a right to family unification to this end (Janda 2021:941). Member States may involve applicants in the management of accommodation centres, either through advisory boards or representative councils. Their participation may extend to both the material and non-material aspects of their housing.

Disregarding these minimum standards is permitted in exceptional cases only. If regular accommodation capacities are exhausted, asylum seekers may be accommodated within the framework of the general social assistance system,<sup>8</sup> though for a limited period of time, which should be as short as possible. Nevertheless, all basic needs of asylum seekers have to be met. This does not only refer to the proverbial “roof over one’s head”. Human dignity, the protection of family life and the

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<sup>8</sup> ECJ, 27.02.2014, C-79/13 (Saciri), ECLI:EU:C:2014:103, para 44.

protection of physical and mental health and the specific needs of vulnerable persons have to be safeguarded at any time (Janda 2014:437). This is also the case if member states provide cash benefits for renting accommodation on the housing market. However, the Reception Conditions Directive does not comprise an individual right of asylum seekers of freely choosing their accommodation according to their personal preferences.<sup>9</sup>

#### **2.1.4 Health Care**

EU member states have to ensure that asylum seekers receive necessary medical care, though their entitlement may be limited to emergency care and “essential treatment” of illnesses and serious mental disorders. Hence, the directive does not establish an obligation to full equal treatment with nationals of the member state concerned. The terms “necessary” or “essential” have to be interpreted in the light of the other provisions of the Reception Conditions Directive. Therefore, health care benefits have to meet an adequate humanitarian standard and guarantee the protection of both physical and mental health. This, however, does not mean that asylum seekers may claim a state of complete health and well-being, since the directive itself provides for basic care only. In contrast, vulnerable persons with specific needs must receive all necessary medical or other assistance. This includes psychotherapy as well as the provision of specific social services (Haedrich 2010:232). Insofar the directive does not leave any discretion to the Member States, hence vulnerable persons are entitled to all necessary health care just like nationals.

#### **2.1.5 Reduction or withdrawal of benefits**

Member States may restrict or withdraw material benefits under certain conditions, for example if an asylum seeker leaves his determined place of residence without authorisation, fails to comply with his obligations to provide information or to attend personal interviews and other appointments during the asylum procedure. If he voluntarily reports to the competent authority, a decision on the renewed granting of the withdrawn benefits has to be taken. In doing so, the competent authority has to consider the applicant's motives for violating his obligations. Furthermore, benefit restrictions may be considered in the case of

- subsequent asylum applications of the same person,
- persons who, without good reason, do not apply for international protection as soon as reasonably practicable after arrival in that Member State,
- persons who have concealed income or assets and have therefore unduly received benefits, or

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<sup>9</sup> ECJ, 27.2.2014, C-79/13 (Saciri), ECLI:EU:C:2014:103, para 46.

- persons who have seriously violated the rules of the accommodation centre or otherwise committed seriously violent behaviour.

The decision to restrict or withdraw benefits has to be taken on a case-by-case basis by an objective and impartial body; reasons must be given. Unless such an individual decision has been taken, the full regular amount of benefits shall continue to be granted. As for particularly vulnerable persons, the Reception Conditions Directive requires a specific proportionality test. In any case, access to medical care and a dignified standard of living have to be safeguarded; this minimum level must not be undercut even in the case of sanctions.<sup>10</sup>

### 3. Temporary Protection Directive 2001/55/EC

The Temporary Protection Directive 2001/55/EG<sup>11</sup> contains specific rules that deviate from the Reception Conditions Directive in the event of a so-called mass influx. It aims at equal distribution of the burdens associated with the reception of a large number of displaced persons among all member states.

A “mass influx” is characterised by the arrival of a large number of displaced persons in the European Union, who come from a specific country or geographical area, irrespective of whether their flight was spontaneous or aided through evacuation programmes. The notion of “displaced persons” refers to third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated. Due to the situation in their country of origin - for example, an armed conflict, endemic violence or serious risks of systematic or widespread human rights violations - they cannot return there safely and permanently for the time being. The persons concerned may also fulfil the conditions of the refugee status according to the Geneva Refugee Convention; however, this is no precondition for being recognised as a displaced person. A decision of the European Council has to determine whether there is a large number of persons seeking protection to meet the criteria of a mass influx. 21 years after the coming into force of the directive, this decision has been taken for the first time in 2022 after the Russian attack on Ukraine.

In the event of a mass influx, the EU member states are obliged to implement a specific procedure for granting temporary protection. Unlike in asylum procedures, only the identity of the person and her former residence in the country of origin are examined. The individual need for protection is not subject of the procedures for it been recognised by the Council decision in a general manner.

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<sup>10</sup> ECJ, 12.11.2019, C-233-18 (Haqbin), ECLI:EU:C:2019:956.

<sup>11</sup> Council Directive 2001/55/EC of 20.7.2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ, 7.8.2001, L 212 p. 12.

The Temporary Protection Directive provides for a range of social rights of displaced persons. For the duration of their protection status, they must be allowed to engage in gainful employment and have access to education, vocational training or internships. During work, they must be included in the social security system of their country of residence under the same conditions as nationals. Furthermore, EU member states have to ensure adequate accommodation in kind or provide cash benefits for housing, and they have to safeguard social assistance to ensure an adequate standard of living as well as sufficient health care. Social assistance benefits may be limited to those who do not have sufficient income or other resources. Health care must include at least emergency care and essential treatment of illnesses. As under the Reception Conditions Directive, member states are obliged to provide necessary medical or other assistance to vulnerable persons with specific needs like unaccompanied minors and victims of torture, rape or other serious forms of psychological, physical or sexual violence.

#### **4. Qualification Directive 2011/95/EU**

As soon as the refugee status is granted, the so-called Qualification Directive 2011/95/EU<sup>12</sup> applies. It does not only determine the refugee status – in line with the criteria laid down in the Geneva Refugee Convention – but also establishes a broad set of rights for persons who qualify for international protection. As for refugees' social rights, the directive sets minimum standards only, hence member states are free to enact more favourable regulations.

##### **4.1.1 Refugee and subsidiary protection status**

A refugee is a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country. The same applies to stateless persons who are outside the country of their previous habitual residence and who cannot or do not wish to return there due to the abovementioned threats. However, the Qualification Directive goes beyond the Geneva Refugee Convention and covers persons with a so-called subsidiary protection status as well. This status is granted to third-country nationals or stateless persons who do not qualify as a refugee, but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country of origin, or country of former habitual residence, would face a real risk of suffering serious harm and who are therefore unable or unwilling to avail themselves of the protection of that country. Such serious harm may consist of the death penalty or its execution, torture

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<sup>12</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13.12.2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9.

or other inhuman or degrading treatment or punishment in the country of origin, or of a serious and individual threat to life or physical integrity as a result of an armed conflict. In contrast to refugee status, the subsidiary protection status does not require individual and targeted persecution based on race, religion, nationality, political opinion or membership of a particular social group, but refers to threats to life and freedom from inhuman forms of punishment or the general danger of becoming a victim of an armed conflict as a civilian.

#### **4.1.2 Social Welfare**

EU member states are obliged to award the necessary social assistance benefits to all persons who they have been granted the refugee or subsidiary protection status. The directive requires equal treatment with nationals of that member state, not least in order to comply with the equal treatment rules under the Geneva Refugee Convention. Exceptions are legitimate for beneficiaries of subsidiary protection only: According to the Qualification Directive, member states may limit social assistance to “core benefits”, which however have to be provided at the same level and under the same eligibility conditions as for their own nationals. The notion of “core benefits” is specified insofar as they shall include “at least minimum income support” as well as assistance in case of sickness or pregnancy and parental assistance, provided that those are granted to the member state’s own nationals under national law. The exception applies to beneficiaries of subsidiary protection only and does not allow for any legal distinction between refugees who have been awarded different residence statuses. The ECJ therefore declared a provision in the Austrian Minimum Income Protection Act to be contrary to EU law, according to which refugees with a temporary residence permit received a basic benefit only, whereas refugees with a permanent residence permission were awarded the same benefits as Austrian nationals.<sup>13</sup> The court held that reducing the level of benefits depending on the duration of the residence permit may lead to a situation in which the specific needs of persons who had only recently arrived in the member states would not be met (Goldbach 2019:18).

#### **4.1.3 Reduction or withdrawal of benefits**

The strict application of the equal treatment principle also touches upon the reduction or withdrawal of social assistance benefits. This issue has been under discussion since the national law of some member states provides for the cutting of benefits if refugees and beneficiaries of subsidiary protection are subject to residence clauses and leave their assigned place of residence. The ECJ had to rule on this question in the *Alo and Osso* case, referring to the situation in Germany. According to the German Residence Act, the competent authorities may impose residence obligations and therefore determine the place of residence in order to equally distribute the financial burden of

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<sup>13</sup> ECJ, 21.11.2018, C-713/17 (Ayubi), ECLI:EU:C:2018:929.

social assistance benefits among all regions. Such obligations do not only affect refugees' freedom of movement under the Qualification Directive 2011/95/EU. Moreover, if the person leaves the assigned place of residence, social assistance benefits will be cut. The ECJ held that this violates the equal treatment principle for no corresponding provisions existed for German nationals (Goldbach 2019:18).<sup>14</sup>

However, residence obligations that serve the purpose of integrating persons with a subsidiary protection status into the society of the country of residence, and of preventing segregation, are still considered compatible with EU law (Schmahl/Jung 2018:7; Thym 2016:248). According to the jurisprudence of the ECJ, beneficiaries of subsidiary protection and other third-country nationals are not in a comparable situation to nationals of the country of residence in this respect, hence the equal treatment clause in respect of social welfare was not touched.<sup>15</sup> This reflects the principle that equal treatment always refers to persons under the same circumstances, while persons under unequal circumstances shall be treated unequally (Pelzer 2019:449). However, distinctions between refugees and beneficiaries of subsidiary protection with regard to their need for integration or their risk of segregation are not legitimate – this risk usually relates, among others, to language skills, literacy or education of a person, but not to their residence status (Pelzer 2019:449). Moreover, the reduction or withdrawal of necessary social assistance benefits, be it in the case of disregarding residence obligations or not, may violate Art. 11 ICCPR (Hathaway 2005:488).

#### **4.1.4 Health Care**

The principle of equal treatment of refugees, persons with subsidiary protection status and nationals extends to adequate health care. The Qualification Directive does not specify the notion of “adequacy” of medical treatment; however, the required level of protection can be determined in referring to other provisions of the Qualification Directive and the Geneva Refugee Convention. Health care benefits therefore have to be designed in a way that safeguards human dignity and protects both physical and mental health. In contrast to the Reception Conditions Directive 2013/33/EU, the Qualification Directive 2011/95/EU does not merely provide for emergency care. Hence, refugees and persons benefitting from subsidiary protections have to be treated equally with nationals.

If indicated, health care must include treatment for mental disorders of vulnerable persons like persons with disabilities, victims of torture, rape or other forms of psychological, physical or sexual violence, and minors who have suffered any form of abuse, exploitation, torture, cruel and degrading treatment.

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<sup>14</sup> ECJ, C-443/14 and C-444/14 (Alo und Osso), ECLI:EU:C:2016:127, para 55 et seq.

<sup>15</sup> ECJ, C-443/14 und C-444/14 (Alo und Osso), ECLI:EU:C:2016:127, para 59.

## **5. Return Directive 2008/115/EC**

The Return Directive 2008/115/EC<sup>16</sup> applies to third-country nationals illegally staying in a member state of the European Union. This is, for example, the case if a person's application for international protection is rejected and national law does not foresee the issuing of a residence permit for other reasons. The directive specifies the procedure for terminating the illegal stay as well as the prerequisites of detention for the purpose of removal. At the same time, it aims at enforcing fundamental human rights of persons obliged to leave the country. To this end, the Return Directive contains a range of rights that are to be ensured until they return to their country of origin. Member States shall ensure that emergency health care and essential treatment of illnesses is taken into account "as far as possible". This means that any health emergencies have to be treated adequately both during the period determined for voluntary return and during periods in which the enforcement of the obligation to return is suspended. Furthermore, the directive stipulates that the specific needs of vulnerable persons are considered at any time. Yet, there are no further rules according to which the EU member states would have to provide access to other social benefits for persons obliged to leave the country.

## **6. Family Reunification Directive 2003/86/EC**

The Family Reunification Directive 2003/86/EC<sup>17</sup> determines the conditions of access to education and employment for family members of third-country nationals lawfully residing in an EU member state (Walter 2021:885). It does not provide for any other social rights beyond these. Moreover, the right to attain education or to engage in gainful employment does not comprise a corresponding right to the granting of training allowances or comparable social benefits (Hailbronner/Thym 2016:C II, art. 9 para 9).

## **7. Outlook and Prospects**

European Union law clearly states that social rights may not be restricted to the nationals of the member states. However, it does not give a uniform answer to the conflict rules of social security law, but rather determines whether and to what extent different groups of persons are entitled to social benefits, following a strikingly differentiated approach. The admission of third-country nationals to the labour markets essentially remains within the exclusive competence of the member states, while the granting of humanitarian residence permits follows common European approach – not least due to the paramount provisions in international law like the Geneva Convention on Refugees. Therefore, one cannot speak of a

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<sup>16</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16.12.2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98.

<sup>17</sup> Council Directive 2003/86/EC of 22.9.2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12.

common European immigration policy (Groenendijk 2014:313; Verschueren 2018:102; Janda 2017:152).

The “legislative patchwork” (Groenendijk 2014) does not only testify to the fragmented approach of European labour migration policy, but also leads to contradictions. While some labour migrants, which have not been dealt with in this article, enjoy far-reaching equal treatment rights, especially in social security law, others have restricted access to the social benefits in their country of employment. Generally speaking, the distinction is made according to the professional qualification of the labour migrant, awarding advanced rights to highly skilled workers and core rights for seasonal workers (Verschueren 2018:108). Although the principle of equal treatment is generally recognised in social law, European Union law allows for unequal treatment in a variety of contexts. Contribution-based benefits usually are awarded irrespective of the nationality and residence status of a third-country national. In contrast, social assistance benefits that shall secure a dignified standard of living and which are financed from general taxes, are closely linked to nationality (Hohnerlein 2016:49; Becker 2017:103). Social rights are granted generously where member states benefit from immigration, which is considered to be the case with highly skilled workers (Janda 2017:162; Verschueren 2018:104). However, member states also benefit from the immigration of low-skilled workers. Nevertheless, they enjoy a much less comprehensive set of rights (Janda 2021:964).

As for refugees and other persons who were forced to leave their country of origin, one can observe a certain degree of stratification in respect of their social rights as well. Persons who have been granted the refugee status enjoy equal treatment with nationals, which is clearly driven by the Geneva Refugee Convention. At the same time, the entitlements of persons with a subsidiary protection status may be limited to core benefits. Persons who enjoy temporary protection in an event of mass influx have access to all necessary benefits to ensure a dignified standard of living; the same is the case for asylum seekers during the asylum procedures. As far as temporary protection is concerned, the distinction from the social status of refugees can be considered as being the price to be paid for the swift granting of their protection status without an individual assessment of the need for protection.

Unequal treatment may be justified by the relative nature of solidarity (Hailbronner/Thym 2016:C III, Art. 11 para 5), but this approach negates the principle of the universality of social rights under international law. Following the logic of European Union law, which focuses on controlling migration and on setting incentives for labour migration, this may seem reasonable. However, it is doubtful whether such utilitarian considerations may constitute a legitimate reason to justify unequal treatment in respect of social rights. The granting of social rights is an essential component of citizenship status (Marshall 1950).<sup>18</sup> This concept, however,

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<sup>18</sup> *Marshall* Citizenship and Social Class, Cambridge 1950.

must not be misunderstood to mean that social rights are to be restricted to nationals (Janda 2021:964). Rather, lawful stay and / or lawful employment should be sufficient categories for access to adequate social benefits. Excluding certain groups of migrants from social rights will impair social cohesion of a society: it does not only prevent third-country nationals from identifying with their country of residence, but may also promote mistrust among nationals, such as the fear of “social tourism” (Hohnerlein 2016:65).

However, despite all the inconsistencies, the importance of European Union law for harmonising third-country nationals' access to social rights should not be underestimated. It obliges EU member states to at least partially open their national social security systems and to set minimum standards (Janda 2017:152), even if this legal matter falls within their exclusive legislative competence.

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# **A Socio-Economic Analysis of Menstrual Hygiene Practices Among Women of Low-Income Class**

**\*Ms Jyoti Jindal**

## **ABSTRACT**

This paper outlays a study of 144 women, done in Ludhiana district of Punjab, wherein information has been obtained through objective as well as open-ended questions. These women belong to lower income families and menstrual hygiene is not a priority for them due to their lack of awareness of the consequences of poor menstrual hygiene and prevalent taboos preventing them from openly discussing their problems.

## **1. Introduction**

A large proportion of women still use old rags and unhygienic cloth during menstruation. None of the women interviewed was aware of any ongoing government scheme for menstruating women, which implies that government needs to strongly advertise these schemes. The pads supplied in such schemes are regular-sized and do not cover the needs of all women, thereby leading to leakages and discouraging them from using pads altogether. Schools only teach the girls about menstruation which perpetuates a culture of hiding it from the male population and fails to teach boys that it being a biological phenomenon needs to be respected and not ridiculed. Female attendants at government pharmacies are therefore necessary to encourage women to buy pads and also, these pharmacies can be used for spreading salubrious information. This paper further gives an economic analysis as to why the government scheme implemented by the government is not efficient enough, and what steps can be taken to address this problem.

Dr. BR Ambedkar said that *“I measure the progress of a community by the degree of progress the women have achieved”*. Menstruation is a biological phenomenon, which every woman goes through monthly and which adversely affects the mental and physical well-being of half of the population of our country. Poor menstrual hygiene results in a plethora of fungal & bacterial infections of the reproductive and the urinary tract. In fact, 70% of the Reproductive Tract Infections (RTI's) in women are caused due to poor menstrual hygiene.<sup>1</sup> Not only this, 1/3rd of the global cases of cervical cancer are in India, the major cause of which is poor menstrual

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<sup>1</sup> The United States Agency for International Development & The Kiawah Trust, *Spot On! Improving Menstrual Management in India* (2018).

hygiene.<sup>2</sup> 10% of Indian girls believe Menstruation to be a disease since it affects their health adversely.<sup>3</sup> Periods are still considered to be 'unclean' in the Indian society, and over the years we have not been able to eradicate this presumption.<sup>4</sup> There are incidents in India wherein girls are stripped naked to check if they are menstruating,<sup>5</sup> to ensure that they do not enter temple or kitchen premises during their menstrual period<sup>6</sup>, places where they are isolated in 'period huts'<sup>7</sup>, they are deemed to be religiously impure and their involvement in daily activities deemed impure<sup>8</sup>, this has resulted in large-scale neglect of their health conditions and there are increasing reports of women resorting to hysterectomy in specific areas.<sup>9</sup> Despite their being scientific evidence with regard to the consequential harm of poor menstrual hygiene, most women in low and lower-middle income countries use old clothes for blood absorption.<sup>10</sup> As per 2012, the estimated number of women using disposable napkins is only 10-11%.<sup>11</sup> It is however disheartening to note that we have made very little progress from there.

Anurag Chauhan, the *pad-man* of India, once said that 'menstruation is not the problem; poor menstrual hygiene is. Poor Menstrual Hygiene is a problem, as big as polio'. However, India successfully eradicated polio by deploying an army of healthcare workers making door-to-door visits and vaccination camps in high risk areas.<sup>12</sup> However, Menstrual practices are yet to meet a hygienic companion to disassociate the potential discomfort and diseases, alongside the existing taboos which accompany menstruation.

<sup>2</sup> K. Kaarthigeyan, *Cervical cancer in India and HPV vaccination*, 33 INDIAN J. MED. PAEDIATR. ONCOL. 7–12 (2012).

<sup>3</sup> Ministry of Education, Bhutan and UNICEF Bhutan, *Menstrual Hygiene Management of adolescent school girls and nuns in Bhutan 2018*, (2018) <https://www.unicef.org/bhutan/media/211/file/Menstrual%20Hygiene%20Management%20Report%202018.pdf>

<sup>4</sup> R. Kaur, K. Kaur, and R. Kaur, *Menstrual Hygiene, Management, and Waste Disposal: Practices and Challenges Faced by Girls/Women of Developing Countries*, J. ENVIRON. PUBLIC HEALTH (2018).

<sup>5</sup> Geeta Pandey, "Period-shaming" Indian college forces students to strip to underwear, BBC NEWS (Feb. 16, 2020) <https://www.bbc.com/news/world-asia-india-51504992>.

<sup>6</sup> India school's "menstruation check" investigated, BBC NEWS (Mar. 31, 2017) <https://www.bbc.com/news/world-asia-india-39452245>.

<sup>7</sup> Barkha Mathur, *Where women are banished to a 'period hut' with no power or loo*, TIMES OF INDIA, (Nov. 27, 2018) <https://timesofindia.indiatimes.com/city/nagpur/where-women-are-banished-to-a-period-hut-with-no-power-or-loo/articleshow/66834713.cms>.

<sup>8</sup> *Menstruating women cooking food will be reborn dogs: Hindu religious leader*, HINDUSTAN TIMES, (Feb. 18, 2020) <https://www.hindustantimes.com/india-news/menstruating-women-cooking-food-will-be-reborn-as-dogs-swami-narayan-sect-member/story-c9M4Ozcl0oilsYFEV4DfzN.html>.

<sup>9</sup> Jyoti Shelar, *A harvest of crushed hopes: Why number of hysterectomies are high in Maharashtra's Beed district*, THE HINDU (Aug. 10, 2019) <https://www.thehindu.com/news/national/other-states/in-beed-a-harvest-of-crushed-hopes/article28969404.ece>.

<sup>10</sup> K. Seymour, *Bangladesh: Tackling Menstrual Hygiene Taboos*, UNICEF, (2008).

<sup>11</sup> A. Sebastian, V. Hoffmann, & S. Adelman, *Menstrual management in low-income countries: needs and trends*, 32 WATERLINES, 135–153 (2013).

<sup>12</sup> Esha Chhabra, *The End of Polio in India*, STANFORD SOCIAL INNOVATION REVIEW (2012) [https://ssir.org/articles/entry/the\\_end\\_of\\_polio\\_in\\_india](https://ssir.org/articles/entry/the_end_of_polio_in_india).

Media, government and people all over the country have tried to ward off these taboos, but every grassroot survey we conduct shows us that there are problems still intact and milestones yet to be achieved. This paper is an attempt to analyse the problem of menstruation in one district of Punjab, reflecting in bits and pieces as to how it affects India as a whole.

## **2. The study: Aims and Methodology**

Research shows lack of awareness about **Jan Aushadhi Centres** (“**JAC’s**”) and generic medicines amongst people due to the paucity in number of doctors prescribing it and lack of advertisement about the same has been conducted<sup>13</sup>.

This study attempts to analyse the knowledge of women about JAC’s along with their awareness about Jan Aushadhi Suvidha Oxo-Biodegradable Sanitary Napkins by asking a set of questions to women and looking at possible solutions to the problems highlighted.

The primary objective of this study is to find answers to the following questions:

- i. The usage of sanitary napkins amongst these women;
- ii. their awareness of ‘Jan Aushadhi Suvidha Oxo-Biodegradable Sanitary Napkins’ (Ministry of Chemicals and Fertilizers, 2019); and
- iii. the prevalent practice of maintaining Menstrual Hygiene and problems faced by women.

Further, an attempt at creating awareness amongst the women was also made by the volunteers.

## **3. Study Area of Sampling**

The study was conducted on 26<sup>th</sup> February 2021 in a park of a colony on pretext of distributing free sanitary napkins (it is hereby noted that women would not have come if they knew what the camp was about and the free substance being distributed was sanitary napkins. The same was felt during the evening hours when women refused to come since the word had already spread about sanitary napkins being distributed) and explaining menstrual hygiene practices to women of lower-income class. The posters for the camp were put up and the information about the same was being spread from 2 weeks’ prior on every social media platform as well as through verbal communication between housewives and housemaids. The camp was conducted all day from morning 10:00 a.m. to evening 8:00 p.m. with 3 attendants present full-time. Verbal consent was obtained and the name, age, residence, present menstrual product being used, menstrual hygiene practices opted by them, problems faced during

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<sup>13</sup> Vijay Thawani, Abin Mani, and Neeraj Upmanyu, *Why the Jan Aushadhi Scheme Has Lost Its Steam in India?*, 8 J. PHARMACOL PHARMACOTHER, 134-136 (2017).

their period, along with their awareness of the existing government scheme was noted.

Personal information revealing identity has been removed from the dataset and is only kept as record with the principal investigator. A total of 144 women visited the camp at different timings throughout the day. The age of the women varied from 13 to 60 years. Most of the women worked as domestic help or were involved in other low-paying jobs. 40% of the women were from *Sunet*<sup>14</sup> and others were from adjoining areas falling under the same pin code. Both objective as well as open-ended questions were asked. In-depth interviews were also conducted to gauge the gravity of the situation.

#### 4. Tools and Techniques of Data Collection

Given the multitude of factors responsible for a varied response amongst different age groups and for facilitating a comprehensive understanding of underlying reasons distinctly, women are classified into six age groups for the purpose of this study. (Table 1)

Group number	Age groups	Number of women studied	Percentage of total data set (approx.)
1.	13-16 years	20	13.8
2.	17- 20 years	21	14.5
3.	21- 30 years	35	24.3
4.	31- 40 years	43	29.8
5.	41-50 years	16	11.1
6.	51-65 years	8	5.5
	<b>Total</b>	<b>144</b>	<b>100</b>

Table 1: Classification of women into different age groups

#### 5. Results

The findings are based on interviews conducted and questions asked. An analysis of the objective questions has been presented in Table-2; and Table-3 contains the salient points particular to each group, followed by some incidents that happened during the study.

Basis	G1 (13-17yrs)	G2 (17-20ys)	G3 (21-30yrs)	G4 (31-40yrs)	G5 (41-50yrs)	G6 (51yrs+)	Overall
Awareness of Consequences of poor Menstrual Hygiene	None	None	None	None	None	None	None
Awareness of govt scheme*	None	None	None	None	None	None	None
Awareness of JACs**	None	None	Few	Few	None	None	Very Few

<sup>14</sup> PINCODE / POST OFFICE LOCATOR TOOL, <https://pincode.net.in/sunet-rajguru-nagar-ludhiana-east-punjab-141012>. (last visited Jul. 16, 2021).

Using cloth	3	5	18	14	6	6	
	15.7%	23.8%	51.4%	32.5%	37.5%	37.5%	33%
Using pad	16	16	17	29	10	N.A.	
	84.2%	76.1%	48.1%	67.4%	62.5%	--	67.66%
<b>Total</b>	<b>19</b>	<b>21</b>	<b>35</b>	<b>41</b>	<b>16</b>		

Table 2: Group-wise summary-analysis of all the objective questions asked

\* The Govt. scheme is the Jan Aushadhi Suvidha Oxy-biodegradable Sanitary Napkin scheme.

\*\* Jan Aushadhi Centres are referred to as JAC's.

While most of them were aware of the pads available in the market, they found them to be 'too costly'. They also stated that the regular-sized pads which were the cheapest in the market, were not useful as they resulted into leakages. Women with heavy flow said that they had bad experience using pads for the first time, and the bigger pads were more expensive.

They all felt embarrassed sharing it with the opposite gender or talking to them about it. Not entering kitchen or temples during menstruation is still prevalent. Most women while suffering from menstrual cramps, do not know how to share it with the male members of the family. Some women, mostly between the age group of 13-20 years, said that they were too shy to purchase pads from male attendants at pharmacies. When 'Jan Aushadhi Centres' were mentioned, they inquired whether a man/woman runs it. Many women could link menstruation to child-birth, while they did not exactly know why they bled every month. Menstrual Hygiene was not a priority for these women as they were not aware of the consequences of poor menstrual hygiene or the resultant diseases, many also did not keep a track of their period and used pads as well as cloth interchangeably. Most of them were not habitual to using pads. None was aware of 'tampons' or 'menstrual cup' as a menstrual product. Most women who wear pads, do not change them for long intervals, often wearing the same pad all day. Among those using cloth, some said that they used 2 pieces of cloth during the day, changing it after half-a-day had passed and throwing off the used cloth; while some also remarked that they used the same cloth for the full duration of their menses, washing it only at night.

Group no.	Salient features
Group 1 (13-16 yrs.)	<ul style="list-style-type: none"> <li>➤ <b>Maximum percentage</b> of women using pads in this age group, primarily because of education and govt schools supplying free sanitary pads.<sup>15</sup> (“Punjab Government”, 2021)</li> <li>➤ Girls were unaware about menstruation before menarche.</li> <li>➤ Two girls received sanitary napkins alongside their salaries from their employer.</li> <li>➤ It was also noted as a general trend that each girl this age greeted us with a sheepish grin owing to the secrecy associated with the subject in question</li> </ul>
Group-2 (17-20 yrs.)	Roughly 10% of the girls stated that they used cloth and pad interchangeably, whatever they had at the moment.
Group-3 (21-30 yrs.)	This group had the <b>least percentage</b> of women using pads and maximum were using cloth. Many used cloth and pads interchangeably.
Group-4 (31-40 yrs.)	Women usually came with their <b>peers</b> . They also tried to copy their answers. The reasons for copying can be ‘embarrassment’ for not using pads and still using cloth; or fear that they might not receive a free sample and therefore, <i>should do as others are doing</i> .
Group-5 (41-50 yrs.)	While some mothers said that their daughters had started using pads, they themselves did not use them. They looked at it as an avoidable expense and using it to be a luxury which could be forfeited.
Group-6 (51-60 yrs.)	<ul style="list-style-type: none"> <li>➤ Smallest sample, therefore, least representation.</li> <li>➤ Most women had reached menopause.</li> </ul>

Table-3: Specific characteristics of each age-group

## 6. Discussion

Periods are colloquially known as “*mahina*”, (meaning ‘month’), because they occur every month. Very few were aware about Jan Aushadhi Centres, also colloquially known as “*Modi Dawai Khana*”, wherein they could purchase medicines at a lower price; however, none was aware of the scheme regarding low-cost sanitary napkins.

It is important to note that since girls are unaware of menstruation before menarche,<sup>16</sup> they often end up hiding their first period from their parents and get stressed thinking of what has happened to them. This was further reiterated by the study conducted.

There was also an incident where a mother-child duo, both of menstruating age, were handed over packets of pads wrapped in newspaper, but were reluctant to hold it, as though they were given something ‘dirty’ to held onto. They kept on passing the pack to each other, for neither of them wanted to hold it. Their main concern was, “*Koi dekh*

<sup>15</sup> Punjab government announces free sanitary pads for girls in high schools and colleges, INDIA TODAY (Jan. 8, 2021) <https://www.indiatoday.in/education-today/news/story/punjab-government-announces-free-sanitary-pads-for-girls-in-high-schools-and-colleges-1757009-2021-01-08>.

<sup>16</sup> A. Dasgupta, M. Sarkar, *Menstrual Hygiene: How Hygienic is the Adolescent Girl?*, 33 INDIAN J. COMMUNITY MED. 77, (2008).

*lega to kya jawab denge?*” (What will we say if somebody sees and asks?) The burden of hiding it, considering it to be unclean and the shame associated with periods is still intact in some parts of India, and this was a clear example.

Three girls from the first age-group belonging to well-off families, said that their mothers had not talked to them about menstruation but it was their peers they had learnt it from. (This data has not been included in the overall sampling) The little knowledge passed onto them by their mothers was to not talk about it publicly and to keep it a secret from boys. It is important to realise that this taboo is being passed on from every mother to daughter to granddaughter to keep it a secret from the opposite gender as it is ‘indecent’ to talk about it.

A woman, after thoroughly looking at the pad, stated that she will not use it since the pad was too small and would only stain her clothes and bedsheet. She said that while the price was affordable, the pads do not serve the intended purpose.

It was peculiar to note that some women straightaway refused to enter the camp, stating that they knew what it was for, and did not want pads for free since they do not use them. Some of them had never used a pad and were unaware of ‘how to use a pad’. When demonstrations were given to explain how simple it was to wear a pad, the women felt highly embarrassed and considered it to be an inappropriate subject to have a camp on. Some women were reluctant to try these pads, as they worked as housemaids every day, and could not afford to have a leakage while they are working in somebody’s house. None of them were aware of the consequences of poor menstrual hygiene. They were also not aware of any governmental scheme of 1 Rs per pad which could be bought from Jan Aushadhi Centres.

A woman from Sunet said, *“I share the area where I reside with 6 more women and none of them uses a sanitary napkin. Pads are very costly and we cannot afford. If you tell everyone about these pads and the consequences of poor menstrual hygiene, they will surely listen to you and follow.”*

A significant number of women admitted to using cloth. One woman said that she used the same cloth for the number of days a single menstrual cycle lasted by washing it once a day, another said that she used the cloth for half the day, and then throws it and uses another one. They also feel that they cannot justify the presence of sanitary pads in their houses as the male members wouldn’t understand and they would feel shy. Even today, when women have cramps and menstrual pain, they hide it from the male members of the family. Suffering from menstrual pain, discomfort and not even being able to talk about it, deteriorates the mental as well as the physical condition of women. The Jan Aushadhi

Centres that were visited in the locality had full supply of these pads was there in the locality, yet the public was unaware.

## **7. Economic Analysis for Efficient Policy**

To increase the efficiency of the policy, it is crucial to increase the difference between the total benefits and the total costs.<sup>17</sup> There are various economic and rational methods of analysing the efficiency of a policy. One of which has been laid down by the Office of Management and Budget, U.S. Government<sup>18</sup>, and the same method has been used to try to understand the reasons behind implementation of the Jan Aushadhi Suvridha Sanitary napkins scheme by the government and pin-point the lacking areas.

### **7.1 Understanding the policy rationale and the lacunas**

The scheme uses a 4-point criterion for demarcating the cost-efficiency of a policy as presented by the U.S. government. These are:

#### **7.1.1 Policy rationale**

The rationale for policy making should consider the possible market failure, and also see as to how it leads to cost-saving investments. In this case, investment in improving the health of women will have a ripple effect on their productivity, thus, boosting the economy by providing a healthier workforce.<sup>19</sup> The objective of this policy was two-fold; firstly, cultivating a healthy menstrual product using habit among women, and secondly, making the pad oxy-biodegradable preventing harm to environment.

#### **7.1.2 Assumptions Used**

The estimated future benefit derived out of the cost depends on the underlying assumptions used for reaching such a conclusion, these may include the number of future beneficiaries, the intensity of service, etc. Further, the strengths and weaknesses of such assumptions should also be analysed.

Identifying the assumptions: Since the price of the sanitary pad was a dominant factor in preventing women from purchasing it, it was assumed that reducing it to Rs. 1 per pad will incentivise them to buy it. However, they can only buy the product if they know of its existence. It was assumed that the lower-income class women will get to know about the scheme through advertisements and

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<sup>17</sup> WILLIAM K. BELLINGER, *THE ECONOMICS OF PUBLIC POLICY*, 151-173 (Routledge 2007).

<sup>18</sup> Office of Management and Budget, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs*, (October 29, 1992) THE WHITE HOUSE (CIRCULARS) <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf>

<sup>19</sup> Yuko Imamura, et. al., *Association of Women's Health Literacy and Work Productivity among Japanese Workers: A Web-based, Nationwide Survey*, 3 JMA, 232-239, (2020).

word of mouth, once they know about it, they will purchase and use them.

The fallacy with the assumptions: The using of cheaper pads by women is contingent on their knowing about it. Television, newspapers or media could not have conveyed the information as it is often the male members of the family who read the newspaper and visit news channels; however, the social taboos often prevent both the genders from talking to each other about it. Therefore, alternative methods should be used so that the information reaches the ears of the targeted audience.

Moreover, the potential harms associated with poor menstrual hygiene, or the benefits that come alongside using a hygienic menstrual product were not conveyed to them, and therefore, even after being informed of the cheap price of the pads, they would not have bought them. This has resulted in none of the women knowing about it, at least in the study sample analysis, and further, no accompanying mechanism for explaining the need for using menstrual products has been undertaken.

There needs to be a further mechanism, which takes place after the commencement of her using these pads as well. This should address her apprehensions and further evaluate the efficiency of the product being supplied. If timely changes to the product and the response of women towards it is not known, it is not possible to know if the scheme is a success or not. Mere distribution of pads is not the way out.

### **7.1.3 Evaluating Alternatives**

While deciding which policy to adopt, alternative means of achieving the objectives by scrutinising the variations which may occur by changing the scale of program, methods of provision or degree of government involvement are also analysed. This may also include upgrading and renovating the existing scheme. In the present case, 'sanitary napkins' were a preferred option as more women prefer sanitary pads in India in comparison to using menstrual cups or tampons and therefore, incentivising their use seemed appropriate. However, it is important to note that sanitary napkins are not entirely safe options if they are not changed within 4-6 hours.<sup>20</sup>

### **7.1.4 Verification**

Ex post facto studies evaluating if the predicted benefits and costs have been attained are extremely useful, therefore, the

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<sup>20</sup> T. Mahajan, 'Imperfect Information in Menstrual Health and the Role of Informed Choice', 26 INDIAN J. GEND. STUD., 59-78 (2019) (hereinafter MAHAJAN).

implementing organisation should devise periodic, results-oriented evaluation of program effectiveness. This will also come in handy when further funding is deviated towards the project or in case of change in amount of funding. However, no such feedback mechanism gathering information with regard to the success of the scheme has been made available in this case.

Mere launching of a policy, without successful implementation and follow-up shall defeat the purpose as then the cost of the policy shall overpower the predicted benefits. Therefore, it is of utmost importance that steps be taken in the right direction to make the policy most efficient.

Conclusively, even if women are made aware of the scheme, as long as they are not educated as to why they need to use the products, they will choose to save their 10 Rupees by not buying 10 pads. To them, the opportunity cost of Rs. 10 can be a packet of biscuits which should not be forfeited for disposal of blood which can be done on cloth rags or newspaper waste which will cost them nothing. This realisation should be there that the best alternative in this choice is not the packet of biscuits, rather a pack of pads as it is her good healthy years of life packed in a pink paper. This realisation can only come when someone interlinks the concept of health and the usage of pads for her, at the same time, interlinking the consequences of poor menstrual hygiene with “free” unhygienic piece of cloth.

### **7.2 Will this policy be beneficial in the long-run or has the potential to fail?**

To analyse if such a policy facilitating subsidised pads would prove to be beneficial in the long run, the study done by Abhijit V. Banerjee & Esther Duflo is taken into account. In their reasoning, applying the principles as were laid down for analysing whether free bed-nets would have made people habitual to using them in malaria-prone areas, three major questions were proposed that could have answered the problem.<sup>21</sup> Similar rationale has been applied for preparing the following questions:

- ⇒ First, if women should pay the full price (or at least a significant part of the price) for a pad, will they prefer to go without it?
- ⇒ Second, if the pads are distributed free of cost or at a subsidized price, will women use them, or will they be wasted?
- ⇒ Third, after getting the pad at subsidized price once, will women become more or less willing to pay for the next one if the subsidies are lessened in the future?

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<sup>21</sup> ABHIJIT V. BANERJEE & ESTHER DUFLO, POOR ECONOMICS, 16-17, (2012).

The study has successfully answered the first question that they deem the pads to be too costly and instead prefer to go without them if they are not provided for free/ subsidised.

The second question is analysed from the perspective of the pads being distributed at Rs. 1 per pad under the current scheme. Here, there is a possibility that women even after being made aware of the scheme do not buy the pads. The reasons for the same are two-pronged:-

- A.** They do not find them useful as they do not understand the consequences of using unhygienic menstrual products.
- B.** They are habitual to using cloth and do not want to change it since pads are generally considered to be uncomfortable and they fear leakage.

Therefore, there is a higher chance that Government's investment into making this initiative a success may fail as the underneath problem as to why women are not using pads stays unaddressed. Therefore, a sincere effort at awareness is required and needs to be given priority for the success of any such scheme. As even though the cost of the product is a major problem, it is not the only problem in hand.

The third question can only be answered if there is a proper mechanism that exists for collecting feedback. Every good policy and even law that has been made needs to change with time. Such changes can only be made if we have enough data to make the correct decision. Therefore, a feedback mechanism to gauge whether the investment put forth in propagating a social cause is yielding the desired result or not has to be checked for.

## **8. The Way Forward**

Studies have shown a direct connection between poor menstrual hygiene and a lower prevalence of reproductive tract infections.<sup>22</sup> Therefore, belonging to the educated strata, it becomes our responsibility to educate others about it. Based on the problems faced by women, the following steps can be taken to ameliorate their situation.

### **8.1 Creating awareness about Jan Aushadhi Suvidha Oxo-biodegradable sanitary napkin scheme**

Since there is sheer lack of awareness amongst the women about the scheme, it calls for a proper mechanism through which such essential awareness can be spread. The Covid-19 pandemic made evident the role that misinformation, or no information can play in exacerbating

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<sup>22</sup> B. Torondel et. al., *Association between unhygienic menstrual management practices and prevalence of lower reproductive tract infections: a hospital-based cross-sectional study in Odisha, India*, 18 BMC INFECT. DIS., 1-12 (2018).

the health conditions of people.<sup>23</sup> The Covid-19 pandemic showed us that the government is capable of parting authentic information to every nook and cranny of this country. Those channels of parting information thus made, should be utilised for spreading information about this scheme. The government's responsibility is not limited to the launching of a welfare-scheme, but extends to ensuring that its benefits are availed by the targeted population. Further, the local media, shopkeepers, doctors, etc. should all be engaged in the process of spreading the word.

Menstrual Hygiene camps ought to be conducted by students from universities all over the country. The state can direct at least the government universities to take up initiative for spreading awareness on menstrual hygiene. Volunteers from National Service Scheme Programme<sup>24</sup> can also be taken to conduct this drive. The Universities and the students which take up such initiative can be given certificates acknowledging their good work which can act as an incentive to take up similar initiatives.

## **8.2 Jan Aushadhi Centres can play an important role**

### **8.2.1 Awareness initiative**

These centres are strategically located and if all these centres put up posters, hold camps and even display the product outside their shops, it will hugely benefit women and spread the word about the scheme. Such posters in and around the shop will attract women, making them aware of such a scheme.

### **8.2.2 Female attendants**

Females often feel embarrassed to buy pads from the male pharmacists. If female attendants are present at Jan Aushadhi Centres, it would encourage more ladies to buy sanitary pads. These female attendants can also educate them regarding Menstrual hygiene practices and the ladies will be able to share their grievances with them. To lower-income women visitors especially, the female attendants can talk about the scheme, whereas any word by the male pharmacist can make the woman uncomfortable.

### **8.2.3 Jan Aushadhi Sugam**

This mobile application called 'Jan Aushadhi Sugam' which helps people locate the nearest Jan Aushadhi store around them can also

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<sup>23</sup> *Lessons from the COVID-19 pandemic for tackling the climate crisis*, UNICEF (Aug. 13, 2020), <https://www.unicef.org/stories/lessons-covid-19-pandemic-tackling-climate-crisis>.

<sup>24</sup> NATIONAL SERVICE SCHEME, <https://nss.gov.in/nss-volunteer>, (last visited Dec. 28, 2021).

be used.<sup>25</sup> Those owning smartphones should be encouraged to guide the underprivileged regarding generic medicines available in these stores along with the sanitary pad scheme. Doctors should be encouraged to educate women visitors about the same.

### 8.3 Review of the already existing schemes

The pads which are provided by the government under the Jan Aushadhi Suvidha Oxy-biodegradable scheme are regular-sized pads. If the regular-sized pads catered to the needs of all women, then companies would not have invested so much capital into making different-sized pads either. A one-size-fits-all solution has led to women not using pads at all due to fear of leakage. Most of the studies show that women find most distressing the fact that the blood has leaked onto their clothes.<sup>26</sup>

If women do not use the regular sized pads for fear of leakage and are still forced to use pieces of cloth, then the scheme cannot be considered a success. Therefore, it is important that review studies be conducted so that problems of the product launched and scheme are known to address grievances.

### 8.4 Making menstrual education gender-neutral

It is rightly said that *“there comes a point where we need to stop just pulling people out of the river, we need to go upstream and find out why they’re falling in.”* It is our education system which needs to teach menstruation and hygiene to not just girls; but to boys as well. Studies have time and again highlighted the importance of menstrual education for adolescent boys.<sup>27</sup> If boys are educated about the same, they can further the cause and become spreaders of menstrual hygiene for the women in their family.<sup>28</sup> A change of attitude for both men and women is the need of the hour.

### 8.5 Alternatives to using sanitary pads

While India has considered sanitary napkins to be a solution to poor menstrual hygiene practices and period poverty, it is important to note that Menstrual cup is considered to be a safe option as well.<sup>29</sup> While sanitary napkins consist of up to 90% plastic and cause problems for

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<sup>25</sup> PRADHAN MANTRI JAN AUSHADHI PARIYOJANA (PMJP), <http://janaushadhi.gov.in/pmjp.aspx> (last visited Sept. 15, 2021).

<sup>26</sup> JEN GUNTER, *THE VAGINA BIBLE* (2019).

<sup>27</sup> M. Gundi & M. A. Subramanyam, *Curious eyes and awkward smiles: Menstruation and adolescent boys in India*, 85 J. ADOLESC., 80-95 (2020).

<sup>28</sup> L. Mason et. al., *‘We do not know’: a qualitative study exploring boys perceptions of menstruation in India*, 14 REPROD. HEALTH, 1-9 (2017).

<sup>29</sup> Van Eijk et. al., *Menstrual cup use, leakage, acceptability, safety, and availability: a systematic review and meta-analysis*, 4 LANCET PUBLIC HEALTH, e376-e393 (2019).

waste management worldwide,<sup>30</sup> menstrual cups can be more environment-friendly and cost-saving. While using hygienic cloth can also act as a safe menstrual product, it is important that the hygiene practices be strictly adhered to. Other menstrual products like tampons, reusable pads, reusable menstrual underwear, etc. are also viable alternatives which people are unaware of. Informed choice for women will always help minimise the damage to environment and ensure their health does not degrade.<sup>31</sup>

## 9. Conclusion

This research highlights the existence of a substantial percentage of women who are still using unhygienic cloth during their periods, the existence of widely prevalent taboos beleaguering menstruation and the unawareness of the government sponsored schemes for low-priced sanitary napkins. This research has assumed that the data provided by women subjects is accurate to the best of their knowledge and has attempted to present the ground-level situation of menstrual hygiene amongst women of lower-income class. It has further presented suggestive measures for the government as well as those which can be undertaken at individual or community level. It is important that this issue gains priority and women understand that menstrual hygiene is their right, and period poverty should not be able to deprive them of this. At the same time, it is proposed that children be taught these practices in their school at an early age and the root cause of the taboos and lack of education in this arena be rectified.

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<sup>30</sup> A. Pachauri, et. al, *Safe and sustainable waste management of self care products*, BR. MED. J, 365 (2019).

<sup>31</sup> MAHAJAN., *supra* note 20.

# **A Critical Study Child Protection and Internet Regulation through Cyber Security**

**\*Ms. Vidhi Chouradia**

## **ABSTRACT**

Child safety laws have emerged as a major problem in light of the exponential growth of technology and the pervasiveness of online socialisation and information exchange. This is an issue that bothers many nations all over the globe, both rich and poor. However, the problem of child safety seems to have received increased focus during the CoVID-19 epidemic. Despite the internet's many positive effects, studies have shown that it has also become the "new medium" via which frequently recognised kinds of child abuse, such as physical, sexual, and emotional abuse, in cyber world are perpetrated. The educational opportunities for kids have suffered as a result. In this article, we look at how the cyber security can be used to regulate internet protection of children. It focuses on the impact of internet-mediated communication on children and addresses the role of cyber laws aimed at protecting them. This article uses legislation proposed by the European Commission and the perspectives of educators and parents to address the problem of child internet misuse. The report uses a pilot study to inquire into the perspectives of educators and parents on the topic of children's Internet usage at school and at home. The article finishes with several suggestions for curbing the spread of online abuse.

**Keywords:** Internet, globalization, technology, child protection, legislation and Cyber Security.

## **1. Introduction**

The Information and Communication Technologies (ICT) have quickly become an indispensable component of our everyday life as a result of their rapid development. One of the most exciting developments in information and communications technology is the Internet, which provides users with a platform from which they may more efficiently and effectively communicate with one another and exchange information. The utilisation of a platform of the Web 2.0 on the Internet has resulted in a significant increase in the number of options for learning, creative expression, and interpersonal communication, as well as the proliferation of social networks. Because of this, a greater number of users, the majority of whom are youngsters and adolescents, have joined the internet. The terms "children" and "adolescents" collectively refer to the category of the society

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that requires a significantly higher level of care. Because of the extensive use of the Internet by children and teenagers, there have been several issues raised regarding the information security of these age groups.<sup>1</sup> It is possible for children to be exposed to content that promotes sexual abuse, aggressiveness, and violence as a result of the availability of websites that are full of dangerous information on the global network. They are subjected to deception on the internet, as well as aggression and unethical behaviour, and they are threatened by technological as well as socio psychological dangers. As a result, people end up being taken advantage of by cybercriminals. Children are "trained" to behave in a way that is not in line with how they were brought up by their families because the Internet drives them away from their loved ones and causes them to behave in a manner that is "dictated" by the virtual world. Children have a natural international perspective on the world around them. This process alters young people's perspectives of the world and gives them the impression of not having a place to call "home." The information that is obtained from the global network has a direct impact on a user's perception, and it also supports a heartwarming, "happy environment," or "habits." Additionally, it stimulates the user's will to participate in other societies and lifestyles. Children are being subjected to what may be described as a "brain wash".<sup>2</sup> The article provides commentary on the various ways that have been taken to solve worldwide challenges linked to the protection of children in the online environment. Investigations are conducted into the workings of National Safer Internet Centers and the rules governing them, as well as the dangers that children face when interacting with the Internet and the potential solutions to such problems.

Today's youth regularly log lengthy sessions at their computers, be it for schoolwork or leisure. The internet has both fantastic benefits and serious dangers. Despite the fact that more and more of their lives are being digitally recorded, which may have long-term repercussions on their privacy and safety, young people have a hard time weighing the benefits and drawbacks of internet and digital system use. Sometimes people don't see the risks or dangers until it's already too late. Consequently, they are vulnerable to cyberbullying. Users can avoid or reduce losses from cyber security threats through a combination of technical remedies and security knowledge and practises. A number of elements contribute to effective security procedures, but one of them is the familiarity with and skill with risk assessment and threat mitigation that individuals possess.

Children's reliance on the internet has increased recently, notably in the wake of the covid-19 outbreak. Most kids have begun spending more

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<sup>1</sup> Sokolov I.A., Kolin K.K. Development of the information society in India and actual problems of information security // Information Society. –2009, No 4-5, pp.98-106.

<sup>2</sup> Allahverdieva S.S. Problems of Children's Security on the Internet, Express-Information, Baku, Information Technology, 2016, 91 p.

time online since the lockdown, school closure, and online learning. As a direct result of the pandemic, internet use in India has surged by 50 percent. As with many things, the Internet may be both a positive and negative influence on kids' development. In this age of instant information, the Internet has become an indispensable tool. In addition to providing information and enjoyment, the Internet also exposes youngsters to material that may be dangerous or improper. Child pornography, cyberbullying, cybersexual harassment, invasion of privacy, cyber grooming, and incitement to criminal behaviour are only some of the online crimes that can result from such exposure. As more and more kids upload videos of their daily antics and other content to social media, stricter rules have become necessary to keep them safe while they're online.

Industry and academics have invested a lot of time and money in studying and developing youth cyber security education programmers in recent years. Although there are several phases of childhood, we have chosen the World Health Organization's, the United Nations Children's Fund's, and the Child Rights International Network's (CRIN) definition of "kid" for the purposes of this research: everyone under the age of 18 is a child. Prior & Renaud, 2020) and online privacy (Kumar et al., 2018, Zhao et al., 2019) are just a few of the areas that research has focused on to identify potential cyber security threats for children. There have also been numerous digital resources created to inform kids about cyber safety.

## **2. Child Psychology and behaviour in Digital Environment**

Research on the risks children face online shows that when utilising the worldwide network, they are more likely to share their impressions with friends and peers than with their parents. It is estimated that more than half of youngsters who face threats do not talk to their peers about it. Similar to the rest of society, Internet use among children varies greatly by age. This variation can be seen in the context of either social networks or digital artefacts. There are three distinct age brackets<sup>3</sup> that experts use to categorise Internet users: those younger than ten, those between the ages of ten and thirteen, and those between fourteen and seventeen. Below is a brief overview of the risks faced by children of varying ages. Protecting kids under 7 on the internet. Games are a big part of life for kids under 7, and they naturally excel at manipulating digital assets in games. Since kids have just recently learned to read and write, they are restricted to visiting websites only when accompanied by an adult. Children's online safety in the ages 7-10. According to the experts, this is because the psychology of kids this age means they just want to do what they want. Young people of this age learn new technologies quickly and are ready to download unethical films, malicious files, and harmful applications, as well as visit sites and chats that their parents have banned. They could come across predators and sexually explicit content while looking for a

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<sup>3</sup> John Mcalaney, Psychological and behavioural examination in cyber security 153-158(Premium reference source),2018.

"buddy" online. The best thing parents can do for their children is to create a "White list".

The "White List" is a curated selection of safe websites that parents may feel good about sending their kids to. As a result, the goal of these platforms is to safeguard youngsters. Protecting youngsters aged 10-13 online. Most kids this age have heard of the Internet and know how to use it to find what they need. Many people are eager to learn, read, and hear about these topics. Students in the 10-13 age range are the most common Internet users for schoolwork. When kids play online games, they develop an unhealthy reliance on their computers [16]. This means that parents are ultimately responsible for setting limits on their children's screen time. It is recommended that any Internet-connected computers in the common area be placed under parental control, and that the corresponding software be written on a computer. Safety of teenagers between the ages of 14 and 17 online. Compared to their parents, kids this age are more likely to use the Internet for social interaction. They are getting harder and harder for parents to manage. Therefore, it's important for parents and children to come to an understanding about how to keep each other safe while using the Internet. Adolescents nowadays are avid users of the internet in all its forms, including web searches, e-mail, IM, music and movie downloads, video games, and more. Teenage boys, especially those in the 14–17 age range, have a wide range of interests. They often choose violent video games and inappropriate media. Girls of the same age enjoy frequent online communication, and they are more likely to share or seek out unsuitable material or content when doing so <sup>4</sup>. It is important for parents to check the reports detailing their children's time spent online. They must demonstrate methods of spam prevention. Parents should instruct their teens to use their real e-mail address while accessing the Internet, to ignore spam, and to set up mail filters. Definitely, parents should be aware of the places their kids are visiting. Internet use by minors should not be strictly prohibited. Instead of outright banning Internet use, parents should take the time to educate their children on the risks and benefits of various online activities, as well as set limits on frequency and duration of use.

### **3. Classification of Offences Children Faces with Internet**

Children's usage of the Internet increases their vulnerability to a variety of physical and digital dangers. You face these risks when you: become a target of criminals; are aware of hazardous information; are Internet-dependent; play harmful games; use phishing technologies; or download malware. encountering criminals as an intended victim. People in an online chat are not actually there; their virtual selves are.

Learning to recognise dangerous content. Cyberbullies and predators use the Internet to spread messages of religious, racial, national, and social hatred as well as sexual exploitation. Included in this category are

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<sup>4</sup> Ibid

guides on how to use and make drugs, how to store and set off different dangerous and explosive chemicals at home, and incitement to acts of terrorism. There are cartoons and short films on the sites that appeal to teens who may otherwise not be interested in terrorist organisations. Additionally, youngsters may be influenced by the appealing promotional videos, non-ethical language and slangs, and immoral practises that are prevalent on the sites. Addiction to using online platforms. Some youngsters spend all day online, either browsing or playing games. Their obsession with technology is harmful to their physical and mental well-being. The pacing system of children who spend too much time in front of screens slows down, leading to the emergence of a wide range of disorders, giving rise to the common perception that these kids have "penguin feet." Having to strain your eyes to see the screen up close is not healthy for your eyes. Because of this, the user's eyesight gradually deteriorates. As their passions grow, though, they can't help but rely on online resources. Individuals who are highly dependent on the Internet for their daily information needs are at risk of being victims and perpetrators of cybercrime. The daily habit of chatting with "acquaintances" and "friends" in the virtual world and the eagerness to participate in interactive games takes children's attention away from such phenomena as time, space, and reality, fosters mistrust of their surroundings, disrupts their daily routines, and reduces their academic performance. They're so reliant on the internet that they'd be miserable without their laptops. Many nations already see Internet use as a health risk. In order to protect their children from the perils of the Internet, parents should encourage them to pursue other interests, such as athletics, art, etc. Reducing children's Internet use requires shaping their information culture and promoting information and behavioural standards.

#### **4. Parents and Educator can help to adopt Right Social Media Behaviour**

Students have a higher propensity to utilise social media platforms as a direct result of the widespread availability of smart phones. Although India's Internet penetration is only 27%, the country has the world's second-largest user base (355 million people) according to the 2017 Mary Meeker Internet trends report. The number of people who use the Internet increases by 40 percent every year. More than 35% of Internet users fall into the 15-24 age range, and 72% of all Internet users are younger than 35, according to the survey.

According to the survey, mobile internet access accounts for almost 80% of all internet use in India. This is far higher than the global average of 50%. It also states that 34% of all mobile usage is devoted to information-gathering activities like searching, social networking, and messaging, while 41% is spent on entertainment. Both on-demand media and cheap data contribute significantly to the latter.

If the statistics are any indication, the advent of social media has had a profound impact on our capacity to interact with one another and form

and sustain connections. Living in a digital environment has some advantages, but it also has certain dangers. The young of today are missing out on developing important interpersonal skills because they spend so much of their spare time communicating with others through electronic media. The dangers of cyberbullying, harassment, and Facebook depression all rise in tandem with the number of hours spent online.

What we mean when we talk about "cyber bullying" is the spreading of malicious rumours or other online attacks with the intent to harm another person.

Both schools and parents have a role to play in preventing their students from becoming victims of cyber bullying and educating them on appropriate online conduct. The impact of parents and schools on students' online conduct. When schools host workshops to help students and their families become more comfortable using social media, they may discover whether or not a student is being bullied online. Many guardians don't know that Facebook membership is restricted to those who are at least 13 years old. It's crucial to remember that there's no way to make kids follow this guideline, but open communication can help guide them toward responsible online behavior.

An open dialogue between parents and children about issues like cyberbullying and Facebook depression is more likely to occur in a warm and supportive family setting.

Teachers are a student's second most important role model after their parents. Teachers should be educated on how to qualitatively map their pupils' behaviour in response to stress. They need to learn how to engage with and monitor pupils on a daily basis. If a teacher sees a significant shift in a student's behaviour, they should bring it up with the class coordinator and counsellor. There must be curricular reform.

Life and societal developments necessitate that traditional curricula be updated to reflect these realities. It is important that computer-based lessons in the classroom reflect the needs of the modern world. Teaching children the value of privacy controls is an essential component of any computer education programme. Encourage them and instruct them on the significance of customising their privacy settings to their individual online habits. It is also crucial to underline the need of encouraging users to read the privacy policies of each social networking site they use.

## **5. The Significance of Parental Supervision and Discipline**

It's crucial to keep tabs on your kid's online activity and intervene if necessary. If you're a parent, you should think about getting software that can monitor your computer's activity online. This has the potential to detect cyberbullying earlier on. It is crucial to keep tabs on the websites your child is accessing, but you shouldn't resort to spying or invading their privacy to do it. It is also important to monitor the child's online activity, including the games they play, the websites they visit, and the people they

interact with. In addition, parents should teach their kids to avoid giving their personal details on untrusted websites. It's crucial that parents keep tabs on the photos their kids post online. Parents should consciously show their children their social media profiles to help them develop good habits. Furthermore, it is necessary to establish norms for mobile device usage. In the early years of a child's life, it is important to discourage them from using their phones late at night, to foster in them a love of reading, and to encourage them to participate in at least one sport.

While the negative effects of social media and Internet use on kids are discussed, it is the role of parents and educators to teach young people that the information available on the Internet can be utilised to increase knowledge and hone their skills provided they approach it with caution.

## **6. European Commission Recommendations**

The new European strategy for a better internet for kids (BIK+) emphasises the need of online safety while simultaneously encouraging digital involvement and empowerment. As the European Digital Principles and the beginning of the next Digital Decade approached, on May 11, 2022, a new strategy for enhanced kid-friendly internet access (BIK+) was established. With this strategy in place, children can enjoy a positive online experience without fear of harm. BIK+ is being modified for use with younger demographics. European Strategy for a Better Internet for Children (BIK), an earlier initiative, has been expanded with this new approach (BIK). Since 2012, there have been substantial developments in both technology and EU legislation, necessitating the drafting of a unified set of rules governing both.

The many perspectives of today's youth are especially valued in BIK+. When designing the approach and later when evaluating its effectiveness, children will play an essential role. Our goal is to make sure that no kid throughout Europe is left behind in the digital era by giving them access to age-appropriate content and tools and creating an environment where they can feel respected, capable, and safe when using the internet.

The European Year of Youth 2022's flagship programme,<sup>5</sup> BIK+, offers programmes based on these three tenets: safe digital experiences to protect children from harmful and illegal content, behaviour, contact, and risks as young consumers and to improve their well-being in the digital realm by providing a safe, age-appropriate, child-friendly online space created with their best interests in mind; digital empowerment to guarantee that all children, including those i.e. The Better Internet for Kids page will continue to be updated with new resources and examples as part of BIK+. To do this, we will cooperate with the EU-funded network of Safer Internet Centres in Member States to educate and empower parents, teachers, and kids online.

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<sup>5</sup> Brussels, A digital decade for children and youth: new European strategy BIK+, European commission, 13<sup>th</sup> September, 2022 11:59, <https://digital-strategy.ec.europa.eu/en/policies/strategy-better-internet-kids>.

The European Union (EU) should adopt a guideline on age-appropriate design, standardise age assurance and verification across Europe, promote the speedy evaluation of unlawful and harmful content, and ensure that the "116 111" number provides support to victims of cyber bullying<sup>6</sup>. Some recent efforts include the following, all with the goal of equipping today's youth with better, more tangible resources for navigating the internet in a way that is both safe and useful. It will be difficult to achieve these goals without the collaboration of the business sector and the member states.

The participation of youth is still highly valued. By extending peer-to-peer activities on national, regional, and local levels, and requiring firms to interact with the young people who use their goods, BIK+ shows that it appreciates the input of children and young people and seeks to actively involve them in decision-making processes.

All of the EU Member States will be able to use the new strategy as a guide for future policymaking. The Commission will keep working to spread awareness of the need for a global plan to safeguard children's digital rights and will collaborate with other international groups to disseminate its findings and guiding principles. In 2021, the Rights of the Child (RoC) digital component of the EU Strategy will be implemented, and it will be known as BIK+.

## **7. Cyber Security and Laws in India**

According to Norton's Cyber Safety Insight Report, both India and the United States experienced some of the highest rates of cybercrime over the past year. Greater than 3.13 million cyber incidents were reported in India in 2019. After the pandemic reports were seen due to online mode in everything this has raised the cyber crimes number more higher.

Indian Laws- Child trafficking, cyberbullying, pornography, and identity theft are the four main types of cybercrime that target children.

- To combat cybercrime, the government now enforces the Information Technology Act of 2000<sup>7</sup> and the Indian Penal Code of 1860. In 2008, the law governing information technology was updated. Multiple provisions of the Information Technology (Amendment) Act, 2008 were revised to address new challenges posed by the proliferation of digital information and the rise of cybercrime.
- The Information Technology Act of 2000<sup>8</sup> Provisions Penalties for knowingly allowing a computer virus to compromise a system or network are outlined in Section 43. Data breach compensation is addressed under Section 43A.

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<sup>6</sup> Ibid

<sup>7</sup> Information Technology Act, 2000

<sup>8</sup> Ibid

- Identity theft is punishable by up to 3 years in prison or a fine of up to Rs. 1 million, according to Section 66C. When someone violates your privacy, you could face up to three years in prison and a fine of up to two million rupees (Rs. 2,000,000).
- Punishment for electronic dissemination of child pornography (Section 67B). These rules don't apply only to kids but to everyone equally.

### **Punishment under the Indian Penal Code, 1860**

- Cyberstalking and cyberbullying of women are both illegal in India and are punished by law under sections 354A and 354D of the country's penal code.<sup>9</sup>Both laws fail to address cybercrime against minors in any detail.

## **8. Laws for Protecting Child Rights in India**

People who are connected with the sexual abuse or mistreatment of a child through the use of a computer are subject to legal action taken by law enforcement agencies in accordance with the provisions of the relevant laws. The Information Technology (IT) Act, 2000 has provisions that are sufficient to control the many forms of cybercrime that are now prevalent. In Section 67B of the Act, strict penalties are outlined for those who distribute, browse, or communicate juvenile sexual entertainment in an electronic format. In addition, the Indian Penal Code's Sections 354A and 354D provide a legal framework for the discipline of online stalking and cyber harassment of females.

An important piece of legislation that covers sexual offences perpetrated against children is the Protection of Children from Sexual Offences (POCSO) Act, which was passed in 2012. This law was enacted in 2012. POCSO makes it a crime to commit cybercrime against children. This includes acts such as child pornography, cyber stalking, cyber bullying, defamation, grooming, hacking, identity theft, online child trafficking, online extortion, sexual harassment, and invasion of privacy.

## **9. Arrangements to ensure that a Child's Online Information is protected under the Personal Data Protection Bill of 2019**

After a protracted period of time, the governing body decided to push back the date of its inaugural In December 2019, the Parliament will debate and vote on the Personal Data Protection Bill, 2019. The purpose of the individual information assurance fee is to protect the individual's personal information and to establish a foundation for an information insurance expert for the equivalent of the individual. The processing of personally identifiable information and sensitive personally identifiable information pertaining to children is outlined in detail in Chapter IV of the Personal Data Protection Bill. The personal data protection bill was initially

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<sup>9</sup> Indian Penal Code, 1860.

scheduled to be discussed in the parliament in December 2019, but it was postponed at that time. Then, in January, the Covid19 pandemic struck the Indian region, and the bill has since been put on hold. It will be brought up for debate once again in front of the "Parliament," after which it will receive official approval and become law.

Multiple protections for children's privacy are included in the measure. The definition of 18 as the age of consent is a key provision. In order to process a child's personal information, a data fiduciary will need parental permission, as outlined in the new legislation. The paper also suggests that a data trustee who deals only with minors should formally register with the relevant data protection authorities. Processing children's data and delivering services to them are regarded qualifying factors for determining a substantial data fiduciary. The bill imposes new duties on data fiduciaries with a disproportionate amount of responsibility. It is against the law for data stewards to conduct surveillance or tracking of children's data or to utilise personal information in a way that could compromise their safety.

It is the intent of this law, which is a draught measure based on the findings of a joint parliamentary committee, to ensure that children's internet privacy is protected in 2019.

## **10. Government Initiation**

On September 20th, 2018, the Ministry of Home Affairs unveiled the National Cyber Crime Reporting Portal ([www.cybercrime.gov.in](http://www.cybercrime.gov.in)) as part of a programme called "Cyber Crime Prevention against Women and Children" (CCPWC), through which members of the public can report instances of child pornography/child sexual abuse material, rape/gang rape images, or sexually explicit content. The public can use this hub's "Report and track" feature or remain anonymous when filing a complaint.

The Ministry of Home Affairs has begun a Twitter campaign to raise awareness about cybercrime under the handle @CyberDost, and they have also published A Handbook for Adolescents/Students on Cyber Safety (downloadable [here](#)).

The government of India has established national cyber security measures for a variety of reasons. Preventing and properly investigating cybercrimes, including those committed against children, is a primary goal of the policy. It establishes a sound legal framework for strengthening enforcement powers. Its ultimate goal is to raise people's consciousness about the importance of cyber security. As an added bonus, the measure safeguards individuals' information, forbids intrusions into their privacy, and compensates them for losses incurred as a result of cybercrimes like data theft etc.,.

## **11. Conclusion**

Less safeguards are in place for children online than in the real world. Parents should first improve their own level of comfort with computers and Internet research. Parents should install "family control systems" and antivirus software on their computers to limit their children's access to inappropriate content online. Cyber security education and efforts to promote a more cautious approach to online activity are needed now more than ever. Topical challenges to be addressed in this field include raising public awareness about cybercrime, establishing support services, and creating safeguards to prevent children from being exposed to inappropriate material. For optimal safety from online dangers, it is necessary to combine efforts from the home, the classroom, and the government. In this regard, the following steps should be taken: - raising public awareness through the media of the psychological harm to children and teenagers posed by dangers on the Internet; - studying and introducing international experience; - establishing cooperation with the organisation Insafe; - creating a website for child safety on the Internet; - training a scientific personnel specialised in the relevant field; - creating social networks intended for child use. There are a number of ways in which parents, schools, and relevant competent authorities may protect children from online risks or help find the best answer to this issue.

Because of the epidemic, children and teenagers all over the world are choosing to remain at home rather than attending conventional educational institutions or enrolling into online learning platforms. Encourage your children to create accounts on social media so that they may continue their education. The present state of penetration of the internet into human existence, particularly the lives of children. Young people in today's society give out their personal information online without giving it any thought. What are the implications or the risks that are not obvious? Children are often under the impression that clearing the data on their electronic devices would protect them from harm, despite the fact that this is not the case.

When information is saved online, it is considerably more difficult to remove than when it is stored on electronic devices, which may be destroyed without leaving a trace. The effects of the digital era will ensure that any information that is shared on the internet may be accessed eternally. " Although human forgetfulness is common, neither the Internet nor the individuals who use it are capable of losing their memories.

A thorough and determined endeavour to remove content off the internet ultimately results in the whole and comprehensive elimination of such content. These prints can still be found in this location. It has been said that in this day and age of digital technology, it is the exception to lose things forever and the rule to save things forever.

The issue of ensuring the safety of one's computer network in today's modern society is one of the utmost significance. The most effective way to

counteract this risk is to make the data easily accessible to the general population. Strengthen the protective laws that are already in place and bring people from all parts of the world together to discuss this matter. In addition to that, it is essential that the children get instruction on the themes of online safety and personal privacy. Through the implementation of a wide range of cyber-awareness programmes, which state governments operate both online and offline. This applies not only to national governments, but also to individual citizens, who have a responsibility to spread awareness about the significance of installing antivirus software and elevating the cyber security settings on their own devices who are enough for being virus free.

# **Taking Principled Criminalisation Seriously in the Legislative Process**

**\*Mr. Mohammed Irshad**

## **ABSTRACT**

The article spells out the importance of principled criminalisation and explores the common legislative practice of unprincipled criminalisation. The article hasn't intended to generalise the existence of unprincipled criminalisation, but rather it is claimed, like any country, the existence cannot be denied in India. The article claims that the Constitution and the existing tests of determining the constitutional validity of statutes don't inhibit the legislature from creating such unprincipled criminal laws. To partially resolve this dilemma, the author proposes scrutiny of criminal legislation before the law gets passed. The scrutiny referred here is used in terms of a pre-study of principled criminalisation of that particular conduct to be criminalised and discussion of the same in parliament and publishing the same in the form of a report. The author claims that such an approach is not a restriction but rather a tool for creating legitimacy for legislative action. The article also enumerates why such scrutiny is important in the context of criminalisation.

## **1. Introduction and Background to the Research**

To maintain a peaceful society, the state condemns and coerces individuals through criminalisation. This power to criminalise is the most stringent and repressive one enjoyed by the state. Criminalisation is a political act, whereby the state designates certain human conduct to be criminal offense with a range of criminal sanctions.<sup>1</sup> When state criminalises an act it gets attached with the wrongfulness, the harm it results in, the culpability of the actor and the gravity of fear it will create.<sup>2</sup> The purpose of criminalisation and criminal law are manifold; it may be to create a deterrent effect, retributive effect, rehabilitate the offender, or to create a community sense of right and wrong.<sup>3</sup>

The concept of overcriminalisation is a result of excessive use of criminalisation by the state. Many scholars argue that there are too many criminal laws in existence, a lot of times, citizens turn out to be criminals

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<sup>1</sup> NINA PERSAK, CRIMINALISING HARMFUL CONDUCT: THE HARM PRINCIPLE, ITS LIMITS AND CONTINENTAL COUNTERPARTS 6,9 (Springer 2007).

<sup>2</sup> Erick Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 11 UTAH L. REV. 205, 207 (1983).

<sup>3</sup> 2 Henry M. Hart, *The Aims of the Criminal Law* 23 Law and Contemporary Problems, 401(1958).

without even knowing the reasons behind it.<sup>4</sup> Scholars like Erick Luna, Douglas Husk and Ashworth call the legislature's attention to address the issue of overcriminalisation. Overcriminalisation is primarily due to disproportionate punishment, untenable offences, over-extended culpability, crimes without jurisdictional authority and excessive or pretextual enforcement of minor violations.<sup>5</sup>

Ashworth calls criminal law a lost cause. He claims that the state criminalises act in a chaotic, unprincipled manner, reflecting a populist tendency of politicians. Criminal law has become a common occurrence, a usual response to social concerns, a primary way to put state policies into practice. It was submitted that the United States and England had become one of the most criminalised societies on earth. To illustrate this point, in England, there is more than a 40% rise in criminalisation, and in the U.S. as well, there is an exponential increase in criminalising various conducts. It has been observed that in 1980 England identified 7208 distinct criminal offences<sup>6</sup>. In 1999 the figure was identified as 8000 discrete criminal offences.<sup>7</sup> The figure rose to 10000 by 2008.<sup>8</sup> Similarly, it has been claimed that more offences get added to the count as the government changes.<sup>9</sup>

If we take the above observation as true, the point of reflection would be, as Ashworth claimed, '*criminalisation has become an everyday occurrence and states use criminalisation as a mechanism to prevent any perversion and implement the government's policies in power*'. But such a conclusion is not devoid of criticism. In England, the claim of overcriminalisation has been countered with projects carried out by various authors. It has been claimed that overcriminalisation is not a modern phenomenon, and it is very difficult to conclude that there has been a rise in criminalisation in recent decades, as there are not many comprehensive studies conducted on it. Neither criminalisation can be referred to as a lost cause, nor a crisis of over-criminalisation exists since there is no significant rise in criminalisation, as claimed by many authors. Instead, there is an issue of overbroad offences and a lack of principled approach.<sup>10</sup>

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<sup>4</sup> Report by justice, *Breaking the Rules: The Problem of Crimes and Contraventions* JUSTICE para 2.1, 2.2 (1980).

<sup>5</sup> Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. Univ. Int. Law Rev. 703 (2005).

<sup>6</sup> Andrew Ashworth, *Is the Criminal Law a Lost Cause*, 116 Law Q. Rev 225 (2000).

<sup>7</sup> Andrew Ashworth and Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime Procedures, and Sanctions*, 2 Crim. Law Philos 21 (2008)

<sup>8</sup> James Chalmers and Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MLR 217, 217(2008). And also see James Chalmers, '*Frenzied law making: overcriminalization by numbers*', 67 Curr. Leg. Probl 48 (2014).

<sup>9</sup>Id.

<sup>10</sup> J Chalmers, F Leverick, and A Shaw, *Is Formal criminalization Really on the Rise? Evidence from the 1950*, 3 Crim. L.R. ) 177 (2014).

If we come to India, it would be fundamentally wrong to accuse the state of overcriminalisation without properly studying its criminalisation trajectory and the criminal justice system. Neither such a study has been identified by the authors, nor such a study has been attempted in this paper. Hence it is not claimed here that there is an issue of overcriminalisation in India, considering the fact that it requires a comprehensive study of various offences and the criminal justice system as a whole. However, it could be identified that certain conduct has been criminalised in an unprincipled manner, wherein the object of criminalisation could have been materialised through other least restrictive ways.

This article is divided into six parts. The first part deals with principled criminalisation and why it is important to have a principled approach to criminalisation. The second part identifies two recently enacted statutes in India and points out why there is a lack of a principled approach to criminalisation in India. The third part deals with the popular myth of the will of the people and why there is a need for a Scrutiny of the legislative actions, even before it criminalises particular conduct. The scrutiny used here refers to a prior study of that specific conduct and justification of the same based on principles and theories of criminalisation. The fourth part of the article ponders upon the definite justifications for principled criminalisation and for the scrutiny of the legislative actions before criminalisation. These justifications are general in nature, not exclusively applicable to the Indian context alone. The penultimate part of the article talks about the Indian Supreme Court's approach toward the criminalisation of conduct with the theories and principles. The article also acknowledges the recent judicial change of approach in Navatoj Singh Johar and Joseph Shine.

## 2. Liberty and Principled Criminalisation

John Locke famously remarked that every man has inalienable natural rights of property, life and liberty; what was lacking in the society was unity, which was cured by the social contract.<sup>11</sup> Liberty is a term capable of changing from period to period, and different jurists have different ideas of liberty. To define liberty with a closed bracket restricts the change happening in society. For this paper, I subscribe to liberty as *'the absence of restraint upon the existence of those social conditions which in modern civilisation are the necessary guarantees of individual happiness'*.<sup>12</sup> Here I took the liberty to choose what I consider to be the best definition for liberty. Every individual has certain life purposes, which are influenced by the surroundings and community. In a free society, the state should enhance the capacity of individuals to live their life as demanded by their

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<sup>11</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT IN THOMAS HOLLIS (ED.), (Online Library of Liberty: London 1764).

<sup>12</sup> krishna Chandra jena and Krusna Chandra jena, Harold Laski And His Concept Of Liberty 21 IJPS 61 (1960).

life's purposes ( liberty). However, we can't forget the fact that we live in a society of coexisting individuals where one's capacity to choose their purpose in life should not affect other's capacity to choose their life purposes, and the state should be neutral, concerning the individual conception of good and purpose of life.<sup>13</sup>

Absolute liberty is when human beings become their own masters and can do whatever they want. <sup>14</sup>But then, it has to be accepted that it is impossible to balance an absolutely free society or it is impossible to give absolute liberty to do everything. This is why thinkers like Hobbes argued that centralised control of individuals is rudimentary to maintain the balance in society, preserve the society and prevent one from destroying another.<sup>15</sup> The two concepts of liberty are pertinent here, namely liberty in the negative and positive sense. Liberty in the negative sense denotes, '*What is the area within which the subject--a person or group of persons--is or should be left to do or be what he is able to do or be, without interference by other persons?*' and liberty in positive sense denotes '*What, or who is the source of control or interference that can determine someone to do, or be, this rather than that.*' <sup>16</sup> The first sense of liberty opens up the questions like what all are those areas which should not be interfered with by a powerful authority, and that should be left alone or what should be the areas where an external authority can interfere? The second sense of liberty answers the question of who can legitimately interfere with or control the liberty of another. In the modern context, it is the state that enjoys this power.

Liberty limiting exercise, particularly from a legitimate, powerful authority, is the most essential and, at the same time, a dangerous power entrusted with the state (in the modern context).<sup>17</sup> As stated before, the state is a community of coexisting individuals. Among these coexisting individuals, different groups possess different concepts of life goals. In a free state, it is wrong to assume or argue that one group will serve a good ideal for the rest<sup>18</sup> (be it minority or majority), and that is why many thinkers argued for a minimalistic interference, protecting individuals' freedom of conscience, association and other fundamental freedom which enhance their purpose of life,<sup>19</sup>. The interference should only be performed through a balance between conflicting life purposes. Hence, the state, while restricting an individual's liberty, should not enter into the private sphere. Such an exercise will surpass the power vested with the state.

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<sup>13</sup> JOHN RAWLS, POLITICAL LIBERALISM.( Columbia University Press: New York, 1993a).

<sup>14</sup> J. S. MILL, 'ON LIBERTY' IN S. COLLINI (ED.), ( Cambridge University Press: Cambridge, 1989).

<sup>15</sup> HOBBS, T.. LEVIATHAN ( Penguin: London ,1985).

<sup>16</sup> ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 118,153 ( Oxford University Press,,: Oxford , 1969).

<sup>17</sup> Id

<sup>18</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, ( Basic Books: New York, 1974).

<sup>19</sup> Mill, *supra* note 14, at 40

Criminalisation is one such liberty-limiting exercise used by one in power to maintain the peace and security of society. Criminalisation is always attached to the stability of the state and it minimises the instability and helps in the peaceful coexistence of the society.<sup>20</sup> The primary expectation from criminal law is stability expectation. If the same is not meeting the expectation, it fails to satisfy the primary aim of criminal law. As stated in the initial part of this paper, criminalisation is the most stringent power enjoyed by the state to condemn and coerce individuals to maintain a peaceful society. Hence it ought to be minimal and, at the same time, a mechanism which maximises the individual's efficacy, freedom and stability.<sup>21</sup> We should note that no other branch of the state in modern society enjoys this power to coerce an individual by punishing the individual through various forms, including imprisonment, capital punishment, forfeiture of property, and solitary confinement.<sup>22</sup>

Individual liberty being the most sacrosanct aspect of one's life, limiting the same should only be a last resort or ultimate ratio.<sup>23</sup> The state in power should mandatorily justify the reasons for criminalising particular conduct. The criminalisation process should be used cautiously and should not be a usual occurrence. Here arises the importance of liberty-limiting principles and theories of criminalisation and hereinafter referred to as '*principled criminalisation*'. The principled criminalisation provides adequate justifiable reasons for criminalising a conduct. It offers legitimate reasons to criminalise an act and thereby impede the illegitimate exercise of such power.

## 2.1 Liberty limiting Principles

### Harm principle

JS Mill's harm principle is the most widely used for justifying criminalisation. In his historic essay "On liberty," he states that the sole purpose of exercising power over any other person or a member of a civilised community is to prevent harm to others. Mill argued disagreement over goodness or badness should not be a criterion for determining the legality of something. What is essential is human freedom, liberty and autonomy.<sup>24</sup>

### Offence principle

Joel Feinberg argued that the harm principle is not the only justification for criminalisation, rather, he also introduced the principle of '*offence to others*'. He propounded the offence principle in his book '*The moral limits of criminal law, offence to others*' (

<sup>20</sup> Hobbes, *supra* note 15

<sup>21</sup> 2 H.L.A HART, PUNISHMENT AND RESPONSIBILITY 182 (Oxford University Press: Oxford, 2008)

<sup>22</sup> Indian Penal Code, 1886, s. 53, No. 45 Act of Imperial Legislative Council, 1860 (India)

<sup>23</sup> Nils Jareborg, *criminalization as Last Resort (Ultima Ratio)* 2 OSJCL 521 (2004).

<sup>24</sup> Mill, *supra* note 14.

vol.2). It asserts that it is always a good reason to criminalise to prevent offence to others. The offence is an unpleasant experience or an affront to people's sensibilities. He says offensive conduct is wrongful to a person when it infringes the right of others or if the conduct substantially offends the mental state of the other person. To further limit the criminalisation, he put forth a mediating and balancing principle, which balances the inconvenience caused with the reasonableness of the conduct.<sup>25</sup>

### **Legal Paternalism**

Many liberals, including Feinberg and Mill, have denied paternalism as a liberty-limiting principle. Legal paternalism justifies the use of force to protect and prevent someone from self-inflicted harm and ultimately to guide them towards their own well-being and good. Here the state acts as a parent and assumes that the state is in a better position to understand the needs of its citizens better than they do. The principle of *Loco Parentis* is the main determining factor here. Feinberg illustrates various forms of paternalism, namely: Hard and soft paternalism, Blamable and Non-blamable paternalism and benevolent and non-benevolent paternalism. After explaining different types of paternalism, he took an anti-paternalistic view.<sup>26</sup>

### **Legal Moralism**

Legal Moralism is defined as the immorality of an act of type. It is grounded on the fact that the morality of the majority community ought to be obeyed, which also reflects the legal framework. The purpose of the law is to enforce morality; thus, if the conduct is immoral, then the state ought to criminalise the same.<sup>27</sup> The famous Hart Devlin debate is the primary resource for understanding the use of morality as justifying reason for criminalisation. Devlin argued that if the conduct is immoral, the same is a good subject matter of criminalisation, irrespective of the fact that whether it causes harm to others or not. Against this, Hart vehemently claimed that social morality is an authoritarian idea and criminalising every immoral conduct will lead to tyrannical criminalisation. Feinberg argued that harm and offence principles are the only principle that offers a sufficient justification for criminalisation to limit the individual's liberty. He argued that not every morality is a subject of criminalisation; instead, it matters only when it violates the right of others.<sup>28</sup>

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<sup>25</sup> 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW OFFENSE TO OTHERS* (Oxford University Press: New York, 1987).

<sup>26</sup> 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW HARM TO SELF* (Oxford University Press: New York, 1988).

<sup>27</sup> PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 17 (Oxford University Press: New York, 1963).

<sup>28</sup> Feinberg, *supra* note 25.

Many other scholarships have been added to the above-mentioned liberty-limiting principles. Many others expound these principles in more detail, either by adding more inputs or pointing out the flaws in the principles. A famous criticism against the harm principle is that what is harm itself is subjective and vague. Mill himself has avoided the question of what all will constitute harm to others. It has been argued that the state extends the harm principle to a great level and even interferes with the private sphere of an individual thereby destroying the very idea which the principle puts forth and wants to safeguard.

## 2.2 Various theories of criminalisation

The vagueness in the concept of harm and other principles of criminal law induced theorists to form a workable criterion for criminalisation<sup>29</sup>. This workable criterion is what we generally refer to as theories of criminalisation. A proper theory of criminalisation should talk about its scope, the aspects while criminalising an act, what to criminalise and how to define offences. But then, such a comprehensive theory of criminalisation is hard to find in the existing literature.<sup>30</sup> Authors like Douglas Husk, R.A Duff and Ashworth have come up with theoretical frameworks for criminalisation, but not comprehensive ones.

Douglas Husk, after recognising a dearth in theories of criminalisation, attempted to form a theory. He defined criminality in terms of punishment by the state and developed his limitation to criminalisation in seven different constraints. He divided them into internal (within criminal law) and external constraints (Political view). The internal constraints are; (1) The conduct criminalised must either be non-trivial harm or non-trivial evil or the risk of both. (2) the conduct must be wrong (*culpability requirement constraint*) (3) the conduct criminalised must warrant punishment (*desert constraint*): it says the punishment can only be justified if it is proportional, and excessive punishment cannot be tolerated. And lastly, (4) The burden of proof falls on those justifying criminalisation (*the burden of proof constraint*). Husk also developed intermediate scrutiny derived from the American constitutional law theory to constrain criminal legislation. The external constraints are i) the state must have a substantial interest in pursuing the objective that the legislation is designed to pursue or *the substantial state interest constraint* i) the law must directly advance that interest or the *direct advancement constraint*, and lastly, the statute must be no more expansive than necessary

<sup>29</sup> 1 A.P SIMESTER AND A. VON HIRSCH, CRIMES HARMS AND WRONGS: ON THE PRINCIPLES OF CRIMINALIZATION, ( Bloomsbury Publishing: London, 2010).

<sup>30</sup> Victor Tadros, *The Architecture of Criminalization*, 28 (1) Crim. Justice Ethics 74 (2009).

to achieve its purpose or the *minimum necessary extent constraint*.<sup>31</sup>

R.A Duff, pointing out the pessimistic view of criminalisation, doubted whether a crisis of overcriminalisation exists or not. He tried to develop a normative theory of criminalisation, which he argued a normative theory should contain principles that criminalisation exercise should be guided and structured. The theory does not attempt to constrain or narrow the criminalisation but makes the same more principled. A normative criminalisation theory ought to have stated what to criminalise and how to define offences, but then Duff aimed at giving a theory where it primarily talks about the role of criminal law in a democratic polity and based on which decides what all conduct can be criminalised. He believes that criminal law deals with wrongs; in other words, the wrongfulness of conduct is the basis for legitimate criminalisation. The theory is based on legal Moralism, wherein he argued that the best way to approach criminalisation is through the modest version of legal Moralism. Accordingly, criminal law is only concerned with public wrongs.<sup>32</sup>

Ashworth and H & L. Zedner created workable criteria for criminalisation and risk prevention. He says before criminalising an act i) it is necessary to satisfy the harm principle and prove that resulting harm or risking that harm amounts to wrong. ii) Unwarranted erosion of individual autonomy should be avoided, and the cost and risk of criminalisation need to be performed. iii) It can only be resorted to if criminalisation is the appropriate and least restrictive response here. Then with respect to preventive offences, Ashworth says the following additional principles have to be satisfied. i) Calculation of risk and normative issues that may arise after the criminalisation; the aspect of the remoteness of harm should be considered. ii) If the prevented harm is remote, more compelling cases must be made by adding more fault elements like dishonesty and recklessness. iii) For future acts, more normative elements, like "assisted or encouraged, need to be satisfied. iv) All the offences have to satisfy the rule of law, fair warning aspect, the certainty of the offence, fair labelling and finally, the concrete or explicit endangerment requirement, which warrants that only the severe risk of harm could be a matter of criminalisation.<sup>33</sup>

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<sup>31</sup> DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (Oxford University Press : New York, 2008).

<sup>32</sup> R A DUFF, THE REAL OF CRIMINAL LAW (Oxford University Press: New York, 2018).

<sup>33</sup> A. Ashworth & L Zedner, *Prevention and Criminalization: Justification and Limits*, 15 New Crim. Law Review 542 (2012)

This part gave a brief idea of principled criminalisation. These are some guidelines to the legislator before criminalising particular conduct. It needs to be noted these principles have persuasive value only. The basic issue here is which principle the legislature ought to follow and how the legislature chooses between different theoretical frameworks. As a matter of fact, let us accede to the fact that it is the pure discretion of the law-making body. There is no clear mandate as to whether a particular theory has to be given priority over the other. For the purpose of this paper, I have arranged below certain principles that the legislature ought to follow before criminalising an act:

- 1) Harm test- it is necessary to satisfy the harm principle and prove that resulting harm or risking that harm amounts to the wrong
- 2) The conduct criminalised must be either non-trivial harm or non-trivial evil or the risk of both.
- 3) The conduct criminalised must warrant punishment, it can only be justified if it is proportional, and excessive punishment cannot be tolerated.
- 4) The burden of proof falls on those justifying criminalisation.
- 5) It can only be resorted if criminalisation is the appropriate and least restrictive response here.
- 6) The state must have a legitimate substantive interest in criminalising that conduct, and the state has to prove how criminalisation helps in achieving that interest.
- 7) Finally, the law must be no more expansive than necessary to achieve its purpose.

### **3. Scrutiny to Various Criminal Legislations**

Having discussed the principled approach to criminalisation, this part endeavours an investigation into two recent criminalisation statutes, which created distinct offences. The aim here is to see whether there is an issue of unprincipled criminalisation in India.

Let us take the recent example of the Muslim Women (Protection of Rights on Marriage) Act 2019. The law was enacted to protect the rights of married Muslim women to prohibit divorce by pronouncing the act called triple talaq (Talaq-ul biddat). Section 4 of the Act made it clear that any Muslim husband who divorces her wife by pronouncing talaq-ul biddat shall be punished with imprisonment for a term which may extend to 3 years and shall also be liable to fine. The offence is also categorised as cognisable, compoundable at the wife's instance and non-bailable.

Talaq-ul Biddat, or in other words, triple talaq, is a practice of instant divorce seen in India, wherein the Muslim husband instantly divorce his wife by saying Talaq Talaq Talaq. It is a fact that such a practice of instant divorce produces irreparable damages to the wife and denies the conjugal rights of women. After noting the archaic practice, the Supreme Court declared it as illegal and void-ab initio. So, after the judgment, any such pronouncement of talaq will not be considered as talaq (or divorce) and the wife is entitled to all the conjugal rights. Thereafter, the parliament enacted a law with an object clause to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands. Now, the question remains, is the criminalisation of pronouncing triple talaq a principled criminalisation? So by applying the third constraint listed above,<sup>34</sup> the act of triple talaq was a wrong practice, which had already been cured by the Supreme Court judgment and the conduct does not warrant punishment. Since Muslim marriage is a civil contract, then how would the state justify the criminalisation of divorce and penalise it with a punishment of a maximum of 3 years, considering the last constraint that the statute shall not be any more expansive than necessary, to achieve its purpose. The act of instant divorce is already illegal after the Supreme Court judgment. Then it remains questionable as to what is the substantial interest and objective of the legislation designed to pursue and how the law advances that interest by criminalising a pure civil act.<sup>35</sup>

Now let us take the recent Law passed by the State of Uttar Pradesh, ***The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021***. The act passed with an object clause, '*for the prohibition of unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage and for the matters connected therewith or incidental thereto*'<sup>36</sup>. Section 3 prohibits conversion from one religion to another *by misrepresentation force, fraud, undue influence, coercion and allurement*". Section 4 of the Act states that the following may lodge a FIR, which shall include any aggrieved persons or his/her parents or brothers or sisters, or any other person who is related to him/her by blood, marriage or adoption. Further, section 5 provides the punishment for contravention of section 3, which shall not be less than one year but may extend to 5 years and shall also be liable to a fine not less than Rs. 15000/-. The section also provides aggravated punishment for conversion of Scheduled Caste, tribe and mass conversions, with respect to the former, the punishment shall not be less than two years and may extend to 10 years and shall also be liable to fine, not less than Rs. 200000/- and for the latter, the punishment shall not be less than three years but which may extend to 10 years and shall also

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<sup>34</sup> The conduct criminalized must warrant punishment, it can only be justified if it is proportional, and excessive punishment cannot be tolerated.

<sup>35</sup> The state must have a legitimate substantive interest in criminalizing that conduct, and the state has to prove how criminalization helps in achieving that interest.

<sup>36</sup> The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 Object Clause, No, 3, Act of Uttar Pradesh state legislature, 2021 (India).

liable for fine, not less than Rs. 50000/-. The offence is cognisable, non-bailable and triable by the Court of Session. The act also made it mandatory to give a declaration at least 60 days in advance to the District Magistrate or Additional District Magistrate, specifically authorised by the D.M., stating that his/her conversion is free and without any force or coercion or undue influence or allurement. The act put the burden of proof on the accused to prove that the conversion was free and with consent.

This act was passed to prevent unlawful conversion. Though there have been politics surrounding it, I'm not endeavouring to discuss the politics behind it since my aim is to see whether conducts criminalised in the statute are principally criminalised. But for a fact we can say that this law is one of the most politicised laws passed in recent times and is based on the conviction that the 'dominant religious majority feels threatened by an active growing religious minority'<sup>37</sup>. First of all, I accede to the fact that unlawful conversion from one religion to another is wrong, but then whether it can be a matter of criminalisation or is it possible to tailor the same to a principled approach and whether the punishment prescribed is proportionate to the gravity of the offense are the pertinent questions remain to be discussed. Currently, 9 out of the 29 states in India have Anti conversion Laws. Most of these laws are similar and hence not separately discussed here, even though there is a slight difference in prescribed punishments. Now, if we apply the constraints listed to this process, the question is, what is the substantive and legitimate interest that the state is designed to pursue through this law? A person's religious conviction (believer or non-believer) is a personal choice, so when a law is designed to prohibit unlawful conversion, it should be the victim who should initiate the case, unless the victim is a minor. The law takes away the personal autonomy of an individual to decide which religion the person wants to follow, and the state does not have any legitimate interest in allowing the parents and other related parties to file an FIR against a person. Such a law is a clear-cut expansion of legislative power. In a deeply religious country like India, where honour killing is a regular occurrence, this law creates significant room for abuse and does not pass the test of principled criminalisation. The third constraint listed says the conduct criminalised must warrant criminal punishment. The choice of religion is an intimately personal decision, weighing the right to choice of religion with the offence created, the offence is trivial in nature, which does not warrant state interference and punishment. If the state decides to interfere, the same should be punished proportionately, considering the gravity of the offence. State interference in asking to file a declaration of change in religion, allowing the related parties to file an FIR and making it a cognisable offense attracting severe punishment up to 10 years with a fine, make the criminalisation expansive and unprincipled.

This section aimed to reflect on the principled criminalisation exercise in India. The section hasn't intended to generalise the existence of

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<sup>37</sup> Manish, *Evaluating, India's new Anti conversion laws* 6(2), CALJ 33,34 (2022).

unprincipled criminalisation in India, but rather as in any other country, it is claimed that certain criminal laws enacted by the parliament or state legislature criminalise conduct without considering the principled criminalisation approach.

#### **4. The myth of the will of People and the need for scrutiny of Criminalisation**

In countries like India and the USA, the legal philosophy largely lies with the Apex Court. Many laws made by the legislatures have been declared to be unconstitutional by the apex courts of these countries. In India, we have the presumption of constitutionality of a law made by the legislature, which means the law made by the parliament will presumed to be constitutionally valid and the burden of proof is on the person who is questioning the law to prove the unconstitutionality of the law.<sup>38</sup> The assumption here is that, the people directly elect the legislators hence the legislatures will create laws based on the temper of the people, so the benefit of the doubt should always be given to the legislature.<sup>39</sup> It is acknowledged that such an assumption is meritorious and valid since it is the will of the people (at least majority) who elected their representative to govern and make laws for them. But against this common conviction, there is an accepted objection that the legislators create laws for their own political benefits and foster their own political and economic interests. Many schools of jurisprudence denied the assumption that lawmakers express the people's will or have value choices in making laws.<sup>40</sup> Law, therefore, is not a neutral framework expressing the collective interest of a society, rather it is an instrument of one who is in power to impose their views and balance their privilege and position. Thus, the law as the reflection of society or the will of the people cannot be accepted in its entirety. This assumption of law is evident from the history of constitutional amendments made in India. The various phases from 1950-2022, clearly depict the politics of constitutional amendments. It is simply comprehended by the fact that the Indian Constitution has been amended more than 100 times and occupies the position of the most amended Constitution in the world. It had been a struggle between the legislature and the Judiciary of India to come up with the basic structure doctrine to preserve the Constitution of the Country.<sup>41</sup> Adding to this, throughout the history of Independent India, protest has been a tool to foster the demand of the public. Protest being an extra-institutional and non-representative tool for political change,<sup>42</sup> has been the most widely used tool in India. The

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<sup>38</sup> Peoples Union for Civil Liberties v. Union of India (2004) 2 SCC 476.

<sup>39</sup> Tarun Jain, Presumption of Constitutionality, Electronic copy available at: <http://ssrn.com/abstract=1087388> (2007). and in ,M/s. B.R. Enterprises v. State of U.P. and others (1999 ) AIR SC 1867.

<sup>40</sup> W. CHAMBLISS & R SEDIMAN, LAW, ORDER, AND POWER( Addison-Wesley Pub.co: Boston 1971).

<sup>41</sup> Dc Chauhan , *Parliamentary Sovereignty Vs. Judicial Supremacy in India* 74 IJPS 99, 102 (2013).

<sup>42</sup> Celeste Beesley, *Euromaidan and the Role of Protest in Democracy* 49 PS Polit Sci Polit 244 (2016).

recent experience of Farm Bills and Citizenship Amendment Act 2019 and their subsequent mass protests can be taken as immediate examples. The point of reflection is that the assumption of the constitutionality of a statute is not devoid of criticism, and the assumption that the legislature knows 'the pulse of the people might not be a reality in many scenarios'.<sup>43</sup>

The Supreme Court plays an important role in keeping a check on Fundamental Right violations. If a law violates Fundamental Rights, it gets struck down by the Supreme Court as unconstitutional. This power of the Supreme Court to review the legislation is the primal reason for calling S.C. *'the watchdog of the Constitution'*.<sup>44</sup> If we look at the history of judicial review in India, we could observe that a number of constitutional amendments and laws have been declared as unconstitutional by the Hon'ble Supreme Court. Hence we have a system where the Supreme Court plays a major role in scrutinising legislation essentially based on constitutional values and thereby creating a check and balance in the powers of the legislature and judiciary.

Now, if we take the criminalisation exercise in India, it remains largely a prerogative of the legislature. There is an obvious logic of extensive scrutiny for criminal legislation due to its innate tendency to curtail an individual's liberty. The claim of overcriminalisation in the U.S. and England is the best example in this context. It exhibits the state's use of criminalisation as a tool to implement its political motives and thereby denigrate the very own people who had elected it.<sup>45</sup> Richard Quinney rightly argued that interest groups use criminal law for their political or other gains.<sup>46</sup> Therefore, unconstitutional criminalisation ought to have been a major concern for the Supreme Court, considering its role and the nature of criminal laws. However, if we observe the trajectory of the Supreme Court, declaring a criminal offence as unconstitutional based on constitutional values, it is visible that these are very rare occurrences. The author identified certain offences which had been declared unconstitutional by the Supreme Court of India.

No	offense	Case	Grounds
1	S 497 IPC- Adultery	Joseph Shine v Union of India (S.C.), (2018 SCC OnLine SC 1676.)	Violation of Art 14, 15 and 21 of the Indian Constitution

<sup>43</sup> David M. Burke, 'The Presumption Of Constitutionality' Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty 18 Harv. J.L. & Pub. Pol'y 73(1994).

<sup>44</sup> Tarunabh Khaitan, *'The Supreme Court as a Constitutional Watchdog'* 721 Seminar 26 (2019).

<sup>45</sup> Charles E. Reason, *Politicizing of Crime* 64(4) The Criminal and the Criminologist 471 (1974).

<sup>46</sup> RICHARD QUINNEY, *THE SOCIAL REALITY OF CRIME* ( Little Brown and Company: Boston 2001)

2	S 377 IPC- Same sex relation	Navtej Singh v UOI (SC) (AIR 2018 SC 4321)	Violative of art 14,15,19 and 21 of the Indian Constitution
3	S 66A I.T. Act- Punishment for sending offensive messages through communication service, etc.	Shreya Singhal v. Union of India (S.C.) AIR 2015 SC 1523;	Violative of article 19(1) (a)
4	S 303 IPC- Mandatory death sentence of person undergoing life imprisonment committed murder	Mithu V. State of Punjab (S.C.) AIR 1983 SC 473	No rationale in the classification and arbitrary distinction.

**IPC- Indian Penal Code 1864 - I.T.- Information Technology Act, 2000 -S- Section-SC- Supreme Court**

This simple study has many implications. We could claim that India does not have many criminal laws that violate citizens' basic rights or the Constitution. Or we could argue that challenges to many criminal laws are pending before the Court of Law, and the process is time-consuming. Or we could say that the country's apex court is lenient towards criminalisation. Hence most of the time, the Court upheld the constitutionality of the offence in question.

I don't intend to incline to a particular view stated above because each view stated above is a matter of separate academic research. Rather our concern here is whether *'the existing legislative system and the Constitution of India ensures principled criminalisation of a particular conduct at the first instance'<sup>47</sup>?*

The question mentioned above has to be presupposed by another question *'Whether there is a need to have scrutiny on the legislature even before enacting a particular law for ensuring a principled criminalisation'*. It is acknowledged that the bare claim of scrutiny on the legislative power before passing the criminalisation legislation will attract a lot of criticism unless explained meticulously. The argument is grounded on the premise that it is advisable and a best practice not to justify criminalising conduct based on majoritarian populism or the ideology of the state but rather based on established criminalisation theories and principles. The reason I'm claiming for a scrutiny on legislature even before criminalising a conduct is the answer to the first question raised here, i.e., whether *the existing legislative system and the Constitution of India ensure principled criminalisation of a particular conduct at the first instance?*

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<sup>47</sup> The term first instance refers to refraining from unprincipled criminalization initially at the beginning of law making process itself.

It is a fact that the power of the legislature is largely unrestricted. It is only after the enactment of law the same can be questioned in a court of law. The claim that the Constitution will act as a restriction to enact an unprincipled criminal law is contestable. Article 21 says the right to life, and personal liberty of an individual can be taken away with the procedure established by law. The procedure established by law means a law that the legislature has lawfully enacted. A lawfully enacted law tests whether the law-making body has the power to make it or in other words whether the subject matter falls within the respective list given under schedule 7 of the Constitution and whether the legislature followed the law-making procedure given under the Constitution, which shall include, the introduction of the bill, passing it in the parliament with prescribed majority etc. A law that satisfies the lawful requirement mentioned above is a valid law under article 21 for depriving an individual's liberty. Then the case of *Maneka Gandhi*, qualified the procedure established by law with right, reasonable, fair and just, not fanciful or arbitrary, as a necessary condition to pass the test of constitutionality<sup>48</sup>. Further, if we see the standard of review in India, we generally follow the classification test. In the classification test, the state has to prove the intelligible differentia in the classification and the law in question should have a rational nexus with the objective sought to be achieved.<sup>49</sup>

The procedure established by law and the reading of various safeguards to the Article 21 is a mere guarantee of fair procedure. The substance of the power that the state may legitimately exercise is not given here. In such a scenario, it is wrong to conclude, the procedural safeguard limits the legislature substantively.<sup>50</sup> My claim is that the legislature can easily create a valid law curtailing the liberty of an Individual, irrespective of the fact that whether the conduct is principally criminalised or not. The exception given under art 21 and the presumption of constitutionality gives enough room for the legislature to create such laws. Further, it also needs to be noted that the standard of review that we follow in India is not sufficient to restrict the legislature from making such unprincipled criminal laws, the state just has to prove legitimate interest to make such laws, and in most cases, the state will be able to do the same. Hence, these tests do not restrict the legislature from enacting an unprincipled criminal law. The point is that constitutionality is a subsequent question that arises after the promulgation of the law, and the experiences depict that the legislature enacts many laws which violate the Constitution and its fundamental values. Constitutional scrutiny is not restricting the legislature from making such laws in the first instance.

The argument I'm raising here is that, legislature before criminalising particular conduct should perform a pre-study to check the possibility of

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<sup>48</sup> *Maneka Gandhi v. Union of India* (1978) AIR SC 597.

<sup>49</sup> *State of West Bengal V. Anwar Ali Sarkar* [1952] SCR. 284.

<sup>50</sup> John Paul Stevens, *The Concept of Liberty* 41(4) Bulletin of the American Academy of Arts and Sciences 11, 31 (1988).

a principled approach and shall explain the principled approach followed in that criminalisation process and further discuss it in the parliament. The same has to be published in the form of a report. This is what I meant by the word scrutiny on the legislature, and I appeal not to mistake the same as a restriction on legislature but rather a tool for creating legitimacy for the action of the law-making body. The claim is that the practice of prior scrutiny not only validates the criminalisation process but also creates legitimacy and wide approval of the legislature's action. The lack of such a study is the fundamental problem found in India's recent criminal law legislation.

## **5. Why Principled Criminalisation**

My aim here is to establish why the legislature, before exercising the law making power to criminalise a particular conduct, should perform scrutiny of a principled approach to the criminalisation of that particular conduct. I haven't approached this question from a purely legal perspective, rather, a mix of philosophical and practical approaches have been adopted here. The following reasons are identified herein:

- The legislative supremacy in criminalising a conduct
- Politicised criminal laws
- Various modalities of substantive criminal law and enforcement

These reasons are created rather than found in the existing literature, to justify scrutiny before criminalising an act.

### **The Legislative Supremacy in criminalising a conduct**

At least in theory and through decisions of the Supreme Court, it has been well accepted that the Constitution is the highest law of the land, and the actions of three organs of the government should be in conformity with the Constitution. Hence from a theoretical perspective, it is easy to conclude that the criminalisation process should conform to the Constitution. Constitutional values such as equality, life and liberty etc.. need to be respected. But then, such constitutional scrutiny before the Law-making process is limited in India, a proper discussion and debate on the constitutionality of a particular law before the presidential assent is largely limited in India.<sup>51</sup> Even if we accept the discussion and debates are happening, the same is not hindering the legislature to make an unprincipled criminal law. The legislature can easily curtail a person's liberty by creating an offense by a valid law. These are the reasons why I have claimed that the constitutions in itself is not limiting the legislature to enact an unprincipled law to criminalise a particular conduct at the first instance. It is already submitted that judicial scrutiny is a subsequent

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<sup>51</sup>Utkarsh Anand, lack of debate in house causing gaps in laws: CJI( Aug 15 2021) <https://www.hindustantimes.com/india-news/lack-of-debate-in-house-causing-gaps-in-laws-cji-101629048981228.html>

stage, and the same is also not restricting the legislature from enacting an unprincipled criminal law.

My claim of legislative supremacy is nothing but the unrestricted power of the legislature to criminalise particular conduct without a proper study of any existing principles and theories of criminalisation. The legislature criminalises acts without justifying it but rather purely to satisfy the populist ideas and impose their political convictions. This power of the legislature to enact such unprincipled criminal laws without any restriction at the first instance (that means restriction before the enactment of law) is what I call legislative supremacy in criminalising conduct. I specifically appeal not to confuse this concept of legislative supremacy with the British experience of legislative supremacy.

### **Politicised Criminal Laws**

The myth of the will of people and law has already been put forth in the first part of the paper. It was argued that law is not a neutral framework expressing the collective interest of a society, rather it is an instrument of one who is in power to impose their views and balance their privilege and position. Thus, the law is the reflection of society, or the will of the people cannot be accepted in its entirety. The same has been related to criminal legislation, where substantive criminal laws are used to enforce the state's political agendas. The state use criminalisation as a tool to implement its political motives. Ashworth claimed the state criminalises acts in a chaotic, unprincipled manner, reflecting a populist tendency of politicians. Criminal law has become a common occurrence, a usual response to social concerns, and a primary way to put state policies into practice. This act of state using criminalisation as a tool to impose state policies is what I refer to as politicised criminal laws. The state uses criminalisation as a mechanism to foist the policies of the state and put state policies into action.

### **Various modalities of criminal law and enforcement**

The term modality mentioned in the heading is borrowed from existing literature <sup>52</sup>. The meaning intended here is the method and procedures by which the criminal law is created, enforced and changed. The expansion of criminal law is not restricted to the creation of an offence, instead, it has various modalities. The same shall include creating offence, intensifying penalisation, creating strict liability offences, reducing procedural safeguards, civil, criminal hybrid criminalisation, increasing the power of enforcement personnel (police) etc. The argument is that when

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<sup>52</sup> L. McNamara, J. Quilter, R. Hogg, et.al, *Theorising criminalization: the value of a modalities approach* 17 (3) International Journal For Crime, Justice and Social Democracy 91, 93 (2018).

an act is being criminalised, it is not merely creating an offence but also expanding many other modalities attached to the criminalisation process.

The triple talaq criminalisation Act created a distinct offence and made it cognisable, wherein the police can arrest without a warrant (increasing the power of enforcement personnel). Similarly, Anti conversion law creates an offence which is cognisable and non-bailable, thereby increasing the chance of getting arrested and not getting bail within the statutory period given under the procedural law. The law also shifts the burden to the accused to prove that the victim was not unlawfully converted. Such an approach is a fundamental deviation from the procedural safeguard we envy, creating another modality. Further, mandatory imposition of a minimum one-year punishment reduces the discretion of the Court to make a reasonable judgment, considering the gravity of the offence, which again created another modality of abuse.

## **6. Supreme Court of India and approach towards Principled Criminalisation**

This part attempts to analyse various Supreme Court decisions to see the apex court's approach to principled criminalisation. A brief analysis of various decisions of the Supreme Court has been attempted here.

In **Ramji Lal Modi V. State of Up** <sup>53</sup>(1957). The Hon'ble Supreme Court of India upheld the constitutionality of section 295A IPC ( **deliberate and malicious intention to outrage the religious feelings** ) as a 'reasonable' restriction upon free speech 'in the interests of public order' by holding that only 'aggravated forms' of insult to religion tend to disrupt public order. Throughout the judgment, there was no discussion on principled criminalisation, and the Supreme Court never approached the offence from a theoretical perspective. Likewise, the recent case of Ashish Khetan v. Union of India, which again questioned the constitutionality of section 295A in 2016, the Court hasn't approached the offence from a principled criminalisation angle.

**Kedarnath Singh V. State of Bihar**<sup>54</sup>, this case upheld the constitutionality of section 124A ( sedition) in the interest of maintaining public order. The same is done after balancing Article 19(1) (a) with Art 19(2) of the Constitution. A small discussion of resulting harm could be seen in the judgment, which explained the two essential ingredients of the offence. But again, the offence was not tested from a theocratical perspective or from a principled criminalisation approach.

**Ranjith D Udeshi V. State of Maharashtra 1965 AIR 881**<sup>55</sup>, Here, the petitioner challenged the constitutional validity of Section 292 IPC ( sale of obscene books and other materials). The Hon'ble Supreme upheld the constitutional validity of the section by applying the Hicklin test and

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<sup>53</sup> Ramji Lal Modi V. State of Up (1957) SCR 860.

<sup>54</sup> Kedarnath Singh V. State of Bihar 1962 SCR Supl. (2) 769.

<sup>55</sup> Ranjith D Udeshi V. State of Maharashtra (1965) SCR (1) 65.

held that the test does not offend Art. 19(1) (a) of the Constitution. The Court held that the knowledge of obscene material is not an essential ingredient for the offence to be established. Here again, the Court didn't test the offence with the existing principles and theories, such a discussion was never attempted.

**Kartar Singh V. State of Punjab 1994 4 SCC 569**, this case upheld the constitutional validity of four Acts, namely: Terrorist Affected Areas (Special Courts) Act (No. 61 of 1984), the Terrorists and Disruptive Activities (Prevention) Act (No. 31 of 1985) and the Terrorists and Disruptive Activities (Prevention) Act, 1987 (No. 28 of 1987) and U.P. Gangsters and Anti-social Activities (Prevention) Act, 1986 (U.P. Act 7 of 1986). The Supreme Court upheld the constitutionality of the Acts after considering the worldwide scenario of terrorism and the need for regulating the same for a better societal life. The Court in fact gave more weight to social context than the fundamental rights in part III of the Constitution. Different types of offences have been created through these statutes. Neither the petitioners nor the Court looked at it from a theoretical approach to criminalisation.

**Navtej Singh Johar vs Union Of India Ministry Of Law and Others:**  
<sup>56</sup>This is one of the important cases where the Supreme court declared Section 377 of IPC unconstitutional. Section 377 criminalises consensual homosexuality or same-gender sexual relationship. The Supreme Court struck down the section on the ground that it discriminates against individuals on the basis of their sexual orientation/gender identity. Which, in turn, is against art 14 and 15 of the Constitution. It was also found that section 377 directly affects an individual's right to life and personal liberty ( Art 21) by destroying the choice and personal autonomy. Finally, it was also found that the section also violates art 19(1), as it stigmatises their identity and violates the right to freedom of expression. If we analyse the judgment, we could see a comprehensive discussion of the harm principle in the last part of the judgment. The Supreme Court, in the judgment, accepted the harm principle as the legitimate liberty limiting principle <sup>57</sup> and held that, '*Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality*'. The Court delved into a small discussion of what crime is and quoted DUFF, Nozick and Grant Lamond's idea of public wrong <sup>58</sup> and further had a discussion of Hart -Delvin debate on enforcing morality and finally concluded that constitutional morality should prevail over popular morality. The Court observed, "it is the constitutional morality, and not mainstream views about sexual morality, that should be the driving factor in determining the validity of Section 377."

<sup>56</sup> Navtej Singh Johar vs Union Of India Ministry Of Law and Others, (2018) AIR SC 4321.

<sup>57</sup>Id.at para 240.

<sup>58</sup> Navatej singh, supra note 57 at para 301.

**Joseph Shine vs Union Of India 2018<sup>59</sup>**, the Supreme Court, in this case, struck down 497 of IPC, which criminalises adultery being violative of Art 14,15 and 21 of the Constitution. The Court found the offence of adultery is manifestly arbitrary, as it treats the husband as the sole aggrieved person. No such right has been granted to the wife and hence violates equality. The offence also treats women as the husband's property, as the section treats only the third party as the offender, not the wife. The Court found the section is also in violation of women's right to privacy as the section allowed adultery with the husband's consent. Finally, the Court also found that criminalising adultery is tantamount to entering the individuals' private realm and not a legitimate reason for criminalising. This judgment also used the harm principle to strike down the offence of adultery. Towards the end of the judgment, the Court had a brief but not comprehensive discussion on J.S Mill's harm principle. The Court pointed out the three elements of criminalisation from Ashworth and Jeremy order commentary titled Principles of Criminal Law, namely (i) harm, (ii) wrongdoing, and (iii) public element. The Court added these three elements to prove while classifying something as criminal. The Court also acknowledged a minimalist approach in the criminalisation of offences.

The analysis above cases reveals that when the constitutional validity of an offence is questioned, in most cases, discussion on principled criminalisation or testing the offence with the existing theories and principles of criminalisation is minimal. It forces me to argue, that this might have been the reason for the legislature not approaching the criminalisation in a principled manner. I'm not arguing that the acts mentioned in the case laws are not a capable subject matter for criminalisation. Instead, it is claimed that the Court ought to have considered these offences from a theocratical perspective as well, irrespective of the fact that, such theories carry a persuasive value only. Navatej Singh Johar and Joseph shine can be considered as a welcoming step in the process of principled criminalisation. It is claimed that approaching criminalisation in a principled way is best suited for a free society. Such an approach increases the validity of both the legislative and judicial acts.

## 7. Conclusion

This paper intended a practical exploration rather than a purely legal approach. It claims the common descriptive notion of popular law is unsatisfactory and requires a more practical approach to solve the ongoing dilemma of unprincipled criminalisation. It claims that there is a huge gap between objective criminalisation and the theoretical approach of the same, which means many criminal laws criminalise conduct in an unprincipled manner, and the legislature does it without significant formal constraint, neither from the Constitution nor from the Court. Hence claimed that to at least partially escape this dilemma of unprincipled criminalisation, there needs to be scrutiny on the legislature, the scrutiny

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<sup>59</sup> Joseph Shine vs Union Of India (2018) SCC OnLine SC 1676.

intended here is not to restrict the legislative power but rather to create more legitimacy in legislative actions. The scrutiny refers to a proper study to check the possibility of a principled approach, explain the principled approach followed in that criminalisation process, discuss the principled approach followed in the parliament and publish the same in the form of a report before passing the law. I further listed three reasons for adopting this approach in the last part: the Legislative Supremacy in criminalising a conduct, Politicised criminal laws and Various modalities of criminal law and enforcement.

# National Emergency Under Indian Constitution

**\*Mr. Viraj Pratap Khatter**

## ABSTRACT

K.C. Wheare has called the constitution of India as quasi federal. It is mainly because of the reason that there are various circumstances when the federal nature is converted into unitary completely. This contention has been supported by even the father of our Indian constitution Dr. B.R. Ambedkar. Emergency provisions are one such type of provisions wherein the federal structure is converted into unitary. Emergency has been defined “as the failure of social system to deliver reasonable conditions of life” as per the Black’s law dictionary. “Part XVIII of the Constitution of India” provides for emergency provisions wherein emergency has been classified into three types i.e. national emergency, state emergency or the presidential rule and the financial emergency. Since, imposing emergency affects the very basis of the Indian Constitution which is federalism; it must be ensured that imposition of such emergency should only be used as a last resort. It should be used only after all the possible methods to make the situation pacific have been exhausted.

Out of the three types of emergencies the National emergency has been issued three times till date while the state emergency has been issued around 125 times in various states. Contrary to this, the financial emergency has never been imposed in India. This paper mainly highlights the first of the three emergencies i.e. National emergency and a thorough perusal has been made of various concerned constitutional provisions while analyzing the procedure, duration, revocation and consequences thereof. In addition to this, reference has also been made to the landmark 44<sup>th</sup> amendment act as well in this context.

**Keywords:** Article 352, National Emergency, Constitution of India, Internal disturbance, Armed Rebellion, War, External aggression

## 1. Introduction

The Indian Constitution being federal in nature provides for the division of power between center and the state. It is because of this division of power, during situations of danger there have been instances when our constitution proved to be a weak constitution. It has been therefore provided in the constitution that at the time of emergency there should be united concerted action by the center or the union

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government. “The constitution of India provides for three types of emergencies”, namely-

- “National emergency -Article 352
- State emergency or presidential rule- Article 356
- Financial emergency- Article 360”

The national emergency is proclaimed by the president of India wherein there is any kind of threat to the security to any territory or to the whole of India because of either of three reasons<sup>1</sup>-

- War
- External aggression
- Armed rebellion

State emergency or Presidential Rule is provided in “article 356 of the constitution of India”. State emergency is proclaimed in the case of “failure of constitutional machinery”. The president has power to either promulgate it on the Governor’s report or he can do it himself also by taking suo motu action. A proposal regarding the same has to be “approved by both the houses of the Parliament” with 2 month. It is the duty of center to make sure that the state is run as per the constitutional provisions as the constitution is sacrosanct in nature. One of the grounds of imposition of the state emergency was also highlighted by the Sarkaria commission report in which it was contended that emergency under article 356 can be proclaimed in cases where there is any type of political crisis. Further it can also be proclaimed in case there is internal subversion. In the case of “S.R. Bommai vs Union of India<sup>2</sup>”, the 9 judges bench held that emergency can be promulgated in case there is non-maintenance of the provisions of secularism in the state. However it is pertaining to note here that the emergency cannot be proclaimed by the government at center in one go. It is a *sine qua non* that the center should firstly issue warning and ask the reason that why should the emergency not be imposed and only if the state does not revert and only after giving them the right to be heard, action of imposing emergency can be taken. This was reiterated in S.R. Bommai case<sup>3</sup>. Albeit, Dr. B.R. Ambedkar called it a dead letter, yet it has been imposed more than 125 times in various states. The “maximum duration” for which Presidential rule can remain in force is three years from the date it was first promulgated.

“Financial emergency is provided under article 360 of the constitution” and is the sole emergency which has never been proclaimed as of now. This emergency can be imposed by the President in cases

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<sup>1</sup> Constitution of India, art. 352(1).

<sup>2</sup> 1994 AIR 1918

<sup>3</sup> supra

where there is threat to the financial stability and credit of India<sup>4</sup>. The power has been provided to the “president of India” to impose the financial emergency and once imposed it remains in effect, unless revoked by a subsequent proclamation<sup>5</sup> i.e. there is no maximum period of imposition provided. During the emergency the salary and allowances of all classes of people can be reduced including those of judges as well<sup>6</sup>.

## 2. National Emergency

As already contended above, there are three grounds of imposition of National emergency. Earlier in place of armed rebellion, internal disturbance was included as the ground of imposition but after the 44th amendment act internal disturbance was substituted by armed rebellion<sup>7</sup>. The main reason behind this was that the prime minister at that time had imposed national emergency on the grounds of internal disturbance just to fulfill her ulterior motives. As per article 352, “the President of India can impose national emergency” if he “satisfied” that there is a “grave threat” to the territory of India or to any of its part on the basis of above grounds. It is pertinent to note here that the actual occurrence of the above mentioned ground is not needed<sup>8</sup> and mere satisfaction of the president on reasonable grounds that there exists an imminent danger due to above mentioned grounds will suffice the purpose<sup>9</sup>. In the “case of *Minerva Mills vs Union of India*”<sup>10</sup>, it was held that the judicial review of the proclamation under article 352 can be done and it can be perused that whether the “satisfaction” as contended in the constitution was on valid ground or not. It shall not be on irrelevant or mala fide basis. Also in the case of *U.N. Rao vs Smt. Indira Gandhi*<sup>11</sup>, the apex court observed that wherever in the constitution “satisfaction of President” is required then it means satisfaction in constitutional sense which is satisfaction of Council of Ministers. In order to issue proclamation, the union cabinet shall send their decision in writing to the president<sup>12</sup> and the proclamation can be made only after this is done. Such proclamation has to be laid before parliament which includes both the houses and if the acceptance by both of them is not given within a period of 1 month then in that case the emergency will cease to exist. Also, there may be a situation where in the Lok sabha is not in session and is dissolved while the proclamation was still in force, and in such situation if the proclamation has been passed by the Council of states already then a period of 30 days is provided to get the proclamation passed from the Lok sabha after it sits for the first time

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<sup>4</sup> Constitution of India, art. 360(1).

<sup>5</sup> Constitution of India, art. 360(2)(a).

<sup>6</sup> Constitution of India, art. 360 (4).

<sup>7</sup> Subs. By the Constitution (Forty-fourth Amendment) Act 1978

<sup>8</sup> Ins. By the Constitution (Forty-fourth Amendment) Act 1978

<sup>9</sup> Constitution of India, art. 360(1) Explanation.

<sup>10</sup> AIR 1980 SC 1789

<sup>11</sup> 1971 AIR 1002

<sup>12</sup> Constitution of India, art. 352(3).

after being reconstituted. Failure in doing so will lead to the emergency being ceased. Both the houses have to pass it with special majority.<sup>13</sup>

Once it has got the approval it remains in force for duration of 6 months unless and until it is revoked<sup>14</sup>. In order to continue the emergency past 6 months period, a fresh re-approval will be required by parliament. There is no maximum duration of imposition of this type of emergency. The emergency can be removed by the president if a proclamation regarding the same is past by Lok sabha<sup>15</sup>. Also when the Lok sabha gives a written notice signed by at least one tenth member of the house regarding their wish to discontinue the emergency to the speaker or the president then in that case a special setting is held within 14 days and the decision is there by made<sup>16</sup>. It is pertinent to not here that such notice is given “to the speaker” when the “Lok sabha is in session” and if it is not then in that case the return notice is given to the President of India. In the case of *Minerva Mills*<sup>17</sup>, the SC observed that “as long as the proclamation of emergency” is not revoked by another proclamation; it would continue to be operative irrespective of change of circumstances.

So far, National Emergency has been imposed three times.

Firstly it was issued on 26 October 1962 on the grounds of external aggression as at that time the Indo China war was going on the prime minister at that time was Pandit Jawaharlal Nehru and S. Radhakrishnan was the president. The emergency was revoked on 10th January 1968.

The emergency was again imposed during the Indo Pak war on the same grounds on 3rd December 1971 with the prime minister being Smt. Indira Gandhi and the president being V.V. Giri.

After this, on 25th June 1975 emergency was imposed for the third time on the grounds of internal disturbance by the president Fakhruddin Ali Ahmed and the prime minister at that time was Smt. Indira Gandhi. Both second and third emergency were together revoked on 21<sup>st</sup> March 1977.

### **3. Effect/Consequences of National Emergency**

The most evident effect or consequence of the national emergency is that the structure of Indian Constitution changes from federal to unitary. The powers of state are vested in the hands of centre till the point, the emergency is revoked. The effect or consequence of National Emergency can be analyzed on the basis of-

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<sup>13</sup> Constitution of India, art. 352(4).

<sup>14</sup> Constitution of India, art. 352(5).

<sup>15</sup> Constitution of India, art. 352(7).

<sup>16</sup> Constitution of India, art. 352(8).

<sup>17</sup> *Minerva Mills vs Union of India*, AIR 1980 SC 1789

**Effect on judicial relation-** in order to ensure that their shall not be any kind of arbitrariness and the people in power should not start acting unreasonably as per their whims and wishes, there is no effect of the imposition of National Emergency on the judicial relations. the power of Supreme court or subordinate courts are not affected by such proclamation.

**Effect on executive relation-** during the proclamation of emergency, the union gets vested with the power of giving directions to any of the states with respect to their executive power<sup>18</sup>.

**Effect on Legislative Relations** <sup>19</sup>- when National Emergency is in force, wide power gets vested in the hands of union and this extends to even making laws on the subjects of state list as well. This means that in simple words the division of legislative power that has been given by virtue of the three lists in the constitution of India<sup>20</sup> no longer exists and even the subjects of state list can be legislated upon by the centre. The parliament can confirm powers or imposed duties upon various officers even in respect of subjects that are not included in the union list. In addition to this, parliament has also been given the power to extend the term of Lok sabha by 1 year at a time by law and by simple majority. However such extension cannot be beyond 6 months once the proclamation has ceased to exist.

**Effect on financial Relations** –the “financial relations between the centre and state” also gets affected during National Emergency and president can alter the financial distribution of power under Article 268-279 as it thinks fit.

**Suspension of Fundamental Rights-** proclamation of National Emergency has major effects on the fundamental rights as well. While it is in operation article 19 gets suspended automatically<sup>21</sup>. In addition to article 19, the “enforcement of all the fundamental rights except article 20 and article 21” is suspended<sup>22</sup>. It is important to note here that only the “enforcement of the fundamental right guaranteed under part III” is suspended during such emergency and not the fundamental right itself. This was reiterated in the case of “M.M. Pathak vs Union of India<sup>23</sup>” and the Supreme Court clarified that the fundamental right cannot be suspended out of its existence during emergency and it is only the enforcement which is suspended. This means that only restriction is on questioning the government during emergency but such question can be raised afterwards once the emergency has ceased to exist.

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<sup>18</sup> Constitution of India, art. 353(a).

<sup>19</sup> Constitution of India, art. 353(b).

<sup>20</sup> Constitution of India, art. 246. & Seventh Schedule.

<sup>21</sup> Constitution of India, art. 358.

<sup>22</sup> Constitution of India, art. 359(1).

<sup>23</sup> 1978 AIR 803

The case of *Makhan Singh vs State of Punjab*<sup>24</sup>, laid down the difference between article 358 and 359 and observe that the farmer is confined to article 19 only have ever the letter extends to all the fundamental rights under the constitution accept article 20 and 21. Also it was observed that the former suspends the right however in the latter case only the remedy is suspended.

#### **4. 44<sup>TH</sup> AMENDMENT ACT AND DEMOCRACY**

The 44<sup>th</sup> amendment act was cock a snook to the original emergency provisions that existed in the constitution of India and which had given by arbitrary powers in the hands of those in power. The 44<sup>th</sup> amendment act brought various changes in the provision regarding National Emergency and it can be said that these changes are nothing less than a significant step towards strengthening the democracy in India. This can be understood from the various changes that were introduced by the 44<sup>th</sup> amendment act in the provisions of National Emergency which includes-

1. Prior to the 44<sup>th</sup> amendment act, National Emergency could be imposed on the grounds of internal disturbance. But this was substituted by armed rebellion. Internal disturbance as a ground proved to be a loophole and was misused in the past.
2. Secondly, the 44<sup>th</sup> amendment act made it mandatory that the decision of the Union cabinet in writing should be provided to the president. This addition made sure that the president was not governed by merely words in oral form which may be given by the prime minister on arbitrary and malafide basis, as it was earlier given.
3. Thirdly, prior to the 44<sup>th</sup> amendment act 2 months were given in order to get the approval "of both the houses of the parliament regarding the proclamation of emergency" but this was reduce to one month by the amendment and also earlier simple majority would work while giving approval but now after this amendment approval by dual majority was an essential. The change in time period from 2 months to 1 month made sure that a long window was not provided to the houses and in case of urgent situation, quick decision to save the nation could be taken. Dual majority represents a more deliberate decision making.
4. Also after the 44<sup>th</sup> amendment act the national emergency can be proclaimed on different grounds as well.
5. Apart from this it is now important that the proclamation shall be reapproved every 6 months in case there is need of extension of the emergency. Earlier there was no such provision and if once

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<sup>24</sup> AIR 1964 SC 381

approval was given by the parliament then it used to go be on their power to re approve or to reconsider their decision.

6. One major change that was brought by the 44<sup>th</sup> amendment act was that prior to the amendment act the power “to suspend all fundamental rights under part III of the constitution” were provided but after this amendment act fundamental rights except article 20 and 21 can be suspended. Thus protection has been provided to the most essential fundamental right of “Right to Life and personal Liberty”.

Considering all the above mentioned, changes that were brought by the “44th amendment act 1978” it can be evidently said that the 44th amendment act 1978 was a milestone in guarantying that the democracy gets strengthened more. These provisions are being followed till date as well.

## **5. Conclusion**

The provisions of emergency were inserted by the constituent assembly while framing the constitution, keeping in mind that there may be situations in the future when they are could be grave threat to the territory of India or to any of its part and so in order to safeguard and two handle the situation that may arise at that time it was deliberately inserted as a part of the constitution. This threat can be in the form of external aggression, armed Rebellion, war, breakdown of constitutional machinery or threat to the financial structure as well. As provided under “Part XVIII of the constitution”, emergency provisions safeguard the nation and ensure that the threats are dealt with in an efficient manner while upholding the sanctity of Constitution of India. And in order to ensure this federal structure of the Constitution is converted into unitary and wide powers gets vested in the hands of union to take decisions on behalf of the state so as to ensure a more unified and rigid position. Considering this change, the Indian Constitution has been rightly called as “federation sui generis” by Professor Alexandrowicz and D.D. Basu.

# Corporate Social Responsibility in India

\* Dr. Manoj Kumar

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## ABSTRACT

The perception of a corporation as an artificial person is age old and is now being replaced by a duality in terms of its nature. Now a concept is emerging which entails that corporations are not only economic-legal entity but also a social entity. Now the corporations are intending or attempting to solve some social problems that were partly or wholly caused by them. The idea of “Corporate Social Responsibility” (CSR) involves much complexity and is an evolving concept in the business world. In modern days the corporations are to justify that they are not only beneficial to the shareholders but also to the whole society.

The principle of CSR is founded on the fundamental notion that “business” and “society” are interrelated and intertwined and their existence depends on each other. The principle of CSR could be understood with reference to the loss that corporations cause in the form of negative social and environmental conditions in furtherance of their economic pursuits. The expectations of society change with the passage of time and growing affluence. This change has evolved an idea that corporations are not only economic entities to use resources for maximizing profits but they also have some social responsibility. Earlier the social responsibility of corporations had a very narrow ambit that was confined to the use of resources in rational manner to maximize the profits while keeping within the legal domain i.e. to follow the competitive policies of the State without resorting to any deception or fraud.

In the light of this background the present paper is an effort to discuss and analyse the conceptual aspects of the corporate social responsibilities and its Indian perspective.

**Keywords:** Corporations, Company, Responsibility, Philanthropy, Business, Social, Profit.

## Corporate Social Responsibility in India

*“I honestly believe that the winning companies of this century will be those who prove with their actions that they can be profitable and increase social value- companies that both do well and do good... increasingly, shareowners, customers, partners and employees are going to vote with their feet- rewarding those companies that fuel social change through business. This is simply the new reality of business- one that we should and must embrace.”*

- Carly Florina, Ex- Chairman and Chief Executive Officer, HP.

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## 1. Introduction

The perception of a corporation as an artificial person as deemed at statutes like the Companies Act, 1956, is age old and is now being replaced by a duality in terms of its nature. Now a concept is emerging which entails that corporations are not only economic-legal entity but also a social entity. Moreover, the booming business are demonstrating that the social responsibility which has been cast upon the shoulders of corporations is merely out of altruistic practices but in the age of globalization and ethical consumerism, it is bringing back good in many folds to the business. Another cause of the growth of this concept is that more and more corporations are intending or attempting to solve some social problems that were partly or wholly caused by them.<sup>1</sup>

The idea of “Corporate Social Responsibility”<sup>2</sup> involves much complexity and is an evolving concept in the business world. However, its origin is not new as in 1961, George Goyder in his book “Responsible Company” had talked about the social responsibility of company.<sup>3</sup> In modern days the corporations are to justify that they are not only beneficial to the shareholders but also to the whole society. It has also been rightly observed by Douglas, J. of the American Supreme Court that “today, it is generally recognized that all corporations possess an element of public interest. A corporation director must think not only of the stockholders but also of the laborers, the suppliers, the purchasers and the ultimate consumers.”<sup>4</sup>

The principle of CSR is founded on the fundamental notion that “business” and “society” are interrelated and intertwined and their existence depends on each other. Corporations have three groups which have interests in their activities. The first group is of shareholders who are investing in the same in order to get a return on their investments to the maximum possible extent. The second group comprises the people involved in running the corporation. The third group consists of the consumers and the general public at large. Now, it is the third group which is streamlined to serve the interest of the first group. The principle of CSR could be understood with reference to the loss that corporations cause in the form of negative social and environmental conditions in furtherance of their economic pursuits. This loss is caused to the third

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<sup>1</sup> “Corporate Social Responsibility is defined as the serious attempt to solve social problems caused wholly or in part by the corporation. The problem concept is operationally defined, and social problems are distinguished from non-social problems. A method of social problem solution, based on the principles of applied behavior analysis, is demonstrated using an industrial accident reduction example.” Cited from H. Gordan Fitch, “Achieving Corporate Social Responsibility”, 1 *The Academy of Management Review* 38 (1976).

<sup>2</sup> Hereinafter referred to as CSR.

<sup>3</sup> George Goider, *Responsible Company* (2<sup>nd</sup> Ed., 1961).

<sup>4</sup> Inaugural speech in the company law seminar in 1961 in Calcutta under the auspices of Association of Company Secretaries and Executives as reproduced by N. M. C. Bhandari in his book “*Encyclopedia of Company Law and Practice*”.

group that is the consumer and general public at large. The corporate social responsibility focuses its attention upon this group.<sup>5</sup>

The expectations of society change with the passage of time and growing affluence. This change has evolved an idea that corporations are not only economic entities to use resources for maximizing profits but they also have some social responsibility. Earlier the prevailing notion was that “the doctrine of social responsibility is fundamentally subversive to the economic principles.” Earlier the social responsibility of corporations had a very narrow ambit that was confined to the use of resources in rational manner to maximize the profits while keeping within the legal domain i.e. to follow the competitive policies of the State without resorting to any deception or fraud. Friedman had classified “non-profit maximizing activities as theft, and as going against the economic principle of efficient resource allocation” and believed that “having managers involved in tasks beyond their expertise goes against the interests of companies’ principles and the shareholders.”<sup>6</sup>

In the light of this background the present paper is an effort to discuss and analyse the conceptual aspects of the corporate social responsibilities and its Indian perspective.

## 2. Definition and Meaning of “Corporate Social Responsibility”

The term “corporate social responsibility” is variously been defined and till now we have not got a single universally accepted definition. Each definition we have fortifies the impact that businesses have on society and the societal expectations from such businesses. However, the basis of CSR lies in philanthropic activities such as donations, charity, relief work, awareness programmes etc. by the corporations. There are several terms which have been associated with the CSR or have been embodied in the concept of CSR such as “triple bottom line”, “corporate citizenship”, “philanthropy”, “strategic philanthropy”, “shared value”, “corporate sustainability” and “business responsibility.” The European Commission earlier defined CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”.<sup>7</sup> It has come up with a new definition of CSR as “the responsibility of enterprises for their impacts on society.”<sup>8</sup> In order to discharge this responsibility the corporations “should have in place a process to integrate social, environmental, ethical, human rights and consumer

<sup>5</sup> Cynthia A. Williams, “Corporate Social Responsibility in an Era of Economic Globalization”, 35 *UCDLR* 705 (2002).

<sup>6</sup> See, “A Friedman doctrine-- The Social Responsibility Of Business Is to Increase Its Profits”, available at: <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> (last visited on Sept 29, 2022).

<sup>7</sup> European Commission, “A renewed EU strategy 2011-14 for Corporate Social Responsibility” available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:en:PDF%20> last visited on Sept. 20, 2022.

<sup>8</sup> *Ibid.*

concerns into their business operations and core strategy in close collaboration with their stakeholders.”<sup>9</sup> The “World Business Council for Sustainable Development” defines CSR as “the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large.”<sup>10</sup> Therefore, CSR is a tool through which corporations strive to maintain “a balance of economic, environmental and social imperatives (Triple-Bottom-Line- Approach) while at the same time addressing the expectations of shareholders and stakeholders.”<sup>11</sup> The Collins Dictionary of Business defines CSR as “a business philosophy which stresses the need for firms to behave as good corporate citizens, not merely obeying the law but conducting their production and marketing activities in a manner which avoids causing environmental pollution or exhausting finite world resources.”<sup>12</sup> Further, CSR is defined as “a self-regulating business model that helps a company be socially accountable to itself, its stakeholders, and the public. By practicing corporate social responsibility, also called corporate citizenship, companies can be conscious of the kind of impact they are having on all aspects of society, including economic, social, and environmental.”<sup>13</sup> As per International Labour Organization “Corporate Social Responsibility is a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors.”<sup>14</sup> As per a Report of “World Bank Institute”, “Corporate Social Responsibilities is commitments of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve quality of life in ways that are both good for business and good for development.”<sup>15</sup> The Organization for Standardization (ISO) defines CSR as “The responsibility of an organization for the impacts of its decisions and activities on society and the environment, resulting in

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<sup>9</sup> *Ibid.*

<sup>10</sup> Bryane Micheal, “Corporate Social Responsibility in International Development: An Overview and Critique” 10(3) *Corporate Social Responsibility and Environmental Management* (2003), p 115-128.

<sup>11</sup> See, “What is CSR”, available at: <https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr#:~:text=CSR%20is%20generally%20understood%20as,expectations%20of%20shareholders%20and%20stakeholders>. (last visited on Sept. 25, 2022).

<sup>12</sup> Collins Dictionary of Business (2006).

<sup>13</sup> See, “Corporate Social Responsibility (CSR) Explained with Examples” available at: <https://www.investopedia.com/terms/c/corp-social-responsibility.asp> (last visited on Sept. 25, 2022).

<sup>14</sup> InFocus Initiative on Corporate Social Responsibility (CSR), Governing Body, 295th Session, Geneva, 2006, available at: [https://www.ilo.org/public/libdoc/ilo/GB/295/GB.295\\_MNE\\_2\\_1\\_engl.pdf](https://www.ilo.org/public/libdoc/ilo/GB/295/GB.295_MNE_2_1_engl.pdf) (last visited on Sept. 20, 2022.)

<sup>15</sup> See, “Public Policy for Corporate Social Responsibility”, available at: <https://web.worldbank.org/archive/website01006/WEB/IMAGES/PUBLICPO.PDF> (last visited on Sept. 20, 2022).

ethical behavior and transparency which contributes to sustainable development, including the health and well-being of society; takes into account the expectations of stakeholders; complies with current laws and is consistent with international standards of behavior; and is integrated throughout the organization and implemented in its relations.”<sup>16</sup>

Commenting upon the social responsibility aspects of corporations Peter Drucker had once quoted that “If you find an executive that wants to take on social responsibilities, fire him first.”<sup>17</sup> This quotation amply depicts us as to how the relationship between corporate business and social responsibility was viewed in the business world earlier. Corporate business world understood the expression “corporate social responsibility” very narrowly and relied on the literal meaning only as “corporations are responsible for solving society’s problems” rather than taking the same in somewhat wider connotation that “corporations cannot do whatever they want with society” or “corporations are responsible for the impact of their actions on society.”

There has existed dilemma in various sectors such as public, private and civil society regarding the true meaning and scope of the expression “corporate social responsibility.” This may be due to the fact that this concept has emerged from philanthropy and therefore it is understood in that sense. However, in modern age the scope of CSR is so wide that “philanthropic activities are held as only a part of CSR, which otherwise constitutes a much larger set of activities entailing strategic business benefits. There has been an apparent transition from giving as an obligation or charity to giving as a strategy or responsibility.”<sup>18</sup>

The words “social” and “responsibility” have mistakenly been read disjunctively and assigned meaning accordingly such as “social” means and relates to social issues viz., health, education, security etc. which fall within the domain of government or something which relates to society in wider context such as the planet, environment, ecology, climate change etc., the domain in which corporate bodies function and similarly, “responsibility” means “accountability for the corporation’s actions”; “a sense of duty towards society”; “good judgment” etc. depending on a person’s perception.<sup>19</sup> In view of this corporate social responsibility is understood to mean that “the corporations have a responsibility towards society”; “the corporation has a responsibility to do something about the problems that affect society”; “the corporations must take responsibility for their own activities as they affect society”. These meanings have

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<sup>16</sup> See, Definitions of CSR, available at: <https://youmatter.world/en/definition/csr-definition/> (last visited on Sept. 25, 2022).

<sup>17</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 35 (1<sup>st</sup> ed. 2005).

<sup>18</sup> “Corporate Social Responsibility: Towards a Sustainable Future”, A White Paper by KPMG & Associated Chambers of Commerce and Industry of India (ASSOCHAM), available at: [http://www.in.kpmg.com/pdf/csr\\_whitepaper.pdf](http://www.in.kpmg.com/pdf/csr_whitepaper.pdf) (last visited on Sept. 22, 2022).

<sup>19</sup> The Golden Rule depicts it as “Do unto others as you would like done unto you.”

different repercussions. These meanings however must be analyzed in view of the object for which corporations exist and if it is done many of such meanings of CSR may be discarded as they are the citizen's responsibilities and that of governments. Most of the private sectors do not subscribe to these meanings and discard the entire concept of CSR. However, corporations as legal entities may be held liable for the impacts they cause through their activities to society and environment and thereby may be required to perform some activities for the benefit of affected persons.

An important question here at this juncture is regarding meaning and scope of the term "impact" for fastening liability on corporations. What is responsible behavior and what is not depends on context, culture, social perceptions etc. and may vary from time to time. There was a time when it was never thought that food corporations could be held liable for causing obesity to their customers as obesity depends on the genetics of persons or the same is an individual's concern. However, now a days in developed countries responsibility is being fastened to food corporations for the same and they are being obligated to produce healthy food and bring awareness among the consumers. It is a very reasonable expectation that a pharmaceutical company should produce drugs for curing diseases but the corporations cannot be put under responsibility to produce cheap drugs. It may be desirable that the corporations produce drugs which are easily affordable and if they do so it may enhance their reputation amongst consumers but it is not the responsibility of corporations.

In view of absence of a universally acceptable definition clarifying the nature and extent of responsibilities of corporations, stakeholders may perceive it differently and may assert that the corporation should act in a particular way but the corporation may not consider the same within the arena of its responsibility. However, overlooking the desire of stakeholders may cost the corporation heavily.<sup>20</sup> Amidst all these unclarity regarding the scope of CSR, the corporations take up some actions which sometimes are within their scope of responsibilities and sometimes just to satisfy their stakeholders and for maintaining public relations. The impacts of the activities of corporations, positive as well as negative, are felt for a considerable period and therefore they are encompassed within the concept of CSR.

In developing States, providing for some basic facilities is beneficial for citizens and also may be in the long-run interest of the corporation. For example, ensuring safe and hygienic water supply and providing for better primary education may lessen the migration of workers or may attract better pool of skilled and healthy workers. These amenities are available to the people in developed countries and therefore the same may not be considered to be the responsibilities of the corporations.

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<sup>20</sup> For example, "producing cheap drugs for the poor" or "enhancing the quality of life in the community."

However, it has been observed by an early critic of CSR that “It may well be in the long-run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government. That may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects.”<sup>21</sup> Though, there is no unanimity as to what constitutes CSR but it can certainly be said to be “a practice which is generally used to describe business’s efforts to achieve sustainable outcomes by committing to good business practices and standards.”

### 3. Purpose of the Corporation

Corporations are perhaps the most influential entities in society and contribute in multifarious ways to the growth and development of society. Society has granted them unique privileges in order to make them capable to serve its needs. However, the prevailing notion of corporation is that “the sole purpose of corporations is maximizing profits for shareholders.” Milton Friedman has once famously quoted that “The business of business is to maximize profits, to earn a good return on capital invested and to be a good corporate citizen obeying the law – no more and no less.”<sup>22</sup> He also opined that “company managers who spend money on social causes are basically spending somebody else’s cash for their own purposes.”<sup>23</sup> The critics of CSR quote it to justify their opposition against those activities which have no direct bearing on profit maximization as they assert that the only responsibility of corporations is to augment profits for the benefit of owners and shareholders.<sup>24</sup> Also, in *Dodge v. Ford Motor Co.*,<sup>25</sup> the Michigan Supreme Court declared that “a business corporation is organized and carried on primarily for the profit of the stockholders.”

In recent past we find out a make shift occurred in the approach to the purpose of the corporation. In 2019, in a Business Roundtable of the Biggest Corporations of America where 181 CEOs participated “a twenty-two year old policy statement that defined a corporation’s principal purpose as maximizing shareholder return” was discarded and a new “Statement of Purpose of a Corporation” was adopted which stated that “companies should serve not only their shareholders, but also deliver value to their customers, invest in employees, deal fairly with suppliers

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<sup>21</sup> See, “A Friedman doctrine-- The Social Responsibility Of Business Is to Increase Its Profits”, available at: <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> (last visited on Sept 29, 2022).

<sup>22</sup> *Ibid.*

<sup>23</sup> See, “What Is The Purpose Of The Corporation?”, available at: <https://www.forbes.com/sites/londonschoolofeconomics/2022/06/20/what-is-the-purpose-of-the-corporation/?sh=a7cfd8a59a35> (last visited on Sept. 28, 2022).

<sup>24</sup> See, “The Ethics of Business, A Survey of Corporate Social Responsibility”, *The Economist*, 20, 22 (Jan. 22, 2005). It is stated that “The proper business of business is business. No apology required.”

<sup>25</sup> 170 N.W. 668 (Mich. 1919).

and support the communities in which they operate.”<sup>26</sup> According to the Future of the Corporation Project of the British Academy, “the purpose of the corporation is to provide profitable solutions to problems of people and planet, while not causing harm.”<sup>27</sup> The project has examined the role of business in society and concluded that businesses should be “producing profitable solutions from the problems of people and planet, and not profiting from creating problems.”<sup>28</sup> This shift in approach has provided a fertile ground for the growth and development of the concept of CSR.

#### 4. Legal Theories of the Corporations and Profit Maximization

Two legal theories have been evolved with respect to corporations—contracts theory and entity theory. The contracts theory considers “corporations primarily as a set of property or contractual relations.” The entity theory considers “corporations as a concession from society with its attendant rights but also obligations.” As per contracts theory, “the corporation is a collection of private contracts between shareholders, managers, and others. In this view, the primacy is the contract with shareholders, which allows and conditions all other contracts. From this, it follows under the theory that the corporation should only be governed by the interests of the property owners or the contracting parties.”<sup>29</sup> Each of the parties to the contract is to bargain at best to protect its interest. Shareholders’ interests are to be protected by corporations. This theory assumes that “shareholders are rational human beings who always want more and more wealth, therefore, the object of the corporation is to maximize the shareholders’ wealth.”

The “entity theory” holds that corporations operate in society not in vacuum and in course of their operation use planetary resources for their activities which belong to society. Further, the consumers of the products and services of the corporations belong to society only. Therefore, corporations owe responsibility to society. This theory takes into account the complex relationship of corporations with others and holds that in addition to explicit contracts which a corporation enters into with different persons there exists many implicit contracts such as those entered into with the local community, people who breathe the polluted air emitted by the corporations etc. This theory also holds that there could be greater bargaining power imbalance between corporations on one hand and the explicit or the implicit contracting parties on the

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<sup>26</sup> See, “How CEOs Put Principles Into Practice”, available at: <https://purpose.businessroundtable.org/>, (last visited on Sept. 28, 2022).

<sup>27</sup> See, “On the Purpose of the Corporation”, available at: <https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/>, (last visited on Sept. 28, 2022).

<sup>28</sup> See, “Future of the Corporation”, available at: <https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/> (last visited on Sept. 10, 2022).

<sup>29</sup> Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* 3-7 (2002).

other hand specifically when the corporation is bigger and operates globally. It has also been considered under this theory that state plays a vital role in regulation of the affairs of the corporations as it is the state which has given license to the corporation to function either with “limited liability or as a legal person”.

The foundation of the contract theory is based on the notion that a corporation is all powerful and fulfills the needs of society by providing goods and services and therefore society should be obliged to it and should not expect anymore. The entity theory rests on the assumption that the basis of the activities of corporations is a license and all the parties to the contract whether explicit or implicit including shareholders are stakeholders in the corporations.<sup>30</sup>

A corporation may be a private entity being owned and managed by certain individuals but it operates in public sphere and does not necessarily function in private sphere and consequently it owes some responsibilities towards public. However, the critics of CSR say that existence of corporations are themselves beneficial for society for reasons such as “job creation”, “production of goods and services”, “creation of wealth”, and “moral and material support of other activities of civil society”.<sup>31</sup> Citing these reasons they assert that “these all are the social responsibilities of corporations” and in addition to these the corporations do not owe any other responsibility towards the society.

The economic theory of corporation has cast deep impact on many businesses and economists and is to a great extent developed on the basis of theory of contracts. The central theme of this theory is that “profit must be maximized to enhance the welfare of the society. In a purely competitive environment with no externalities, with perfect markets, and where the individual always prefers more money to less, the pursuit of profit will make everyone work harder, resources will be better used, only the most efficient corporation will survive, and everyone will be better off. Take care of profit and the rest will take care of itself. Profit is literally the last line, the bottom line of the income statement; it is the net of all revenues and expenses, summarizing everything that occurred in the business. This profit belongs to the owners and shareholders and it is all that matters. The shareholders put the capital at risk, which secures other financial, labor and material resources. Profits are the bottom line of business.”<sup>32</sup>

Thus, profit maximization is one of the major objectives of corporation. The corporations which fail to earn profits cannot survive to render services to society. However, it cannot be said that the sole aim of corporations is to maximize the profits. Indeed, “no corporate statute has

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<sup>30</sup> Michel Aglietta & Antoine Reberiou, *Corporate Governance A Drift: A Critique of Shareholder Value*, 22-47 (2005).

<sup>31</sup> Michael Novak, *The Future of the Corporation* 14-15 (1996).

<sup>32</sup> William J. Baumol & Allan S. Blinder, *Economics: Principles and Policy*, 195- 97, (Thomson/ South Western, 1979).

ever stated that the sole purpose of corporations is maximizing profits for shareholders.”<sup>33</sup> It is within the purview of the corporations to see that the other stakeholders are not getting adversely affected by their activities and also to ensure that their activities have minimum possible negative impacts. The concept of CSR has brought out a “shift from profit maximization to profit optimization and shareholders to stakeholders.”<sup>34</sup>

## 5. The Rise of Corporate Social Responsibility

In the last few decades there has occurred vast change in the relationship of private sector with the state and civil society. Globalization, privatization, de-regularization etc. have altered the baseline which existed between state and the financial market as a result of which corporations are expected to contribute to society distinctively. Also, the responsibilities of corporations are not limited to philanthropic activities but the role of business in society is being examined in terms of the juristic concept of rights and obligations. This has led to the growth and development of a new principle of CSR in view of which the corporations are perceiving that rethinking to minimize the adverse impact of business on society, addressing some social and environmental issues etc. will go a long way in ensuring their long-term business success.<sup>35</sup> In view of the same many corporations have evolved their own CSR policies viz. “public commitment to standards”, “community investment”, “continuous improvement”, “stakeholder engagement” and “corporate reporting on social and environmental performance”.

There have emerged some constituents which are being held as the “basic drivers of corporate social responsibility”<sup>36</sup> such as “value shift”,<sup>37</sup> “strategic development”<sup>38</sup> and “public pressure”<sup>39</sup>. In course of time CSR has emerged as a tool of strength and strategic importance for the corporations for creating sustainable values. However, the component of public pressure has been the central point for driving CSR agenda which is mainly related to environment, labor standard and human rights. Generally, CSR programmes are undertaken by companies which have established their business to such a level where they think that they

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<sup>33</sup> Einer R. Elhauge, “Corporate Managers’ Operational Discretion to Sacrifice Corporate Profits in the Public Interest, in *Environmental Protection and the Social Responsibility of Firms*”, *Perspectives from Law, Economics, and Business* 23 (2005).

<sup>34</sup> Bindu Sharma, Bharti Sharma and Anubha Kaushik, “Corporate Social Responsibility in India: Issues and Challenges”, *International Journal of Management* 11(5), 2020, pp. 1651-1664.

<sup>35</sup> Zadek, S; Pruzan, P; & Evans, R. *Building Corporate Accountability: Emerging Practices in Social and Ethical Accounting, Auditing and Reporting*, (Earthscan, London. 1997).

<sup>36</sup> Report on “Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries”, United Nations Industrial Development Organization, Vienna, 12 (2002).

<sup>37</sup> Due to this value shift businesses are not only concerned with profit maximization but they are also feeling responsibility for social and environmental goods.

<sup>38</sup> Due to this strategic development the corporations are trying to become more socially and environmentally responsible as a part of their business strategy.

<sup>39</sup> Pressure groups such as consumers, media, the state and other public bodies are pressurizing corporations to operate in more socially responsible manner.

should contribute something back to the society.<sup>40</sup> Therefore, CSR activities were initially confined to MNCs but now it has garnered the attention of SMEs also.

## 6. The Case against Corporate Social Responsibility

M. Wolf had once quoted: “The role of well-run companies is to make profits, not save the planet. Let them not make the error of confusing the two.”<sup>41</sup> However, the concept of CSR emerged as “a tool to balance the negative and positive effects of modern capitalism.” There are supporters as well as critics of this concept across the globe who make an intense debate over it but the central theme of the argument has been “a definition of the parameters of a company’s responsibility”. According to neoliberalists, CSR is distraction from the well-established principles of economics and thereby an antithesis to creation of wealth. Citing Milton Friedmann, they say that “there is one and only one responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.”<sup>42</sup> They counter the concept of “sustainable development”, “fair trade” and “environmentalism” by quoting principles of economics and say that “the ‘invisible hand’ of the market ensures that what is good for business is good for society.” The proponents of shareholders’ theory of corporations also give emphasis on profit maximization and argue that “corporations meet their proper social responsibilities by excelling in their economic activities, which then contributes to a well-functioning economy by employing people, by providing needed goods and services and by contributing to social welfare through paying taxes.”<sup>43</sup> This model of thought is called Hansmann and Kraakman model<sup>44</sup> which finds its foundation in the premise that corporate accountability that posits corporate managers ought to have direct accountability under corporate law only to shareholders.<sup>45</sup> David Henderson is also of the view that “Companies will best discharge the responsibilities which specifically belong to them by taking profitability as a guide, subject always to acting within the law, and that they should not go out of their way to define and promote wider self-chosen objectives.”<sup>46</sup>

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<sup>40</sup> Bhaswar Kumar, “What is Corporate Social Responsibility?” available at: [https://www.business-standard.com/podcast/economy-policy/what-is-corporate-social-responsibility-122031100056\\_1.html](https://www.business-standard.com/podcast/economy-policy/what-is-corporate-social-responsibility-122031100056_1.html) (last visited on Sept. 18, 2022).

<sup>41</sup> M. Wolf, “Sleep-walking with the enemy: Corporate Social Responsibility distorts the market by deflecting business from its primary role of profit generation”, *Financial Times*, London, (May 16<sup>th</sup>, 2001).

<sup>42</sup> M. Friedmann, *Capitalism and Freedom*, (University of Chicago, Chicago, 1962).

<sup>43</sup> George Goider, *Responsible Company* (2<sup>nd</sup> Ed., 1961).

<sup>44</sup> Henry Hansmann and Reinier Kraakman, *The End of History of Corporate Law*, 89 *Geo.L.J.* 439 (2001).

<sup>45</sup> Zadek, S; Pruzan, P; & Evans, R. *Building Corporate Accountability: Emerging Practices in Social and Ethical Accounting, Auditing and Reporting*, (Earthscan, London. 1997).

<sup>46</sup> D. Henderson, “Misguided Virtue: False Notions of Corporate Social Responsibility”, (Business Roundtable, New Zealand, 2001).

Such assertions follow that “Corporations aren’t allowed to be nice. Company directors are legally obliged to act in the best interests of their shareholders’ investments - i.e. to make them as much money as possible. Genuine efforts to sacrifice profits in favour of human rights and environmental protection are off-limits. Even if a company’s directors took the long view that environmental sustainability is ultimately essential for economic sustainability, their share price would drop and they would probably be swallowed up by competitors. This is why corporate social and environmental initiatives can’t really get beyond the marketing and green wash stage.”<sup>47</sup> Stephen Viederman also says that “it will always be in the financial interests of companies to externalize costs until we establish laws that prevent this.”<sup>48</sup>

However, “the development of universal standards of corporate performance” is questioned by both sides because it is inappropriate for the developing countries as it is only being advocated when the developed countries have already done the polluting and exploitation activities. The leaders of developing states have raised their concern through this criticism including Nelson Mandela who says that “this is just a ‘further burden’ to exports from the South.”<sup>49</sup> Thus, neoliberalists are of the view that CSR is a bad idea for corporations as well as society while those who are averse to capitalism subscribe that it is good for corporations and bad for society.

## **7. Corporate Social Responsibility and Human Rights**

When we see the “economic”, “social” and “environmental” aspects of corporation’s activities then human rights aspect becomes utmost important. For example, labor rights requiring companies to pay fair wages and to follow the minimum social welfare legislation standard cast economic impact on corporations. The right to non-discrimination is held as a basic human right which is concerned with the social aspect of corporations. Also, the operation of a corporation may affect many “human rights” viz. “right to clean water” which fall within the ambit of environmental aspect of CSR.<sup>50</sup> Therefore, though the obligation to enforce international human rights standards rests on state governments yet the corporations have an important role to play in this regard as they affect human rights in many ways. The impacts of corporations over human rights have grown manifold in recent past because they have emerged as economic and political giants and are providing services which were earlier rendered by the states.

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<sup>47</sup> Corporate Watch, “What’s Wrong With Corporations?”, (*Corporate Watch*, August 6, 2001), <https://archive.globalpolicy.org/socecon/tncs/2001/0917wrong.htm> (last visited on Sept. 20, 2022).

<sup>48</sup> Zadek, S; Pruzan, P; & Evans, R. *Building Corporate Accountability: Emerging Practices in Social and Ethical Accounting, Auditing and Reporting*, (Earthscan, London. 1997).

<sup>49</sup> Nelson Mandela, “Speech to the World Trade Organisation”, Geneva, (May 1998).

<sup>50</sup> Ilias Bantekas, “Corporate Social Responsibility in International Law”, 22 *B.U.Int’l.J.* 309 (2004).

It is being realized by the corporations that it is part of good corporate citizenry to respect the human rights of other persons who come in contact of corporations either “directly”<sup>51</sup> or “indirectly”<sup>52,53</sup>. It is being realized by the corporations that the compliance of socially responsible behavior creates goodwill among the customers and investors and accordingly consumers and investors get influenced to the extent the corporations run CSR programmes.

The probable linkages between corporations and human rights have also been expounded at international level by the global community in the last few decades. Some initiatives have also been taken by the corporations, industries, NGOs and stakeholders etc. on voluntary basis which includes “voluntary guidelines and codes of conduct”, “monitoring and reporting procedures”, and “socially responsible reporting indexes”.<sup>54</sup> In view of these initiatives many corporations have resolved to safeguard “specific human rights standards” which shows that the corporations are recognizing the need to “protect the interests of their shareholders, employees, customers and the community in which they operate” as part of their CSR.

## **8. Corporate Social Responsibility and Environment**

After the Stockholm Conference environmental awareness has grown tremendously across the globe and people as well as nations of the world are realizing the impact of “economic growth and development” on environment. The “Brundtland Report” further stated about the “urgency of linking economic progress to environmental responsibility in order to avoid the depletion of natural resources and the destruction of the environment.”<sup>55</sup> Rio Declaration is an outcome of the United Nations Conference on Environment and Development which advocated for sustainability approach through international cooperation and focused on climate change, forests and biodiversity. Agenda 21 is also held as an outcome of this conference which is held as “a blueprint for sustainability in the 21<sup>st</sup> century” wherein the state parties have resolved “to develop national strategy for sustainable development and to encourage the promotion of sustainability at local and regional level within their state.” It is a very comprehensive document which encourages several stakeholders such as “governments”, “industry”, NGOs and public to promote sustainability in participative manner. Corporations’ activities affect the environment adversely in many ways

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<sup>51</sup> Employees, customers and others are the persons in direct contact of corporations.

<sup>52</sup> Workers, suppliers, people living in the vicinity of the corporation etc. are the persons in indirect contact of corporations.

<sup>53</sup> *Ibid.*

<sup>54</sup> David Weissbrodt, “Eighteenth Annual Corporate Law Symposium: Corporate Social Responsibility In The International Context: Business And Human Rights”, 74 *U. Cin. L.Rev.* 55 (2006).

<sup>55</sup> The report gave focus on sustainable development and defined it as: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

which have been spotlighted by the media in past few years.<sup>56</sup> Now a contention is being raised that corporations must take the responsibility to not only protect the environment but also to preserve the environment. This can easily be done by mandatory observance of the rules and regulations made by the state and by voluntarily following the code of conduct.

## 9. Corporate Social Responsibility in India

India has a deep-rooted culture of sharing and caring. In India, the term Corporate Social Responsibility may be new in theory but in practice it is carried on to quite an extent. It has been practiced in ancient times informally. It is done as a measure of philanthropic activity. This concept can also be traced in the Mauryan history, wherein Kautilya emphasized on ethical practices and principles while operating businesses. Gandhi's philosophy of trusteeship resembles with that of CSR of the modern world. According to his philosophy, "Trusteeship was a means of transforming the present capitalist order of society into an egalitarian one."<sup>57</sup> It is stated that "his trusteeship model did not recognize any right of private ownership of property except what was permitted by society for its own welfare and this did not exclude legislative regulation of ownership and use of wealth."<sup>58</sup>

During the initial stages of industrialization, out of philanthropic more than religious reasons, various trusts and institutions were set up for common good of the people like universities, orphanage, old age homes, hospitals etc.<sup>59</sup> In 19<sup>th</sup> century, the industrial families<sup>60</sup> of India were considerate enough about economic as well as social considerations and set up charitable foundations, educational, cultural and healthcare institutions, and trusts for community development. They helped India grow economically, socially as well as politically. However, their actions of social and industrial development were influenced by selfless and religious motives coupled with caste groups and political objectives. The first foundation in India was set up by Nowrojee Wadia which object was to support projects intended to promote common good.

In modern India some leader of Gujarati and Parsi business communities of Bombay spearheaded the idea of Western philanthropic trend.<sup>61</sup> It is known about Jamshedji Tata that he experimented with labor welfare as well as his son, Ratan Tata espoused the need of alleviation of poverty.<sup>62</sup> Also, the corporations such as "Tata Iron and

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<sup>56</sup> Exxon Valdez in 1989, Shell Brent Spar in 1995 and Prestige in 2002 are some of the well-known examples of controversial company activities that caught the attention of the whole world.

<sup>57</sup> Seema Sharma, "Corporate Social Responsibility in India- Emerging Discourse & Concerns", 48(4) *Indian Journal of Industrial Relations* (2013) at 585-586.

<sup>58</sup> *Ibid.*

<sup>59</sup> Mansie Shah, "Emerging Trends in Corporate Social Responsibility", 2 *CLJ* 168 (2009).

<sup>60</sup> Tata, Godrej, Bajaj, Modi, Birla, Naidu, Singhanian etc.

<sup>61</sup> Jamsetji Jejeebhoy, Jamshedji Tata, Sir Dinshaw Petit and Premchand Roychand.

<sup>62</sup> Mansie Shah, "Emerging Trends in Corporate Social Responsibility", 2 *CLJ* 168 (2009).

Steel Company Limited (TISCO) and ITC were the first organizations in India to utilize the concept of the social audit to measure their social performance in the late 1970s. This trend was followed by Industrialists like G.D. Birla, Jamnalal Bajaj, Lala Shri Ram and Ambalal Sarabhai, all believed to be influenced by Mahatma Gandhi and his theory of the trusteeship of wealth.”<sup>63</sup> The genesis of the CSR concept could be found in the Value System of Birla Group of industries much before it was included in corporate lexicon. The founder of this group G.D. Birla advocated for the trusteeship concept of management way back in 1940s which is based on the idea that “the wealth that one generates and holds is to be held as in a trust for our multiple stakeholders. With regard to CSR, this means investing part of our profits beyond business, for the larger good of society.”<sup>64</sup>

In independent India the role of business has been emphasized in development by political leaders. Way back in 1965 a Seminar was organized which was chaired by the then Prime Minister Lal Bahadur Shastri wherein “policy-makers”, “business leaders”, “thinkers” and “trade union leaders” participated which called for “regular stakeholder dialogue”, “social accountability”, “openness and transparency”, “social audits” and “corporate governance”.<sup>65</sup> Corporate Social Responsibility in India has traditionally been considered as philanthropy, e.g. financially supporting schools, hospitals, and cultural institutions. In India Tata Group of Companies are known for their CSR practice which initially has provided compensation for employee’s accident and scholarship for higher education. Later on it has contributed in the development of institutions for education and research. Tata also runs various “comprehensive community development” and “social welfare programs” related to “education”, “health” and “infrastructure development” in nearby towns and villages where its steel plant is located in Jharkhand.

With the advent of globalization some novel trends have emerged in Indian CSR. Western aspect of CSR is casting a deep impact on Indian CSR and a shift is occurring from “philanthropy towards measuring, managing and improving all aspects of companies’ environmental, social and economic impact.” This is being done by incorporation of the same in the form of rules, regulations and guidelines in the terms and conditions of the business. There has occurred “rise in power of global civil society and the internationalizing of civil society campaigns and lobbying has disturbed the comfortable relations between Indian NGOs and businesses, with more critical voices coming forward to highlight poor corporate performance”. Competitiveness has increased manyfold in businesses which is “constraining the ability of many companies to do

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<sup>63</sup> *Ibid.*

<sup>64</sup> Reena Shyam, “An Analysis of Corporate Social Responsibility in India” 4(5) *International Journal of Research – Granthaalayah*, (2016), pp. 56-64.

<sup>65</sup> Mohan, A., *Corporate Citizenship: Perspectives from India*, (Warwick Business School, Warwick, 2001). available at: <http://www.csmworld.org/csrdoc/jcc2moha.pdf> (last visited on Sept. 10, 2022).

anything more than what is strictly necessitated by regulation, and many are being forced to restructure in ways that challenge their commitment to CSR.”<sup>66</sup> However, due to stiff competition in the market place traditional philanthropic practices of CSR are facing challenges as the Articles of Associations of the Companies bear a formal “commitment to be mindful of its social and moral responsibilities to consumers, employees, shareholders, society and the local community.”<sup>67</sup> A legal framework of CSR in India has been developed taking into account Indian model of business ethics and western conception of CSR to respond the prevailing need of competitiveness.

### 10. Legal Framework of CSR in India

In 2000, a Task Force was set up to study the subject “Corporate Excellence Through Sound Corporate Governance” and was asked to submit its report. The Task Force submitted its report in which it stated that “CSR is socially as well as financially good.”<sup>68</sup> In its recommendation it “identified two classifications, namely, essential and desirable, with the former to be introduced immediately by legislation and the latter to be left to the discretion of companies and their shareholders.”<sup>69</sup> In 2009, distinction between philanthropy and CSR became almost apparent for the first time. The formal and progressive step to impose social responsibilities on corporations and to give CSR a concrete shape was taken for the first time when the “Corporate Social Responsibility Voluntary Guidelines, 2009” was issued by the Ministry of Corporate Affairs, Government of India.” These guidelines were further revised in the year 2011 and the “National Voluntary Guidelines on Social, Environmental and Economic Responsibility of Business”<sup>70</sup> were issued which superseded the 2009 guidelines. These guidelines are directed towards promoting “inclusive growth” and “represent a significant and substantial effort in enhancing the protection of stakeholder interests in the corporate sector.” For this purpose the guidelines lay down nine principles which the corporations are to observe. Pursuant to this many other steps were taken in this direction to ensure compliance of different responsibilities in the nature of Social, Economic and Environmental through issuance of guidelines. However, with the mandate of SEBI to top listed 100 companies<sup>71</sup> to compulsorily disclose their CSR activities in the Business Responsibility Reports accompanying the Annual

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<sup>66</sup> Center for Social Markets, “CSR Perspectives from Indian Business”, (2001) available at: <http://www.csmworld.org> (last visited on Sept. 10, 2022).

<sup>67</sup> R. Kumar, D. Murphy, & V. Balsari, *Altered Images: The State of Corporate Responsibility in India*, (Tata Energy Research Institute, New Delhi, 2001).

<sup>68</sup> A. C. Fernando, *Business Ethics and Corporate Governance*, (Pearson India, 2<sup>nd</sup> Ed., 2000).

<sup>69</sup> *Ibid.*

<sup>70</sup> “National Voluntary Guidelines on Social, Environmental and Economic Responsibility of Business”, available at: [https://www.mca.gov.in/Ministry/latestnews/National\\_Voluntary\\_Guidelines\\_2011\\_12jul2011.pdf](https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf) (last visited on Sept. 30, 2022).

<sup>71</sup> As per Clause 55 of the Listing Agreement.

Reports a shift occurred from voluntary CSR era to a regulated regime of CSR.

Most importantly, the legislative recognition to mandatory CSR activities for corporations was given by the enactment of Section 135 of the Companies Act, 2013 which was missing in the “Companies Act, 1956.” CSR spending and reporting by the corporations in India were made mandatory as per this provision and thereby CSR activities came within the purview of corporate law. With this enactment India has become the first country in the world having legislated CSR provisions. It requires certain corporations “to spend a fix portion of their profit every year” on issues germane to social development non-compliance of which would subject them to penalty. As per this section, “every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.”<sup>72</sup> The Corporate Social Responsibility Committee is required to “(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII; (b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and (c) monitor the Corporate Social Responsibility Policy of the company from time to time.”<sup>73</sup> The Board of every company is required to approve the CSR Policy of the company as recommended by the CSR Committee and “shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy: Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities.”<sup>74</sup>

Schedule VII of the Act lists out the broad areas of CSR activities such as “(i) eradicating extreme hunger and poverty; (ii) promotion of education; (iii) promoting gender equality and empowering women; (iv) reducing child mortality and improving maternal health; (v) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; (vi) ensuring environmental sustainability; (vii) employment enhancing vocational skills; (viii) social business projects; (ix) contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women” which may be undertaken by

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<sup>72</sup> The Companies Act, 2013, Section 135(1).

<sup>73</sup> *Id.* Section 135 (3).

<sup>74</sup> *Id.* Section 135 (5).

the companies.<sup>75</sup> Further, in order to give effect to these CSR provisions the “Companies (Corporate Social Responsibility Policy) Rules, 2014” have been framed which came into effect from 1<sup>st</sup> April 2014.

Initially the Companies Act, 2013 did not provide penalty for non-observance of CSR provisions. In case of non-compliance by the companies they were to just “specify the reasons for not spending the amount” in the report made under section 134(3)(o) which gave impetus to non-compliance of these provisions by the companies.<sup>76</sup> Therefore, in order to ensure compliance of CSR provisions the Act was amended to introduce penalty provisions. The Companies Amendment Act, 2019 inserted sub-section (7) in Section 135 regarding the same which was further replaced by the Companies Amendment Act, 2020. Now the company as well as the officer of the company on whose part the default lies are fastened with liability and are required to pay fine. It is stated that in case of default in compliance with the CSR provisions “the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.”<sup>77</sup> The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, published by the MCA in January 2021, has brought into effect the modifications made to CSR by the Companies Amendment Acts of 2019 and 2020.

A major change has also been brought into the definition of CSR. Earlier rule 2(c) provided an inclusive definition<sup>78</sup> of the term CSR which

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<sup>75</sup> *Id.*, Schedule VII.

<sup>76</sup> *Id.* Second proviso to Section 135(5): “Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount “and, unless the unspent amount relates to any ongoing project referred to in sub-section (6), transfer such unspent amount to a Fund specified in Schedule VII, within a period of six months of the expiry of the financial year.” Also, if any unspent amount with respect to an ongoing project in relation to CSR Policy of the company is required to be transferred by the company to a special account opened by the company for this purpose to be called the Unspent Corporate Social Responsibility Account and from this account such amount shall be spent within a period of three financial years to the ongoing project. In case of failure to do so the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year. See, The Companies Act, 2013, Section 135(6).

<sup>77</sup> *Id.* Section 135(7).

<sup>78</sup> The Companies (Corporate Social Responsibility Policy) Rules, 2014, rule 2(c) earlier stated that “Corporate Social Responsibility means and includes but is not limited to: (i) Projects or programs relating to activities, areas or subjects specified in Schedule VII to the Act; or (ii) Projects or programs relating to activities undertaken by the Board of Directors of a company in pursuance of recommendations of the CSR Committee of the Board as per

has been replaced by an exhaustive definition by the Companies (Corporate Social Responsibility Policy) Rules, 2014,<sup>79</sup> which defines CSR in Rule 2(d) to mean “the activities undertaken by a company in pursuance of its statutory obligation laid down in section 135 of the Act in accordance with the provisions contained in CSR Rules, but shall not include the following, namely:- (i) activities undertaken in pursuance of normal course of business of the company: Provided that any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22, 2022-23 subject to the conditions that – (a) such research and development activities shall be carried out in collaboration with any of the institutes or organisations mentioned in item (ix) of Schedule VII to the Act; (b) details of such activity shall be disclosed separately in the annual report on CSR included in the Board’s Report; (ii) any activity undertaken by the company outside India except for training of Indian sports personnel representing any State or Union territory at national level or India at international level; (iii) contribution of any amount directly or indirectly to any political party under section 182 of the Act; (iv) activities benefitting employees of the company as defined in clause (k) of section 2 of the Code on Wages, 2019; (v) activities supported by the companies on sponsorship basis for deriving marketing benefits for its products or services; (vi) activities carried out for fulfilment of any other statutory obligations under any law in force in India.”

In case of any non-compliance of CSR provisions by a company, the government is empowered to take action against such company as per the provisions of the Companies Act, 2013. Failure to comply with the CSR provisions amounts to civil wrong with effect from 22<sup>nd</sup> January 2021. The provisions related to violations of CSR by a company are mentioned in section 134(8) of the Companies Act, 2013.<sup>80</sup> General penalty provisions mentioned in section 450 are applicable in such circumstances.<sup>81</sup> In case of default in making payment of penalty within

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declared CSR Policy of the company subject to the condition that such policy will include activities, areas or subjects specified in Schedule VII to the Act.”

<sup>79</sup> As amended vide Companies (CSR Policy) Amendment Rules, 2021 notified on 22<sup>nd</sup> January 2021.

<sup>80</sup> The Companies Act, 2013, “Section 134. Financial statement, Board’s report, etc. ... (3) There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include— ... (o) the details about the policy developed and implemented by the company incorporate social responsibility initiatives taken during the year; ... (8) If a company is in default in complying with the provisions of this section, the company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.”

<sup>81</sup> *Id.* “Section 450. Punishment where no specific penalty or punishment is provided. If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the

the prescribed period the provisions of section 454(8) are applicable.<sup>82</sup> By taking this step India has certainly become one of the world's top nations in requiring companies to engage in CSR activities.

### 11. CSR Trends of Some Leading Corporations in India

The following table helps us understand the CSR expenditure and Trends of some leading corporations in India. It depicts the amount of CSR expenditure incurred by certain corporations and the activities performed by them in the Financial Year 2020- 21:<sup>83</sup>

Sr. No.	Corporation Name	CSR Expenditure (INR)	Description of Activities
1.	Reliance Industries Ltd.	922 Crores	It undertook CSR initiatives through Reliance Foundation only and has “spent 49% of its budget for the promotion of education through scholarships and infrastructure procurement.” Other activities include “promotion of healthcare”, “rural development”, “sports promotion”, and “environmental sustainability”.
2.	Tata Consultancy Services Ltd. (TCS)	674 Crores	Its major activity was contribution of “256 Crores to PM CARES Fund for combating COVID- 19.” Other focal areas were “education promotion”, “healthcare”, “art and culture promotion”, and “Bridge-IT-a youth entrepreneurship program”.

company who is in default or such other person shall be liable to a penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person.”

<sup>82</sup> *Id.* “Section 454. Adjudication of Penalty. ... (8) (i) Where a company fails to comply with the order made under sub-section (3) or sub-section (7), as the case may be, within a period of ninety days from the date of the receipt of the copy of the order, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees

(ii) Where an officer of a company or any other person who is in default fails to comply with the order made under sub-section (3) or sub-section (7), as the case may be, within a period of ninety days from the date of the receipt of the copy of the order, such officer shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.”

<sup>83</sup> See, “Top 50 Companies in CSR Activities Funding in India”, available at: [https://csrbox.org/Impact/description/Article\\_full\\_Top-50-Companies-in-CSR-Activities-Funding-in-India\\_36](https://csrbox.org/Impact/description/Article_full_Top-50-Companies-in-CSR-Activities-Funding-in-India_36) (last visited on Sept. 14, 2022).

3.	HDFC Bank Ltd.	634.91 Crores	The company concentrated on financial literacy programs, promotion of education, rural development, healthcare, farmers' livelihood, skill development and COVID relief.
4.	ONGC Ltd.	522.98 Crores	This PSU "contributed Rs. 300 crores to PM CARES Fund". Its other CSR initiatives where it spent were "rural development", "education promotion", "environment", "healthcare", and "sports".
5.	Indian Oil Corporation Ltd.	460.38 Crores	It contributed 225 Crores to PM CARES Fund. Further as part of its CSR initiatives it established "Skill Development Institute, Bhubaneswar to provide skilled human resources to the job-ready industry" and also established "a 100 TPD (tons per day) cattle dung-based Biogas plant at Rajasthan, in alignment with the national goals of 'Aatmanirbhar Bharat', Make in India, and Swachh Bharat mission." Also, the company has spent in the "Indian Oil Sports Scholarship Scheme for sports promotion", healthcare, national heritage conservations, and education promotion.
6.	NTPC Ltd.	418.87 Crores	It "spent 66% of its CSR budget on healthcare promotion and infrastructure." It has also "contributed to rural development, environment sustainability, sports, education promotion and disaster management." Further, "the company is Setting up 50 Sanitary Napkin Mini Manufacturing units (MMU) in the state of Odisha under the Stree Swabhiman program."
7.	ITC Ltd.	365.43 Crores	It "contributed Rs. 100 crores to the PM CARES Fund", "constructed 640 Individual Household Toilets (IHHTs) in 28 districts of 15 states in collaboration with the respective

			State Governments/District sanitation departments and 23 community toilets were constructed/renovated in West Bengal and Tamil Nadu.” Its other initiatives were to “run awareness campaigns to create demand and drive behavioural change”, “to support the disaster-affected people by its relief program” and “spent on healthcare and agricultural projects”.
8.	Infosys Ltd.	325.32 Crores	It conducted its CSR activities through Infosys Foundation. Its CSR activities include “holistic community development”, “heritage conservation”, “armed forces support”, and “sustainable development”. It was also involved in activities “for combating the COVID pandemic by providing essential medical equipment and infrastructure to various hospitals and frontline workers, supporting daily livelihood requirements of the poor and needy.” Also, it is involved in aiding “projects that help soldiers and their families when they retire or are martyred.”
9.	Wipro Ltd.	251.19 Crores	It worked for “Education for the underprivileged.” The company has a <u>Community Ecology program</u> .
10.	Power Grid Corporation of India Ltd.	240.59 Crores	As part of its CSR initiatives, it has “contributed to 270+ projects”. To promote cleanliness, it has “installed about 36,000 twin-bin dustbins in about 300 railway stations in Himachal Pradesh, Gujarat, and in various parts of the country, supplied 5 truck mounted sweeping machines with the vacuum cleaners to various government agencies and bodies, cleaned and restored water bodies and provided clean drinking water to a large number of villages.” It “helped in the construction of 20 Bedded OPD at SK Roy Civil

			Hospital Hailakardi.” Other areas of focus of the company were “education”, “healthcare”, “environment”, “sanitation”, “rural development”, and “art & culture promotion.”
11.	Tata Steel Ltd.	221.98 Crores	The main focus of the company was to help and promote “marginalised and tribal communities.” It provided aid to “the ICICI Foundation for tribal skill development” and also aided “in increasing the average income of 1,000 households by promoting kitchen gardens, linking farm produce to markets, making bags from newspapers and creating art and textile designs.” It also ran Education Signature Programme to transform lives of children by which approximately 2,51,000 children were benefitted.
12.	Hindustan Zink Ltd.	214.03 Crores	Its focal area was to ensure better health of the community. It helped and supported “the Children, Youth, Farmers & Women of its communities across 189 villages in 6 districts of Rajasthan & Pantnagar.” It “spent Rs. 116 crores for combating the COVID pandemic” and “undertook several projects aimed at addressing the basic needs of the rural communities, construction of community halls, school infrastructure, roads, cremation centres & drains, etc.” Its other initiatives include promotion of environmental sustainability, developing “Safety Modules for communities, covering household and workplace safety aspects in rural settlements.”
13.	Hindustan Unilever Ltd.	165 Crores	This company “contributed INR 61 Cr. for COVID relief activities” and as a COVID relief measure it ran project Prabhat which provided benefit to more than 1.3 million

			people across the country by supplying them relief kits which included “Lifebuoy soaps, grocery kits, and food packets”. It also ran Project Shakti which object was “to financially empower and provide livelihood opportunities to women in rural India.” Other initiatives of the company included “education”, “rural development”, “PwD skilling”, and “environmental sustainability”.
14.	Larsen & Toubro Ltd.	150 Crores	Its CSR initiatives includes “COVID relief”, “education” and “healthcare” “environment”, “gender equality”, and “rural development”.
15.	Bharat Petroleum Corporation Ltd.	144.88 Crores	The main CSR initiatives of the company were in the areas of “healthcare”, “COVID relief”, “sanitation”, “education” “skill development”, “art & culture”, “environment”, and “rural and community development”.

The above trend clearly indicates that the companies have slowly started shifting their focus in CSR spends from generic activities viz. constructing roads, school-buildings community development, conservation of environment, sustainability, sanitization, water and energy conservation to specific activities for benefiting certain needy and individuals viz. poor villagers, unprivileged communities, children, capacity building, deprived members of community, rural women etc. which could actually ameliorate their poverty and ensure to permanently rehabilitate them to see a better future, which is the prime objective of CSR provision of the Companies Act, 2013.

## 12. Conclusion

In the modern era of globalization, privatization and liberalization the corporations are playing very crucial role in development of economy but they cannot function in isolation. It is required that they should also behave and act in a responsible manner like other members of the society. They cannot part with the moral values as well as the statutory obligations which have been imposed on them. The corporations must do the proper utilization of the available resources to acquire profits and the motive must be to provide benefits to other. This suggests that there must exist a fine balance between the rights of the corporations which they can claim and the advantage which the society derives from them. In Indian scenario, there is a need to pay special attention to CSR as the gap between rich and poor is very wide and there are several areas such as poverty eradication, education, primary health care, sanitation, skill

gap, drinking water etc. where lot of focus and resource deployment is needed.

The changing winds of time are compelling the corporations into actions by accepting responsibilities and performing them. On the one hand the view is that the main social responsibility of the corporations is to secure increased production by making optimum use of the scarce resources so that the national income of the country goes up at the least cost while on the other hand a view is emerging that the managers and secretaries of corporations are under an obligation to see that the capital invested in the corporation is paying a fair return to the shareholders and simultaneously it is not affecting adversely the general public at large. They are also under a social responsibility to the workers- the human capital- people who put their labor and lives in the service of the corporation, payment of fair wages, and continuity of employment etc. Their duty to the consumers requires that they get standard product at a fixed and reasonable price. The corporations also owe a duty to the society which gave it birth and advantages by providing perpetual succession. The corporation also owes a duty to the state and therefore it is essential to be law abiding and not to indulge in malpractices like tax-avoiding and black marketing. The companies have also to comply with various laws regulating their conduct of business. If within these frameworks, companies try to maximize the profits of the corporations, they would have served the social purpose. Further, the profits or resources of the corporations should not be diverted to the interest of the management or any particular group of shareholders but decisions should be taken keeping in view interest of society at large.

The core issues which are emerging due to the concept of corporate social responsibility are that the corporations are bound to take any decision taking into consideration its effect on human rights of the citizens, environmental aspects and the labor standard. Although the human rights aspects are so wide that it embraces all the concerns which has a tendency to affect the lives of people. In brief, social responsibility of corporations should not be treated in isolation from social responsibility of business. The two are not mutually exclusive but complementary. The profit motive might be regarded as a social responsibility to some but profit is only a measure of success. For enforcing social responsibility, the inputs and outputs should not be reckoned only with reference to cost and revenue but overall rate of growth of the economy and its contribution to the development of the society should also be taken into account. The shareholders of the company have to participate in ensuring the socio-economic progress of the community, not merely to maximize their own profits, but to contribute what they can do for the welfare of the nation. Therefore, CSR is not only about protecting the environment or human rights; it is about cultivating long-term, mutually beneficial ties with the society at large that help businesses develop. In Indian scenario, the CSR can be of great

value in ensuring inclusive growth. It can supplement the actions of government and lead to ensuring sustainable development.

The concept of social responsibility should find a place in Memorandum and Articles of Association. The company management and administration should introduce suitable provisions for better presentation of accounts, efficient audit, and social audit etc. However, it is not easy for a company to satisfy claims of all but there is a need to reconcile their relative importance and meet their demands under the concept of social responsibilities.

# **Creating a Synergy between Health and Human Rights for Building the Nigerian Nation: The Case for CEDAW'S Women's Right to Choose and Right to Life for the yet-to-be-born Child**

**\*Dr. Ganiat Olatokun**

## **ABSTRACT**

Health and human rights are important issues if Nigeria must propagate her citizen's well-being. Our health policies and programs must be seen to have a very high impact on human rights. The Nigerian State must be able to put into proper context CEDAW'S women's right to choose and right to life for the yet-to-be-born child. When this is done, serious health issues, especially criminal abortions, which have become so rampant despite our Penal Laws with their severe outcomes, will be averted. The most important thing expected of the law makers in Nigeria is to see to the quick and prompt domestication as well as, implementation of the so-called Convention on the Elimination of all forms of Discrimination against Women (CEDAW). This can only be arrived at, after the actual meaning of women's right to choose has been made public. To achieve this, a doctrinal analysis was undertaken and it was exposed that, women's right to choose actually stands for women's right to reproduce. This being the issue on ground, this research has investigated the connections between health and human right of women and yet to be born child in order to forestall nation building. The objective of this research is a legislative policy that will have the power to connect the health of women in Nigeria together with the yet to be born child's inherent right to life. It was recommended that, a legislative policy encompassing women's reproductive right to choose to reproduce and the yet to be born child's inherent right to life is key when thinking of ensuring a healthy Nigerian nation.

**Keywords:** Good Health, Right to choose, Right to life, Unborn Child, Women

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## 1. Introduction

It has always been said that all human rights has a space within morality and law national and international levels.<sup>1</sup> All these human rights have are aimed towards national governments demanding compliance as well as enforcement.

These demands for compliance and enforcement are functions which the governments are expected to carry out starting from the Universal Declaration of Human Rights 1948 (UDHR), where a set of list, comprising over two dozen of explicit human rights expected of countries to regard and adhere to, can be found. Sample of the above rights are the very few group rights which centers on the equal opportunities for the less privileged groups. A typical example of such less privileged group are the women folks. By these assertions, it becomes visible that this CEDAW'S right to choose, which is a significant part of the reproductive right, is an acknowledged human right because it falls under the less privileged group rights which is the actual concern of the UDHR.<sup>2</sup>

The regard for the equal rights of the less privileged group has always been the utmost interest of all human rights movement. Human rights instruments provided that all the people are the same and equal before the law, and that every person, women inclusive, have equal essential rights which should be enjoyed by them continuously without any prejudicial treatment from anybody, whatsoever.<sup>3</sup> Ever since 1964, the United Nation's General Assembly have dealt with the rights of women using specialized lawful documents such as, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).<sup>4</sup>

Under Articles 12 and 16(1) CEDAW, all State parties were enjoined to take justified measures to eliminate all discrimination against all women in the area of health care, particularly those relating to ensuring, on the grounds of equality of every men and women, the identical equal right to choose to make up their minds freely and responsibly on the actual figure and specific timing of all their babies..

Every embryo and foetus is another set of disadvantaged group who has a very limited time to stay *in-utero*. Consequently, therefore, the child, by extension, also falls under the disadvantage group. All United Nations Convention must be seen to be compatible with every foundational declaration principles as well as the principle of each and every UN Declaration upon which the treaty is based upon.<sup>5</sup> Consequently therefore, the Declaration on the Rights of the Child, and the Convention on the

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<sup>1</sup> Anthony Pagden, 'Human Rights, Natural Rights and Europe's Imperial Legacy' (2003) 32 *POLIT. THEORY*. 172.

<sup>2</sup>Article 1 The *Universal Declaration of Human Rights (UDHR)*

<sup>3</sup> 'Ibid'

<sup>4</sup> Article 1 The *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)*

<sup>5</sup> Rita Joseph, *Human Right and the Unborn Child* (MartinusNijhoff Publishers, 2009) 117.

Rights of the Child have always affirmed that every signatory must ensure that all children are protected before as well as after their births.<sup>6</sup>

No matter the economic and financial situations of every States, each State is required to put in place all possible measures to enable the realization of child's rights, thereby, paying particular attention to the most disadvantaged group. These include children who are at the risk of abortion, because their mothers are seen to be in a difficult economic or social conditions.<sup>7</sup>

If the women's right to choose is mandated by ensuring that every woman has right to reproduce, and the right to life is accorded to the yet to be born generations of Nigeria, criminal abortions, which is the order of the day in Nigeria will be a thing of the past. Healthy women in Nigeria will henceforth, be seen to be producing healthy children which is a signal for national development and general well being.

This research, therefore asserts, that the right to choose as mentioned in the CEDAW and the right to life for the unborn children are important health signals, if peace and security is to be guaranteed for building a very strong and viable Nigerian State.

## **2. Literature Review on Right to Choose for Women**

This researcher has found it as a thing of utmost importance to put into proper content and context the exact and actual meaning of the right to choose accorded to all women worldwide by the Convention on the Elimination of all Discrimination against Women (CEDAW). The literature review in the forthcoming paragraphs will elucidate the fact that women's right to choose is not the same as women's right to abort.

Cook, gave us an insight to the General Recommendation 24 of CEDAW. The recommendation mandated every state parties to ensure the elimination of every discrimination against women in the area of health and health care, and must ensure that every woman can enjoy and take advantage of human rights and fundamental freedoms on the basis of equality with men. It is crystal clear from the recommendation that, discrimination takes place against women whenever the health systems refuses or ignore to provide the very health services that only women needed, such as safe abortion services. The recommendation argues further, that states are obliged to remedy and look into the situation.<sup>8</sup>

In going against this stand respectfully, it must be buttressed that the actual stand of this research is that, the right to choose mentioned in the CEDAW is not the same as the right to choose abortion which is being

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<sup>6</sup> Principle 2 The Declaration on the Rights of the Child (Geneva Declaration of right of the Child) 1924 and Article 3(2) of the Convention on the Rights of the Child 1990.

<sup>7</sup> Joseph (n5).

<sup>8</sup>Rebecca J. Cook, *Abortion, Human Rights and the International Conference on Population and Development (ICPD)* Ina K. Warriner and Iqbal H. Shah (eds), (Guttmacher Institute 2006) 27.

canvassed by the radical feminists of the 1960s. Better still, our health systems should be seen to be in favour of only the human rights that preaches the right to life. This has become very necessary because of the special position held by physicians with respect to the protection and the preservation of life.<sup>9</sup> This researcher is of the believe that the CEDAW recommendation which provides that all state parties should ensure abortion right is not a ticket for our health service systems to propagate abortion because, this is inconsistent with the right to choose provisions under the CEDAW, after all, there is nowhere within the CEDAW itself, that such provision was mentioned.

The right to choose provided under the CEDAW to women must be interpreted in consonance with every other international human rights instruments that seeks to promote the unborn child's right to life.<sup>10</sup> In order for the unborn children to enjoy their right to life, through the right to choose to reproduce granted under the CEDAW, this researcher is of the view that, our health care systems has an important role to play in making sure that every woman receives adequate information concerning family planning.

In one of her endowed writings, Cook has a different idea regarding the provision of the CEDAW as it relates to health care services. The CEDAW provides that: State parties shall take appropriate measures to eliminate discrimination against women in the field of health care<sup>11</sup>

There is nowhere in the content of the CEDAW that abortion was mentioned. Cook can be said to have conceived this provision to be referring to abortion. This is not the case with the contention of this research. Our health care systems must support the human right to reproduce, which will eventually lead to the right to life for the unborn children.

In the words of the late Jonathan Mann, there seems to exist a relationship (synergy) between public health and human rights.<sup>12</sup> The contentions of Mann can be seen in the above provision of the CEDAW, which has conveniently included public health within its framework. Health care can be seen as a necessary tool to assist women so that they will be able to exercise and express their right to choose to reproduce, (the very right to determine the number and spacing of their children) and not their right to abort. Family planning is not the same as abortion. They are two completely different phenomena. While family planning actually recognizes ways and manners which women will undergo in spacing and

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<sup>9</sup>Momoh Anate, *Women Reproductive Health in Africa: A Continuing Tragedy* (University of Ibadan Press, 2008) 11.

<sup>10</sup>For example, the Universal Declaration of Human Right (1948), the Geneva Declaration of right of the Child (1924).

<sup>11</sup> Art 12(1) Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979.

<sup>12</sup>Cook (n8) 17. See also, Jonatan M. Mann, 'Medicine and public Health, Ethics and Human Rights' (1997) 27 HASTINGS CENT. REP. 6.

determining the actual number of children they are willing to have, abortion on the other hand, is concerned with the actual killing of an already implanted life in the womb of a woman.

This researcher, hereby reaffirms that, the murder of an already implanted life in its mother's womb cannot be within the contemplation of the CEDAW as envisaged in the right to choose granted by the CEDAW. This is seen in its provision of Article 12 on health, dealing with the right to life of children which is already being anticipated by its provision of family planning. Accordingly, under this provision on health, both the mother's right to life as well as the right to life of the children are being defended. A very key contention of this research is that, in order to stay alive and healthy, women need to adequately plan their family.

A woman's right to health is guaranteed only when she is able to plan her family adequately. A woman cannot boast of a right to health when she is guaranteed a right to abort. Hence, in giving due respect, this researcher is vehemently opposing the commentaries of Professor Oye-Adeniran that, reproductive health is a part of women's human right to abort, as asserted in his work<sup>13</sup> This is simply so, because the commentaries of the erudite Professor does not tally with the aims and aspirations of public health. Professor Oye-Adeniran also called on the government to respect the basic human rights of women by making sure that no obstacles are placed in the access to reproductive health services, including abortion.

This researcher feels a misconception here. It has been established forcefully in the preceding paragraphs, that there exist a synergistic link between health and human right. The professor has erroneously linked right to abort to women's health. Respectfully, this researcher re-affirms that this is not true. There is absolutely, nothing healthy in abortion. Thinking of these nature tends to jeopardize the main intent and purpose of the CEDAW which made provision for the right to choose.

In order to see that the right to choose to reproduce is read and fix into the CEDAW, and not right to choose to abort, the African Anti-Abortion Coalition (AAAC), in a well written letter to the late president of Nigeria, Alhaji Musa Yar'Adua, informed the late president that, certain pro-abortion groups, after failing woefully to convince several individuals in Nigeria about abortion rights, has shifted base and now focuses their fight against the Nigerian unborn children to the State's Houses of Assembly, after their shameful defeat at the National Assembly.<sup>14</sup>

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<sup>13</sup>'Nigeria-Abortion: Between Law and Human Rights'  
<<http://www.medicalabortionconsortium.org/news/nigeria-abortion-between-law-and-human-rights-128.html>> accessed 15 Jan 2023

<sup>14</sup>African Anti-Abortion Coalition, Chidicon Medical Centre,<  
[AAAC Letter to Gov on Abortion in States.doc \(live.com\)](#) accessed 15 Jan 2023

The evidence to show for the above is the existence of a Bill named, 'Women's Reproductive Rights Law', which authorizes abortion throughout the terms of pregnancy which was passed in Anambra state, one of the many States in the Eastern region of Nigeria<sup>15</sup> The first argument canvassed by the AAAC was that, section 6 of the law, which gives the state government the power to authorize reproductive right for women (the right to choose) is a violation of the Fundamental Human Rights provision of the Constitution of the Federal Republic of Nigeria, which provided for the right to life for everyone under section 33.

By the argument canvassed above by the AAAC, it can be seen that the AAAC has also likened the right to choose provided in the CEDAW to mean right to choose abortion. It has always been the position of this research that, the right to choose provided in the CEDAW must be rightly interpreted and taken to mean the right women has to reproduce, and not the right they have to abort. The reason being that, there is always consistency in all international human rights treaties which guaranteed right to life for yet to be born children of the world. The author here insists, that, by the very name of the Bill, 'Reproductive Right Bill', the interpretation of abortion right cannot stand.

The reproductive right to choose which was seen to be provided for under section 6 of the Anambra State's Law must, in fact, be taken to mean the right Nigerian women has to reproduce. This interpretation will in turn, be in consonance with the right to choose provisions under the CEDAW as well as the fundamental human rights stipulations of the Constitution of Nigeria, which guarantees right to life to everyone, including the yet to be born children. Whenever a woman exercises her right to choose, she has indirectly given her yet to be born child a right to life, and therefore, a right to live. Going by these assertions, therefore, the Reproductive Right Law of Anambra State is not inconsistent with the fundamental human rights provision of the Constitution of the Federal Republic of Nigeria.

It has therefore, become imperative to give a proper interpretation to reproductive right to represent the right to reproduce (consequently the right to life for yet to be born children) and never, the right to abort. By so doing, the reproductive right provided by the Anambra State law will be seen as consistent with the reproductive right granted under the CEDAW, and since we say that the right to life guaranteed by the Constitution of the Federal Republic of Nigeria is consistent with the Reproductive right provided under Anambra State law, the Reproductive Right Law of Anambra State shall be taken as reinforcing the right to life provided for under the Nigerian Constitution, and by extension, the right to life of the yet to be born children as envisaged under CEDAW's reproductive right.

In order to ensure that the unborn children in Nigeria are accorded the right to life, the Imo State House of Assembly, (another state in the Eastern

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<sup>15</sup>Section 6, Women's Reproductive Right Law (2005), Anambra State, Nigeria.

Region of Nigeria), have been applauded for rejecting in totality, the Imo State Women's Right Bill (2009). The State's legislature, voted 13 to 1, thereby crushing the entire bill that would have made abortion legal in the State.<sup>16</sup> A former governor of Imo State have expressed his disappointment on the current insistence to make abortion legal in Nigeria. The crushing of the said bill have demonstrated that the generality of Nigerians have a deep regard for cultural attributes, traditional norms and religious beliefs. In Owerri town in Eastern Nigeria, the crushing of the bill was tagged as the victory of the superior Imo cultural attributes over and above the recent global western Cultural Revolution.<sup>17</sup>

It is interesting to know that the several human rights instruments available have dealt with issues concerning human rights differently, and it appears that, the recent worldwide western Cultural Revolution had found its way, eventually, into the human rights instruments. This can be seen in the adoption by the African Union in 2003, of the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa.<sup>18</sup> Article 14(2) of the Protocol provided that State parties shall take all appropriate measures to protect the reproductive right of women by authorizing medical abortions in all necessary cases.

It must be categorically stated here, that this African Protocol is the one and only human rights instrument that made a direct assertion on the right to abort. The Right to choose, as it was provided under the CEDAW cannot be interpreted to mean abortion. This researcher, again, maintains, as always, that there exists a misconception by the African Protocol by attempting to connect abortion with women's reproductive right to choose. The progressive meaning to be attached to women's right to choose, as guaranteed by the CEDAW, is women's right to reproduce, never to women's right to choose abortion. By its deliberate act of making outright provision for abortion right for women therefore, the African Protocol is seen as being inconsistent with the CEDAW, and by implication, all other international human rights instruments.

Furthermore, the African Protocol is also seen as being inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, which has provided for right to life for all Nigerians, whether born or unborn. It is however, important to add here that, despite the fact that both the CEDAW as well as the African Protocol has been ratified by Nigeria, neither of them has been domesticated nor implemented.

The optimism of the researcher cannot be far fetched as seen in her continuous stand that the misconception on the actual meaning of

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<sup>16</sup> [AAAC Letter to Imo House of Assembly on Abortion.doc \(live.com\)](#) accessed 15 Jan 2023

<sup>17</sup> 'Ibid'

<sup>18</sup> Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa, 2003.

[Microsoft Word - Protocol on the Rights of Women \(ohchr.org\)](#) accessed 15 Jan 2023

women's right to choose as provided by the CEDAW, is the reason why Nigeria, as a country has refused vehemently to either domesticate or implement the CEDAW. Women's right to choose as provided by the CEDAW has to be put in its proper perception, as representing women's right to choose to reproduce if Nigeria will have to domesticate and implement the CEDAW.

Again, Nigeria will not be willing to domesticate the Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa. This is so because, domestication of the Protocol will be not be in the best interest of the unborn children and will also be inconsistent with the provision of the right to life of the unborn children which is recognized by all other international human rights instruments.

Joseph,<sup>19</sup> has given a perfect elucidation suggestive of the fact that every international human right instruments has a place for the right to life for all unborn children. This erudite scholar has maintained her stand after well over three decades in the university. The experiences gathered by her, while teaching and researching in the university has further buttressed her stand on the existence the right to life for the unborn children. In going against the right to abortion propagated by the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003), as being inconsistent with the well-known fundamental principles of all international rights instruments, as well as going against African values and tradition, she have reaffirmed, just like the contention of this research that, the actions of the CEDAW committees can be termed as relative to instigating an abortion era by its promotion of abortion as a type of human rights.<sup>20</sup>

This researcher, while supporting Joseph completely, is asserting through this research that, the CEDAW committee (a group of persons) and the CEDAW (the actual document) are two different things. The main duty given to these group of persons, making up the CEDAW committee is just to monitor compliance by State parties of the CEDAW (the actual document). If this is the case, it is the submission of this research that, the correct perception of women's right to choose as provided by the CEDAW, is the right that all women has to enable them reproduce, and not the destructive right to enable them abort. Hence, going by all these perceptions, the CEDAW committee must monitor compliance to reflect the correct perception of women's right to choose as provided by CEDAW.

It can be seen vividly that even Joseph, has a misconception about recommendation 24 of the CEDAW committee, because she also believed it to be a kind of abortion right granting provision. The life of this misconception should be cut short if the yet to be born children are to claim their right to life granted them by all international human right treaties.

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<sup>19</sup> Joseph, (n5) xviii.

<sup>20</sup>Ibid' 245-246.

The review above, have set the properly, reader's mind to be able to accommodate the proper perception of women's right to choose granted by the CEDAW as representing the absolute right which every woman possesses that will enable her reproduce off springs. This absolute right will eventually result into inalienable and absolute right to life for the yet to be born children. In this regard therefore, both the women and the children, when eventually born will be able to boast of a good health.

### **3. Literature Review on Right to Life for the yet to be born Child**

Again, this researcher has also thought it right to give a brief literature review suggesting that the unborn children have a guaranteed right to exist, a right to live.

From the very first chapter of her master piece, Rita Joseph has continue to make a very strong case for an all-inclusive definition for the term "children" as contained in the foundational human rights document, the Universal Declaration of human Right (UDHR) 1948 as well as every other subsequent United Nation's human rights texts. Rita Joseph, in her book, also made overwhelming explanations of all regional treaties in Europe, Latin America and Africa, while maintaining that the "children at the risk of abortion" and "every child before birth" are vulnerable "group" or "set" who deserves very special protection. She have continuously displayed concerted efforts at explaining that the unborn children possesses the right to life.<sup>21</sup> This assertions by Joseph, it must be noted is 100% taken by this researcher, who agreed in totality that the unborn children, do has a right to life.<sup>22</sup>

In their comprehensive work, Marcelo Shiguero Motoki et al, found out that amongst students in the faculty of medicine at the University of Sau Paulo, there is every likelihood that fresh students in the faculty, as against senior students within the same faculty, are more likely to embrace the right to life of the unborn child over that of its mother.<sup>23</sup> This present way of thinking, which is being accepted in several parts of the world today, can seen in Ireland.<sup>24</sup>

By a referendum, the people of Ireland, through the 8<sup>th</sup> Amendment to the Ireland Constitution recognizes foetal right to life. Fionade Londras, in her book, applauded this super action by the government of Ireland.<sup>25</sup> Ever

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<sup>21</sup>Susan Yoshihara, 'Book Review: Human Rights and the Unborn Child by Rita Joseph' [2011] THE NAT. CATH. BIOETHICS QUTLY. 599.

<sup>22</sup> Ganiat M. Olatokun & Rusniah Ahmad, 'Fundamental Principles of International Human Right Law- Basis for the Right to Life of the Unborn Child' (2014) 5 UUM J. LEGAL STD. 143.

<sup>23</sup> Marcelo Shiguero Yosikawa Motoki, Fabio Roberto Cabar & Rossana Pulcineli Vieira Francisco, 'Mother's Freedom of Choice and the Right of an Unborn Child: A Comparison between the views of the freshman and Senior Medical School Students' (2016) 71 CLINICS (SAO PAULO) 570.

<sup>24</sup> Ireland is the first country in the whole wide world that accorded constitutional right to life to the unborn child.

<sup>25</sup> Fionade Londras, 'Constitutionalizing Fetal Rights: A Salutary Tale from Ireland' (2015) 22 MICH. J. GENDER & L. 243.

since the government of Ireland carried out this super action, foetal rights as contained in the constitution and legislations have become a basic tool in the hands of anti-abortion campaigners. Interestingly, several attempts have also been recorded in order to create Foetal Person hood Laws in some parts of the United States. It is no longer news that there also exists a concerted effort at constitutionalizing foetal rights in Wisconsin in 2013. All these actions have proved beyond reasonable doubt that the unborn children, indeed possesses the right to life.<sup>26</sup>

To say that the unborn children are vested with the right to life cannot be far from the truth. This is so because, the person hood of the unborn children have been provided for under section 4(1) of the American Convention on Human Right. It was established in the said Convention that life shall be protected "in general, from the very moment of conception". In spite of the fact that Alvaro Paul, another notable scholar, took his precious time to highlight the different interpretations that might be accorded to this section, he also made an overall conclusion asserting that the unborn children are vested with the right to life. <sup>27</sup>

The Convention on the Right of the Child, which came into operation on the 2<sup>nd</sup> September, 1990, also indicated that every child possesses a right to life and survival, a right to nationality, a right to identity, a right to be heard, a right to freedom of thought, conscience and religion and also, a right to health. Although the Convention is quiet on the actual age at which childhood commences, Article 1 of the same Convention which gives a definition of a child, permitted several interpretations at which childhood might be said to begin. One of such interpretations is that childhood might start at fertilization, at conception, at birth and even at some other points between conception and birth.<sup>28</sup> This researcher has align herself with the interpretation suggesting that childhood commences at conception, or even at fertilization, which both conferred on the unborn children the right to life.

To showcase that the unborn children does possesses a right to life, one might have to refer to the great request for the protection of the unborn victims which have become visible both at the state and federal levels. Presently, in the United States of America, well over 20 states recognized some forms of criminal responsibilities and liabilities for any harm caused to the unborn children.<sup>29</sup> This have become a great and welcome pointer, suggesting that personhood status is gradually becoming being acceptable to the unborn children. This is an overwhelming situation, because, if allowed to prosper, it, sure, has every tendencies to make the right to life for the unborn children to become an acceptable norm worldwide.

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<sup>26</sup>"Ibid'.

<sup>27</sup> Ivaro Paul, 'Controversial Conceptions: The unborn and the American Convention on Human Rights' (2012) 9 LOYOLA. UNIV. CHI. INT'L L REV. 209.

<sup>28</sup> Abby F. Janoff, 'Rights of the Pregnant Child Vs Rights of the Unborn Under the Convention on the Right of the Child' (2004) 22 BOSTON UNIV. INT'L L. J. 163.

<sup>29</sup> Michael Holzapfel, 'The Right to Live, The Right to Choose and The Unborn Victims of Violent Act' (2002)18 J. CONTEM HEALTH L. & P'LICY 431.

In making an attempt at reviewing some literatures relating to the right to life of the unborn children, this researcher have been able to give an exposition that everyone is possessed of the right to life, whether born or unborn. It was brought to lime light that, it is only when the unborn children are given the chance to develop in utero, that they can be born alive hail and healthy, thereby possessing the right to life.

#### **4. Guaranteed Health Regime for Nation-Building based on Women's Human Right to Choose and the Right to Life for yet to be born Children**

When we talk of human right to health, we are saying in essence that, each and every one of us possess every right to the highest attainable healthy standards of physical as well as mental health that encompasses the link to every medical services assistance, unique hygiene, adequate nutrition, honorable housing, healthy labour conditions and a very spic-and-span environment.<sup>30</sup>

These human health rights can be seen to have developed rapidly under our International laws, and its normative clarifications have very significant implications, both conceptual and practical for our health policy. The very first idea of a right to health under our International Laws was found under the Universal Declaration of Human Right (UDHR) 1948.

Art. 25 UDHR provided that, "Everyone has the right to a standard of living adequate for the health and well being of himself and his family including food, clothing, housing and medical care and necessary social services".

Based on this provision cited above therefore, it can be said that, women's right to choose to reproduce, as well as the right to life for the yet to be born children can fit properly as human right to health, bearing in mind that all medical services should be concentrated towards the realization and achievement of these rights. The best medical service and care available in order for women to realize their right to choose to reproduce is for State Parties to the CEDAW to comply with the provisions as contained under Article 12(1) of the Convention.

Once the State parties are prepared and able to comply with the provisions above, the right to life for the unborn children is as good as becoming automatic. This is because, women will have the opportunity and right to decide freely and responsibly, without any coercion whatsoever, on the number and spacing of the children they are willing and capable of having through the means of family planning and never, abortion. The use of contraceptive, as an adequate form of family planning have a wider social as well as economic benefit, but its known and

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<sup>30</sup>Alicia Ely Yamin, 'The Right to Health under International Law and its Relevance to the United States' (2005) 95 AM. J. PUBLIC HEALTH 1156.

immediate purpose is to do away with unintended pregnancies.<sup>31</sup> The use of different family planning methods have been acclaimed to be the actual goal for preventing unwanted pregnancies.<sup>32</sup>

Thus, human right have been noted to be an integral part of nation-building process. Nation building, on the other hand, have many important components. First and foremost, it is all about building a formidable political entity which align itself to a particular territory, according to some generally acceptable rules, norms and principles, as well as a common citizenship. Most importantly however, nation-building represents the erecting of a common sense of purpose, a common destiny, and a collective understanding of togetherness.<sup>33</sup> In sum, nation-building is all about the social responsibility of caring for one another.

Human right has the capabilities of building a nation by creating security. In addition, human right can be used to create a sense of belonging to a nation. Human right can also serve as a useful tool to bring about socioeconomic opportunities for all people living within the nation.<sup>34</sup> It can thus be imagined how secured a woman would be within a nation if she is guaranteed a human right to choose to reproduce healthy children.<sup>35</sup> This woman consequently feels a sense of belonging. She becomes ever ready to contribute to the socioeconomic development of the nation within which she finds herself.

The physical and mental health of a nation could be of particular importance in order to maintain peace and security. Any human right design which seeks to provide a comprehensive protection for human right to health is very crucial to achieving this. The immediate provision of an unhindered pathway to health care in post-conflict nations of the world will assist in preventing the comeback of any civil unrest. Such unhindered access must include, but not limited to emergency as well as routine and constant medical treatment,<sup>36</sup> like that of family planning, as well as immunization programs for all children when born alive.

## 5. Recommendation and Conclusion

The very idea of the right to health is a form of human right which implies that every citizen of Nigeria should expect the Nigerian government to provide the highest feasible standards of bodily and mental health. These can be guaranteed if Nigerian women are opportune to exercise their

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<sup>31</sup> Robert E. Black, Ramanan Laxminarayan, Marleen Temmerman and Neff Walker (eds), *Reproduction, Maternal, New-born and Child Health* vol 2 (3<sup>rd</sup> ed. Disease Control Priorities, The World Bank 2016).

<sup>32</sup> Li Liu & others Three Methods of Estimating Births averted nationally by Contraception' (2008) 62 POPULATION STD. CMB. 191.

<sup>33</sup> Prof Ibrahim Gambari, 'The Challenges of Nation Building: The Case of Nigeria' MAF. <[www.mafng.org](http://www.mafng.org)> accessed 3 Feb 2022

<sup>34</sup> Salma Yusuf & Jennifer Woodham, *Role of Human Rights in Peace Building* (Institute of Human Right, 2012). <[www.internationallawobserver.eu/.../](http://www.internationallawobserver.eu/.../)> accessed 3 Feb 2022

<sup>35</sup> 'Ibid'

<sup>36</sup> 'Ibid'

human right to choose to reproduce as contained in the CEDAW's reproductive right to choose. The women's right to choose to reproduce as portrayed under the CEDAW will automatically clothe unborn children with the human right to be born alive. It is hereby recommended that the government of Nigeria should consider strongly, the documentation as well as implementation of the CEDAW.

Furthermore, the legislative houses in Nigeria must attach a health perspective to any policy involving women's reproductive right in Nigeria. By so doing, women's health, and by extension, those of their off springs will be given priority.

Whenever right perspective is attached to health, it automatically transforms developmental discussions and suggestions, so that the right to health approach to women's issues and the unborn children's maters, will no longer be seen as charity or benevolence issues. Rather, it will assume the status of an entitlement for both women and children by virtue of their being human beings. Consequently, therefore, being human has created many opportunities for women, especially those of being involved in the family planning discussions, which has become an important aspect of securing an ever lasting peace, noted identity, valued citizenship and a formidable unification of a people within a particular nation.

# **AI in Medicine & Healthcare Sector: Analyzing the Implications under Medical Negligence Laws**

**\*Ms. Gunjan Arora**

## **ABSTRACT**

Artificial Intelligence is indeed the future of mankind, replacing manpower with machine power and human intelligence with Artificial Intelligence. The ability of a nation's Healthcare sector to provide medical assistance is a determining aspect of its growth and prosperity, as a country's economic development is directly proportional to its capacity building in terms of its population's good health and well-being. Hence, while we are determining the involvement of AI in the medicine and healthcare sector, we must also determine the consequences or fallouts of resorting to using AI for treating humans. The very first aspect of using AI in the health sector is to determine the copyright and patent right that may be attributable to an AI along with the liability clause. Another question is whether or not Tort of Medical Negligence is attributable to AI? If yes, what shall be the nature of liability? Whether AI may be treated as a legal person, if the liability is fixed? Whether it is the AI or the creator of AI, who shall be held responsible? Seeking answers to these questions becomes all the more relevant in the context of the Medical Negligence jurisprudences that come from the Bolam and Bolitho tests. These are a few questions that need to be understood and determined, before we step into the business of engaging the expertise of AI for treating medical conditions of humans. This paper shall seek to understand the nature of AI related medical treatments resorted to by different countries and the prospects for future development. It shall also discuss the legal implications that may arise under such circumstances and analyze the advantages and disadvantages of investing in AI in so far as the medical and healthcare sector is concerned. A doctrinal research shall be undertaken to analyze and critically evaluate the prospects of bringing AI into the healthcare sector. The research shall prove relevant in terms of the policy decisions and jurisprudential basis of fixing the liability in such circumstances.

## **1. Introduction**

Rights and liability are the two tangents of the individual liberty that we as humans can exercise as members of the society and as subjects of the law of the land. Law grants the rights and liberties of every individual and is backed by sanctions, in cases where exercise of rights exceeds to violate the liberty of the other person. This is how the law creates a balance

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in the society and regulates the rights by imposing liabilities for the wrongs committed against others. The principles of liability emerge from this exercise of rights and liberties on one hand and violation of the rights of others on the other.

The common law principles of liability which are designated under the umbrella term of Law of Torts form part of the civil wrongs which are committed by persons against others, to whom they owe a duty of care, imposed by law. Law of Torts brings under its ambit various forms of civil wrongs including Negligence. Broadly speaking, Negligence is defined as a breach of duty on part of one person, against another by failing to comply with the duty of care to preserve, protect and guard against the exercise of rights by such another person. Negligence may include both recklessness and carelessness irrespective of the existence of the element of intention. A reckless commission or omission involves an element of ignorance of another person's right and one's own duty of care towards such other person. On the other hand, a careless commission or omission of duty involves lack of due diligence and evaluation of the ramifications that may follow owing to such breach. Hence, when damage is caused to the other party as a consequence of negligent act, liability entails.

The measurement of liability depends on the various principles of liability in the Law of Torts. These include: No-Fault Liability & Fault Liability. In the case of No-Fault Liability, both vicarious and strict/absolute, it is the act of breach that matters, irrespective of the intention to cause harm or knowledge of the existence of the right of the other party. This is because, it is assumed that the imputed act or omission violates the right of the other party and the nature of the act is itself wrong and not in conformity with the duty imposed by the law. Based on the following premise, the present paper seeks to understand the concept of tortious and criminal liability for cases of acts of negligence committed in the Medical industry in general and in the context of Artificial Intelligence driven future in particular.

This article is divided into two parts. The first part deals with the concept of Artificial Intelligence and its usage in the Medicine and Healthcare sector. The second part of the article discusses the concept of Professional and Medical Negligence with the help of the jurisprudential narration on liability of Doctors and Medical practitioners in cases of Medical negligence is determined. This part discusses the precedents that have been yet followed and the overall concept of medical negligence. It delves into various approaches under medical law and jurisprudence, to understand how and why informed consent plays a crucial role in terminating the liability of a doctor for a medical treatment he chooses to administer upon the patient. In the context of different approaches to understand consent under medical jurisprudence, it draws an analogy to determine the nature and extent of liability, in cases where there is an AI being used in the medical and healthcare sector.

## 2. Artificial Intelligence in Medicine and Healthcare:

R. Kurzweil has defined artificial intelligence as “the science of making computers do things that require intelligence when done by humans”.<sup>1</sup> AI is predominantly a computer program or a computer administered robot which is capable of undertaking actions that generally involve use of reason and intelligence.<sup>2</sup> Cambridge Dictionary defines artificial intelligence as “the study of how to produce machines that have some of the qualities that the human mind has, such as the ability to understand language, recognize pictures, solve problems, and learn from experience”.<sup>3</sup> Recently Artificial Intelligence has also come to be seen as a clone of the human intelligence itself- both imitating and intimidating.<sup>4</sup> A computer program has been made technologically so advanced that it is capable of generating original and novel creative works without any external human intervention. The algorithmic data configured in a computer programs enables AI to help translate language, recognise speech and even act upon the digital directions- all of these multiple tasks at the same time.

However, the difference is that the human mind may at one point in time stop working, however, an AI has the capacity to undertake an uncountable calculation and decision making process for an infinite time period. An AI has two major aspects: The first is the software aspect of an AI and the second is where the AI software systems develop by way of learning from experience. The experiential learning is done using the information that is fed into the system software in different formats.<sup>5</sup> AI systems are bound to exhibit certain drives which shall be a part of any such AI system unless explicitly counteracted. These include- the drive for self-improvisation and self protection, exhibiting rational behaviors and preserving their utility functions, acquisition of resources and their maximum utilization efficiently.<sup>6</sup>

Creativity in the present times is not only attributable to humans. In the present times, self-driven cars, computer programs creating photos from portraits, creative machines and learning algorithms have changed the future aspects of employment of humans for every form of creative work irrespective of whether it involves use of skill or knowledge. One such form of creative machine is Artificial intelligence. It's an artificial human

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<sup>1</sup> Mizuki Hashiguchi, The Global Artificial Intelligence Revolution Challenges Patent Eligibility Laws, 13 J. BUS. & TECH. L. 1, 36 (2017).

<sup>2</sup> B. J Copeland, Artificial Intelligence, ENCYCLOPEDIA BRITANNICA Available at <https://www.britannica.com/technology/artificial-intelligence>

<sup>3</sup> Cambridge Dictionary Available at <https://dictionary.cambridge.org/dictionary/english/artificial-intelligence>

<sup>4</sup> Joost N. Kok et. al, *Artificial Intelligence- Definition, Trends, Techniques and Cases*, ENCYCLOPEDIA OF LIFE SUPPORT SYSTEMS (Available at <http://www.eolss.net/sample-chapters/c15/e6-44.pdf>)

<sup>5</sup> *Artificial intelligence and privacy*, The Norwegian Data Protection Authority Report, January 2018

<sup>6</sup> Stephen M. OMOHUNDRO, *The Basic AI Drives*, Conference Proceedings on Artificial general intelligence, 2008 (available at- <https://dl.acm.org/doi/10.5555/1566174.1566226>)

who can imitate and mimic the configuration of human neural networks by the use of computer programming algorithms that are fed into such machines by a human himself. An AI can work with or without human intervention and is also capable of creating new works of art, thereby replacing or substituting humans who were until now credited for creativity and innovation. In Medicine and Healthcare an example of AI technology is GlaxoSmithKline's deal with the British Biotech Company Exscientia, to use its deep learning technology to produce life saving drugs.<sup>7</sup> The AI of Exscientia helps in analysing and evaluating the nature of molecules thereby determining the extent of the benefits which a drug may yield.<sup>8</sup>

The Medicine & Healthcare Industry has always been driven by machine learning and the decision making process. Every medical instrument, including the Pulse Oximeter, ECG machine, Pacemaker and even the Blood sugar machine or the Blood pressure measuring machine, is an AI as the very purpose of these devices is to simplify the measurements and calculation, which the human mind may not be able to complete with precision and time boundations. The problem lies with the interpretation that has been assigned to AI. Any artificial intelligence is a computer programming and result of decision making process by an industrial device which works without any internal human assistance or intervention.

Healthcare industries around the world are faced with four important achievable objectives: improve health of the population, improve patients' experience of healthcare, enhance caregiver experience and reduce the rising cost of care. All of these objectives are believed to be fulfilled by augmenting technology driven by AI in assisting the healthcare industries to provide better health and medicinal support to its population.<sup>9</sup> Currently there are two forms of AI driven Medical technology which is found in the medicine and healthcare sector. Another AI driven medical process is Clinical Decision Making and Imaging Analysis.<sup>10</sup> Clinical decision support tools helps in deciding method of treatment, types of medication and gauges the mental health of the patient. Imaging Analysis AI tools include use of CT scans, X-rays, & MRIs for an internal examination of the human body. In fact with COVID-19, there were several AI driven technology based diagnostic equipments for testing and

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<sup>7</sup> Ben Hirschler, *Big Pharma Turns to AI to Speed Drug Discovery*, GSK Signs Deal, REUTERS (Available at <https://www.reuters.com/article/us-pharmaceuticals-ai-gsk-idUSKBN19N003>)

<sup>8</sup> Ben Hirschler, *Big Pharma Turns to AI to Speed Drug Discovery*, GSK Signs Deal, REUTERS (Available at- <https://www.reuters.com/article/us-pharmaceuticals-ai-gsk-idUSKBN19N003>)

<sup>9</sup> Junaid Bajwa, et al., *Artificial intelligence in healthcare: Transforming the Practice of Medicine*, (available at - DOI 10.7861/fhj.2021-0095)

<sup>10</sup> IBM Report on Artificial Intelligence and Medicine, 2020, (available at- <https://www.ibm.com/topics/artificial-intelligence-medicine#:~:text=Artificial%20intelligence%20in%20medicine%20is%20the%20use%20of,q> uickly%20becoming%20an%20integral%20part%20of%20modern%20healthcare)

screening of COVID positive patients. AI is also widely used for clinical trials and output analysis by auto-updation of relevant clinical trial findings and drug viability for future usage. This was recently adopted by two IBM Watson Health clients.<sup>11</sup> AI driven wheelchairs and robotic nurses are further supporting the healthcare sector to provide easy and accessible medical benefits to the public.<sup>12</sup>

Robotics surgery is another example of AI driven medical invasion of the human body, with minimum human invasion during the process. This is an automated robot controlled surgery, that allows a doctor to perform even the most complex procedures with utmost precision, flexibility and control, than the conventional techniques. A common form of clinical robotic surgery involves a camera and mechanical arms which has surgical instruments attached to it. The surgeon is able to control the arms from a computer console that gives him a 3D magnified view of the body part.<sup>13</sup>

### 3. Professional and Medical Negligence: Jurisprudential Aspects

Negligence is understood to mean an actionable wrong which consists of neglecting the use of ordinary care or skill towards any person, as a result of which the latter has suffered injury to his person or property. It is an omission to act upon a duty which a reasonable man is expected adhere. The plaintiff has to prove that such defendant owed a duty of care towards the former and that the breach of such resulted in injury or violation of right of the plaintiff. It is the proof of damage suffered by the plaintiff as a consequence thereof which completes the chain of liability in the case of negligence.

**Black's Law Dictionary** defines negligence per se as “conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid Municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, constitutes.”

In the case of **Glasgow Corporation v. Muir**<sup>14</sup>, Lord Macmilliam observed that “the standard of foresight of the reasonable man is, in one sense, an impersonal test. The reasonable man is presumed to be free both from over apprehension and from overconfidence, but there is a sense in which the standard of care of the reasonable man involves in its

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<sup>11</sup> Mizuki Hashiguchi, *The Global Artificial Intelligence Revolution Challenges Patent Eligibility Laws*, 13 J. BUS. & TECH. L. 1, 36 (2017).

<sup>12</sup> Stresing, D., *Artificial Caregivers Improve on the Real Thing*, in TechNewsWorld. 2003.

<sup>13</sup> [Robotic surgery - Mayo Clinic](https://www.mayoclinic.org/tests-procedures/robotic-surgery/about/pac-20394974) (https://www.mayoclinic.org/tests-procedures/robotic-surgery/about/pac-20394974)

<sup>14</sup> *Glasgow Corp v Muir* [1943] A.C. 448

application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here, there is room for diversity of views. What to one Judge may seem far-fetched may seem to another both natural and probable”.

Hence, whether the defendant owes a duty to the plaintiff or not depends on the extent to which the injury was reasonably foreseeable. Reasonable foreseeability of the injury further endows the defendant with the responsibility to undertake whatever is reasonably possible to prevent that injury. A reckless ignorance of such reasonable duty makes him liable. In order to establish negligence fact of foreseeability of injury is not enough. There must be a reasonable likelihood of the causation of such injury and a duty to guard against all probabilities rather than bare minimum possibilities of its causation.

A person is designated as a professional when has obtained knowledge or skill in a specific area and pursues it while delivering services to the society. There is an onus of responsibility which is attached with a professional person who deals with people from the society while he is serving them in consideration of the skill he has obtained. Professional negligence is an unintentional action that occurs when a professional person performs or fails to perform an action that another reasonable professional person would or would not have committed in similar circumstances. An act of negligence committed by a person while he is dealing with other persons in a professional space amounts to Professional Negligence. Professional Negligence may be understood to mean an absence of reasonable care or skill or willful negligence on the part of the medical practitioner in the treatment of the patient whereby the life or health of the patient is endangered.

***Indian Medical Association vs. V.P. Shanta***<sup>15</sup> the Court held that occupations which are regarded as professions have four main characteristics, they are:

- a. The specialized nature of the work which is skilled and a substantial part is mental than manual;
- b. commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;
- c. professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics;
- d. Medicine is a profession and an act of negligence committed by a medical practitioner or hospital or its staff shall amount to medical negligence.

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<sup>15</sup> *Indian Medical Association vs. V.P. Shanta* 1995 SCC (6) 651

In the case of **Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr.**<sup>16</sup>, **AIR and A.S.Mittal v. State of U.P., AIR 1989 SC 1570**<sup>17</sup>, it was laid down that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are:

- (a) duty of care in deciding whether to undertake the case,
- (b) duty of care in deciding what treatment to give, and
- (c) duty of care in the administration of that treatment.

A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his doctor. In the aforementioned case, the apex court inter alia observed that negligence has many manifestations – it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence, or negligence per se.

In the context of medical law and jurisprudence, in order to affix the liability of the medical practitioner for negligence, it is first important to dilute the possibilities of an act or omission committed by a medical practitioner from the purview of informed consent given by the patient or his family members. Medical law is based on the study of two forms of approaches to justify the nature of the act which a medical practitioner undertakes to do or not to do while he is treating the patients<sup>18</sup>:

- *Consequentialism* judges whether an action is ethically right or wrong by the consequences it produces. A consequentialist will say that an action is right if, all things considered, the consequences are good, but wrong if they are bad. Also called utilitarian where ends justify means.
- *Deontological absolutism* holds that certain things are right or wrong regardless of the consequences. considers duties and obligations and how best they may be met. Outcome may not be sufficient to justify action (ends alone may not justify means).

It is in this context that the concept of informed consent also plays a crucial role, to determine all the possibilities which exude the medical practitioner of any minutest of the liability for the act he is alleged to have

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<sup>16</sup> Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr., AIR 1969 SC 128

<sup>17</sup> A.S.Mittal v. State of U.P., AIR 1989 SC 1570

<sup>18</sup> Sunčica Ivanović, et al., *Medical Law and Ethics*, Acta Medica Medianae, 52(3) 67-72 September 2013

(DOI: [10.5633/amm.2013.0310](https://doi.org/10.5633/amm.2013.0310) <http://dx.doi.org/10.5633/amm.2013.0310>)

committed.<sup>19</sup> Informed consent is essentially an enabling process. A judgment has to be made about what information is relevant and/or significant in enabling a patient to make a reasonable choice that is appropriate for his/her circumstances. Informed consent is patient-specific.

There are two forms of consent: Express Informed consent and Implied informed consent. The former includes obtaining consent from the patient by way of making him sign a consent form. Implied consent on the other hand undertakes to evaluate- what was communicated to the patient and how such communication was made. Under such circumstances it has to be seen whether there was a genuine and possible opportunity given to the patient to tender a valid consent.

There are essentially two views of consent<sup>20</sup>:

- The first is a 'clinician-centered' view, which is a legalistic approach to consent and considers what the clinician should tell a patient about the nature of a procedure and the risks. It is the minimum required to protect the clinician from a charge of bodily intrusion against the patient.
- The second is a 'patient-centered' view, which considers what is necessary to enable the patient to make an informed choice. This is what is referred to in ethics as 'informed consent'.

Consent is also governed by two approaches: Paternalism and Autonomy. Paternalism involves actions which the Doctor may consider doing in the best interests of the patient, irrespective of the latter's consent. Autonomy on the other hand is the right of refusing to undergo a particular treatment by a patient and is based on the principle of bodily inviolability. In **Sidaway v Bethlam Royal Hospital**<sup>21</sup> it was held that "the physician's duty of care is discharged by revealing enough information to enable the patient to make a rational decision, with the extent of disclosure to be based on accepted medical practice".

Further, Informed consent requires that everything is done to ensure that the patient understands:<sup>22</sup>

- I. *The nature of the procedure* – what is to be done and in simple terms how it is to be done.

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<sup>19</sup> Himani Bhakuni, *Informed consent to clinical research in India: A private law remedy*, Medical Law International 2020, Vol. 20(3) 256–283 (available at- DOI: 10.1177/0968533220958185)

<sup>20</sup> Varkey B. , *Principles of Clinical Ethics and Their Application to Practice*, Med Princ Pract 2021;30:17–28 (available at- <https://doi.org/10.1159/000509119>)

<sup>21</sup> Sidaway v. Board of Governors of the Bethlem Royal Hospital [1985] AC 871

<sup>22</sup> Herring Jonathan, Medical Law and Ethics, Oxford University Press (2016)

- II. *The risks involved* (but as above, this is not simply a list of all possible risks). They are the most likely risks and any that the patient themselves might be concerned about in making a decision. If a patient asks about a risk that the clinician has not mentioned, then the clinician should inform the patient about that risk.
- III. *The consequences* – what are the likely outcomes of the procedure and alternatives
- IV. *The alternatives* – this includes information about what the likely outcome would be if the patient chooses not to have the procedure and any other alternative the patient themselves may ask about where relevant.

A valid consent requires the following aspects to be fulfilled<sup>23</sup>:

- I. A patient must have sufficient understanding- mental capacity or competence to make a reasoned and informed decision.
- II. A patient must consent to or refuse the treatment of his own free will, with no duress or undue influence.
- III. A patient must have been given sufficient information about the treatment;
- IV. Consent that is voluntary is different from the defence of *volenti non fit injuria*.

The patient's willingness in accepting the risks is important for different reasons. The law on medical negligence, in one school of thought, relates to injury from medical negligence as "tort of battery" - a form of trespass to the person. In this form, when consent is not proper then tort of battery revives, therefore informed consent is required. The other school of thought derives the action as a species of tort of negligence. When the dispute between doctor and patient is treated as a consumer dispute then "informed consent" assumes importance and supplying appropriate information forms part of "duty of care". In effect, under both schools, if the patient willingly accepted the risks involved with the medical procedure then there was no negligence. However, if the patient was misled into taking the risks then the resulting damage was the result of medical negligence. In other words, the issue of information of risks given to the patient assumed importance.

Under medical jurisprudence of tortious liability of medical practitioners for committing medical negligence and owning the liability for the wrong committed against the life and health of a patient,<sup>24</sup> the

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<sup>23</sup> Claudia Carr, *medical law and Ethics*, Routledge Taylor & Francis Group, 2013 (ISBN 978-0-203-56824-8 (e-book) (print)

<sup>24</sup> K K S R Murthy, *Medical negligence and the law*, Indian Journal of Medical Ethics Vol IV No 3 July-September 2007

courts have relied on a such overt act or omission on the part of the medical practitioner which any other reasonable medical practitioner would not have done under similar or same circumstances, prioritizing the life and health of the patient taking into consideration the risks involved and the damages anticipated. This was laid down in **Bolam v Friern Hospital**<sup>25</sup> which relied on the 'prudent doctor test' in order to minimize the liability of a doctor in cases of breach of duty against the patient. The US Courts of Appeals in **Canterbury v. Spence**<sup>26</sup> laid down the 'reasonable person standard', also called the Canterbury principle, which mandated the doctor to disclose all 'material risks' to a patient to indicate that the consent was 'informed'. The US court held that "true consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible". The rule laid down in this case confirms the proposition taken in criminal law and proposes that surgery without proper consent results in battery. In **Maynard v. West Midlands Regional Health Authority**,<sup>27</sup> it was maintained that the failure to exercise the ordinary skill by a doctor in the appropriate specialty, if he be a specialist, is necessary".

Thereafter in **Bolitho v. City Hospital & Hackney Health Authority**<sup>28</sup> the courts were entitled to disregard opinion of a responsible body of medically sound professionals if they were incapable of withstanding logical & reasonable analysis.

With **Chester v. Afshar**,<sup>29</sup> the principles of liability for cases of medical negligence were reformed and it was established that once the duty to inform the patient was in fact breached, it is necessary to give a remedy to the patient. The road to establishing the principle of "implied causation" in the cases of negligence by a doctor came to be established.

With **Montgomery v. Lanarkshire Health Board**,<sup>30</sup> the principles of liability determining a case of medical negligence were liberalised. It was held that "*a patient is entitled to take into account her own values, her own assessment of the comparative merits of giving birth in the "natural" and traditional way and of giving birth by caesarean section, whatever medical opinion may say, alongside the medical evaluation of the risks to herself and her baby. The issue is not whether enough information was given to ensure consent to the procedure, but whether there was enough information*

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<sup>25</sup> Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

<sup>26</sup> Canterbury v. Spence (464 F.2d. 772, 782 D.C. Cir. 1972)

<sup>27</sup> Maynard v. West Midlands Regional Health Authority [1985] 1 All ER 635

<sup>28</sup> Bolitho v. City and Hackney Health Authority [1996] 4 All ER 771

<sup>29</sup> Chester v Afshar [2004] UKHL 41

<sup>30</sup> Montgomery v Lanarkshire Health Board [2015] UKSC 11

*given so that the doctor was not acting negligently and giving due protection to the patient's right of autonomy”.*

**Hii Chii Kok v. Ooi Peng Jin London Lucien and Anr.**<sup>31</sup>, held that the question to be evaluated is whether it was incumbent on the doctor, applying the Bolam-Bolitho test, to gain information from the patient by conducting an appropriate test. Such a question therefore, falls within the purview of the Bolam-Bolitho test rather than an informed consent issue. Hence the principles of liability still confirm the aspect of an actual act committed by the doctor which may be considered as unreasonable by persons of the same vocation under similar or identical medical emergencies.

As far as Indian is concerned, similar principles of determining the action on the part of a Doctor is a requirement under the law of torts as developed from time to time by the Supreme Court and the High Courts in India.<sup>32</sup> In **Spring Meadows Hospital and another v. Harjol Ahluwalia**<sup>33</sup> it was held that an AI in case of medical negligence shall be only held responsible as an agent of the Hospital and the absolute liability for the negligence shall be borne by the Hospital or doctor incharge.

#### 4. The Answer to the Question of Liability

In all the cases mentioned above dealing with the interface of AI with copyrights, patents and medical negligence, the pivotal question to be determined is: if such AI is given a certain right, is it capable enough to undertake the liability attached to the right granted? The question of liability goes hand in hand with the rights that are granted to any person. A right is always followed by a liability clause. However, liability is something that can only be fulfilled by a person, who can be put at a responsible or answerable stature. **United States v. Athlone Indus Inc.** is a notable judgement on incapacity of robots to be sued. An AI is incapable of owning a legal personality and can merely be considered a or a service.<sup>34</sup> Hence, in all probability, liability can be shifted upon the creator/programmer of such an AI who can be held liable under the clauses of ‘product/manufacture liability’ or for providing deficit services.

However, with a machine such designation of a position where it may be held answerable is uncertain. Even if we annotate an AI with the personality of a Legal person, the execution of liability by a machine is highly impossible. Unless, the computer programming contains a configuration where the machine is made to exhibit its answerability and responsibility by undertaking to fulfill the liabilities affixed. This, by far, seems impossible and a far cry considering the kind of the disruptive technology that AI has as a matter of its innate programming. In fact it is

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<sup>31</sup> Hii Chii Kok v Ooi Peng Jin London Lucien and another [2017] SGCA 38.

<sup>32</sup> Jacob Mathew v State of Punjab (Appeal (crl.) 144-145 of 2004)

<sup>33</sup> M/s Spring Meadows Hospital and another v Harjol Ahluwalia (CIVIL APPEAL NO. 7858 OF 1997)

<sup>34</sup> *United States v. Athlone Indus Inc.* 746 F. 2d 977.

very common and obvious for an AI to make a mistake or act against the programming fed into it in case there is a technical glitch motivated by circuit layout positioning or computer programming functioning. An AI may become disruptive and destroy its surroundings without being guilty of the way it has reacted to certain circumstances or problems. This is also because an AI is devoid of any Emotional Quotient or sensitivity. Further, in order to make policy guidelines to answer the above questions, we may have to refer to what Isaac Newton described about the three laws of robotics in his science fiction books<sup>35</sup>:

1. That a robot should not cause injury to a human being, or cause him to come to harm.
2. That a robot should obey the orders of the human controlling it, except where such orders are in conflict with the Grundnorm.
3. That a robot should protect its own existence as long as such protection does not conflict with the Law of the Land or laws regulating its own conduct.

Considering the above facts, if personhood is accorded on an AI and if such AI is involved in providing diagnostic and therapeutic assistance to humans, the next question that arises is whether such AI may also be held liable under the suspicion of medical negligence? If yes, then whether the principles used for determining the liability of a human medical practitioner shall also apply to an AI enabled medical practitioner? These questions may be answered by understanding application of medical negligence under different circumstances as discussed herewith:

- i. In cases when services of AI are hired, element of mens-rea shall be presumed absent. If there is any medical malpractice that arises, mens-rea for the offence committed shall shift upon the developer of such AI. Criminal liability for manufacturing defect shall lie upon the developer itself and not the medical practitioner. However, if there is an act or omission by the medical practitioner himself in diagnosing the ailment or prescribing the treatment, such that the patient is placed in a vulnerable position, the former shall be brought under the suspicion of medical negligence.
- ii. In cases where the developer did not intend to commit any offence or was unable to foresee the possibility of a case of medical negligence, but due to faulty diagnosis by the AI, patient suffered damages, such misjudgment shall be attributed to the developer of AI. However, when the doctor may be proved to have intentionally or mistakenly altered the diagnostic prescriptive data for the patient, the doctor shall be held liable.

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<sup>35</sup> Cited from, Wu, W., *Isaac Asimov's Robots in Time; Predator*. 1993: Avon Books, New York. 244 In, Keith Sullivan, *Intellectual Property, Communication Etiquette and Artificial Intelligence*

- iii. In cases when AI is an autonomous and independent which operates by placing reliance on its own life experiences and is said to have reasonably sufficient autonomy to choose from alternate options, AI will be solely responsible. This is however, a possibility that is fairly etched in the distant future and may come to be resolved with the changing jurisprudence on the subject.

Presently AI is completely immune from all responsibilities; it is high time for the legislators to make necessary changes in prevailing laws before things go south. For ex. The definition of 'person' can be broadened wide enough to include AI. By granting Legal personality to AI, it can be subjected to legal rights and duties. Just like Sophia, a humanoid which was granted citizenship and legal status by Saudi Arabia. Therefore it will no longer be treated as an agent but as a principle. Alternatively, common enterprise liability can be imposed on all the entities who are involved in use and of the AI system. One benefit of this method is all the entities involved will be extra cautious for safety and equally responsible. Also, there will be no burden of finding the error in AI for the complainant (which would be very difficult in case of Black-box AI). Stringent rules and regulations should also be laid down by government regarding the standard of care which should be complied by all AI units before coming into market.

## **5. Conclusion**

It may be a lifetime opportunity for India to be a driver in regulating legal positions pertaining to AI in the medicine and healthcare domain for national and multinational corporations, considering that we have a National IPR Policy, 2016 already in place, that seeks to invest more and more in research and innovation. With back-up from the vast startup community, India may also have the best opportunity to tackle health related problems with the help of AI. In this quest, the Government has already started various initiatives to pave the way for AI in healthcare. Yet, many hindrances still stand regarding the attribution of liability of AI. This can only be resolved with an extensive regulatory framework which ensures transparency and accountability at the same time which does not obstruct innovation. Having achieved this India will soon have a flourishing AI healthcare ecosystem.

# International and constitution law of Israel: How was Israel formed as modern Nation State

**\*Abhishek Mishra**

## **1. Introduction**

First and foremost, I shall briefly laydown the legal and constitutional history of state of Israel. This is important because of the uniqueness of state of Israel in the world order. In the modern world order Israel does not have organic history. It became a state for the Jewish people who were persecuted all along their history especially in Europe. This persecution became the *raison d'être* for the establishment of Jewish State of Israel in the West Asia whereas majority of forefathers of present-day Israel's lived outside the present day Israel<sup>1</sup>. Since, the State of Israel does not have an organic history of its attaining the statehood, therefore its laws have haphazard growth in the Middle East. Armed conflict has special contribution in the laws of Israel, given that some parts of its territory are occupied territory, which is acknowledged by its Supreme Court and ICJ alike. Before, analyzing the legal architecture that governs extrajudicial killings in Israel

## **2. Zionist Movement and demand for Jewish State**

Let me first explain the meaning of the term Zion and Zionism. Zion has its origin in the Bible and carries various meaning depending on the context in which it is used therein. Zion is English version of Hebrew word Tzion and is mentioned 157 times in Bible. Roberts<sup>2</sup> explain Zion in religious sense as follows:

“There is fairly general agreement among scholars as to the content of Zion tradition. Edzard Rohland, in what remains the basic work on the subject analyses the tradition into the four following mitifs: 1) Zion is the peak of Zaphob, i.e., the highest mountain; 2) the river of paradise flow out of it; 3) God has defeated the assault of the waters of chaos”

Zionism in Oxford dictionary<sup>3</sup> has two meanings, first is “*A movement for (originally) the re-establishment and (now) the development and protection of a Jewish nation in what is now Israel. It was established as a political organization in 1897 under Theodor Herzl, and was later led by*

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<sup>1</sup> See, Chaim Gans, *A Just Zionism: On the Morality of the Jewish State*, NewYork, 2011, p.4. Also see, Ahad, Ha'am, *Nationalism and the Jewish Ethic: Basic Writings of Ahad Ha'am* (ed. Hans Kohn), New York, 1962, p.78. The

<sup>2</sup> See, J.J.M Roberts, 'The Davidic Origin of the Zion Tradition', 92 *Journal of Biblical Literature*, 1972, pp.329-344

<sup>3</sup> See, Oxford Dictionary, online available at <https://en.oxforddictionaries.com/definition/zionism> (last accessed on 17 March, 2018)

*Chaim Weizmann*". The second meaning relates to the practice of some Christian churches in Africa. According to a course offered in University of Washington, Seattle<sup>4</sup>, Zionism is, "most commonly defined as Jewish Nationalism. Named for Mount Zion in Jerusalem, a symbol of the Jewish homeland. Zionism as an idea has existed among the Jewish community since Biblical times. In the book of Genesis, God promised Abraham, *"I will give you unto thee, and to thy seed after thee, the land wherein thou art a stranger, all the land of Canaan, for an everlasting possession; and I will be their God"*<sup>5</sup>. In Jeremiah, it is believed, the Lord promised to the Jews, "I will turn away your captivity and I will gather you from all the nations, and from places whither I have driven you, saith the Lord, and I will bring you again into the place whence I caused you to be carried away captive"<sup>6</sup>. Today, this ancient land mentioned in Genesis encompasses present day Israel and the Palestinian territories, as well as Lebanon and parts of other neighbouring countries. It is not a recent development among Jews to believe that this area is the site of their Promised Land. However, it is within the last century that the mass movement to reclaim this has been undertaken." Further, Zionism, in the words of Chaim Gans<sup>7</sup>, "was one of the several Jewish nationalist ideologies prevalent among European Jews at the end of the nineteenth century...The Zionist movement aspired to realize Jews' interests in the adhering to their culture and in realizing their self-determination in the Land of Israel rather than in places where the Jews were currently residing, or in any other territory without a special significance in the history of the Jewish people"

As seen the cultural nationalism was taking shape in the Jews of Europe and there were many proponents thereof. However, these demands were mainly concerned within the territory where Jews were living. It all changed with a revolutionary idea that became the inflection point in the Jewish movement of cultural nationalism.

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<sup>4</sup> See, Lacey Chastain, the Zionist Movement, [http://courses.washington.edu/disisme/Our Encyclopaedia/Entries/2008/9/14 The Zionist Movement.html](http://courses.washington.edu/disisme/Our%20Encyclopaedia/Entries/2008/9/14/The_Zionist_Movement.html) (last accessed on 14 Feb, 2018)

<sup>5</sup> Genesis 17:8

<sup>6</sup> See, Jeremiah 29:14

<sup>7</sup> See, Chaim Gans, *A Just Zionism: On the Morality of the Jewish State*, New York, 2011, p.4. Gans provide a very vivid description of how the Jewish movement that started with the demand of autonomy at those places where they were living, later changed into Chief proponent of such call were Bund- the Jewish Socialist Party of Lithuania, Poland, and Russia, and Russian Jewish Historian Shimon Dubnow. For this see, Daniel Blatman, *For Our Freedom and Yours: The Jewish Labor Bund in Poland 1939-1949*, London, 2003, p.14, also, Daniel Boltman, 'The Bund: the Myth of Revolution and the Reality of Everyday Life', (ed Israel and Israel Guttman), *The Broken Chain: Polish Jewry through the Ages*, vol.2, Jerusalem, 2001, pp.493-553. Even attempts were made to constitute Jewish Colony in Argentina at the end of the nineteenth century. See, Haim Avni, 'Argentina: "The Promised Land": Baron De Hirsch's Colonization Project in the Argentine Republic, Jerusalem, 1973, p.33. For more and territorialist attempts see, Isak Nachman Steinberg, 'Territorialism: Free Israel and Free Land', in *Struggle for Tomorrow: Modern Political Ideologies of the Jewish People*, (ed. Felix Gross and Basil J. Vliavianos), New York, 1954, p.112-129; Ben Halpern, *The Idea of the Jewish State*, Cambridge, 1969, p. 147-157.

In 1896 a book titled as *Der Judenstaat* (The Jewish State) by Theodor Herzl paved the way for modern day Israel in the land of Ottoman ruled Palestine and fulfillment of the demand of Jewish people's cultural self-determination to have a state. Thus, the credit for providing steam to movement of land for Jewish people goes to Theodor Herzl. His book, in German language, is considered as pioneer work that started in 1896 and materialized on May 14, 1948 when Israel became a state for Jewish people. It, therefore, would be injustice not to quote some of the writings of the Theodor Herzl from *The Jewish State*.

Theodor Herzl is heralded as the visionary of Jewish state. Soon after his book was published, it was followed by a convention of the First World Zionist Congress<sup>8</sup> in Basel, Switzerland on 29 August, 1897. The Convention was the symbolic parliament<sup>9</sup> for hitherto nascent Zionist movement. The conference lasted for three days and as many as twenty or more speeches were delivered. The conference ended with a vote to form a Zionist Organisation with Herzl as its president. Zionist Organization so established set its goal of Zionism<sup>10</sup> as seen above and it is popularly known as Basel Program<sup>11</sup>. The World Zionist Organisation is an active body today and has recognition of Knesset of Israel, and has adopted a new program for itself, which is termed as Jerusalem Program<sup>12</sup> as the continuation of the First Zionist Congress<sup>13</sup>. Its last

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<sup>8</sup> The first Zionist Congress took place in 1897 and is held till date, however, the frequency for the same has changed but the institution has survived. The Congress was held yearly from 1897 to 1901. Post 1901 it was held biennially, i.e. once in every two years from 1903 to 1939. After the establishment of Israel it meets every five-year as decided by the Council of World Zionist Organization. See, Art.13, Constitution of the World Zionist Organization And the Regulation for Its Implementation, Online available at <http://www.wzo.org.il/files/huka/huka2017english.pdf> (last accessed on 14 September, 2017). For full list of Zionist Congress please visit <https://www.jewishvirtuallibrary.org/first-to-twelfth-zionist-congress-1897-1921> (last accessed on 18 September 2018).

<sup>9</sup> See, Ronald L. Eisenberg, *Dictionary of Jewish Terms: A Guide to the Language of Judaism*, Maryland, 2008, p.470

<sup>10</sup> See, Chaim Gans, *A Just Zionism: On the Morality of the Jewish State*, New York, 2011, p.3. The Zionist program is also defined by the Constitution of the World Zionist Organization And the Regulation for Its Implementation. S.1 of this constitution defines, the Zionist Program was defined by the First Zionist Congress in Basle as follows: "The aim of Zionism is to create for the Jewish people a home in Eretz Israel secured by public law."

<sup>11</sup> Basel Program had following objective; Zionism aims at establishing for the Jewish people a legally assured home in *Eretz Yisrael*. To achieve this purpose, the following means shall be employed: Promoting the settlement of Jewish farmers, artisans, and tradesmen in Palestine.; Organizing and uniting the whole of Jewry through effective local and international means in accordance with the laws of each country. Strengthening of the Jewish national sentiment and national consciousness through Israel education with shlichim; Preparatory steps toward obtaining the consent of governments, where necessary, in order to achieve the goals of Zionism.

<sup>12</sup> As per the Knesset (Israel's Parliament) Jerusalem Program recognized the World Zionist Organization at the 23rd Zionist Congress, held in Jerusalem in 1951 for the first time following the establishment of the state, new missions were defined for the Zionist movement. These were known as the "Jerusalem Program," and they promoted the following goals: "Reinforcement of the State of Israel, gathering of the Diaspora in Eretz Yisrael, and guaranteeing the unity of the Jewish people." This new status for the World Zionist Organization within the State of Israel was defined in the World Zionist

reported congregation was in Jerusalem from 17-21 June 2002<sup>14</sup>. The significance of World Zionist Organization can further be gazed from the League of Nations' Palestine Mandate, which in Art.4 constituted a Jewish Agency as a,

"...public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish National home and interests of the Jewish Population in Palestine...The Zionist Organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognized as such agency..."

The Jewish Agency for Eretz Yisrael was established in 1929 to act on behalf of World Zionist Organization in relation to the British Government, the administration of Palestine and the League of Nations. The official aim of the World Zionist Organization was defined in 1942 as the aspiration to establish a "Jewish Community." The Biltmore Program stated that "Eretz Yisrael will be based as a Jewish community, to be integrated into a new democratic world." This was the first official demand of the Zionist movement for a Jewish state to be established in Eretz Yisrael (though the word "State" was not specifically mentioned), long after it was agreed upon between Zionists that their goal is to aspire for an independent sovereign state.

### 3. Theodor Herzl and the Jewish State

Anti-Semitism- hatred for Jewish people- was rampant all across of Europe or at any such places where there was large presence of Jewish people was the *raison d'être* for this landmark book, 'Der Judenstaat' (The Jewish State). The translated version of book is divided into four chapters and is only 47 pages long.

The six parts of books are namely a) Introduction, b) The Jewish Question, c) The Jewish Company, d) Local Groups, d) Society of Jews

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Organization – Jewish Agency (Status) Law-1952, in which the State of Israel recognized the World Zionist Organization and the Jewish Agency as authorized bodies aimed at the development of Israel, its settlement, immigrants' absorption, and the coordination among Israeli institutions which handle these issues." For this see [https://www.knesset.gov.il/lexicon/eng/wzo\\_eng.htm](https://www.knesset.gov.il/lexicon/eng/wzo_eng.htm) (last accessed on 18 September 2018). In 2004 the World Zionist Organization gave a new definition to Jerusalem program The Jerusalem Program, as defined by the Zionist General Council in 2004, is as follows: Zionism, the national liberation movement of the Jewish people, brought about the establishment of the State of Israel, and views a Jewish, Zionist, democratic and secure State of Israel to be the expression of the common responsibility of the Jewish people for its continuity and future. For this see, Art. 2, Section 2 of The Constitution of World Zionist Organization and the Regulations For Its Implementation, as updated on 2015, online available at [http://www.wzo.org.il/congress/files/articles/WZO\\_Constitution\\_march\\_2015.pdf](http://www.wzo.org.il/congress/files/articles/WZO_Constitution_march_2015.pdf) (last accessed on 14 September 2018)

<sup>13</sup> See, Art.2, Section 1, *ibid*

<sup>14</sup> See, Walid Khalidi, 'The Resolutions of the Thirty-Fourth World Zionist Congress, 17-21 June 2002', 32 *Journal of Palestine Studies*, 2002, pp.59-77

and Jewish State and e) Conclusion. Herzl has described Anti-Semitism in following words while dealing with the Jewish question<sup>15</sup>,

"No one can deny the gravity of the situation of the Jews. Wherever they live in perceptible numbers, they are more or less persecuted. Their equality before the law, granted by statute, has become practically a dead letter. They are debarred from filling even moderately high positions, either in the army, or in any public or private capacity. And attempts are made to thrust them out of business also: "Don't buy from Jews!" Attacks in Parliaments, in assemblies, in the press, in the pulpit, in the street, on journeys--for example, their exclusion from certain hotels--even in places of recreation, become daily more numerous. The forms of persecution varying according to the countries and social circles in which they occur. In Russia, imposts are levied on Jewish villages; in Rumania, a few persons are put to death; in Germany, they get a good beating occasionally; in Austria, Anti-Semites exercise terrorism over all public life; in Algeria, there are traveling agitators; in Paris, the Jews are shut out of the so called best social circles and excluded from clubs. Shades of anti-Jewish feeling are innumerable. But this is not to be an attempt to make out a doleful category of Jewish hardships. I do not intend to arouse sympathetic emotions on our behalf."

It is interesting to note that the form of state and government he had in his mind, given the uniqueness of theory that he was presenting for justifying a state for Jewish people from all parts of the world. He postulated,

"One of the great commissions which the Society will have to appoint will be the council of State jurists. These must formulate the best, that is, the best modern constitution possible. I believe that a good constitution should be of moderately elastic nature. In another work I have explained in detail what forms of government I hold to be the best. I think a democratic monarchy and an aristocratic republic are the finest forms of a State, because in them the form of State and the principle of government are opposed to each other, and thus preserve a true balance of power. I am a staunch supporter of monarchical institutions, because these allow of a continuous policy, and represent the interests of a historically famous family born and educated to rule, whose desires are bound up with the preservation of the State. But our history has been too long interrupted for us to attempt direct continuity of ancient constitutional forms, without exposing ourselves to the charge of absurdity.

A democracy without a sovereign's useful counterpoise is extreme in appreciation and condemnation, tends to idle discussion in Parliaments, and produces that objectionable class of men -- professional politicians.

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<sup>15</sup> See, Theodor Herzl, *The Jewish State*, 1896, translated by Sylvie D'Avigdor, p.10. The translated version of the book is available online at <http://www.mideastweb.org/jewishstate.pdf> (last accessed on 27 April, 2018)

Nations are also really not fit for unlimited democracy at present, and will become less and less fitted for it in the future. For a pure democracy presupposes a predominance of simple customs, and our customs become daily more complex with the growth of commerce and increase of culture. "Le ressort d'une democracie est la vertu," said wise Montesquieu. And where is this virtue, that is to say, this political virtue, to be met with? I do not believe in our political virtue; first, because we are no better than the rest of modern humanity; and, secondly, because freedom will make us show our fighting qualities at first. I also hold a settling of questions by the referendum to be an unsatisfactory procedure, because there are no simple political questions which can be answered merely by Yes and No."

Perhaps his dilemma became an insurmountable obstruction in the way for formulation of constitution for Israel, which could never be materialized till date.

#### 4. Constitutional and Legal History of Israel

Israel is a unique nation-state as it is neither the result of colonization by its people nor it is an organic state<sup>16</sup>. Further, present day state of Israel is distinctive because it's a settlement but different from imperial colonialism or settler colonialism. Its one of those rare occasions that has seen settler community outnumbering the indigenous population<sup>17</sup>. The majority of the present inhabitants of State of Israel are from Europe and some other parts of the world who claim to have Jewish lineage or ancestry<sup>18</sup>, Israel is home to forty three percent (43%)

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<sup>16</sup> See, Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe*, New York, 1999, p.3. For a distinction between imperial colonialism and settler colonialism see, Caroline Elkins and Susan Pedersen, *Settler Colonialism: A Concept and its Uses*, in *Settler Colonialism in Twentieth Century: Projects, Practices, Legacies* (eds. Caroline Elkins, Susan Pedersen) , New York, 2005, p.2 online available at <https://books.google.de/books?id=UDFY8hZN0S0C&pg=PA206&dq=organic+state+colony+settlement+state&hl=en&sa=X&ved=0ahUKEwidiu7W3dPeAhUjMewKHSVODU4Q6AEISDA G#v=onepage&q=organic%20state%20colony%20settlement%20state&f=false> (last accessed on 14 Nov, 2017)

<sup>17</sup> Caroline Elkins and Susan Pedersen, *Settler Colonialism: A Concept and its Uses*, in *Settler Colonialism in Twentieth Century: Projects, Practices, Legacies* (eds. Caroline Elkins, Susan Pedersen) , New York, 2005, p.3. It is important here to underscore the various kinds of settler colonialism that has been argued in this chapter of the book. It states, "Even in Australia, notes Patrick Wolfer, settler colonialism cannot be seen as essentially fleeting stage but must be understood as the persistent defining characteristics, even the condition of possibility, of this new world settler society. Indigenous peoples, Wolfe writes, were indeed brutally and even decisively defeated- yet settler themselves were never able to put that defeat behind them, instead reenacting through their land labour and population policies that effort to make the indigenous disappear...A first difference has to do with the size and tenacity of the indigenous population, for while settler communities were sometimes large (over a million in Algeria and in Manchuria), in none of the cases in this book (except Palestine/Israel after 1948) did settler come to constitute a majority of the given territory's population."

<sup>18</sup> On its seventieth birthday (14<sup>th</sup> May) Israel's total population was 8.842 million of which 74.5 percent were Jewish. In other words of the total population 6.589 millions were Jews

of the total Jews around the world. In 1948 the total population of Israel (after its division from Palestine) was 8,06,000 people. Additionally, in 1949 total Jewish population across the entire world was 11.5million and only a miniscule number was living in Israel, i.e. six percent (6%). From six percent of the world Jewry population in 1948 to 45 percent thereof in present time is a gigantic change in the number of Jews living in Israel.<sup>19</sup>

As per Special Committee constituted by UN General Assembly the demography of Palestine till 1946 was A/364/1947, para.12

	<b>Moslems</b>	<b>Jews</b>	<b>Christians</b>	<b>Others</b>	<b>Total</b>
1922	486,177	83,790	71,464	7,617	649,048
1931	493,147	174,606	88,907	10,101	966,761
1941	906,551	474,102	125,413	12,881	1,518,947
1946	1,076,783	608,225	145,063	15,488	1,845,559

Thus, establishment of Jewish state in Israel for people majority of whom were not the residents of the territory is one of the greatest experiments of the world and from all perspective an exceptional event. Thus, its constitutional history is explicable in the context of *Altenueland (old new land)* of Theodor Herzl<sup>20</sup> in which it took place and warrants brief survey.

It is imperative here to underscore that the idea of constitutional society was conceptualized in Europe and it basically presumed existence of a nation for which corporatization of its public power was needed to legitimize the government ruling such people. The constitutional power thus is nothing but its customs, tradition, judicial pronouncements, and other laws promulgated by rulers of the land. The consolidation of such rules led to the legitimization of government, and not the vice versa<sup>21</sup>.

However, the land of Palestine was not the first choice for a home land of Jewish people, the first offer for a separate land of Jewish people came as early as in 1903 by the British Government. At that time British offered East Africa to the Jewish People as their prospective homeland to protect them from their endemic persecution in Europe. This scheme is called as Uganda Scheme. However, this offer witnessed a split in the proponents of Zionist movement and was ultimately rejected by Zionist

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while Arabs were around 1.849 million and constituted 20.9% of the total population according to Central Bureau of Statistics of Israel.

<sup>19</sup> Online available at <https://unispal.un.org/DPA/DPR/unispal.nsf/c17b3a9d4bfb04c985257b28006e4ea6/07175de9fa2de563852568d3006e10f3?OpenDocument> (last accessed on 15 September 2018)

<sup>20</sup> See, Theodor Herzl, *The Dairies of of Theodor Herzl*, ed. Raphael Patai, translated Harry Zohn, New York., 1960, p.1071. Also see, Suzie Navot, *The Constitution of Israel: A Contextual Analysis*, 2007, London, p.1

<sup>21</sup> See, A. V. Dicey, *The Law of the Constitution*, oxford, 1914, pp.202-203, online available at [http://files.libertyfund.org/files/1714/0125\\_Bk.pdf](http://files.libertyfund.org/files/1714/0125_Bk.pdf) (last accessed on 17 April, 2017)

Congress in 1905<sup>22</sup>. The fulfillment of Jewish home in Palestine once again gathered steam with the British declaration of war on Turkey on 5 November 1914. The modern and pragmatic constitutional history of State of Israel commences with the downfall of Ottoman Empire and British take over of Palestine in 1917. Sensing a possible victory over Ottomans, Samuel Herbert<sup>23</sup>, the first Jew to sit in a British Cabinet, presented the British Cabinet with the idea annexation of Palestine by Britain with the aim of *self-government by Jewish immigrants*<sup>24</sup>. The conquest of Palestine was followed by Balfour Declaration of 2<sup>nd</sup> November, 1917 in which British expressed their intent of establishing a Jewish state in the land of Palestine. It is pertinent here to reproduce the entire declaration in toto<sup>25</sup>,

“November 2nd, 1917

Dear Lord Rothschild,

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet.

"His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country." I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation.

Yours sincerely,

Arthur James Balfour”

## 5. The Mandate of League of Nations

This short missive can safely be said to be founding document of present day state of Israel. End of World War I witnessed the creation of League of Nation, an institution to govern international affairs as

<sup>22</sup> See, Monroe, Britain's Moment in the Middle East, 1914-1956, London, 1965, p.26. Also see, John Cooper, The Unexpected Story of Nathaniel Rothschild, New Delhi, 2015, p.40

<sup>23</sup> Samuel Herbert served as High Commissioner of the Mandatory Government of Palestine from 1921 to 1925. He was the first Jew to exercise the authority in the Holy Land since the collapse of Shimon Bar Cochba's revolt against Rome in A.D. 135. Further, he became the first of the seven high commissioners who rules Palestine under the League of Nations mandate between 1920 and 1948, and the only Jew among all the high commissioner's of this period. For this see, Bernard Wasserstein, 'Herbert Samuel and the Palestine Problem', 91 The English Historical Review, 1976, pp.753-775.

<sup>24</sup> See, Samuel Herbert, 'The Future of Palestine', Memorandum to the Cabinet, January 1915, The National Archives of the UK, CAB 37/123/43.

<sup>25</sup> See, Balfour Declaration, 1917. Online available at <https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/balfourdeclaration.pdf> (last accessed on 15 September, 2017).

mandated by Treaty of Versailles, 1919. Art.22, Treaty of Versailles<sup>26</sup> provided for the mandate system of territories, which were incapable of self-governance. Mandate system was applicable to either colonies or to “those territories, which as a consequence of the late war have ceased to be under the sovereignty which formerly governed them...”

The United Kingdom was entrusted, in accordance with Art.22 of League of Nations, with the mandate of Palestine as Mandated territory. The mandate over territory of Palestine was exactly as was envisaged in the Balfour Declaration<sup>27</sup>. The Mandate of Palestine to Britain was delivered on 24 July, 1922. The Mandate referred to Balfour Declaration of 2<sup>nd</sup> November 1917 as original declaration, it read<sup>28</sup>,

“Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2<sup>nd</sup>, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country;”

The Mandate envisaged that British would have the full powers of legislation and administration<sup>29</sup>. It also entrusted the British with creation of such political, administrative and economic conditions as will secure the establishment of the Jewish National Home<sup>30</sup>. The Mandate required the constitution of self-governing institutions and also ensuring that the civil and religious rights of all the inhabitants of Palestine are

<sup>26</sup> See, Art.22, Treaty of Versailles, 1919. Online available at <http://avalon.law.yale.edu/imt/parti.asp>

<sup>27</sup> The Special Committee on Palestine of UN explained the mandate in following terms On 25 April 1920, the Supreme Council of the Allied Powers agreed to assign the Mandate for Palestine to Great Britain on the understanding that the Balfour Declaration<sup>54/</sup> would be put into effect. The draft mandate was confirmed by the Council of the League of Nations on 24 July 1922, and entered into force formally on 29 September 1923. Following its occupation by British troops in 1917-1918, Palestine had been controlled by the Occupied Enemy Territory Administration of the United Kingdom Government. Anticipating the establishment of the Mandate, the United Kingdom Government, as from 1 July 1920, replaced the military with a civilian administration, headed by a High Commissioner ultimately responsible to the Secretary of State for the Colonies in Great Britain. See, A/364/1947

<sup>28</sup> See, The Palestine Mandate, 1922, League of Nations. Online available at [http://avalon.law.yale.edu/20th\\_century/palmanda.asp](http://avalon.law.yale.edu/20th_century/palmanda.asp) (last accessed on 18 September, 2017). Following is the paragraph of the Mandate that agreed to create a Mandate for the Palestine from the erstwhile Turkish Empire (Ottoman Empire), “Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of [Article 22 of the Covenant of the League of Nations](#), to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them...”

<sup>29</sup> See, Art.1, The Palestine Mandate, 1922, League of Nations.

<sup>30</sup> See, Art.2, ibid

safeguarded<sup>31</sup>. As said above most of the Jews for whom national home in Palestine was being carved out from erstwhile Turkish Empire came from outside Palestine, the Mandate ruled that an appropriate Jewish Agency shall be recognized as public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interest of the Jewish population in Palestine.

The most interesting part of the Mandate was that it recognized the Zionist organization as possible public body for advising and cooperating with the Administration of Palestine. The Zionist organization were supposed to take such steps in consultation with British government to secure co-operation of all Jews who are willing to assist in the establishment of the Jewish National home<sup>32</sup>. The Mandate also put the encumbrance of territorial integrity of Palestine on the British Government<sup>33</sup>. The Mandate was also given the power to control the foreign relations of Palestine and right to issue exequaturs to consuls appointed by foreign powers<sup>34</sup>.

The establishment of Mandate under the auspices of British soon started paying dividend to the Jewish people as Palestine witnessed a massive influx of immigrants to Palestine. The immigration also saw a monumental growth of Jewish capital in Palestine. For example, between 1922 and 1944 the country's total population<sup>35</sup> swell from 7,50,000 to approximately 17,00,000, the Jewish population saw a meteoric rise too from 83,000 to about 5,30,000. In twenty years the ten percent of Jewish population of Palestine swelled to 30 percent of the total population of Palestine<sup>36</sup>.

As seen, Art.1 of the Mandate over Palestine gave the legislative authority to the British Mandatory, but it was not an easy task for the British to comprehend and make laws for Palestinian territory. For the simple reason that what Brits encountered as Mandate of Palestine was a legal system, which was completely alien to them. The legislative and administrative mandate was to ensure the smooth transition of Jewish national home for Jewish people from Europe or other parts of the world, but Palestine was filled with laws from the time of Ottoman, which developed from Islamic practices. These laws had seeped into all walks of Palestinian life, such as criminal and civil laws.

Nevertheless, soon after the mandate of Palestine to British, a King's Order in Council in 1922 was issued. If Balfour document was conceptualization of a future constitution of Jewish homeland in Palestine, the document was given flesh and blood by the King's Order in

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<sup>31</sup> *ibid*

<sup>32</sup> *ibid*.

<sup>33</sup> Art.5, *ibid*

<sup>34</sup> Art.12, *ibid*

<sup>35</sup> *supra* at 573

<sup>36</sup> See, Suzie Navot, *The Constitution of Israel: A Contextual Analysis*, 2007, London, p.2.

Council of 1922 and therefore, some scholars have termed it the original and perhaps the only document which is akin to be termed as Constitution of Israel<sup>37</sup>. One must keep in mind till date Israel could not give itself one consolidated constitution, **we shall see the reasons therefor in later part of this chapter.**

## **6. King's Order in Council**

A brief survey of this law promulgated by King of Britain on 10 August 1922 would make it easy for us to establish that why it is termed as first ever constitution for modern state of Israel<sup>38</sup>. The King's Order was named as 'The Palestine Order in Council' (POC), and had VIII parts and two schedules<sup>39</sup>. The power to extend legislative authority for the territory of Palestine sprang from Foreign Jurisdiction Act, 1890<sup>40</sup> and the entrustment of Mandate of Palestine by League of Nations. The Part II established Executive or the Government of Palestine under the designation of High Commissioner and Commander-in-Chief<sup>41</sup>. High Commissioner was granted all the power of executive according to the tenor of any Orders in Council relating to the Government of Palestine<sup>42</sup>. An Executive Council was also constituted for assisting the High Commissioner of the Government of Palestine, the membership of which was to be determined by crown in Britain<sup>43</sup>.

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<sup>37</sup> See, The Special Committee Report, A/364.1947, para 71. It stated, "The constitutional basis of the Government of Palestine established by the mandatory Power is set out in the Palestine orders-in-council, 1922 to 1940."

<sup>38</sup> It shall be pertinent here to quote some of the provisions of POC to make it establish that it was the first constitution of modern day State of Israel. Part I, Preliminary clause, Art.2, the High Commissioner" shall include every person for the time being administering the Government of Palestine

"Public Lands" means all lands in Palestine which are subject to the control of the Government of Palestine by virtue of Treaty, convention, agreement or succession, and all lands which are or shall be acquired for the public service or otherwise.

12 (1) All rights in or in relation to any public lands shall vest in and may be exercised by the High Commissioner for the time being in trust for the Government of Palestine

<sup>39</sup> See, The Palestine Order in Council, 10 August 1922, online available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C7AAE196F41AA055052565F50054E656> (last accessed on 16 September, 2017)

<sup>40</sup> See, Foreign Jurisdiction Act, 1890, 53 & 54 Vict. Ch.37, online available at [http://www.legislation.gov.uk/ukpga/1890/37/pdfs/ukpga\\_18900037\\_en.pdf](http://www.legislation.gov.uk/ukpga/1890/37/pdfs/ukpga_18900037_en.pdf) (last accessed on 17 July, 2018). In its preamble stated that And whereas, by treaty, capitulation, grant, usage, sufferance and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries... (the same passage was mentioned in POC with addition that His Majesty has power and jurisdiction within Palestine by virtue of Art.22, League of Nations.). S.1, Foreign Jurisdiction Act provided that "It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

S.3 stated Every Act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country

<sup>41</sup> See, Art.4, The Palestine Order in Council, 1922

<sup>42</sup> *ibid*.

<sup>43</sup> See, Art.10. *ibid*

Part III of the POC constituted the Legislative Council<sup>44</sup>, and Part IV allowed the application of the certain British Statutes<sup>45</sup>. Part IV of POC constituted judiciary thereof, the Courts were divided into Civil Courts and Criminal Courts. Magistrate Courts constituted by Ottoman's by Ottoman Magistrates Law of 1913 were allowed to function as they did. The provision of appellate court was also inducted in the POC. One of the most important provision of POC was applicable for these courts, Art.46 thereof. Art.46 embraced all the existing law of Ottoman Empire of that time and introduced common law and principles of equity to it along with procedural laws as applied by Justice of Peace of England<sup>46</sup>.

State of Israel later on adopted the system of governance so set up by POC, and the laws that it promulgated till its Mandatory and independence of Israel in 1948<sup>47</sup>. Post independence Israel enacted the Law and Administration Ordinance, which adopted all the laws prevailing in the country at 1948, including British Mandatory Law, as Israeli Law. However, such adoption of laws was not sweeping exception and amendments to them were introduced as required by the nascent state of Israel in 1948<sup>48</sup>. The consequence of introduction of British law to Palestine on post independent Israel was that it inherited a mosaic of various legal systems such Ottoman, Islamic law, French Law, Jewish Law and, of course, English laws.

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<sup>44</sup> Art.17-37, *ibid*.

<sup>45</sup> Art.35, *ibid*.

<sup>46</sup> See, Art.46, *ibid*. It read, "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

<sup>47</sup> See, Sholmo Guberman, 'The Development of the Law in Israel: The First 50 years', published <http://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/development%20of%20the%20law%20in%20israel-%20the%20first%2050%20years.aspx> (last accessed on 17 September 2018)

<sup>48</sup> See, Law and Administration Ordinance, No.1 of 5708-1948, *Official Gazette*, No.2 of the 12th Iyar, 5708 (21st May, 1948). S.11 provided, "The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities." Online available at <http://www.geocities.ws/savepalestinenow/israelaws/fulltext/lawandadministrationord.htm> (last accessed on 17 September 2018)

As said since it was not the land of immigrant Jewish people, the POC also solved that problem as it acquired the land therein. Art.12, POC<sup>49</sup> stated that,

“All rights in or in relation to any public lands shall vest in and may be exercised by the High Commissioner for the time being in trust for the Government of Palestine. All mines and minerals of every kind and description whatsoever being in, under or any land or water...shall vest in the High Commissioner.”

## 7. The United Nations and Declaration of Independence of Israel

With the breaking out of WWII in 1935, the activities of League and World Zionist Organization as Jewish Agency saw a pause till the war was over in 1945. 1945 also witnessed the demise of the system of League of Nations. League of Nations was replaced by its successor UN charter. Chapter XII of the UN Charter replaced the existing mandate system by Trusteeship Council, however, it did contain rule regarding the territories under mandate of League. UN Charter provided<sup>50</sup> that “*The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: a) territories now held under mandate.*” No sooner than on 2<sup>nd</sup> April 1947, the United Kingdom, holder of the mandate for Palestine, requested the Secretary General of the UN that the question of Palestine shall be put on agenda of the next regular session of General Assembly for the purpose of constituting a special committee to prepare a report and action plan for the Palestine question. Accordingly, the first special session of General Assembly was summoned on April 28, 1947 and it was called the First Committee. The First Committee heard the Jewish Agency for Palestine and Arab Higher Committee. The General Assembly adopted the recommendations of the First Committee at the seventy-ninth meeting on 15 May 1947 by a final vote (on the resolution as a whole, after having voted each paragraph) of forty-five to seven, with one abstention. Consequently, a special committee<sup>51</sup> was constituted as requested by the representative of the United Kingdom<sup>52</sup>. From 26 May, 1947 until 31 August 1947, the day of the signing of the report, the Special Committee held sixteen public meetings and thirty-six private meetings<sup>53</sup>.

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<sup>49</sup> See, Art. 12, POC

<sup>50</sup> See, Art.77, UN Charter

<sup>51</sup> Special Committee had eleven members countries namely; Australia, Canada, Czechoslovakia, Guatemala, India, Iran, Netherlands, Peru, Sweden, Uruguay and Yugoslavia

<sup>52</sup> See, Official Records of the Second Session of the General Assembly, Supplement No.11, United Nations Special Committee on Palestine, Report to The General Assembly, Lake Success, New York, 1947, A/364 of 3 September 1947. Online available at <https://unispal.un.org/DPA/DPR/unispal.nsf/c17b3a9d4bfb04c985257b28006e4ea6/07175de9fa2de563852568d3006e10f3?OpenDocument> (last accessed on 15 September 2018)

<sup>53</sup> The special committee was rejected by the Arab Higher Committee, which was given finality by the letter of Mr. Jamal Hussein, vice-chairman of the Arab Higher Committee. Ibid.

## **8. Reports of Special Committee and Immigration to Palestine: The reason for conflict**

The Special Committee so constituted carried out an in-depth analysis of the various factors that were needed to be taken into consideration before the establishment of Jewish home in Palestine post mandate. In its report it very aptly summarize the bone of contention that marred the British Mandate of Palestine and establishment of Jewish State. The conditions of Jews have worsened since the establishment of mandate in Palestine and during WWII. However, the demand of Jewish land in the Palestine was not as easy as it sound, given the presence of Arab population existing on that land for time immemorial. The question of creating a state in all Palestine and then wait for immigration of Jews from across the world was not geographically and ethnically a daunting task to achieve. In the words of Special Committee<sup>54</sup>:

“The Jewish case seeks the establishment of a Jewish State in Palestine, and Jewish immigration into Palestine both before and after the creation of the Jewish State subject only to the limitations imposed by the economic absorptive capacity of that State. In the Jewish case, the issues of the Jewish State and unrestricted immigration are inextricably interwoven. On the one hand, the Jewish State is needed in order to assure a refuge for the Jewish immigrants who are clamoring to come to Palestine from the displaced persons camps and from other places in Europe, North Africa and the Near East, where their present plight is difficult. On the other hand, a Jewish State would have urgent need of Jewish immigrants in order to affect the present great numerical preponderance of Arabs over Jews in Palestine. The Jewish case frankly recognizes the difficulty involved in creating at the present time a Jewish State in all of Palestine in which Jews would, in fact, be only a minority, or in part of Palestine in which, at best, they could immediately have only a slight preponderance. Thus, the Jewish case lays great stress on the right of Jewish immigration, for political as well as humanitarian reasons. Special emphasis is therefore placed on the right of Jews to “return” to Palestine.”

The legal basis of the Jewish claim, of immigration, *inter alia*, was mainly traced in Biblical, Balfour Declaration and Mandate of Palestine by League. The Jewish Agency placed before the Committee that they did understand the existence of Arab majority was a fact when they first proposed the idea of return of Jewish people to Eretz Yisrael<sup>55</sup>. Jewish Agency further argued-before the Special Committee- that many Jews have already built in Palestine from other parts of the world and had faith in Balfour Declaration and Mandate, which will be cheated if this,

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<sup>54</sup> *ibid.* para.127

<sup>55</sup> *Ibid.* para.132

built in is halted<sup>56</sup>. Further, they argued that no time limit was given or suggested for immigration or settlement<sup>57</sup>, and no injustice would be committed to Arab, if a Jewish State were constituted in Palestine, since there was never an Arab government in Palestine<sup>58</sup>. Furthermore, they posit that a Jewish State in Palestine guarantee the legal and political protection of Arab Population if they were to become minority in Palestine as a consequence of uninhibited Jewish immigration<sup>59</sup>.

## **9. Special Committee's appraisal of Jewish case- Recommendation for division of Palestine**

Special Committee found merit in the claim of Jewish Agency on the basis of Mandate of Palestine to Britain and Art.22 of League of Nations. However, it traced inherent contradiction in the Jewish demand of Jewish National Home and self-governing independent institutions in the Palestine. The question of National Jewish Home was intricately conjoined with the issue of Jewish immigration to Palestine<sup>60</sup>. However, it was suggested by UN that-while acknowledging that there was never a question of primacy between the obligation of creating self-governing institution and establishing the Jewish home<sup>61</sup>- the Mandate granted to Britain had its primary obligation to constitute Jewish National Home in

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<sup>56</sup> The committee noted the argument of Jewish Agency and summarized it in following word.

(a)The Jewish immigrants to Palestine, who are said to be merely returning to they home-land, are portrayed as having been primarily responsible for developing the economy of the country, for establishing an infant industry, for cultivating theretofore waste lands, for instituting irrigation schemes and for improving the standard of living of Palestine Arabs as well as Jews.

(b) The immigrant Jews displace no Arabs, but rather develop areas which otherwise would remain undeveloped. Ibid para.133.

<sup>57</sup>Ibid. para.134

<sup>58</sup> Ibid.para.134(a)

<sup>59</sup> Ibid. para.134(b)

<sup>60</sup> See, Art. 6, The Mandate for Palestine, July 24, 1922. It read, "The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency. referred to in Article 4, close settlement by Jews, on the land, including State lands and waste lands not required for public purposes."

Art.7 thereof further provided that, "The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine." Online available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20mandate%20for%20palestine.aspx> (last accessed on 17 September, 2017)

<sup>61</sup> The Special committee observed, "The practical significance of the controversy was that, if the country were to be placed under such political conditions as would secure the development of self-governing institutions, these same conditions would in fact destroy the Jewish National Home. It would appear that, although difficulties were anticipated, when the Mandate was confirmed it was not dearly contemplated that these two obligations would prove mutually incompatible. In practice, however, they proved to be so." See, Official Records of the Second Session of the General Assembly, Supplement No.11, United Nations Special Committee on Palestine, Report to The General Assembly, Lake Success, New York, 1947, A/364 of 3 September 1947, para.137

Palestine, and to that extent the obligation vis-à-vis self governing institution was subordinated to obligation of Jewish National Home.

The UN was also not clear as to the import of all the legal documents that made the case for Jewish National Home including the Mandate by League of Nations<sup>62</sup>. None of these documents used the words 'Commonwealth' or 'State' while claiming the Jewish National Home. It perused the various reports issued by British while observing their duty of Mandatory of Palestine and concluded that 'Jewish State' in Palestine would be the correct interpretation of the term 'Jewish National Home' because the claim of Jews were based on ancient historic connection of Jewish with Palestine and constituted a right for Jewish people to be in Palestine. In the end, majority of the committee members after perusing various proposals regarding the governance of Palestine and Jewish National Home in Palestine recommended that Palestine be partitioned into an Arab territory and Jewish territory, rejecting all other proposals<sup>63</sup>. The partition envisioned was political division with economic integration of both the states. The scheme of partition envisaged the division of Palestine into three parts: an Arab State, a Jewish State and the City of Jerusalem, for a transitory period till the economic and political unification of Palestine takes place. The division of Palestine was to be matured into a Federal government of Palestine that would have three layered governments, a Central Government; and two governments of Jewish and Arab territory of Israel. The Committee further recommended that Jerusalem should be accorded special international status as the capital of Federal State of Palestine.

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<sup>62</sup> *ibid.* para.141

<sup>63</sup> The Committee had the opportunity to hear and analyse various solutions to the settlement of Jews and their constitutional scheme in Palestine. One such model was presented by Anglo-American Committee which proposed, "(a) That "Palestine shall be neither a Jewish State nor an Arab State", but that it should "ultimately become a State which guards the rights and interests of Moslems, Jews, and Christians "alike." (b) That until Arab-Jewish hostility disappears "the Government of Palestine be continued as at present under mandate pending the execution of a Trusteeship Agreement under the United Nations." The British and American officials examined the Anglo-American plan in July, 1946, and their report is called Morrison-Grady Plan. The plan provided that constitutional scheme of Palestine post its Mandate rule should be result it division of Palestine into four semi-autonomous areas including Arab and Jewish province, and for Central Government whose powers were to be exercised initially by the High Commissioner through a nominated Executive Council and, provinces carved out would be exercising only those powers which were expressly conferred upon them. See, Official Records of the Second Session of the General Assembly, Supplement No.11, United Nations Special Committee on Palestine, Report to The General Assembly, Lake Success, New York, 1947, A/364 of 3 September 1947, para. 112. However all these recommendation were rejected and recommendation of Federal State of Palestine was made. Part II, Boundaries. Following was the geographical definition of boundaries. "The proposed Arab State will include Western Galilee, the hill country of Samaria and Judea with the exclusion of the City of Jerusalem, and the coastal plain from Isdud to the Egyptian frontier. The proposed Jewish State will include Eastern Galilee, the Esdraelon plain, most of the coastal plain, and the whole of the Beersheba sub-district, which includes the Negeb"

## **10. Future Government of Palestine and The UNGA resolution: From Mandate to Independence**

The recommendations of the Committee were accepted and adopted by UNGA resolution<sup>64</sup> titled as 'Future Government of Palestine (Res. 181)'. UNGA accordingly requested the UNSC to take necessary measures as provided for in the plan for its implementation. The UNGA resolution contained a detailed political road map for the implementation of the Committee's recommendation. At the outset, the Res.181 ordered the compulsory termination of the Mandate for Palestine by 1 August 1948. It also ordered the progressive withdrawal of Armed Forces of the Mandatory Power from Palestine, which was to be completed by 1 August, 1948. The resolution also ordered the establishment of Special International Regime for the City of Jerusalem, in the words of Res.181,

"Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem, set forth in part III of this plan, shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948. The boundaries of the Arab State, the Jewish State, and the City of Jerusalem shall be as described in parts II and III below."

The resolution provided for measures for the transition period, i.e. the period before which the independent state of Jewish and Arab population is established. For the transition period administration of Palestine was given to the Commission set up UNGA. The Mandatory Power was required to hand over the administration as they complete the withdrawal progressively. The Commission so constituted<sup>65</sup> was to act in conformity with the recommendations of UNGA and under the guidance

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<sup>64</sup> See, A/RES/181 (II), 29 November, 1947. Online available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253> (last visited 23 November, 2018)

<sup>65</sup> See, A/RES/181 (II), 29 November, 1947. Online available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253> (last visited 23 November, 2018)

"A Commission shall be set up consisting of one representative of each of five Member States. The Members represented on the Commission shall be elected by the General Assembly on as broad a basis, geographically and otherwise, as possible.

The administration of Palestine shall, as the mandatory Power withdraws its armed forces, be progressively turned over to the Commission, which shall act in conformity with the recommendations of the General Assembly, under the guidance of the Security Council. The mandatory Power shall to the fullest possible extent coordinate its plans for withdrawal with the plans of the Commission to take over and administer areas which have been evacuated. In the discharge of this administrative responsibility the Commission shall have authority to issue necessary regulations and take other measures as required. The mandatory Power shall not take any action to prevent, obstruct or delay the implementation by the Commission of the measures recommended by the General Assembly."

of UNSC. It was vested with the powers to issue regulations and take all measures required for the administration of the Palestine.

Most importantly, it mandated for the establishment of constituent assembly for each State, i.e. Jewish and Arab State, to draft a democratic constitution for its State. Para.9 of the Res.181 (II) resolved that, *“Provisional Council of Government of each State shall, not later than two months after the withdrawal of the armed forces of the Mandatory Power, hold elections to the Constituent Assembly, which shall be conducted on democratic lines. The election regulations in each State shall be drawn up by the Provisional Council of Government and approved by the Commission ...”*.

### **11. Constituent Assembly of Israel & the Basic Law**

Following the Res.181 (II) Jewish community in Palestine came forward and started the procedure to constitute the governing institutions for the nascent and disputed state. In March 1948, the National Committee and the Jewish Agency for Israel- the governing Zionist organizations in Palestine and abroad respectively- established National Council. The members of the National Council met in Tel Aviv and declared the establishment of the State of Israel<sup>66</sup>. At this meeting, the Council became the Provisional State Council, the highest institution of the new state. The Declaration of the Establishment of the State of Israel was made which would write a constitution in which the permanent governing institutions would be determined<sup>67</sup>:

“WE HEREBY DECLARE that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), and until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the National Council shall act as a Provisional Council of State, and its executive organ ... shall be the Provisional Government of the Jewish State, to be called "Israel".”

An election for the Constituent Assembly of Israel to frame Israel's constitution was held on 25 January 1949. Interestingly, the Provision Council dissolved itself and conferred its law making power on the Constituent Assembly itself. Thus, Constituent Assembly now had dual responsibility of framing a constitution for the new State of Israel and also of making the law therefor<sup>68</sup>. Therefore, it had to don two different hats at the same time, first of being a Constituent Assembly and also of Parliament of Israel (Knesset).

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<sup>66</sup> See, Lee Kohn, 'Constitution of Israel', 27 Journal of Education Sociology, 1954, pp.369-379

<sup>67</sup> See, Samuel Sager, 'Israel's Provision State Council and Government', 14 Middle Eastern Studies, 1978, pp.91-101

<sup>68</sup> See, Samuel Sager, 'Israel's Dilatory Constitution', 24 The American Journal of Comparative Law, 1976, pp.88-99

The first legislation by the Constituent Assembly was to pass 'Transition Law'. The transitional law transformed the Constituent Assembly into the Knesset, in other words, Constituent Assembly reconstituted itself as Knesset. More importantly it immediately revoked those laws, which restricted the immigration or confronted the defence of new state of Israel and transfer of land.<sup>69</sup> The Constituent Assembly thus became the Legislature of the State of Israel. A protracted debate ensued between those favoring immediate enactment of a constitution, and those who believed either that there should be no constitution, or at the very least, that the time was not yet ripe. The Knesset adopted a compromise, transferring the powers of the Constituent Assembly to subsequent Knesset's, and introducing the idea of a constitution "by chapters" instead of one formal written document. The text of this resolution, known as the "Harari Resolution" after its sponsor, MK Yizhar Harari, read as follows:

The First Knesset instructs the Constitution, Law and Justice Committee to prepare a draft State Constitution. The constitution will be built chapter by chapter, in such a way that each will constitute a separate Basic Law. The chapters shall be presented to the Knesset when the committee completes its work, and all the chapters together shall comprise the Constitution of the State.

The draft constitution was consists of a Preamble and eight chapters therein. However, this draft constitution was never enacted for various inexplicable and explicable reasons such as uncertainties of the nascent state of Jews in the heart of Middle East. Kohn cites following reason for its non-enactment of the Draft Constitution<sup>70</sup>;

"As the months passed, opinion in authoritative quarters hardened against the early enactment of a written constitution. It was widely felt that the time had not yet come for such a decisive step. The development of the young State was still in flux with thousands of immigrants coming in every month, and it was urged that there should be a greater measure of consolidation before an organic law was enacted. The British precedent was quoted by the supporters of this view. They advocated the enactment for the time being of a limited number of fundamental laws fixing the competence of the principal organs of State while allowing for the growth of an unwritten constitution by the gradual evolution of usage and convention. There was, further, the apprehension that lengthy discussions on fundamental issues, such as are inevitable when a comprehensive constitution comes to be worked out, might be detrimental to the maintenance of that national unity which all responsible quarters were anxious to see preserved during the formative period of the State."

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<sup>69</sup>See, Lee Kohn, 'Constitution of Israel', 27 *Journal of Education Sociology*, 1954, pp.369-379

<sup>70</sup> *ibid* at p.372; also see, Barak: 'The Israeli Constitution: Past, Present, and Future' 43 *Hapraklit* (1997 In Hebrew) (iss. 1-2) p. 24.

## 12. Constitution of Israel-The Basic Laws

As seen the first Knesset of the Israel dissolved without enacting even a chapter of its prospective constitution. Subsequent Knessets used their constituent powers to enact various legislations pertaining the governmental institutions. These laws that form the edifice of the governmental architecture are called Basic Laws. There are altogether eleven Basic Laws; there are two classifications in which these laws can be categorised; those dealing with powers of governing bodies and basic human rights<sup>71</sup>. The eleven basic laws are; i) The Knesset (1958); ii) State Lands (1960); iii) The President (1964); iv) The Government (1968); v) The State Economy (1975); vi) Israel Defense Forces (1976); vii) Jerusalem (1980); viii) The Judiciary (1984); ix) The State Comptroller (1988); x) Human Dignity and Liberty (1992); xi) Freedom of Occupation (1992). Of these eleven Basic Laws the one concerned with Human Dignity and Liberty and Freedom of Occupation are the laws that deals with Human Rights in Israel. The Basic Law can only be changed by a majority of the Knesset members. The majority is required for decisions of the Knesset plenum in the first, second and third readings. The change sought in the Basic Law could either be explicit or by implications<sup>72</sup>.

### 12.1 Basic Laws on Human Rights: A formal Constitution of Israel:

Given the unique nature of Basic Laws and their enactment, it is obvious to enquire about the rule of repugnancy vis-à-vis ordinary statutes and Basic Laws. **By rule of repugnancy, I mean, what will be the relationship between those norms which are Basic Laws and all other norms which are not Basic Laws, which norm would prevail in the case of conflict between them?** The two Basic Laws on Human Dignity and Liberty and Freedom on Occupation enacted by Knesset paved the way for judicial review of repugnancy between ordinary laws of Knesset and Basic Law<sup>73</sup>. The question of normative supremacy of the Basic Law as against the ordinary statute was brought before the Supreme Court of Israel for the first time in *Bank Mizrahi v. The Minister of Finance*<sup>74</sup>. The Supreme Court of Israel stated that though the Basic Laws of Human Dignity and Liberty; and Freedom of Occupation do not contain a supremacy clause or non-obstante clause providing that any norm which contradicts of conflicts with the Basic Law is void, yet the Court is competent to declare such violating norms void. Since then the Supreme Court of Israel has extended the domain of the application of its

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<sup>72</sup> See, Art. 44, Basic Law: Government

<sup>73</sup> See, Yoram Rabin and Arnon Gufeld, 'MARBURY v. MADISON AND ITS IMPACT ON ISRAELI CONSTITUTIONAL LAW', 15 U. Miami International and Comparative Law. Review, 2014, pp.303-335. Also see, Frank I. Michelman, 'Israel's "Constitutional Revolution": A Thought from Political Liberalism', 19 Theoretical Inquiries L., 2018, pp.745-765

<sup>74</sup> See, CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Collective Village., 49 (4) PD 221 [1995] (Isr.). It was partially translated in 31 ISR. L. REV. 764 (1997); see also full translation at 1995-2 ISR. L. REPORTS 1, available at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf)

Judicial Review power and also of the law that are violative of the two Basic Laws.

The Court enlarged and extended its review of ostensibly unconstitutional laws of Knesset over those cases in which it was alleged that 'ostensibly unconstitutional law' violates human rights that are not specifically itemized in the Basic Law; and which are constitutionally protected solely as an exegetical derivative of Basic Law. It must be noted that this security was allowed by the Court despite the fact that many of these resulting rights *"were deliberately omitted from the Basic Laws because of disagreements in the Legislature about their inclusion. Such disagreements were a reflection of the complex and unstable conditions surrounding the issue of the Israeli constitution. Moreover, the Court applied its ruling, retroactively, to Basic Laws enacted prior to 1992 and whose provisions do not include any form of protection"*<sup>75</sup>.

While deciding the supremacy of the Basic Law of these two Human Rights legislation the Supreme Court of Israel was aware of the constitutional angle of the decision, and it is for this reason they used the word formal Constitution for these two enactments.

**12.2 Right to Life and Basic Law:** As seen two Basic Laws namely Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation has the status of formal constitution in the legal scheme of Israel. Right to life is twice provided under Basic Law: Human Dignity and Liberty. It states, *"There shall be no violation of the life, body or dignity of any person as such"*<sup>76</sup>. Further it also provides that, *"All persons are entitled to protection of their life, body and dignity"*<sup>77</sup>. The distinction between two right to life is that former is a negative obligation for the State of Israel and whereas the later is positive obligation. Under Art.2 the State is obliged not to do anything, which takes away or affects the life on any one. Since the Basic Law makes a distinction between person and citizen therefore it is safe to conclude that right to life, which is accorded to every person includes all those who are not Israel citizen. As a positive obligation for State of Israel right to life presupposes that individual has a claim against the Israel for their safety and security. As seen laws made by Knesset in its legislative capacity are inferior to Basic Laws, the same is relationship between executive action and Basic Laws pertaining to human rights. The Basic Law: Government provides that residuary power of government rests with it in those areas, which are not

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<sup>75</sup> See Yoram Rabin and Arnon Gufeld, 'MARBURY v. MADISON AND ITS IMPACT ON ISRAELI CONSTITUTIONAL LAW', 15 U. Miami International and Comparative Law. Review, 2014, pp.303-335; also see HCJ 212/03 Herut National Movement v. Chairman of the Central Election Committee for the 16th Knesset, [2003] IsrSC 57(1) 750, at 754- 756 (hereinafter: "Herut")

<sup>76</sup> See, Art.2, Basic Law: Human Dignity and Liberty  
[https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm)

<sup>77</sup> See Art.4 *ibid*.

regulated by existing legislations<sup>78</sup>. However, this executive power is also subject to Basic Laws on Human Rights<sup>79</sup>.

**12.3 Basic Law- Supreme Court:** It is also appropriate here to mention the judicial architecture of the Israel as a state. The Basic Law: Judiciary provides for the scheme of judicial system therein. It envisages four categories of courts in Israel, following are those courts; 1) Supreme Court; 2) a District Court; 3) a Magistrate Court; and 4) another court designated by Law as a Court<sup>80</sup>. Supreme Court of Israel sits in Jerusalem<sup>81</sup>. It is an appellate court and hears appeals against the judgments and other decisions District Courts<sup>82</sup>. When the Supreme Court is not exercising its appellate power, it sits as 'High Court of Justice'<sup>83</sup>. As a High Court of Justice it hears matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court<sup>84</sup>. The Supreme Court sitting as High Court of Justice has power to issue following writs; to make orders for the release of persons unlawfully detained or imprisoned; (Habeas Corpus); to order state and local authorities and the officials and bodies thereof...to do or refrain from doing any act in the lawful exercise of power (mandamus) etc.

**12.4 Basic Law- the Government- Emergency:** The power to declare emergency is provided under the Basic Law-The Government. It provides that should Knesset ascertain that the State is in a state of emergency, it may of its own initiative or, pursuant to proposal of the Government, may declare emergency<sup>85</sup>. The declaration will stipulate the duration in the proclamation thereof, however, the stipulated time shall not exceed the limit of one year. In order to exceed the one-year time bar provided by the Basic Law: The Government, it is incumbent upon Knesset to make a renewed declaration of a state of emergency. Further, if the Knesset is not in session and Government in its assessment is positive about the state of emergency to be in existence then it is authorized to declare the emergency before the convening the Knesset. Moreover, such declaration

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<sup>78</sup> See, S 32 of Basic Law: The Government 5728-1968, SH No 540. It states: 'The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority'

<sup>79</sup> See HCJ 11163/03 Supreme Monitoring Committee for Arab Affairs in Israel v Prime Minister 61(1) PD 1 [2006] (in Hebrew) as cited in Daphne Barak-Erez, 'The National Security Constitution and Israeli Condition' in Constitutional Rights and 'State of Emergency' online <https://www.tau.ac.il/law/barakerez/articals/E%2052Sapir%20Ch28.pdf> (last accessed on 19 September 2018)

<sup>80</sup> See, Art.1 (a), Basic Law: Human Dignity and Liberty- (5792-1992) online available at [https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (last accessed on 27 September, 2019). In addition to these courts, the Basic Law also recognizes judicial authority of these bodies having judicial power, a) a religious court (beit din); b) any other court (beit din) and another authority all as prescribed by Law.

<sup>81</sup> See, Art.15 (a) *ibid*

<sup>82</sup> See, Art.15(b) *ibid*

<sup>83</sup> See, Art.15 (c) *ibid*

<sup>84</sup> *ibid*

<sup>85</sup> See, Art.38, Basic Law: The Government

of emergency shall not survive the period of seven days from the date of proclamation, if the Knesset does not approve it within seven days. Additionally, if the Knesset does not convene within seven days and proclamation lapses, the Government is authorized to renew the declaration of emergency<sup>86</sup>.

Once an emergency is imposed the Government may make emergency regulations for the defense of the State, public security and maintenance of supplies and essential services. Emergency regulations will be submitted to the Foreign Affairs and Security Committee at the earliest date after their enactment. However, such emergency regulations are prohibited to alter or change Basic law, temporarily suspend it or make it subject to any preconditions.

Attempts were made by civil societies to break the continuance of emergency in Israel and petition to this effect was filed in High Court of Justice. The Association of Civil Rights in Israel petitioned in the High Court of Justice that declaration of emergency had become onerous, and tedious, over the period of time, therefore, it must be abolished. However, there were many legislation which were in force because of the recital clause of emergency provisions, therefore, the effect of the revocation of the emergency provisions and efficacies of these laws had to be examined. Accordingly, Ministry of Justice started the project of the examination of such laws, which is allowed by the High Court of justice which put the pending petitions in abeyance. The whole exercise was put to rest when the Court arrived at the conclusion that threats on Israel had neither subsided nor vanished. Hence all such petitions were dismissed by the Court 'expression its wish that the Ministry of Justice continue to promote the effort it initiated in reviewing statutory scheme applicable during emergency situations<sup>87</sup>.

**12.5 Emergency in Israel-The Defence (Emergency) Regulations, 1945:** Israel had to face serious challenges from the day of its inception, initially in form of skirmishes between Arabs and Jewish in undivided Palestine, which later culminated into full fledged war between Arab-Israel. The first war broke out right after Israel declared its independence on May 15, 1948. It is known as Arab-Israel War, it took place even before the partition of Palestine was planned and announced by UN in May 1948. Since then till now Israel has been perpetually<sup>88</sup> under state

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<sup>86</sup> See, Art.38 (b), Basic Law: The Government

<sup>87</sup> See, HCJ 3091/99 Association for Civil Rights in Israel v Knesset (1 August 2006) (in Hebrew) (hereinafter: Declaration of Emergency case). The Supreme Court deferred the hearing of this petition without dismissing it. For this see,

<sup>88</sup> The first emergency was proclaimed in 1948 and since then Israel has never lifted State of Emergency, the government website states, "Despite the fact that the circumstances which prevailed during the first years of the State of Israel's existence have changed, a national state of emergency has existed since the country's inception in 1948. It has been regularly extended by the Knesset and the Government due to the fact that over the years the Knesset has enacted many laws which include directives that are conditioned by the existence of a state of emergency. The cancellation of the state of emergency will lead to the annulment of these directives." Online available at

of emergency<sup>89</sup>. The most recent extension took place on September 4, 2019 when Knesset approved Foreign Affairs and Defense Committee recommendation to renew the declaration of national state of emergency. However, since 1966 Basic Law is governing the emergency provision.

State of emergency proclaimed in 1948 Israel has enacted many extraordinary provision, many of such provision were adopted for Palestine by Great Britain while it was a Mandate power therefor<sup>90</sup>. The instrument containing such provision is called Defence (Emergency) Regulations, it ordained detention without trial, deportation, curfew and suppression of publications.

**12.6 Israel and Occupied Territory- Legal Regime:** On the fateful day of 5 June, 1967 Israel defence forces struck preemptively on the Arab and Egypt forces. This preemptive strike is remembered as Six Days War in the annals of the Israel Arab Conflict. The war gave decisive victory to Israel over the combined forces of Egypt, Lebanon, Jordan and Syria. Israel ended up capturing sizeable territories from these countries, viz West Bank and old city of Jerusalem from Jordan, Sinai Peninsula and Gaza Strip against the marching forces of Egypt, and Golan Heights from Syria. Interestingly, the first UN peacekeeping forces, called as United Nations Emergency Forces, were deployed in this area in Egypt and it was at the request of Egypt that these forces were removed from its territory<sup>91</sup>. These territories, now in control and possession of Israel,

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[https://knesset.gov.il/lexicon/eng/DeclaringStateEmergency\\_eng.htm](https://knesset.gov.il/lexicon/eng/DeclaringStateEmergency_eng.htm) (last accessed on 27 September, 2018)

<sup>89</sup> John Quigley, 'ISRAEL'S FORTY-FIVE YEAR EMERGENCY: ARE THERE TIME LIMITS DEROGATIONS FROM HUMAN RIGHTS OBLIGATIONS?', 15 Michigan Journal of International Law, 1994, pp.491-518. While ratifying the International Covenant on Civil and Political Rights in 1991 Israel made a formal declaration which is as follows, "Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant." For this see, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT DEC. 31, 1991, at 149, U.N. Doc. ST/LEG/SER.E10, U.N. Sales No. E.92.IV.4 (1992) [hereinafter MULTILATERAL TREATIES 1991] (Israeli declaration of Oct. 3, 1991).

<sup>90</sup> Law and Administration Ordinance, art. 11, 1 Laws St. Isr. 7 (1948); see also Michael Saltman, The Use of the Mandatory Emergency Laws by the Israeli Government, 10 INT'L J. Soc. L. 385 (1982). On Knesset discussion of the Regulations in the early years of the Israeli State, see DAPHNA SHARFMAN, LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL 45-50, 151-52 (1993).

<sup>91</sup> UNEF as described by the UN peacekeeping website is as "the first United Nations peacekeeping force – was established by the first emergency special session of the General Assembly which was held from 1 to 10 November 1956. The mandate of the Force was to secure and supervise the cessation of hostilities, including the withdrawal of the armed forces of France, Israel and the United Kingdom from Egyptian territory and, after the withdrawal, to serve as a buffer between the Egyptian and Israeli forces and to provide impartial supervision of the ceasefire. UNEF was withdrawn in May-June 1967, at Egypt's request."

and their status in international law and municipal of Israel law has been matter of intensive debate across the world<sup>92</sup>.

First and foremost, the occupation of these territories is one of the longest occupations of a territory in modern history. David Kretzmer<sup>93</sup> writes that, *'the term "occupied territories" has become associated in contemporary international relations with Israel's continued occupation of the West Bank and Gaza. This is probably the longest occupation in modern international relations...'* The decision to retain the territories post the end of armed conflict between Arab forces and Israel was debated in Israel's domestic politics also. It was decided that these territories must be retained until peace agreements with neighbouring countries were negotiated. David Kretzmer in his book presents following understanding in the Israel's Cabinet<sup>94</sup>,

"Divergent views within Cabinet emerged regarding the future status of the West Bank and Gaza. While occupying the West Bank had not been an initial war aim, circles that believed the Jewish State should have control over the whole of historical Land of Israel west of the Jordan River had always existed. They now regarded what had happened as an historic opportunity to realize their aims. Within a short time, voices were heard claiming that the Territories had not been occupied, but that parts of the homeland had been liberated from foreign occupation"

Once the decision was to keep the territory under the control of Israel was reached, authorities of Israel established a military government in those areas. When the military government took over the administration or *'assumed the responsibility of for security and maintenance of the public order in the Area'*<sup>95</sup>. Military Commander so appointed was also vested with the, via a Military Order, power of government, legislation, appointment and administration vis-à-vis occupied Palestinian territory. Ever since then the administration so established has promulgated catena of security legislations. Law promulgated by military government were to prevail over all other laws that were in force in the occupied territory of The rhetoric was strong and powerful therefore protection of people who came under the incidental occupation of Israel fell upon the Supreme Court of Israel sitting as High Court of Justice.

<sup>92</sup> See, Avi Shalim, 'Israel and the Occupied Territories', 29 The World today, 1973, pp.421-429

<sup>93</sup> See, David Kretzmer, 'The law of belligerent Occupation in the Supreme Court of Israel', 94 International Review of the Red Cross, 2012, pp.207-236

<sup>94</sup> See, David Kretzmer, Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, New York, 2002, p.7

<sup>95</sup> See, Proclamation concerning the Takeover of Administration by the [Israel Defence Forces] iDF(No. 1) (5727-1967) cited in Joel Singer, 'The Establishment of Civil Administration in the Areas Administered by Israel', 12 Israel Year Book on Human Rights, 1982, p.259. Also see, Proclamation Concerning the Administration of Rule and Justice (West Bank Region) (No. 2) (5727-1967) cited in Mier Shamgar, ed. Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects, 1 Hebrew University, 1982.

**13. Conclusion**

Israel as modern day Nation-State without a written constitution, albeit it has piecemeal legislation, which are constitutional in nature, cannot be compared with India's situation of Kashmir. This paper never intended to analyse or examine the value judgment of validity of Israel's creation or formation under international law.

# Regulating E-Commerce through Consumer and Competition Law Framework

**\*Dr. Sushila**

## ABSTRACT

The faster growth of e-commerce in India has been enabled by a facilitating policy support by Government of India in permitting 100% FDI under automatic route in the marketplace model of e-commerce. The investments made by Government of India in rolling out fibre network is further likely to spur the entire e-commerce ecosystem as more citizens will be connected to digital network. Presently, E-Commerce is governed by multiple sectoral regulations (RBI, FSSAI, IRDA, Motor Vehicles Act, Consumer Protection Act *etc.*) apart from competition regulation (CCI). The proposed Data Protection Bill is likely to add one more layer of regulation to E-Commerce. As the evolving E-Commerce has significantly contributed to consumer welfare, it is imperative that such burgeoning ecosystem of e-commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself. The present paper seeks to focus on regulation of E-Commerce under the Consumer and Competition Law & Policy Framework only and endeavours to critically analyse the various policy interventions through such policy framework in regulating unfair trade practices and anti-competitive conduct of E-Commerce players. The paper attempts to analyse in detail the recently proposed amendments to E-Commerce Rules 2020 in order to ascertain their efficacy in regulating the unfair trade practices indulged in by E-Commerce entities as also their impact on the sector as such. The paper also seeks to examine the role of Competition Law in E-Commerce and an attempt has been made to study the enforcement interventions made by Competition Commission of India (CCI) in digital economy.

**Keywords:** e-consumer, compliance burden, ex-ante regulation, consumer protection, fall back liability, abuse of dominant position

## 1. Introduction

E-commerce has been witnessing exponential growth in recent times. COVID-19 has further accelerated the pace of shift of consumers from

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traditional brick and mortar stores to e-commerce platforms<sup>1</sup>. This shift is not peculiar to India as similar growth stories have been observed across the globe. However, despite the high rate of growth of e-commerce in India, online retail still constitutes a small segment of total retail market. As of 2019, online retail constituted only 4.7% of total retail and is likely to constitute 10.7% of total retail market by 2024<sup>2</sup>.

The faster growth of e-commerce in India has been enabled by a facilitating policy support by Government of India in permitting 100% FDI under automatic route in the marketplace model of e-commerce<sup>3</sup>. The investments made by Government of India in rolling out fibre network is further likely to spur the entire e-commerce ecosystem as more citizens will be connected to digital network.

Digital markets have attracted the attention of Governments and regulators across the world and have been key focus area of regulation. The increased shifting of physical markets towards digital markets has accentuated the need to have a closer look at the digital markets. No doubt, digital markets are bringing in innovation and an enhanced consumer experience, at the same time, they are giving rise to various concerns which need suitable policy intervention.

Presently, E-Commerce in India is governed and regulated by various regulatory bodies and different horizontal regulations. The Reserve Bank of India was the first to move in regulating e-commerce and it released guidelines for Internet banking as early as in 2001. MeitY (the Ministry of Electronics, Information and Technology) also realised the importance of regulation of E-Commerce and accordingly, exercising its powers under the Information Technology Act 2000 (IT Act), it introduced the Information Technology (Intermediaries Guidelines) Rules 2011. Apart from recognition of the operational models of e-commerce companies through the FDI Policy in 2016, the E-Commerce continues to be under fragmented sectoral regulation under various laws through amendments from time to time. Presently, E-Commerce is governed by multiple sectoral regulations [RBI, FSSAI, IRDA, Motor Vehicles Act, Consumer Protection Act 2019 (CPA 2019) etc.] apart from competition regulation (CCI). The proposed Data Protection Bill is likely to add one more layer of regulation to E-Commerce.

As the evolving E-Commerce has significantly contributed to consumer good and welfare, it is imperative that such burgeoning ecosystem of e-commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have

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<sup>1</sup> The Indian E-Commerce market is expected to grow to US\$ 111.40 billion by 2025 from US\$ 46.2 billion as of 2020. By 2030, it is expected to reach US\$ 350 billion. Source: <https://www.ibef.org/industry/ecommerce.aspx>

<sup>2</sup> As per E-Commerce Report (November, 2021) by India Brand Equity Foundation (IBEF)

<sup>3</sup> In India, there are three type of e-commerce business model (i) Marketplace base model (ii) Inventory base model (iii) Hybrid model of inventory based and market place e-commerce model.

an unintended effect not only on the growth of the sector but on the consumer interests itself.

The present paper seeks to focus on regulation of E-Commerce under the Consumer and Competition Law & Policy Framework only and endeavours to critically analyse the various policy interventions through such policy framework in regulating unfair trade practices and anti-competitive conduct of E-Commerce players. The paper attempts to analyse in detail the recently proposed amendments to E-Commerce Rules 2020 in order to ascertain their efficacy in regulating the unfair trade practices indulged in by E-Commerce entities as also their impact on the sector as such. The paper also seeks to examine the role of Competition Law in E-Commerce and an attempt has been made to study the enforcement interventions made by the antitrust body of India i.e. Competition Commission of India (CCI) in digital economy.

## **2. E-commerce and Consumer Law**

The Consumer Protection (E-Commerce) Rules 2020<sup>4</sup> (hereinafter “E-Commerce Rules”) had been notified by the Central Government on 23 July 2020. After the notification of the Rules, several representations were received by the Government of India from different stakeholders particularly consumers complaining against unfair trade practices being indulged-in by e-commerce operators rampantly. In light of the above, the government proposed to amend the e-commerce Rules for protecting the interest of the e-consumers. Accordingly, the Government mooted amendments in the E-Commerce Rules in 2021 and put the proposed amendments in public domain to elicit views / comments / suggestions till 6 July 2021, which was extended till July 21, 2021<sup>5</sup>.

The proposals to amend the existing E-Commerce Rules attracted a lot of public and stakeholder attention due to the sheer scope of the proposed regulation and the potential impact thereof upon the e-commerce ecosystem.

At the outset, it is apposite to note that the proposed amendments to the E-Commerce Rules seek to provide a robust regulatory mechanism

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<sup>4</sup> The E-Commerce Rules cover the duties and liabilities of e-commerce entities which apply to all electronic retailers offering goods and services to Indian consumers irrespective of their place of registration. The rules mandate e-commerce companies to make it easy for customers to return items, handle customer complaints, and not treat merchants differently on their platforms. These rules apply to any goods or services purchased or sold through any digital platform, and cover all types of unfair business practices in all e-commerce models.

<sup>5</sup> The amendments to the current e-commerce rules are still being determined. According to media reports, the Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce is expected to release a draft of the e-commerce policy, which will establish rules for online trade and address any deficiencies in the overall digital commerce policy, along with the revised e-commerce rules by the Ministry of Consumer Affairs, Food and Public Distribution, which will aim at ensuring consumer interest.

over e-commerce platforms to protect the interests of consumers who purchase goods or avail services through digital modes. This, of course, would go a long way in attaining and reinforcing the objectives of the CPA, 2019 in protecting the interests of e-consumers of e-commerce in a more organised, systematic and institutional manner. In fact, the proposed dispensation would provide an *ex-ante* check and balance over e-commerce entities in regard to their unfair business practices and this may minimize the *ex-post* complaints filed before the consumer fora by consumers of e-commerce. Thus, the *ex-ante* regulatory requirements would supplement the *ex-post* enforcement task of consumer fora and would help achieve the larger objectives of law in a more coherent, efficient and speedier way.

### ***Scope of Coverage***

The E-Commerce Rules, by virtue of their overarching coverage as provided in Rule 2<sup>6</sup>, are applicable in respect of “*all goods and services bought or sold over digital or electronic network* including all models of e-commerce *i.e.* marketplace or inventory models of e-commerce; all e-commerce retail, including multi-channel single brand retailers and single brand retailers in single or multiple formats; and all forms of unfair trade practices across all models of e-commerce.”<sup>7</sup>

Notwithstanding such wide coverage, the definition of “e-commerce entity” as provided in Rule 3(b)<sup>8</sup> essentially confines coverage of these Rules to marketplace platform operators only (as is evident from reference to sellers offering goods or services for sale on such platforms), and thereby excludes the applicability thereof to other modes of e-commerce such as where a seller is providing goods or delivering services through its own website. Further, including entities within the sweep of “e-commerce entity” who are engaged by platforms for fulfilment of orders may cover even logistic arms, storage facilities and payments gateway *etc.* even though the principal selling entity itself is excluded from the scope of the definition. End-consumers do not have any privity of contract with such service providers. It may not be appropriate to disperse the single node liability of platform by roping in other peripheral service providers. The “related party” may extend the coverage vast and may affect the efficiencies brought about by joint ventures.

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<sup>6</sup> Rule 2 of the E-Commerce Rules 2020 detail the scope and applicability of the Rules in E-Commerce.

<sup>7</sup> Rule 2 of the E-Commerce Rules 2020

<sup>8</sup> Rule 3(b) of E-Commerce Rules defines “e-commerce entity” as meaning “any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, including any entity engaged by such person for the purpose of fulfilment of orders placed by a user on its platform and any ‘related party’ as defined under Section 2(76) of the Companies Act, 2013, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity [the underlined portion is proposed to be inserted vide the 2021 draft amendments to E-Commerce Rules, 2020]”.

Accordingly, it is imperative that the coverage of the Rules and definition of “e-commerce entity” are in sync, so that they do not exclude any mode of e-commerce providing goods or services. Else, the regulatory mechanism under the Rules would create an uneven and discriminatory field, besides being in conflict with the declaration of universal application of the Rules to all types of e-commerce *i.e.* whether platform based or direct retail through website, as provided in Rule 2.

### **Cross-Selling**

The definition of “cross-selling”<sup>9</sup> as proposed is confined to sale of goods or services which are related/ adjacent/ complimentary. The supplementary impositions need not be in neighbouring products or services and any type of cross-selling whether for related products or otherwise should be brought within the discipline of “cross-selling”. Further, to introduce the requirement to establish “intent” for showing cross-selling, is not in accord with the standards and norms of a civil statute, as such requirements are appropriate for criminal legislations. Establishing “intent” would place a high threshold of burden upon the consumers and thereby upon consumer fora and may result in exoneration of e-commerce entities in various cases of cross- selling.

As such, the criminal standards of establishing “intent” need to be removed. So also, the phrase “....to maximize the revenue of such e-commerce entity” from the proposed definition as maximizing revenue *per se* may not be the concern from consumer welfare perspective so long as no harm is caused to the consumers and the entity concerned is not commanding any market power or dominance.

In fact, consumers may be deprived of various complimentary products that are offered by various players *gratis* across consumer goods categories and such blanket prohibition upon e-commerce entities may rather result in consumer harm than providing any tangible benefits to the consumers. Maximizing revenue is a legitimate business objective and in the absence of any predatory behaviour by a dominant entity having significant market power, such overarching embargo on such behaviour *per se*, may not be appropriate and hence may be considered for deletion from the proposal.

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<sup>9</sup> Rule 3(c) proposes definition of “Cross-selling” as “sale of goods or services which are related, adjacent or complimentary to a purchase made by a consumer at a time from any e-commerce entity with an intent to maximise the revenue of such e-commerce entity”.

### ***Fall-back Liability***

The “fall back liability<sup>10</sup>” clause seeks to place legal obligation upon online platforms who are essentially intermediaries for the negligent conduct, omission or commission of any act of the sellers, who are registered with the platform, in fulfilling the duties and liabilities which causes loss to consumers.

To begin with, such imposition of liabilities upon the intermediaries through a subordinate legislation such as the proposed amendments to the E-Commerce Rules may not be legally tenable as such intermediary platforms enjoy protection against legal action for the acts and omissions of the sellers, under the Information Technology Act 2000. It may be pointed out that Section 79 of the Information Technology Act, 2000, in certain instances, provides exemption to intermediaries from liability. As per the section an intermediaries will not be liable for any third-party information, data or communication link made available by them.<sup>11</sup> Thus, any subordinate legislation such the proposed Rules which overreaches the supreme legislations, may not stand judicial scrutiny and may be declared *ultra vires*.

Besides, holding marketplace e-commerce entities liable for the acts of sellers registered with them, may make this form of business model highly unattractive and unviable, which has otherwise grown very fast. This may deprive the willing consumers from buying goods or availing services through such channels.

### ***Flash Sale***

Flash sales are very popular amongst consumers due to attractive discounts and wide variety of goods available during flash sales. However, the proposed Rule 5(16)<sup>12</sup> imposes a blanket ban upon flash

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<sup>10</sup> The proposed amendments to E-Commerce Rules seek to insert Rule 3(d) therein by providing definition of “Fall back liability”:

Rule 3(d). “Fall back liability” “means the liability of a marketplace e-commerce entity where a seller registered with such entity fails to deliver the goods or services ordered by a consumer due to negligent conduct, omission or commission of any act by such seller in fulfilling the duties and liabilities in the manner as prescribed by the marketplace e-commerce entity which causes loss to the consumer”;

<sup>11</sup> Section 79 of the Information Technology Act, 2000

<sup>12</sup> The proposed amendments to E-Commerce Rules seek to insert Rule 3(e) therein by providing definition of “Flash sale” and further by proposed Rule 5(16) imposes a blanket ban upon flash sales:

Rule 3(e). “ ‘Flash sale’ means a sale organized by an e-commerce entity at significantly reduced prices, high discounts or any other such promotions or attractive offers for a predetermined period of time on selective goods and services or otherwise with an intent to draw large number of consumers

sales<sup>13</sup>. The question arises- whether sweeping and blanket embargo upon flash sales, will be in interest of consumers? It is submitted that such sweeping and blanket embargo upon flash sales, without any empirically validated harm to consumers or markets due to such sales, may deprive consumers of discounts and reduction in prices. This may also interfere with freedom of trade. Further, the issue of predatory behaviour and practices of such e-commerce entities, such as deep discounting, may be appropriately examined by Competition Commission of India. As such, to create an additional and overlapping regulatory mechanism to address such issues without any supporting enforcement infrastructure and expertise, may not be necessary.<sup>14</sup>

The proviso to definition of “flash sale” seems to confine meaning of “flash sale” to those which are organised “...by fraudulently intercepting the ordinary course of business using technological means with an intent to enable only a specified seller or group of sellers managed by such entity to sell goods or services on its platform...”.

The use of terms such as “fraudulently”, “intent” etc. used in the Rules may not be appropriate as this may have the effect of placing a high threshold in the civil law for establishing proscribed behaviour of e-commerce entities, which may not be desirable looking at the summary nature of the proceedings of consumer fora and the need to deliver speedier justice to consumers of unfair trade practices.

### **Mis-selling**

The proposed amendments seek to insert the following definition of “mis-selling”:

Rule 3(k) defines ‘mis-selling’ “as an e-commerce entity selling goods or services by deliberate misrepresentation of information by such entity about such goods or services as suitable for the user who is purchasing it”. The explanation provides that misrepresentation means:

- (i) *the positive assertion, in a manner not warranted by the information of any entity making it, of that which is not true;*

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Provided such sales are organised by fraudulently intercepting the ordinary course of business using technological means with an intent to enable only a specified seller or group of sellers managed by such entity to sell goods or services on its platform.”

<sup>13</sup> The Government seems to have provided clarification on “flash sale”. See report at: <https://economictimes.indiatimes.com/tech/technology/govt-clarification-on-flash-sales-compounds-confusion-among-e-tailers/articleshow/83757968.cms?from=mdr>

<sup>14</sup> The government has later clarified in press conference that all flash sales won't be banned. However, distinguishing between conventional flash sales and other specific flash sales (sought to be banned under the proposed Rules) may not pass the muster of intelligible differentia.

- (ii) *any display of wrong information, with an intent to deceive, gain an advantage to the e-commerce entity committing it, or any seller claiming under it; by misleading consumer to the prejudice of e-commerce entity, or to the prejudice of anyone claiming under it;*
- (iii) *causing, however innocently, a consumer to purchase such goods or services, to make a mistake as to the substance of the thing which is the subject of the purchase* <sup>15</sup>

To begin with, it is observed that the misrepresentation itself should be made actionable without requiring such misrepresentation to be deliberate.

Further, explanation to the definition of “mis-selling” is mutually contradictory in as much as clause (i) thereof requires such misrepresentation to be actuated by “intent” whereas misrepresentation relating to clause (iii) makes this category of misrepresentation to be actionable even if it is done *innocently*. As mentioned already, mental elements should not be introduced in the Rules and thereby in the adjudicatory process of consumer fora. This may create higher threshold for consumers to prove their claims. Mental elements should not be made the prerequisites for establishing consumer harm and for obtaining remedies under the Consumer Protection Law.

### ***Registration of e-commerce entities***

The new Rules stipulate registration by e-commerce entities<sup>16</sup>. It is not readily evident as to what are the prerequisites for registration of e-commerce entities by Department for Promotion of Industry and Internal Trade (DPIIT). Neither such requirements have been spelt out in the proposed amendments nor any enabling provision by way of rules or other such instrument has been conceived or made in this behalf. Registration *simpliciter* without any conditions thereto may be vacuous exercise. Also, it is not clear as to what useful purpose would be served through such additional registration requirement when

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<sup>15</sup> Rule 3(k) of the proposed amendment to the Rules

<sup>16</sup> Registration of e-commerce entities:

“Rule 4(1) Every e-commerce entity which intends to operate in India shall register itself with the Department for Promotion of Industry and Internal Trade (DPIIT) within such period as prescribed by DPIIT for allotment of a registration number.

Provided that the DPIIT may extend the period for registration of such e-commerce entity for sufficient reason, to be recorded in writing.

(2) Every e-commerce entity shall ensure that such registration number and invoice of everyday order is displayed prominently to its users in a clear and accessible manner on its platform”

entities before commencing business have to register either under the Companies Act or the Partnership Act or the LLP Act *etc.* The Rule states that every e-commerce entity which “*intends*” to operate in India shall register itself with DPIIT meaning thereby the existing operating entities need not register. This may itself create discrimination and an uneven field between the incumbents and the new entrants.

It is also important to point out that no specific consequence by way of penalty or otherwise is provided for non-compliance with such registration requirement and other requisitions such as display requirement of registration number by e-commerce entity. A general declaration that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not suffice<sup>17</sup>.

Further, such compliance requirements with no tangible benefits to consumers, may only result in increased costs for consumers as firms may pass on the burden incurred on such additional regulatory compliance, upon the end consumers.

***Duties of e-commerce entities (appointment of grievance officer/nodal officer/ compliance officer etc.)***

The E-Commerce Rules outline duties of E-Commerce entities including the duty to appoint a nodal officer<sup>18</sup>. The Rule proposes that E-Commerce entities are to obligated to appoint a nodal person of contact or an alternate senior designated functionary (who is resident in India, to ensure compliance with the provisions of the Act or the rules made thereunder). No mechanism has been provided in the Rules to ensure monitoring with such requirements. Further, a general declaration that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not suffice<sup>19</sup>.

Specifically, the E-Commerce Rules contains prohibition against display or promotion of misleading advertisement whether in the course of business on its platform or otherwise<sup>20</sup>. This above prohibition will be on e-commerce entities.

The above proposed obligation upon E-Commerce entities under Rule 5(4) not to allow display/ promotion of misleading advertisement (whether in the course of business on its platform or otherwise), puts a heavy burden of due diligence upon e-commerce platform operators to ascertain the misleading advertisements displayed by sellers

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<sup>17</sup> Rule 8 of the existing E-Commerce Rules, 2020.

<sup>18</sup> Rule 4 (to be numbered as Rule 5 post-proposed amendments) outlines duties of e-commerce entities.

<sup>19</sup> *Supra* Note 13.

<sup>20</sup> Rule 5(4)

registered with online platforms. When millions of orders are placed on online platforms everyday, it will be impossible for the platform to ascertain the accuracy of each and every advertisement put by the sellers to advertise and market their products on the platform. Besides, even such requirement is not backed by any mechanism to enforce or monitor the same. The only obligation that can be put upon the e-commerce entity in this regard, is the situation where e-commerce entity is notified or reported to take down such product from the platform due to misleading nature of the advertisements. Alternatively, platform operators may be obligated to obtain a suitable declaration in this regard from the sellers.

The mechanism may provide a ruse to platforms to delist the sellers, not preferred by them, and may become an arbitrary tool in the hands of platforms in the garb of compliance with this proposed norm to be followed by e-commerce entities.

The E-Commerce Rules<sup>21</sup> further require e-commerce entities to establish an adequate grievance redressal mechanism keeping in consideration the number of grievances ordinarily received by such entity and specifically mandates appointment of a Chief Compliance Officer (CEO) who shall be responsible for ensuring compliance with the CPA, 2019 and rules the Act. The CEO will be held responsible in legal proceedings regarding any information, data, or communication link provided or hosted by the e-commerce entity, if they fail to ensure that the entity properly follows their responsibilities under the Act and its regulations.<sup>22</sup>

The proposal *vide* Rule 5(5) to obligate E-Commerce entities to appoint Compliance Officers and consequent liability therefor, requires some clarifications. It appears from Rule 5(5)(a) that Compliance Officer shall be personally responsible for ensuring compliance and shall be liable accordingly. The proviso, however, says that no liability shall be imposed upon *e-commerce entity* without being given an opportunity of being heard. It is thus not understood as to why an opportunity of being heard is accorded to e-commerce entity, and not to Compliance Officer, when the liability is fixed upon the Compliance Officer personally. Analogously, providing of opportunity of being heard to e-commerce entity is meaningless when the Rule makes Compliance Officer personally liable for such non-compliance.

E-Commerce companies are required to clearly display on their website or mobile application (or both) the name and contact information of their Grievance Officer, as well as the process for users to file complaints about violations of the rules or any other issues related to the resources and services provided on the platform. The

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<sup>21</sup> Rule 5(5)

<sup>22</sup> *Ibid.*

Grievance Officer must also accept and respond to any orders, notices, or directions issued by the government, any authorized body, or a court of competent jurisdiction.<sup>23</sup>

The multiplicity of requirements to appoint Nodal Contact Person, Resident Grievance Officer and Chief Compliance Officer; may add compliance burden/cost upon the entities which is likely to be passed upon the consumers by way of enhanced costs. In the absence of any statutory mechanism to monitor compliance of these stipulations or a specific mechanism to ensure compliance, no tangible benefits are likely to accrue to consumers. It should suffice if e-commerce entities are left to devise their own self-regulatory mechanism in respect of grievance redressal or compliances. Whether such functions should be discharged by separate designated officers or by one officer, should also be left for the e-commerce entities to decide. The Parliamentary Standing Committee on Commerce ('the Standing Committee')<sup>24</sup>, in its report presented to the Rajya Sabha has recommended that additional duties and liabilities (especially related to appointment of the abovesaid officers) to be introduced through the proposed amendments should be made applicable only to e-commerce entities qualifying a certain threshold.

***Additional compliances by e-commerce entities selling imported goods or Services***

Rule 5(7) provides that when an e-commerce company sells imported goods or services., it shall:-

- (a) mention the name and details of any importer from whom it has purchased such goods or services, or who may be a seller on its platform;*
- (b) identify goods based on their country of origin, provide a filter mechanism on their e-commerce website and display notification regarding the origin of goods at the pre-purchase stage, at the time of goods being viewed for purchase, suggestions of alternatives to ensure a fair opportunity for domestic goods;*

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<sup>23</sup> *Ibid.*

<sup>24</sup> The Department related Parliamentary Standing Committee on Commerce (the Standing Committee), presented to the Rajya Sabha, its report titled 'Promotion and Regulation of E-Commerce in India' on 15th June 2022. The mandate of the Committee was to examine the current regulatory regime for e-commerce in India in consultation with the Department for Promotion of Industry and Internal Trade (DPIIT) and the Department of Revenue and the industry. The Committee in its report recommended inter alia the formulation of the National E-Commerce Policy at the earliest and filling the regulatory and enforcement gaps in the e-commerce ecosystem. The Committee was headed by Shri V. Vijayasai Reddy.

- (c) *provide ranking for goods and ensure that the ranking parameters do not discriminate against domestic goods and sellers.*

The proposal in Rule 5(7) to obligate E-Commerce entities to comply with requisitions made thereunder such as mentioning of details of importers and identifying goods based on their country of origin; are burdensome and unworkable. Such obligations can be more appropriately discharged by the sellers registered with online platforms than the platforms themselves.

The requirement of suggesting domestic alternatives in Rule 5(7)(b) is impractical besides having the effect of affecting organic search parameters and skewing algorithms. For example, every time a person tries to book flight on a foreign airline, which might be cheaper than Indian alternative, does the foreign airline need to flash an Indian airline?

Moreover, such Rules do not apply to brick-and-mortar players who are handling 95% sales.

Also, Rule 5(7)(c) is made applicable in the case of “goods” only leaving out “services” from its ambit for reasons which are not readily discernible. Search-bias through ranking parameters may also happen in sectors providing services such as hospitality, travel, food delivery *etc.*

### ***Obligation upon e-commerce entities against search bias***

E-Commerce entities have been further obligated to ensure that no search bias takes place on their platforms<sup>25</sup>.

Issues of search bias/ preferential treatment/ self-preferencing may be left to Competition Commission of India which has already investigated such case of search bias against dominant entities<sup>26</sup>. Consumer Fora may not have the necessary technical expertise or wherewithal to examine manipulation in algorithms. Also, it may not be necessary to create parallel jurisdiction between CCI and Central Consumer Protection Authority (CCPA) on these aspects when already a regulatory authority is well-equipped to address such issues.

Proceedings before CCI are inquisitorial unlike adversarial proceedings before consumer fora and as such public enforcement of Competition Law through its already existing and well-equipped multidisciplinary investigation arm backed with forensic support, can more suitably address issues of algorithmic collusions than leaving it to individual consumers before consumer fora to establish such

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<sup>25</sup> Rule 5(14) (c) – (f).

<sup>26</sup> <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

algorithmic manipulations or to the consumer for themselves, in the absence of any technical expertise available with them.

Furthermore, provisions relating to sharing of consumer data must be left to the proposed Personal Data Protection Authority *i.e.* through parliamentary legislative route than through subordinate legislatures such as Rules.

### ***Abuse of dominant position by dominant entity***

Rule 5(17) declares that no e-commerce entity holding a dominant position in any market shall be allowed to abuse its position. An explanation to this, further states that for the purpose of this clause “abuse of dominant position” shall have the same meaning as prescribed under the Competition Act, 2002 (Section 4).<sup>27</sup>

The proposed Rule 5(17) is superfluous as already the Competition Act, 2002 forbids abuse of dominant position and therefore to repeat the same legislative prohibition in subordinate legislation may rather diminish the impact of supreme law made by the Parliament. Such unnecessary insertions may inadvertently impinge upon the jurisdiction of other regulators without any tangible benefits and as such may be avoided. Also, it may create jurisdictional overlaps and wastage of resources of two agencies in pursuing the same cause. The Standing Committee has also raised the concern of potential overlap of jurisdictions between consumer authorities, CCI, FDI Regime and Data protection authorities which must be avoided.<sup>28</sup>

## **3. E-commerce and Competition Law**

### ***Role of CCI***

The modern competition law with an aim to secure efficient allocation of economic resources, seeks to promote and protect the process of free market competition. As per common belief, it is ultimately concerned with the protection of consumers’ interest and when the competition is thwarted or damaged, consumers’ interest is harmed.

Both consumer protection law and competition law aim to improve the well-being and welfare of consumers. Both of these laws acknowledge the imbalance of power between consumers and producers. Consumer protection is achieved by setting standards for quality and safety of goods and services, as well as providing ways for consumers to seek resolution of their complaints. The objective of competition is met by ensuring that there are sufficient numbers of producers so that no producer can attain a position of dominance. If

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<sup>27</sup> Rule 5(17)

<sup>28</sup> Supra note 24.

the nature of the industry is such that dominance in terms of market share cannot be avoided, it seeks to ensure that there is no abuse on account of this dominance. Competition law also seeks to forestall other forms of market failure, such as formation of cartels, leading to collusive pricing, division of markets and joint decisions to reduce supply. Mergers and acquisitions also need to be regulated as they reduce competition.<sup>29</sup>

### ***CCI Interventions in E-Commerce***

CCI has been very proactive in dealing with anti-competitive practices in E-Commerce. It has received cases against different e-commerce entities (including their associate/ holding companies etc.) operating as marketplace platforms, search engine service providers operating in different verticals, online sellers/ service providers *etc.*, alleging anti-competitive practices and abuse of dominant position in contravention of the Competition Act's provisions.

It would be appropriate to discuss some key interventions of CCI in E-Commerce:

In *Delhi Vyapar Mahasangh v. Flipkart and Amazon*<sup>30</sup>, Delhi Vyapar Mahasangh filed an Information before CCI against Flipkart and Amazon alleging that these marketplaces are preventing non-preferred merchants or vendors from using these online marketplaces by forming agreements with their 'preferred sellers'. It was alleged in the Information that exclusivity through discounting and preferential listings is being provided by forming exclusive partnerships in the relevant market with smartphone manufacturers.<sup>31</sup>

After examining the Information at *prima facie* level, CCI *vide* its order dated 13.01.2020 observed that there were four alleged practices on these marketplaces *viz.* exclusive launch of mobile phones, 'preferred sellers' on the marketplaces, deep discounting and preferential listing/promotion of private labels, which needed to be investigated. Exclusive launch and preferential treatment combined with the deep discounting practices of platforms may create an ecosystem that might have an adverse effect on competition.<sup>32</sup>

Accordingly, CCI directed the Office of the Director General (DG) to cause an investigation into the matter against Amazon, Flipkart and their affiliated entities. After some litigation before High Court and Supreme Court, the matter is presently pending investigation before the DG.

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<sup>29</sup> Consumer Protection and Competition Policy available at [https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/11th/11\\_v1/11v1\\_ch11.pdf](https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf)

<sup>30</sup> 2020 SCC OnLine CCI 3

<sup>31</sup> *Ibid*

<sup>32</sup> *Ibid*

In *Federation of Hotel & Restaurant Associations of India v. MMT/GoIbibo/ OYO*, Case No. 14 of 2019<sup>33</sup>, an Information was filed by Federation of Hotel & Restaurant Associations of India against MMT/GoIbibo/ OYO alleging that MMT & Goibibo (MMT-Go) indulged in certain anti-competitive practices *inter alia*, unfair pricing practices, excessive commission fees charged to hotels, offering illegal and unlicensed bed and breakfasts on the platform, and providing false or misleading information. Additionally, it is alleged that MMT-Go imposed a price parity clause in their agreements with hotel partners, which prohibited the hotel partners from selling their rooms on any other platform, including their own online portals, at a lower price than the one offered on MMT-Go's website/portal. Additionally, the hotel partners were required to maintain room parity, meaning they could not refuse to provide rooms on MMT-Go at any time if the rooms were available on other platforms. It was also alleged that MMT and OYO entered into agreements which gave OYO preferential treatment on MMT's platform, thereby denying market access to Fab Hotels and Treebo in violation of Section 3 and 4 of the Competition Act. Additionally, the hotel partners were required to maintain room availability parity, meaning they could not refuse to provide rooms on MMT-Go at any time if the rooms were available on other platforms. It was also alleged that MMT and OYO entered into agreements which gave OYO preferential treatment on MMT's platform, thereby denying market access to Fab Hotels and Treebo in violation of Section 3 and 4 of the Competition Act.<sup>34</sup>

On taking cognisance of the Information, CCI noted that MMT-Go and OYO operate in different relevant markets. In the '*market for franchising services for budget hotels in India*', OYO was held to be possessing a significant market power, though it was not found to be in dominant position. In "*market for online intermediation services for booking of hotels in India*", MMT-Go was *prima facie* held to be dominant as a "Group".<sup>35</sup>

As regards the Room and Price Parity Imposition through agreements, CCI observed, "though the magnitude of the anticompetitive effects of these agreements *inter alia* will depend on the market power of the platform, given the *prima facie* dominance of MMT-Go, such parity restriction needs to be investigated to gauge its impact under Section 3(4) as well as Section 4 of the Competition Act, which deal with vertical restraints and abuse of dominant position respectively."<sup>36</sup>

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<sup>33</sup> 2019 SCC OnLine CCI 37 also available at available at :

<https://www.cci.gov.in/images/antitrustorder/en/1420191652260686.pdf>

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*

<sup>36</sup> *Ibid*

As regards the allegation of denial of market access to competitors of OYO pursuant to the commercial agreement between MMT and OYO, CCI *prima facie* opined that if MMT gives preferential treatment to OYO on its portal pursuant to an agreement between them, to not list the closest competitors of OYO on the platform, may potentially be contravening the provisions of Section 3(4) of the Competition Act, which needs to be investigated.<sup>37</sup>

In view of the above, an investigation was opened up by CCI *vide* its order dated 28.10.2019 and the Office of the Director General was directed to investigate into the matter.

*Vide* the said order, CCI also ordered investigation in respect of other allegations which included predatory pricing, misrepresentation due to delayed de-listing and manipulation of market dynamics and charging of service fee by MMT-GO respectively. CCI *prima facie* found a case for investigation against MMT-Go for contravention of Section 4 as well as Section 3(4) of the Competition Act. As regards OYO, investigation under Section 3(4) of the Competition Act has been ordered. The matter is currently under investigation.<sup>38</sup>

In *Meru Travel Solutions Private Limited v. UBER*, Case No. 96 of 2015<sup>39</sup>, Meru Travel Solutions Private Limited filed an Information against UBER alleging that owing to its deep pockets, it has indulged in a series of anti-competitive practices of predatory pricing, imposition of unfair conditions *etc.* with the intent of establishing monopoly and of eliminating otherwise equally efficient competitors from the relevant market. Uber was alleged to be having dominant position in 'radio taxi services in Delhi & NCR' (relevant market in this case) and owing to its dominant position, it was alleged to have adopted certain abusive practices such as providing excessively low or predatory prices through discounts, in order to eliminate competition from the market. Additionally, it was claimed that Uber's *incentive policy* was not financially justified and was solely intended to exclusively tie drivers to its network, thereby preventing competitors from accessing them. As a result, Uber was accused of exploiting its dominant position in the relevant market.<sup>40</sup>

Though initially CCI closed the matter, the Honourable Appellate Tribunal and the Honourable Supreme Court directed the Director General to investigate the issue and submit an investigation report.<sup>41</sup>

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<sup>37</sup> *Ibid*

<sup>38</sup> *Ibid*

<sup>39</sup> 2016 SCC OnLine CCI 12 : [2016] CCI 12

<sup>40</sup> *Ibid*

<sup>41</sup> Competition Appellate Tribunal Appeal No.31/2016 available at

[http://compatarchives.nclat.nic.in/Attachments/JudgementList/4198\\_Meru.pdf](http://compatarchives.nclat.nic.in/Attachments/JudgementList/4198_Meru.pdf)

In *XYZ AND Alphabet Inc. and Others*, Case No. 07 of 2020<sup>42</sup>, based on an Information filed against Google and its related entities, CCI launched an investigation against Google in November 2020, focusing mainly on three accusations.:

- (i) “*firstly*, in relation to the allegation of pre-installed *Google Pay* on Android smartphones leading to a “*status-quo bias*” that harms the interests of other apps that offer payments through UPI, the CCI acknowledged that Google already has a strong presence in the UPI-based digital payments market and this could potentially influence the growing and changing market in its favour and thereby potentially disrupt the level playing field.
- (ii) *secondly*, the CCI was of *prima facie* view that requiring app developers to use Google Play Store's payment system and in-app billing system for charging users for apps and in-app purchases on the Play Store limits the developers' ability to choose their own preferred payment processing system.
- (iii) *thirdly*, in relation to excluding/discriminating other mobile wallets/UPI apps as one of the effective payment options in the Google Play's payment system, CCI noted that Google Pay and other competing UPI apps were integrated in Play Store with different methodologies which *prima facie* resulted in better user experience in case of Google Pay. This difference has the potential to shift users towards adopting Google Pay over other UPI based payment apps.”<sup>43</sup>

In view of the above, Google, as per the CCI's *prima facie* view, has abused its dominant position in contravention of the Section 4(2) of the Competition Act, therefore, the commission ordered an investigation in this matter by the Director General. The case is presently under investigation.

In *Umar Javed & Others v. Google LLC & Others*,<sup>44</sup>, CCI ordered investigation against Google for imposing alleged restrictions on Android device manufacturers through various agreements *i.e.* Mobile Application Distribution Agreement (MADA) and Android Compatibility Commitment (ACC). As per MADA, android device manufacturers will have to preinstall the entire suite of Google apps at a predetermined position, in order to be able to preinstall any proprietary app of Google, *e.g.* Play Store. Pre-installation of Google apps may create behavioural bias among consumers and reduce the ability of rival apps to compete in the relevant market. ACC reduces the ability and incentive of device manufacturers to develop and sell devices operating on alternative

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<sup>42</sup> 2020 SCC OnLine CCI 41

<sup>43</sup> cci.gov.in

<sup>44</sup> *Umar Javed & Others v. Google LLC & Others*, 2019 SCC OnLine CCI 42 (Case No 39 of 2018) also available at <https://www.cci.gov.in/sites/default/files/39-of-2018.pdf>

versions of Android i.e. Android forks. The matter is under consideration of CCI.

In *Matrimony.com Limited v. Google LLC & Others*, Case Nos. 07 & 30 of 2012<sup>45</sup>, CCI levied a penalty of INR 135.86 crores upon Google for indulging in search bias in abuse of its dominant position in the relevant market. It was found by the CCI that ranking of Universal Results (news/ images/ local businesses) prior to 2010 were pre-determined to trigger at certain fixed (1<sup>st</sup>, 4<sup>th</sup> or 10<sup>th</sup>) position on the Search Engine Result Page (SERP) instead of by their relevance. Such practice of the Google was found to be in contravention of the provisions of Section 4(2)(a)(i) of the Competition Act which pertain to imposition of unfair condition by a dominant enterprise and was also unfair to the users/consumers. On Google's Flight Commercial Unit, prominent display of Commercial Flight Unit by Google on SERP with link to Google's specialized search options/ services (Flight) in contravention of the provisions of Section 4(2)(a)(i) of the Competition Act was found by CCI. The agreements made for search intermediation that imposed restrictions on publishers were deemed unjust as they limited the options of these partners and prevented them from utilizing the search services offered by other search engines. Google's imposition of unjust terms on these publishers was in violation of Section 4(2)(a)(i) of the Competition Act. Given the gatekeeper role of Google, the order of the Commission was aimed at eliminating search bias, promoting competition on merits and creation of a level playing for all firms irrespective of their sizes. <sup>46</sup>

In *Ms. Prachi Agarwal v. Swiggy Bundl Technologies Private Limited*, Case No. 39 of 2019<sup>47</sup>, the Informants in this case alleged a contravention of the provision of Section 4 of the Act on account of *Swiggy* charging higher rates through its app/ website than the price/rates offered by the respective restaurant(s) in their outlets for walk-in customers, over and above the delivery charges. It was also stated by the informants that the customers generally are not aware about the price/ rates charged by a particular restaurant in the offline mode due to which they cannot compare the same with the rates listed/displayed on *Swiggy's* app/website. This, as per the Informants blinds the customers who are completely oblivious of the inflated prices charged by *Swiggy*.

CCI considered the information and the response of *Swiggy* with regard to the allegations made by the Informant. CCI observed that the *Swiggy* had no role to play in the pricing of the products offered by the restaurants on *Swiggy's* platform. In the facts and circumstances of

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<sup>45</sup> *Matrimony.com Limited v. Google LLC & Others*, 2018 SCC OnLine CCI 1 (Case Nos. 07 & 30 of 2012) also available at <https://www.cci.gov.in/images/antitrustorder/en/07-and-3020121652434133.pdf>

<sup>46</sup> Ibid

<sup>47</sup> 2020 SCC OnLine CCI 22

the case, it was further noted by the CCI “*it may not be germane to define a precise relevant market and conduct further analysis. Having been satisfied with the averments of Swiggy that it had no role to play in the pricing of the products offered by the Partners on the platform*”. CCI did not find a *prima facie* case of violation of the provisions outlined in Section 4 of the Act.

Thus, it can be seen that CCI has been playing a key role in regulating the anti-competitive conduct of E-Commerce players through its interventions particularly in the cases which have impact upon a large number of consumers.

#### 4. Conclusions

The proposed amendments to the E-Commerce Rules, 2020 seek to provide a robust regulatory mechanism over e-commerce platforms to protect the interests of consumers who purchase goods or avail services through digital modes. This, of course, would go a long way in attaining and reinforcing the objectives of the CPA, 2019 in protecting the interests of e-consumers in a more organised, systematic and institutional manner. In fact, the proposed dispensation would provide an *ex-ante* check and balance over e-commerce entities in regard to their unfair business practices and this may minimize the *ex-post* complaints filed before the consumer fora by consumers of e-commerce. Thus, the *ex-ante* regulatory requirements would supplement the *ex-post* enforcement task of consumer fora and would help achieve the larger objectives of law in a more coherent, efficient and speedier way.

Evolving e-commerce has significantly contributed to consumer welfare and more and more consumers are shifting towards purchases in online mode. The recent pandemic has also contributed in nudging consumers in availing services through online platforms. It is, therefore, imperative that such burgeoning ecosystem of e-commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself.

The proposed Rules seek to provide overarching *ex ante* prescription for all e-commerce entities irrespective of their size or any other criteria. Such uniform compliance requirements, particularly that operate at regulatory level *ex ante*, may disturb the level playing field between big & incumbent players on the one hand and small & new entrants on the other, as these requirements may act onerously upon the latter even though they may remain otherwise compliant with such prescriptions. Also, additional compliances and norms to be followed by e-commerce entities may further create a discriminatory framework *vis-à-vis* brick-and-mortar players as well, who are handling about 95% sales and would not be covered by such *ex-ante* compliance and regulation.

Further, the proposals effect a paradigm change in the focus of consumer law & policy from regulating business-to-consumer (B2C) relations to regulating platform-to-business (P2B) and business-to-business (B2B) relations, an area more appropriate for regulation by other policy tools and agencies such as CCI/ ED/ Data Protection Authority/ IT Act *etc.* Such shift in approach and focus, apart from stretching the resources thin, may also inadvertently impinge upon the regulatory domain of other Agencies and Departments which are well-suited to discharge regulation of P2B and B2B transactions and conduct within their regulatory framework. For example, the reference in the proposed amendments to proscribed conduct of dominant undertakings under the Competition Act, 2002 is unnecessary as it may confuse consumers as to the appropriate forum for pursuing cases against exploitative abuses of dominant firms *i.e.* whether to pursue before consumer fora/ CCPA or before Competition Commission of India. Similarly, the proposed Rules touch upon the regulatory framework of the Information Technology Act, 2000; the proposed Personal Data Protection Bill and Enforcement Directorate (FDI Regulations in e-commerce). Potential overlaps amongst different organs may create jurisdictional issues and may also result in consumer detriment.

The proposed Rules seek to create a dedicated compliance mechanism and appointment of compliance officer from a sectoral perspective. In this, businesses must be allowed to have the flexibility to have a compliance mechanism through a single window mechanism across the sectors instead of mandating them to have multiple compliance officers for ensuring compliance with different regulations administered by different agencies and wings of the Government. Such fragmented mechanism would result in enhanced costs for doing business and may again ultimately burden the end-consumers, besides resulting in micro managing the businesses and thereby interfering with freedom of trade. E-commerce is a sunrise sector and any micro-management through granular policy prescriptions, may have the unintended consequence of affecting the growth and innovation in the sector. E-commerce is a fast evolving sector and regulatory intervention has to be very calibrated and targeted lest it stifles growth and innovation.

Though a number of *ex ante* measures are required to be followed by e-commerce platforms uniformly but in the absence of any institutional mechanism to monitor and enforce those measures, the same may not be in themselves sufficient to achieve their avowed objectives. A general provision in the Rules to provide that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not be enough without any institutional and enforcement support.

In sum, a comity of regulators, working harmoniously in their respective fields governing E-Commerce, through inter-regulatory coordination would go a long way in creating an ecosystem of regulation which would not only protect consumer interests in E-Commerce without stifling businesses and innovation.

# The Promise of Equality: A Comparison of India's Reservation Policy with Affirmative Action of the United States

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## ABSTRACT

Reservation has always been a contentious issue in the national political discourse for its inherent discriminatory, albeit positive, nature. Despite a forward-looking vision of our constitution makers to create an undivided and equitable society, the issue of merit and positive discrimination, in favour of those standing at a differential status, continue to be at loggerheads thus keeping the issue alive ad nauseum. This paper attempts to assess the efficacy of the extant Indian system of reservation vis-a-vis the affirmative action policy of the United States.

The United States is chosen for comparison due to parallels which both the nations enjoy in their national policies qua affirmative action. In both the countries, affirmative action is provided as a compensation for past injustices. However, their approach towards the policy is different in as much as where the US has adopted an individualistic approach, India has preferred a class based approach in their policy of affirmative action. Notably, with the introduction of Economic Backward class reservation, the Indian policy is tilting towards an individualistic approach. The article applauds the state's policy. An individualist approach, the paper contends, can help India's Constitution framers achieve their goal of creating a classless society.

Despite some similarities, there remains a significant gap in the administration and implementation of affirmative action in both democratic states. This paper seeks to understand the affirmative action policy in the US and India, makes an attempt to evaluate their systems and propose changes that are required on dire basis.

**Keywords:** *Group Based Approach, Individualistic Approach, Affirmative Action, Quota Based Reservation, Economic Backward Class.*

## 1. Introduction

Justice is the end of any civilised legal system and is understood<sup>1</sup> in two senses - wider and narrower. In a wider sense, justice is synonymous to morality and the same is given natural law interpretation by Aquinas and Augustine who claim<sup>2</sup> that "*unjust law is no law*". While in a narrower

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<sup>1</sup> Rohinton Mehta, 50 Lecture on Jurisprudence, (Snow White Publication 2000).

<sup>2</sup> *Ibid.*

sense, it means impartiality or equality. It entails the fair and equal treatment of all. It was supported by Aristotle who maintained<sup>3</sup> that “*like should be treated as alike*”. Equality as a term implies being equitable. Equality is characterized as the condition of being equitable, particularly in status, rights and so on. Salmond defines<sup>4</sup> justice as “*giving every man his due*”. The idea of equality does not, subsequently, expect that things or individuals are precisely the equivalent or clones of one another. It<sup>5</sup> has been rightly viewed that men aren't always made equal. True equality among citizens, however, is impossible to achieve because we all have natural inequalities. We recognize that one person may have superior beauty or power, as well as greater inherent literary or athletic ability. As a result, some degree of discrimination among people is reasonable and even necessary in a just society. Sen<sup>6</sup> also famously argues that “*Equal consideration for all may demand very unequal treatment in favour of the disadvantaged*”.

The word “affirmative action” refers<sup>7</sup> to a series of policies adopted by a country's sovereign, specifically on the basis of race, caste, and gender, with the goal of fostering equal opportunities in jobs, education, public works, and health-related matters. Affirmative action seeks to achieve full diversity, i.e. adequate representation from all socioeconomic backgrounds. It is impossible to resist giving special treatment to specific groups of people who are considered to be “very backward” in this way. The basic logic<sup>8</sup> behind affirmative action is that first, there is a disparity in the number of individuals that are qualified and the amount of money that the government is willing to distribute. Second, affirmative action incentives are unequally distributed to those that fall into the qualifying categories. Many nations have chosen affirmative action to alleviate discrimination against traditionally disadvantaged backward classes. In the United States, affirmative action seeks<sup>9</sup> to mitigate the impact of past forms of discrimination in society, particularly in the workplace, by allocating jobs and resources to members of certain groups, such as minorities and women. The Indian constitution contains a scheme of quota reservations. The caste or quota based affirmative action program<sup>10</sup> in India is called the reservation system. When we look at the historical

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<sup>3</sup> Paridhi Gupta and Subhadeep Chowdhury, Equality: Sameness and Difference, IGNOU (2020).

<sup>4</sup> Rohinton Mehta, *Supra note.1*.

<sup>5</sup> Nicole Lillibridge, The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States, volu.13, William and Mary Bill of Rights Journal, (2004-05).

<sup>6</sup> S Sarath Mathilal de Silva, the concept of Equality: Its Scope, Developments and International Legal Regime, volu.16, Royal Asiatic Society of Sri Lanka (2016).

<sup>7</sup> Thomas Sowell, Affirmative action around the world, Gale University Press (2004).

<sup>8</sup> Frank de Zwart, The Logic of Affirmative Action: Caste, Class and Quotas in India, Vol. 43, Sage Publications Ltd (2000).

<sup>9</sup> Anthony F. Libertella, Sebastian A. Sora and Samuel M. Natale, Affirmative Action Policy and Changing Views, Vol. 74, Springer (2007).

<sup>10</sup> Durga P Chhetri, POLITICS OF SOCIAL INCLUSION AND AFFIRMATIVE ACTION: CASE OF INDIA, Vol. 73, Indian Political Science Association (2012).

history of the caste system in India and ethnic inequality in the United States, we find several parallels.

This article will first examine the idea of affirmative action in India and the United States from the historical context, and then look at existing laws and policies in this regard. Third, it will look at how such policies are implemented in both nations, then in fourth part it will attempt to comprehend India's recent shift from a group-based to an individualistic approach as a result of the establishment of a new policy, namely the Economic Backward Class reservation policy (hereafter referred as EBC reservation policy) and finally, it will conclude with author's opinion.

#### **A. The concept of affirmative action in India and the US along with its historical background**

- **Case of India**

In India, affirmative action is granted on a preferential basis based on caste. The Varna system underpins the 2500-year-old<sup>11</sup> caste system. In the Varna scheme, the entire population is divided into four occupationally specific classes that are mutually exclusive. Brahmins, Kshatriyas, Vaishyas and Shudras are the four Varnas. All of the menial and residuary positions that were not taken up by the three Varnas fell to the Shudras. Shudras were therefore regarded as "untouchables," and their existence was regarded as polluting. As a result, they were separated from the majority of the population and regarded as an undesirable class<sup>12</sup>. The upper class, which included three Varnas, accounted for 18%<sup>13</sup> of the population, while Shudra made up nearly half of the population. It is obvious that a division dependent on jobs is inextricably linked to the economic factor. The upper Varnas grew stronger over time, while the untouchables grew poorer and were increasingly targeted for persecution, brutality, and exclusion. As a result of this, there was a significant social divide between these groups of people as time passed. As a result, in India, affirmative action is aimed at the 'Jati,' who come under the Shudra Varna.

In legal terms, these castes are now known as scheduled castes, but most Indians refer to them as "Dalit," which means "oppressed." Despite the fact that untouchability is abolished by legal means. There has also been no social integration of Dalits into the mainstream. Even today, the growing number of atrocity and hostility to Dalits demonstrate that the situation is far from ideal. Due to their stigmatised status and as a way out of bigotry and separatism, the 'untouchables' were forced to convert to other religions such as Christianity and Islam, as the caste system is

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<sup>11</sup> Nicole Lillibridge, *supra* note.5.

<sup>12</sup> Ashwini Deshpande, *Quest for Equality: Affirmative Action in India*, Vol. 44, *Indian Journal of Industrial Relations* (2008).

<sup>13</sup> Ashwini Deshpande, *EQUITY & DEVELOPMENT*, World Development Report (2006).

historically synonymous with Hinduism. Many low castes have adopted Buddhism in the hope of achieving social equality. This class of people converted to Buddhism, formerly untouchable, is called a 'Neo-Buddhist'.

The affirmative action program in India is however concentrated towards the Hindu lower castes, the SC's. In addition to this, there are more than 50 million people belonging to tribal communities called 'Adivasis' whose origins can be traced back before the Aryans. Such people, who speak different dialects and live on the outskirts of civilization, are excluded from mainstream society as well as from overall growth. As a result, the affirmative action policy is extended to them. Apart from these two categories, the OBCs (Other Backward Classes), who form the residual category and include anyone who is neither a SC nor a ST, are fundamental to the concept of affirmative action in India. The Mandal commission (Second National Commission on Backward Classes, first being the Kaka Kalelkar commission) classified 52<sup>14</sup> percent of the population as belonging to the "Other Backward Classes," or "OBCs," and recommended a 27<sup>15</sup> percent reservation in education and jobs.

As a result, the government expanded reservation towards OBC's, making caste-based reservation quotas available to SC's, ST's, and OBCs. Persons with disabilities (PWD) and a quota for women are among the two additional horizontal-based reservations that have recently been introduced. Very recently the Economic Backward Class (EBC) quota has been introduced by 103rd<sup>16</sup> Constitutional Amendment of 2019.

- **Case of United States**

During the period of colonization in America, the idea of the Puritans<sup>17</sup> was to establish religious freedom in and to form a Christian state. This religious freedom was based on the idea that there should be an establishment of a religious community. The transformation of this community oriented view of the Puritans to one based on Individualism was a result of two prominent events, one is the Great Awakening in the late 1730s and the other being Enlightenment period (1685-1815) in Europe. Both of these changes shifted the puritans' community-centered view of just society to an individual-centered one.

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<sup>14</sup> Mandal Commission: Reservation for Backward Class, (22<sup>nd</sup> May, 2021 7:30 PM)

<https://www.yourarticlelibrary.com/essay/mandal-commission-reservation-for-backward-class/35168>.

<sup>15</sup> *Ibid.*

<sup>16</sup> One Hundred and Third Amendment Act 2019, Section 3, Acts of Parliament, 2019(India).

<sup>17</sup> Nicole Lillibridge, *Supra note.5*.

Even if United States became an individual centric society or became more conscious for individual rights, racial discrimination was still prevalent in US society. It is largely focused on skin colour and other readily identifiable phenotypical characteristics. As a result, it is self-evident that people with similar appearances or who belong to the same race will band together. Thus, color-based racial discrimination can be encountered in daily life in the United States, especially by those who are on the receiving end of racial discrimination. Historically, the US as a nation is discovered by white European settlers, dispossessing the Native Americans who were then deprived of their land. The black slave labourers which were cheaper than the slave labour elsewhere were forcibly brought from Africa for economic development. Black slaves had no rights and no social standing. Ironically, this 'separate but equal' facility was upheld by the Supreme court in the case of *Plessy vs Ferguson*<sup>18</sup>. The condition of blacks after the ban of slavery did not change much as there was a humungous gap already created between the races for example, restrictions of the blacks to low paid jobs, lack of education opportunities and social and economic discrimination. It took the Supreme Court to overturn the government-sponsored segregation maintained in *Plessy vs Ferguson*<sup>19</sup> by striking down the separate but equal practice in *Brown vs Board of Education*<sup>20</sup>, giving rise to the first hint of affirmative action in the United States.

## B. Current positions of laws in India and US

### • Case of India

The reservation system is enshrined in the constitution of India unlike the affirmative action of the US. It is important to take note of the intent of the Constitutional Makers while providing for affirmative action within the Constitution. It was *KT Shah* who suggested<sup>21</sup> during the formulation of Article 15<sup>22</sup> that an amendment should be made in it order to extend advantages and safeguards to STs and SCs, the intention being that such groups have been neglected in the past and their right to claim equal citizenship did not exist owing to their backwardness. Other members like *B.R. Ambedkar* was not in favor<sup>23</sup> of this as he was of the opinion that such an amendment would segregate backward classes from the general public. Therefore, it was not included initially. In the prominent case of *State of Madras v. Champakam*

<sup>18</sup> *Plessy v. Ferguson*, 163 U.S. 537.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Brown vs Board of education*, L.A. No. 30485. Supreme Court of California, (1954).

<sup>21</sup> Constitutional Assembly Debate, [https://www.constitutionofindia.net/constitution\\_assembly\\_debates](https://www.constitutionofindia.net/constitution_assembly_debates) (Last access 10 May, 2021).

<sup>22</sup> INDIA CONST, art 15.

<sup>23</sup> Constitutional Assembly Debate, *Supra note.21*.

*Dorairajan*<sup>24</sup>, a challenge was posed on fixing of a particular number of seats for different communities including Harijans, which was violative of Article 15(1)<sup>25</sup> and 29(2)<sup>26</sup> hence void under Article 13. The court also held it was inconsistent and rejected the appeal. In order to cure the ill effects of this judgment, the first Constitutional Amendment Act, 1950<sup>27</sup> was passed which inserted Article 15(4)<sup>28</sup> into the Constitution.

Talking in the context of Equality of status and of opportunity in public services, initially the Constituent Assembly was not in favor of incorporating such a provision. It was<sup>29</sup> *B.R. Ambedkar* who from the very start was in favor of it and ultimately it was added in the Constitution (but not as article 16(4)<sup>30</sup> as it exists today). Further discussions on this inclusion took place primarily due that the term “backward classes” was ambiguous in nature. This ambiguity was ultimately settled by *Mr. Munshi* who clarified<sup>31</sup> that the use of the term class is not restricted to only backward classes but also STs and SCs. He also laid down that backward class is one which is socially, economically and educationally backward.

After the first Constitutional Amendment, the first case related to affirmative action was *Balaji v. State of Mysore*<sup>32</sup> wherein the order of the Mysore Government reserving seats for backward classes in medical and engineering colleges was challenged. The Court in the case rejected the appeal and held that Article 15(4) is an exception to Article 15(1) and (2)<sup>33</sup>. Talking in the context of quantum of reservation, a passing reference was made that the reservation of seats should not be more than 50% of the total seats. Various other judgments were passed which were in consonance of the Balaji verdict.

Later, in the case of *Indira Sawhney v. Union of India*<sup>34</sup> (famously known as Mandal Commission case) wherein the 27% quota for Other Backward Classes and 10% economic reservation of higher classes was challenged. The court upheld the reservation of seats for OBCs but rejected the 10% economic reservation. Also, it was held that Art 15(4) is not an exception to Art 15(1) or (2), rather it is an extension of it. On the point of quantum of reservation, 50% reservation of seats was upheld but a relaxation

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<sup>24</sup> AIR 1951 SC 226.

<sup>25</sup> INDIA CONST, art 15 §, cl 1.

<sup>26</sup> INDIA CONST, art 29 §, cl 1.

<sup>27</sup> First Constitutional Amendment Act, Acts of Parliament, 1951 (India).

<sup>28</sup> INDIA CONST, art 15 §, cl 4.

<sup>29</sup> Constitutional assembly debate, *Supra no.21*.

<sup>30</sup> INDIA CONST, art 16 §, cl 4.

<sup>31</sup> Constitutional assembly debate, *Supra no.21*.

<sup>32</sup> AIR 1963 SC 649.

<sup>33</sup> INDIA CONST, art 15 §, cl 2.

<sup>34</sup> AIR 1993 SC 477.

to this can take place in exceptional circumstances. Further, in case of reservation in promotion in public employment, the same was not allowed but the previous promotions made on the basis of reservation shall not be done away with, in fact giving it a prospective effect. The concept of creamy layer was also introduced within OBCs which became a criteria for excluding certain sections who were economically, socially and educationally more empowered.

Consecutively in case of *RE. Kerala Education Bill*<sup>35</sup>, *T.M.A. Pai Foundation v. State of Karnataka*<sup>36</sup> and *P.A. Inamdar v. State of Maharashtra*<sup>37</sup> the court held that states cannot ask the private educational Institutions which are not aided by the government to reserve seats for the backward classes of citizens. This created frustration among reserved category candidates and legislature. Therefore, the *93<sup>rd</sup> Constitutional Amendment Act, 2005*<sup>38</sup> was passed which added clause (5)<sup>39</sup> to Article 15 according to which the states have the authority to ask such institutions( whether aided or unaided) to reserve seats for backward classes. This Constitutional Amendment and 27% reservation for OBCs was challenged in the case of *Ashok Thakur v. Union of India*<sup>40</sup> on the grounds that it was violative of the basic structure of the Constitution. The court upheld the Art 15(5)<sup>41</sup> as well as 27% reservation.

Now coming to aspect of reservation in public services in which there are many grey area such as reservation in promotion, consequential seniority and the carry forward rule. After the *77<sup>th</sup>*<sup>42</sup>, *81<sup>st</sup>*<sup>43</sup> and *85<sup>th</sup>*<sup>44</sup> *Constitutional Amendments* have been incorporated under Article 16(4A)<sup>45</sup> and 16(4B)<sup>46</sup> of the Constitution which settled all the turf in this field. In the landmark judgment of *M.Nagaraj & Others vs. Union of India and Others*<sup>47</sup> the constitutional validity of the abovementioned amendments was questioned on the ground that they violate the basic structure of the Constitution. In this case, the court rejected the petition by stating that the carry forward rule under Art. 16(4B) does not violate the quantum of reservation that is prescribed to 50%. Moreover, both the provision Art. 16(4A) and (4B) have been carved

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<sup>35</sup> AIR 1958 SC 956.

<sup>36</sup> (2002) 8 SCC 481.

<sup>37</sup> AIR 2003 SC 355.

<sup>38</sup> Ninety Third Constitutional Amendment Act 2005, Acts of Parliament, 2005 (India).

<sup>39</sup> INDIA CONST, Art 15 §, cl 5.

<sup>40</sup> 2008 (6) SCC 1.

<sup>41</sup> *Ibid.*

<sup>42</sup> Seventy Seven Constitutional Amendment Act, 1995, Acts of Parliament, 1995 (India).

<sup>43</sup> Eight-First Constitutional Amendment Act, 2000, Acts of Parliament, 2000 (India).

<sup>44</sup> Eight-Fifth Constitutional Amendment Act, 2001, Acts of Parliament, 2001 (India).

<sup>45</sup> INDIA CONST, Art 16 §, cl 4A.

<sup>46</sup> INDIA CONST, Art 16 §, cl 4B.

<sup>47</sup> AIR 2007 SC 71.

out of Art. 16(4), which enables the government to make provisions for reservation in public employment and appointment. The other important question which was considered in this case was the extent of backwardness. This extent of backwardness is to be determined on the basis of quantifiable data on the representation of backward classes in public employment. This extent has to be checked on the touchstone of Art. 335<sup>48</sup>.

Recently, in 2018 this case was revisited by the apex court in *Jarnal Singh vs Lachhmi Narain Gupta*<sup>49</sup> that the requirement of obtaining quantifiable data for ST/SC in the judgment was quashed keeping in mind the fact that STs and SCs are historically suppressed communities and therefore they are deemed backward which was subsequently backed by the Apex court in *B.K Pavitra vs State of Karnataka*<sup>50</sup>. Very recently interesting question upon the possibility of sub-classification of Scheduled caste into “more backward” and “backward” for the purpose of providing reservation arises in the case of *The State of Punjab and Ors. Vs. Davinder Singh and Ors*<sup>51</sup>. The court observed that the sub-classification of SC’s is a need of the hour to accomplish equality in its truest sense which appears in conflict with the earlier case of *E.V. Chinnaiah v. State of A.P. and Ors*<sup>52</sup> wherein the court viewed the contrary. The law of reservation in India has witnessed another change in *Dr.Jaishri Laxmanrao Patil v. The Chief Minister and Ors*<sup>53</sup> where the court, by a 3:2 majority, holds that only the President, after consulting the governors of the states, has the authority to name Socially and Educationally Backward Classes (SEBC) for constitutional purposes.

As of now 22.5% of the quota is reserved for SC/ST and 27% for OBC groups in government jobs, seats in educational institutions, including the ones which have partial government funding and also the electoral constituencies at various levels of government. Hence this quota-based reservation is clearly enshrined in article 15(4)<sup>54</sup> and article 16(4)<sup>55</sup>. The reservations for these classes are extended into three spectrums: Political arena, Education and Employment.

1. Article 330<sup>56</sup> and Article 332<sup>57</sup> provide for the reservation of seats for SC and ST in the Lok Sabha and the Legislative

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<sup>48</sup> INDIA CONST, Art 335.

<sup>49</sup> SCC 2018, SC 1641.

<sup>50</sup> (2019) 16 SCC 129.

<sup>51</sup> MANU/SC/0620/2020.

<sup>52</sup> MANU/SC/0960/2004.

<sup>53</sup> MANU/SC/0340/2021.

<sup>54</sup> INDIA CONST, art 15 §, cl 4.

<sup>55</sup> INDIA CONST, art 16 §, cl 4.

<sup>56</sup> INDIA CONST, art 330.

<sup>57</sup> INDIA CONST, art 332.

Assembly of the State respectively. Such a reservation is not applicable to the OBC's.

2. Article 15(4) explicitly allows the State to enforce any special provision for the betterment of socially and educationally backward classes and for SC's & ST's, Article 15(3)<sup>58</sup> empowers to make special provisions for women and children, thereby getting them under affirmative action in India.
3. Similarly, Article 16(4), Article 16(4-a), 16(4-b) and 335. These articles empower reservation in education for the backward classes and delegate the government authority to amend and make changes whenever required. Another important aspect of article 16(4) is that it provides for reservation for the backward class of citizens in appointments to post of public employment, which in opinion of the state are not adequately represented under these service of the state. Exercising the authority given by the constitution to the parliament has resulted in enactment of various laws such as the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989<sup>59</sup>, establishment of several constitutional intuitions like the National Commissions for backward class<sup>60</sup>, the National Commission for women<sup>61</sup>, the National Commission for SC's<sup>62</sup> & ST's<sup>63</sup>.
4. Newly inserted article 15(6)<sup>64</sup> and 16(6)<sup>65</sup> enables the state for making special provision for the advancement of Economic Weaker Section in so far relate to their admission in educational institutions and for the appointment or posts in the public services upto maximum 10%.

#### ● Case of United States

The 14th<sup>66</sup> amendment was only successful in abolishing slavery. It states that the state shall not deny to any individual in its jurisdiction, the equal protection of law. It is the equal protection of law clause which governs the equality approach in the USA but didn't develop the condition of blacks in America. After the landmark judgment of *Brown vs Board of education*<sup>67</sup>, which

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<sup>58</sup> INDIA CONST, art 15 §, cl 3.

<sup>59</sup> The Scheduled Castes and Tribes (Prevention of Atrocities) Act 1989, No.33, Acts of Parliament, 1989 (India).

<sup>60</sup> INDIA CONST, art 338B.

<sup>61</sup> National Commission for Women Act 1990, section 3, no. 20, Acts of Parliament, 1990 (India).

<sup>62</sup> INDIA CONST, art 338.

<sup>63</sup> INDIA CONST, art 338A.

<sup>64</sup> INDIA CONST, art 15 §, cl 6.

<sup>65</sup> INDIA CONST, art 16 §, cl 6.

<sup>66</sup> 14th Constitutional Amendment 1868, Acts of Parliament, 1868 (United States).

<sup>67</sup> *Brown vs Board of education*, *Supra note*. 20.

paved way for further development but discrimination persisted eventually the Civil Rights Act of 1964<sup>68</sup> was enacted.

The Civil Rights Act 1964<sup>69</sup> explicitly brought the principle of affirmative action to the spheres of American society. The Supreme Court backed this new affirmative action program which was not quota based unlike in India. The Lyndon B. Johnson's administration signed<sup>70</sup> several executive orders with the primary objective to achieve equality in employment and education. Title VI and VII of the Civil Rights Act 1964<sup>71</sup> enshrines affirmative action in its raw form. Finally, these titles abolish discrimination on grounds of colour, race, religion, sex, and national origin, in federal assisted activities and in employment, respectively. One cannot forget the *Bakke vs University of California*<sup>72</sup> where affirmative action policy received criticism throughout the country. The Supreme Court came to the rescue with a 5-4 majority ruling in favor of the affirmative action policies. Later on in the USA, the test of strict scrutiny was evolved which was required to be applied to the policy of affirmative actions. This test is articulated in various case laws, for instance *Fullilove v. Klutznick*<sup>73</sup>. The court stated that strict scrutiny requires that the affirmative action has been extended only for compelling interests and it should be narrowly tailored to serve the compelling interests. In employment cases, the compelling interest can be to address a past discrimination by agency that is providing benefits. In Higher Educational Institutions, diversity is a major compelling interest, and using race as a factor, diversity can be achieved. It is to be noted that this does not hold true in the case of Primary and Secondary Education.

The examples which shows how courts apply the test of strict scrutiny in Higher Education are *Gratz v. Bollinger*<sup>74</sup> and *Fisher v. University of Texas*<sup>75</sup>. In the particular case of *Gratz v. Bollinger*, the Law School of University of Michigan refused admissions to students. These students challenged the race based admission policy, the compelling reason being diversity, being violative of their equal protection of right. The case made it to the US Supreme Court. It was held by the court that the compelling interest qualifies the test of strict scrutiny and the admission program was narrowly tailored to achieve the compelling interest. Hence, the affirmative action policy is not violative of the Equal Protection clause. In the latter case of *Fisher v. University of Texas*, Abigail Fisher, a white

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<sup>68</sup> Civil Rights Act 1964, Acts of Parliament, 1964 (United States).

<sup>69</sup> *Ibid.*

<sup>70</sup> Affirmative Action, (10<sup>th</sup> May, 2021 5:30 PM)

<https://www.britannica.com/topic/affirmative-action>.

<sup>71</sup> Civil Rights Act 1964, *Supra note*.68.

<sup>72</sup> *University of California v. Bakke*, 438 U.S. 265, (1978).

<sup>73</sup> U.S. 448, 1980.

<sup>74</sup> 539 U.S. 302 (2003).

<sup>75</sup> 579 U.S. --- (2016).

woman who was denied entry to the University of Texas, believes the school's two-part admissions scheme, which considers race, is unconstitutional. The university accepts approximately the top 10% of each in-state graduating high school class, a strategy known as the Top Ten Percent Plan, and then considers a variety of variables, including race, to fill the remaining spots. In a 4-3 decision led by Justice Anthony M. Kennedy, the Supreme Court found that the university's policies met the criteria of strict scrutiny, and that a school should be allowed fair leeway in the review process if it has considered other ways to achieve diversity.

### **C. Evaluation and Execution of Affirmative Action policies in India and the USA**

- **Case of India**

In India, the Ministry of Social Justice is in charge of enforcing the government's policies. A national regulatory agency for affirmative action initiatives does not exist in India. Although there is no remedy of civil action, for the denial of benefits, there is always remedy of writ jurisdiction under Article 32<sup>76</sup> and 226<sup>77</sup> of the constitution however the same is not effectual due to financial constraints, high pendency of cases and low literacy of litigants. Constitutional institutions such as the National Commission for Backward Class, the National Commission for Women, the National Commission for SC's & ST's have just remained mere spectators as there is no strong enforcement by them. The only arena in which the reservation quotas have been fulfilled is the electoral sphere. As a result, powerful Dalit political parties have emerged. This clearly demonstrates the ineffectiveness of affirmative action programmes in practice.

- **Case of United States**

In 1971, after several executive orders under Johnson's administration from 1963 to 1968 and the Richard Nixon's administration 1968 to 1974, the US Department of Labor has given government contractors instructions to follow "goals and timetables" for recruiting minorities and women. In the same year, the US Supreme Court ruled that an employer cannot impose a certain minimum certification until hiring an individual if such a requirement creates a "built-in headwind" for minorities<sup>78</sup>. The main deal was the presence of enforcement mechanisms in the US program, for example equal employment opportunity commission<sup>79</sup> established under the Civil rights act, is a key enforcer of

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<sup>76</sup> INDIA CONST, art. 32.

<sup>77</sup> INDIA CONST, art.226.

<sup>78</sup> Thomas Weisskopf, *Affirmative action in the United States and India*, Routledge Tylor and Francis Group (2004).

<sup>79</sup> *Supra* note.68.

affirmative action policies framed under the act. The affirmative action policy in the United States increased the number of black students admitted to classes from 0.8 percent in 1951 to 6.7 percent in 1989. In the early 1970s, it was discovered that there was a 30% wage disparity between races, which was reduced by the Civil Rights Act. According to the EEO-1 results, women made up 29.9% of all officials and managers, compared to 10.2% for men in 1970<sup>80</sup>

#### **D. The Concept of the EBC Reservation policy in India: From a Group-Based to an Individualist Approach**

The issue of reservation based on caste has always been remain contentious since its inception. Though it pacifies a section of people by providing some affirmative actions, it also generates a kind of dissatisfaction among a section of people who have not been considered the part of this reservation policy. The two line of thoughts has been emerged thoroughly in the debates on policy of reservation. The supporter for reservation policy on the base of cased argued that this policy is helpful and beneficial for the upliftment of the status of socially and educationally backward classes on the other line of thought is that they argued that this reservation policy has not been much helpful in amelioration the caste rigidity and upliftment of poor's.

The idea of Distributive justice<sup>81</sup> has been coined by the philosophy of preferential treatment. As Aristotle mentioned "*Injustice arises when equals are treated unequally and also when unequals are treated equally*"<sup>82</sup>. It is the sine qua non for the theory of distributive justice that every individual should deserved to get the distribution of benefit and the burden according to the place he/she hold in the society. But sometimes it could be problematic to do such kind of distribution of resources by making such Preferences.

Generally, it is suggested that individual's need, merit, status is some of the proper bases of distribution of benefits<sup>83</sup>. These proper bases of distribution indicate different types of inequalities prevalent in the society for instance inequality of necessity and inequality of merit but such inequality too vary from each other in a manner that not the same kinds of goods could be given to the people as means to encounter those inequalities.

In the opinion of Bernard Williams, the distribution of goods with reference to merit comprises an aspect of competition which is

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<sup>80</sup> Bineet Kedia, AFFIRMATIVE ACTIONS, Volume 2, International Journal of Law and Legal Jurisprudence Studies (2015).

<sup>81</sup> J.R. Lucas, On Justice (Clarendon Press, 1980).

<sup>82</sup> Aristotle, The Nicomachean Ethics (Hackett Publishing Company 1999).

<sup>83</sup> J.R. Lucas, *supra note*. 81.

somewhere missing in the case of inequalities out of need<sup>84</sup>. Besides the distribution of goods, for preservation of merit the distribution of opportunity to attain the goods is also requisite. The equality of opportunity proposes that there should be no exclusion from the access on the grounds other than those considered appropriate or rational for the goods in question."<sup>85</sup>

In the opinion of Bernard William, the genuine spirit of equality of opportunity requires not only that access be denied on grounds other than those that are reasonable or appropriate for the commodities in question, but that the reasons judged reasonable be such that persons from all walks of life have an equal chance of satisfying them.<sup>86</sup> We cannot include portions of the population designated solely by features that are in compliance with the grounds for distribution of goods when defining a "section of society," since this will further exclude some sections of the population<sup>87</sup> here. Bernard William raise a question that what will probably result if a section of people are acknowledged by characteristics which are in accordance to ground for allocation of goods? In response of this question, he pains staked a hypothetical situation which comprise an imaginary society in which great esteem was link to community of a warrior class, but restricted to wealthy families, for the recruitment of membership of the warrior class the precondition was set to pass the physical strength requirement.

Subsequently, after the pressure of some egalitarian reformers, the requirement rule got scrapped and new rule were framed according to them suitable competition was started and no warriors could be selected on the basis of appropriate competition. But notwithstanding this suitable competition was open to all only wealthy families were exploiting the opportunity as the rest of the population were not good enough due to the fact as the population were undernourished due to the poverty and therefore their physical strength was not up to the mark as those of the wealthy family. This instance indicate that the equality of opportunity in itself did not achieve as the poverty did hamper the opportunity and the poor were excluded from the warrior class not due to the poverty but due the weakness.<sup>88</sup> On similar analogy, taking into the merit as the characteristic for the competition and keeping out the rest of the competitor who do not fall into the merit is also connecting the characteristic with ground of exclusion. But there is possibility that people belonging to different section will not be able to satisfy such grounds, and for this the prime reason could be the poverty on account of that they were remained unapproachable of the quality of education, which may further hamper the meritocracy.

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<sup>84</sup> Bernard Williams, *The Idea of Inequality* (Cambridge University Press 1973), what is Justice? (Oxford University Press, 2000).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

Hence, the poor people ought to be administer with equality of opportunity when they fall on different footing with respect to the other people due to the poverty, so that they could be able to satisfy the condition of meritocracy.

Bernard William also says that in some situation for the selection of any education institution the social class and environ factors do also contribute essentially in result. He further gave an example of two students smith and jones where smith grew in favorable condition but john was grown in unfavorable but in curable conditions. Hence “their identity from a particular social group for these purposes does not include their curable environment which in itself is unequal and a contributor of inequalities.”<sup>89</sup> Further an observation can be drawn that within a same social group, inequalities do exist. Whether it be economic inequality, educational inequality or social inequality. Therefore, some affirmative action should be provided, which in the best way will equal up the conditions.<sup>90</sup>

Now the question arises that what kind of preferential treatment should be imparted in Indian context as it is fact that the objectives of constitution makers was to create a casteless society<sup>91</sup> Which means a caste should be considered analogous to class, as the class is a homogenous group of people having similar traits. A caste ought not to be equated to a class as within a caste, as there are numerous inequalities subsist within a caste, for example people can fall different level of income brackets, different status in society, different educational level and different environment to realise their full potential not only materialistically but also spiritually. On the other hand, if we opt economically weaker people as class to provide them preferential treatment, it could be turn out in a homogeneous class.

One can ponder upon two principle of theory of economic justice propounded by the John Rawls:

- 1) According to John Rawls every individual possesses an undefeatable claim of equal basic liberties, and the principle ought to be in tune with idea of liberty to all
- 2) Rawls says that two condition ought to be fulfilled in order to satisfy the social and economic inequalities which are as follow:
  - a) These two inequalities under the conditions of fair equality of opportunity should be attached to offices and positions that are open to all,
  - b) They are intended to benefit the society's most vulnerable members the most (the difference principle)<sup>92</sup>.

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<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Supra note.40.*

<sup>92</sup> John Rawls, Justice as Fairness (Universal Law Publication, 2001).

It is to be noted that the social and economic inequalities are governed by the difference principle. But it should be kept in mind that difference principle is subordinate to the first principle and the principle of fair equality of opportunity and the difference principle shall only apply when the prior principles are satisfied.<sup>93</sup> According to him Fair equality of opportunity does not mean that public offices and social positions should be open to all but it demands that all should have a fair chance to attain them. For example, If there is a distribution of native endowments, all those with the same level of ability and talent, as well as the willingness to put these gifts to use, should have the same chances of success, regardless of their social class of origin, the class in which they are born, and the class in which they develop until they reach the age of reason.<sup>94</sup>

John Rawls had surfaced some measures on which the least advantaged group of people in a society should be identified which are enlisted as follow:

- (a) The basic rights and liberties,
- (b) The freedom of free choice of occupation and movement against the background of diverse opportunities,
- (c) Powers and prerogatives of offices and positions of authority and responsibility,
- (d) Wealth and income,
- (e) The social roots of self-respect are defined as those features of basic institutions that are typically required for citizens to have a reasonable sense of their own value as individuals and to be able to go on in their lives with self-assurance.<sup>95</sup>

The genius of Rawls rest in the fact that he come down in favour of income and wealth in terms to define the underprivileged not emphasis much on other eventualities that are also answerable for the deprivation of the least advantaged group of people in a society. However, concept in theory of social justice voices in favour of poor section of society. The principle of justice of Rawls talks about the economic inequalities which shows his argument in the favour of the least advantaged classes. Economic justice warrants that how an individual is going to generate a self-governing material foundation to fulfil his/her economic need as the principle come up with to give them equal opportunities to fulfil his needs. The ultimate goal of economic justice is to enable each individual to engage creatively in labour that is not limited by economics, such as work of the mind and spirit. <sup>96</sup>

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

To add on this concept of economic justice, consideration of Maslow's theory on hierarchy of needs<sup>97</sup> should be given. Maslow mulled over five needs for the human in a hierarchical order. At the lower bottom of pyramid, he considered the basic need which includes food, shelter, health, etc. Maslow called them psychological needs. On the second level he put safety and security. On third level he mentioned social need, the needs of belongingness. At the fourth stage Maslow put the need of self-esteem of a person and at last Maslow consider the need of self-actualization at the fifth stage which means the optimal utilization of a person. Nevertheless, so as to achieve these need ones need that state should provide them equality of opportunities. And this equality of opportunities will only be occurred if the basic needs are contented and for realization of these basic needs economic need is much obligatory. Hence the preferential treatment must be based on the economic criteria rather on the base of caste of an individual.

It is to be noted that the Varna system was also based on the occupational meritocracy. Later, in the system caste started to play dominant role in determining the occupation. Michael Young in his book mentioned that the true spirit of Meritocracy lies in Equal Opportunity which will ultimately lead to Egalitarianism.<sup>98</sup> Now the question arises that what does the equality of opportunity embrace? Article 15 of the constitution of India mention equality of opportunity and of status for everyone. Is reserving some seats in educational institution and in government services adequate to establish equality of opportunity? There is certain question which we should raise, since the many decade of enactment of constitution, article 15 has not been construed properly. How the equality of opportunity could be established if there are not enough resources in the hand of an individual? And how can meritocracy be attained in its truest sense if some section of people continued aloof of the opportunity due to their deplorable economic conditions? Before analysis the question of that how this poor economic condition and poor quality of education do hamper the meritocracy not only in reserved classes but also in economically weaker general category. In order to examine these question there is need to make some assessments of data to understand the better picture of ground reality that is prevalent in country, that how much the reservation based on caste has been effective in Ameliorating the conditions of the reserved classes.

Justice Pasayat and Thakkar in the case of Ashok Kumar Thakur case<sup>99</sup> stated:

*“Classification on the basis of castes in the long run has tendency of inherently becoming pernicious. Therefore, the test of reasonableness has to apply. When the object*

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<sup>97</sup> Abraham Maslow, Theory of Human Motivation, Psychological Review (1943).

<sup>98</sup> Michael Young, The Rise of the Meritocracy, London: Thames and Hudson (1958).

<sup>99</sup> *Supra* note.40

*is elimination of castes and not the perpetuation to achieve the goal of casteless society and a society free from discrimination of caste, judicial review within the permissible limits is not ruled out. But at the same time compelling state interest can be considered while assessing backwardness. The impact of poverty on backwardness cannot be lost sight of. Economic liberation and freedom are also important.”<sup>100</sup>*

He further stated that:

*“Poor has no caste. It is an unfortunate class. It is a matter of common knowledge that the institution of caste is a peculiarity of Indian Institution when there is considerable controversy amongst the scholars as to how the caste system originated in this country.”<sup>101</sup>*

Pt. Nehru mentioned the dangers of reservation based on caste completely. He stated: -

*“... help should be given on economic considerations and not on caste. I dislike any kind of reservation, more particularly in service. I react strongly against anything which leads to inefficiency and second- rate standards... The only real way to help a backward group is to give opportunities of good education. But if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second-rate or third rate. I am grieved to learn of how far this business of reservation has gone based on communal consideration. It has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way lies not only folly, but disaster. Let us help the backward groups by all means, but never at the cost of efficiency. How are we going to build our public sector or indeed any sector with second rate people?”<sup>102</sup>*

In India, social groupings have been segregated by caste for decades. The caste system emerged from the Varna system, in which people were split into groups based on their vocations. However, in the Varna system, caste plays a significant role in determining occupation. As a result of this, backward castes such as ST/ST/OBC have been denied equal opportunities, resulting in economic, social, and educational disadvantage. The founders of the Constitution included provisions for positive action in terms of quota in educational

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<sup>100</sup> *ibid*

<sup>101</sup> *Ibid.*

<sup>102</sup> Jawaharlal Nehru, Letters to Chief Ministers 1947-1964, vol. 5, Oxford University Press (1959).

institutions and government services to combat the caste system. Reservations were majorly made on the basis of 'caste.' Time and situation has changed substantially as a result of globalisation and education. In addition, necessary policy modifications should be made. One of the most important features of an ideal legal system is adoption changes.<sup>103</sup> However it is equally true that, even if minimized, caste-based discrimination has not been eradicated throughout India, therefore we cannot entirely abandon our quota based reservation system. It is regrettable that the Constitution's goal of building a caste-free society has not been realised after so many years of quota based reservation.

Based on the preceding discussion, we may claim that economic reservation, in addition to our quota-based reservation, is necessary. Economic reservation supports the principle of Economic Justice, hence the 103rd Constitutional Amendment Act of 2019 is not illegal in and of itself. The spirit of the Constitution is infused with economic justice. The preamble, which mentions justice, social, economic, and political issues, reflects this. Equality will be promoted by promoting economic justice. Further the apex court in *Indira Sawhney* and in *Nagraj* case set the limit of 50% for the reservation. Court foster clarify that this 50% cap will be the part of basic structure doctrine. *Indira Sawhney* case, it was observed that "Reservation contemplated under clause (4) of Article 16 shall not exceed 50 percent. It is to be noted that court fixed that quota of 50% in *Indira Sawhney* only for the purpose of Art 16(4). The 103<sup>rd</sup> Constitutional amendment carved out 10% quota from the other 50% who are unreserved. Thus, this amendment does not disturb the 50% capping.

## 2. Conclusion

Therefore, it can be contended in the comparative analysis of India and the United States that past history plays a very important role in shaping the policies in a nation, and in this case the right equality. The USA sticks to an individualist approach to equality. Through a proper scrutiny of the 14th Amendment, it is clear that the American Constitution is tilted towards securing individual freedoms rather than securing right to equality. Also in the case of *Plessy v Ferguson*<sup>104</sup> Justice Harlan described America as such a state which is classless and color blind. On the other hand, the Indian constitution presupposes inequality in the caste hierarchy. India's constitution represents a group-based approach to equality however it would not be wrong to say that India is now tilting towards an individualist approach for reservation policy specifically after this 103rd Constitutional Amendment Act of 2019 which provides reservation in India not on the basis of quota system but on the basis of economic backwardness. It might be a significant step forward if India improves its infrastructure to ensure that economic reservation is

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<sup>103</sup> Rohinton Mehta, *Supra note. 1.*

<sup>104</sup> *Supra note. 18*

implemented as efficiently as feasible. Everyone should be required to reveal their incomes and assets, and a genuine database should be built to keep track of each individual. Economic reservation can contribute to the creation of a "casteless society," which was the goal of the Indian Constitution's framers.

Furthermore, due to a lack of supervision, accountability, and sanctions, it has been observed in India that the implementation of programmes in government jobs and educational institutions has remained ineffective. Owing to the many loopholes in the quota restrictions, this is the case. Privatization on the other hand is playing its part in making the reservations redundant, which showcases a need for a reservation into the private institutes. The United States, on the other hand, is seen as being more successful than India in terms of policy execution, owing to citizens' voluntary efforts. These voluntary efforts bolstered the laws, resulting in more creativity. Unlike India, the United States has a higher level of awareness of rights and safer ways to pursue legal recourse. In the United States, affirmative action can be implemented against a private employer; however, this is not the case in India. Economic inequalities are shrinking as a result of better implementation<sup>105</sup>.

The main reason for improper implementation of quota based reservation policy in India is the uncertainty in the caste system, the data relied upon for the reservation is based on the caste-based census carried out in 1931<sup>106</sup>. A caste-based census is the most pressing need of the day in order to get a better picture of the situation. The reasons for not conducting a caste census, according to the author, may be political. The uncertainty surrounding castes, sub-castes, the size of the population, and a lack of public knowledge are all major impediments to successful execution. Another important reason for ineffective implementation may be politician's ignorance. In simple terms, people belonging to the SCs, STs, and OBCs make up the majority of voters in India, and extending reservation to them helps them win elections again and again. The author does not want to suggest that quota based reservation backed by constitutional provisions in India have been altogether failed, it has been effective specially<sup>107</sup> in emancipation of women, have given representation to the minorities and depressed groups in important places so that their voices could also be heard but it is equally true that it does require progressive changes on dire basis. The author agrees with Ashwini Deshpande who claims<sup>108</sup> that in India, affirmative action needs to be implemented more effectively. Quotas should be seen as the beginning, not the end, of Affirmative Action.

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<sup>105</sup> Harry. J. Holzer, *The Economic Impact of Affirmative Action in the US*, 14, *Swedish Economic Policy Review*, 2007

<sup>106</sup> Caste census 1931, [https://censusindia.gov.in/Census\\_And\\_You/old\\_report/Census\\_1931n.aspx](https://censusindia.gov.in/Census_And_You/old_report/Census_1931n.aspx) (Last Visited 10 May 2021).

<sup>107</sup> Durga P Chhetri, *supra note.10*

<sup>108</sup> Ashwini Deshpande, *Supra note.12*

# COVID-19 & Domestic Violence: Raising Alarm to Counter the 'Constant' Pandemic

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## ABSTRACT

One of the most brutal and barbaric forms of abuse is domestic violence. Despite several attempts both nationally and internationally, to effectively tackle the issue, the menace of domestic violence is far from over. Even though the national legal framework provides for progressive laws such as the Protection of Women from Domestic Violence Act of 2005, Dowry Prohibition Act of 1961 and S. 498A of the Indian Penal Code of 1860, the ground reality remains the same due to lack of enforcement, awareness and social stigma attached to the issue. The situation further aggravated in the wake of the COVID-19 pandemic and subsequent lockdowns due to crumbled assistance mechanisms, close and continued contact with the perpetrators, among others. The lockdown and resultant growth in the domestic violence cases, which is visible in numbers, raises the alarm showing how ineffective and obsolete the existing mechanisms can be during times like these. The authors have tried to understand the issue from a feminist perspective which analyses multiple causes behind the violence taking place in a household, break stereotypes of men and women's roles in domestic violence, and create an atmosphere where speaking against domestic violence is normalised. Some urgent reforms have been recommended (including reformatory measures) in the existing laws and policy to ensure effective implementation and serious intent to deal with this collective shame, i.e., domestic violence.

**Keywords:** Domestic violence, COVID-19, Integrative feminist model, Protection of Women from Domestic Violence Act of 2005, Dowry Prohibition Act of 1961, Indian Penal Code of 1860.

## 1. Introduction

The deep-rooted male dominance and patriarchal mind set, particularly in the Indian context, has been the breeding ground of violence against women. One of the most brutal and barbaric forms of abuse against women, stemming out of patriarchy, is domestic violence. The term Domestic Violence as understood from the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act') incorporates any harm, injury or danger to the safety, health, life or well-

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being of a woman by means of physical, sexual, verbal, emotional or economical abuse.<sup>1</sup> The definition also includes coercing any woman to meet any dowry, property or valuable security-related demands.<sup>2</sup> The *Vienna Accord, 1994*<sup>3</sup> and the *Beijing Declaration, 1995*<sup>4</sup> categorically recognised domestic violence as a gross violation of human rights. Furthermore, The UN Committee on Convention on Elimination of All Forms of Discrimination against Women (*ratified by India in 1993*) also pushed the member countries to ensure that women are not subjected to any form of violence, especially those happening within the family.<sup>5</sup> Despite these international obligations, our country did very little to combat this evil, a fact that is acknowledged even in judicial pronouncements.<sup>6</sup> Our failure became evident in 2015, when in a review report marking 20 years of the historic Beijing Declaration India admitted to its deep rooted gender inequalities which undermined our inclusive development as well as economic growth.<sup>7</sup>

While the failure to bring gender equality and eradicate violence against women has been admitted by the authorities as well, the issue further worsened during the COVID -19 triggered restrictions and lockdowns. This article is an attempt to present the grim picture of the battle that women had to face under the garb of the unprecedented COVID crisis. We have tried to understand the issue of domestic violence from a feminist perspective and further point out the anomalies and ineffectiveness of the law, which appears to be nothing more than a toothless paper tiger. The authors suggest immediate changes required in the law to ensure that the basic right to live with the dignity of half of our population does not remain a mere bookish gimmick but is realised.

## 2. The 2005 Act: Is it Sufficient?

After significant efforts and struggle of women, the 2005 Act was enacted with the aim to address the widely prevalent menace of domestic violence against women and protecting their rights guaranteed by the Constitution. The Act being civil in nature, not only protects the women from domestic violence but also provides them financial aid and protects their right of having a share house. Furthermore, as part of the progressive

<sup>1</sup> The Protection of Women from Domestic Violence Act, 2005, § 3, Acts of Parliament, 2005 (India).

<sup>2</sup> *Id.*

<sup>3</sup> Vienna Declaration and [Plan-Programme](https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf) of Action, *World Conference on Human Rights in Vienna*, 1993, <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>.

<sup>4</sup> Fourth World Conference on Women, *Beijing Declaration 1995*, <https://www.un.org/womenwatch/daw/beijing/platform/declar.htm>.

<sup>5</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.

<sup>6</sup> *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755, AIR 2014 SC 309.

<sup>7</sup> Meena Menon, *India admits to Gender Inequalities in Beijing Plus 20 review*, The Hindu, (Aug. 18, 2016), <https://www.thehindu.com/news/india-admits-to-gender-inequalities-in-beijing-plus-20-review/article6603307.ece>

approach, the law protects married women as well as women being a part of live-in relationships, mothers, daughters, and other female members of the family.<sup>8</sup> In order to widen the protection granted to women, the case of *Hiral P. Harsora v. Kusum Narottamdas Harsora*<sup>9</sup> struck down “adult male” from the definition of “respondents” mentioned under Section 2(q) of the Act, thereby extending the remedies against female as well as non-adult male perpetrators.

Apart from the 2005 Act, criminal legislations such as Section 498A<sup>10</sup> under the Indian Penal Code, 1860 (hereinafter referred to as ‘IPC’) or the Dowry Prohibition Act, 1961<sup>11</sup> also put criminal sanctions in cases where a woman’s husband or relatives of the husband subject her to cruelty and the act of harassment for dowry respectively. Nonetheless, the 2005 Act, due to its wide-ranging applicability and remedies, has been lauded time again even by the courts.

Hon’ble Supreme Court in the *Harsora judgment*<sup>12</sup> observed that: “a cursory reading of the statement of objects and reasons makes it clear that the phenomenon of domestic violence against women is widely prevalent and needs redressal. Whereas criminal law does offer some redressal, civil law does not address this phenomenon in its entirety. The idea therefore is to provide various innovative remedies in favour of women who suffer from domestic violence against, the perpetrators of such violence”. The Supreme Court in *Krishna Bhattacharjee v. Sarathi Choudhury*<sup>13</sup> has held that the object to legislate the 2005 Act is “to provide for more effective protection of the rights of the women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto”.

Unfortunately, even though the Act and subsequent judicial pronouncements acknowledge and appreciate the robust mechanism, the menace of domestic violence is unarguably still persistent. The most recent National Family Health Survey (NFHS - 4) of 2015-16 suggests that 51.3% of women (in urban areas) and 47.5% of women (in rural areas) aged between 15 to 49 have been victims of physical *and* sexual violence from their spouses and have suffered some form of injury within the marriage.<sup>14</sup> Considering the social stigma and mental agony surrounding the issue, many women do not even report the incidents. Hence, the actual numbers may be way more than the survey suggests. This clearly points towards

<sup>8</sup> The Protection of Women from Domestic Violence Act, 2005, § 2 (f), Acts of Parliament, 2005 (India).

<sup>9</sup> *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165.

<sup>10</sup> [The](#) Indian Penal Code, 1860, § 498A, Acts of Parliament, 1860 (India).

<sup>11</sup> The Dowry Prohibition Act, 1961, Acts of Parliament, 1961 (India).

<sup>12</sup> *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165.

<sup>13</sup> *Krishna Bhattacharjee v. Sarathi Choudhury*, (2016) 2 SCC 705.

<sup>14</sup> International Institute for Population Sciences, [National Family Health Survey \(NFHS-4\), 2015-16: India](#), Ministry of Health and Welfare, India (Dec. 2017), <http://rchiips.org/nfhs/nfhs-4Reports/India.pdf>, pg. 593.

the weak enforcement and lack of awareness about the existing remedies among the affected class.

While the persisting problem of domestic violence is acknowledged, it is further heart-breaking to account for intensification and rise in domestic violence cases in the ongoing pandemic and subsequent lockdowns. Severe lockdowns were imposed across the country to break the chain of the deadly COVID-19, but in the shadow of lockdowns, women had to struggle with the evil of domestic violence as well, maybe in a more aggravated manner. The National Commission of Women and the NCRB data clearly show a steep rise in the incidents of domestic violence.<sup>15</sup> As per the available data, while 19,908 and 19,730 cases were received (by NCW) in 2018 & 2019 respectively, the cases rose to 23,722 in 2020 and 30,164 in 2021.<sup>16</sup> The severity of the situation can be further understood by the fact that due to the lockdown and following curbs, which restricted movements and communication, women even found it difficult to report the matters either to authorities or relatives. The inefficiency and lacunae of the existing laws have been voiced for a long time now, but the pandemic and the alarming rise in cases of domestic violence calls for immediate response.

### 3. Feminist Perspective on Domestic Violence

The feminist model has been a unique model since the 1970s, when the contemporary feminist philosophy emerged.<sup>17</sup> The feminist model has travelled across different waves of feminism and undergone different kinds of feminism based on an intersectional approach. As a result, feminism means and includes too many distinct things, making it difficult to define feminism generally.<sup>18</sup> Generalising the definition of feminism in the presence of intersectionality and approaches to feminism would result in a fragmented definition as it cannot be all-inclusive. However, the aim of these feminist perspectives is to seek justice for all human beings (whether women or men) who have faced the brunt of a dominating group. Domestic violence becomes an integral aspect of analysis from a feminist perspective because the laws also recognise that one partner is being dominated by the other partner using some form of violence. Hence, it necessitates an understanding of domestic violence from a feminist angle.

Traditionally, the feminist model believed that domestic violence occurs because of the male oppression present in patriarchal societies.<sup>19</sup>

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<sup>15</sup> National Commission for Women, Nature -Wise Report of Complaints Received by the NCW in 2020, (Jun. 07, 2021), <http://164.100.58.238/frmReportNature.aspx?Year=2020>.

<sup>16</sup> Id.

<sup>17</sup> McAfee, Noëlle, Feminist Philosophy, The Stanford Encyclopedia of Philosophy (Fall 2018 Edition), <https://plato.stanford.edu/archives/fall2018/entries/feminist-philosophy/>.

<sup>18</sup> Patrick C. Hogan, Feminism: efforts at definition, 5(1) Critical Survey 45, 45 (1993).

<sup>19</sup> Beverly A. McPhail et al., An Integrative Feminist Model: The Evolving Feminist Perspective of Intimate Partner Violence, 13(8) Violence Against Women (Sage Publications) 817, 818 (2007).

This traditional model believed that the patriarchal oppression resulted in power dynamics that kept women subordinate, resultantly orchestrating male violence.<sup>20</sup> It was believed that the patriarchy invisibly influences all of our actions, and one such action attributed to it had been domestic violence.<sup>21</sup> Hence, a primary reason for domestic violence has been attributed to the patriarchy by traditional feminists.<sup>22</sup> However, the traditional feminists were unable to account for the intersectionality existing in feminism. The intersectionality forces us to examine the implication and role of domestic violence from a new feminist perspective which is more flexible and unconventional. Therefore, the purpose of this analysis is not to position different feminist perspectives against each other but to analyse domestic violence from a feminist perspective that is unique, flexible and not narrowly limited to one school of thought. Such a feminist model has been applied using different names like an integrative feminist model<sup>23</sup> or updated feminist model.<sup>24</sup>

The integrative feminist model is an attempt to retain the crucial elements of the traditional and intersectional feminist models while exploring new perspectives to the same.<sup>25</sup> All the theoretical aspects cannot be adjusted into an integrative feminist model, but the feminist ideology remains a central piece.<sup>26</sup> This model seems appropriate to analyse domestic violence because it does not forget the approaches of previous models but intends to build on it from a unique perspective. Such a feminist model can focus more on fundamentally radical actions and not merely sensitising the population.<sup>27</sup> The sensitisation of the population is important, but a radical and reformative approach may take us one step forward. Such an approach targets understanding how forms of discrimination like poverty may add to the problems at hand.<sup>28</sup> Further, such an approach may strive to achieve social justice changes like viewing domestic abuse perpetrator as shameful and supporting the domestic abuse victim (no matter who such a person is).<sup>29</sup>

Such a model pushes us to look for more reasons for domestic violence apart from the male oppression in patriarchy. It opens a Pandora's box when possibilities of other reasons are considered. For instance, the abuser may have been abused in his/her childhood, or a psychodynamic

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<sup>20</sup> Id.

<sup>21</sup> Victoria Dickerson, Patriarchy, Power, and Privilege: A Narrative/Poststructural View of Work with Couples, 52(1) Family Process 102 (2013).

<sup>22</sup> Evan Stark & Anne Flitcraft, Women at Risk: Domestic Violence and Women's Health (SAGE Publications, 1996).

<sup>23</sup> McPhail, supra, 825.

<sup>24</sup> Jayashree George & Sandra M. Stith, An updated feminist view of intimate partner violence, 53(2) Family Process 179 (2014).

<sup>25</sup> McPhail, supra, 823.

<sup>26</sup> McPhail, supra, 825.

<sup>27</sup> McPhail, supra, 826.

<sup>28</sup> Id.

<sup>29</sup> Id.

reason, or the effect of personal relations in his/her childhood, or social structure characteristics, or substance abuse, or anger issues, to name a few. Sometimes, socioeconomic inequality is a reason for domestic violence where the perpetrator maintains power through economic stability, and the victim may stay in such a relationship because of a lack of economic resources or societal pressures.<sup>30</sup> Lastly, this model makes us explore data that suggests that a woman can also be a perpetrator of domestic violence.<sup>31</sup> This in no way undermines the countless instances of domestic violence suffered by women. Domestic violence faced by women victims is still at the centre of such a feminist model. However, this feminist models opens us to a new perspective where the men may also be the victim of domestic violence. Societal pressure may act as a significant hindrance in the reporting of these incidents. Hence, such an integrative or updated feminist model helps us in gaining a fresh perspective on traditional actions like domestic violence. Regardless, it keeps domestic violence of females at its core and tries to explore these fresh perspectives.

Further, this feminist model helps us in addressing how masculinity and societal structure among males affect domestic violence. Some scholars have believed that a challenge to men's masculinity has facilitated domestic violence.<sup>32</sup> Higher economic resources and stability affects the men's perception of masculinity and their perception of marriage.<sup>33</sup> However, within men, some have a higher class, while some belong to a middle-class or even lower-class.<sup>34</sup> The latter group may face difficulties in achieving better economic stability or education than their partners.<sup>35</sup> This directly impacts their perception of masculinity in their relationships, where they feel that their masculinity is challenged, and they retaliate by exerting dominance and violence over their partners.<sup>36</sup> Therefore, such an integrative feminist model helps us in understanding multifaceted perspectives and reasons behind domestic violence.

Homosexuality has been legalised in India.<sup>37</sup> Hence, this model of feminism seeks to cover the liberal ideas encompassing domestic violence, like the issues of domestic violence in same-sex couples.<sup>38</sup> There is a

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<sup>30</sup> Kristin L. Anderson, Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches, 59(3) Journal of Marriage and Family 655, 656 (1997).

<sup>31</sup> Walter S. DeKeseredy & Molly Dragiewicz, Understanding the Complexities of Feminist Perspectives on Woman Abuse: A Commentary on Donald G. Dutton's Rethinking Domestic Violence, 13(8) Violence Against Women (Sage Publications) 874, 875-877 (2007); *see also*, George & Stith, supra; McPhail, supra.

<sup>32</sup> Anderson, supra, 658.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, AIR 2018 SC 4321.

<sup>38</sup> Leonard D. Pertnoy, Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's

presence of domestic violence in heterosexual, homosexual, bisexual and transgender couples.<sup>39</sup> It leads us back to a finding that women may also be perpetrators and men might also be subjected to domestic violence. A lack of legal enforcement mechanism for such acts of domestic violence where men may be victims or where it is occurring in a same-sex relationship creates a vacuum for punishing the perpetrators in such cases. However, such an updated feminist model of integration seeks to bridge the gap between the traditional ideologies of a relationship with the liberal understanding of the relationships. Therefore, this feminist model provides a new approach to domestic violence which tries to integrate different groups, ideologies, and perspectives. It facilitates an all-encompassing understanding of domestic violence.

The victims have negative consequences after coming forward since the notion of 'adjustment' or the hope of your partner improving is often brought to the forefront.<sup>40</sup> However, such an approach to domestic violence subconsciously results in normalising such behaviour or treating it leniently. It results in developing societal pressure because once domestic violence is normalised in a society, then anyone speaking against it might be viewed from a position of judgement or criticism. Further, it results in an increase in such behaviour because such acts of violence may be normalised and speaking or complaining against it is not normalised. The COVID-19 lockdown resulted in a rise in the cases of domestic violence. However, there may be more cases that were not even reported due to a lack of a mechanism to report the same, like domestic violence in same-sex couples, or domestic violence where men are victims, or because of societal or other pressures, to name a few.

This perspective demands us to consider a new approach to domestic violence wherein multiple spheres are addressed from victim-shaming and masculinity to gender-neutrality and LGBTQIA+ couples. The primary purpose of this feminist perspective is to highlight the difference in the existing understanding of domestic violence and the required all-encompassing understanding of the same. Thus, this perspective acts as a starting point for the required reforms in the current laws of domestic violence as discussed further in this paper. It instils an idea in the minds of the policy-makers regarding the reforms and the essence needed in the domestic violence laws. It focuses on bringing a new perspective to the table which practically impacts the approach of policy-makers as well as the citizens to the issue of domestic violence and can further impact their actions. Hence, it brings a new perspective on domestic violence which may eventually be considered while engaging in reforms by addressing the contemporary issues discussed in this feminist perspective because it

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Syndrome in Same-Sex Domestic Violence Cases, 24 St. Thomas Law Review 544, 545 (2012); see also, McPhail, supra, 829.

<sup>39</sup> Id.

<sup>40</sup> McPhail, supra, 831.

highlights the end-goal to be achieved by the proposed reforms in this paper.

Moreover, apart from acting as a focal point in the minds of the people regarding the end-goal to be achieved, this feminist perspective also helps in tackling the current problems in a better manner. It is pertinent to understand the root cause of any issue before devising a solution for the same. This perspective discusses the deeper causes behind the acts of domestic violence and tries to reach at the root of the menace called domestic violence. Once such root causes have been identified, a better legal, sociological, and psychological approach can be taken in addressing the issue of domestic violence as well as curbing it in the future. Therefore, this perspective not only acts as a base for the suggested reforms but also tries to highlight the root causes of domestic violence. It thus has a practical utility in addressing the issues of domestic violence.

Therefore, such a unique feminist perspective to domestic violence becomes pertinent, which seeks to understand multiple causes behind domestic violence, shatter the stereotypes of the act of men and women in domestic violence, and create an atmosphere where speaking against domestic violence is normalised.

#### **4. The Lockdown and Domestic Violence: An Unpleasant Development**

The basic mantra in the fight against COVID has been to ‘Stay Home, Stay Safe.’ Unfortunately, staying at home did not seem to be safe for women across the world, including India. In December last year, UN India came up with its report titled *Shadow Pandemic: UN India responds to uptick in violence against women and girls during COVID 19*, wherein it was stated that “beneath the COVID-19 pandemic lies the shadow of gender-based violence which is on the rise due to restricted mobility and limited access to essential services”.<sup>41</sup> The report called upon the government, agencies and self-help groups to ramp up their efforts against this fight to eradicate gender-based violence forever.<sup>42</sup>

Even though extensive research on the specific point of domestic violence perpetrated against women during the course of pandemic & subsequent lockdown is limited, preliminary reports and data suggest that complaints pertaining to domestic violence during lockdowns were found to be at highest in ten years.<sup>43</sup> In the course of the initial few days of the

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<sup>41</sup> UN Sustainable Development Group, Shadow Pandemic: UN India responds to uptick in violence against women and girls during COVID 19, (Jun. 07, 2021), <https://unsdg.un.org/latest/stories/shadow-pandemic-un-india-responds-uptick-violence-against-women-and-girls-during>.

<sup>42</sup> Id.

<sup>43</sup> Vignesh Radhakrishnan, Sumant Sen, Naresh Singaravelu, Data| Domestic Violence Complaints at a 10-year high during COVID-19 lockdown, The Hindu, (Jun. 07, 2021),

lockdown of over 60 days, i.e., from 25<sup>th</sup> March till 31<sup>st</sup> May 2020, a total of around 1500 complaints of domestic violence were registered in India.<sup>44</sup> However, these figures do not even partially depict the grim situation because more than 86% of Indian women who are subjected to domestic violence never seek out help.<sup>45</sup> It is further disturbing that out of the 14% of victims who raise their voice, an abysmal 7% reach out to the appropriate authorities while others rely on family and friends for help.<sup>46</sup> In the data presented by the Ministry of Women and Child Development to the Lok Sabha last year, it was stated that NCW alone received over 13,000 distress calls during the period of the lockdown, i.e., between March – September 2020.<sup>47</sup> In an online survey conducted during the Phase III of lockdown in India, spousal violence was recorded at 18.1%, wherein physical, sexual, verbal and emotional violence was rated at 34.7%, 10.9%, 65.3% and 43.6%, respectively.<sup>48</sup> Needless to say, these numbers are merely the tip of the iceberg, as most of the cases never see the light of the day due to multiple social constraints.

As per the survey, among the significant reasons for domestic violence were financial uncertainties, constraints on socialising, sharing household responsibilities and inability to follow addiction.<sup>49</sup> Experts suggest that the economic uncertainty and the social stress coupled with a constraint on movement and formal help mechanism aided the increase in instances of domestic violence globally.<sup>50</sup> The lockdowns not only forced the cohabitation of women with the perpetrators but also paralysed the existing modes of help and communication. The continuous presence of the committers made it difficult for the victims to approach their relatives and families, who are usually the first point of contact for the victims. Even the formal mechanism had collapsed since the protection officers under the Act, as well as the Non-Governmental Organisations, could not approach the victims for their help. The NCW released its WhatsApp

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<https://www.thehindu.com/data/data-domestic-violence-complaints-at-a-10-year-high-during-covid-19-lockdown/article31885001.ece>.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Radheshyam Jadhav, Abuse of Women at home rose during Lockdown, The Hindu Business Line, (Jun. 07, 2021), <https://www.thehindubusinessline.com/data-stories/data-focus/abuse-of-women-at-home-rose-during-lockdown/article33060560.ece>.

<sup>48</sup> Amrit Pattojoshi, Aninda Sidana, Shobit Garg, Suwendu Narayan Mishra, Lokesh Kumar Singh, Nishant Goyal & Sai Krishna Tikka, Staying home is NOT 'staying safe': A rapid 8-day online survey on spousal violence against women during the COVID-19 lockdown in India, Wiley Online Library, (Jun. 07, 2021), [https://onlinelibrary.wiley.com/doi/full/10.1111/pcn.13176?casa\\_token=G0V9-gZCRloAAAAA%3AaswdmTw1566VroqbPXO6y60ebNbHy7gkK5rLiSylAKdDDaFn6QKl3x7jm](https://onlinelibrary.wiley.com/doi/full/10.1111/pcn.13176?casa_token=G0V9-gZCRloAAAAA%3AaswdmTw1566VroqbPXO6y60ebNbHy7gkK5rLiSylAKdDDaFn6QKl3x7jm).

<sup>49</sup> Id.

<sup>50</sup> Id.

assistance number to tackle the situation, but the fact that merely 38% of Indian women have access to mobile phones limited the beneficiaries.<sup>51</sup>

The problematic development has exposed the insufficient resources and efforts being taken by the authorities while tackling violence against women. It is true that mobility was significantly reduced during the lockdowns but the urgency in dealing with the domestic violence cases could and must not have been allowed to get hampered. As has been highlighted earlier, in most of the cases the victims are unable to approach the appropriate authority due to lack of awareness and restricted mobility during lockdowns have further aggravated the issue. Earlier this year, a writ petition was filed before the Hon'ble Supreme Court which sought a direction for making contact details of protection officers/service providers/shelter homes widely available across all police stations and official websites.<sup>52</sup> The matter is still pending before the court. In this regard, inspiration must be taken from developments in other countries to strengthen the informal support network such as France, where warning systems have been placed at grocery stores and medical centres to allow the victims of domestic violence seek help and alarm the authorities.<sup>53</sup>

If the effectiveness of already poor infrastructure is allowed to reduce further by not initiating appropriate and timely action, it will leave the victims more vulnerable. Hence it is necessary that complaints are not treated as mere data but continuous and effective support is also provided. While there is data to show the number of complaints received by various authorities, in how many cases effective redressal was provided remains unknown. A study funded by the Ministry of Women and Child Development (WCD) highlighted that lack of support often leads to a forced compromise outside the court due to the social pressure, thereby frustrating the whole purpose of law.<sup>54</sup> While countries like France, Canada and United Kingdom made provisions for financial aid, emergency shelters, and support services for victims of domestic violence during the pandemic<sup>55</sup>, the Indian government even failed to recognise it as essential

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<sup>51</sup> Aniket Panchal, G Vishal, Domestic Violence – The Shadow Pandemic, The London School of Economics & Political Science, <https://blogs.lse.ac.uk/gender/2020/06/01/domestic-violence-the-shadow-pandemic/>.

<sup>52</sup> We the Women of India v. Union of India, W.P. (C.) No. 1156/2021.

<sup>53</sup> Ibtissem Guenfoud, French Women use Code Words at Pharmacies to Escape Domestic Violence During Coronavirus Lockdown, ABC News (April 04, 2020) <https://abcnews.go.com/International/frenchwomen-code-words-pharmacies-escape-domestic-violence/story?id=69954238>.

<sup>54</sup> Bharatiya Stree Shakti, Tackling Violence against Women: A Study of State Intervention Measures (March 2017), [https://wcd.nic.in/sites/default/files/Final%20Draft%20report%20BSS\\_0.pdf](https://wcd.nic.in/sites/default/files/Final%20Draft%20report%20BSS_0.pdf) (320-321).

<sup>55</sup> Raisa Patel, Trudeau Pledges more help for Vulnerable Canadians struggling with Coronavirus Crisis, CBC News (March 30, 2020) <https://www.cbc.ca/news/politics/trudeau-announces-more-help-for-vulnerable-canadians-1.5514055>; Funding Boost for Rape and Domestic Abuse Support, (Nov. 18, 2020)

services let alone making separate provisions for it. It is pertinent therefore to accept the degree of gender-based violence, change government policies, and re-establish support networks to make it convenient for the victims and enable them easy access to them.

No matter what explanations or excuses may be provided as a response to increased violence against women in the COVID-19 lockdowns, it points towards the complete failure and poor enforcement of the existing legal framework. The pandemic and consequential restrictions cannot be allowed to become a foundation of increased violence against women, which violates their fundamental right of living a safe and healthy life. Hence, we point out the loopholes in the existing laws, and despite much chest-thumping, these laws have failed to achieve the desired goals. We suggest some immediate reforms that must be considered to root out this weed from our society permanently.

## **5. Recommendations for the Laws on Domestic Violence**

The three major laws on domestic violence, the Act,<sup>56</sup> Section 498A of IPC,<sup>57</sup> and Dowry Prohibition Act 1961,<sup>58</sup> seem to be airtight but are not able to curtail the rise in domestic violence cases. These legislations have been enacted to reduce the cases of violence against women, but there are some fronts where these laws may need to improve. A major hindrance in achieving the object of reducing domestic violence cases has been the enforcement and execution of the laws.<sup>59</sup> It is coupled with another obstacle regarding lack of access to their legal rights or lack of awareness about the domestic violence laws<sup>60</sup> and what constitutes domestic violence. Hence, there is a need for some recommendations for these laws on domestic violence.

The implementation of domestic violence will get better when the protection officers, police officers, service providers, medical facilities, shelter homes, and other administrative officers perform all the duties imposed on them and not breach any of their duties without sufficient cause since these local officials are often reluctant in carrying out their implementation duties.<sup>61</sup> The Act needs to impose stricter punishment for all these officers who fail to discharge their duties. For instance, Section 33<sup>62</sup> of the Act imposes a minor penalty on protection officers for not

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<https://www.gov.uk/government/news/funding-boost-for-rape-and-domestic-abuse-support>.

<sup>56</sup> The Protection of Women from Domestic Violence Act, 2005, Acts of Parliament, 2005 (India).

<sup>57</sup> Indian Penal Code, 1860, § 498A, Acts of Parliament, 1860 (India).

<sup>58</sup> The Dowry Prohibition Act, 1961, Acts of Parliament, 1961 (India).

<sup>59</sup> Sujata Gadkar-Wilcox, Intersectionality and the Under-Enforcement of Domestic Violence Laws in India, 15 Univ. of Pennsylvania Journal of Law and Social Change 455, 462 (2012).

<sup>60</sup> Id.

<sup>61</sup> Gadkar-Wilcox, supra, 464.

<sup>62</sup> The Protection of Women from Domestic Violence Act, 2005, § 33, Acts of Parliament, 2005 (India).

discharging their duties. This penalty can be made stricter, as well as include other officers on whom such penalty may be imposed for not discharging their duties. It can be coupled with sensitising the people and making them aware of domestic violence laws in India. Workshops can be conducted in schools about what constitutes domestic violence and the laws for the same. Further, workshops can be conducted in workplaces like the workshops on sexual harassment at the workplace. All these workshops need to be conducted alike in rural and urban areas.

The workshops can specifically include a community-based programme like the initiative of service learning started by the United States of America with the National and Community Service Act, 1990. Service learning is an initiative where a person must provide their services for the said cause and learns by experience gained in the said service.<sup>63</sup> It may be helpful because the experience gained through the service teaches the attendees about the proper recourse to be taken as well as increases the social and legal responsibilities of the attendees.<sup>64</sup> Along with this, it also gives two-fold benefit as it helps the attendees as well as the victims on whose cases they may be assisting. It was offered to the students in the United States of America, but the same can be offered to the attendees for the aforementioned workshops. Another initiative could be a Public Awareness and Education Project as suggested by the United States Department of Justice.<sup>65</sup> It can be done by organising any creative competition or fairs at popular places where the attendees are educated about the given issue and made aware about the possible solutions and enforcement of the solutions to those issues.<sup>66</sup> It can be used for educating the attendees about domestic violence and its laws.

Rural areas can be particularly focused on the laws on domestic violence for sensitising the population, raising awareness regarding the laws as well as improving the implementation. There is a need for additional laws which particularly focus on rural areas as they accommodate 68% of the Indian population, and as per the IIPS National Family Health Survey by the Ministry of Health and Family Welfare, women in rural areas are more likely to suffer from domestic violence than women in urban areas.<sup>67</sup> The urban areas have a better-equipped healthcare system that intervenes and prevents domestic violence, but the

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<sup>63</sup> Thomas R. Owens & Changhua Wang, Community-Based Learning: A Foundation for Meaningful Education Reform, Education Northwest, (Jan. 1996), <https://educationnorthwest.org/sites/default/files/Community-BasedLearning.pdf>.

<sup>64</sup> Id.

<sup>65</sup> Shay Bilchik, Raising Awareness and Educating the Public, Youth in Action by Offices of Justice Programs, U.S. Department of Justice, (Jan. 2000), <https://www.ojp.gov/pdffiles1/ojjdp/178926.pdf>.

<sup>66</sup> Id.

<sup>67</sup> International Institute for Population Sciences, National Family Health Survey (NFHS-4), 2015-16: India, Ministry of Health and Welfare, India (Dec. 2017), <http://rchiips.org/nfhs/nfhs-4Reports/India.pdf>.

rural areas lack the same and need more focus.<sup>68</sup> Such targeted laws for rural areas are required since the victims in rural areas have limited access to information on domestic violence laws, have a lack of social and institutional support, among other things.<sup>69</sup>

Therefore, the model envisaged by SWATI (Society for Women's Action and Training Initiatives) has set up prevention and support centres in hospitals that seek to bridge the gap between urban and rural areas.<sup>70</sup> Such a model is unique since it sets up centres in hospitals since women may have a limitation on movement outside the house, but they are allowed to go to hospitals for their and their children's health check-ups.<sup>71</sup> This model has proven successful since many victims have come forward for help, and some have been able to tackle further violence in future.<sup>72</sup> Hence, the SWATI model could be made mandatory in rural areas by amending the domestic violence laws. A nodal officer may also be appointed for ensuring the implementation of the same. A team may assist the nodal officer, which may also seek to sensitise the rural population and spread awareness about domestic violence laws through multiple initiatives discussed above in this paper. It serves a twofold benefit. Firstly, it will help to propagate domestic violence laws and to curtail domestic violence. Secondly, it will create a pool of employment as well.

Further, Section 3<sup>73</sup> of the Act includes mental abuse under domestic violence. The explanation of Section 3 also defines *physical abuse, sexual abuse, emotional abuse and economic abuse*. However, it does not define mental abuse. So, the provision states that mental abuse is included in domestic violence but does not define the same along with other abuses in the explanation. This lack of definition may lead to a vague interpretation of mental abuse or may lead to a non-understanding of what constitutes mental abuse. Therefore, the Act should define what constitutes mental abuse and should seek to read and interpret it along with the Mental Healthcare Act, 2017.<sup>74</sup> It will result in a better understanding of what constitutes domestic violence.

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<sup>68</sup> Society For Women's Action And Training Initiatives (SWATI), [Making Rural Healthcare System Responsive to Domestic Violence: Notes from Patan in Gujarat](https://www.epw.in/engage/article/making-rural-healthcare-system-responsive-to-domestic-violence), Economic & Political Weekly, Vol. 55 Issue No. 17 (Apr. 25, 2020), <https://www.epw.in/engage/article/making-rural-healthcare-system-responsive-to-domestic-violence>.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> The Protection of Women from Domestic Violence Act, 2005, § 3, Acts of Parliament, 2005 (India).

<sup>74</sup> The Mental Healthcare Act, 2017, Acts of Parliament, 2017 (India).

Moreover, the Act<sup>75</sup> and Section 498A<sup>76</sup> of IPC have rigid constructions of domestic violence. The definition of 'aggrieved person' is extended only to females, and the definition of 'respondent' is extended only to males as per Section 2<sup>77</sup> of the Act. The terminology of Section 498A of IPC also shows that the females are always the victims and the males or their relatives are always the accused. However, these laws on domestic violence do not account for a scenario that is the other way around. In the feminist perspective to domestic violence, it is discussed that females can commit domestic violence on men too,<sup>78</sup> but due to lack of laws for the same and societal pressure, they are not getting justice. Therefore, the definitions of 'aggrieved person' or 'victim', and 'respondent' or 'accused' in the laws of domestic violence need to be amended to make it more flexible and inclusive and not just limit it to a person of a particular gender.

Additionally, the laws on domestic violence do not account for domestic violence in LGBTQIA+ couples. When the laws have strictly defined that a woman will be a victim and not an accused, and the men will be an accused and not a victim, then homosexuals may not be able to report domestic violence. It is because either in a lesbian couple, the woman does not come under the ambit of an accused, or in a gay couple, the man does not come under the ambit of a victim. The LGBTQIA+ couples who do not recognise themselves with either gender do not have any recourse for the same. Hence, a change in the wordings of the laws is needed because homosexuality is legal in India,<sup>79</sup> and live-in relationships have been legalised for homosexuals.<sup>80</sup> Such an amendment is necessary to give justice to the victims in LGBTQIA+ relationships.

The concept of live-in relationships in the legal field has been present for a long time. This concept has evolved over time with the development of society and other laws. In 1927, the Privy Council held that when without getting 'legally' married, a couple has been living together respectively as spouses for a long time, then it will be presumed that they were living in a legitimate marriage unless obviously contradicted.<sup>81</sup> In the 2000s, the Supreme Court recognised that the live-in relationship between two consenting adults of opposite sex might be immoral, but is not illegal.<sup>82</sup> Eventually, the Supreme Court in 2018 overturned the position of Section

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<sup>75</sup> The Protection of Women from Domestic Violence Act, 2005, Acts of Parliament, 2005 (India).

<sup>76</sup> Indian Penal Code, 1860, § 498A, Acts of Parliament, 1860 (India).

<sup>77</sup> The Protection of Women from Domestic Violence Act, 2005, § 2, Acts of Parliament, 2005 (India).

<sup>78</sup> DeKeseredy & Dragiewicz, *supra*, 875-877; *see also*, George & Stith, *supra*; McPhail, *supra*.

<sup>79</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, AIR 2018 SC 4321.

<sup>80</sup> *Id.*

<sup>81</sup> *Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Blahamy*, AIR 1927 PC 185.

<sup>82</sup> *Lata Singh v. State of U.P. & Another*, AIR 2006 SC 2522; *see also*, *S. Khushboo v. Kanniammal & Another*, (2010) 5 SCC 600.

377<sup>83</sup> of IPC, which criminalised the cohabitation with sexual relations between two adults of same-sex.<sup>84</sup> Hence, live-in relationship for same-sex couples was also held to be not illegal.

The concept of a live-in relationship is essential because it is not illegal, and the statutory recognition of a “domestic relationship” under Section 2(f)<sup>85</sup> of the Act does not expressly envision a live-in relationship. Section 2(f)<sup>86</sup> of the Act instead uses the terminology “*a relationship in the nature of marriage*”, which is left to be interpreted by the court on a case-to-case basis. However, the concept of live-in relationship has not been specifically mentioned. When the live-in relationship is not illegal in India, and many couples are living in such relationship, then an amendment is required which expressly includes live-in relationships in the definition of “domestic relationship” under Section 2(f)<sup>87</sup> of the Act. It cannot simply be left to interpretation by the courts, but an express inclusion is needed because it will inform the victims in live-in relationships of their rights and recourses. It will also encourage them to come forward and report cases since their relationship would be expressly included and not just left to interpretation.

Furthermore, in the landmark case of *Indra Sarma v. V.K.V. Sarma*,<sup>88</sup> the Supreme Court made an interesting observation. Along with stipulating the criteria where the live-in relationship can be granted the recognition of marriage, the Supreme Court pointed out that the term ‘*domestic relationship*’ in Section 2(f)<sup>89</sup> of the Act is limited since it does not include victims of illegal relationships.<sup>90</sup> The Apex Court also called upon the Parliament to legislate a new statute focused on the conditions laid down by the court, which protects the victims of such relationships from societal wrongs.<sup>91</sup> Hence, an amendment to the Act and other laws on domestic violence is needed, which extends the protection to victims of an illegal relationship.

Lastly, the potential and existing perpetrators (both in rural and urban areas) should be sensitised regarding the impact of their actions. Many initiatives can be used for sensitising the potential and existing perpetrators. The idea of rehabilitation of the perpetrators first existed

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<sup>83</sup> Indian Penal Code, 1860, § 377, Acts of Parliament, 1860 (India).

<sup>84</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, AIR 2018 SC 4321.

<sup>85</sup> The Protection of Women from Domestic Violence Act, 2005, § 2 (f), Acts of Parliament, 2005 (India).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755, AIR 2014 SC 309.

<sup>89</sup> The Protection of Women from Domestic Violence Act, 2005, § 2 (f), Acts of Parliament, 2005 (India).

<sup>90</sup> *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755, AIR 2014 SC 309.

<sup>91</sup> *Id.*

globally in the 1995 Beijing United Nations World Conference on Women.<sup>92</sup> Further, Article 16 of the Istanbul Convention aimed at support programmes for perpetrators of domestic violence.<sup>93</sup> A few initiatives taken by the European Countries are the Daphne Programme II (2006-2008)<sup>94</sup> by the European Commission and the European Network for the Work with Perpetrators of Domestic Violence founded in 2014.<sup>95</sup> These initiatives include perpetrator programmes like motivational interviewing and interactive approaches for the perpetrators wherein certificate courses are offered to the perpetrators.<sup>96</sup> These initiatives also focus on victim support services.<sup>97</sup> Another such initiative is the Partnership for Peace Violence Intervention Programme in Guyana.<sup>98</sup> In this programme, a 16-session psycho-educational programme is ordered by the court for a certain small-group of perpetrators wherein the perpetrators are given therapeutic and educational exposure.<sup>99</sup> These are certain initiatives and programmes which can be used for the potential and existing perpetrators in case of domestic violence.

Furthermore, they should be requested to ponder how some form of domestic violence may impact the victim's life.<sup>100</sup> One question will always be vital in preventing domestic violence, and everyone needs to think over it to curtail such violence. One may engage in domestic violence for whatever reason, but the question is, whether engaging in domestic violence is solving one's problems or helping them? Certainly not. It may add to one's problems by spoiling their relationship with their near and

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<sup>92</sup> Cristina Oddone & Donjeta Morina, Setting up Treatment Programmes for Perpetrators of Domestic Violence and Violence against Women, Council of Europe, (Jan. 2021), <https://rm.coe.int/research-on-perpetrator-treatment-programmes-kosovo-eng/1680a24362>.

<sup>93</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series - No. 210, Article 16 (Istanbul, 11.V.2011).

<sup>94</sup> European Commission, Daphne Programme II- Work with Perpetrators of Domestic Violence in Europe, Project Reference Number: 2005-1-217-W, (2006-2008), [https://ec.europa.eu/justice/grants/results/daphne-toolkit/content/working-perpetrators-domestic-violence-europe\\_en](https://ec.europa.eu/justice/grants/results/daphne-toolkit/content/working-perpetrators-domestic-violence-europe_en).

<sup>95</sup> European Network, Work with Perpetrators of Domestic Violence, (2014), <https://www.work-with-perpetrators.eu/>

<sup>96</sup> European Network, WWP EN Training, (2014), <https://www.work-with-perpetrators.eu/training>.

<sup>97</sup> European Network, supra.

<sup>98</sup> United Nations Guyana, Guyana Spotlight Initiative Project -Sensitisation Session on the Partnership for Peace Violence Intervention Programme, United Nations (Sept. 24, 2021), <https://guyana.un.org/index.php/en/146872-guyana-spotlight-initiative-project-sensitisation-session-partnership-peace-violence>.

<sup>99</sup> Id.

<sup>100</sup> Hiba Beg, Muffled Voices: Women Share Stories of Domestic Violence, The Quint (Mar. 4, 2020, 8:38 AM IST), <https://www.thequint.com/neon/gender/domestic-violence-in-india-women-share-stories#read-more>; see also, Amnesty International, These women survived domestic violence. Now they're taking a stand to help others (Oct. 24, 2019, 12:15 UTC), <https://www.amnesty.org/en/latest/news/2019/10/gun-violence-report/>.

dear ones, it may lead to a police case, it may lead to mental health issues, and the list can go on. For the victim, apart from feeling the pain, anger and anguish, he/she may develop a fear of relationships, may have mental health issues, may need physical or mental therapy, may feel threatened, and so many other issues that the victims could face. Such acts of violence may turn the victim's life upside down.

In such a case, if engaging in domestic violence is adding more to problems than helping them, then one seriously needs to ponder over their actions, the impact of their actions, and whether it is worth it. Eventually, many people's lives are being affected by such domestic violence, and it finally needs to stop. The legal reforms, strict implementation coupled with targeting the conscience of the people can help to prevent the violence.

## **6. Conclusion**

Domestic violence has been a part of human society for a long time. As discussed, there may be multiple reasons for engaging in domestic violence, which may happen in multiple ways. Anyone and everyone can be a victim of domestic violence. The feminist understanding of domestic violence is just an additional perspective on this issue. It is not the only perspective to look at it, but in this environment, such a perspective may prove to be helpful. Further, there are dedicated laws for preventing domestic violence and protecting the victims of domestic violence. Still, the number of cases seemed to be on the rise, especially during the COVID-19 lockdown. The world was going through a tough time during the COVID-19 lockdown, and so many victims of domestic violence had it tougher despite the presence of laws for their protection. Therefore, a need for reforms and amendments arises because the purpose of the law is to prevent domestic violence. People also need to be sensitised about the gravity of domestic violence, and an awareness drive needs to be conducted for everyone. It may help the victims realise their rights and help the perpetrators realise the severity of their actions and how they are impacting the lives of their loved ones. Hence, the recommendations in this paper may bring us one step closer to achieving the purpose of preventing and extinguishing domestic violence.

# Defining Abuse of Dominance in Multi-Sided Platforms

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## **ABSTRACT**

Social networking platforms, search engines, e-commerce websites, exchanges, are some of the prime examples of the multi-sided platforms and in their ability to assemble and serve huge section of people and businesses, these platforms have become essential in solving the problem of value exchange between distinct groups of agents.

This research endeavors to propose a framework for the analysis of abuse of dominance, an anti-competitive conduct, in the light of multi-sided platforms. The study seeks to identify common artifices of misconduct leading to abuse of dominance and whether the regulatory regimes of the two jurisdictions are equipped adequately to identify, analyze and take a strengthened recourse to curb the issue, in order to ensure fair competition and marketable practices.

The study will analyze and explain basic relevant concepts such as direct and indirect network externalities, homing, abuse of dominance and others, in order to provide a deeper understanding of the operational strategies of multi-sided platforms and their impact on the market. After providing an overview of these concepts, the proposed study shall proceed to examine the economic and technological factors that affect the viability of the multi-sided platforms, necessarily in the light of digitalization of domestic and international markets. Thereafter, an examination of existing laws and the challenges faced by the regulatory authorities shall be tendered in order to identify the grey areas of legislation and provide possible suggestions to depose the same.

## **1. Introduction**

Multi-sided platforms work differently from the standard market. One of the most significant works undertaken in this regard is by Rochet & Tirole which has immensely helped researchers in shaping out various aspects of these platforms and identify what one may encounter if these markets are taken to be treated as traditional markets. Since these markets are different from the standard ones, the competition agencies are therefore required to probe competition with an alternate approach, a more suited one with reference to the changing dimensions of digital market, and subsequently, competition. The common struggle faced by the authorities here is to move on from the traditional analysis of anti-competitive conduct with respect to one-sided market and to bring about

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a modern framework which is fit from the position of multi-sided platforms.

These platforms give rise to certain unique challenges to competition and competition law as the convergence of businesses and people not only creates opportunity to boost growth and development, but also creates a number of opportunities for this union to behave in a manner detrimental to the interests of fair competition. MSPs in the present scenario need to be scrutinized since they have an established user base which is proportionate to the number of engagements a platform has and as such, it puts MSPs in a position, where in order to incentivise, they may resort to strategies which are anti-competitive in nature. This abuse is primarily resorted to restrict competition from other platforms which can possibly be more efficient for users. Another anti-competitive facet that may emerge from their position is predatory pricing, such as providing a low price to cost ratio. On the other hand, high prices are indicators of market power or monopoly. However, it is often suggested that during the early stages of development, an imbalanced pricing strategy, may not necessarily be an anti- competitive measure<sup>1</sup>.

### ***What are MSPs?***

A multi-sided platform or MSP acts as an intermediary for demands between two or more different group of users. It is a kind of marketplace where usage of the platform by one group of users affects the value of complementary product or service, for another group of users<sup>2</sup>. Payment systems (eg. PayPal), social networking sites (eg. Facebook), securities exchange platforms (eg. Zerodha), are some of the prime examples of MSPs. As MSPs act as centralized platforms for interaction between users or, more clearly, buyers and sellers, the absence of such platforms could result in higher transactional costs<sup>3</sup>. MSPs work on the principle of positive externality, meaning, the use of the platform for consumption or production of goods or services by the users benefits the MSPs, a third party<sup>4</sup>.

### ***Relevant Market***

A critical step is defining relevant market and this becomes particularly important for the assessment of the dominating power in the market and the possibility of subsequent abuse of the dominant position. Relevant market in its simplest sense is the market in which the particular platform operates. In India, Section 2(r) of the Competition Act, 2002 (the 2002, Act) defines that a relevant market

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<sup>1</sup> Johnson Matthew, 'Home Advantage? Who wins Multi-sided Platform Competitions?' [2020] *Advancing Economics in Business OXERA*, p 3

<sup>2</sup> Bishop Grant, 'Issues for two-sided platforms in Canadian Competition Law' [2013] *Canadian Competition Law Review* 26(1) p 1

<sup>3</sup> *ibid*

<sup>4</sup> Evans D. S., 'Governing bad behaviour by users of multi-sided platforms'[2012] *Berkeley Technology Law Journal*, 27(2) p 1203

is the one which the Competition Commission of India may define while referring to either relevant geographic market or relevant product market or both.

As per section 2(s) of the 2002 Act, the *relevant product market* comprises of interchangeable or substitutable products or services. This interchange ability is dependent on the *characteristics of the products or services, their prices and intended use*. “Demand substitution” is one of the most used concepts in defining a relevant market, both in India and EU, precisely because a reaction to change in price would be the fastest from the demand side. On the other hand, the *relevant geographic market* comprises of geographical territory all participants of the relevant product face homogenous or similar competition condition and as such, this geographical area is distinct from other territories. These geographical boundaries in such a case could be local, national, or even global. While determining relevant geographic market, the competition authorities are required to consider certain important factors such as – regulatory barriers on trade, costs of transportation, procurement policies at the national level, consumer preferences, etc<sup>5</sup>.

There are many challenges in defining the relevant product market with reference to MSPs. The anti-trust authorities may define the relevant market for MSPs, based solely on the paying side, as the other side is subsidized<sup>6</sup>. Another significant problem is that either side of the platform could be a distinct product market in itself, which can easily be out of purview of the bigger multi-sided picture. SSNIP test (Small but Significant and Non-transitory Increase in Price test) is one of the most referred to when dealing with determination of relevant product market. Some of the jurisdictions that use the SSNIP test are EU, Australia, Israel, Netherlands, Brazil, USA, Bulgaria, New Zealand and UK. The small or significant increase for the purpose of this is taken to be either 5% or 10% and hence, it is also called the 5-10% test. In this test in order to find out the relevant product market smallest possible set of products is taken for analysis which can profit from non-marginal price increase of typically 5%. If the increase is non-profitable due to presence of alternatives, the substitute products are added to relevant market<sup>7</sup>. A detailed method with regard to application of SSNIP test was given by Filistrucchi & others. They argued that in case of non-transactional two or multisided market, price rise profitability on each market side should

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<sup>5</sup> RELEVANT GEOGRAPHIC MARKET, BALTIC LEGAL THE BUSINESS ENCYCLOPAEDIA, <https://wiki.baltic-legal.com/relevant-geographic-market/> (last visited March 20, 2021)

<sup>6</sup> Filistrucchi, Lapo & Others, ‘Market Definition in Two-sided Markets: Theory and Practice’ [2013] *Journal of Competition Law & Economics*, 10(2) p 293

<sup>7</sup> Daljord, Øystein, Sørsgard, Lars and Thomassen, Øyvind, ‘The SSNIP Test And Market Definition With The Aggregate Diversion Ration: A Reply to Katz and Shapiro’, [2008] *Journal of Competition Law & Economics* 4, p 263

be checked. While in case of transactional two or multisided market, profitability of increase in price level, with respect to the sum total of transactional price paid by each side must be considered. In both these cases, adjustment of price structure by a hypothetical monopolist should be allowed ideally.<sup>8</sup>

Since there is emergence of new multi-sided businesses everyday it may not be possible to develop a uniform SSNIP test in all cases. The definition of relevant product market in MSPs should be inclusive of all sides so that there can be correct assessment of constraints faced by firms. To this regard, the rationale behind SSNIP could be applied in a way that all sides of the platform are equally embraced within its scope.

### ***Network externalities***

Network externality is an important concept underlying MSPs. It occurs when the user participation on one side of the platform, influences the efficacy that a user on the other side of the platform. For example, phones are useful only as long as other persons also have phone. The more number of people a person can call more is the benefit of owning a phone. Network externalities are of two types:

- a. *Direct Network Externality*- The above example is that of direct network externality. In direct network externality as the number of users increase, a product or service or even the platform's value increases. A prime example of platform benefitting from direct network externality is Facebook, a social media platform. Facebook's growth and valuation has increased significantly, as more and more users are attracted to join the platform. It is a result of direct network effect.
- b. *Indirect Network Externalities*- This is a characteristic feature of MSPs. Where the demand on one side of the platform, is influenced by that on the other side, it is called indirect network externality. For example, if more and more people tend to use Google pay as the payment method, more and more merchants will be willing to accept payments through Google pay. Similarly, if a lot of sellers or retailers accept particular credit card as payment gateway, more and more buyers will be carrying that card. Indirect network externalities greatly impact the economics of MSPs. They are its driving force.

### ***Homing and its competitive dynamics***

Homing comes in handy when determining the competitive effects of multi sided platforms as based on this phenomenon, the MSPs

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<sup>8</sup> Filistrucchi, Lapo & Others, 'Market Definition in Two-sided Markets: Theory and Practice' [2013] Journal of Competition Law & Economics, 10(2) p 293

decide how to face competition from new entrants. Homing refers to the extent to which a user can use more than one platform. In case the user is only opting for one platform, it is single homing, and where the user engages into more than one platform, it is called multi-homing. When a new entrant arrives, the users on both the sides of the MSP can choose to switch to the new entrant or decide to use both the platforms<sup>9</sup>. For example, when Amazon entered the Indian e-commerce market, users on either side could have chosen to switch from Flipkart to Amazon (single-homing) or decided to adopt both of these platforms (multi-homing).

Multi-homing induces the platforms compete aggressively as the users always have the option to switch to a better competitor, both in terms of quality and price. Frequent switching by users from one MSP to another, results in a less likely survival of smaller MSPs. The larger MSPs having giant capital can easily subsidize any new user's entry and diminish the user's unwillingness to switch. Dominant MSPs can act out by stipulating a very high switching cost. One of the most common ways by which multi-homing is prevented is through exclusive contracts.

## **2. Determining Dominant Position in Multi-Sided Platforms: Contributing Factors**

The dominant position enables an entity to act independently of the prevailing market forces. Under the 2002 Act, dominant position with reference to enjoyment of a position of strength by an entity, in India's relevant market, is one which allows the entity to:

- a. operate independently of the prevalent competitive forces in relevant market; or
- b. have such an effect on its competitors, that it tips the market in its favor.

The Indian economy is undergoing a digital transformation at a rapid pace and much is required to keep the transformation accelerated. At present India has more than 692 million active internet users and the number is expected to cross the 900 million mark by 2025. Internet and Mobile Association of India (IAMAI) in its report titled 'Internet in India' stated that around 341 million Indians engaged themselves in online transactions such as digital payment and e commerce. As per the report, since the onset of the coronavirus pandemic, a record 51% increase in online transactions (from existing 291 million in 2019) was observed in past two years.

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<sup>9</sup> Park, Kyeonggook and Seamans, Robert, 'Multi-Homing and Platform Strategies: Historical Evidence from the US Newspaper Industry' [2018] Harvard Business School Technology & Operations Mgt. Unit, Working Paper No. 18-032

While the numbers are impressive, it also makes users vulnerable to exploits by the big data companies, who have experienced possibly more online transaction in last 2-3 years, than any other period of time. Multiple cases of dominance were investigated by the Competition Commission of India, against Google, in a period of 4-6 years.

Under the EU competition law model, Article 102 (previously Article 82) of the Treaty on the Functioning of the European Union states: “any abuse by one more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States”.

In *Hoffmann-La Roche*<sup>10</sup>, an Article 102 case, the European Court of Justice gave the definition of market dominance, which is still used nowadays: “[the dominant position] relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”<sup>11</sup>.

There is no market power or dominance in a perfect market. However, such ‘perfect competition’ is only an illusion, as in reality, gradual development of market dominance by many entities has been seen all around the globe.

### **Joint Dominance in Digital Platforms**

The concept of joint dominance has been recognized in the European competition law model. Unlike dominance, joint dominance is not just about the aggregate market power of firms, but also need to identify certain form of coordination among them (Kuhn 2002). Joint dominance is the ability of companies to exercise the market power jointly. This includes ability to significantly raise the prices by firms, acting as if they are a single entity. The European Court of Justice in the *Airtours* case<sup>12</sup> elaborated upon the concept of joint dominance. The court in this case prescribed three conditions to determine joint dominance in an oligopolistic market:

- i. High level of transparency, enabling companies to immediately become aware of their competitor’s behaviour in the market.
- ii. There can be sustainable tacit coordination, along with the mechanism providing for easy implementation of retaliation against deviating behavior.

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<sup>10</sup> Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 1979 E.C.R. 00146

<sup>11</sup> *ibid*

<sup>12</sup> Case 342/99, *Airtours Plc v Commission of the European Communities*, 2002 E.C.R. 02585

- iii. The competition in the present form or potential future competition must be unable to upset the coordination set up by dominant companies collectively.

The Airtours case has been accepted as “*authoritative and complete statement on the law relating to collective dominance*”. The case establishes the standards of evidence which are necessary to be met with, before the antitrust authorities or courts can justify collective dominance in the market. (Holmes 2017).

### **Factors to Determine Dominance**

There are three major harms which could be created by dominant internet platforms, which make determination of dominant position extremely important in case of MSPs:

- i. Added costs to the advertised products, resulting in increase of prices,
- ii. No emerging competition to the products in the market or elimination of existing competition,
- iii. Increase of prices beyond the added cost of advertisement because of the market power of the firms that remain.

Section 19(4), of the Competition Act, 2002 list certain factors for determining dominant position- market share, enterprise resource and size; enterprise's economic power competitors' importance and size; vertical integration; barriers to market exit and entry; countervailing buying power; extent of consumer dependence on enterprise; market structure and size; source of dominance for instance if dominant position is result of law, etc.; contributions made by the enterprise towards development of nation's economy and social obligations, like corporate social responsibility.

Article 102 of the TFEU, does not define dominance. The judgments rendered by the EU Courts, Decision by the Commission and the issued Guidance Paper, tend to define dominance as a position of economic strength that confers on a company ‘the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers’. For MSPs such as Facebook & Google, dominant position is gained from the element of positive externalities, i.e. more is the number of users, more is the value of the service. The expansion of network effects is underpinned by a business model that provides their services free to end-users and relies on advertising revenues for profits.

Certain key features whose analysis would provide sense of dominance are as follows:

## **I. Indirect Network Externalities**

INE is both an important feature of the MSPs and also an important factor for determination of dominant position. As defined above, it simply means that gains derived by one side of the platforms, is dependent upon the number of consumers on the other side, and vice versa. This means that in MSPs the demand of each group of customers is interlinked.

The INE work in both directions, i.e., its impact is upon group of customers on either side of platforms. Although it may not be as strong on one side as it is on the other side. Therefore the number of users a platform jointly has on either side is a direct indicator of its dominant position. For instance, as per *Oberlo*, Facebook currently has 2.80 Billion monthly active users and 1.84 Billion daily users. In the fourth quarter of 2020 Facebook brought in revenue of \$ 27.2 Billion. Undisputedly, Facebook is one of the dominant players globally in the field of MSPs.

## **II. Tipping**

Network externalities can lead to markets tipping to one, or a few, providers. The feedback loops arising from strong INE are indicators of concentrated multi-sided markets. When there are distinguished offerings from the competitors and more and more multi-homing by customers on either side, the multi-sided market is less likely to tip. Economies of scale achieved by a platform and the mass of consumer it holds influence its financial viability and thus both these elements are useful in determination of market concentration. In the event of tipping, the platform's market power becomes established, as is evident from the behaviour of businesses and consumers. In order to restore competition, heavy coordination is needed from both the businesses and customers to switch to other alternatives, which is unlikely to be obtained. There can be many reasons for ignoring switch, one of which could be technological factor.

## **III. Market Share and Concentration**

Another useful indicator of market power and concentration is supplying share, specifically of similar goods and services. However, there are certain challenges to using market share as power indicators. Among these challenges, the prominent one is a optimum method of measuring market share. The extent to which a market is multi-sided is hard to determine considering how shares should be computed is not clear. One approach could be the sequential measure of market shares on all sides of the platforms.

A further evaluation of the same can be done considering the nature of the feedback loops and demand links. This approach is

flexible and also provides for attachment of more weight to large market share on one side of the platform, drawing the conclusion that this particular side is accustomed to single homing.

It is always a challenging task, identifying the group which is consumer, and the one which is competitor. This is primarily because a consumer on one side, can very well be the competitor of the platform itself. For example, a third-party seller on Amazon, may compete with the Amazon marketplace itself by attracting or trying to advertise options for direct sales. This requires proper identification of competitors and customers in order to measure the market share as accurately as possible.

Authorities do not tend to identify short term measures to determine market power (e.g. market influx), but rather look for a long-term measure such as sustained or continuously high levels of market share. Network externalities tend to make multisided platforms susceptible to tipping and as such may call for early intervention by authorities. It thus requires extra care to identify whether determining dominance in development stage of market, will lead to market dominance in future as well.

#### **IV. Homing: Single v Multiple**

The extent of single- or multi-homing on one side, influences the single-or multi-homing of customers on the platform's other side. If the examination of the extent of homing on each side is properly conducted, it can significantly indicate the extent of market power exerted by the enterprise.

When a business lists on more than one platform, it can benefit from playing these platforms against each other. When users' multi-home it is less likely that there will be concentration of market power as it will result in aggregate increase in number of users across various platforms. For example, if a group of consumers single home to platform X and other group single homes to platform Y, then the businesses would list on both the platforms. This necessitates presence of alternatives in the market and also indicates that the availability of homing options to the users is a direct factor helping in determination of dominance. Availability of homing options act as insurance to competition as users on either side can switch to another platform if they are not happy with the behavior of the platform they are currently enrolled with.

It is necessary in markets with strong [INE](#) that extent of homing on each side, single or multiple, is measured before consideration of feedback loops. A practical approach to this regard could be a follow up of these steps:

- Analysis of competition on non-subsidized side of market

- This involves determination of proportion of people on the free side who single-home. This helps in determination of market power as the businesses would want to list on the platform there are consumers in good number who single-home as it is an incentive to them.
  - Next step is to determine the number or proportion of businesses that single-home i.e. customers on the paid side. Concentrated single- homing by business is also an indicator of market power. However, if consumers single home, businesses may need to list on multiple platforms to attract such customers.
  - If the businesses are able to attract the customers of the other side, without the use of platform, then it is less likely that the platforms will have market power.
- Analysis of Competition on the free side of platform involves few things such as:
    - A platform's success depends on how much the customers prefer it with respect to the services it provides. If the customers are able to resource their products from other channels, the platform is less likely to succeed.
    - Customer's loyalty towards platform, i.e., how often they switch or multi-home.

## **V. Switching Costs as source of Market Power**

Switching costs are also indicators of market power. These costs can create barrier to expansion and entry. These costs can be between platforms, or between sales and platform, due to the habits of consumer and his convenience. A platform may, for example, save the consumer's card details so he doesn't have to enter it again, the platform may provide customized notifications and cookies based on customer preferences and past buying habits, it already has customer's contact details through which it can provide targeted promotion. All these aspects make it very convenient for the consumer and reduces his search costs and thus he may be driven to use the platform instead of switching.

Technological advancements can both establish and de-establish market power. Enhancement in technology results in continuous innovation and businesses are bound to respond to these changes and thus, there can be breakdown of market power. On the other hand technological growth may also result in

establishment of market power. For example, with the development of apps on mobile phone, customers may prefer placing orders through the app, rather performing tradition web browser searches. Also, it is true that they may not want to have a lot of apps performing similar functions on their phone.

### **3. Artifices for Abuse of Dominance by Multi-Sided Platforms**

#### **I. Entry Barriers by Network Effects**

Significant entry barriers are created by the network effects, both direct and indirect, for rival platforms. For emerging platforms, a key challenge is to acquire a critical user mass as in order to be successful they require scaling up on each side of the platform rapidly. In order to achieve this, there is a requirement of significant amount of capital and expense, which a start-up may not have.

David Evans<sup>13</sup> (2016) states that during the initial stage when they begin to operate, MSPs tend to suffer from a chicken and egg issue due to the objective they tend to accomplish. He illustrates this with an example, where a platform is in the business of getting a user of A type together with the user of B Type. Now, Type A user may not want register to the platform unless it is certain that the platform has attracted type B, and similarly the Type B user may not want to register unless it knows that the platform has gotten the attention of Type A user. Here the platform needs to derive a way where it can board both these types of users, in a number so that they can be of value to each other.

The first-mover advantage also significantly adds to entry barrier. This works in the sense that first mover can capture the complete market, making it difficult for emerging platforms, if they take indirect network effect advantage and proceed to have consumer lock-in. for business to be successful, they need to undertake product enhancement, improve quality, offer innovations and discounts.

#### **II. Switching costs**

High switching costs are just as detrimental to competition, as the high indirect network effect as it creates consumer lock-in. High switching costs act as barrier, when the consumer tries to switch from platform to another.

The concept of switching costs is not a unique one and is found significantly high in multisided platforms. One of the forms of

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<sup>13</sup> Evans, D. S., 'Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms.' [2013] SSRN Electronic Journal.

switching cost is brand loyalty. The presence of direct and indirect network effects adds to the higher switching costs in these multisided platforms.

Along with cost of connecting to a new network switching cost also includes the “opportunity cost” which potentially arises from the network effect losses, resulting after a customer switch to another platform. The larger is the user base of a platform, larger will be the disincentives it provides for users that switch.

In rival platforms switching costs include social costs, i.e. damage to social capital. Platforms invest considerably in order to build reputation and receive good consumer ratings. Similar is the case for consumers who invest significant amount of time and vigor to get used to a platform, its mechanism, community engagement and review of the platform. It is therefore a huge loss of social capital if the user switches to another rival platform.

Certain factors determining consumer lock-in other than network effects include:

- Time needed in getting used to new platform and system
- Unwillingness to switch from a trusted platform, due to brand loyalty
- Choice to stick with the brands already known

While elaborating upon the string among switching cost and network effects and its impact on competition, Lobel & Bamberger<sup>14</sup> state that the combination of switching costs and network effect support each other while creating consumer lock-in as it would then need consumers to perform a coordinated costly switch to another platform in order to benefit from the rival network. This would in turn provide a firm in dominant position to substantially increase prices, consumer deadweight loss and harms the innovation and choices to consumers.

Klemperer (1987) provides for a two-period model with respect to switching costs in a market. He states that in the second period, the prices are raised by the firms in order to gain advantage of the partly locked in customers from the first period. This means that in the second period, the prices higher, generally, than they were in the first period, before the consumer had been locked-in. Also, the prices, without any significant switch cost, are higher than any market. Therefore, the network's profit in the second period, depends upon the number of consumers locked-

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<sup>14</sup> Bamberger, A. Kenneth & Lobel Orley, 'Platform market Power' [2017] Berkeley Technology Law Journal 32(2) p 1054

in in the first period.

Entering into the platforms, whether large scale or small, with deep rooted market dominance is difficult. Large scale entry is discouraged by switching costs as the network of consumers prior to its entry already has witching switching cost. On the other hand, small scale entry is negatively impacted by network effect because of the need to achieve critical mass in order to provide value to consumers.

### **III. Reduced Bargaining Power**

Due to high indirect network effects, switching costs are also high, and thus businesses relying on these platforms lose bargaining power. There are multiple ways in which a dominant online platform can abuse its business power.

Contracts between businesses and the platforms have price parity clauses. Using market power, these platforms restrain businesses from selling a product at cheaper price elsewhere, not even on the own website of the seller or offline channels of distribution.

These clauses can be of two types:

- i. Wide Price Parity clause- here the price of the product sold by the business on the platform, cannot be higher than the price it charges when selling directly or through another platform.
- ii. Narrow Price Parity Clause- under this type of parity clause, the platform price of product cannot be higher than the price charged when sold directly.

Price parity clauses have been subjected to scrutiny by antitrust authorities in Europe and elsewhere. In the aftermath of investigation in Europe, Amazon got rid of its price parity clause, while Expedia and Booking.com made a five-year commitment of not imposing wide parity clauses in Europe.

Preventing 'show-rooming' is often cited as one of the reasons, by the platforms, as to why they have these price parity clauses. Show-rooming refers to the situation where the person searches a product on the platform, gathers relevant information, but ends up buying the product from the seller directly, at a price which is lower than the platform.

The general view with respect to impact of price parity clauses on competition is that due to these clauses the competition on rate of commission between the platforms is limited, and this leads to consumers being charged higher prices. When platforms use wide price parity clauses, the seller is bound to set the same price across all platforms even where he sells directly. Due to this, the

platforms do not fear loss of market share to rivals and therefore incentivize by increasing commission beyond the level of 'competition'. This results in 'supra-competitive commissions' and in turn higher prices are charged to consumers by suppliers<sup>15</sup>.

#### **IV. Exclusionary Behaviour and its Conceptions**

Some might argue that multisided platforms do not require much of scrutiny from competition law authorities and maybe treated with leniency. This is based on the idea that in this market the cross-platform network effect is so high that it produces a large amount of competitive restraint and thus these platforms have less market power than what may initially appear.

Katz and Valletti disagree from the view that multisided platforms require less scrutiny. According to Katz, the relevant market where multi-sided platforms are operational can prove to be more fertile for exclusionary conduct. While, Valletti on the other hand suggests that in these markets exclusionary conducts are more likely to happen as compared to other markets. Both literatures suggest that antitrust authorities need to give higher priority to the multisided platforms than required in traditional market.

Katz and Valletti side with the view that conducts such as predatory pricing or exclusivity clause, which are potentially exclusionary in nature, should be tried on a case-by-case basis. The issue for consideration is whether or not these practices are more likely to hamper competition on multisided platform market than the traditional one-sided market.

##### **a. Exclusivity Contracts**

Exclusivity contracts pose a greater risk because they can potentially affect the users on that side of the platform who are not a party to the contract between the platform and the business or user on the other side. On the other hand, with respect to one side platforms it is suggested that the contracts are not likely to have anti-competitive effect or harm consumers as they do not serve the interests of retailers competing with each other if the exclusivity agreement increases the price to be paid. However, the same cannot be said about the multisided platform, that user on one side of the platform acknowledge the impact of them entering into

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<sup>15</sup> Thibaud Vergé, (2020) Are Price Parity Clauses Necessarily Anticompetitive? [2020] Competition Policy International, available at < <https://www.competitionpolicyinternational.com/are-price-parity-clauses-necessarily-anticompetitive/> > last accessed May 10, 2021

exclusivity contract with the platform.

Another factor is creation of economies of scale through cross platform network effects as a greater number of users on one side of the platform, attracts an increasing number of users on the other side. In such a situation, in order to shift the competition to create customer exclusive relationship from competing to sell units, and thereby, increase the rivals' costs, the incumbent may enter into exclusivity contract.

## **b. Predatory Pricing**

In the case of predatory pricing, the exclusionary conduct gives a larger incentive to the incumbent, when the cross-platform network externality is higher or stronger. Though it holds true that such a situation would exist even when the user on one side is unconcerned about user on other side, Katz suggests that there is a greater risk by predatory approach in multisided platforms as there are opportunities for the platforms to indulge in predatory pricing by giving incentives and letting go of profits on one side, while simultaneously charging high prices from the other side. More on predatory pricing has been discussed later.

Over the years several tests have been established to differentiate exclusionary behavior from what is claimed as competitive behavior or strategy. Some of them are stated below:

### **i. Impact on Social Welfare and Competition Test**

Under this approach, a conduct is labelled exclusionary if it harms competition and social welfare<sup>16</sup>. The test has its direct linkages to the object of the particular competition policy or sense of economic welfare. However, it has certain limitations such as not having a defined notion of what is "harming competition"<sup>17</sup>. In case of predatory pricing, while the plaintiff would insist that competition is suffering, the defendant would boast that is simply a competitive strategy. Therefore, by not defining harm, this test faces challenging issues.

### **ii. An equally efficient rival under the same condition**

In the second test, it is examined whether a rival with

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<sup>16</sup> Salop, S.C., 'Exclusionary conduct, effect on consumers, and the flawed profit-sacrifice standard' [2006]

Antitrust Law Journal 73(2) p 330.

<sup>17</sup> Melamed, A.D., 'Exclusive dealing agreements and other exclusionary conduct—Are there unifying

principles?' [2006] Antitrust Law Journal 73(2) p 375

same efficiency could compete in the circumstances alleged to be exclusionary. If the answer to the test is positive, the alleged conduct is not exclusionary<sup>18</sup>. This test provides a sense of “harm to competition” mentioned in the social welfare test, that if the incumbent is competing on merits, a similarly abled entrant would also be able to compete successfully. However, this test too suffers from certain shortcomings.

The first and primary limitation is that in actual marketplace, what contributes to an “equally efficient rival” is not easy to determine. In case the rival and the firm both sell same product, efficiency can be determined on the basis of prices, and if the price of rival product is equal or low, he is equally efficient. But where the products are different the determination of efficiency is extremely difficult as characteristics of product and varying business strategies are different across multiple firms.

In case of network effects, it raises certain other issues such as whether the installed base be taken into consideration while calculating efficiency? If the base is so taken into account, the test’s credibility is weakened as it would then label almost all the conducts that leveraged advantage to the firm, through its installed base, as non-exclusionary.

Equally efficient rival test has been relied upon by the European Commission while assessing the impact of price based exclusionary conduct upon the consumer and its subsequent harm. But the Commission has also upheld the view that exclusion of non-efficient competitors could have significantly negative edge upon competition, under certain circumstances.

a. No economic sense tests

Under this test, when a conduct makes no business or economic sense, but suggests that it is only being pursued for the sake of hampering competition, it is termed as exclusionary. This test is also related to “profit sacrifice test” where the incumbent would initially lose profits deliberately in initial stages in order to weaken competition and obtain profit in the long run.

The test is free from certain potential pitfalls proposed by rival or consumer welfare tests as it focuses on the economic welfare of the alleged. The focus is based on the idea that a potential defendant would be able to better predict the impact

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<sup>18</sup> Mandorff, Martin & Sahl Johan, (2013) ‘The Role of the ‘Equally Efficient Competitor’ in the Assessment of Abuse of Dominance, [2013] Konkurrensverket Working Paper Series in Law and Economics

of its conduct upon its own profits, rather than the impact upon the welfare of its rivals or consumer. One element while applying the test is to consider what would have happened if the conduct had not affected the strength of competition.

## V. Predatory Pricing in MSPs

Predatory pricing is a strategy to foreclose, by a firm in a dominant position where the firm initially sacrifices its profits for a short period of time, through which it drives the other businesses or competitors out of the market, and the later recovers the losses by increasing the prices significantly<sup>19</sup>.

Whether a given pricing strategy is predatory or not, in order to determine this, there are certain analytical challenges that need to be overcome. In below the cost pricing strategy, a form of predatory pricing, the incumbent seeks to attain a price which is below certain average cost, thus making even the efficient rivals unable to compete<sup>20</sup>. On the other hand, above-cost pricing, another form of predatory pricing, requires a broader connotation that the step is not just to drive out rivals, but has a business justification, such as clearing out of inventory about to expire.

Over the years, the European Union has adopted the following approach:

- i. In case of price being below the average variable cost, it is presumed that there is predatory pricing, which the defendant can try to refute;
- ii. In case it is above variable cost but below total cost, it is upon the plaintiff to prove that such pricing is done in order to eliminate competition.

While the European Union does not consider recoupment as a standard, the Commission does. The European Commission scrutinizes if the market conditions are such that the predatory pricing can in fact harm competition, examining factors such as recoupment, entry barriers, etc. The test for recoupment is basically a test as to whether the pricing strategy alleged as predatory could potentially harm the competition.

## 4. Identifying the Challenges and Deriving Solutions

The idea of creative destruction by Schumpeterian suggests that in a new economy market power or dominance is temporary and this is followed by a “*constant fear of being outdone by new product*” due to rapid change in technology. Those who support this view, argue that:

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<sup>19</sup> OECD, Competition Policy Roundtables: Predatory Foreclosure, 2004 available at < <https://www.oecd.org/competition/abuse/34646189.pdf> > last accessed May 10, 2021

<sup>20</sup> Ibid

- Due to rapid innovation, there is bound to be a paradigm shift in market power and what is today's existing order, will not be the same over a later period of time. Hence, the market will correct itself without requiring authorities to ensure enforcement of certain legal standards.
- The technological sector is extremely fast paced and innovative. The pace with which the decisions are taken by an antitrust authority and the lack of technological expertise, are a mismatch to the new, real time economy, thereby rendering the final findings of the authority, irrelevant.
- In case the intervention is too much, the firms will be left without any incentive to innovate.

Even though the above arguments have merit, it would be largely irresponsible if there is no reasonable intervention by the antitrust authorities in the digital realm as the same factors can also play a vital role in aiding competition. If Schumpeterian's idea was to be followed, the bundling practice by Microsoft, tying various products with its operating system, would not have been brought to a halt, as the idea would have assumed that Microsoft would not be in market power forever. Google has been under scrutiny with regards to its advertising and search optimization. Even though Google has a gigantic data base of users, it has not been able to compete with Facebook in its social media reach, which begs the question as to what is the extent of Facebook's market power.

All of these instances suggest that innovation is not the only thing necessary to compete with dominant market players. There can be huge gap of timeline if we were to wait out for the next riotous innovation to arrive in order to disrupt the current dominant firm or innovation and change the structure of the market. During this gap, the dominant firm may find sufficient strength to capture distinct markets and create an entirely new cycle of dominance.

Any competition policy is sector neutral, economically. The same competition assessment framework should be used to govern other sectors, with acknowledgement of the distinct characteristic of the sector. In case of multi-sided platforms, these characteristics, as discussed previously, are network effects, lock-in, etc., and it is imperative to acknowledge these features while enforcing laws and standards on these businesses.

### ***Changing the traditional approach***

The Supreme Court of India in the matter of *CCI vs. Steel Authority of India*<sup>21</sup> observed that a delay is very likely to frustrate the purpose of the Indian competition law regime and possesses a

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<sup>21</sup> (2010) 10 SCC 744

significant threat to the open market and as a result, hamper the economy of the nation. As discussed above, the speed with which the dimensions of an online platform change as compared to traditional sectors is much higher. The only opportunity to intervene is prior the moment when the network effects set in. Therefore the first and foremost requirement is to adopt a system which is robust and time efficient so that in cases of abuse or potential abuse, the findings of the competition authority remain relevant and in the context of the present market scenario. Accepting a commitment by the firm by the competition authorities, whose conduct is anti- competitive, is one way of levelling up the system.

One example is the practice followed by the European Commission where the EC accepts 'commitment decision' made by parties even though they have not made any infringement. The procedure of investigation 'commitment decision' is of a shorter timespan than a full- fledged investigation. Hence, the EC is able to swiftly proceed, in a time bound manner, addressing the competition concerns and therefore quickly restoring market to its undistorted position. In the anti-trust investigation of Google, Jaquín Amunía noted that quick resolution of competition concerns can potentially benefit the fast moving digital markets. He notes that instead of undergoing lengthy proceedings, it is preferred that competition is swiftly restored at an early stage, to users' good.

In India, the CCI is not empowered to enter into such arrangements or settlements. In this regard some observations have been discussed by the Madras High Court. The court observed that any settlement which is pending an investigation by CCI, can be allowed by the CCI subject to three conditions<sup>22</sup>:

- i. The anti-competitive conduct is not continued;
- ii. It would not allow abuse of dominant position; and
- iii. It is not prejudicial to the interest of consumers or trade.

The anti-trust authorities need to consider following perspectives in order to develop a robust resolution system:

## **I. Understanding Market Dynamics of MSPs**

The first step while considering cases involving market power and abuse is gaining substantial knowledge about the nature of competition prevailing in the market. From the perspective of multisided platforms, this includes understanding the impact of interlinked demands and multiple groups of consumers have on market power, rapid technological changes, data collected on

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<sup>22</sup> TN Film Exhibitors Association v. CCI, High Court of Madras, Writ Appeal Nos. 1806 and 1807 of 2013

behavior of platforms by the users, network effects, etc. Where there are strong indirect network effects, market power on one side of the platform can induce market power on the other side, or may support a particular conduct on the other side, or it could also lead to a situation where both conduct and power on are on one side, but affect another side as well. It is important to understand that in a multisided platform, competitive restraints may come from all or any side of the multisided platform.

In many cities we see Ola and Uber fiercely competing to gain scale and drive out the other competitors. They are providing huge discounts to riders and deep incentives to the drivers, even though both the companies are undergoing huge losses. This is possible because of their PE investors. If this below-price costing is sustained, eventually all the other players in the ride share market will be eliminated, which has already started happening to a certain extent.

In 2016, Uber and Ola, raised their fares but reduced incentives to drivers. Some suggest that this is a gradual recoupment strategy being applied by these cab aggregators, as both these companies have now established their significance in the market. Therefore the Commission is required to take into consideration the “overall picture” and not just the market share to determine the dominance. Overall picture may include scheme of discounts, funding, network expansion goal, etc.

## **II. Modifications in SSNIP test**

Consider a platform with sides A and B. Both these sides are linked by indirect network effect. If the traditional SSNIP test is applied, which is one-sided, only one side, either A or side B would be analysed from the view as to what direct effect the increase in price would have on the profitability and demand of that side. It would not provide for the impact, the reduced number of consumer on side A, have on Side B or vice versa. It also will not account for the reduced demand, by a small number of consumers on one side, underestimating the loss to the other side.

The SSNIP test works on the basic principle of economic theory that a monopolist has the market power. Preserving the same logic, SSNIP test should be modified according to the type of platform, in this case multisided platform, being analysed:

- i. If both sides of the platform create a non-transactional market, overall profitability that could be achieved from the rise in price, must be checked.
- ii. If both sides of the platform create a transactional market, profitability by increasing prices, that is, total transaction

price paid by each side, must be checked.

### **III. Assessing Recoupment**

Massive amounts of funding cannot be the sole ground of unfairness. If such an approach is adopted, it is likely that major economic sectors will receive a huge blow on the inflow of investment.

The test for recoupment can be used to distinguish between two types of discounting practices:

- i. One that will benefit the consumers;
- ii. One that will potentially be harmful in the long run, as it will allow the player to establish market power or monopoly.

It is therefore recommended, where the predatory pricing is allegedly being practiced by the firm, possibility of strategy of recoupment must also be considered by the CCI, even though it is not mandated by the Act to do so.

In multisided platforms, continuous predatory pricing is highly likely to drive out other payers gradually. Along with their exit, network externalities will create substantial entry barriers which will not let the newcomers survive as the profit for margin will be extremely low or negligible. The market structure thus established will allow the dominant player to recoup all its losses which it had incurred earlier through excessive discounts and incentives. This will inevitably tip the market in favour of the dominant firm. While considering recoupment not only the first market should be considered, but also the other markets where the firm expanded its business by leveraging its position in the entry market.

Following is suggested:

- i. Assess dominance with regards to economic principles;
- ii. Examine if there is below cost pricing;
- iii. Timespan of below cost pricing strategy;
- iv. Test for recoupment.

### **IV. Interoperability**

Where possible, essential facilities doctrine may be opted in order to direct interoperability (exchange of communication in IT enabled firms) between the firm which is found to be abusive and other market players. This will significantly enhance open access. When interoperability is imposed on a dominant firm, like a payment network, it can help in the extension of network effect of

digital payment system to the nationwide economy, instead of subjecting it to limited network. However, implementing interoperability will need to consider, fair and reasonable fee payment for access, adhering to complex nature of institutional setups, monitoring these arrangements and assessing future impacts.

## **V. Commitment Decisions**

It cannot be stressed enough as to how important it is for the authorities to deliver a time bound decision. This calls for a system where the cases are settled voluntarily and amicably among the parties. This will allow those firms, who could potentially abuse their position, to change their attitude, without requiring the authorities to conduct a time taking investigation. In such a situation the regulator will be able to resolve the concern before it has taken place or caused any substantial harm which could possibly affect the competition in an irrevocable manner, potentially tipping it in favor of a single dominant player. This would be the same as that of European Commission's, as described above. The cases where it is not possible to avoid detailed investigation, the CCI would need to develop a time bound resolution system so that findings are in line with market condition.

## **5. Conclusion**

After reading leading literature on the economics of multisided platform, I have tried to provide a framework for identification of market power, abuse of power and its remedies. I have also tried to provide suggestion as to how the multi-sided platform market can be identified and its characteristics, how the SSNIP test needs to be applied in such a market and other relevant concepts.

The technological aspect of every facet of economy, domestic or international, has been changing rapidly across the globe. While integration of economies of the world and transfer of technology, have significantly boosted growth and development of competition, it also brings certain concerns along with it. These concerns need to be adequately identified and addressed by the antitrust authorities of respective nations. With the digitization of trade and commerce, there come its own challenges to the swift running of competition. The development in the past decade or so, in the field of online markets, has successfully demonstrated that the online platforms can create an entirely new market and change the dynamics of existing ones. Successful platforms like Google, Amazon, Facebook, etc have been observed to have a market valuation which was not previously accounted by anyone. Naturally, this has taken quite the interest of antitrust authorities which intend to make standards and guidelines in order to neutralize future competition concerns.

It has been argued by many that online market is a characteristically dynamic one and is highly competitive, the non-observance of due attention to these markets from the competition law perspective cannot be an argument. It is important to ensure that competition remains free and fair, unhinged from players who tend to obtain the position of power. As discussed above these dominant players use various artifices which can be deceptive of their position and the authorities can easily overlook their misconduct.

It is difficult to determine whether a firm is dominant or not, in a market where the competition is based on innovative products. In such a market, traditional tools are not really efficient. The study reveals that where there are strong network externalities, it would be appropriate to bring the platform under scrutiny of competition law authorities. In order to capture the multisided-ness of the platform, it would be pragmatic to take into account the market power on each side of the platform and consider the feedback loops, and then draw its relevance to the issue of investigation, i.e. the conduct. It is therefore required that the traditional approach to dealing with abuse of dominance be changed, according to the changing digital market norms. First of this being market definition. The future of these platforms tells us that defining the relevant market for these platforms will be an uphill task. It will indefinitely pose multiple challenges and will need to be developed drawing reference from current practices. The safest approach would be to adjust the test for relevant market on case-to-case basis. Similarly, there are other concerns such as recoupment strategy, which largely goes un-noticed.

In summary, the tools need to change in order to:

- Identify the nature of anticompetitive conduct in multisided platforms;
- Effect of these conducts;
- Consideration of all potential responses to these restraints;
- Develop test to see that whether these effects are observed; and
- Determine the reason behind participation by each side of the platform.

# Deciphering Delhi's Dilemma: 'Special Statehood' an Antidote

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## ABSTRACT

"Delhi is not only the capital of modern India, but it is also a unique city which has dominated the political fortunes of this country for as long as we know the history of this country."<sup>1</sup> It is in a position where it has sufficient governments, but insufficient governance. With the report of the Balakrishnan Committee, the demand for 'Statehood' which was time and again echoed was inhumed by conferring Delhi a 'Special Status' vide insertion of Article 239-AA in the Constitution which was supplemented by the "Government of National Capital Territory of Delhi Act, 1991". The ripple effect caused by persistent disputes led to the Amendment Act of 2021 with a centralising tendency. A city with such magnitude must not be left hanging like Trishanku, ergo, the need of the hour heeds for extricating Delhi and proffering it with a 'Trishanku Heaven' i.e.; 'Special Statehood'. Most evidently, with the aid of primary data this Article provides an exposition in order to determine whether granting of this 'Special Statehood' as opposed to the existing status of 'Special Union Territory' would work as a lubricant between the Centre and the State; further, it attempts to examine the most workable model for National Capital Territory of Delhi.

**Keywords:** National Capital Territory of Delhi, Centre, State, Article 239-AA, Special Statehood.

## 1. Introduction

The Valmiki's Ramayanam sets forth the anecdote of Trishanku, a monarch who wanted to depart for heaven in his physical body, but he found himself foiled at each turn. Ambulating for a while, he crossed paths with Vishwamitra, who commiserating, acceded to his prayer. Using his power and abilities solus, Vishwamitra kept his promise. The only hurdle to this was Indra, who thwarted Trishanku's ascension to heaven. The result was a tug-of-war situation between Vishwamaitra, and Indra, as both had their considerations and promises to keep. To this, the solution left was a compromise, to leave Trishanku hanging between Earth and Heaven, pleading with everyone to put an end to the torment.<sup>2</sup>

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<sup>1</sup> SHRI JAGDISH TYTLER, The Minister of State of the Ministry of Surface Transport.

<sup>2</sup> Alok Prasanna Kumar, "Statehood for Delhi: A Legitimate Demand" 53 *VCLP* 12 (2018).

The above narrative could be a replica of the situation prevailing in Delhi. Delhi is the perfect paradigm for understanding pragmatic federalism in India. That is because of the fact that, its position has remained *sui generis*<sup>3</sup>, and it has been beyond the defined conceptions of federalism. The report given by the S. Balakrishnan Committee had introduced the idea of incorporating a specific chapter apropos Delhi in addition to renaming it as the National Capital Territory as they were of the opinion that Delhi should stand out from the other Union Territories for being recognized as the capital of the country.<sup>4</sup> In Delhi, there exists the State legislature led by the Chief Minister along with his Council, and also control of the Parliament, through the Lieutenant Governor, who is vested with a lot more power than that of the Governor of other States.

In a federal country viz. ours, with the presence of this dual conflict in the National Capital, delineating a proper framework for governance has been exhausting, and this remains an obstacle to harmony in the region. For the Central Government, the control is called for the reason of effective administration and discharge of national and international duties, and conversely, the State Government's desideratum cannot be disregarded because of the democratic right of the people to take part in the governance. Hence, an approach is needed that could reconcile the requirements or which could provide for alternative solutions.<sup>5</sup>

Though a subsisting issue, with the advent of novus "Government of National Capital Territory of Delhi (Amendment) Act, 2021", this dormant dilemma of the status of Delhi has come into the light, raising multiple questions and arguments in recent times. Thus to put it simply, the present-day conflict could be marked-out as a state of "federal crisis" where both the parties accuse one another of transgressing and interfering with their permitted area of authority and ergo, hampering the other's ability to operate effectively.<sup>6</sup>

## **2. The History of Governance in Delhi**

### **A. Pre-Independence Era:**

#### **a. Position Before 1857:**

It is incontestable that Delhi was ruled by the Mughals for centuries and that it tailed off during the reign of Aurangzeb due to strife- like foreign power attaining control on one hand and the Marathas on the other. Albeit, the Marathas in the year 1788 conquered it, but, yet again in 1803 they were annihilated by the Britisher in the battle of Delhi. The then Mughal

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<sup>3</sup> *Government of NCT of Delhi v Union of India*, (2018) 7 SCJ 356.

<sup>4</sup> Government of India, Report: *Committee on the Reorganisation of Delhi Set-Up* (Ministry of Home Affairs, 1989).

<sup>5</sup> *Supra* note 4.

<sup>6</sup> Tanmay Garg, "GNCTD (Amendment) Act, 2021 and Its Effect on AAP Governance" 1 *Jus Corpus* 516 (2021).

Emperor was appropriated a swathe of land recognized as the 'Delhi Territory', in order to sustain his family. The application of General Regulations of the Britisher were not to be extended to this assigned territory and it was the office of Resident and Chief Commissioner of Delhi who had been given the charge of such territory. Finally, owing to Regulation V of 1832 the East-India Company took charge of the administration of the Delhi Territory. As the reverberation of the 'Revolt of 1857', an Act was passed (Act XXXVIII of 1858) by which Delhi became a Provincial town of the Frontier Province. Subsequently, it was ceded into Punjab under a Lieutenant- Governor.<sup>7</sup>

**b. Position During the British Raj (1857-1947):**

Delhi continued to remain as a district of the Province of Punjab for the next 55 years. As Calcutta was seat of both the Provincial Government of Bengal and the Government at the Centre, therefore, in and around 1911, the change in Capital from Calcutta to Delhi was necessitated owing to few reasons *firstly*, in view of the fact that conflict arose between both the authorities. *Secondly*, to swathe the Capital from the revolutionary vehemence in Bengal which followed due to its partition in 1905. *Thirdly*, Delhi was better geographically placed than its counterpart, as it was centrally located in British India. So, considering these dynamics, the Imperial Capital was shifted from Calcutta to Delhi on December 12, 1911. Successively, a notification was published which provided that these areas i.e.; the Tehsil of Delhi and the Mehrauli Police Station would be administered under a Chief-Commissioner.<sup>8</sup> Delhi remained a Chief-Commissioner's Province under the "Government of India Act, 1919 and Government of India Act, 1935". Such Province was directly superintended by the Governor-General who acted through the Chief-Commissioner. Such classification was analogous to the present-day Union Territory.<sup>9</sup>

**B. Post-Independence:**

**a. Position During 1947-1950:**

After the independence of India in 1947, Delhi continued to be under the direct superintendence of the Government of India. Yet again, in the same year, a Committee was set up

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<sup>7</sup> *Supra* note 4.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> Niranjan Sahoo, "Statehood of Delhi: Chasing a Chimera", *Orf Occasional Paper*, June 15, 2018, available at [https://www.orfonline.org/wpcontent/uploads/2018/06/ORF\\_OccasionalPaper\\_156\\_Delhi\\_Statehood\\_Final.pdf](https://www.orfonline.org/wpcontent/uploads/2018/06/ORF_OccasionalPaper_156_Delhi_Statehood_Final.pdf) (last visited on March 21, 2022).

under the Chairmanship of Dr. B. Pattabhi Sitaramayya. This committee was mainly set-up in order to study and analyse the constitutional changes which were vital with regards to the Chief-Commissioner's Province. The Committee submitted its report and was of the view that though special responsibility must be taken by the Central Government and also financial aid and solvency needs to be maintained but, "the people of the province which contains the Metropolis of India should not be deprived of the right of self-government enjoyed by the rest of their country-men living in the smallest of villages."<sup>10</sup> The report of the Committee was fervently debated and discussed by the Drafting Committee who were of dissentious opinion as they maintained that considering the fact that Delhi was the national capital, it ought not be positioned under a local administration. But, the sole representative of Delhi in the Constituent Assembly, Deshbandhu Gupta, voiced his dissatisfaction as he demanded more local governance.<sup>11</sup> Notwithstanding the demands, the Constituent Assembly deemed fit to categorize Delhi as a Part C state which would be administered directly by the President through Chief Commissioner or Lieutenant Governor. Art. 239 and 240 (in its original form) were inserted to this effect.

### **C. Position After the Commencement of the Constitution:**

By virtue of Art. 240 (in its original form), Parliament legislated the "Government of Part C States Act, 1951" and the Act contained provisions with regard to Council of Ministers in the Capital to aid and advise the Chief Commissioner. Further, it also contained provisions with regard to the elected representatives. The Act, vide S. 21 excluded some subjects on which the legislature of Delhi would not have the power to legislate like public order, police etc.<sup>12</sup> It also provided that such aforesaid authorities need to comply with the directions given by the President. So, this Act honoured Delhi with a Legislative Assembly from 1952-1956. The States Reorganisation Commission which was set up in 1953 for scrutinising the functioning of the Part C states, submitted its report in 1955 expressing its opinion that considering the financial and functional vulnerability of such states they must either be merged with the neighbouring states or the Centre must administer it.<sup>13</sup> Ruling out all the suggestions, the Commission proposed that Delhi being a National Territory was a special case and thus, must continue to be regulated by the National Government. The

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<sup>10</sup> *Supra* note 4.

<sup>11</sup> Rajgopal Saikumar, "National Capital of Delhi: Towards a Unique Diarchy", *The Hindu Centre*, June 30, 2015, available at <https://www.thehinducentre.com/the-arena/current-issues/Art.7367199.ece> (last visited on March 23, 2022).

<sup>12</sup> *Supra* note 4.

<sup>13</sup> *Ibid.*

recommendations were implemented via the Seventh Constitutional Amendment and Part C States were rechristened as Union Territories, also, Art. 240 was omitted. Moreover, to further the other recommendation one “Delhi Municipal Corporation Act, 1957” was enacted for nearly the entire Delhi.<sup>14</sup>

The 1957’s administrative set-up was the cause of great displeasure for the Delhites as there was a lack of accountable governance. Consequently, the Centre enacted the “Delhi Administration Act, 1966” in order to overcome certain lacunas in the governance pattern and to provide some form of representation to the citizen by way of Metropolitan Council. Nevertheless, there were many implicit pitfalls in it, so the demand for full-fledged State Assembly was outpouring. The “Constitution (Forty-Seventh) Amendment Bill, 1978” and “Government of Union Territories (Amendment) Bill, 1978” were introduced to give Delhi the similar status as Union Territory having a legislature with some reservations, but, it lapsed as the 6<sup>th</sup> Lok Sabha dissolved. Henceforth, the Indian Government appointed the Sarkaria Committee in 1987.

### **3. An Excerpt from the Balakrishnan Committee Report**

The Sarkaria Committee, subsequently recognized as the Balakrishnan Committee, was appointed on 24th December 1987 owing to the reason that the population of Delhi had remarkably increased, whereby it had become crucial to solve the existing problems and determine a proper structure of governance.<sup>15</sup> Therefore, the deficiencies in the “Delhi Administration Act, 1966” were made the terms of reference of the Committee and were enacted as follows-<sup>16</sup>

- (i) To scrutinize the then prevalent structure to test its effectiveness and efficiency, including assessing the accountability of the administration to the public;
- (ii) To examine the scope and difficulties created by the existence of a multiplicity of authorities with overlapping of functions, i.e., whether it was because of administrative deficiencies like the absence of proper coordination or due to structural reasons like lack of an accountable nodal officer;
- (iii) To formulate recommendations on changes, both structurally and functionally, where, the functional side would cover analyzing the need

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<sup>14</sup> Delhi Legislative Assembly, India, *available at*: <http://delhiassembly.nic.in/DYP/Docs/AboutDelhiAssembly.pdf> (last visited on March 23, 2022).

<sup>15</sup> Nehmat Kaur, “Delhi, a history of governance: A look back at the legal journey from 1858 to 2018”, *The Leaflet*, June 15, 2018, *available at* <https://theleaflet.in/delhi-a-history-of-governance-a-look-back-at-the-legal-journey-from-1858-to-2018/> (last visited on March 24, 2022).

<sup>16</sup> *Supra* note 4.

for decentralization of financial and administrative power, while the structural side would include identifying the most effective structure of governance.

The Committee observed that Delhi being the National Capital was perceived as a miniature version of our Country, and it would be at the forefront of discussions on all important matters. Hence, it was extremely important to devise a structure of administration that had the highest possible standards and gave maximum efficiency. Accordingly, the suggestions given were categorized under the following heads-<sup>17</sup>

- i. **Retaining the then present structure with necessary modifications:** The Delhi Administration Act 1966, was in force in Delhi for nearly 22 years. In this course of time, several commissions and committees had already delved into the question of revamping the administration. Therefore, it was suggested by the Committee that making improvements to the source of the problem itself would not serve the required purpose of giving Delhi a democratic substance.
- ii. **Direct Administration by the Centre except for municipal functions:** In respect of this view, the Committee opined that placing Delhi under direct superintendence of the Centre, without sufficient elected representation, would lead to a situation of lack of accountability and the presence of such unresponsive government with the absence of feedback mechanism from the people would go against the essence of democracy.
- iii. **Granting Delhi full Statehood:** After analyzing the arguments made from both sides, the Committee concluded that arguments made against Statehood appeared more valid, substantial, and sound. They gave threefold reasons for the same- first, because of the existence of a federal structure in India, conferment of complete Statehood would mean giving exclusive power to the State Government to make laws in the State list without any interference by the Parliament which in consequence, would not allow the Centre to carry on the special responsibilities concerning the National Capital; second, Delhi would not be able to financially sustain itself without aid from the Centre as its expenditure would be far greater than the resources it could raise, and even classifying it as a special state would not suffice; and thirdly, the National Capital belonged to the whole nation and not to any State. Hence, granting full Statehood would not be just.
- iv. **Bestowing the National Capital with a Legislative Assembly and Council:** The Committee believed that this view could be a potential solution as by way of existence of these structures, several difficulties faced by the administration and also the people which arose from the structural deficiencies, like lack of coordination and accountability,

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<sup>17</sup> *Supra* note 4.

increased responsibility of the Municipal Corporation, etc., could be adequately resolved.

Hence, after all the careful deliberations, the Committee concluded that the best form of governance that could be enforced in the National Capital would be, to accord it with a special status amongst the Union Territories. In other words, Delhi would continue as a Union Territory with the addition of a Legislative Assembly and a Council, to take in hand the problems faced by the public. However, keeping in mind its special status, certain items of the State List like public order, police, and land were placed under the Centre. The Administrator was to be aided and advised by the Council, and any disputes arising from it were to be referred to the President for his final decision. The Committee also proposed that, to assure “stability and permanency”, the framework should be included in the constitution itself rather than the law of the Parliament.<sup>18</sup> Thus, the consequence of such an arrangement was Art. 239AA which governed Delhi henceforward.

#### **4. Constitutional Overview on the Status of Delhi**

As opposed to most Union Territories, the 69th Amendment Act of 1991, bestowed Delhi, a distinctive status by way of Art. 239AA of the Constitution, which grants it a direct representation in the form of a Legislative Assembly. The justification for incorporating such special provisions was that the laws that govern the Capital must be a “self-contained legal framework”, and all the core features of the governance structure should be incorporated in a wholesome manner, saving it from the play of the political parties.<sup>19</sup>

Art. 239AA (1) empowers the President to administer the Union Territory of Delhi through the Lieutenant Governor, who acts as an administrator. Further, clause (2) establishes a responsive, participatory, and representative government for the National Capital, chosen through direct elections.<sup>20</sup> It also mandates the appointment of Council of Ministers, who form 10% of the total members of the Assembly<sup>21</sup>, and are collectively responsible to it.<sup>22</sup>

The scope of the legislative powers of the government is traceable to clause (3) which delimits the ambit of the Legislative Assembly. It firstly eliminates certain subject matters contained in the State List like land, public order, and police to vest it with the Centre; secondly, it authorizes the Centre to enact laws on entries upon which the elected Assembly is generally empowered to make laws, i.e., matters enumerated in both the State and the Concurrent list; and thirdly, it clarifies that doctrine of repugnancy will operate in cases of inconsistency between the laws made

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<sup>18</sup> *Supra* note 14.

<sup>19</sup> *Supra* note 4.

<sup>20</sup> The Constitution of India, art. 239AA, cl. (2)(a).

<sup>21</sup> *Id.*, art. 239AA, cl. (4).

<sup>22</sup> *Id.*, art. 239AA, cl. (6).

by the Parliament and the Delhi Assembly, out of which those of the Centre would prevail.<sup>2324</sup>

The three subject matters were excluded from the jurisdiction of the State List by reason that they were vital to the Capital for which the responsibility could not be divided.<sup>25</sup> It was accentuated by the policy makers that the Capital of a country is the most vulnerable to any attack, and it had to be prepared for sudden upheavals. There also exist certain central police forces that have to necessarily coordinate with the general police force on duty. Hence, it becomes important to retain public order and police with the Centre. For the question of control of land, it was emphasized that it was essential to have a framework that would ensure proper use, disposal, and planned development according to accepted norms for maintaining a National Capital, for which retention of land in the hand of the Centre became unavoidable.<sup>26</sup>

Additionally, Art. 239AA(4) uses the words “aid and advice” of the Council of Ministers to bind the Lieutenant Governor to the extent the Assembly is competent to legislate. It also gives the Lieutenant Governor the authority to refer matters to the President for a “final decision” in case of disagreement and further authorizes him to decide on circumstances that requires immediate action.<sup>27</sup>

However, in the event of a breakdown of the constitutional machinery or failure of proper administration of Delhi, the President has been vested with the power under Art. 239AB to take charge of the system of governance. This suggests that the President can make all consequential and incidental provisions that appear expedient and necessary for administering the National Capital Territory analogous to Art. 239 and 239AA.<sup>28</sup> Besides, Parliament was also given unbridled power by Art. 239AA(7)(a) to enact laws for giving effect to any of these related matters.

## **5. Supplementary Provisions: The Act of 1991**

In order to supplement the provisions of our Constitution which related to the Legislative Assembly of NCT of Delhi and its Council of Ministers, a Bill was introduced in the House of People on 20<sup>th</sup> December, 1991 which subsequently came to be known as the “Government of National Capital Territory Act, 1991”. It is pertinent to mention here that the said Act was

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<sup>23</sup> *Id.*, art. 239AA, cl. (3).

<sup>24</sup> Devansh Garg, “Proviso to S. 44(2) of the Government of National Capital Territory of Delhi Act, 1991: A Constitutional Perspective” 13 *ICLRQ* 56-57 (2021).

<sup>25</sup> Lok Sabha Debates on December 20, 1991 available at:

[https://eparlib.nic.in/bitstream/123456789/9973/1/10\\_IL\\_20121991\\_p431\\_p470\\_t512.pdf](https://eparlib.nic.in/bitstream/123456789/9973/1/10_IL_20121991_p431_p470_t512.pdf) (last visited on Mar. 27, 2022).

<sup>26</sup> *Supra* note 4.

<sup>27</sup> Satyam Bhardwaj, “Analysing Constitutionality of the GNCTD Amendment Act: A Classic Case of Collaborative Federalism in Competing Jurisdictions”, *NLUJ Law Review*, Aug. 13, 2021.

<sup>28</sup> M.P. Jain, *Indian Constitutional Law* 516 (LexisNexis, 8<sup>th</sup> edn., 2018).

legislated in furtherance of Art. 239AA(7)(a) of the Constitution.<sup>29</sup> As it stands in the travaux preparatoires in the form of Lok Sabha debates, 'Shri Madan Lal Khurana', a Parliamentarian from South Delhi enunciated his views on the Bill that though the democratic rights which had been taken away from the people of Delhi will be reinstated, but, the Assembly which this Bill seeks to bequeath is a handicapped one as there were several restrictions provided.<sup>30</sup>

Part-IV of the Act encompasses S. 41-45, where S. 41 lays reference about the subjects in which the Lieutenant Governor may use his discretionary power i.e.; the subjects on which the Legislative Assembly enjoyed no power but the President entrusts or delegates him that power or functions or, in those matters where any law requires him to act as per his discretion or in the exercise of any judicial or quasi-judicial functions.<sup>31</sup> It implies that since the Lieutenant Governor can freely exercise his discretionary power in the aforesaid matters, so, he is not subjugated to the aid and advice of the Council on the matters itemized under S. 41 of the Act of 1991. Nonetheless, he is bound by the aid and advice of the Council in all other matters save as those explicitly mentioned under S. 41 (1) of the Act.<sup>32</sup> S. 44(1) of the Act empowers the President to lay down rules for facilitating more convenient transaction of business between the authorities, and S. 44(3) enumerates that if the order and instruments are authenticated in the prescribed manner, then, it cannot be confronted by reason that it is not made or executed by the Lieutenant Governor.<sup>34</sup> Withal, by virtue of S. 45 of the Act the Chief Minister of Delhi is vested with the duty to keep the Lieutenant Governor informed regarding the decisions taken by the Council so that he has the leeway to exercise his power reflected in the Proviso to Art.239AA(4).<sup>35</sup>

In essence, the Bill was severely criticized by the opposition on the ground that it lacked required authority which ought to be accessible to the elected representative i.e.; the Chief Minister. Shri Khurana during his speech in the Lok Sabha while mentioning the shortcomings of this Bill (as it stood then) remarked, "The people of Delhi will not be able to take decisions. This is also undemocratic. It means that the Central Government does not name faith in the people of Delhi."<sup>36</sup> So, they supported the Bill under protest and half-heartedly as they can be said to have apprehended the future conflicts.

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<sup>29</sup> *Supra* note 20, art. 239AA, cl.7 (a).

<sup>30</sup> Lok Sabha Debates on December 20, 1991 *available at*: [https://eparlib.nic.in/bitstream/123456789/1164/1/lsd\\_10\\_2nd\\_20-12-1991.pdf#search=Government%20of%20National%20Capital%20Territory%20Bill](https://eparlib.nic.in/bitstream/123456789/1164/1/lsd_10_2nd_20-12-1991.pdf#search=Government%20of%20National%20Capital%20Territory%20Bill) (last visited on Mar. 27, 2022).

<sup>31</sup> The Government of National Capital Territory of Delhi Act, 1991 (Act 1 of 1992), s. 41.

<sup>32</sup> *Government of National Capital Territory of Delhi v Union of India and Another* (2018) 8 SCC 501.

<sup>33</sup> *Supra* note 24 at 63.

<sup>34</sup> *Supra* note 31, s. 44.

<sup>35</sup> *Supra* note 31, s. 45.

<sup>36</sup> *Supra* note 30.

## 6. The Ambiguities Surrounding the Status of Delhi

“Delhi now belonged to everyone who lived in it. But no one belonged to Delhi.”<sup>37</sup>

The present pattern of governance in the NCT of Delhi is congruent to, and most decorously satisfies the aforesaid quote. The situation could not withstand the test of being a Catch 22, when “the Monsoon refused to rain down on Delhi because it was not sure under whose jurisdiction it would fall”.<sup>38</sup> After the enactment of the 1991 Act, there existed a brief period of aerobized interrelation, but due to the undefined jurisdiction and the constant intervention, it pronto turned into a series of countless conflicts over every possible matter between the elected government and the Lieutenant Governor. Some could be recapitulated as:

**Administrative Services:** The matter of transfer and posting of the bureaucrats after their appointment to the National Capital Territory, became a point of contention between the authorities when the central government by its notification, had embargoed the Elected government on matters concerning the State Public Services. The assertion made on behalf of the State was that, Entry 41 of the State List bestowed them executive power to take up alike matters, while the Centre adduced that S. 41 of the GNCTD Act accorded the Lieutenant Governor such powers in which the State was not capable of intruding.<sup>39</sup>

**Aid & Advice:** The term aid & advice being open-ended was subjected to multiple interpretations owing to which disputes arose. One such instance could be attributed to the unilateral appointment made to the post of Chief Secretary by the Lieutenant Governor. Before 2018, various judgments<sup>40</sup> pertaining to other jurisdictions were erroneously cited to explicate this term ignoring the unique position of Delhi, as a consequence of which the matter remained speculative.

**Anti-corruption branch:** It needs to be considered that Art. 239AA (3) (a) of the Constitution provides three subjects in the State list on which the Delhi Legislative Assembly could not legislate. But, one of the contemporary disputes that arose was regarding the powers and jurisdiction of the Anti-Corruption Branch (ACB). As stated, though the entry relating to police has been omitted, but entry 2 of the Concurrent list which contains the Code of Criminal Procedure has not been excluded.

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<sup>37</sup> Sanjay Arora, “The DU dream-A reality check”, *The Tribune*, October 21, 2020, available at: <https://www.tribuneindia.com/news/jobs-careers/the-du-dream-%E2%80%94a-reality-check-159116> (last visited on March 28, 2022).

<sup>38</sup> Twitter, India, available at: [https://twitter.com/SalmanRushdie?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/SalmanRushdie?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) (last visited on March 31, 2022).

<sup>39</sup> Aditya Anand, “Government of NCT of Delhi V. Union of India: A Tale of Two Judgments” 13 *ICLRQ* 80-81 (2021).

<sup>40</sup> *Shamsher Singh v State of Punjab*, AIR 1974 SC 2192; *Devji Vallabhbhai Tandel v. Administrator of Goa*, AIR 1982 SC 1029.

So, the subject lacks clarity and such vagueness takes prominence in creating conflicts.<sup>41</sup>

The above conflicts along with many other have been instrumental in taking the dysfunctions to new heights and thus soliciting litigation on the controversy as regards the status of Delhi.

**A. In the High Court of Delhi: “Government of NCT of Delhi v. Union of India”**

Hitherto, the division bench of the Delhi High Court<sup>42</sup> heard multiple cases, ranging from service matters to questions of corruption, all of which raised key concerns under Art. 239AA.

The Judgement delivered by the Delhi High Court left no difference between a city-state and Nizamate.<sup>43</sup> It went on to assert that specific rules for Delhi cannot override Art. 239, in consequence of which the Lieutenant Governor has the authority to act independently of the Council. Therefore, by way of this judgement the Centre through the Lieutenant Governor had two-fold powers- first, they could intervene in every decision made by the Delhi Government and discontinue or quash every matter in which the concurrence of the Lieutenant Governor was not taken, and second, by interpreting the word “on any matter” as “on every matter”, the court made it clear that the Lieutenant Governor was empowered to disregard the “aid and advice” given by the Council and essentially act on his own. Thus, this decision had the impact of reducing the elected government of Delhi to mere advisors and the Lieutenant Governor to a Nizam.

**B. In the Supreme Court of India: “Government of National Capital Territory of Delhi v. Union of India”**

The Constitutional Bench of the Supreme Court was clearly not on the same page with the High Court of Judicature at Delhi in interpreting Art. 239-AA of the Constitution. The then CJI, Dipak Misra was of the view that it would be a breach of confidence that the citizens instil in any democratic set-up, if the Delhi Government will not be able to legislate even on the policies and laws over which the Legislative Assembly possesses the power by virtue of the Constitution.<sup>44</sup> The court through Chief Justice observed that the term ‘any matter’ must not be construed by the Lieutenant Governor as ‘every matter’ as it would hinder the “stream of governance”, also the suggestion given by the Delhi Government to interpret only the three excluded subject as

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<sup>41</sup> *Supra* note 11.

<sup>42</sup> *Government of NCT of Delhi v Union of India* (2016) SCC OnLine Del. 4308.

<sup>43</sup> Alok Prasanna Kumar, “Delhi Govt-Centre Power Tussle: SC Has Not Resolved All Issues Fully, But Has Set Framework for Addressing Them”, *Firstpost*, July 5, 2018, available at: <https://www.firstpost.com/india/delhi-govt-centre-power-tussle-sc-has-not-resolved-all-issues-fully-but-has-set-framework-for-addressing-them-4669971.html> (last visited on April 2, 2022).

<sup>44</sup> *Supra* note 33.

'any matter' was rejected by the court.<sup>45</sup> The court narrated that the Lieutenant Governor must exercise his power given under proviso to Art. 239 AA (4) parsimoniously and in exceptional circumstances only keeping in view the constitutional objectivity.<sup>46</sup>

The bench after laying down the principles and defining the scope of Art. 239-AA reverted the matter to the division bench<sup>47</sup> to deal with the specific issues which time and again were akin to such conflicts.<sup>48</sup>

Many might agree that regardless of the Apex Court's run-of-the-mill judgement, all it could accomplish was to return to a "predicament status quo" as it failed to precisely demarcate the circumference of powers and duties between the two authorities.

The face-off between the Centre and the State concerning the appointment of Special Public Prosecutors for an investigation into the Delhi riots, began around April 2020 when, the Lieutenant Governor had accepted the 11-member list of SPP given by the city police. This list was rejected by the State Government on the ground that the Public Prosecutors would not be independent. Given this fact, the State had alternatively given their list which was then negated by the Lieutenant Governor, and subsequently, on May 29, 2020, the matter was referred to the President under Art. 239AA(4) for his final decision, which was to proceed with the list approved by the Lieutenant Governor.<sup>49</sup>

Latterly, the "Delhi Municipal Corporation (Amendment) Bill 2022" was passed in the Rajya Sabha with the object of amalgamating the three existing Municipal Corporations in Delhi. The Centre emphasized the point that the former amendment, brought to the Act of 1957 was done in a haste with no traceable reason for such trifurcation.<sup>50</sup> But, the State termed the action as unconstitutional because it gave the Centre an upper hand to run the MCD by replacing "Government" with "Central Government" in 11 Sections.<sup>51</sup>

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Government of NCT Delhi v Union of India* (2019) SCC OnLine SC 193.

<sup>48</sup> *Supra* note 39 at 89.

<sup>49</sup> Karn Pratap Singh, "Delhi riots: Prez approves L-G's list of 11 spl public prosecutors", *Hindustan Times*, June 27, 2020, available at: <https://www.hindustantimes.com/india-news/delhi-riots-prez-approves-l-g-s-list-of-11-spl-public-prosecutors/story-OgMJkCBQy4vpNrSdjR036M.html> (last visited on April 3, 2022).

<sup>50</sup> Bindhu Shajan Perappadan, "Rajya Sabha passes Delhi Municipal Corporation (Amendment) Bill, 2022", *The Hindu*, April 5, 2022, available at: <https://www.thehindu.com/news/cities/Delhi/rajya-sabha-passes-delhi-municipal-corporation-amendment-bill-2022/Art.65293845.ece> (last visited on April 6, 2022).

<sup>51</sup> Alok KN Mishra, "Delhi govt may challenge MCD unification Bill in court: CM Kejriwal", *Hindustan Times*, March 27, 2022, available at: <https://www.hindustantimes.com/cities/delhi-news/delhi-govt-may-challenge-mcd-unification-bill-in-court-cm-kejriwal-101648319146858.html> (last visited on April 6, 2022).

## 7. An Attempt to Subvert the Mandates: Amendment Act of 2021

It is evident from the above turn of events that the GNCTD Amendment Act, 2021 along with some other recent developments complicates the situation. In utter disregard to the judgment of *PUCL v. UOI*,<sup>52</sup> wherein it was stated that the legislature must not invalidate the judgement of the Apex Court as it would contradict the basic structure doctrine<sup>53</sup>, the Amendment undertakes to modify four provision of the Act of 1991 i.e.; S. 21, 24, 33 & 44.

**Amendment to Section 21:** The Amendment Act vide S. 2 states that the expression “Government” would mean Lieutenant Governor with reference to any law that has been enacted by the Legislative Assembly.<sup>54</sup> It is argued that the term “Government” in Union Territory should denote Central Government and the Administrator who has been appointed by the President i.e.; the Lieutenant Governor, but, this argument seems flawed considering the fact that Delhi is not a usual Union Territory rather, the 1991 Amendment makes it a “Special Union Territory”. So, designating a nominated face as the ‘Government’ instead of an elected one can be equated to the mockery of citizen’s mandate. Additionally, Art. 239AB of the Constitution contains provisions relating to the failure of constitutional machinery, and it lays down that the concerned report to the President needs to be submitted by the Lieutenant Governor.<sup>55</sup> It would be a bizarre to recommend against oneself to the President, as the elected representative will no longer be entitled to be referred as the government.

**Amendment to Section 24:** The Amendment Act vide S. 3 incorporates an additional ground to the second proviso to S. 24 of the Act of 1991. The proviso puts an obligation on the part of the Lieutenant Governor not to assent to any such Bill, but to reserve such Bill for the consideration of the President when the grounds laid down under the S. is fulfilled. As per the newly incorporated ground, the Lieutenant Governor’s jurisdiction to assent is barred if the matter covered by the Bill incidentally falls outside the purview of the Legislative Assembly.<sup>56</sup> This means that even the matters which not in their true essence, but even incidentally falls outside the competence of the Legislative Assembly then, it shall be reserved. So, the term “incidentally” confers very wide power in the hands of the Lieutenant Governor which is manifestly unjust.

**Amendment to Section 33:** By virtue of an amendment to this S., a dual restriction is imposed on the Legislative Assembly for enacting rules. This means that the Assembly can only ordain those rules of procedure that are congruent with that of the Lok Sabha, and further a retrospective clause is inserted where the Assembly along with its committees, are

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<sup>52</sup> *People’s Union for Civil Liberties v Union of India & Anr.*, AIR 2003 SC 1207.

<sup>53</sup> *Supra* note 6 at 522.

<sup>54</sup> The Government of National Capital Territory of Delhi (Amendment) Act, 2021 (Act 15 of 2021), s. 2.

<sup>55</sup> *Supra* note 20, art. 239AB.

<sup>56</sup> *Supra* note 54, s. 3.

prohibited from considering any rules relating to affairs of “day-to-day administration” concerning the National Capital.

Every State Legislature is entitled to make their own rules and have complete discretion to govern themselves. Even the rules of the both house of the Parliament are not identical and hence, such amendment is against the idea of cooperative federalism.<sup>57</sup> Moreover, Art. 239AA(6), lays down the idea of collective responsibility and Art. 239AA(4) postulates that the Lieutenant Governor will act on the ‘aid and advice’ of the Council in regard to almost all matters which, correspondingly makes even the Lieutenant Governor accountable to the Assembly. This lifeblood of the parliamentary system of governance, is discredited by the Act of 2021 which takes away an essential power of the Legislature which otherwise, is left with no other function.

Recently, Ajit Mohan<sup>58</sup>, official of Facebook challenged the summons issued by the Peace and Harmony Committee on the ground of lack of jurisdiction before the Supreme Court. He contended that such domain falls within the ambit of the Parliament. The Committee was constituted by the Delhi Assembly in wake of the widespread Delhi riots. The Court, held that, the functions of the legislature go beyond the law making power and appointment of such committee was justified. This leaves us in a dilemma as the new Act, makes such appointment void but, the Court’s judgment goes the other way, disregarding the Act.

**Amendment to Section 44:** This amendment, impels the State Government to seek the “opinion” of the Lieutenant Governor over all executive actions that may be notified. It tries to accomplish what was explicitly outlawed by the Constitution Bench in its judgement of 2018, and giving the Lieutenant Governor unconstitutional powers will be a hindrance to the functioning of the Elected Government who represent the will of the people. Thus, this alteration, gives the Lieutenant Governor the authority to notify any matter that they deem appropriate and thus, unduly broadens the scope of Art. 239AA (4).

Therefore, the Amendment tries to pull the rug from under the Elected Government, defeating the principles on which our Constitution is based, besides making the mockery of the interpretation given by the Supreme Court. The move, as agreed upon by sixty-seven former civil servants, paralyzes the State Government, and it will have serious ramifications on how India’s federal governance is carried out.<sup>59</sup>

Recently, this Act has been taken up by the Supreme Court to determine its constitutional validity.

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<sup>57</sup> The Wire, India, available at: <https://thewire.in/government/gnctd-amendment-act-deprives-delhi-people-of-elected-govt-76-ex-civil-servants-write> (last visited on April 3, 2022).

<sup>58</sup> *Ajit Mohan & Ors. Vs Legislative Assembly National Capital Territory of Delhi & Ors.* (2021) SCC Online SC 456.

<sup>59</sup> *Supra* note 57.

## **8. What Next for Delhi: The Way Forward**

### **A. People v. Parliament:**

Democracy is based on the “will of the people” with the legislature acting as its guardian and thus, it is this “will” that constitutes the nation-state. This notion is a fundamental tenet of the Constitution of India, as confirmed in “S.R. Bommai v. Union of India”.<sup>60</sup> So, in balancing “Delhi as a seat of national administration” and “Delhi as a self-governed polity,” there can be no compromise on the fundamental democratic value of upholding the “will of the people” as expressed via its democratically elected government. It is a sad state of affair to assert that this principle has also been in a state of compromise.<sup>61</sup>

### **B. Appreciating the Forms of Federalism:**

The great American Historian of the Indian Constitution, Granville Austin, designated India as the first country to subsume since its inception the idea of cooperative federalism in its Constitution.<sup>62</sup> The Center-State relation in today’s context must not be interpreted in limited sense, as merely of a “donor and a receiver”<sup>63</sup>; conceptualizing that Delhi is not just a Union Territory but a special case, there must be a horizontal division of power with some necessary reservations. Additionally, the concept of collaborative federalism entails the hypothesis that the authorities should negotiate and co-operate in their circumscribed limit, ensuring the development and harmony in the national capital.<sup>64</sup> These concepts lead us to twin complementary convictions i.e.; of “pragmatic federalism” which caters to the problems by providing efficient, effective and practical solutions in line with the dynamics of the society;<sup>65</sup> and further of “federal balance”, thus giving prominence to decentralization in a true sense, upholding constitutional morality.

### **C. Drawing Parallels Amongst the Global Capitals:**

Whenever a comparison is made, the other side has to be on a similar and equivalent footing. For instance, though, Washington DC is solely a “Political Capital” while Delhi is unassociated, being a “multi-functional one”.<sup>66</sup> But, despite of all the differences, the aspiration of people still remains elementary i.e.; they desire for a complete Statehood and the situation could not be termed as anything other than bizarre when the Congress has to take decisions on trivial

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<sup>60</sup> *SR Bommai v Union of India*, 1994 AIR 1918.

<sup>61</sup> *Supra* note 11.

<sup>62</sup> Press Information Bureau, India, *available at*:

<https://pib.gov.in/newsite/PrintRelease.aspx?relid=185916> (last visited on April 10, 2022).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Supra* note 32.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Supra* note 11.

matters at local level.<sup>67</sup> This is akin to the Home Ministry interfering at the local matters in Delhi.

However, the model of Ottawa serves differently by remaining a part of the Province of Ontario with minimal interference by the Federal Government after the passing of the National Capital Act, 1960 which enabled the creation of National Capital Commission (NCC) for assistance in the improvement, development and conservation of National Capital Region. In terms of autonomy and governance, the municipality is a major stakeholder.<sup>68</sup> This prototype materializes to be utopian, and something which Delhi must look up to.

## **9. Data-Analysis**

### **A. Sample Design**

- Diverse Profession
- Group of over 300 people
- Out of 315 participants, 67 were the resident of Delhi/Delhi NCR
- Age Group  $\leq 18$  years to  $\geq 60$  years

### **B. Group-I (General Analysis)**

- The survey was conducted on informed population as 79% out of the total 315 participants were aware about the country's federal set-up.
- A staggering majority of 82.5% believed the existence of multiple authorities i.e.; the Lieutenant Governor and the Chief Minister will result in confusion and act as a barrier to the efficiency of governance.
- The analysis further takes only the participants who were fully aware about the governance structure of Delhi and the GNCTD Amendment Act, 2021, i.e.; 105 of 315 (33.3%).

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<sup>67</sup> Dr Munish Kumar Raizada, "Delhi versus Washington DC: Why we must let Federalism win", *The Indian Express*, February 2, 2015, available at: <https://indianexpress.com/Art./blogs/delhi-versus-washington-dc-why-we-must-let-federalism-win/> (last visited on April 10, 2022).

<sup>68</sup> Researchgate, India, available at: [https://www.researchgate.net/publication/329451101\\_'STATEHOOD\\_OF\\_DELHI'\\_AND\\_CENTRE-STATE\\_RELATIONS](https://www.researchgate.net/publication/329451101_'STATEHOOD_OF_DELHI'_AND_CENTRE-STATE_RELATIONS) (last visited on April 10, 2022).

**a. Analysis of the Responses to Prominent Questions:**

*Whom do you think the power should vest with, the Centre through Lieutenant Governor or the Elected Government through Chief Minister?*

The answers collected for this particular question revealed that 58 participants out of 105 (55.2%) believed that the elected government through the Chief Minister and the Council should be vested with the power to govern the NCT of Delhi. The next set of people had their belief in the concept of dual governance where there would be power sharing between the Centre and the State (23 people, 21.9%). However, only 21 people (20%) were of the opinion that the power of governance should be vested with the Centre, through the Lieutenant Governor.

Hence, from the above data it can be deduced that people strongly believe that the power must be vested in the hands of their elected representatives rather than the Lieutenant Governor who is a nominated authority. This also suggests that people want to be governed by the authorities who are accountable to them and the fact of Delhi being a National Capital makes no exception.

*Do you believe that granting Delhi a Statehood would be a solution to the existing problem?*

This question is actually the continuation of the above question, and something which has remained in the light of controversy since the post-Constitution era. Maximum participants (45 people, 42.85%) strongly advocated that it would be an absolute solution, out of them, 37 were the believers in the Chief Minister while 3 believed in the rule by the Lieutenant Governor. 23 people (21.9%) agreed that granting Delhi a Statehood could be a potential solution. However, 37 partakers which constituted 35.23% of the population negated the above contention and out of them 16 were in favour of the indirect rule by the Centre whereas, 9 backed the direct rule.

**C. Group- II (Specific Analysis)**

- This analysis pertains to the group comprising of 67 participants who were the residents of Delhi/ Delhi NCR.
- The survey was conducted on informed population as 86.5% of them were aware about the country's federal set-up.
- The analysis further takes into account only the participants who were fully aware about the governance structure of Delhi and the GNCTD Amendment Act, 2021, i.e.; 25 of 67 (37.3%).

**a. Analysis of the Responses to Prominent Questions:**

*Whom do you think the power should vest with, the Centre through Lieutenant Governor or the Elected Government through Chief Minister?*

In response to this question, the residents of Delhi were of the opinion that the power should vest with the elected government through the Chief Minister on whom they have directly entrusted their faith. The data shows that 17 out of 25 (68%) participants supported the above notion while 2 (8%) were of the dissentious opinion that the power should vest with the Lieutenant Governor. Further, a particular sect of the partakers, i.e.; 16% rested their opinion in favour of both the authorities.

This group of contributors differ from the general population as they are the absorbents of the shock wave. Thus, it can be concluded from the data in hand that this sect strongly calls for a more accountable and responsible government.

*Do you believe that granting Delhi a Statehood would be a solution to the existing problem?*

The residents of Delhi/ NCR were definite about their want as 16 participants out of 25 (64%) affirmed statehood to be a solution out of which a majority of 15 (93.75%) were the believer in the Chief Minister's rule, while 2 (8%) identified that it could be a possible way out. But, there were 7 participants (28%) who were not in agreement with the above conviction, amongst whom 2 stood by the Lieutenant Governor.

Hence, an amalgamation of the above data point towards the fact that granting Delhi a Special Statehood could be one of the way-outs to the long drawn tussle between Centre and the State.

## **10. Recommendations**

The governance pattern of Delhi calls for brainstorming in order to peacefully construct the vexed situation. The Amendment Act, further complicates the situation by laying down the provisions, which poses threat to the basic tenants of the 'Federal System', and as a consequence makes it highly foreseeable for the democratic institutions to succumb. By giving precedence to the nominated authority, the Act has the effect of making the elected government meaningless.

Though it may appear *prima facie* that Delhi's position is just like any other state by virtue of it having an elected assembly and a Chief Minister,

this notion is far from reality.<sup>69</sup> The existence of multiple governing hands having overlapping jurisdiction and the over-interference by the Centre, makes the National Capital vulnerable to chaos, thus impeding the developmental pace of the region. Additionally, keeping the local police outside the jurisdiction of the Delhi Assembly does not serve any problem, rather it itself is the problem as it makes the Home Ministry responsible for every trivial matter which subsequently is placed at the last of the list of matters. In contrast, even in Washington DC which is considered to be one of the most “centrally restricted” capitals globally, such regulated and rigid mandates are not imposed as the municipal police has a considerable stake in city policing.<sup>70</sup>

Amongst the other model of governance across the world, the model of Ottawa and Berlin comes to rescue. In the Canadian model, a separate body has been created to administer the capital rather than the presence of usual legislative and executive body, that appears to be thought-provoking and having the potential to serve the best interest of the citizens. The capital has complete autonomy on the subjects of financial matters, day-to-day administration like law and order, delivery of services and the development of the city with the federal government having no veto over it.<sup>71</sup> Also, NCC a wing of such government has been dedicated to safeguard its interest over some pivotal areas such as land in and around the Parliament etc.<sup>72</sup> Considering the Berlin model what could be assimilated is that, the Centre had no authority to interfere in the internal matters of Berlin. Furthermore, a Joint Committee was also established to oversee the disputable matters.<sup>73</sup>

These two models offer a viable solution that could cater the needs of the NCT of Delhi. The existing problems are suggestive of the fact that the present model of governance needs modifications and alterations. The idea of “*Less Government and More Governance*” must be incorporated and similar to Ottawa and Berlin, greater autonomy and lesser interference in terms of internal matters including policing, law and order, finance and other administrative work must be accorded to the elected and accountable representative in the best interest of Delhi. The Central Government may retain the areas that have institutions, buildings and monuments of national importance, specifically the area of New Delhi, Delhi Cantonment etc. but the rest of the area should be vested under the authority of the Legislative Assembly, in whom the people entrusted their faith. Hence, the need of the hour is granting Delhi the status of “Special Statehood” in contrast to the status of “Special Union Territory”.

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<sup>69</sup> Niranjana Sahoo, “Proposing a new governance structure for Delhi”, *ORF*, April 1, 2021, available at: <https://www.orfonline.org/research/proposing-a-new-governance-structure-for-delhi/> (last visited on April 16, 2022).

<sup>70</sup> *Supra* note 9 at 29.

<sup>71</sup> *Supra* note 9 at 22.

<sup>72</sup> Divya Ann Samuel, “Fight of Delhi for a Full Statehood”, 11 *NUALS L. Journal* 248 (2017).

<sup>73</sup> Hal Wolman et. al., “Capital Cities and their National Governments: Washington, D.C. in Comparative Perspective”, 2 *GWIPP* 12 (2007).

## **11. Conclusion**

To recall, in Valmiki's Ramayana in order to abstain from any further skirmish with Vishwamitra, Indra had compromisingly agreed to find a middle ground as Trishanku was left hanging between the earth and the heaven. In summary, they decided to create a separate heaven for Trishanku which would serve everyone's interest.<sup>74</sup> The same situation needs to be replicated in the case of Delhi by way of designating it as a "Special State". While most of the countries are acknowledging the importance of de-centralization of power for the administration of their National Capital, India is harbingering in an opposite path.

The problem in Delhi is far from the stage of compromise as the demeanor of Centre towards the elected government seems to be ignorant and rigid, which is discernible by the introduction of the 2021 Amendment Act. This Act was passed in complete disregard of the Supreme Court's 2018 judgement thus, disrupting the slightest harmony construed thereafter. In the absence of any foreseeable solution to the decades long conflict, autonomy kicks in as the only plausible solution.

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<sup>74</sup> *Supra* note 2 at 14.

# **Revisiting the Menstrual Leave Legislations and Corporate Policies- The inclusion of 'Gender Difference' and 'Gender Diversity' in Workplace Policies**

**\*Dr. Asha Bhandari**

## **ABSTRACT**

The men and women are biological different', this is the important ground on which various countries have introduced the protective legislations to safeguard the interest of women in the labour world; demand for legal sanction of menstrual leave also contextualize the same reasoning. In this backdrop it is worth to analyze the menstrual leave legislation as a labor entitlement designed to accommodate the biological differences and neglect of infrastructural and institutional needs of women. The paper is an effort to analyze the journey of such laws that legitimize menstrual leaves in various countries and further the effort is to understand the efficacy of introduction of leaves in India and lastly suggestions are given to introduce such leaves through law as a progressive step for gender equity and future legal reforms.

**Keywords:** Menstruation, Menstrual Leave Legislation, Gender Equity, Workplaces Policies

## **1. Introduction**

The labour market participation of women continues to be the interest of various government across globe; while the cultural context of the specific country have considerable impact on the economic participation of women but the significant impact of formal labor laws also cannot be ignored in the context of contemporary economic and legal changes. Thus the laws related to 'gender equity' have received a considerable focus in the global policy discourse but simultaneously the role of menstrual leave legislations in promoting women welfare at workplace largely ignored. In this backdrop it is worth to analyze the menstrual leave legislations as a labor entitlement designed to accommodate the biological differences and neglect of infrastructural and institutional needs of women and re-conceptualizing the contemporary workplaces through feminist lenses. There is a need to interrogate that whether formal legislation are progressive step to ensure the women rights or such arrangement lapse into the notion of biological determinism of workplace and become obstacles in growth of women workforce. In this backdrop there is a need to ponder upon the central theme and associated arguments related to efficacy of introducing

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menstrual leave legislation in India: does menstrual leave legislation makes the labor policy fused between the 'biological essentialism' and 'progressive outcomes of feminist efforts'? Whether the introduction of such legal provisions creates a tense relationship between the notion of 'equality' and 'protection'? Do formal laws have any significant influence on shaping laborers work life? How do the menstrual leave legislation has potential role in improving or undermining women status ? Do menstrual leave address the labor entitlement, as infrastructure and institutional neglect of women's need in the public domain and thus support the new feminist materialism that reintroduce the biological and material agency? In the backdrop of above discourse the present paper is an effort to understand that, introduction of such leaves would be a protective or discriminatory measure for the women workforce ? To achieve the goal, paper has three parts: In the Part I an analysis of various legislations and corporate policies that have introduced menstrual leave policy specially in Asian countries are being done. Part II gauge the dichotomy of gender specific laws and understands the objections and responses to such laws with special reference to India, Part III is an attempt to contextualize the appropriate reasoning for introduction of menstrual leave through legal and constitutional framework and some suggestive majors for the proper implementation of such leaves in India are deliberate upon.

## **2. Part-I Legislative and Corporate Policies Framework of Menstrual Leave Policies Across Globe- An Analysis**

Menstrual Leave was introduced for the first time in some factories in USSR but such provisions remained in use only for the five years and discontinued in the year 1920 as per the demand of women workers; then in the early 20<sup>th</sup> century menstrual legislations introduced in Soviet Union (1922&1931), Japan(1947) and Indonesia(1948);in Soviet union the leaves were introduced as a special protective labor laws for the health of women workers so that they should be able to fulfill their reproductive and maternal functions. Further the demand for such leaves got momentum in Japan with the constant efforts of female workers for the industrial reasons and inadequate sanitation facilities at the workplace and consequently in 1947 Article 68 of the Labour Standards Law allowed women to take days off from work on the ground of menstruation<sup>1</sup>. Indonesia was the third country to implement the national policy for menstrual leave in early 20 century and the provisions were introduced with the particular socio- economic and institutional context of the time and restructured in 2003 as a part of a legislative reform process. In Indonesia under the Labor Act of 1948<sup>2</sup> and Labor Act 13, 2003 women can avail two days paid leaves ie for the first and second day of their menstrual cycle with the maximum limit of 24 days per year,

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<sup>1</sup>. "Working conditions shall be those which should meet the needs of workers who live lives worthy of human beings." (LSL. Article 68) <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/governance/langen/index.htm>

<sup>2</sup> [http://niew.gov.my/niew/en/download/doc\\_download/324-labour-act](http://niew.gov.my/niew/en/download/doc_download/324-labour-act)

although with the new changes introduced in 2003 the leaves may be claimed depending on the dialogue between employer and the union of the organizations.<sup>3</sup> Thus in this early phase the menstrual leave is used by the different governments as a protection measure for reproductive health and pro-natalist policy for their female workers.

The another phase of menstrual leave saw the introduction of such leave provisions in Hainan, Hubei in China(1993), South Korea(2001) Taiwan(2002) and Philippines(2004). In October 1992, China's national government implemented the law of that necessitate the consideration of women physical fitness but without explicitly mentioning 'menstruation' and indirectly considering such conditions for special protections related to women safety. This legislation has influence the Chinese provinces to introduce the menstrual leave policy in early 1990. In China various province including Anhui, Shanxi,(2016) Ningxia(2016)Hainan(1993) and Hubei(2003) implemented the menstrual policies either for one or two days with the condition of providing doctors certificate.<sup>4</sup> In South Korea, Article 73 of the 'Labour Standards Law' allowed menstrual leave and further ensuring additional pay on non availing such leave<sup>5</sup>. The entitlement also attacks the criminal liability if the employers fails to meet the requirement of providing leaves on women demands.

Established in January 2002 and amended in December 2013, Taiwan's menstrual leave policy is incorporated in the 'National Act of Gender Equality in Employment 2002' and Article 14 allows a maximum of three-days menstrual leave with employees receiving half of their regular wage as 'health-related leaves' per year in addition to 30 days of sick leaves<sup>6</sup>. In the Philippines, public debate on considering menstrual leave in early 20 century represented a step toward ensuring the substantive gender equality as 'Menstruation Leave Act' propose "menstruation leave for all female employee of one day per month with fifty percent daily

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<sup>3</sup> ' Article 81(1) of Concerning Manpower [No 13 of 2003] states: "female workers [laborers] who feel pain during their menstrual period and tell the [employer] about this are not obliged to come to work on the first and second day of menstruation".

<sup>4</sup> Anhui, menstrual leave provides for one or two-days paid leave "on production of a certificate from a legal medical institute or hospital." Similarly, in Ningxia, provincial government policy includes two days leave per month to "improve conditions for women in the workplace," although it is unclear whether leave is paid or requires medical certification. Employers in the Ningxia province are bound by the policy and subject to punishment if they "do not comply.

<sup>5</sup> Ser mayo Ja (2008, January 29). Once again, court orders menstrual leave pay) *Korea Jungang* daily. retrieved from <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2885715>

<sup>6</sup> <http://www.chinapost.com.tw/taiwan/national/national-news/2013/11/27/394603/Gender-equality.htm>

remuneration in all public and private sectors”<sup>7</sup>Spain recently approved for introduction of three days paid menstruation leave for its employee suffering from period pain<sup>8</sup>. The menstrual related leaves introduced in this era were indeed rationalized the protection of women in the workplace but also emphasized on their roles as a mother and caregivers. But lack of proper implementation of such leaves remained critical and thus ceases the aim of securing gender equality at workplace.

Since 2015 the menstrual leave discourse become the one of prime agenda of many countries across Europe, South America, Africa, East and South East Asia, without gaining much success except the case of Vietnam, Zambia and some provinces in China those introduce such legislations and safeguarded the women rights . The first country in this period was Vietnam that formally incorporated the policy in its ‘National Labour Code’(Decree No 85/2015) in November 2015 and issue the new decree that ensure the greater rights for women including the 30 minutes leave per day with the maximum duration of three days in a month for the menstruation related problems although such entitlements are based on employers and employee negotiation <sup>9</sup> . In Zambia <sup>10</sup> time of menstruation is referred as ‘Mother day’ and granting leave is legal and non compliance of such attract an punitive action. The article 47 of the ‘Employment Code Act 2019’( Act no 3 of 2019) provides for one day absence of work each month, without a need to produce medical certificate or justifying any reason.

The contemporary period have also witness the various other efforts across the globe for raising voices and lobbying for menstrual based leaves. Russian lawmaker have also proposed a draft bill to provide the two days off to women workers on the grounds of menstruation<sup>11</sup>.In Hong Kong, the voices are raised by Association of Democracy and People’s livelihood to provide the civil servants a monthly , one day leave without the need to produce medical certificate <sup>12</sup>. Italy may well be on its way to

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<sup>7</sup>Kaite Hunt (2019,June 28)Period pain linked to nearly 9 days of lost productivity for a woman in a year. *CNN*

<https://cnnphilippines.com/lifestyle/2019/6/28/period-pain-productivity-study.html?fbclid=IwAR27QhQM5e8kK3CHZXOEOyCD86zzFWAvyCgvvMcEuxluSNKklpkG9DYJro>

<sup>8</sup> <https://mb.com.ph/2022/05/18/spanish-cabinet-approves-paid-menstrual-leave/>

<sup>9</sup> The regulatory change under Decree No 85 came into effect on November 15, 2015.include health benefits, *South China Morning post*(2016,March 8) retrieved from <https://www.scmp.com/magazines/hk-magazine/article/2037709/women-petition-menstrual-leave-ahead-international-womens-day>

<sup>10</sup> Willy Worley (2017, Janurrray 4)The country where all women get time off for being on their period. *The Independent*. Retrieved from <https://www.independent.co.uk/news/world/africa/zambia-period-day-off-women-menstruation-law-gender-womens-rights-a7509061.html>

<sup>11</sup> Toyin Owoseje(2013,July31)*Menstruation Leave: Russian Lawmaker Proposes Paid Days Off For Women Employees on perio*. *International Business Times UK*. .Retrieved from <https://www.ibtimes.co.uk/russian-lawmaker-proposes-paid-days-menstruating-women-495918>

<https://www.scmp.com/magazines/hk-magazine/article/2037709/women-petition-menstrual-leave-ahead-international-womens-day>

have an official policy for menstrual leave, starting in 2017<sup>13</sup> calling for three-days paid leave per month in addition to pre-existing sick leave entitlements and designed as a benefit for all female employees, including part time and contract workers. Ireland and France are the two other countries to debate the menstrual leave in the contemporary context on the ground of accommodating menstrual bodies in the workplace and recognize and respect the difficulties faced by women. In Brazil also the menstrual leave legislation was debated in year 2016 (Bill PL 6784/2016, to amend the Brazilian Book of Labor Laws) to formally include the leave provision of three days unpaid leave per month with submission of medical certificate, however women who claim such leaves need to make up that time afterwards. India has tried to incorporate menstrual leave policies as early as 1912 when the Government Girls School in *Tripunithura*, allowed girls students to take 'period leave'; Bihar has had a policy of 'contingency leaves' of two consecutive days every month since 1992; India also came very close to the implementation of Menstruation leave policy in 2018, as 'Menstruation Benefit Bill' was presented in *Loksabha* (lower house of Indian parliament), to provide four days paid menstrual leave to women workers and school girls; but the bill was not passed. The PIL is also filed by Delhi Labour Union advocating for menstrual leave, rest during menstruation and menstruation hygiene at the workplace.

The menstrual leave policies discourse has also attracted the private organizations and companies across the world to introduce such provisions to incorporate the differences among workers, their genuine needs, allow them to take 'breaks' that increase their work capacity and providing the safe environment to safeguards their rights at the workplace. In India, United States, United Kingdom, Australia, Indonesia, Nepal and Egypt, companies have introduced the leaves with the aforesaid objectives. Technically, Nike was the first company to implement menstrual leave in the corporate sector; however they do not have an explicitly menstrual corporate policy. Nike have introduced such leaves in their 'Code of Leadership Standards' in all of their offices where they operate and national legislative regimes of those countries have the guidelines for menstrual leave<sup>14</sup> In mid-2016, the Australian Victorian Women's Trust (VWT) also implemented a one-year trial of menstrual and menopause policy to provide an opportunity of self care to their women workers<sup>15</sup>. A UK based company designed the menstruation leave policy to allow women to take time off during menstruation with a hope that it

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<sup>13</sup> The lower house of the Italian Parliament has discussed a draft law of mandatory three days of paid menstrual leave every month for working women suffering from painful periods, *Policy Brief: Women and Menstruation in the EU(2018)* Eurohealth. , retrieved from. <https://eurohealth.ie/policy-brief-women-and-menstruation-in-the-eu/>

<sup>14</sup> Nike, Code of Conduct, 2015

<sup>15</sup> .<https://www.vwt.org.au/projects/menstrual-workplace-policy/>

will make the workplace more efficient<sup>16</sup>. Australian manufacturing workers union (AMWU) also started a campaigning asking for the 12 paid leaves per year for the women employee at Toyota.<sup>17</sup> In Nepal *Sastodeal* became the first company to implement the menstrual leave policy granting various entitlement including the work from home or rests breaks.<sup>18</sup> In India *Culture Machine*, a digital media company in Mumbai in 2017 has legitimized the first day of period leave.<sup>19</sup> *Gozoop*, a digital media company in Mumbai also introduced official menstrual leave in 2017 that also allows to work-from-home option every month<sup>20</sup>. Industry ARC, Hyderabad in 2018 has introduced a menstrual leave policy that is even incorporated in the employee guidelines handbook and provide one day off though they need to compensate the same on another days. *FlyMyBiz* in 2019 has become the first company in Kolkata to introduce one day , paid menstrual leave and the third company all over India.<sup>21</sup> *Mathrubhumi* Malayalam Media Company announced 'First Day of Period' leave for its employees which will not be counted under sick leave or casual leave in the same year.<sup>22</sup> Online food delivery company *Swiggy*, provides two days menstrual leave policy to women delivery partner.<sup>23</sup> Chennai based magazine platform *Magzter* give one day paid leave to female employee on first or second day of their period. Wet and Dry a Delhi based feminine hygiene product maker gives two days off during menstrual cycle to its women employee. In 2020 Surat based digital company *IVIPANAN* allowed it female worker ,a 12 days yearly menstruation based leaves. <sup>24</sup> A food delivery company *Zomato* announced that it would grant women and transgender employees

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<sup>16</sup> Bex Baxter, Director of Coexist, said the move is an attempt to synchronise work with the body's natural cycles.UK company to introduce 'period policy' for female staff (2017, October 20) *The Guardian*, retrieved from

<sup>17</sup> *Union seek menstrual leave for Toyota workers*, (2005, February 11) *ABC news* retrieved from <https://www.abc.net.au/news/2005-02-11/unions-seek-menstrual-leave-for-toyota-workers/1517308>

<sup>18</sup> Mukherjee Runa, (2016, August 24) Indian company implement menstrual leave. *News 18com* retrieved from <https://www.news18.com/news/buzz/indian-company-implements-menstrual-leave-policy-sets-the-ball-rolling-for-others-1284920.html>

<sup>19</sup> *The Times of India*. Retrieved from <https://timesofindia.indiatimes.com/home/sunday-times/meet-the-people-who-have-period-leave/articleshow/77565635.cm>

<sup>20</sup> MW @ 20. Retrieved from <https://www.mansworldindia.com/uncategorized/in-conversation-with-the-pioneers-who-have-implemented-menstrual-leave-policy-in-their-organisations/>

<sup>21</sup> Gupta Anamini ((2019, January 6) *The Indian Express*. Retrieved from <https://indianexpress.com/article/india/this-new-year-kolkata-company-introduces-period-leave-a-gift-to-its-women-employees-5513510/>

<sup>22</sup> <https://www.thehindu.com/sci-tech/health/period-peace/article19341135.ece>

<sup>23</sup> Bhupinder Singh. 12 companies that allow menstrual leave in India,, India time October 26, 2021, <https://www.indiatimes.com/trending/social-relevance/indian-companies-that-offer-period-leave-to-female-employees-552433.html>

<sup>24</sup> Bhupinder singh. 12 comaines that allow menstrual leave in India,, India time October 26, 2021, <https://www.indiatimes.com/trending/social-relevance/indian-companies-that-offer-period-leave-to-female-employees-552433.html>

ten days of paid period leave in a year.<sup>25</sup> Horses and Stable News a Bengluru based startup allow its female employee to take two day period leaves and also offer a allowances of Rs.250. Buyju , educational app also allow its female employee to avail up to 12 day leaves in year for menstruation. In middle east region the Cairo based digital company Shrak and Shrimp become the first company to introduce menstrual leave policy. The lobbying for the period cramps and paid period leave also entered in public discourse in US after Lena Dunham , creator of HBO girls wrote an essay about endometriosis that affect millions of American women.<sup>26</sup>

The study of various menstrual policies across the world justify that there were no single reasons for various government or private organization to introduce the menstrual leave policy. The policy has multiple causal contexts and policy perspectives range from the pronatalist conservatism, industrial protection to economic rationalism and corporate feminism.<sup>27</sup> Thus, menstrual leave introduced in the early 20<sup>th</sup> century was an effort to protect and safeguard women's reproductive capacity, health and bodies and thus consequently support the traditionally gendered division of labor. This reasoning was institutionalized in the policy of various countries including USSR, Indonesia, South Korea and Vietnam. Menstrual leave demands in various other countries are linked with the inadequate menstrual health management facilities at the workplace and the industrial hazards that conflict with the status of women's health. The recognition of the contribution to the labor force as female workers, the concerns of blue collar women workers about the inadequate sanitation facilities and the hazards of industrial labor emerged as a national labor concern initiated by the group of women employee not by government in the countries like Japan and Indonesia. This rationale may divide the workplace as the white collar worker generally have the adequate sanitation conditions available in offices but blue color workers do not but this policy perspective also have capacity to favor the demand for revolutionized the workplaces by considering the women specific demands and thus providing adequate menstrual health conditions at workplaces. Menstruation problems are also associated with the higher rate of absenteeism either of girls at school or women workers at the workplaces and if they participate in workplace are remain less productive and

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<sup>25</sup> Santhanam Radhika(2020,August 21) *The Hindu*. Retrieved from <https://www.thehindu.com/opinion/op-ed/should-women-be-entitled-to-menstrual-leave/article32407772.ece>

<sup>26</sup> Bill Eurovolino(2018.Feburary 15) ,Lena Dunham sparks debate after having hysterectomy to end endometriosis pain.*Nortjourney.com*, retrieved from <https://www.northjersey.com/story/life/columnists/bill-ervolino/2018/02/15/lena-dunham-sparks-hysterectomy-endometriosis-debate-after-surgery/340157002/>

<sup>27</sup> Baird, M., Hill, E., & Colussi, S. (2021). Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labor Entitlement to Reinforce, Remedy, or Revolutionize Gender Equality at Work?. *Comp. Lab. L. & Pol'y J.*, 42, 187

unable to contribute their best at the workplaces.<sup>28</sup> The policy of providing leave or workplace flexibility would simultaneously expand workers' rights, accommodate women's bodies at workplace and allow companies to maximize the productivity of their female employees. This positive reference to productivity is significant and connects with the emerging business case argument made by individual firms. The rationale was implicit in the legislative policy proposals of Brazil, Hong Kong, Italy and also in Coexist policy in UK. These proposal do not classify menstruation as an illness but a medical condition that is part of women physiology and such policy proposal are grounded on medical research. This rationale boost the morale of working women by considering that they are not 'ill' or 'less capable' and also help in improving their productivity though the danger of considering women as a 'problematic' and then providing the solutions for their problems cannot be ignored. In the contemporary context there is a emergence of new wave of human resource management that focused on the worker well being and diversity. This modern proposal seeks to revolutionize workplace gender relations by normalizing periods in the labor force and allows women to be embodied in the workplace .<sup>29</sup> Menstrual leave in Taiwan and the proposal in Ireland, France, Philippines, are examples that how policy may be linked with notion of women's rights" and as a means for promoting substantive, rather than formal, gender equality in the workplace. Similarly the coexist policy at UK incorporate the notion of self care and wellness into the workplace and linked with naturalist feminist framework. The policies of various organizations in the private sector in India have implicate the same rationale in their policies to make workplace conducive to women needs and understand and respect the differences between gender and breaking the menstrual taboo and providing the men and women the opportunity that are necessary linked with them.

### **3. Menstrual Leave Legislation- An analysis**

To analyze the efficacy of introduction of menstrual leave legislation and policies, there is a need to understand the ideological doctrine and architectural structure of menstrual leave related legislative models introduced till date across the world on the various grounds:

- What are the philosophical assumptions to introduce the menstrual leave legislation?

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<sup>28</sup> Menstruation leave also justified on the rationale of medical opinions as "high levels of estrogen ... cause premenstrual tension. Brain-cell swelling, in turn, causes increased irritability, depression, emotional instability and headache. Various activists and legislators recognize many women "end up suffering in silence, or resort to taking painkillers" rather than displaying their pain or asking for help. Local Legislators Urge Congress to Pass "Menstrual Leave" Policy, PHILIPPINES NEWS GAZETTE: LEGAL (Feb. 21, 2017), <https://www.philippinesnewsgazette.com/local-legislators-urge-congress-to-pass-menstrual-leave-policy/>

<sup>29</sup> Baird, M., Hill, E., & Colussi, S. (2021). Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labor Entitlement to Reinforce, Remedy, or Revolutionize Gender Equality at Work?. *Comp. Lab. L. & Pol'y J.*, 42, 187.

- How do such postulates make an impact on the menstrual discourse and journey of women's rights?
- What is the nature of such leaves i.e. maximum duration, inclusion in sick leave or not, requirement of medical certificate, paid or not, mandatory or optional etc.
- Whether employer has a compulsion to grant such leave?
- Is there any redressed mechanism available if employer fails to meet such conditions?
- Whether the workplace policies comply with arrangements of 'menstrual management' facilities at the workplace?
- Whether such leave entitlement should be extended to the case of 'menopause' and associated complexities?
- Whether the workers in the informal sector can also avail such leave provisions?
- Do menstrual legislation primarily use menstruation as 'women issue' and oversimplified the complexity associated thus overlook the inclusion of transgender, gender diverse and non binary people from legal entitlement?
- How do employers have any advantages, if they provide such leaves to their workers?
- Should the legal provision recognize the 'physiological constitution' and continue to protect women's 'difference from men', or should it promote the essential equality between the sexes?
- How does a formal labor law have an impact on the women status in general and menstrual justice in particular?

Thus the leaves introduced across globe are grounded on various reasoning and their implementations are subject to the specific groups at the workplace. In some countries legislation have provisions for availing the leaves on the ground of menstruation but that are not properly availed by the workers due to either intuitional barriers, fear of discrimination or unaware about the actual process of availing such rights. The various research studies conducted to know the impact of these leaves on the women workforce highlights that despite the fact that these countries has recognize such leaves through introduction of legislative framework only few women avail them. In Japan such leaves were introduced to protect the fertility of women but only 50 % of women use them; due to various structural barriers majority of women hesitate

to avail the leaves<sup>30</sup>. These common perceptions hinder the actual implementation of such provisions.

Menstrual leave policy was more originated in labour based policy but in the last few decades various employers based policies has been introduced. These menstrual policies introduced by the various corporation have a comparative quite different success ratio of their implementation rate as compared to the legislative efforts; however women working in these companies have also faced the organizational barriers and sometime it become very difficult for concerned women to avail such leaves as they are required to prove their menstruating status. (The New Vision, 2018). Thus, menstrual related leaves have been introduced either through the various labor laws provisions or as a corporate policies in the different countries but the implementation of such leaves that could benefit the women workforce is still not a reality. Some of such factors are described below that contextualize the various reasons for the improper implementation of such provisions:

- Menstrual based leaves introduced in the various countries in the early phase of menstrual leave journey are the part of either the labor code or employment code of that specific country; no separate legislation has been introduced to consider such leaves. In the present context some of countries ie Italy, Philippines, India has introduced the menstrual leave legislation that discuss specifically the menstrual leave.
- Menstrual leaves have not been introduced as an extra entitlement that take into account only the period of menstruation for the purpose of leaves, but the some of the labor laws provisions across the different jurisdiction include such leaves into the category of 'sick leaves' defining that menstruation could be a ground for availing such leaves.
- 'Menstrual experience' differ from women to women but the legislations introduced to safeguard the rights of women that ensuring menstrual justice, introduce the 'menstrual leave' as an umbrella term without considering such differences of experiences among the women workforce. Thus the entitlement of leaves applies uniformly to all women whereas menstrual experiences differ from women to women.
- The menstrual leaves that have been offered in the various countries are not a 'paid entitlement' thus restrict the women workforce to avail the same.
- Some of the legislative framework have also burden the employee for the submission of medical certificate to claim such leaves. This practical difficulty restricts the women to lead such arrangement.

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<sup>30</sup> Vandello, J. A., Bosson, J. K., Cohen, D., Burnaford, R. M., & Weaver, J. R. (2008). Precarious manhood. *Journal of personality and social psychology*, 95(6), 1325.

- Menstrual related leaves offer the leaves for the one or two days , but menstrual related difficulties may further require some of the workplace arrangement like few rests break, flexible working hours (that may be commentate later,) but the menstrual leave legislative frameworks do not explain such provisions neither are supported by menstrual management progrmme. Such lacunas hamper the actual implementation of such provisions.
- The menstrual leave polices requires efficient redressal mechanism , that in turn safeguard the violation of such claims, but majorities of such menstrual leave provisions and policies lacking such arrangement .
- The success of any legislative measure depend on its effective enforcement but majority of these legislations do not have provision of any punishment that compel the employer to ensure the leaves or any form of punishment granted to them if they fail to sanction such leaves.(except Zambia).
- Ensuring the policy provisions by employers may require the attraction of extra benefits for them if they provide such entitlement to their employees, but such arrangements are lacking in menstrual legislations.(except Vietnam)
- The policies introduced are not gender inclusive and lack the extension of such leave to transgender (excepting policy at *Zomoto*) .
- ‘Cultural issues’ that favor silence about menstruation hindered the availing of such leaves by women workforce.
- Overall menstrual leaves in various legislative framework were not introduced as a women’s rights concerns, rather it incorporated either with the logic of ‘protection measures’ or ‘health related benefits’ included in the provisions of sick leaves.

The above lacunas contextualize that despite the constant efforts made by various countries to incorporate such provisions that safeguard the menstrual rights of women at the workplace, the proper use and implementation of such laws is limited by various factors that require attention for the policy and law makers. Although with all these obstacles the discourse about the leave policy in the contemporary contexts took more radical stand and favored as a ‘women rights’ concerns that embodied women body in the workplace and attempt to achieve substantive equality at the workplace. However, the achievement of menstrual equity at the workplace is a still a distant realty for majority of women workers across globe.

#### **4. Part- II Ensuring ‘Special Protection of Women’s Rights’ Under Various Labour Laws- Objections and Responses with special reference to India**

The contemporary social changes contextualize the introduction of various legislations across the globe that protect the rights of women and ensure that the workplace environment would be conducive for them. These changes are extended to India as well and the various provisions introduced with an aim to uplift women the last decades. This includes i.e. The Factories Act, 1948, The Maternity Benefit Act, 1961, Equal Remuneration Act, 1976, etc). But contrary to such positive developments the results of the various research studies conducted and evaluations of various global policies indicate that such gender specific legislations and policies could harm the concerned women. These trends could be act as obstacles in achieving the women entry and growth in the labor market as majority of employers would hesitate to give opportunities to women due to compulsion of providing such extra benefits; and this turn the upside down the main objectives of such legislations. Such legal compulsions deter employers from hiring women- by assuming that women cannot perform certain tasks during menstruation, pregnancy, post-pregnancy and menopause; enterprises find these provisions burdensome, consequently it may block the equal opportunity for them and results in the hiring of male employee rather than women; This could be one of probable reason that the Labour Standards Law in Japan was amended in 1997 and such rules were removed but interestingly the labour force participation of women in comparison to men remain constant. This raises the question that whether law making bodies should really consider the ‘gender differences’ and accordingly make the labor laws? In the background of such concerns, the following section is an effort to discuss the objections raised against gender specific laws and responses articulate in general and the related to introduction of menstrual leave legislation in particular.

It has been argued that very introduction of such legislative measure are against the notion of gender equality as the policies favor the certain section of society ie women. Critics may argue that recognizing a legislative entitlement is a step away from achieving gender equality in the workplace; Menstrual leave legislation are being proved inadequate to meet the women demand as majority of women seldom take leaves due to need of medical approval or insufficient guidance how to apply, or due to stigma associated with the menstruation. So the legislations are not benefiting the women in those countries. Menstrual leave legislations introduced are women specific and ensure the rights of women, and does not take into account the needs of transgender, thus oversimplifies the legislative provisions. The law apparently designed to promote the substantive equality in the workplace can reinforce menstruation stereotype.

Menstrual leave legislation may have capacity to divide not only women from men but also women from women. As women belong to white collar and blue collar professions have different perceptions about the leave policy; if blue collar workforce sees this as remedy for the inadequate menstrual facilities at workplace, the white collar worker may see this as an embracement. As the workplaces are designed to suit the male body, employer's may oppose the employment of women workers. The employer may use systematic effort to discourage the menstrual leave by providing extra allowances for good attendance at office as the case in Japan. Policies may reinforce the gender norm at the workplace and further institutionalized the women traditional roles.

On the other side the argument for advancing the menstrual leave policies are grounded on the notion of the discourse on equality and equity, the idea of substantive equality and formal equality, the concerns for human rights of workers, the constitutional obligations of securing the rights of workers. The equality demands the equal treatment to all but equity seeks the fair treatment in the light of differences. As men and women are not same, the equity notion and substantive equality at the workplace is required to implement and this can also further safeguards the rights of women workforce.

Menstruation is not a 'illness' that may be covered with the provisions of sick /medical leaves thus , there is a need to introduce such leaves in the labor code of different countries. There is a positive liability upon the state to frame the special laws that protect the rights who require it. The menstrual leave legislations are the constitutional obligation of state to protect and nurture the rights of women. It becomes apparently duty of the state to provide all the necessary conditions of work. There is a need to improve the labour standards of flexible work hours, appropriate rest breaks and menstrual/menopausal health literacy at the workplace to ensure the rights of working women. There is need to introduce the effective redressal and enforcement mechanism for actual implementation of such laws. Menstrual leave legislation will promote the possibility of inclusion of women bodies at the workplace by understanding their reproductive functions and associated complexities. Menstrual leave legislation in the context of emerging economies can be instrumental in addressing the inadequate menstrual facilities to workplace and economic cost of absenteeism of female workforce.

## **5. Whether menstrual leaves may socially exclude the women?**

The question to address that whether the idea of menstrual leave is moving back to those days when women were discriminated and excluded on the basis of their biology; whether demanding the leaves are further excluding women from the workplace. Answer lies that such directions are not in violation of any extra treatment or providing the menstrual leaves to the women as the idea is not to exclude them from the offices or workplaces rather it is an demand for the inclusion of their gender specific needs and protecting the rights; it further help in

normalizing the discussion around menstruation and strengthen the demand for menstrual health.

## **6. Why do we require separate legislation or inclusion of menstrual leave in the existing legislation:**

A regulatory legal reform for menstrual leave policy is preferable for multiple reasons that assure universal application, mandatory compliance and responsive to women menstrual health. From the feminist perspective it is against the idea of women rights and their constant struggle to achieve the gender equality that menstruation could be considered as illness or diseases ; this undermine all the effort of women rights activists to dissociate the women's reproductive and bodily functions from connotations of disease. Menstruation is a common physiological feature of women life that should not be medicalized. This is also contrary to women rights to expect them to use their other types of leave to deal with the symptoms that are part of a biological process. It is not worthwhile to expect every organization to form the policy related to menstrual leave, this may create the multiple number of policies with diverse system of availing them; thus creating more confusion or the employee and employer both. Why women are not willing the leaves or the employers are discouraging for such leaves in those countries have multiple reasons that could be overcome by introduction of an enforcement mechanism in the legal framework.

Regardless of the number of objections raised by the opponent for the introduction of menstrual leave legislation and policies the fact grounded in the women rights approach supports the positive consequences for such policy reforms. A universal paid statutory entitlement may provide the concerned the requisite time to meet with the menstrual related changes. Regardless of it limited number use such policy may help in normalizing the menstruation discourse in the context of workplace. The potential benefits of such policies may undermine its negative effects and may be fruitful if supported by adequate education, accompanied by cultural shifts and broad outlook of society.

## **7. Part III- Efficacy of Introducing Menstrual Leave Legislation In India**

In the recent pasts India has witness quite a few progressive legislations however, there are certain issues that have always been posing the challenges to such changes in our country and one such issue is of 'menstruation'. The arguments from both supporter as well as opponents, contextualize that the question of providing menstrual leave is not related to notion of 'gender equality' at workplace rather an issue of understanding the 'gender differences' (biological differences), gender diversity, gender equity and its recognition through policy formulation. Menstruation is not a 'choice', not a 'sickness' rather it is an inevitable process. Thus to merge menstrual leaves with 'sickness leaves' that are provided to all employees would not be rational; Menstruation

experiences vary from person to person; therefore even the uniform policy of menstruation leave for all those who menstruate also may not be a practical solution. Opponents often present the data of non use of these leaves, decline rate of women economic participation in the countries where paid leaves are granted to women workforce on the ground of menstruation. But, do we need to say that introduction of welfare legislation should be stopped if the practical applicability and accessibility to same is very limited? As same reasoning could be applicable to introduction of various other social legislations that have limited implementation rate- Dowry Prohibition Act, 1961 or Prohibition of Child Marriage Act, 2006 etc. Rather on the other side the effort would be initiated to make the legislations more meaningful; simultaneously, it would also be interesting to research that 'whether the decreasing rate of women workforce participation is due to reluctant attitude of employer to hire woman or some other factors ie due to imbalance in work life women themselves are leaving their jobs. The introduction of menstrual leave also could be indicative of organization gender sensitivity. The new contemporary changes and the emerging corporate feminism are conducive of introduction of such affirmative changes through law. In the last few years the perception about menstruation has been changing ie from a very conservative to progressive views. As Indian overall workforce is growing at rapid pace there is a clear need for such inclusive policies; the need for policy become further strengthen as the women workforce participation is declining. In this backdrop the need for menstrual leave policy is urgent especially for women who do not have basic facilities at the workplaces.

The debate of menstruation and the goals of gender equity is a complicated one and at this point there is a need to understand the two important issues:

Will it be Constitutional to introduce the 'menstrual leave' for women workforce in India?

If yes, what could be the framework?

The introduction of menstrual leave is in sync with the constitutional obligations and duty of state to provide the human conditions of work. This gel well with the reasoning contained in the various articles including article 14, 15<sup>31</sup>, 21 and 42<sup>32</sup> that ensure the equality before law, special clause on the ground of equity, human dignity, fair conditions of work etc. There could also be specific legal remedy possible to introduce such leaves; there are two ways to introduce the menstruation leave policy either through enactment of new legislation or inclusion of this policy to existing Maternity Benefit Act 1961 :a new

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<sup>31</sup> Under Article 15, "although there is a bar on discrimination only on grounds of sex, clause 3 of the Article authorizes the state to pass laws making any special provision for women."

<sup>32</sup> Under Article 42, the state is mandated to "make provision for securing just and humane conditions of work and for maternity relief."

chapter may be added to such act to cover the menstruation and name could be extended to 'Maternity and Menstruation Benefit Act'. These leave policies should be supported by the 'menstrual management programmes' in the organizations, government offices or at NGO level (for informal sectors) that may help in bring a positive attitude towards inevitable biological process, remove the stigma and the myths prevails in the society. Legislations may take lead to transfer the social realities and proper legislative framework is a mean to achieve the goal:

The following could be considered for making any legal provisions:

- **The introduction of term 'menstruator'**<sup>33</sup>- The menstrual leave legislation should not be 'women specific' and there is a need to introduce the term 'menstruators' that in turn makes the law gender neutral by taking into account the needs of all those who menstruate. So, these leaves should be applicable to all those capable of being menstruate, ie people of reproductive age including women and non binary persons from public and private sector without making any exclusive category of beneficiaries.
- Different arrangement for different experiences-'Menstruation experiences differs'; all beneficiary categories are not homogeneous even among the category of women; menstrual experiences differ from women to women. Therefore, one umbrella term 'menstrual leave' for such leaves may not be appropriate; leaves/ work flexibility/contingency planning/ compensatory leaves different categories are needed to meet the different genuine needs of workforce. Such categories could be identified with the clinical examination and personal narratives. There should not be universal application of leaves to the entire class of women. Due to lack of uniformity in the menstrual experiences leave arrangement and right to leave ought to be granted on need basis not on the basis of sex.
- Not to be included in 'sick leave' category-Menstruation is not a sickness, rather an inevitable physiological process. The purpose of such policies is to 'support employees for their care and consequently increase in work efficiency; without compensating with the other leaves and thus ensuring the granting of such leaves to genuine persons of the reproductive age'. Thus, menstrual leave should be introduced as a separate category and not to be included in the category of sick leaves or any other existing leaves and should be given as 'paid leaves'. Accordingly, there is a need to make amendments in the labor laws to include menstrual leaves in the provisions of leave entitlement for the workers.

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<sup>33</sup> Crawford, B. J., Johnson, M. E., Karin, M. L., Strausfeld, L., & Waldman, E. G. (2019). The ground on which we all stand: a conversation about menstrual equity law and activism. *Mich. J. Gender & L.*, 26, 341.

- Nomenclature of leaves as 'wellness leaves' and associated data privacy clause-menstrual leaves could be termed as the 'wellness leaves'/work flexibilities that would be 'self sanctioned' by employee and could be availed only by providing information(eg mail) to the concerned offices. This will help in reducing the associated hazards of 'data management/ handling' and 'data privacy' and consequently reduce the barriers for non availing of such leaves by the concerned.
- Inclusion of genuine needs of transgender in the menstrual leave legislative framework: Laws and legal provisions in India are explicitly binary in nature recognizing only men and women; however the some of the recent judgment and the legislation ie "*National Legal Services Authority v. Union of India*" and "Transgender Persons (Protection of Rights) Act, 2019" become examples to recognize their identity and providing them the constitutional rights. But the same zeal is not being reflected in the labour laws of the country that are still not explicitly advocating the inclusion of transgender person; one such example is Maternity Benefit Act, that not clear about consideration the genuine needs of leave of those transgender person who possibly may give birth and are entitled to such benefits. The Code on Social Security, 2020 and the Industrial Relations Code, 2020 do not deal with transgender in any of its provision. Thus, law making process needs to take into consideration there different needs of workers and accordingly include them into the law codes. This reasoning applies even in the case of menstrual leave and menstrual health management at the workplaces and justifies the inclusion of transgender too in the policy of menstrual leave legislation.
- Extension of entitlements to 'MEN'-In limited context (ie flexible work arrangements) such benefits may be extended to male employee as well so that they can care the women in their families, it may further reduce the stigma associated with menstruation. The idea is equalize the introduction of menstrual leaves to 'paternity leaves' that a male worker gets and providing his contribution towards the care givers roles. This in turn will help in integrating them into this larger movement of achieving gender equity.
- Welfare provisions for informal sector-The menstrual entitlement for the informal sector may be clubbed with the provisions of Social security Code, and Code of on Occupational Safety, Health & Working Conditions Code, 2020 ( suggestion to include specifically the 'menstrual health' in the category of mandatory health checkups yearly)and Industrial Relations Code, 2020 that are considering the requirement of informal sector. These arrangements and inclusions could be gel well

with the objectives of empowerment of women through new labor code, 2022.

- Menstrual status data protections-There is need to ensure that menstrual data in any organization remain confidential and the privacy of the beneficiary remain intact. Thus the specific framework /policy /or legal measure is required that keep the medical information of the concerned employee as confidential, an female officer may be appointed to handle such data privacy, and the imposition of liability if such information is shared should be the necessary elements of the policy framework.
- Duties of employers and associated 'tax benefits'/'compensatory fund' -In the informal sector, a lump-sum amount could be paid by employer to compensate the payment due to absence of worker due to such complications. The transfer of such funds could be done directly to the concerned account to minimize the misuse of fund available. The proof for transfer of fund could be utilized by concerned employer to get 'tax rebate'. State may introduce the policy of providing the 'compensatory funds' to those employers who sanctioned these leaves and accordingly give the salaries. Such arrangements could also be extended to the formal private sector employers. This aim at shifting the economic burden of hiring socially disadvantaged groups from the employer to the state. Replication of this fiscal strategy may prove prudent in tackling the negative externalities associated with such welfare policies.<sup>34</sup>
- Redressal mechanism-The important practical solution to make these laws meaningful in general and menstrual leaves in particular is to have incorporation of redressal and enforcement mechanism at workplace. To actualize it a committee may be set up like Internal Compliant Committee for Sexual Harassment at Workplace( this suggestion is also incorporated in the Menstrual Benefit Act,2018( bill tabled) to look into the grievances of workers.
- Punitive measures-To make the law effective , it is essential to create a formal control on the individual members , thus there is a need to have inclusion of punitive measures in the legislative framework in the form of punishment/ fine if employer fail to meet such requirements of providing leaves or work flexibilities to concerned. The compliance of these rules should be made strict and on repeated failure to meet the norm strict the major financial punishment could be imposed. Accordingly the administrative machinery may be oriented to achieve the objectives.

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<sup>34</sup> Ibid

- Menstrual management programme-These leave policies should be supported by the 'menstrual management programmes' in the organizations, government offices or at NGO level( for informal sectors) that may help in bring a positive attitude towards inevitable biological process, remove the stigma and the myths prevails in the society. These programme should be made mandatory conditions follow at workplace.

## **8. Strengthening the Rights- Supportive Social Measures**

'Menstruation is a personal issue with social significance'; therefore there is a need to strengthen the other measures in the society to achieve the gender equity and ensuring efficacy of menstrual leave policy at workplace. Legislations may take lead to transfer the social realities on the other side social change and societal intervention may be the one of very important way to create such environment that help in protecting the rights of worker in general and menstruating person in particular as such positive conditions bring the change in the mind set and grassroots level.

The rate of female workforce participation is constantly declined in India; that necessities the introduction of such measures that are more inclusive of needs of all gender for such purpose various facilities at the workplace should be available to employee in general and women workforce in particular that guarantee the safe, secure and meaningful workplace. The workplace polices and legal measures should be designed in such a manner that takes into consideration the needs of women in general and menstruation in particular.

## **9. Conclusion**

In the last few decades various countries have introduce protective legislations to safeguard the interest of women employee at the workplace on the ground that 'men and women are biological different'. Demand for the legal sanction of menstrual leave also contextualize the same reasoning but with the dichotomous views as proponents support that introduction of such legal provisions would increase the productivity of women employee and reduce the absenteeism at the workplace; and opponents argue that the special laws are an extra burden on the employer and might become a tool to discriminate against the women workforce. In the backdrop of such contrary views the paper was an effort to probe the journey of legal provisions in various countries that sanction the menstrual leaves. This inquiry helps in comprehending the various issues like whether such leaves are paid or not? are the leaves provided in addition to sick leave or not? What are the limits of obligations for employer? any redressal mechanism available, the extant of supportive menstrual management programme at the workplace etc. Further effort was to understand the efficacy of introduction of leaves in India by analyzing the effort put across by the State to safeguard the menstrual health, menstrual activism and role of judiciary; the argument

advanced about the notion of 'equality' and 'substantial equality' to safeguard the gender specific rights; human right aspects of menstrual health, synergy of constitutional provisions and introduction of such leaves in India. Women specific requirements are considered under various labour laws provisions in India but the issue of menstruation is unnoticed therein; the above analysis outweigh the negative consequences and justify that there is a need for the formal intuitional recognition of such specific needs through legal interventions. Introduction of menstrual leave could help in 'normalizing' menstruation; introduction of menstrual leaves through law could be protective and progressive step for 'gender equity' and may be further functional for other countries having the similar cultural contexts and women favorable labour laws. Lastly, 'menstrual equity' is essential to creating a fair and just society for all.

# Shadow Cabinets: The Potential Fifth Pillar of The Indian Democracy

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## ABSTRACT

The Indian parliament is an institution by which the people of the nation express their will; through freely and fairly elected representatives. This makes it necessary for the parliament to act in the best interests of the citizens. However, in the past decade, India experienced the passage of many bills of great strategic and administrative importance, without sufficient discussion. One key factor identified as the root cause was that the incumbent government was formed out of a single political party with unprecedented majority in both houses of the parliament, a phenomenon not previously observed in India. This paper studies political symptoms including deteriorating research standards amongst concerned ministries, ineffective opposition, negligible discussions on bills, and a consequent weakening of Dicey's concept of 'Predominance of legal spirit'. This paper takes note of the effects of unbalanced public governance and an administration without parliamentary opposition, on the rule of law in India. A solution is then considered in the form of a shadow cabinet created out of the opposition members of parliament, as a new check and balance mechanism to monitor the actions of the ministerial cabinet led by the Prime Minister. The paper compares the socio-political evolution of shadow cabinets, along with their constitutional validity and functional efficiency in India.

**Keywords:** Rule of Law, Shadow Cabinets, Parliament, Shadow Ministers.

## 1. Introduction

India is a leading example of parliamentary democracies around the world, with a successful track record in public law and governance<sup>1</sup>. It has conformed to most of the requirements that shape an ideal structure of governance. It encompasses the idea of Rule of Law through the spirit and essence of its constitution<sup>2</sup>. The system of checks and balances allows the judiciary, executive and legislature to restrain each other whenever necessary, and this system is a part of the basic structure of

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<sup>1</sup> K. ASALAH, PARLIAMENTARY DEMOCRACY IN INDIA 31 (V. Bhaskara Rao et al. eds., 1<sup>st</sup> ed. 1987).

<sup>2</sup> Som Raj v. State of Haryana, 1990 AIR 1176.

the Indian constitution<sup>3</sup>. The interpretation of Rule of law has evolved over the years to include in its ambit, the absence of discretionary or arbitrary power to the executive. Various Indian judgments have emphasized on this, recognizing the following principles:

- i. Governance must not be vague or fanciful, but by certain state-made rules<sup>4</sup>.
- ii. Absence of arbitrary power is essential, our constitution depends on it<sup>5</sup>.
- iii. Unless the instrumentalities of state carry out their responsibilities in a just and fair manner, the Rule of law cannot be upheld in letter and spirit<sup>6</sup>.
- iv. There should not be unfettered law-making power with the legislature even though it is democratically elected<sup>7</sup>.

Being a democracy, India undergoes elections at the Union and State government levels every five years. It has been observed that in its infancy, Indian politics saw the rise of popular figures as party leaders at the national level, who also occupied prime positions in the government<sup>8</sup>. These leaders included members of the Indian National Congress such as Jawaharlal Nehru and Sardar Vallabhbhai Patel, owing to their pan-India presence in the freedom struggle movements, and the independence negotiations with the British<sup>9</sup>. In these circumstances, multiple political parties representing various communities were invited to the constituent assembly in order to create an inclusive government, & this 'Nehruvian inclusivity' proved to be an anchoring instrument for providing regional stability and national unity to a newly independent nation<sup>10</sup>.

Presence of smaller regional parties and their growing influence over citizens during the next few decades sowed the seeds of a multi-party system in Indian politics<sup>11</sup>, whereby the government could be formed with majority only if the established national parties garnered support of regional ones<sup>12</sup>. A need for coalition governments arose, and voting patterns were polarized in favour of two major blocs, the National Democratic Alliance and United Progressive Alliance, who secured a

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<sup>3</sup> S. Krishnaswamy, *Democracy & Constitutionalism in India*, 3 IN. J. CONS. L., 214, 215, (2009).

<sup>4</sup> A.D.M. Jabalpur v. S K. Shukla, (1976) AIR Supreme Court 1283 (Ind).

<sup>5</sup> Godavarman vs. Ashok Khot, (2006) 5 SCC 1 (Ind).

<sup>6</sup> A.K. Kraipak vs. Union of India, (1970) AIR Supreme Court 150 (Ind).

<sup>7</sup> Bacchan Singh vs. State of Punjab, (1980) AIR Supreme Court 898 (Ind).

<sup>8</sup> Suranjan Das, *The Nehru years in Indian Politics*, 16 EDI. P. S. A. STU., 1, (2001).

<sup>9</sup> Graham Spry, *The Independence of India*, 1 (4) INTL. JOUR., 288, 292, (1946).

<sup>10</sup> Aditya Mukherjee, *Nehru's Legacy: Inclusive Democracy & People's Empowerment*, 50 E. P. W., 38, 40, (2015).

<sup>11</sup> Sudha Pai, *Regional parties & emerging pattern of politics in India*, 51 (3) IND. J. POL. SCI., 391, 410, (1990).

<sup>12</sup> Adam Ziegfeld, *Coalition Government & Party System*, 45 (1) COMP. POL., 69, 85, (2012).

majority in the parliament in alternating instances, while the other acted as an opposition party<sup>13</sup>. This pattern was disrupted by the landslide victory achieved by the Bharatiya Janata Party while leading the NDA in 2014 Lok Sabha elections, after which a single party (BJP) was able to garner majority votes in the Lok Sabha<sup>14</sup>. The same was repeated in the 2019 elections, and the pattern has made an impact on the democratic functioning of the parliament<sup>15</sup>.

The immediate consequences observed include the passage of certain legal bills without sufficient discussion or debate amongst the members of parliament, creating a sense of non-cooperation and disharmony between the benches<sup>16</sup>. Lack of parliamentary communication can create distrust between elected members of the Lok Sabha, and as observed, was reciprocated<sup>17</sup> with frequent walk-outs, disruptions, absenteeism and other forms of informal protest in the House. The overwhelming change in voting patterns also meant that no political party garnered sufficient votes to be declared as the Opposition party<sup>18</sup>, meaning that there would be no constitutional mechanism of organised opposition to the government's actions inside the Lok Sabha. The inability to demarcate a political party as the Opposition party also means that there would be no Leader of Opposition. It is not ideal for the health of a parliamentary democracy to function without its prime tool of criticism against the government in power.

## **2. Need For Shadow Cabinets**

### ***2.1. Fluctuating Political Inclusivity***

The Indian administration at the Union level has been occupied by leaders from diverse social and political backgrounds over the years, and has been tempered under various administrative ideologies. The constituent assembly itself was arranged to have a mixed composition, so that the parliament could never be irreversibly controlled by a single ideology system, and that views and opinions could be exchanged across belief structures<sup>19</sup>. The presence of representatives from princely states, provinces and underrepresented

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<sup>13</sup> Rahul Verma, *What Determines Electoral Outcomes in India?*, 52 (2) ASIAN SUR., 270, 295, (2012).

<sup>14</sup> Ashok Sharma, *India votes: a Modi landslide*, 39 (4) N. Z. INTL. REV., 2, 4, (2014).

<sup>15</sup> S. GANGULY & WILL THOMPSON, *ASCENDING INDIA AND ITS STATE CAPACITY*, 245, (1<sup>st</sup> Ed. 2017).

<sup>16</sup> Milan Vaishnav & Bilal Baloch, *Consequences of the 2019 General Election for Politics & Policy in India*, INDIA REVIEW, (May 19, 2020), <https://carnegieendowment.org/2020/05/19/consequences-of-2019-indian-general-election-for-politics-and-policy-in-india-pub-81942>.

<sup>17</sup> Chakshu Roy, *Parliamentary disruption has become the norm*, THE INDIAN EXPRESS, (Jan. 10, 2019) <https://indianexpress.com/article/opinion/columns/a-house-in-disorder-lok-sabha-parliament-session.proceedings-5530948/>.

<sup>18</sup> ALAKNANDA SHRINGARE, *CONTEMPORARY INDIAN POLITICS: INTERNAL DYNAMICS AND EXTERNAL COMPULSIONS* 228, (Sanjeev Kumar et al. eds., 1<sup>st</sup> ed., 2016).

<sup>19</sup> Louis Tillin, *United in Diversity? Asymmetry in Indian Federalism*, 37 (1) PUB. J. O. F., 45, 51, (2007).

communities was deemed a healthy method of maintaining balance of power<sup>20</sup>. An aberration from such positive inclusivity occurred under the rule of the Indian National Congress in 1970, the consequence of which was the abhorred national emergency proclaimed by Late Prime Minister Indira Gandhi. The Congress had unfettered majority in the Parliament, and this left the opposition benches in a weak political condition, resulting in massive abuse of legislative and executive power in the upcoming years<sup>21</sup>. The absence of strong opposition representatives, underrepresentation of regional parties and minorities is once again a phenomenon observed in the current administrative regime.

While a single political party forming the government is not necessarily a reason for alarm, it still leaves scope for a better parliamentary structure for the other parties that may or may not have secured seats to form an Opposition Party. It is a known fact that free and fair elections means that the citizens elect members of their choice<sup>22</sup>, and such a process cannot assure that a certain quota of representatives are chosen from each community; it depends on the mandate of the citizens. However, the issue lies in the fact that the presence of a parliamentary monitoring mechanism with an inclusive nature depends on the selection of a political party as the Opposition party<sup>23</sup>. A monitoring mechanism should exist even when the parties in opposition manage to get only a single seat elected into the Lok Sabha<sup>24</sup>. Otherwise, the concept of recognising minority opinions will lose meaning in the arena of public governance.

## **2.2. Adversarial obstructionism in parliamentary discussions**

The Westminster model of governance around which the Indian Parliament is modelled, requires the presence of both the government and the opposition benches to be present while the house is in session<sup>25</sup>. Reason dictates that the task of opposition benches is to critically appraise the policies of cabinet ministers, and scrutinize the details of bills presented. It is a fundamental need of good governance that such scrutiny is made in good faith, & in the best interests of

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<sup>20</sup> J. Chiriyankandath, *Creating secular state in religious country*, 38 (2) COM. & COMP. POL., 1, 5, (2000).

<sup>21</sup> Mary John, *Emergency in India: some reflections on legibility of the political*, 15 (4) INT. AS. C. ST., 625, 626, (2014).

<sup>22</sup> Jørgen Elklitt & Pale Svenson, *The Rise of the Election Monitoring: What Makes Elections Free & Fair?*, 8 (3), JOUR. O. DEMO., 32, 36, (1997).

<sup>23</sup> RUDY ANDEWEG, PARTY GOVERNANCE & PARTY DEMOCRACY 99, (Muller & Narud eds., 1<sup>st</sup> ed. 2013).

<sup>24</sup> Juliann Garritzman, *How much power do oppositions have?*, 23 (1) JOUR. LEG. ST., 1, 9, (2017).

<sup>25</sup> Mark Bevir, *The Westminster Model, Governance and Judicial Reform*, 61 (4) PARL. AFF., 559, 570, (2008).

society<sup>26</sup>. However, historically, the situation in India differs by a great magnitude, since the concept of opposition is construed to mean obstruction in the process of law-making. A pattern is observed whereby criticism of model laws and presented bills is informally overshadowed by personal remarks, unsupported allegations, and more often than not, a mixed critique without any subjective focus<sup>27</sup>. Over the years, thematic mapping studies have revealed that disruptive tendencies in the Lok Sabha amongst both benches can be attributed to ad hominem criticism against political leaders<sup>28</sup>. Such criticism ignores policies, creates unhealthy competition for opportunity to speak and cause a dearth of opportunities to present arguments with formal analyses<sup>29</sup>. The prime cause of these issues has been ascertained by political analysis to be a lack of incentive towards organized approach, sufficient research, analytical study of the bills and formally awarded opportunities to responsible members of the opposition<sup>30</sup>. Hence, a constitutionally formed mechanism that mandates and incentivizes research and reasoned arguments on legislative and executive performance would pose as a logical solution. It can potentially facilitate opposition parties to provide constructive criticism rather than staging walkouts, sloganeering, and damaging property of the House.

### **2.3. Absence of an Opposition Party**

The Lok Saba consists of both types of members, those forming the majority and functioning as government, and those that make up the minority of elected representatives. The latter group is headed by the Leader of Opposition, who has been statutorily defined as<sup>31</sup> “*the Leader of the party in opposition to the Government having the greatest numerical strength and recognised as such by the Speaker of the House of the People.....*” (Hereinafter referred to as LoOP).

Historically, the LoOP is burdened with responsibilities of significant administrative importance. He is customarily required to<sup>32</sup> participate in important appointments in the administrative setup, act as a link between the public and the parliament, critically appraise government performance and help the public form an opinion on governance matters, and finally, to act as an alternative

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<sup>26</sup> Jordan Bastoni, *The executive versus the legislative council*, 27 (1) AUS. PARL. REV., 126, 133, (2012).

<sup>27</sup> Carol Spary, *The Disrupting Rituals of Debate in Indian Parliament*, 16 (3) J. OF LEG. STU., 338, 350, (2010).

<sup>28</sup> Ajit Phadnis & P. Manibabu Manibabu, *Disruptions in legislature*, 20 (3) IND. REV., 348, 351, (2021).

<sup>29</sup> CAROL SPARY, F. ARMITAGE & RACHEL JOHNSON, *DEMOCRACY IN PRACTICE* 185, (Shirin Rai & Rachel Johnson eds., 1<sup>st</sup> ed. 2014).

<sup>30</sup> Supra Note 26 at 5.

<sup>31</sup> The Salary & Allowances Of Leader Of Opposition In Parliament Act, no. 33 of 1977, §2, (Ind.).

<sup>32</sup> KAUL & S. SHAKDHER, *PRACTICE & PROCEDURE OF PARLIAMENT* 156, (A. Sharma eds., 7<sup>th</sup> ed. 2016).

leader<sup>33</sup> to the Prime Minister and his Cabinet. However, since the LoOP is supposed to be the Chief of the party with greatest numerical strength outside the governing party, he has no separate recognition of his own. All his duties and functions are sabotaged by a simple obstruction in recognising an Opposition party. In order to be recognised as a distinct elected group under the status of “Opposition party”, such a political group must also occupy 10% seats in the respective house, the number being 55 seats in the case of Lok Sabha<sup>34</sup>, as directed by the Speaker of the Lok Sabha<sup>35</sup>.

For the past two Lok Sabha terms (2014 & 2019), no party has been able to secure 10% seats, and hence no political party has qualified as the Opposition Party. Since the Speaker has not recognised a party with greatest numerical strength, no Lok Sabha member has qualified as LoOP in this period<sup>36</sup>. Such a trend is undesirable in the democratic context, & efforts need to be made to develop a more comprehensive system to recognize a monitoring institution in the Lok Sabha. This study shall now consider the hypothetical case wherein, during a future election, a political party is able to gain recognition as Opposition party. The main objective of an Opposition party is to “form an alternative government, when given the opportunity, or in the event when the ruling party is defeated”<sup>37</sup>. This means that as a political group, it needs to be perceived as an optional government, with properly demarcated members that can take over the responsibilities of the party in power should the need arise. However, the Indian Constitution or ancillary administrative statutes do not provide any express recognition to the members of the opposition party except for the LoOP<sup>38</sup>. Hence, the Opposition remains ineffective and devoid of structure.

#### **2.4. Diminishing role of parliamentary committees**

A parliamentary committee can be described as a sub-group of legislators, who are provided specific organisational tasks, alongside certain parliamentary privileges to balance out their responsibilities<sup>39</sup>. In India, they belong to two categories, ad hoc and

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<sup>33</sup> Santosh Kumar Nandy, *Reflections on the nature and significance of the opposition in the parliamentary government in India*, 19 (4) IND. JOUR. POL. SCI., 343, 347, (1958).

<sup>34</sup> Directions by the Speaker under rules of procedure & conduct of business in Lok Sabha, No. 366 of 2014, § 121(c), (Ind); Karpoori Thakur vs State Of Bihar, (1983) 1 AIR PAT 86 (Ind); AK Subbaiah v Karnataka Legislature Secretariat, (1993) 1 Kar. L. J. 638 (Ind.).

<sup>35</sup> INDIA CONST. art.100 (3).

<sup>36</sup> T. Khaitan, *Killing the Constitution with a Thousand Cuts*, 14 (1) LAW & ETH. H. R., 49, 50, (2020).

<sup>37</sup> N.S. Gehlot, *Opposition in Indian political system: problem of role perception*, 46 (3) IND. JOUR. POL. SCI., 330, 330, (1985).

<sup>38</sup> Devesh Kapur & Pratap Bhanu Mehta, *The Indian Parliament as an Institution of Accountability*, 23 DEM. GOV. HUM. R. PROG., 1, 20, (2006).

<sup>39</sup> INGVAR MATTSON & KAARE STROM, *PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE* 249, (Herbert Doring eds., 1<sup>st</sup> ed. 1995).

standing committees. Committees usually handle subjects allotted to them by the Lok Sabha, and influence of the majority party usually dominates such situations<sup>40</sup>. Securing organisational transparency through parliamentary committees in India is dependent on the prevailing political context & institutional hierarchical culture<sup>41</sup>. By default, influence of the current majority government has affected the functioning of committees severely, especially during the pandemic. While standing committees vetted 60% of Bills in the 14th Lok Sabha and about 71% in the 15th Lok Sabha, this proportion fell sharply to an all time low of 27% in the 16th Lok Sabha<sup>42</sup>. Few of the most significant Parliamentary Acts in recent years, such as revision of Article 370, which removed Jammu & Kashmir's special status, were not considered by any committee.

To analyse more recent events, only 10% of bills presented in the house were referred to Committees for scrutiny during 17<sup>th</sup> Lok Sabha<sup>43</sup>. Important legislations such as Finance Bill (2020) were passed in the Lok Sabha without any discussion or referral to committees<sup>44</sup>. Based on functions, Parliamentary committees allow MPs to monitor state spending, evaluate policies and proposals, and seek expert opinion. On the other hand, based on statistics, the current administrative regime has sidelined the concept of parliamentary committees, thereby doing away with a monitoring mechanism of the Central legislature. It can be reasonably argued that the diminishing role of committees can be attributed to the fact that they are not constitutionally mandated; they depend on political and governmental discretion. Thus, it logically appears that the current governance model is inefficient for the sustenance & growth of a parliamentary democracy.

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<sup>40</sup> Arthur Rubinoﬀ, *India's New Subject-Based Parliamentary Standing Committees*, 36 (7) AS. SUR., 723, 726, (1996).

<sup>41</sup> TAIABUR RAHMAN, PARLIAMENTARY CONTROL AND GOVERNMENT ACCOUNTABILITY IN SOUTH ASIA 169, (Subrata K. Mitra eds., 1<sup>st</sup> ed. 2007).

<sup>42</sup> Valerian Rodriguez, *Parliamentary scrutiny on a back burner*, THE HINDU, (Sep. 26, 2020) <https://www.thehindu.com/opinion/lead/parliamentary-scrutiny-on-the-back-burner/article32699224.ece>.

<sup>43</sup> THE LOK SABHA SECRETARIAT, RESUME OF WORK DONE BY LOK SABHA 9 (2020), <http://loksabhadocs.nic.in/resumeofwork/IV/17lsresume4sessionENG2021.pdf>.

<sup>44</sup> Gulveen Aulakh, *Lok Sabha passes Finance Bill without discussion*, THE ECONOMIC TIMES (Mar. 23, 2020) <https://economictimes.indiatimes.com/news/politics/and/nation/lok-sabha-passes-finance-bill-without-discussion/articleshow/74773912.cms>.

### 3. Advantages Of Shadow Cabinets

#### 3.1. A parliamentary instrument of Checks and Balances

A Shadow Cabinet can be explained as a team of senior members of parliament selected by the LoOP, to mirror the Cabinet in power<sup>45</sup>. The concept first originated in the Westminster parliamentary model of Britain<sup>46</sup> when political parties gave certain senior members specific duties and positions, with the aim that such persons would occupy similar positions if their party was victorious in the next elections. The same was adopted over the years by other democratic parliaments around the world, such as Canada and Australia. Over the years, shadow cabinets have been known to handle significant responsibilities such as structuring the opposition to monitor the Cabinet's policies, holding ministers accountable, and maintaining a link between the public and the parliament<sup>47</sup>. One significant change introduced to the concept by British Parliamentary reforms was financial and logistical support for the shadow government, which was meant to facilitate research and organized opposition<sup>48</sup>. To consider these facts in the Indian administrative context, the idea of an intra—parliamentary monitoring mechanism fits perfectly, since the Lok Sabha is modeled on the Westminster model of the British Parliament.

In a parliamentary democracy, the Opposition has only a limited and indirect influence on lawmaking, and adding its voice to the public agenda helps them exert pressure on the government, thereby tightening the cabinet's time constraints<sup>49</sup>. However, the introduction of a shadow cabinet helps to formalize the influence by providing as institutional structure to the members in opposition. Secondly, because of its organ-like structure, a shadow government is perceived as a united front with collective responsibility, a feature that inspires combined and disciplined efforts amongst members, under the lead of the LoOP<sup>50</sup>. This creates a sense of responsibility in the opposition, with the added notion of being labeled as an alternate government<sup>51</sup>.

<sup>45</sup> DR. JOEL BATEMAN, IN *THE SHADOWS: THE SHADOW CABINET IN AUSTRALIA* 3 (2008), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.496.4256&rep=rep1&type=pdf>.

<sup>46</sup> Andrew Eggers & Arthur Spirling, *The Shadow Cabinet in Westminster Systems: Modeling Opposition Agenda Setting in the House of Commons, 1832–1915*, 48 (2) BRIT. JOUR. POL. SCI., 343, 346, (2018).

<sup>47</sup> P. Fraser, *Growth of Ministerial Control in Nineteenth-Century House of Commons*, 75 (296) THE ENG. HIST. REV., 444, 463, (1960).

<sup>48</sup> Neville Johnson, *Opposition in British Political System*, 32 (4) THE REP. OF OPPOS., 487, 494, (1997).

<sup>49</sup> HERBERT DORING, *PARLIAMENTS & MAJORITY RULE IN WESTERN EUROPE* 223, (Herbert Doring eds., 1<sup>st</sup> ed. 1995).

<sup>50</sup> R. ALDERMAN & J. CROSS, *TACTICS OF RESIGNATION: A STUDY IN THE BRITISH CABINET GOVERNMENT* 69, (Rouledge & K. Paul eds., 1<sup>st</sup> ed. (1967).

<sup>51</sup> Rodney Brazier, *The Constitutional Role of the Opposition*, 40 N. IR. LEGAL Q., 131, 140, (1989).

in the near future. This also works as a potential threat for the current government, creating a sort of functional check.

### **3.2. Ministry specific specialization and enhanced research**

The responsibility of an ideal opposition party does not end with creating a balance in the political influence on laws. Its prime instrument is the ability to critically examine the policies and decisions of the legislature and executive divisions. With statutory recognition, comes the responsibility to cooperate and coordinate with the cabinet, to bring forth improved laws and public-welfare policies<sup>52</sup>. However, the absence of any traditional structure in the distribution of responsibilities means that opposition members are expected to comment and oppose each and every proposition of the government. It has been observed that such 'Jack of all trades' approach only causes confusion, inefficient research and incoherent opposition towards bills<sup>53</sup>. Lack of research also means that the house might miss out on truly benevolent propositions, and end up criticizing the bill on irrelevant political issues that are restricted to the inter-party differences. An uninformed opinion presented by a member of parliament may not only weaken the image of the Opposition, but can damage its chances of presenting itself as an alternative government<sup>54</sup>.

The Shadow Cabinet, on the other hand, is given a cabinet – parallel structure, meaning that a shadow minister is appointed to monitor and critique the activities of a particular cabinet ministry<sup>55</sup>. This focused approach creates opportunities for the members of opposition to be allotted shadow ministries in which they hold knowledge or experience, and allows the opposition to create a well organized front. This also reduces the obstructive criticism of government policies, and paves a path for informed debates on key features of the law<sup>56</sup>. Such change in the influence of opposition in policy-making was observed in the British Westminster parliament after the introduction of the Second Reform Act (1868) and consequent introduction of shadow-minister-like duties in opposition ranks<sup>57</sup>. Statistically speaking, the agenda-setting abilities of the Opposition grew manifold post-reform, and a positive relation was seen in the performance of opposition members and their ability to

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<sup>52</sup> Rajani Jha and Umesh Jha, *Role of the opposition within state legislature, 1972-80: case study of Bihar*, 56(1) THE IND. JOURN. OF POL. SCI., 1, 2, (1995).

<sup>53</sup> Ibid.

<sup>54</sup> Supra note 50 at 8.

<sup>55</sup> R.M. Punnett, *The Labour Shadow Cabinet, 1955-64*, 18 (1) PARL. AFF., 61, 62, (1964).

<sup>56</sup> Supra note 44 at 8.

<sup>57</sup> R. Saunders, *Politics of reform and making of Second Reform Act, 1848-1867*, 50 (3), HIS. JOUR., 571, 590, (2007).

handle the same portfolios when their party formed the next government<sup>58</sup>.

### **3.3. Improved channels of administrative communication**

The fortification of the Opposition party into a Shadow Cabinet can convert its disorganized status in the national administration framework into a constitutional body with a purpose of ensuring good governance<sup>59</sup>. This reformation in its structure is necessary to make the Opposition accountable to the people, and in doing so, increase the level of transparency and accessibility of the members of parliament who form the non-governmental factions. Research suggests that despite increasing political awareness amongst Indian citizens, the accessibility of administrative and legislative offices and the ability of a common citizen to formally communicate with them have declined substantially<sup>60</sup>. It has been discussed previously that the LoOP is meant to form a link between the citizens and the government, especially when matters causing the public detriment are discussed under official government business<sup>61</sup>. However, a simple political party is only open to communication through informal channels, and it can be mandated to create a formal communication structure for public communication only if it occupies a position which is created through special legislation or constitutional recognition<sup>62</sup>. As the current state of Opposition party is nowhere near this status owing to the absence of any recognized duties imposed on it except for the LoOP, it cannot be expected to bear the burden mentioned above. In systems around the world, the introduction of legislative reforms provided moral, logistical and legal impetus required to convert a passive presence of the Opposition benches into an active monitoring mechanism with a set political agenda<sup>63</sup>. Such change includes a set system of meetings of the Shadow cabinet around the year, publication of the matters reviewed, discussion of subjects to be communicated to the Cabinet for extensive debate, scrutiny of bills presented or questions posed during parliamentary proceedings, and the communication of all

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<sup>58</sup> A. Eggers & A. Spirling, *The Shadow Cabinet in Westminster Systems Modelling Opposition Agenda Setting in House of Commons, 1832–1915*, 48 (2) BRIT. JOUR. POL. SCI., 343, 365, (2018).

<sup>59</sup> C. Bhambhri, *The Role of Opposition in House of People (1952-56)*, 18(3) IND. JOUR. POL. SCI., 244, 246, (1957).

<sup>60</sup> A. G. Mandelbaum, *Strengthening Parliamentary Accountability, Citizen Engagement and Access of Information*, (Nat. Dem. Institute & World Bank Inst., Working Paper No. 2, 2011) <https://www.ndi.org/sites/default/files/governance-parliamentary-monitoring-organizations.survey-september-2011.pdf>.

<sup>61</sup> Supra Note 46 at 8.

<sup>62</sup> Bo Laursen & C. Valentini, *Mediatization & Govt. Communication: Press Work in the European Parliament*, 20 (1) INTL. JOUR. PR. POL., 26, 31, (2015).

<sup>63</sup> U. Sieberer & Daniel Höhmann, *Shadow chairs as monitoring device? A comparative analysis of committee chair powers in Western European parliaments*, 23 (3) JOUR. LEGIS. STUD., 301, 304, (2017).

these matters to the public for their information<sup>64</sup>. An increasingly accessible opposition can allow citizens to relay questions of public importance to be posed to the government in the parliament. Another benefit is a simplified system for members of various parties to contact a specific shadow ministry for queries.

#### 4. Suggested Structural Changes

The study identifies that the appointment of a shadow cabinet in the Parliament will require three main structural changes in the public administration and the laws monitoring the same. The first step of reform would be recognition through the law of the land, and the constitution of India to be specific. It is logical to infer that the recognition needs to be provided in the same manner as is awarded on the cabinet of ministers in the government, that is, under Article 75<sup>65</sup>. It is contended that the manner of introduction be similar as well, worded in a way that it becomes clear that the LoOP shall be a shadow Prime Minister, alongside his consortium of shadow ministers, who together form the shadow cabinet. Such identification shall also include the application of rules presented in the sub-clauses of Article 75, such as the total number of shadow ministers, their appointment, removal, office term and allowances. This step is necessary to establish the importance of the shadow cabinet as a constitutional mechanism of scrutiny.

The second step of reform requires a determination of functions and authority of the shadow cabinet. This change emanates from the historical context of the Indian parliament, especially certain contemporaneous developments discussed earlier in this paper. The prime reason of requiring a shadow cabinet is the lack of official discussion and debate on acts of the executive and legislature in the recent past<sup>66</sup>. This function is seen to be embedded in Article 78 in the constitution, whereby the President may require the Prime minister to present any information or bill before him or the council of ministers for deliberations and scrutiny<sup>67</sup>. The provision requires an addition of the words “and the Shadow Cabinet” in its framework, allowing the President to allocate a particular subject of controversy for scrutiny to a shadow minister or cabinet. Furthermore, in situations where the President may lack impartiality owing to his previous inclinations to a political party, and in the event that he does not refer such transactions for scrutiny, the shadow cabinet itself must be empowered to suo motu take recognition of politically detrimental acts of the government, and hold them accountable for it. These two provisions must be added to the contents of Article 78, as well as in Article 107, which discusses procedure for passing bills<sup>68</sup>.

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<sup>64</sup> Lanny Martin & Georg Vanberg, *Policing the bargain: Coalition government and parliamentary scrutiny*, 48 (1) AMER. JOUR. POL. SCI., 13, 16, (2003).

<sup>65</sup> INDIA CONSTI. art.75.

<sup>66</sup> Supra Note 15 at 3.

<sup>67</sup> INDIA CONSTI. art.78.

<sup>68</sup> INDIA CONSTI. art.107.

Finally, the third step involves the provision of means to the Shadow Cabinet to perform the increased number of functions and legal duties in the parliament that differentiate it from a traditional opposition party. The origin of such benefits can be observed in the SALOP Act governing allowances provided to the leader of opposition in the parliament; as such benefits are accrued by the LoOP in lieu of his services to the parliament<sup>69</sup>. The LoOP is granted a salary, allowances to compensate certain expenditures, medical facilities and office employees as prescribed by the Act and the Rules made thereunder, and such benefits can be reasonably extended to members of the shadow cabinet to enable more efficient functioning of the body<sup>70</sup>.

The need for such provisions is twofold. Primarily, the entire discussion regarding shadow ministers lies in the question for democracy; that is, whether the current system of parliament is equipped enough to monitor the law-making process efficiently. Such equipment denotes the presence of manpower and intellect, of which the latter is provided through the members of parliament who are allotted shadow ministries based on their previous experience in the field and academic inclination<sup>71</sup>. However, currently there exists no manpower in the form of logistic support to the opposition party, and the absence of a dedicated workforce portrays the Opposition party as an unorganised front. Secondly, it must be noted that the concept of ministry in India covers a wide ambit of geographical region, great amount of population and topics ranging from generic and repetitive to those requiring immediate and serious attention during crises.

The success of a shadow ministry thereby partially lies in effectively understanding and monitoring whether the concerned government minister is effectively handling each matter with the attention and support that it needs<sup>72</sup>. Accordingly, the monitoring operation needs to be divided into parts based on the nature of scrutiny required, and may be perceived as a team of experts that advises a shadow minister, which is similar to the various departments present in a government ministry for the purpose of in-depth research into particular issues before they are legislated upon<sup>73</sup>. Such provisions shall also improve the quality of constructive criticism brought upon a particular law, and as discussed in previous sections, this is a desirable outcome in the current Indian politico-legal scenario.

## 5. Conclusion & Comments

<sup>69</sup> Salary & Allowances of the Leaders of Opposition in Parliament Act, No.33 of 1977, (Ind).

<sup>70</sup> SANYUKTA BHATTACHARYA, INDIAN DEMOCRACY: PROBLEMS & PROSPECTS 108, (Sharmila Deb et al. eds., 1<sup>st</sup> ed. 2009)

<sup>71</sup> M. Chiru & Lieven Winter, *Allocation of Committee Chairs and the Oversight of the Coalition Cabinets in Belgium*, 3 GOV. & OPPO., 1, 9, (2021).

<sup>72</sup> Supra Note 62 at 11.

<sup>73</sup> Supra Note 47 at 9.

Over its independent history, India has witnessed misuse of legislative or administrative abilities to achieve that which is not valid, or which is achieved using invalid means by the sovereign. The judicial interpretation of the Indian constitution provided by constitutional courts has clarified the government should not infringe on the rights of people through arbitrary use of power<sup>74</sup>. However, unfortunately, the entire burden of ensuring that arbitrary acts of the government are nullified falls on the judiciary, and this review process is reactionary in nature. The infringement of public rights in the meantime is thus unavoidable, and often lacks a welfare prerogative in implementation. It is further unfair to expect a constitutional adjudicating body such as the Supreme Court to ensure that a law is sufficiently scrutinised in aspects other than its legality; a court cannot possibly check if a law provides for the aims and objects for which it is being passed, especially when its economic or social feasibility is brought under the scanner. Hence, it is only logical for a developing democracy like India to provide for an administrative counter-mechanism to scrutinise laws while they are still in a nascent pre-publication stage.

The shadow cabinet has been found to be a functional pillar of government scrutiny in parliamentary democracies such as Australia, England, Ireland and France. Due to paucity of scope and sufficient material, this paper avoids diving deep into a comparative study of such shadow cabinets to the situation in India. However, there is scope for the Indian parliament to a hybrid version of Shadow cabinet that encompasses the virtues of these foreign models, as has been discussed in previous sections of the paper. It is logical to suggest that with changing political and social structures in a country, its administrative set-up must change accordingly, and only then will the government be successful in implementing solutions to decade-old problems. That in itself is the prime objective of creating a welfare state with a parliamentary structure, so that each elected representative works towards arriving at the most efficient solution. In such pursuit, the manifestation of Dicey's 'Predominance of Legal Spirit' originates from hardcore parliamentary scrutiny of executive actions, for which the shadow cabinet is a potential candidate. It obtains its legitimacy from the three roles that it is expected to perform; the link between subjects and state, the watchdog of the parliament, and the Cabinet-in-training as it stays up-to-date on all the affairs of the state through its monitoring mechanism.

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<sup>74</sup> Maneka Gandhi v. Union of India, (1978) AIR SC 597.

# Gender Equality and Human Rights

**\*Dr. Ayan Hazra**

## **1. Introduction**

What specifically does it entail for being a human? Humans have the ability to think and express their ideas, as well as a conscience that gives them a feeling of good and wrong. However, humans differ in terms of their skin colour, gender, height, and even shape. We still have fundamental human rights because we are still humans.<sup>1</sup> Rights are those demands and claims made by a person or a group of people to a good life that are acknowledged by the State and accepted by the neighbourhood or society as necessary for the common good. In other words, without certain fundamental elements, human existence cannot be perpetuated.

The basic privileges that are bestowed on each person being by reason of birth are known as human rights, to use the phrase in its most frequent usage. The fundamental goal of such liberties is to uphold the dignity and respect of all men, women, and children. For instance, it is our birth right that no one should be subjected to discrimination on the basis of distinctions in race, religion, class, gender, or any other characteristic by the government, the community, or even the family. This is so that no one is better or worse than the other since each person is unique and has their own unique qualities and abilities.<sup>2</sup> Similarly, it is our birth right to always have access to resources that will allow us to realise our greatest potential and fulfil all of our aspirations. The rights to justice, freedom, and life are among these rights. These rights safeguard our human dignity. Human rights are frequently referred to as "natural rights" for just these reasons.

## **2. What Human Rights Are Like**

Additionally, it is acknowledged that human rights are "universal, interconnected, and indivisible." This implies that they pertain to everyone, regardless of social or economic background, gender, age, caste, religion, or community. Additionally, it is impossible to separate regard for civil rights from respect for economic, social, and cultural rights. In other words, political freedom to engage in that activity, including the right to dissent, is a prerequisite for both economic and social growth. You can further understand the nature and traits of human rights by considering the following.

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<sup>1</sup> Johannes Morsink, "Women's rights in the Universal Declaration", Human Rights Quarterly, vol. 13, No. 2 (May 1991)

<sup>2</sup> More information about special procedures is available from [www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx) (accessed 29 November 2013)

- i. **Human Rights are Indispensable and Inevitable** - The moral, physical, social, and spiritual growth of people can be hampered by a lack of respect for human rights. Human rights are absolutely necessary for the creation of a setting that can improve society's moral and physical well-being.
- ii. **Consequently, human rights believe-** that everyone should be regarded with dignity regardless of gender or social or economic standing. For instance, a regulation prohibiting the transportation of human excreta was enacted in India in 1993. The "Employment of Manual Scavengers and Dry Latrines (Prohibition) Act" is the official name of this statute.
- iii. **Human Rights are Global** - Despite their privilege, no class has exclusive control over human rights. They essentially are. These rights protect the fundamental principles of respect and equality that are necessary for human existence.
- iv. **Human Rights Restrain State Power** - Human rights mean that all individuals have legitimate claims to certain freedoms and help from their community.

### 3. Human Rights Violation

Every government has a fundamental responsibility to respect the legal human rights of all of its citizens. Human rights violations occur when the state or any of its officials (such as administrators, police officers, members of the armed forces, etc.) refuse to uphold, defend, or refrain from interfering with an individual's rights. Requisitions for violations of human rights can only be made against the government, not against private citizens.<sup>3</sup> Human rights violations, however, occur when a citizen's fundamental rights are infringed by a private citizen and the state tries to compensate the aggrieved citizen. The fundamental principles of human rights are gender equality. All States have a duty to defend and advance the human rights of women. Nevertheless, discrimination against women persists in many parts of the world. Some examples include: laws and regulations that deny women the same rights to land, housing, and housing; social and economic discrimination; gender abuse; and rejection of reproductive & sexual health rights.<sup>4</sup>

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<sup>3</sup> Johannes Morsink, "Women's rights in the Universal Declaration", Human Rights Quarterly, vol. 13, No. 2 (May 1991)

<sup>4</sup> Françoise Gaspard, "Unfinished battles: political and public life", in The Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination against Women, Hanna Beate Schöpp-Schilling and Cees Flinterman, eds. (New York, Feminist Press at the City University of New York, 2007), pp. 145-153.

#### **4. Women Violence: Human Right Perspective**

Human rights including the freedom from torture, the right to life, and other cruel or inhumane treatment, the freedom from discrimination, and the ability to safety and security may all be violated by gender violence. All of these rights are outlined in regional and global human rights treaties, particularly those put forth by the Congress of Europe and the United Nations. Since most violence against women is perpetrated (by men) for gender-based causes and because gender-based violence disproportionately affects women, the terms gender-based aggression and violence against women are frequently used interchangeably. The goal of gender-based violence is to degrade and make an individual or a group of individuals feel inferior and/or subordinate. It is based on a power imbalance. This kind of violence is frequently supported by a subculture of rejection and denial and is firmly ingrained in the cultural and social structures, norms, and values that control society. Gender-based violence can occur in both the public and private arenas, and it disproportionately impacts women. Gender-based violence can take many different forms, ranging from rape or murder to verbal violence and hate speech on the Internet.<sup>5</sup> It can also be sexual, physical, verbal, psychological (emotional), or political and social in nature. It may be perpetrated by anyone, including spouses, partners, family and friends, colleagues, classmates, acquaintances, acquaintances, or members of institutions from various cultures, faiths, states, or intra-states. Gender-based abuse is a phenomenon involving power dynamics, just like other types of violence. It is driven by a sense of dominance and a need to assert that superiority in the home, at work, in the classroom, in the society, or in society as a whole. The actual human rights framework due to the fact that women make up half of the global community and are guaranteed to all civil liberties on an equal footing with men. Political and public lives, access to Rights to sexual and reproductive freedoms, a fair standard of living, the prohibition of violence against women, immigration, conflict, natural disasters, and access to justice.

According to the Universal Declaration of Human Rights, everyone has the right to take part in national government. It focusses on women's exposure to political and general judgement, to be capable of voting in all polls, to occupy public office and carry out all public duties at all branches of administration, and to take part non-governmental organisations (NGOs) or affiliations that are active in the country's civic and political life. It also states that women have the right to cast a ballot in all election campaigns and public referendums, hold public office and carry out all civic duty in all departments of government, participate in the formulation and implementation of government policies, elect themselves to all elected

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<sup>5</sup> See United Nations Department of Public Information, "Goal 3: promote gender equality and empower women", Fact Sheet (DPI/2650 C), September 2010. Available from [www.un.org/millenniumgoals/pdf/MDG\\_FS\\_3\\_EN.pdf](http://www.un.org/millenniumgoals/pdf/MDG_FS_3_EN.pdf)

governmental institutions, and join quasi-institutions (Non-profits) or affiliations that are involved in the nation's civic and political life. female champions of human rights. While women human rights advocates face similar dangers as other human rights advocates, they are also more likely to be the targets of or witness gender-specific threats and acts of violence. The causes of this are numerous and intricate, and they rely on the particular environment that each woman works in. Women who advocate for human rights are frequently viewed as undermining social norms on family and gender, which can cause animosity from both the public and the government. As a result, they experience stigmatisation and exclusion from families, communities, faith-based organisations, and community leaders who see them as endangering religion, honour, or tradition through their work.<sup>6</sup>

## **5. RIGHTS TO REPRODUCTIVE AND SEXUAL HEALTH**

In terms of international human rights legislation, reproduction and sexuality are among the most delicate and divisive topics, but they are also one of the highest significant. The Millennium Development Goals, which are a result of the Millennium Declaration, highlight their importance and sensitivity. While the Goals do not specifically include sexual and reproductive health, at least 3 of the eight Goals - on maternity care, immunization coverage, and Aids - are closely tied to these issues..

Issues relating to reproduction and sexuality are crucial in the fight against poverty on a worldwide scale. Not every sexual and reproductive disorder entails a breach of a person's right to health or any other human right. When ill health results, in full or in part, from a duty-- bearer's often a State - failure to respect, safeguard, or fulfil a civil rights commitment, that failure becomes a human rights abuse. Individuals encounter barriers in their pursuit of reproductive and sexual health. Is it the responsibility of those who uphold human rights to do everything in their ability to remove these obstacles.<sup>7</sup>

Many of the many barriers to reproductive and sexual well-being are entrenched and connected to one another. Clinical practice, the degree of health care systems, and the fundamental determinants of health are all different levels at which they function. Social and economic factors, in as well as biological ones, are important in influencing the reproductive and sexual well-being of women. Girls' and women's low social status frequently plays a role in their poor sexual and reproductive health. Violence against pregnant women is common, and it can result in miscarriage, early labour, and a small birth weight. The regulation of reproductive and sexual health services, including trustworthy information, is hindered by some conventional attitudes on sexuality, and these ideas are especially harmful to adolescents.

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<sup>6</sup> Homa Hoodfar and Mona Tajali, *Electoral Politics: Making Quotas Work for Women* (London, Women Living under Muslim Laws, 2011), pp. 42–49

<sup>7</sup> Committee on the Elimination of Discrimination against Women, communication No. 17/2008, Views of 25 July 2011.

Inequitable access to healthcare services and the fundamental factors influencing health are linked to poverty. Too frequently, advancements in public health programs favourably affect people who are wealthier. Bringing civil rights to these issues can enhance analysis and aid in identifying efficient, fair, and evidence-based strategies to deal with these difficult issues. Importantly, human rights legislation imposes duties on duty-bearers to make every effort to remove obstacles to reproductive and sexual health. Human rights standards have the capacity to educate and empower marginalised groups and vulnerable individuals with regard to reproductive and sexual health.<sup>8</sup>

## **6. Emancipation**

Both liberties and privileges, such as the ability to be free of discrimination, are included in the right to healthcare, which encompasses the right to obtain contraception. Regarding sexual and reproductive health, the freedom to manage one's own body and health belongs to that group. Sexual violence, including rape, forced sterilisation, forced abortion, female genital mutilation, and forced pregnancy, all seriously violate one's personal ability to reproductive and sexual freedoms and are fundamentally incompatible with one's health rights. One custom that carries a high risk of death and disability is FGM/C.

States must take adequate and forceful action to end the practise wherever it exists as well as any other harmful practises. Girls are disproportionately affected by early marriage. Early marriage is associated with a number of issues, including health hazards related to premature pregnancy. States are required to establish minimal age regarding consent laws and marriage in the interest of adolescent health. The worldwide right to health imposes a number of requirements that take effect immediately away, although being subject to gradual realisation and resource limitations.

The State has a responsibility to respect a person's right to have control over his or her physical well-being. For instance, a State has an immediate commitment to refrain from forced sterilisation and discriminatory acts. In other words, neither resource availability nor progressive realisation affect the freedom aspects of reproductive and sexual health.

## **7. Claims**

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<sup>8</sup> Report of the Fourth World Conference on Women, chap. I, resolution 1, annex II, para. 106 (k). The Special Rapporteur on the right to health presented a report in 2011 to the General Assembly (A/66/254) on criminalization and other legal restrictions on reproductive health services, including abortion. He concluded that "States must take measures to ensure that legal and safe abortion services are available, accessible, and of good quality" and called on States to "decriminalize abortion" and to "consider, as an interim measure, the formulation of policies and protocols by responsible authorities imposing a moratorium on the application of criminal laws concerning abortion". In addition, post-abortion medical services, regardless of the legality of abortion, must always be available, safe and accessible.

The right to wellness involves a claim to a health-related system protection, encompassing healthcare coverage and the fundamental factors that influence health, that guarantees everyone an equal opportunity to achieve the best possible degree of health. Women must have equal access to knowledge on reproductive and sexual health issues, for instance, both legally and practically. As a result, States have a duty to guarantee services for maternal and child health, including adequate care for women in conjunction with pregnancy, and to provide free services as needed.

States should, in particular, provide access to a variety of reproductive and sexual health services such as family planning, pre- and postnatal care, emergency obstetric services, and information. They should also provide access to essential medical treatments such voluntary HIV/AIDS testing, counselling, and treatment, breast cancer screenings, treatment for malignancies of the reproductive system, and treatment for infertility. Women with unintended pregnancies should receive trustworthy information and empathetic counselling, as well as details on how, where, and when it is lawful to end a pregnancy.<sup>9</sup>

Public health authorities should take various steps to guarantee that these abortions are not just safe but also accessible where they are permitted. Abortions must be safe where they are permitted. Women should always have access to high-quality services for the treatment of abortion-related complications. Punitive rules that discriminate against women who have abortions must be changed. States can significantly improve the reproductive and sexual health of their citizens even in times of resource scarcity. For instance, Sri Lanka has achieved considerable strides in the previous few decades with regard to reproductive and sexual health by raising female literacy rates, strengthening education, and expanding access to and improving the quality of healthcare facilities.

## **8. Exclusion, Frailty, and Shame**

Global human rights legislation prohibits discrimination on the basis of ethnic background, colour, sex, language, religious doctrine, political belief, nationwide or social origin, assets, birth, physical or psychological impairment, overall health (such as HIV/AIDS), sexual preference, and civil, political, social, or other social standing that has the desire or effect of negating or restricting access to health-care services and the underpinning determinants of health, as well as to the means for obtaining them. But for many subgroups, particularly women, sexual minorities, refugees, persons with disabilities, rural communities, tribals, people with HIV/AIDS, brothel owners, and people in detention, prejudice and stigma continue to represent a severe danger to sexual and reproductive health.<sup>10</sup>

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<sup>9</sup> Commission on Human Rights resolution 2003/28.

<sup>10</sup> In relation to free services and pregnancy, see in particular the Convention on the Elimination of Discrimination against Women, art. 12.2

Prejudice may be experienced by some persons on account of their gender, colour, economic situation, or health. Gender and HIV/AIDS Gender discrimination makes it harder for ladies to protect themselves from Human immunodeficiency virus. The lack of legal capacity and inclusivity in regions like marriage and divorce, as well as other human rights issues like sexual violence, insufficient coverage to sexual education, education, and services, and harmful customs or conventional processes that influence the health of ladies and children (like premature and forced marriage), all increase the vulnerability of ladies and girls to Human immunodeficiency virus infection. The stigma and discrimination associated with HIV/AIDS may serve to reinforce other biases, inequities, and prejudices related to gender and sexuality.<sup>11</sup>

As a result, even when these services are available, persons who are affected may be hesitant to seek out information, education, counselling, and other social and health services. In turn, this increases other people's susceptibility to HIV infection. Sexual preference Global human rights law prohibits discrimination on the basis of sexual orientation. Numerous people with lesbian, gay, bisexual, and transgender personalities or conduct find it difficult to enjoy sexual and reproductive health due to the legal restriction of same-sex relationships in many nations and the prevalent lack of assistance or safeguards for sexual minorities against discrimination and harassment. Programs that are crucial to advancing the right to a healthy environment and other civil rights might be hampered by criminalization.<sup>12</sup>

## **9. Minimizing and eliminating sexual misconduct and violence in the workplace**

Regardless of industry or income level, gender-based discrimination and abuse, particularly sexual misconduct, are incompatible with good employment but continue to be widespread worldwide. Since four out of every five women fail to report abuse to their employers, the stories of several victims go unnoticed. Workplace relationships, employee engagement, brand reputation, and productivity are all negatively impacted by violence and harassment. Those who suffer abuse and harassment at work may experience damage to their psychological, physical, and sexual health, as well as injury to their dignity, their family, and their social environment. They may also sustain physical injuries, experience anxiety, depression, stress, and other long-term effects of trauma.<sup>13</sup>

Research has demonstrated that sufferers are more likely to switch professions and experience financial difficulty than disclose occurrences to leave an abusive relationship, which has an impact on women's

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<sup>11</sup> Safe Abortion: Technical and Policy Guidance for Health Systems, World Health Organization, 2003.

<sup>12</sup> Women's Health in South Asia, WHO Country Profile, Sri Lanka, available at <http://w3.whosea.org/nhd/pdf/61-64.pdf>.

<sup>13</sup> ILO, Women in Business and Management: The business case for change, 2019, 53.

economic empowerment. Such frantic job transitions may hinder people, especially women, from entering, remaining in, and succeeding in the employment market. They may also have a detrimental impact on employers' turnover. Due to widespread sexual harassment, women could also be unwilling to step into leadership positions or find it more difficult to do so. Sexual harassment hinders workplace equality, creates an unpleasant work atmosphere, and feeds misconceptions about the potential and aspirations of women.<sup>14</sup> Employment, productivity, and the safety and health of employees are all impacted by domestic violence.

Gender-based abuse and harassment are included in the definition of "violence and harassment" in the workplace, which is "unacceptable behaviours and practises, or dangers thereof, whether a specific incident or replicated, that target at, outcome in, or are likely to lead to physical, psychological, sexual, or economic harm." It covers sexual harassment, as well as communications at work (through email and other digital platforms), social gatherings at work, travel to and from job, and domestic violence in private residences when a workplace. All industries, professions, and forms of employment should be protected, including those of job searchers, interns, volunteers, and those performing employer obligations.

Employers should create a policy to:

- Proclaim that aggression and abuse will not be allowed;
- Implement aggression and abuse prevention strategies with, if applicable, quantifiable targets;
- Commit to ending discrimination and harassment at work; and
- Spell out the obligations and rights of both employees and employers, including the freedom of an employee to leave a hostile or harassing environment without fear of reprisal;<sup>15</sup>
- Create procedures for investigating complaints;
- Make sure that all communications-internal and external-about violent acts and harassment are properly taken into account and addressed as necessary;
- Clearly state each individual's right to privacy and secrecy, balancing this with the workers' right to be informed of all risks.

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<sup>14</sup> IFC, Moving toward Gender Balance in Private Equity and Venture Capital, 2019; Wharton Social Impact Initiative, "Project Sage 2.0 Tracking venture capital with a gender lens", Biegel, S., Hunt, S. M., Kuhlman, S., 2019; Atomico, State of European Tech 2019 Report, 2019.

<sup>15</sup> ILO, Rules of the Game: An introduction to standards-related work of the International Labour Organization, 2019, 47.

- Include strategies to combat domestic violence, such as public education, leave for victims, flexible work schedules, interim protection from termination for victims of domestic abuse, and referrals to public mitigation strategies;
- Put in place safeguards to guard against victimisation and retribution of complainants, victims, witnesses, and whistle-blowers.
- Workplace policies against violence and harassment should be developed, implemented, and monitored with input from employees and their representatives. Incorporating associated psycho-social risks into workplace safety and health management is a good idea. The potential of harassment and abuse should be considered in workplace risk assessments, together with any associated psycho-social issues. Particular focus should be given to the dangers and threats that are:
- Involving third parties like clients, consumers, service providers, users, patients, and members of the public; and
- Result from working circumstances and arrangements, work organisation, and human resource management, as applicable.
- They are brought on by prejudice, abuse of authority, and gender-based, cultural, and societal norms that condone harassment and violence.

Employers shall notify staff members and other concerned parties on the hazards of discrimination and violence that have been recognised, as well as the accompanying preventative and safeguarding mechanisms, including rights and obligations, in accessible forms as necessary.<sup>16</sup>

## **10. Management and dedication to a zero-tolerance workplace culture**

Sexual misconduct must be "combatted" through "clear and consistent" anti-harassment messaging from organisational leadership. In addition to enforcing accountability mechanisms at all levels of hierarchy, reiterating nil for harassment and violence preventing and safeguarding against retaliation, and fostering an ecosystem of civility and respect are all responsibilities of firm leadership. Strong and comprehensive employment laws against harassment and violence particularly gender-based violence and harassment, are necessary to eradicate it in the workplace.<sup>17</sup>

A definition of what constitutes violence and harassment with examples, a dedication to nil, preventative measures, availability to a

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<sup>16</sup> ILO, Report III(1B): Giving globalization a human face (General Survey of the fundamental Conventions), 2012, para 859.

<sup>17</sup> UN Global Compact, Communication on Progress: Deutsche Post DHL Group Corporate Responsibility Report 2017, 2017, 38–42.

complaint and inquiry process, availability to solutions and aid (such as services and support for survivors, counselling services as well as relevant data, 24-hour call centres, rescue services, medical treatment and psychological support), and adequate provisions to prevent are all recommended components of an efficient workplace policy. The structure put in place by the policy ought to promote confidence in the complaint handling processes. The steps taken include being transparent about the complaint's procedure, guaranteeing anonymity via a number of reporting sites, and guarding against reprisal. The good organisation needs to build an all-encompassing strategy that addresses all relevant facets of the situation. It should be written with input from employees and their representatives, use language that is acceptable for the culture, and be made available in accessible formats.

It also needs to be reflected in more general regulations like codes of conduct, collective bargaining agreements, and equality initiatives. A better knowledge of what constitutes aggression and harassment, as well as the enforcement of policies aimed at avoiding and address it, can be achieved through training. The most effective strategy appears to be frequent, in-person, interactive training, especially when it includes content that is customised for a particular department, business, or employee cohort. To change the workplace culture, a number of strategies may be necessary, such as implicit (or unconscious) partiality training, targeted intervention coaching, training to challenge prejudices and social standards, and friend training, which equips staff to share knowledge and stop harmful behaviours among themselves.

Based on staff characteristics, composition, and feedback, training should be reviewed to determine its short- and long-term benefits and to make sure that the best practises are put into practise. The consequences of domestic abuse on people and workplaces can be significantly reduced with the help of the workplace. Companies are urged to implement a number of initiatives, such as flexible work schedules, vacation for domestic violence victims, and the inclusion of domestic abuse in professional vulnerability assessment and work rules on all types of abuse and harassment at work. They can also offer protection and assistance to domestic violence victims, for instance by directing a worker to a nearby counselling facility. When providing information to raise public awareness of violence in the workplace, businesses can also make reference to the domestic violence's impact on people and the workplace.<sup>18</sup> Sexual abuse is more likely to occur when there are gender disparities in a profession or sector of the economy. There are dangers associated with a men and hierarchical corporate culture, as well as with occupations that are predominately held by women and have gendered roles that place women in subordinate caregiving and service. This risk could be decreased by taking action to resolve unfair power balances and broaden female

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<sup>18</sup> Harvard Business Review, How Lilly Is Getting More Women into Leadership Positions, 23 October 2018.

representation at all levels. Additionally, men will be enlisted as allies in these initiatives as proactive measures for equitable gender representation.

## **11. JUSTICE ACCESS FOR WOMEN**

Women must have access to effective remedies when their rights are violated, they must have their right to equal treatment before the law upheld, and policies must be in place to ensure non-discriminatory access to justice. The rights to an effective solution must be exercised on an equal basis, free from any type of discrimination, including that based on sex or gender, in order for every other human right to be realised.

Globally, significant advancements have been made in the rewriting of laws that are discriminatory against women and the creation of constitutions that include principles of equality and non-discrimination. For women to have access to justice, a constitutional and legal framework that protects their right at the national scale is essential. However, discriminatory laws continue to be a problem in many countries, and much more so, the application of laws. Women who work in the informal sector or who are assaulted usually have no legal protection. It is imperative to broaden the scope of the law to address issues like sexism and gender inequality, work in the informal economy, and migrant women.

<sup>19</sup>It's critical to emphasise that States have a responsibility to make sure that laws are followed and truly have an impact on women's lives. It is important to emphasise that States have a responsibility to make sure that laws are followed and actually affect the lives of women. The justice systems are a reflection of the power disparities that exist throughout society, especially those that hurt women. Institutional and social barriers make it difficult for women to attain justice. Social impediments include things like not knowing one's rights, being illiterate, ignorant, and depending on male relatives for resources and support. Institutional barriers, such as those caused by geography, infrastructure, and language, must be taken into account to ensure that women who live in rural areas, are members of minorities or tribal groups, or have impairments, have access to justice. When it comes to investigating crimes against them, women must contend with the indifference, gender bias, and stereotyping of state officials, including the judiciary and police.

Women's access to justice continues to be significantly hampered by the entrenched economic disparities between men and women as well as the poverty that women endure. Women's limited access to justice is a result of the traditional denial of women's autonomy in making life decisions, as well as their incapability to receive education and pertinent information about their rights, negligible participation in decision-making, and poor accessibility to estate, territory, and equal employment

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<sup>19</sup> "Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul" (A/HRC/17/30), paras. 27–36; and Progress of the World's Women 2011–2012, pp. 28–31.

opportunities. Furthermore, it is now generally acknowledged that Governments have a investigation, legal action, conviction, and restitution of non-State actors found guilty of human rights violations. States should ensure that perpetrators are caught and punished, that the procedures for doing so are accessible to women, and that those who have had their rights violated have quick ways to seek restitution and reparation. It is essential to provide appropriate reparation in order to guarantee that women have access both to criminal and civil remedies as well as effective protection, care, and rehab centres for abuse victims. One-stop shops are one of the best practises that have increased women's access to the legal system.<sup>20</sup> The employment of specialised and mobile courts is another successful example of how women's access to the judiciary can be improved in practise. By bringing justice closer to survivors, particularly women who reside in remote areas, these courts can effectively tackle problems like gender-based violence. If there is a larger representation of women in the enforcement and the law system, as well as if gender parity is mainstreamed within the court, it can also raise their sensitivity to gender problems and make it easier for women to seek assistance or report their instances.

## **12. Cooperation and Guidance from across the World**

Developed States have a duty to offer international help and collaboration in addition to domestic commitments to guarantee the implementation of economic, social, and cultural rights in poor nations. This obligation results from recent international gatherings, such as the World Conference, as well as rules of international law governing human rights. Therefore, Nations must defend the right to overall wellbeing in other nations, make sure that their actions as participants in international organisations take the right to health into account, and pay special attention to assisting other States in implementing the minimum standards of health that are necessary.<sup>21</sup>

In many low-income nations, the donor community contributes significant financing for reproductive and sexual health care. The funds provided by donors should encourage access to a variety of services necessary for exercising one's right to reproductive and sexual health, including those and information that lessen the prevalence of unsafe abortions. Donors and others can ensure that programmes protect the rights to sexual and reproductive health by incorporating a human rights-based perspective into their policies and programmes. Multi-lateral and bilateral donors increasingly support health budgets rather than projects specifically. These sector-wide strategies can generally be very

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<sup>20</sup> Inter-American Commission on Human Rights, Access to Justice for Women Victims of Sexual Violence in Mesoamerica (OEA/Ser.L/V/II. Doc. 63), para. 269.

<sup>21</sup> Intesa Sanpaolo, Press Release: "Women Value Company 2019 - Intesa Sanpaolo" Award: The Third Edition of the Initiative Sponsored by Marisa Bellisario Foundation and Intesa Sanpaolo Takes Off to Promote Female Talent and Gender Equality, 14 November 2018.

advantageous. However, it is crucial that a sectoral strategy does not marginalise sexual and reproductive health.

The sensitivity around certain reproductive and sexual health concerns puts people at risk of marginalisation. It is crucial that everyone involved explicitly acknowledges the crucial part that reproduction and sexual health play in the fight against poverty. Because what is unidentified is much more prone to be unsupported, explicit identification is crucial. Participatory health policies, programmes, and projects are required by the right to health.<sup>22</sup> All stakeholders' informed and active participation can boost cooperation, widen understanding and a sense of "ownership," and raise the likelihood of success.

All activities for the safeguarding and promotion of reproductive health and sexuality must be developed, carried out, and reviewed in a participatory way because they are essential components of the health-related right. Accountability is also demanded under the right to health. The commitments resulting from the health-care right are difficult to be adequately upheld without methods of accountability.<sup>23</sup> The essential components of reproductive health and sexuality also fall under this umbrella. Therefore, effective, accessible, and open procedures of accountability in regard to all duty-bearers are required for the promotion and safeguarding of reproductive and sexual health.

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<sup>22</sup> European Commission, EU countries commit to boost participation of women in digital, 9 April 2019.

<sup>23</sup> Diversity Woman, 100 Best Companies for Women's Leadership Development, Fall 2015.

# **Insider Trading - An Unethical Practice: With Special Reference to Indian Securities Market**

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## **ABSTRACT**

Insider trading is buying or selling of securities by a person who is part of or connected with the company. Law does not ipso facto prohibit trading of securities by insider but prohibits when he trades the securities by using unpublished price sensitive information. The Insider gains the profit by buying the securities or averts the losses by selling the securities as per the information which is beneficial for his own interest. The person who gets price sensitive information could potentially make larger profit than their fellow investors. The material information is that of any information which could substantially impact the decision of investor to buy or sell the securities. The Unpublished/Non-published information is information that is not available legally to the outside world or public. The insider trading generally takes place in publicly traded companies/listed companies' securities by someone who has non-public material information about that stock. Insider trading is legal or illegal it depends upon information which will affect the fluctuation in the securities of the company on the recognized stock exchange.

The "Securities and Exchange Commission" (SEC) in U.S., Financial Conduct Authority (FAC) in U.K., and "Securities and Exchange Board of India" (SEBI) in India made stringent regulations to prohibit insider trading with an object of protecting the interests of investors in the Securities market with regard to the publicly traded companies where the minority shareholders mostly affected from insider trading. In U.K, U.S and India the insider trading is a serious white color crime which affects the nation's economy in general and genuine investors in particular. In keeping into consideration, the above objectives, the researchers wish to throw some light on the Concept and historical perspective of Insider trading. The researchers focus on various dimensions of national and international perspective pertaining to the insider trading. The researchers concentrate on legal framework and enforcement of insider trading in U.K., U.S., and India. Further the

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researchers want to mention the judicial contours and finally give the conclusive remarks and suggestions.

**Keywords:** Insider Trading, “Price Sensitive Information”, “Securities Exchange Board of India”

## **1. Introduction:**

Securities market plays a significant role in the economy of the Nation in general and corporate sector in particular. The securities market is part of financial market and includes the two different types of markets such as primary and secondary markets. The primary market deals with the fresh issue of securities to the investors where the secondary market facilitates trade the securities on recognized stock exchanges issued in the primary market. The transactions of selling and buying of securities in secondary market take between investors and investors through the stock brokers. The performance of primary market depends upon the performance of the secondary market. The Securities and Exchange Board of India regulates both the primary market as well as secondary markets. As far as the public issue is concern the Company as to fulfill various provisions of SEBI Act and relevant Regulations pertaining to the public issue by the corporation, which admits its securities on recognized stock exchange or it desirous to place its securities on any one of the recognized stock exchanges in near future.

Insider is a person who is an access to the un-published price sensitive information of the Corporation.

He may be director, senior officer or individual who is have nexus to the Unpublished price sensitive information. According to Regulation 2(g) of “SEBI (Prohibition of Insider trading) Regulations, 2015”<sup>1</sup> Insider means any person who is:

- (i) A connected person or
- (ii) In possession of or having access to unpublished price sensitive information”

According to the SEBI regulations Insiders maintains the “Unpublished price Sensitive Information”. The specific information needs to be used only for the Legal purpose and in compliance with the any Law or requirement of regulations. Apart from the specific legal purpose the specific information shall not be shared with anyone else.

Insider trading is the trading of the securities of the corporation by individuals with potential access to un-published price sensitive information which highly fluctuate the stock of the corporation. At present the insider trading is on the Main street level rather than the Wall Street level. The insider who has the price sensitive information

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<sup>1</sup>SEBI (Prohibition of Insider Trading Regulations), 2015, Regulation 2(g)

will take an advantage of gaining the profit or averting the losses by selling and buying the securities for his own benefit.. Buying, selling and dealing in securities of any corporation is a legal activity for everyone. When it comes to the insider such as directors, managers and employees of a corporation can also buy or sell the securities subject to fulfillment of the provisions and the SEBI Act as well as Regulations. The SEBI Regulations clearly provides that it will be considered illegal if the insiders of Publicly Traded Company trade on unpublished/non-published price sensitive information to make profits or avert losses. The insiders of the company are expected to trade in securities in order to maintain positions for a long period of time. Trading securities frequently or entering into reverse transactions at small intervals is considered as insider trading. This type of activity taken by the insiders of the company shall be liable for the legal consequences under the relevant SEBI regulations. The regulator is the key watch dog for the controlling of these types of activities.

Patel committee in its report in the year 1986 defined Insider trading as “Insider trading generally means trading in the shares of a company by the person who are in the management of the company or are close to them on the basis of undisclosed price sensitive information regarding the working of the company, which they possess but which is not available to others”.

## **2. Insiders of the Company:**

Insiders in the companies means not only those persons who are directly connected with the company because of their position but those persons who are connected to or deemed to be connected with the company and have reasonable connection with “Unpublished price sensitive information” of the company. The following persons come under the ambit of insiders:

- Subsidiary company and person acting in concert
- Merchant Banker, Debenture Trustee, Stock Brokers
- Accountancy firms, Law firms and financial Consultants.
- Asset Management Company
- Shareholders and employees of the company.
- Independent Directors includes a person connected six months prior to an act of this unfair practice
- Registrar and Share Transfer Agents
- Portfolio Manager, Investment advisers
- Trustee and Investment Companies

**“Unpublished price sensitive information”:**

It is the information which is with the Company and is accessible to insider but has not been made to public. In other words, “the Prince sensitive information means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company”. This information will be having impact on the securities prices and leads to fluctuation in the secondary markets. The “unpublished price sensitive information” to be sensitized as information not available in the public domain or the securities market is not aware of it. The person who is having this “unpublished price sensitive information” may use for gaining the profits or avert the losses according to the situation. The scope of such information is having highest sensitive value in the course of the management of the company and affects directly or indirectly on the prices of the securities. The scope of such information may include:

- Business development and reconstruction of the company.
- Information relating to existing and future contracts.
- Legal consequences and future litigation of the company.
- Change in the board of directors and change in the senior officials.
- Information on Dividend declaration.
- A change in the structure of the share capital.
- Information relating to the quarterly and yearly results of the company.
- Buy-back of securities or Issue of securities of the Company
- Information relating to Inorganic reconstruction such as Amalgamation or Mergers or Take-over etc.
- Information relating to part or whole winding up of the company.
- Any significant changes in the company affairs

### **3. History behind the regulatory framework of Insider trading in India**

It was in the late 1970s this practice of insider trading was recognized as unfair. The first attempt to curb insider trading was made in India in the year 1948 by appointing Thomas Committee. As per the Committee recommendations there were certain provisions incorporated in the Companies Act 1956. “Sections 307 and 308 of the Companies Act 1956” emphasize on various disclosures by key managerial personal and directors, but it was not effective to prohibit the insider trading<sup>2</sup>.

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<sup>2</sup>The Companies Act, 1956, Sec 307, 308

Following the recommendations by the committees, the SEBI made regulations pertaining to Prohibition of Insider trading by exercising its powers conferred on them under section 30 read with section 11 of “Securities Exchange Board of India Act, 1992”. Later the “Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 1992” has been replaced by the “Securities Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015”. Prior to these regulations there were no regulations for prohibition or prevention offence of insider trading? Prior to the regime of the present “SEBI regulations” there were highest instances in the cheating the small investors in the secondary market by using the techniques of Insider Trading. Simply the insiders who give tips to the near ones in terms of that they take gifts. The famous tipper theory involved in these types of activities. The tipper for the tip is concern gives the information to the tippee.

#### **4. Legal Framework on Insider Trading in India**

Due to rapid increase in the fastest growth of financial markets in India par with the economies of the world, the financial crimes also associated with the Securities market. In order to repose the confidence of the common investor in its securities market, the Government of India made certain specific laws and regulations. One of the current regulations which deals with “prohibition of insider trading” is that “SEBI (Prohibition of Insider Trading) Regulations, 2015” apart from some stringent provisions under SEBI Act, 1992. These Acts and Regulations made an attempt to reduce insider trading was in the shaping of a disclosure requirement on shareholdings of Directors of the company. Considerable progress has been made since passing these Acts and Regulations.

The objective of the “SEBI (Prohibition of Insider Trading) Regulations, 2015<sup>3</sup> is to prevent Insider Trading by prohibiting trading, communicating, counseling or procuring Unpublished Price Sensitive Information relating to a company to profit at the expense of the general investors who do not have access to such information”.

As per “Sub-regulation 4 of Regulation 9 of the aforesaid regulation”, promoters are included in the definition of “Designated Person”. This regulation further covers the board of directors, compliance officer, employees of listed company, CEO, other managerial and secretarial staff who have access to unpublished price sensitive information<sup>4</sup>.

The Companies Act, 2013 provides under section 195 that “No person including any director or Key Managerial Personnel of a company shall enter into insider trading”. In this context “Unpublished price sensitive information (UPSI) means any information, which relates directly or

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<sup>3</sup> The objective of SEBI (Prohibition of Insider Trading) Regulations, 2015

<sup>4</sup>The SEBI (Prohibition of Insider Trading Regulations), 2015, regulation 9(4)

indirectly, to the company or its securities, that is not generally available which upon becoming generally available, is likely to materially affected the price of the securities of the company”<sup>5</sup>.

The “Unpublished Price Sensitive Information” includes the following<sup>6</sup>:

- Dividends which include both interim and final
- Material events in accordance with the listing regulations/agreement.
- Alteration in capital structure
- Financial results of the company
- Change in board or key managerial personnel and
- Mergers and Acquisitions

The Indian Stock market had the history of over hundred years old, the insider trading was outlawed, when the stock market was liberalized following the end of “License Raj”. In India the year 1992 where the SEBI Act and Regulations passed to prevent insider trading. There are certain Committees which worked on with a view to prevent and prohibit the “insider trading” in India. The following committees which recommended the policies need to be taken for the prevention of “Insider trading” in the companies.

The Sachar Committee (1979): This committee mentioned in its report that the company key managerial persons such as directors and other officers may have some “price sensitive information” that could be used to change or malpractice the stock prices which may cause financial losses to the retail investors. The committee further recommended that the amendments to “Companies Act” to incorporate the provisions relating prohibition of Insider trading which need to contain huge penalties and punishments.

The Patel Committee (1986): This committee recommended that there is need of amendments in “Securities Contracts (Regulations) Act, 1956” to make all the stock exchanges which will control the insider trading and unfair stock dealing. This committee further suggested that heavy fines shall need to be imposed along with the imprisonment. Further stated that the gains from Insider trading also need to be recovered from the persons involved in the particular activity.

The Abid Hussain Committee (1989): This committee suggested that the activities of insider trading may be penalized in terms with both civil and criminal proceedings and further suggested that the Securities

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<sup>5</sup>The Companies Act, 2013, Section 195.

<sup>6</sup>SEBI (Prohibition of Insider Trading) Regulations, Regulation 2(1)(n).

Exchange Board of India needs to formulate the regulations and relevant governing codes to prevent unfair dealings in securities market.

The Sodhi Committee (2013): “This committee made a range of recommendations with regard to the legislative framework for prohibition of Insider trading in India. It further suggests that we need a combination of principle-based regulation and rules that are backed by principles”.

The “Viswanathan Committee” (2017) on Insider Trading: “This Committee has made recommendations to reduce the malpractices and prohibit the benami transactions in the securities to reduce the financial malpractice”. Further the committee recommended for the two different codes for prohibition of Insider trading. Out of that the first one is relating to minimum standards need to be placed for the listed companies to deal with the information. The second one is relating to put standards on market intermediaries and related persons on handling of the price sensitive information.

## **5. International perspective of insider trading:**

The researchers would like to focus some of the dimensions pertaining to insider trading regulations in U.K and U.S to prohibition of insider trading.

United Kingdom legal framework on insider trading:

U.K has developed strict regulation against insider trading recently but has a very low enforcement rate. The Financial and Services Markets Act, 2000 has been repealed by the Finance Act, 2012 and “Criminal Justice Act, 1993” provide the statutory framework for insider trading. The Criminal Justice Act prohibits dealing in securities on the basis of insider information or price sensitive information and market malpractices can incur custodial sentences of up to 7 years and fine which is unlimited<sup>7</sup>.

United States legal framework on insider trading:

The United States is the strict implementer for the protection of investors from Insider trading. After the Great Depression of 1929, it was the first country that formally enacted a legislation to control insider trading and prevent the malpractices through the Securities and Exchange Act, 1934. This Act has incorporated the “Securities Exchange Commission” (SEC) to prevent insider trading in the “United States of America”. Further the legislations relating to “The Insider trading sanction Act of 1984” and “The Insider trading and securities exchange Act of 1988” also governs the provisions relating to prohibition of Insider trading.

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<sup>7</sup>The provisions under U.K Criminal Justice Act, 1993.

## **6. Judicial contours:**

Judiciary plays a significant role in prohibiting the insider trading both in India and abroad. The researchers would like to focus some landmark judgments pertaining to the insider trading.

**Salman Vs Securities Exchange Commission<sup>8</sup>:** This case has delivered the jurisprudence relating to giving insider information to the family members and on the basis of that information trading in the securities which is completely prohibited in the United States of America. The American supreme court held that this type activity is enough to convict the accused.

**Dirks vs Securities Exchange Commission:** In this case the United States supreme court propounded the “tipper – tippee” theory on Insider trading. On the basis of tip given by the tipper which means violation of fiduciary duty of the insider for providing the sensitive information, that would lead to liability from the “tippee” side who provides a personal benefit to the tipper.

**Mr. Raja Ratnam and Rajat K. Gupta case<sup>9</sup>:** In this case the SEC which alleged that Rajat tipped his business associate Rajaratnam relating to price sensitive information available at Goldman Sachs group on Berkshire Hathaway investments. The Rajaratnam who used the sensitive information and traded in securities made a reasonable profit. On the basis of this activity the securities exchange commission raised an allegation. The court held that the activities taken by both the person in this case which is violation of securities law and Insider trading regulations.

**Rakesh Aggarwal vs. SEBI:** In the present case Securities Appellate Tribunal orders for the compensation on promoters who traded in the securities on the basis of “Unpublished price sensitive information”. Further the tribunal held that acting against to the objectives of the Securities Exchange Board of India Act, 1992 and Insider trading principles is prohibited. The SEBI need to control these types activities.

**Samir.C.Arora vs. SEBI<sup>10</sup>:** The present case is important in prohibition of Insider trading at the companies. The case observed the Jurisprudence on the circumstances which are leading to the Insider trading and its related activities. Further in this case the board which held that the activities come under the Insider trading.

## **7. Cases under spotlight:**

**Cyrus Mistry’s case:** In the recent days this case became familiar on effect of these regulations. The case came to the lime light due to the

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<sup>8</sup>137 S.Ct 420 (2016)

<sup>9</sup>Securities Exchange Commission vs Rajat K. Gupta and Raj Rajaratnam, Civil Action no. 11-CV-7566

<sup>10</sup>(2002) 38 SCL 422

sharing of material information with the insiders which is not to be done as per the SEBI, 2015 regulations. The case also got familiarity towards the role of corporate governance in India.

Uday Kotak Committee (2017): It is the “SEBI committee on governance of companies”, in its report, had proposed that “any material information be shared with a promoter or promoters or a group having shareholding of more than 25 per cent in the company, who is in direct or indirect control of the shareholders or has nominated a director on the board of director of the listed company”.

The above said committee further specified certain conditions for disclosing of the unpublished price sensitive information and proposed several amendments in the Indian jurisprudence towards the decreasing of cases relating Insider trading.

### **8. Conclusion and Suggestions:**

The Indian jurisprudence on laws relating to “prohibition of Insider trading” is well regulated after the “SEBI (Prohibition of Insider trading regulations), 2015”. Prior to these regulations the complaints and cases relating to Insider trading receives by the regulator on the basis of price sensitive information used to be operated by connected persons in the companies. The present regulations are working towards complete “prohibition of Insider trading”. The penalties and other liability provisions under the regulations is creating impact on the connected persons in the companies on the involvement in Insider trading. On the other side some flaws like absence of criminal punishments in the present regulations on comparison with the developed jurisdictions like United States of America and United Kingdom is affecting the actual objectives of the “Prohibition of Insider trading regulations”. In this sense some more criminal liability measures required under the present regulations in order to further decrease of Insider trading. In lieu of this some of the suggestions in relation to further strengthening of the “prohibition of Insider trading regulations” include:

- a) Incorporation of criminal liability measures under the “SEBI (Prohibition of Insider trading regulations), 2015”.
- b) Requirement of the provisions relating to Prohibition of Insider trading under the Companies Act, 2013 and specific watch dog mechanism in relation to listed companies.
- c) Incorporation of the provisions relating to duty of the stock exchanges in the case of Insider trading under the Securities contract regulations Act, 1956.
- d) Need to be clear the role of stock exchanges in the case of prohibition of Insider trading.

# Forest Tenure Rights and the Will to Develop in Eastern India

\*Dr. Amit Jain

## ABSTRACT

The current discourse on forest tenure security and rural development sees individual and community tenure rights in a binary, emphasizing community over individual tenure rights. This article asks: *how does people's aspiration for both individual and community forest rights compel us to rethink the relationship between the nature of tenure rights and rural development?* Using Li's analytical lens of 'everyday practical political economy' this article shows the regional interpretation of the Forest Rights Act, 2006, in north-western Jharkhand. Such an interpretation informs us how individual and community tenure rights are made co-constitutive at the regional levels; both means and ends towards each other, to achieve development in regionally meaningful ways. The findings of the paper are based on the insights drawn from the year-long fieldwork done in the region.

**Keywords:** Tenure Rights, Rural Development, Practical Political Economy, Forest Rights Act, India, Jharkhand

## 1. Introduction

Globally, roughly 1.3 billion people are dependent on forests in terms of their livelihood needs<sup>1</sup>, fulfilled by their agro-forestry based landuse practices<sup>2</sup>. In current times, many of these forest landscapes are governed through community-based tenure systems, having direct implications for rural development. Vira et al.<sup>3</sup>, and Gioverelli et al.<sup>4</sup> show how secure tenure rights improve access and control over critical livelihood resources and reduce poverty. In the contemporary discourse on forest tenure rights and rural development, there is a tension between the potential of individual and community property rights for achieving positive impacts over the forest commons and the local community, particularly the rural poor. As per the World Bank<sup>5</sup>, "community-based tenure protects resource

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<sup>1</sup> Food and Agricultural Organization of the UN (FAO), *State of World's Forests*, (Rome: Food and Agricultural Organization of the United Nations, 2014).

<sup>2</sup> Rasmussen, L.V., C. Watkins, & A. Agrawal, 84(C), *Forest Policy and Economics, Forest Contributions to Livelihoods in Changing Agriculture-Forest Landscapes*. 1-8 (2017).

<sup>3</sup> Vira, B., C. Wildburger, & S. Mansourian (eds.), 33, *Forests, Trees and Landscapes for Food Security and Nutrition. A Global Assessment Report* (IUFRO World Series. Vienna: International Union of Forest Research Organizations).

<sup>4</sup> Giovarelli, R., B. Wamalwa, & L. Hannay. *Land Tenure, Property Rights and Gender: Challenges and Approaches for Strengthening Women's Land Tenure and Property Rights* (Washington, DC: US Agency for International Development, 2013).

<sup>5</sup> World Bank, *Securing Forest Tenure Rights for Rural Development. An Analytical Framework*, (Program on Forests (PROFOR) Washington, DC. World Bank, 20-45, 2019).

uses that can be eroded through individualization". The report questions the individualization of land rights due to exclusion of the marginalized sections of the local communities; uneven distribution of risks and benefits of resource production; and high costs of individual land titles than social, political, and ecological benefits. Further, the report suggests clarity and resolution of conflicts between customary and modern community tenure rights to strengthen the regime of community forest tenure rights.

In India, the passage of the Forest Rights Act, 2006 (FRA) marks a watershed moment in the history of forest management as it recognizes individual, community, and community resource rights of the local communities over forest landscapes. It's a remarkable step where law as an instrument of social change attempts to undo the historical injustice led by colonial and postcolonial Indian state, and experienced by the local communities in the form of livelihood hardships. However, in practice, such a remarkable attempt falls short of its promise as the state machinery promotes individualization of forest tenure rights and poorly address the conflicts between customary and modern notions of forest tenure rights. In other words, the globally experienced tensions and concerns regarding the forest tenure rights and its impact on rural development cannot be separated from the Indian experience. This paper elaborates upon such tensions and concerns in India's Jharkhand. It shows how rural populace foster creative linkages between individual and community forest tenure rights to achieve locally meaningful development by reinterpreting both FRA and customs.

## **2. Methodology and Theoretical Framework**

The article addresses the above-mentioned concern by using field-based<sup>6</sup> evidence from Hazaribagh, Jharkhand. The data collection methods used were participant observation, informal conversations, key respondent interviews in the study villages, in-depth household interviews, oral history, and expert interviews. For analysing the empirical data to understand the everyday engagement of people with forests and FRA, Li's<sup>7</sup> concept of 'practical political economy' was used. The deployment of such a lens shows how the rural populace co-constitute individual and community forest tenure rights. This happens by reinterpreting and reinventing the notion of community forest rights, which is distinctive of custom, codified under tenancy laws, and FRA, yet constitutive of elements from both.

Li explains, 'practical political economy' is an arena where different set of social actors; including state, civil society, and local communities, articulate their interests and push their claims vis-à-vis resource struggles.

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<sup>6</sup> The empirical evidence presented in this article was collected for a doctoral research project, based on the grounded theory approach as a research design.

<sup>7</sup> Li, T. M., *Images of Community: Discourse and Strategy in Property Relations*, 27(3), Development and Change, 501-527, 1996.

She proposes that such a conceptual lens reveals “well-honed analytical skills and strategies as a routine condition of day-to-day survival and long-term advancement” in an everyday arena. In other words, it points out towards the diverse forms of continuous engagement/negotiation between the rural poor and state institutions through the deployment of diverse channels to improve their access and control over forest resources; resulting in better assertion of power, livelihood opportunities, and ultimately locally meaningful development. Li, further elaborates that “negotiation in this context is a negotiation of meaning and value, not solely manoeuvring of individuals within agreed rules”<sup>8</sup>. In short, practical political economy as an analytical tool parses out diverse everyday forms of struggles/negotiations between rural poor and state institutions over resource distribution and property rights. Such an analytical tool helps us see how material concerns in an everyday life are entwined with cultural meanings and the ways in which everyday politics of resource struggle translate this entwinement to achieve maximum benefits possible.

The following section details the process of internal differentiation in north-western Jharkhand, with a specific focus on village Sondhwa (a pseudonym) in Hazaribagh and the livelihood strategies adopted by the rural populace.

### **3. Regional Development and Forest Tenure Rights in Jharkhand**

In the 19<sup>th</sup> century, as Gadgil and Guha<sup>9</sup> show scientific forestry and its associated bureaucracy were introduced in India to maintain sustained timber supplies for imperial expansion, which required, as Grove<sup>10</sup> argues, management of the forests and dealing with the problem of deforestation as an outcome of this trade (Grove, 1996: 461). Such colonial interests adversely affected the lives and livelihoods of the forest-dependent communities in India and as Guha<sup>11</sup> argues, divided the forest administrators in colonial India on the extent to which the colonial state should intervene in India’s forests. The annexationists wanted a complete exclusion of people from the forest. For them, the local people over-exploited the forest resources and resulting in the degradation of the forest resource. The populists wanted complete control of people over the forest, vital for their livelihood necessities. Whereas, pragmatists took a middle path to propose some patches of the forest to be left for the communities

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<sup>8</sup> Li, 510, 1996

<sup>9</sup> Gadgil, M., & R., Guha, *This Fissured Land: An Ecological History of India* (New Delhi: Oxford University Press, 1992).

<sup>10</sup> Grove, H.R., *Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism, 1600-1860*, 461 (Cambridge: Cambridge University Press, 1996).

<sup>11</sup> Guha, R., *Forestry in British and Post-British India: A Historical Analysis*, 18 (44-45), *Economic and Political Weekly*, 1882-1896; 1940-1947, 1983.

as the 'village forest'. The above-mentioned positions shaped the colonial laws and policy of 1878, 1894, and 1927 respectively.

In Jharkhand, forests have been historically significant in terms of provisioning food supplies and means of labour. As per Mohapatra<sup>12</sup>, people's relationship with the forest resources was mediated through the usage and custom, facilitating an integrated forest-farm use. With the advent of colonial rule, the institution of zamindari and private property were introduced in the region for arable expansion and revenue maximization. Further, Mohapatra<sup>13</sup> states that by the middle of the 19<sup>th</sup> century, colonial interests in the region's Sal forests introduced the concern of controlling deforestation in the land use policy for sustained supplies of timber in mining and expansion of the railways in the region. Such increased demands for forest timber in the regional markets made it an additional and valuable source of revenue generation for the landlords, resulting in ever-increased restrictions over the rural populace for forest use. The outcome was the popular resistance in the region, which forced the colonial administrators to codify the customary land and forest rights under the regional tenure laws, seen as a symbol of victory and autonomy from the modern state.

In early postcolonial India, the National Forest Policy, of 1952, imposed further restrictions upon the forest-dependent communities, by nationalizing the forest landscapes and trade of forest resources. In Jharkhand, this meant the overtake of the forest commons from the landlords to the state Revenue and Forest Departments instead of the local communities. The general outcome was the escalation in conflicts between the government staff and the rural populace and increased poverty in the following decades, due to poor access and control over the forest commons. By the 1970s, the rise of new social/environmental movements in India, demanding social justice and inclusive development gave a fresh lease of life to the issue of people's forest rights. In Jharkhand, these demands were linked to the ethno-regional demand for a separate Jharkhand state. The popular resistance was often dealt with repression by the state, as happened in the infamous 'Gua incident', where demands for forest rights were responded to by bullets from the state. Such state repression resulted in the growth of popular support for militant left-wing extremists (Naxals) in Jharkhand by the late 1980s and early 1990s.

In response to this, one witnesses a shift in the Indian state's technique of rule by promoting participatory development, as argued by Amin and Prakash<sup>14</sup> to stabilize the shaky grounds of legitimacy to rule its

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<sup>12</sup> Mohapatra, P.P, Aspects of Agrarian Economy of Chotanagpur: 1880-1950, 3-12, (Ph.D. Dissertation, Jawaharlal Nehru University, New Delhi, 1988).

<sup>13</sup> Mohapatra, P.P., 16-17, 1988.

<sup>14</sup> Amin, I., & A. Prakash, *Conflict, Governance, and Development: Issues of Social Justice and Participation in Jharkhand and Bihar, India*, Cultures of Governance and Conflict Resolution in Europe and India (Oslo: Peace Research Institute Oslo, 2013).

population. The National Forest Policy, 1988, marking a participatory shift in the Indian forestry sector, proposed prioritizing people's livelihood needs along with forest conservation. The participatory shift resulted in the culmination of the Joint Forest Management Program in 1990 (JFM). JFM represented an approach where new institutional arrangements were seen to address the old challenge of social injustice experienced by the local communities since colonial times. The participatory model of JFM envisioned creating a partnership between the forest bureaucracy and local communities to manage the forest commons together.

On November 15, 2000, the Indian state, recognized Jharkhand as a new state under the Indian federal structure. In the new state of Jharkhand, mining and industrialization remained the mainstay of development and the aim of state government was to create Jharkhand as an 'investor friendly' destination<sup>15</sup>. However, along with an ever-increasing onslaught of capital, the state increased the welfare spending under various targeted development schemes, to foster spaces for participatory rural development, a bargaining chip to gain legitimacy for the dominant development schema. Such a legitimacy received a jolt due to the central Ministry of Environment and Forests notification of 2002, mandating evictions of the 'illegal forest encroachers'. To counter the state move, forest-dependent groups, concerned civil society organizations, and rights-based groups came together under the banner Campaign for Survival and Dignity (CSD). The CSD raised the issue of historical injustice met by the forest communities since the colonial period. The key demand was to undo the historical injustice of poorly recognizing forest rights and prioritizing conservation and corporate needs, resulting in the culmination of FRA, which provisions for tenure security over the forest land and its resources.

Thus, statist intervention since colonial times, subjected the local communities to change under the influence of the regional networks of capital and power, and how local communities showed resilience under such conditions and selectively engaged with the state. Engagement with FRA is not an exception to this in Jharkhand. The FRA provisions tenure rights to the local communities [sections 3(1)a to 3(1)m of FRA], and also empowers the rights holding communities to conserve and protect forest resources, wildlife, and biodiversity (section 5 of FRA). The Act is a significant, given the colonial injustice met by people during the colonial postcolonial time-frames, impacting livelihood opportunities of the rural populace. Despite this, FRA as national legislation, an outcome of the popular demand, in its implementation at the regional level has some key tensions. In Jharkhand, the state bureaucracy is predominantly promoting individual forest rights over community forest rights<sup>16</sup>. Civil society is divided between customary (prioritizing community rights) and new forest rights (advancing both individual and community rights), to

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<sup>15</sup> See Jharkhand Industrial Policy, 2001, and Jharkhand Vision Document 2010.

<sup>16</sup> Expert Interviews in Ranchi

achieve self-rule<sup>17</sup>. Finally, the local communities aspire for both individual and community forest rights<sup>18</sup>.

The following section elaborates upon such forms of local developmental aspirations. It delineates changing developmental aspirations and rising internal class differentiation, affecting the forest-community relationship.

### **3.1. Livelihood Strategies and Internal Differentiation in the Micro-Political Economy of Sondhwa, Hazaribagh**

Sondhwa in Hazaribagh lies in the north-western Jharkhand had customary forest use practices, and was settled around five generations old by the Santhal and Bhuiya groups. Likewise in Hazaribagh, these groups practiced customary forest use to procure reasonable quantities of wood for housebuilding and repair, agricultural purposes, and fuel, along with edibles like *mahua* flowers and fruits<sup>19</sup>. The people grazed their cattle over the jungle, wastelands<sup>20</sup>, common grazing grounds (*arwar*)<sup>21</sup>, and reclaimed farmlands from the forest for expanding the arable in a village<sup>22</sup>. The colonial intervention in the north-western Jharkhand since 1765, as per Sivaramakrishnan<sup>23</sup> transformed the wild and wastelands of the 'Bengal Woodlands' into tamed and productive terrains of farms and groves by introducing the institution of private property and zamindari system. In Sondhwa, under the Ramgarh Raj, a *bhandari*; sokiyaar by caste, was settled to ensure the cultivation of the landlord's choicest rice fields in the village. The village *bhandari*, as an agent of the landlord, ensured the cultivation of his lands using forced labour of the Santhal and Bhuiya tenants<sup>24</sup>. The tenants managed their livelihoods through the reclamation of the farm from the forest, *korkar* (rice fields prepared by embanking the terrain), and procuring food; fuelwood; and means of labour from the forests<sup>25</sup>.

However, by the middle of the 19<sup>th</sup> century, colonial interests in the region's Sal forests introduced the concern of controlling deforestation in the land use policy for sustained supplies of timber in mining and

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<sup>17</sup> Expert Interviews in Ranchi, and observations made in a two-day meeting in Ranchi, organized by Jharkhand Van Adhikar Manch (JVAM). JVAM is a common platform of 17 civil society organizations in Jharkhand, working on the implementation of the FRA. Since 2014, JVAM is in tripartite agreement with Jharkhand Tribal Development Society (JADS) and Primary Agricultural Credit Society (PACS), and supported by Rights and Resource Initiative, Washington DC, since 2016.

<sup>18</sup> Field observations and personal communications with development practitioners and activists in Hazaribagh and Ranchi.

<sup>19</sup> Para, 283, Hazaribagh Settlement Report.

<sup>20</sup> Para, 147, Hazaribagh Settlement Report.

<sup>21</sup> Para, 148, Hazaribagh Settlement Report.

<sup>22</sup> Para, 146, Hazaribagh Settlement Report.

<sup>23</sup> Sivaramakrishnan, K. *Modern Forests: Statemaking and Environmental Change in Colonial Eastern India*, 86 (New Delhi: Oxford University Press, 1999).

<sup>24</sup> Oral history collected in Sondhwa.

<sup>25</sup> Oral History collected in Sondhwa.

expansion of the railways in the region<sup>26</sup>. Such increased demands for forest timber in the regional markets made it an additional and valuable source of revenue generation for the landlords. The logical corollary of such changed market conditions was introduction of taxes on rural populace by landlords for reclaiming the farmland from the forest (*salami*), using forest resources (*banker*), and felling timber in the forest (*tangikar*). These livelihood challenges were mitigated by emigrating to the tea plantations of Assam or coal mines in Jharia, Dhanbad<sup>27</sup>. Also, the rural populace was struggling in their everyday lives to achieve better access to their means of labour. These conflicts, by the end of the 19<sup>th</sup> century, transformed into popular unrest in the region and made the British codify customary forest rights.

Thus, the colonial land use policy unsettled the customary regional and sub-regional histories of forest use by the Adivasis, linking them with the wider networks of capital and power by the modern state in Jharkhand. By the beginning of the 20<sup>th</sup> century, almost 22 percent of the rural populace was dependent upon emigration to the coalfields for their livelihoods in Hazaribagh<sup>28</sup>. By 1951, out of the total district population of 19,37,210 souls, only 1,70,076 people were dependent on agriculture, whereas a significant proportion of the remaining population relied upon mica, coal, timber, and other industries for their livelihoods<sup>29</sup>. The labour participation in the industries raised the economic standards of the rural populace and infused aspirations for a better life with an element of modernity, evident through the District Gazetteer Hazaribagh, 1957, which states:

There has been, no doubt, a marked increase in literacy amongst the aboriginals. The second advance worthy of note is that their economic standard has risen. It appears that the work in the industrial centers is responsible for this. In most of the villages, a percentage of the young men work away from their homes and send money to their relatives in the village. Many of the Adibasis did the war service and had put their bonuses to good account in buying land or building better houses. There has been a steady flow of new aboriginal settlers from the Ranchi district into the Hazaribagh district. Most of them are Mundas. The Adibasis live a cleaner life than before and every Adibasi home has got a few good utensils, cattle or poultry and at least a small bit of land [...] In the Christian villages [...] most of the young wage-earners have left their village homes and are living in urban surroundings [...]

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<sup>26</sup> Mohapatra, 16-17, 1988.

<sup>27</sup> Oral history collected in Sindhwa.

<sup>28</sup> Para, 39, Hazaribagh Settlement Report.

<sup>29</sup> District Gazetteer Hazaribagh, 143 (1957)

The educated boy has little wish to work on the land. The huts of the Santhals and other Adibasis are always neat structures and usually have conventional designs painted on the walls of the houses. There is a touch of modernism slowly coming in because replicas of cycles or motor cars or engines are now being made on the walls of the Adibasi huts<sup>30</sup>.

In independent India, the nationalization of the forests meant enclosing the forests in Hazaribagh as the Protected Forests, with restricted forest access for the rural populace (Singh, 1990: 239). The village Sondhwa in Hazaribagh was not an exception to this, and the people faced immense hardships in meeting their livelihood needs<sup>31</sup>. By the 1960s, the employment opportunities in the collieries declined, and the rural populace in Sondhwa earned a pittance as wage labourers working for the village elites (Sokiyaars), Forest Department, and paper mills. The drudgery was compounded in cases of penal action and exploitation by the forest staff<sup>32</sup>. By the 1970s, Sokiyaars started controlling the cultivable farmlands with village poor through the institution of debt-bondage (*bandhik*). As per the local estimates, the Sokiyaars in the village had around 95 acres of the total cultivable land in the village under their control by the late 1980s<sup>33</sup>. These conditions created fertile ground for the Naxals to root themselves in the village by the 1990s<sup>34</sup>.

The Naxals gained popular support by targeting the Sokiyaars, followed by land 'redistribution' in the village, based upon the number of adult male members in every household<sup>35</sup>. However, a few influential families could manage to procure more as compared to the others<sup>36</sup>. Further, the Naxals forced the forest staff to leave the forest landscapes in Sondhwa to retire in their office in the Hazaribagh district. This ensured better access to land and forest resources in Sondhwa. However, this resulted in a flourishing illegal small timber trade by the rural populace in Sondhwa and other neighboring villages<sup>37</sup>, resulting in an inflow of disposable cash incomes and severe deforestation<sup>38</sup>. By this time, a few members of the rural household, mostly the village youth, migrated to Punjab, Rajasthan, and Gujarat to increase the share of disposable cash incomes in the household for expanding livelihood needs<sup>39</sup>. By the turn of the century, the incomes from the illegal small timber trade dwindled due to diminishing demands of

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<sup>30</sup> District Gazetteer Hazaribagh, 209-210, (1957)

<sup>31</sup> Oral history in Sondhwa

<sup>32</sup> Oral history in Sondhwa.

<sup>33</sup> Key Respondent Interviews

<sup>34</sup> Key Respondent Interviews.

<sup>35</sup> Key Respondent Interviews.

<sup>36</sup> Informal conversations in Sondhwa.

<sup>37</sup> Informal conversations in the village.

<sup>38</sup> Informal conversations in the village.

<sup>39</sup> Oral history in village and Expert Interviews in Hazaribagh.

small timber as fuel, given the availability of cheap coal supplies from the coal seams in nearby Badkagaon. Also, the risk of penal action outweighed the benefits accrued from the sales of the small timber<sup>40</sup>. These changes furthered the rate of migration to meet the expanding needs of the rural household which significantly required cash incomes by this time.

The increased inflow of cash incomes in an agrarian setting where agricultural productivity is limited due to ecological factors and insecure tenure rights brought internal class differentiation. Further, in such an internally differentiated Adivasi community of Sondhwa, a byproduct of the regional networks of capital and power, the vision for a better life has expanded the household needs and is not limited to merely meeting the subsistence needs. In current times, this vision for a better life includes greater control over land and forest resources, along with better choices of education and jobs, better housing and consumer goods, and finer food practices and savings<sup>41</sup>. In current times, the intensification of agriculture with legal restrictions on creation of new rice fields, average landholding size per household has reduced to 2.4 (6 - 0.08 maximum to minimum). Further, much of these lands are less fertile uplands and *korkar* with a few proportions of the fertile rice fields. Thus, making supply of disposable cash incomes along with control over agricultural/forest lands an important factor for internal class differentiation evident through and in-depth household survey conducted in Sondhwa<sup>42</sup>:

Income Groups	Population Percentage	Average Annual Income	Annual Average Expense	Major Cash Income Sources (In preference order)
Category I	10	147000	58000	<ul style="list-style-type: none"> <li>• Livestock</li> <li>• Wage Labour</li> <li>• Migration</li> </ul>
Category II	19	101600	56400	<ul style="list-style-type: none"> <li>• Livestock</li> <li>• Migration</li> <li>• Wage Labour</li> </ul>
Category III	55	67000	47000	<ul style="list-style-type: none"> <li>• Livestock</li> <li>• Migration</li> </ul>
Category IV	16	50000	49000	<ul style="list-style-type: none"> <li>• Wage Labour</li> </ul>

**Table 1: Internal Class Differentiation in Sondhwa**

Category I represents the upper class of the village. Their major source of cash income is from livestock rearing and wage labour with

<sup>40</sup> Informal conversations in the village.

<sup>41</sup> Based on Key Respondent Interviews, and In-depth Household Interviews

<sup>42</sup> In-depth household interviews in Sondhwa.

a few households involved in migration. These households significantly depend upon the forest to rear the livestock, fuelwood, housebuilding/repairing material, non-timber forest produce (henceforth, NTFP), and other edibles from the forest. Category II, the middle class of the village, depends majorly on livestock rearing and remittances from migration for their household cash incomes. These households are primarily dependent upon the forest for feeding livestock, and fuelwood, but not dependent upon the forest for housebuilding material and repairs anymore, as they live in *pucca* houses made by the state housing scheme and remittances from the cities. Further, their dependence on NTFP and other edibles from the forest is significantly low. Category III represents the lower class of the village. These households primarily depend on seasonal migration and livestock rearing as major sources of cash income. These households are primarily dependent upon forest for feeding livestock, and fuelwood, followed by NTFP, other edibles, and material for housebuilding. Category IV represents the lowest class of the village. These households primarily depend upon wage labour as a source of their household cash incomes. These households depend upon forest for fuelwood, followed by NTFP, other edibles, and procurement of housebuilding/repairing material. Further, the households in this group are indebted and still under the institution of *bandhik* with the moneylenders in the neighboring villages. Their annual expenses often exceed their incomes due to payments of interest to the moneylenders and few avenues for cash incomes.

Despite the differential dependence upon forest resources, forests remain significant in the livelihoods of the rural populace in Sondhwa. The relevance of the forests in the local lives is evident in the narrative provided by the village headman as follows:

“If we do not have forests then what else do we have? The forest had been here for generations and made us survive in both good and bad times. We are poor people and the forest is the only asset that we can inherit for our future generations. Our deities and ancestors live there. The forest has given us the rice fields to survive. No matter where we go, or what we accumulate these days, without forests, we will die. Some from our village sold the forest during tough times but that was possible only because we had it. Now the situation is better as compared to the hardships faced by our ancestors, and thus we are protecting the forest from outsiders (people from other villages) for ourselves and our future generation. Even if they go and settle in cities, they would know that back home they have their forests, where their ancestors still live”.

In short, the regional networks of capital and power brought internal class differentiation in the local community, along with

developmental aspirations. These regional networks on one hand dispossessed the rural populace of the means of livelihood, on the other provided livelihood opportunities, albeit precariously placed. In such a situation, the local people strategize in their everyday interactions with resources to secure whatever they have and keep looking for better avenues for further material expansion.

### **3.2. The intervention of FRA and Strategic Interpretation of Forest Tenure Rights in Sondhwa**

Amidst such a context, when FRA was introduced in the village it was bound to local interpretation to secure the existing resources and also seek material expansion. This is evident in the interpretation of FRA in Sondhwa as follows:

On August 2011, the Beat Officer from the Forest Department informed the people of Sondhwa that the government had passed the Forest Rights Act (*Van Adhikar Adhiniyam*) to recognize 'illegally encroached' forest land as rice fields and provision land titles to people, cultivating such lands before 2005. He told, that the government was giving *pattas* to both the Scheduled Tribes<sup>43</sup> and Other Traditional Forest Dwellers, due to the widespread recognition that people have been farming on the forest lands. He added that anyone interested in claiming the *patta* could visit the office of the Forest Department. On approaching the forest office in Hazaribagh, people realized that most of them were not eligible for the individual land title, as informed by the forest staff. The forest staff asked for the fine receipts or any other documentary evidence which proved their occupation of the forest land for farming. But since many of the forest offenses in the past were informally resolved, in most cases through the bribes given to the forest staff, the fine receipt was difficult to produce. In some cases, where the rural populace was able to produce the receipts, the names of the offender did not match with the claimants as much of these holdings are jointly controlled by the extended family. In some cases, particularly the Bhuiyas, the fine receipts were not old enough to prove their occupation for the period of three generations/seventy-five years. Unlike Bhuiyas, the Santhals being recognized as a Scheduled Tribe in Jharkhand were not obliged to prove their occupation over the forest land for three generations.

What followed in Sondhwa after this was the individuals disputing their claims within their extended households and village, discretely bribing the forest staff to compensate for their lack of evidentiary documents, to gain individual land titles. Despite bribing, some people

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<sup>43</sup> The Government of India uses the term Scheduled Tribes as a constitutional and administrative category to do positive discrimination, in terms of reservation in higher education and jobs other benefits to the tribal groups in India, who have been historically marginalized.

claim that they received titles over abysmally low proportions of land than claimed, resulting in an ambiance of general mistrust and lack of social acceptance as people do not show their title deeds but claim that they received the same. These fault lines were exposed in 2017 when the forest department mapped its territory using the Geographic Information System technology. The forest staff erected pillars with the Global Positioning System coordinates, painted in black over the forest land used as the homestead and farmlands<sup>44</sup>. In 2018, FRA was reintroduced in Sondhwa by a civil society organization named *Jan Seva Parishad* as a means to secure community forest rights. A Gram Sabha meeting (a village assembly)<sup>45</sup> was convened in the village and the rural populace, desperate to secure the land titles, gathered in huge numbers. The rights activist informed Gram Sabha about the benefits of the community forest rights in terms of tenure security over the forest land and resources.

He added that the FRA recognizes the customary forest rights, which made the rural populace ask about the customary practice of reclaiming farms from the forest. The activist suggested that it will be easier to claim individual land titles once the community tenure rights are granted to the Gram Sabha of Sondhwa, but only the forest land cleared before the year 2005 will be recognized. Despite this, ambivalence remained about whether the Gram Sabha can later regularize the lands cleared after the cut-off date. After listening to the rights activist, the informal conversations among the forest protection committee members and others showed much interest in the community forest tenure. One of the reasons behind this was to protect their forest from the neighbouring villages, who in the name of custom have been recklessly degrading their forest patch. Also, community forest rights promised greater control and better access to forest land and resources. The meeting dispersed after deciding that the Gram Sabha will meet again to constitute a Forest Rights Committee (henceforth, FRC), which will work on behalf of the Gram Sabha.

In the next meeting, the FRC was constituted and the committee members were made aware of the provisions and processes of claiming rights by the rights activist. The awareness generation included the key FRC members attending the FRA-related meetings at the block and district levels. In one of these meetings, attended by the chairperson of the FRC, the need for a no-objection certificate by the neighbouring villages was asserted to ensure that there are no boundary disputes and that the area under the claim is free of conflicts. This is given the fact that the customary village-level record of rights (*Khatian II*), prepared during the colonial period as per the mandate of the Chotanagpur Tenancy Act, 1908 (henceforth CNTA), records customary forest rights,

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<sup>44</sup> Based on key respondent interviews and informal conversations in the village and the forest staff.

<sup>45</sup> Section 2(g) of the Forest Rights Act, 2006.

overlapping multiple villages<sup>46</sup>. Later, in an informal conversation, the chairperson of the FRC asked the rights activist how they could ensure this in the case of Sondhwa where four neighbouring villages have been using their forest patch historically. The rights activist informally suggested that it was necessary if they want community forest tenure, followed by smooth processing of the individual land titles.

In January 2019, the FRC members went to one of the four neighbouring villages Ambadih, where the chairperson said:

“We know that people from Ambadih have used the forest of Sondhwa for generations. Also, we have seen how people from this village have cleared almost three acres of forest land for a farm and allowed the sand mafias to illegally quarry from the bank of our river. I say it is ours as this forest is on our revenue map and not yours and we have been protecting this forest for years through our forest protection committee. Now we are going to receive the community tenure rights and this forest will be the property of the Gram Sabha, Sondhwa, and not the Forest Department. At the best, we can also help you to get the same and till then allow you to use our forest for household needs, provided all the illegal activities from your village are stopped”.

Such a statement was a conscious attempt by the FRC chairperson, given his conversation with the rights activist, to assert Sondhwa's rights over the forest in such a way as to convince the neighbouring village about the forest rights confined within the boundaries of the revenue village, which was not the case as per the custom. Thus, in Sondhwa, the rural populace interpreted FRA as a means to fulfil two ends (a) to redefine customary geographies of forest users, and (b) to gain individual property rights. They desire such a change due to difficulties in protecting the forest resource, seen as savings and an asset inherited from the ancestors, crucial amidst precariously placed livelihood opportunities. Thus, the above detailed local interpretation of the FRA in Sondhwa, Hazaribagh, shows how people aspire for both individual and community forest tenure rights, seeking diverse forms of material benefits accruing from both the set of rights. The implications of such local aspirations for both the tenure rights in a given regional context are subject to discussion, which follows ahead.

#### **4. Discussion and Conclusion**

This article began by showing that tenure security and rural development are intrinsically connected. The existing knowledge on the subject matter informs us about the implications of the nature of tenure

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<sup>46</sup> Expert Interview with Advocate Rashmi Katyayan, Ranchi.

rights over rural development. It is recognized that individualization of tenure rights leads to poor social and resource outcomes, whereas the community tenure rights over the land and forest resources are the way forward. Further, it is suggested that to achieve sustainable development outcomes through community tenure rights, reconciliation between the customary and legal frameworks is essential. But for the people in Jharkhand, these preferences, prioritization, and a binary of individual and community tenure rights were not of much purchase. People's interpretation of community tenure rights was motivated to achieve individual tenure rights first, then leading towards redefining the customary geographies of the community using FRA. In other words, they traversed the thicket of custom and law to strategically reinterpret both the set of tenure rights, to reinvent them as co-constitutive by making them become means and ends to each other at the same time. Such an engagement of the rural populace with the institutions for tenure rights cannot be addressed if we keep insisting upon these binaries in thinking about rural development through secure tenure rights.

Instead, attention is required to the everyday practical political economy to understand the materialist ontologies in which the rural livelihoods are situated, shaping the co-constitution of forest tenure rights. It draws our attention to the everyday strategies to achieve development bit by bit, negotiating for better access and control over land and forest resources, to use these resources strategically to mitigate the negative outcomes amidst precariously placed livelihood opportunities. Further, it enables us to see how the materialist ontologies are remade by the members of a differentiated community, bargaining inch by inch, for tapping the limited opportunity to advance their material claims. Such an everyday co-constitution of individual and community tenure rights compels us to pay attention to everyday practices to know what kind of rural development people aspire for.

Indeed, secure tenure rights facilitate rural development, but our inattention to the co-constitution of individual and community forest tenure would stifle the very process of rural development. The overlaps and conflicts between the customary and statutory frameworks need to be resolved, but the reality may not always fit within either of the frameworks. Therefore, I argue that individual and community tenure reforms in an everyday life do not exist in binaries or any priority order, but are co-constituted in a given regional context. Instead seeing them in a binary would obscure us from recognizing the will to development from below. I suggest that policymakers and practitioners alike be attentive to everyday practices which reconcile both the set of tenure rights in a given material context, to help the planners calibrate appropriate forest-based institutions. This will facilitate reconciliation between customary and legal frameworks, to achieve the fulfilment of the developmental aspiration of a better life amongst the rural populace.

# Media and Communication in Relation to Law

**\*Ms. Shifa Chouhan**

## **1. Introduction**

Media and communication perform an important function in our day-by-day lives as it's the supply of knowledge we have a tendency to rely on to grasp concerning the affairs of the world. From reading the newspapers to watching the news, without even realising it, we have become addicted to the media world unknowingly. However this dependency will cause to be dangerous for us because sometimes this source can mislead a person's mind due to erroneous information. Our technology has evolved greatly, from a time wherein human beings migrated from village to village for verbal exchange, in the twenty-first century we are just a phone call away from interacting with our friends and family.

Technology has advanced and improved our way of life however there are also bound disadvantages hooked up to the current technology too. While our communication skills have evolved with time in assessment to the ancient India, so have we additionally developed within the methodology of a way to create a rift among the society with the utilization of Media. With straight-forward accessibility to communication through these sources, it is also easy to generate hate among the folks.

We have evolved in every experience and that includes the negativity associated with it too. When the media guides people, they can also mislead people, and regardless of how critical media has been in our everyday life however its proven to be time and again a dangerous poison that is feeding the detest of the people among the society. And to put an end to this negativity there are certain boundaries that the law imposes on the media world.

Before we delve into the intensity of media and its inter-relation with the society and law, let's first recognize what media surely stands for and also the role it plays in an individual's life.

Mass- Media is the main means of communication. Mass-media is the only and the quickest mode of gaining knowledge, now no longer simply it's the quickest mode to make human beings aware of the statistics round the arena however it's also effortlessly reachable to each individual within the world. One can get right of entry to this supply on their cellular phones, televisions, radios and different virtual techniques developed through the years however the maximum conventional use of this supply is through newspaper, magazines and others.

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## **2. Importance of Media and Communication.**

Our generation has evolved from the Palaeolithic Era typically referred to as vintage stone age era to the Cenozoic Era in easy time period referred to as the current life. The 21<sup>st</sup> century is the modern century withinside the Anno Domini era or Common era underneath the Gregorian calendar.<sup>1</sup>

Since the end of the 18<sup>th</sup> century, the Indian media came into existence since then and have become active. Indian media is one of the oldest kind of media within the globe. The first actual invention in the world of media was the Printing Press which began out in India as early as 1780 shifting to Radio Broadcasting which commenced in 1927.<sup>2</sup>

We are dwelling withinside the length of evolution in which technology are invented with the intention to simplify and higher the life-style of the people. We began out from printing media and we are now in a time in which digitalization is the principle-consciousness of the media world. Media has been improvised over time.

From a time, where for a mere communication a person would have to travel for hours to communicate with someone living in another village/state or communicating through letters which used to take months to deliver to getting our life-styles promoted to transportation and mobile phones. Our era has advanced highly over the past decades. But along with the technology and progress of life our century has provided us to make our life more convenient and everything easily accessible with information provided at the comfort of your home. Cutting-edge lifestyle is a dream which our ancestors always persevered.

Media and communication are a crucial part of our everyday life's as they keep us up to date on a wide variety of topics revolving across the world. Media message conveys critical impacts and enables us to get facts and additionally shape opinion and make decisions concerning the facts that is provided to us through the media regarding the information that is given to us through media.<sup>3</sup>

## **3. Advantages of Media**

### **The future of Media:**

The media stream began after the discovery of paper from print media and over the years it advanced in virtual media such as news channels, social media and others. The media not only spreads knowledge and awareness among people however it additionally also performs various fundamental functions in our society. One of those

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<sup>1</sup> <https://www.popularmechanics.com>

<sup>2</sup> <https://www.nimc-india.com>

<sup>3</sup> <https://books.openbookpublishers.com>

functions is entertainment. We are uncovered to the media in taxis, buses, trains, and planes. We type to depend on this flow for entertainment purposes, be it for travel or to catch a breather, that is the supply of amusement all of us depend upon either its watching films or taking note of track on radio, media has linked us throughout the world with each other.

Not simply this prevent here, however it has also additionally connected millions and billions of human beings at the social media streams like Instagram, Facebook, Twitter and plenty of other digital streams that are extensively used round the arena. We can start to orient ourselves withinside the information cloud through parsing what roles the media plays in society, inspecting its records in society, and searching on the manner technological improvements have helped carry us to in which we are today.<sup>4</sup>

Communication is more diverse than ever, whether or not its private dialogue with closed ones or a massive brand's manner of verbal exchange with a consumer. The mainstream advent of the net withinside the early 1990's delivered new and thrilling verbal exchange methods, inclusive of digital media channels that permits users to share messages quickly around the world.<sup>5</sup>

Communication through the media has only gotten better and better over time. Not simply it is used to interact and communicate with people however it is also used as a device to market your commercial enterprises online via social media websites as with only a click on your post you will be able to produce awareness and entice numerous human beings to your commercial enterprise. This doesn't simply forestall with promoting a commercial enterprise online however media additionally also provides meticulous information over the happenings around the world. Whether it's the contemporary state of affairs revolving around Russia-Ukraine conflict or the Hijab Ban moving into Karnataka or the upcoming elections which might be on the corner, media provides us information associated with this situation as though we are present wherein some of these events are happening. Our lives are extraordinarily depending on the media world as it's an integral part of our existence and without the existence of media it had be as though there were no life on earth.

### **Positive Impact of media in Covid-19:**

Not a single day goes by without reading the newspaper in the morning. The second most important thing a person does when they wake up is to read newspaper over a cup of tea. Imagine being able to catch up in the current issues revolving around the world from the

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<sup>4</sup> <https://open.lib.umn.edu>

<sup>5</sup> <https://online.maryville.edu>

comfort of your living room. You don't even have to be compelled to imagine this state of affairs in your mind as this is the truth of all the people in every household. Sitting at your home, you can get access to the information concerning the invasion occurring in Ukraine and the Indian students which are caught there because of the continued conflict with Russia. The Indian Government has commenced an evacuation process to bring back safely the Indian students which are stranded in Ukraine safely. We are getting live updates on the situation in Ukraine as there are videos browsing on social media concerning seven hundred students which are left stranded withinside the nail-biting cold as combating escalates in Ukraine. Supplies are strolling low and get access to water is absolutely reduce off, focused on the survival instincts and forcing numerous humans to soften snow in order to drink water.<sup>6</sup>

Not only that, when a worldwide virus was detected in 2019 that caused everything in the world to shut down, the only source that held us together was the media world. With every single component getting close-down which include the necessary stores such as medical, groceries and others have been close right all the way down to defend and protect us from the life-threatening state of affairs which was revolving around the arena.

It became as though the earth has stopped revolving, human life was paused for the longest length in mankind. It was an un-usual moment which left human beings stunned to their core. In this era of madness, wherein people were stuck in different parts of the world away from their family and friends, media was the only source which saved our sanity intact by keeping us connected to our cherished ones.

Media has been the only source we all relied on daily to know about the current situation during the time of Covid. Everything was at a standstill because of the pandemic however media was the only medium of communication which changed into nonetheless supplying statistics within the covid era. Whether it's the live update on the current covid cases or the availability of vaccines in every state, everything was kept transparent through the various platforms of media that is the conventional antique approach like newspaper or the digital advancement like the social media websites.

Not only does the work of the media end here, however it has also helped fund people who have confronted exquisite loss throughout the lockdown by alerting the general public to the availability of essential survival items such as food, masks and others. Even when people were strangled in their home, media helped all the individuals by helping them communicate with their cherished ones and alerting them in advance of the necessary precautions.

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<sup>6</sup> <https://www.tribuneindia.com>

#### **4. Disadvantages of Media.**

##### **Source for misleading people:**

Media has grown to become an integral part of our life's and one of the essential factors in a human being's life.

Media was invented with the purpose to make the human being's conscious concerning the current world events of the arena and to offer them with statistics in order that they have a clean opinion about the situation of the society, as human being's, we are an important part of the society and our manner of thinking and critiques makes an exquisite distinction in making it a higher vicinity for us to stay in. The media not only provide with intellectual information, but it also provides us with entertainment through the use of various digital platforms.

But while this platform gets mis-used, it creates an havoc withinside the society as human being's everywhere in the world get access to the conventional and virtual varieties of media and when this source provides with erroneous information, it is the most dangerous tool for mankind in the 21<sup>st</sup> century. It can be used as a tool to wage wars between the nations and people with one deceptive information. It every so often becomes tough for us to absolutely rely upon media for information as this field is corrupted by people who want to shape the minds of ordinary people. We do not have any device that can come across whether or not the information furnished through media are 100% accurate.

We cannot absolutely rely upon media and entrust ourselves to it for the best supply of statistics and it's far continually a debate whether or not the statistics supplied to us is faux or not. One such supply for misleading records is social media, as customers often came across fake and deceptive records on social media.<sup>7</sup>

##### **Negative Impact of media in Covid-19:**

During the lockdown period, numerous faux information regarding the deaths and cases of the people infected with Covid had been circulated on mainstream media like Instagram, Twitter and other sources, causing a disruption among the society. Not simply social networking sites, however even media channels had been one of the sources misleading the people with faulty information all through the lockdown. Whatsapp became the biggest hub for misleading the people as a lot of fake messages associated with the virus had been circulated like wildfire on these platforms. Media helped us stay connected with our cherished ones by making it easy to communicate with each other even when we were locked in our homes, but it was also one of the

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<sup>7</sup> <https://www.pewresearch.org>

main factors that caused people to create chaos and not bind themselves with the government guidelines with the faulty information which was easily provided on these platforms. One defective or faulty message is sufficient to cause an uproar among the individuals. An individual cannot rely on media for any political critiques as media in recent times works to form the opinion of people with the aid of filling them with faux information in place of raising awareness of what's going on in the society. It has become a means of making money rather than spreading awareness while maintaining transparency to the society. The media today is no longer transparent, just a source that forces you to form opinions about people by brainwashing them these days is no more transparent but just a source which force-build opinion on people by brainwashing them.

## **5. Inter-relation of law and media**

Freedom of the media is certainly a fundamental part of the liberty of expression and crucial considered necessary of a democratic system. The Indian Constitution has granted this freedom through manner of Fundamental Right.

The media, that is obligated to recognize the rights of individual, is likewise also obligated to work inside the framework of felony concepts and statutes. These concepts had been framed through manner of minimal requirements and do now no longer intend to detract from better requirements of safety to the liberty of expression.<sup>8</sup>

## **6. Rights granted by state to media world**

Media regulation is the frame of regulation that regulates the manufacturing and use of media. Media regulation can practice to a huge style of media types, consisting of broadcast television, the internet, and print media. Media regulation exercise encompasses all criminal problems which can get up in the course of the manufacturing or intake of diverse kinds of media. Generally the authorities now no longer alter newspapers and magazines.

The Press Council of India is a quasi- judicial frame constituted through the parliament and regulates print media in India. Its fundamental goal is to hold and enhance the great of newspaper and information corporations and to keep the liberty of press.

Freedom of press isn't particularly cited in article 19(1)(a) of the Constitution and what's cited there may be handiest freedom of speech and expression. The Indian Constitution does now no longer offer freedom for media separately. But there may be an oblique provision for media freedom. It receives derived from Article 19(1) (a). This Article ensures freedom of speech and expression.

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<sup>8</sup> <https://www.presscouncil.nic.in>

The media is an important factor in everyone's life as it has improved communication between us. No matter how many times I stress about the reality that media has being aligned with our existence, it will not be sufficient to explain the significance and threatening facet outcomes that is connected to the media international. As in today's time, media is used as a weapon to create disruption and war withinside the society as with technology, people have upgraded themselves with digital techniques to create bloodless conflict among the people and the technique of divide and rule is utilized by the masterminds of the people who abuse this invention with the aid of gambling with the minds and emotions of the common man and intentionally create a conflict of opinions between individuals by providing misleading facts.

Just like how we cannot judge a book by its cover similarly in addition we cannot blindly agree with all the information that is offer with the aid of using media world through different platforms without doing our own research. Media has helped us tremendously in our manner of living as it offers with excellent highbrow information to the common man in all of the spheres of existence however the negativity that is connected to the media world cannot be overlooked as all that glitters isn't gold because it generally will become tough to distinguish between facts and faux news.

# **Substantive Equity, Social Stratification, and Representation: Empirical Evidence from Communal Manifestations**

**\*Ms Srishti Gupta**

**\*\*Ms Akshita Aggarwal**

## **ABSTRACT**

Today's India is substantiated with civic altercation marked by antagonism, prejudices, caste ascertainment and irrational anxiety, which is subjected to conglomerated controversies encircling the caste system. The social grouping pervasive to date shapes the fundamentals to the society for time immemorial. This paper addresses the unfortunate tendency of idealizing the postulates of equality of a diverse country with historical injustices under the synonym of formal equality. The main course of contention is laid by the averment that reservations defy the principles of equality under the Constitution of India. The 'privileged' general category refuses to accept the consequences of being born into a lower stratum of hierarchy, in a country that theorizes opportunities on the basis of social standing. The stereotypical and marginalised hypothesis of the disadvantaged contemplates a conclusion of descending economic efficiency resulting from reservations in promotions at the government sector. Indian constitution in its prolonged endeavour acknowledged affirmative actions as a means to attain democratic participation, uniform societal-representation, and upliftment for the deprived categories.

## **1. Introduction**

'Equality' as a limiting expression is conceptually weighted and highly contested, where its sociological and economical aspects revolve around determination of causes and effects of inequalities. 'Formal equality', as a belief, argues that, sustaining equality conveys equal treatment at all times, with fairness. Whereas, for 'substantive equality', equality goes far from treating society as equal, but considers the differences, which caters towards disadvantages which persist in particular groups. Such equality identifies equality as equal opportunities, dignity without discriminations, reasonable accommodation, and long term- upliftment. Substantive equality stands on a 'four-dimensional principle', which addresses disadvantage, prejudices, stereotypes, and stigmas, to achieve a structural advancement to accommodate all sections of the society <sup>1</sup>. Thereby focusing on the real impact of legal provisions in an attempt to respond to

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<sup>1</sup> Sandra Fredman, Substantive Equality Revisited, Oxford University Press and New York University School of Law, vol 14 (2016),

<https://academic.oup.com/icon/article/14/3/712/2404476>.

the real wrongs and remove substantive inequality from the society within disadvantaged groups.

In states, governments generally categorize individuals into various legitimate bundles, to maintain smoother efficiency. The idea to treat these bundles alike, outside the recourse of formal equality, requires engagement with struggles. These struggles win, through continuous engagements within the political system. In the early stages, formal equality was deemed enough, but with the realization of centuries of unequal treatment, engagements moved forward, leading to the concept of substantive equality <sup>2</sup>.

In Indian Constitution, formal approaches to equality have majorly been a dominant concept, with fragments of provisions sliding towards substantive approaches, including affirmative actions which include quotas and reservations for the historically and socially disadvantaged. Indian Constitution with a long struggle of precedents recognizes these affirmative actions to achieve democratic participation, societal representation, and upliftment for the depressed classes <sup>3</sup>. 'Capital caste' of the privileged general category enables them to have a mythical approach towards social hierarchy, where caste has no repercussions, and further introduces them to the idea that reservations contradict the basic provisions of the Constitution and diminish economic efficiency.

The ideology of transformative constitutionalism shaped the constitution, ingrained in the preamble recognizes the injustices and leaves an impression on the society. The idea of reserving positions under article 340, for the disadvantaged relies heavily on the conception of fair equality of opportunity, which accounts for their formal social, cultural, and educational backwardness <sup>4</sup>. By the 1990's the central government introduced firm affirmative actions, to uplift the communities. Arguments and myths revolving around reservations and quotas, eventually deprecate the essence of the constitution, and India's diverse history <sup>5</sup>.

## **2. Social Dynamics and Reservations in India**

India exemplifies a system of immense injustice, where the numbers affected range higher, and the poverty scenarios stoop deeper. Atrocious acts are common, and practices like enforced servitude and discrimination are conventional in nature. A significant mass of Dalits sustains under

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<sup>2</sup> Basavaraju C., Reservations under the constitution of India: Issues and perspectives, Journal of the Indian Law Institute (2009), [https://www.jstor.org/stable/43953443#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/43953443#metadata_info_tab_contents).

<sup>3</sup> Supra 1

<sup>4</sup> Power Richard, Competing Equalities: Law and the Backward Classes in India, WASH. U. L. Q. 565-vol.63 issue 3 (1985), [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2200&context=law\\_lawreview](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2200&context=law_lawreview)

<sup>5</sup> Gautam Bhatia, The Supreme Court's jurisprudence on reservations has gaps, The Hindustan Times (2020), <https://www.hindustantimes.com/columns/the-sc-s-jurisprudence-on-reservations-has-gaps-opinion/story-PgDfzntx3slcNKKlgjD9jN.html>.

less than a US\$ per day. 1 out of every ten Dalit is murdered and 2 Dalit's homes are destroyed every week in India. Rapes and assaults of Dalit women composes daily occurrences within already infuriated scenarios<sup>6</sup>.

In order to cohabit amicably, a demand for "special status" was raised by the minorities, dating back in 1891, when a demand for caste-based reservations was pitched within government jobs, in the princely state of Travancore. The first official outcome to the dictate was observed in 1902, Kolhapur, where 50% reservations were provided within services for such backwards classes<sup>7</sup>.

Even Though the population of the weaker and the depressed sections of the society outnumber the ones who pull the strings and maneuver the caste pyramid constituting to be numerical minorities. Still, the latter group manages to continue the system of untouchability, in certain places in India, operating as a form of legal apartheid.

Many of us Indians refuse to accept that caste, as an issue, still exists in India, where millions suffer due to the prejudices against them. Spheres of education, employment, and politics still lack adequate representation from all sections of society<sup>8</sup>.

Therefore, reservations sought to improvise their economic status and provide adequate means to address their denial of rights and years of oppression. The Supreme Court in *BK Pavitra v. Union of India*<sup>9</sup> affirmed that, to make equality effective and true, reservations are necessary with adequate knowledge of inequalities. These judicial provisions as described by the court, accounts for the structural condition of the people.

Women and other non- binaries, belonging to such classes suffer double discrimination, due to their identity and caste, hence reservation for them becomes a necessity.

In another landmark judgement of 2012, *Nalsa v. Union of India*<sup>10</sup> the Supreme Court had issued to remedy the disadvantaged position of the transgender community in India. The court had directed the government to work on affirmative action, under article 16, to add substantive equality for the community. The necessity of reserving one-third seats for women

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<sup>6</sup> Smita Narula, Equal by law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective, Pace University Law Faculty Publications (2008), <https://digitalcommons.pace.edu/lawfaculty/1127/>.

<sup>7</sup> Guest Post, Caste Based Reservation Is Good or Bad? ipleaders (2016), <https://blog.ipleaders.in/caste-based-reservation/>.

<sup>8</sup> Vishnupriya Bhandaram, Busted: Four Myths on Caste-Based Reservation Policies, epw (2018), <https://www.epw.in/engage-interactives/busting-myths-on-caste-based-reservation-policies.html>.

<sup>9</sup> *B K Pavitra v Union of India*, 16 SCC 129 (SC: 2019)

<sup>10</sup> *Nalsa v. Union of India*, WP (Civil) No. 400 (SC: 2012)

in the parliament, suggests that formal equality lacks adequate representation<sup>11</sup>.

Backwardness to a class is a stratum not defined under constitution but is left on states to postulate the classes which are based on certain groups. These are the groups of society which may possibly be susceptible under any unfavourable condition, and its members are educationally and socially less privileged. Therefore, to meet these prejudices and fair representation, the Supreme Court prerequisites the government to accumulate quantifiable statistics representing backwardness based on perceived social and economic backgrounds of people constructed on class in the country, and inadequacy in the portrayal of these classes in public employment<sup>12</sup>.

### **3. Do affirmative actions a clench upon the opportunities of the general classes?**

One of the rising arguments against caste reservation is that rich people benefit from the reservations, where the general category is being deprived of the opportunities, portraying flaws.

The famously foregoing case, of *Indra Sawheny v. Union of India*<sup>13</sup>, recommended the government to introduce a 'Creamy layer'. This provided that such a provision would exclude the community members which are socially advanced in cases of OBC from the gains of reservation. This would cater that such an exclusion would serve the purpose more justly under article 16(4)<sup>14</sup> and no state government could grant reservations without exclusion of creamy layer. The income ceiling limit for such committees, of the socially and educationally backward communities (SEBc) increases every three years<sup>15</sup>.

The Supreme Court ruled in 2018 in a constitutional bench of *Jarnail Singh v. Lachhmi Narayan Gupta*<sup>16</sup> that creamy layer would be applicable to scheduled caste and scheduled tribes. Failing to remove, it would unjustly hamper the reserved jobs in the public sector, leaving rightful beneficiaries precluded. This outcome is highly challenged, and contrary to Indra Sawhney's discussion on creamy layer which was limited to OBCs (excluding STs; SCs) and treated the judgement as a larger equality

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<sup>11</sup> Jeba Mondal, Reservation fulfil demand of substantive equality under Article 16(1) of Constitution; states duty-bound to offer it to disadvantaged groups, Firstpost (2020, 15:38), <https://www.firstpost.com/india/reservation-fulfil-demand-of-substantive-equality-under-article-161-of-constitution-states-duty-bound-to-offer-it-to-disadvantaged-groups-8044911.html>

<sup>12</sup> The Financial Express, What backwardness? Not all SC/ST are historically backward, Financialexpress (2018, 4:26:13), <https://www.financialexpress.com/opinion/what-backwardness-not-all-sc-st-are-historically-backward/1273036/>

<sup>13</sup> *Indra Sawheny v. Union of India*, AIR 1993 SC 477, Supp 2 SCR 454 (SC: 1992)

<sup>14</sup> The Indian Const. Art.16(4),

<sup>15</sup> Rahul Shrivastava, Centre considering proposal to revise income criteria for determining creamy layer among OBCs, India Today (2021, 7:06), <https://www.indiatoday.in/india/story/centre-considering-proposal-to-revise-income-criteria-for-determining-creamy-layer-among-obcs-1765327-2021-02-03>.

<sup>16</sup> *Jarnail Singh v. Lachhmi Narayan Gupta*, (4) PLJR 108 (SC: 2014).

principle. It was contended that this judgement did not account for substantive equality and equated SC/ST communities' backwardness with that of OBC which could not be equated with economic remedies <sup>17</sup>.

Upper class, often in the sight of privilege, believes that their opportunities are being snatched away, in situations of higher education and public jobs. This privilege, of a being of a general category, aids them to convert their "caste capital" and function as caste does not affect their lives <sup>18</sup>. In 1963, the court in *M.R Balaji V. State of Mysore*<sup>19</sup>, affirmed that the reservations could not exceed 50 % of the total available seats. Recently many affidavits have been filed by the states, to remove the cap, to accommodate the classes which fall under article 16(4). According to the census of India, the general category encompasses about 25% of the total population, and the cap seems to be a just accommodation to uphold substantive equality in right to equal opportunities to both the general caste, and the reserved sections.

#### **4. Do reservations contradict the provisions laid under the Constitution, which aims an egalitarian society?**

Another argued altercation is that reservations contradict the provisions of the Indian Constitution mainly the article 14 <sup>20</sup> and article 16(1)<sup>21</sup> of the Indian Constitution. Indra Sawhney, repeated the view expressed in *N.M Thomas* <sup>22</sup>, that article 16(4), is an expectation to equal opportunities in matters of employment to article 16(1), and hence an exception to formal equality. Indra Sawhney ruled that, rather, article 16(4) is an extension to the above provision, and a mere re-statement. Article 16(4) strengthens the provision of 16(1), by accommodating reasonable arrangements in the form of reservation of seats. It was also enumerated that without even article 16(4), there would be other separate classifications for the backwards classes which would extend from the very provision of right to equal opportunities. This provision, hence, merely adds to the same cause and opened the principle of substantive equality, transforming the understanding of equality in India. This provision when read as an addition to article 16(1), any individual disadvantaged due to their group affiliation has a right to approach the judiciary <sup>23</sup>.

Incidents occur in supreme court, which prove to be controversial, arguably is due to lack of representation of the communities in the judicial positions. In March 2020, *Mukesh Kumar vs State of Uttarakhand* <sup>24</sup> preceded that the state government is not bound to make reservations,

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<sup>17</sup> Anurag Bhaskar, There are glaring flaws in SC judgment excluding SC/ST creamy layer from reservations, ThePrint (2019, 10:56), <https://theprint.in/opinion/ glaring-flaws-in-sc-judgment-excluding-sc-st-creamy-layer-from-reservation/331183/>.

<sup>18</sup> Supra 8

<sup>19</sup> *M.R Balaji V. State of Mysore*, AIR 1963 SC 649 (SC: 1963)

<sup>20</sup> The Indian Const. art. 14

<sup>21</sup> The Indian Const. art. 16(1)

<sup>22</sup> *State of Kerala & Anr vs N. M. Thomas & Ors.*, INSC 224 (1975)

<sup>23</sup> Gautam Bhatia, *Indian Constitutional Law and Philosophy*, IndconLaw Phil (2019), <https://indconlawphil.wordpress.com/tag/substantive-equality/>

<sup>24</sup> *Mukesh Kumar vs State of Uttarakhand*, WP 1129 (HC:2017)

where individuals cannot claim for reservation under promotions, as it is not a fundamental right. Further, it was noted that inadequacy is a subjective interpretation of the state, and if deemed fit, no data collection would be needed to provide for such reservations. Additionally, the judiciary is mainly comprised of upper casts with a lone Dalit representation <sup>25</sup>.

## **5. Promotions in Government Sector: An Addition or an Exception to Art.16**

India breaths a caste-based aura fused with an unfree economic order, continuing from many years. Augmented economic efficiency and its optimal development could potentially be achieved by imparting prerogatives like right to freedom of occupation and educational opportunities <sup>26</sup>. The caste constructed society affected the circulation of capital under its spectrum, owing to restrictions posed on people's occupations, skills and education. In light of differentiation placed in social stratum, where certain work is considered as impure and polluted, reservations come in place which narrow down these bigotries and help eliminate imperfections and raise economic growth through affirmative action policies. Reservations further enhances quality of work among marginalized, for they attain their deserved representation and decision-making <sup>27</sup>.

A fierce argument between the supreme court and the parliament surrounds the issues of efficiency and equivocal right to opportunity. The Indira case failed to consider the question of reservation in promotion, where it reserved promotions for SCs and STs in the government sector. It reasoned that the promotions would express the rule of equal opportunity negatively and would oppose article 16(4).

A controversy of arguments commenced when in 1995, article 16(4A) <sup>28</sup> was introduced, as a 77th amendment of the constitution which allowed reservations in promotions if the state believes that SC/ST are not being represented in government positions. While in the 82nd, provision of consistent efficiency was added to such promotions. Various such amendments were introduced which were interpreted by the masses as an infringement on their rights and, such promotions would hamper the true efficiency of the state.

The supreme court in 2006 via *M. Nagaraj and others v. UOI and ors*, held that reservations in promotions cannot be held until the state

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<sup>25</sup> Sagar, [Uttarakhand scraps reservations in promotions, emboldened by biases of apex court, BJP and Congress](https://caravanmagazine.in/law/uttarakhand-scrap-reservations-in-promotions-emboldened-by-biases-of-apex-court-bjp-and-congress), Caravan Magazine (2020), <https://caravanmagazine.in/law/uttarakhand-scrap-reservations-in-promotions-supreme-court-bjp-congress>

<sup>26</sup> Supra 8

<sup>27</sup> Krishnadas Rajagopal, [why does government want Supreme Court to reconsider stand on SC/ST creamy layer?](https://www.thehindu.com/news/national/why-does-government-wants-supreme-court-to-reconsider-stand-on-scsst-creamy-layer/article61607778) The Hindu (2019), <https://www.thehindu.com/news/national/why-does-government-wants-supreme-court-to-reconsider-stand-on-scsst-creamy-layer/article61607778>

<sup>28</sup> The Indian Const., Art. 16(4A)

provides a reason for such a policy. There were three conditions which had to be fulfilled; first being backwardness, further struck down in *Jarnail Singh v. Lachhmi Narayan Gupta* <sup>29</sup>, citing that this criteria was unconstitutional as it defies the judgement of Indra Sawhney. Where, it explained the unnecessary in collection of such data in order to provide reservation. Second condition, being that the state had to gather data to prove the current backwardness status of the SC/ST; inadequate representation in government offices and lastly being vigilant of the administrative efficiency in the state due to such promotions. Which was further exp by an admission of a new definition of efficiency by Justice Chandrachud.

## 6. A Stereotypical and a Marginalized notion to Economic Efficiency

Overall economic competence and efficiency of the public sector is adversely impacted by affirmative action's such as reservations, as argued by the critics. They contend that to ensure and monitor the overall development, a merit-based approach is best suited, wherein the candidates are selected who are allegedly credible. Constitutional argument, against these claims centre around article 335 <sup>30</sup>.

In *BK Pavitra v. Union of India*<sup>31</sup>, while addressing the efficiency criteria, Justice Chandrachud, dissented the arguments against article 335 and added that efficiency should be defined in an inclusive Spector of diversity and plurality, where all the sections of the society are provided with equal representation in the spheres of governance. The constitution lacks the true sense of the phrase, efficiency in administration and in the public sphere. Article 335 cannot be interpreted on a prejudice that promotion of SC and ST, is not efficient and would reduce efficiency.

This highlights the deep-rooted stereotype in our conditional, which makes us question their efficiency. If we develop a notion of effectiveness, by ways of exclusion, we put forth a marginalized and stereotypical concept against the oppressed. Whilst, if we analyse effectiveness as an inclusion in equal access, we promote social justice and undo the injustices of the historical wrongs <sup>32</sup>.

In a 1985 case, *K C Vasanth Kumar v. State of Karnataka* <sup>33</sup>, Justice Reddy remarked that the privileged class, argues about a typical superior elitist proposition for efficiency, to demolish reservations. The ones who have 'presumed' their merit, believe that they perform better and are much more efficient than the ones who have been appointed to the reserved posts. Arguing that appointments must be based on a merit-based approach is skewed. There has been no report which gives evidence that

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<sup>29</sup> *Jarnail Singh v. Lachhmi Narayan Gupta*, (4) PLJR 108 (SC:2018)

<sup>30</sup> The Indian Consti, Art. 335

<sup>31</sup> *B K Pavitra v Union of India*, Ind. SC 16 SCC 129 (SC:2019)

<sup>32</sup> Faizan Mustafa, *Explained: 'Efficiency' and promotion quota*, Indian Express (2019), <https://indianexpress.com/article/explained/reservation-quota-sc-st-act-supreme-court-ews-5739305/>

<sup>33</sup> *K C Vasanth Kumar v. State of Karnataka*, AIR 1495, 1985 SCR Supl. (1) 352 (HC:1985)

reservations reduce efficiency and hamper meritorious processes. Rather, systems which neglect inequalities, and substantive equalities are in fact anti-merit.

### **7. Are reservations provided to economically weaker sections constitutional in nature”?**

With an effort to provide reservations in higher educational institutions and to facilitate public employment issues from an economic perspective, the Indian Parliament enacted the 103rd Amendment Act, 2019 in the constitution. The provisos of the act incorporated art. 15(6) and 16(6) under its amending ambitions and extended 10% reservation to the citizens belonging from the *Economic Weaker Section (EWS)* category.

The EWS category reservations was thus imparted without altering any existing ventures which are reserved for backward classes, including SCs, STs and OBCs.

The amendment was contested on the issue that the EWS reservation contradicts the basic doctrine of the constitution. Firstly, the reservation was solely based on the economic criteria, and no basis of determining backwardness was used. In *Indra Sawhney v. Union of India*, it was held that reservation solely on basis of the economic backwardness finds no historical justification. Without the determination of backwardness, caste a prominent structure of social standing in India alone cannot be a criterion. Secondly, the reservations exceeded the cap of 50% the total number of available seats.

The grounds of contention were struck down by the Supreme Court on the justification that 15(4), should be interpreted as a class, and not as castes of citizens. The court justified this as the amendment to add article 15(4), and the definition of the backwardness as elucidated in article 340(1) <sup>34</sup>. Thereby, economic backwardness as a criterion was missed from positioning in article 15(4).

As per the statistics specified by the Planning commission between 2004-2005; 2011-2012, reservations usher substantial development in its status, where more people from underprivileged society, ST, ST, OBC are deriving out of destitution, in comparison with the other class-sections of society and leading over and above the poverty line <sup>35</sup>. As a result, the administration was mandatorily required to organise and implement policies which uplifts economically weaker sections belonging to the general category.

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<sup>34</sup> Vibhu Tripathi, Dheeraj Awasthi & Isha Ahir, Constitutional validity of quotas for economically weaker section, Daily Guardian (2020), <https://thedailyguardian.com/constitutional-validity-of-quotas-for-economically-weaker-section/>

<sup>35</sup> Sanchita Makhija, Constitutional Validity of the 103rd Amendment, Indian Law Portal, (2020) [https://indianlawportal.co.in/constitutional-validity-of-the-103rd-amendment/#\\_ftn15](https://indianlawportal.co.in/constitutional-validity-of-the-103rd-amendment/#_ftn15)

## **8. Conclusion**

Developing Substantive Equality in forms of affirmative actions in a multidimensional format, caters for recognizing structural injustices, and exclusion diminishing experiences, by the disadvantaged groups. The vision of 'reservation' contemplated in the constitution seeks a secured environment of socio-economic justice to vulnerable sections, in an attempt to elevate them to the mainstream of the nation. Reservations certainly does not fix inequalities in caste, but undeniably are implied to alleviate some of the sufferings from long-lived caste oppression, resulting in scanty opportunities deployed for the underprivileged. Reservations additionally would avert the absolutism of caste supremacy in their repudiation to extend less privileged their rights. Such actions are effective aiming both the outcomes, and hence encounter opposition from the privileged sections of the society on grounds that either such provisions are unconstitutional and curb the economic development or that their opportunities are being clenched away.

# Environmental Impact Assessment and Public Participation for 'B2' Projects

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## ABSTRACT

*The process of granting Environmental Clearance to an industrial project is very vital as it allows for the assessment of the potential environmental impact an industrial project could have on a particular environment. The two very potent assessment tools that are employed in the granting of the Clearance are Environmental Impact Assessment and Public Hearing. Even though the Environmental Clearance is a mandatory requirement for almost all industrial projects, in effect, the modus operandi laid for the granting of the Clearance varies significantly across different categories of industrial projects, as laid down by the Government by issuing notifications from time to time. This parity causes certain categories of industrial projects to be exempted from Environmental Impact Assessment and Public Hearing. The notifications through which certain categories are exempted from these two tools are unconstitutional as they are marred by excessive delegation of legislative powers as well as infringement of people's right to the environment.*

**Keywords:** Rough Stone, Quarrying, Environmental Clearance, Environmental Protection, EIA

## 1. Introduction

In India, many of the industrial projects and other related projects<sup>1</sup> ('industrial projects') are mandatorily required to get prior "Environmental Clearance" ('EC') from the Union or the State government as the case may be. This EC as a scrutiny and approval mechanism is envisaged by the "Ministry of Environment, Forest and Climate Change" ('MoEFCC'), acting as an agency of the Central government, vide a plethora of notifications issued under the powers granted to it under the Environment Protection Act, 1986 ('EP Act') and the rules made under it, particularly the Environment Protection Rules, 1986 ('EP Rules'). The most significant one of the notifications issued by MoEFCC in this regard is the EIA Notification dated 14th September, 2006<sup>23</sup> ('the Notification'), issued vide powers granted<sup>4</sup> to it under the EP Rules.

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<sup>1</sup> The term industrial projects shall include every project enlisted in the Schedule I of the 2006 EIA Notification.

<sup>2</sup> "Ministry Of Environment And Forests, 14th September, 2006 Notification S.O. 1533(E)"

<sup>3</sup> Here the 2006 EIA Notification means and includes the original 2006 EIA Notification and all the other notifications issued as a clarification, amendment or other such related document.

<sup>4</sup> The EP Act, by verbatim, confers the powers upon the Central Government. The MoEFCC

One crucial thing to acknowledge with regard to this Notification<sup>5</sup> is that it is very substantive in nature. It is this Notification which lays out the substantive policy of the government with regard to the matter of grant of EC and thereby determines vis-a-vis undermines the rights of the public<sup>6</sup> and the liabilities of the proponents of the industry.

## 2. The Modus Operandi

The Notification incorporates the principles of EIA and Public Participation as integral parts of EC, in general. The four stages in sequential order envisaged by this Notification for EC are as follows<sup>7</sup>:

- Stage (1) Screening<sup>8</sup>
- Stage (2) Scoping
- Stage (3) Public Consultation
- Stage (4) Appraisal

The first stage is relevant for the projects that come under the 'B' category in order to ascertain whether those projects would go into 'B1' or 'B2' category. This stage is irrelevant for the 'A' category. The second stage lays the foundation for the carrying out of EIA under which the project proponent<sup>9</sup> first submits certain information according to Appendix I or II of the Notification, preferably along with Term of References ('ToR'). ToR are usually the integral aspects of the industrial project which must be delved upon while carrying out the EIA. After the submission of information as required above, the 'Central Expert Appraisal Committee' (CEAC) or the 'State Expert Appraisal Committee' (SEAC)<sup>10</sup>, as the case may be, issues formal ToR to the proponent in order to allow the proponent to carry out EIA. The third stage consists of what is known as 'Public Consultation' which is defined by the Notification as "...the process by which the concerns of local affected persons and others who have plausible

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as the instrumentality of the Central Government exercises these powers.

<sup>5</sup> The Notifications that the MoEFCC issues are generally very ambiguous and controversial in nature thereby requires a number of successive Notifications, Office Memorandums and other such documents to actually put forth in clarity the procedure laid by the Original Notification.

<sup>6</sup> Clause 6 of Article 2 of Aarhus Convention define "The public concerned" means the "public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

<sup>7</sup> Sub paragraph (i) of paragraph 7 of 2006 EIA Notification

<sup>8</sup> Only for B projects in order to ascertain whether that project would go to B1 or B2.

<sup>9</sup> Public Consultation is defined by the 2006 EIA Notification as a "process by which the concerns of local affected persons and others, who have plausible stake in the environmental impact of the project, are ascertained with a view to appropriately take into account all such material concerns while designing the project"

<sup>10</sup> The Expert Appraisal Committee scrutinises 'A' projects while the State Level Expert Appraisal Committee scrutinises 'B' projects. EAC submits its report to the MoEFCC for the purpose of grant or denial of EC while the SEAC submits its report to the SEIAA for the grant or denial of EC.

stake in the environmental impacts of the project or activity are ascertained with a view to taking into account all the material concerns in the project or activity design as appropriate.”<sup>11</sup> This public hearing includes basically two components: “(a) a public hearing at the site or in its close proximity- district wise, to be carried out in the manner prescribed in Appendix IV of the Notification, for ascertaining concerns of local affected persons; (b) obtain responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project or activity”<sup>12</sup>. The conduct of this public hearing is taken care off by the Central or State Pollution Control Board<sup>13</sup>. In the fourth and the last stage, the Central or the State appraisal authority scrutinises the EIA report submitted by the project proponents after due study of the ToR as well as the concerns that arose out of the ‘Public Consultation’. Upon this submission of a report by the EAC or SEAC, the MoEFCC or SEIAA as the case may be, grants or denies EC to the project proponent.

### **3. The Exclusion Vis-A-Vis Denial**

The paragraph 7 of the Notification as discussed above lays out the broad contours of the procedures to be followed for the grant of EC and thereby explicits the substantive policy of the government with regard to the conservation of environment in the light of the EC mechanism. EIA and Public Consultation are the two bulwarks that are put in place to protect the environment by this Notification. EIA and Public Consultation as two interdependent systems of scrutiny laid down in the notification explicits the rights of the people and the liabilities of the project proponents. But the actual ascertainment of these substantive rights of the public as well as the liabilities of the proponents by this Notification is subject to the classification of industrial projects made out in the Notification. One of the main basis of this classification is the “area of operation”<sup>14</sup> of the industries. Sub clause i of clause I of sub paragraph (ii) of paragraph 7 of the Notification read with sub clause i(e) of clause III of sub paragraph (ii) of paragraph 7 of the Notification excludes the project which are classified as ‘B2’ projects from the application of EIA and Public Consultation. The list of projects that come under ‘B2’ category are as given in the table below.

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<sup>11</sup> “Sub paragraph (i) of paragraph 7 of 2006 EIA Notification”

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> The Notification points that the rationale that is, the area of operation of the industries is directly proportional to the extent of impact a project could have on the environment and thus thereby puts in place tougher scrutiny for a large scale project i.e. A and B1 category projects whereas comparatively easier scrutiny for smaller projects. It is pertinent to note, as clearly evident from Schedule I of the Notification, that this gradation of scrutiny process has, in general, ignored the nature of the industrial projects.

List of projects with exclusionary thresholds in EIA 2006

Ref no.	Type of Project	Capacity/Criteria
1a	Mining	<5 Ha
1c	Hydroelectric power plants	<25 MW
1d	Thermal power plants	
	Pet coke diesel and other fuels	<5 MW
3a	Non-toxic secondary metallurgical processing	<5000 ton/annum
4b	Coke oven plants	<25000 ton/annum
4d	Chlor-alkali (membrane tech)	inside industrial estates
4f	Leather/hide/skin processing	inside industrial estates
5e	Petrochemical based processing	inside industrial estates
5f	Synthetic organic chemicals	inside industrial estates
5j	Sugar industry	<5000 ton/day cane crushing capacity
7c	Industrial estates/EPZ/SEZ/Biotech parks/leather complexes	<500 Ha and not having any category A or B industry
7e	Ports & harbours	<10000 ton/annum of fish handling
7f	Highways	expansion for < 30 km
8a	Building & construction projects	<20000 sq.m.
8b	Townships and area development projects	<50 Ha & <150000 sqm

Thus the Notification envisages a policy for the conservation of the environment by enshrining two substantive rights of people namely EIA and Public Consultation but at the same time it envisages a policy for the denial of those rights to the people for a class of projects.

#### 4. Excessive Delegation of Legislative Powers

The MoEFCC determining vis-a-vis undermining these substantive rights of people through its policy laid down through this notification is legally untenable. This is because the ruling making provision of the EP Act under which the MoEFCC has issued this notification i.e. sub-section (1) and clause (v) of sub-section (2) of section 3 excessively delegates legislative powers upon the delegatee i.e. the MoEFCC<sup>15</sup> and is thereby ultra vires of the parliament.

The law guiding the delegation of legislative powers upon the executive is well settled. The Supreme Court seven judge bench in the case of *In Re The Delhi Laws Act, 1912*<sup>16</sup> ('In Re Delhi Act') held that "The legislature cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature."<sup>17</sup> Further the court emphasised that there are two main checks to determine the vires of the legislation delegating legislative powers i.e. "good sense"

<sup>15</sup> An agency of the Central Government.

<sup>16</sup> 1951 AIR 332; 1951 SCR 747

<sup>17</sup> The Judgement penned by Justice Fazil Ali, one of the judges in the majority side in the In Re Delhi Act case.

and the principle that the delegation should not cross the line beyond which delegation amounts to "abdication and self-effacement". Further in the case of *Gwalior Rayon Silk vs The Asstt. Commissioner Of Sales*<sup>18</sup>, the court acknowledged and analysed a number of significant judgements given by the Supreme Court with regard to the present matter including the *In Re Delhi Act* case and observed that ".....view taken by this Court in a long chain of authorities is that the legislature in conferring power upon another authority to make subordinate or ancillary legislation must lay down policy, principle or standard for the guidance of the authority concerned."

In the Rayon Silk case the court further held that "the principle which has been well established is that the legislature must lay down the guidelines, principles or policy for the authority to whom power to make subordinate legislation is entrusted. The correct position of law thus is that an "unlimited right of delegation is not inherent in the legislative power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used in ancillary measure which the legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislatures must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law.....".

An analysis of the two provisions of the EP Act which empowers the MoEFCC to issue this notification shows how blatantly the excessive legislative power is conferred upon the MoEFCC<sup>19</sup>.

**"3. POWER OF CENTRAL GOVERNMENT TO TAKE MEASURES TO PROTECT AND IMPROVE ENVIRONMENT.-**

(1) Subject to the provisions of this Act, the Central Government, shall have the power to take 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."

"3(ii)(v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards"

Further, no provision of the act or for that purpose, no part of the Act lays any guidelines, principles or policy so as to guide the authority to

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<sup>18</sup> "Gwalior Rayon Silk Mfg. (Wvg.) Co. vs The Asstt. Commissioner Of Sales 1974 AIR 1660"

<sup>19</sup> The researcher vehemently argues for a comprehensive reworking of the EP Act and if possible framing of special substantive legislation for every environmental concern instead of making a vague Substantive legislative and using it as an umbrella legislation to put in place laws governing a plethora of environmental matters. But the researcher for the purpose of this assignment has focused only on the provisions under which the 2006 EIA Notification is issued.

whom power to make subordinate legislation is entrusted. Focusing on clause (v) of sub section (ii) of section 3 of the EP Act, it uses the phrase “subject to certain safeguards” but is not an iota of instructions that has been laid whatsoever to guide the framing of these “certain safeguards”. Subsection 1 of section 3 of the EP Act is simply alarming, particularly the phrases: “all such measures” and “as it deems necessary or expedient”. There is no assistance from even the definition clauses given the EP Act.

Even though it is not integral in testing the vires of the legislation, researcher vehemently argues that there is no document whatsoever which could even remotely used to expound upon the EC modus operandi envisaged by the MoEFCC through the Notification, especially the exclusionary policy as discussed earlier. One significant document concerning this subject matter which was released before the notification of this Notification i.e. The National Environment Policy, 2006 doesn't even connect remotely to the EC policy envisaged by the Notification, especially the exclusionary policy. An analysis of various official documents issued by the Government in pursuance to various obligations, national vis-a-vis international bestows a picture in contravention to the policy envisaged by the Notification. The National Biodiversity Action Plan, 2008 paragraph 84 to 90 is contradicted by the exclusionary principle envisaged by the Notification. Further the target 11 of the “12 National Biodiversity Targets” developed in pursuance to the Global Strategic Plan for Biodiversity 2011-2020 adopted under the aegis of CBD in 2010 is also contracted by this exclusionary policy of the Notification.

Further there has been an instance when the manifestly excessive delegation of legislative powers by the two provisions of the EP Act got demonstrated. In the case of *Society for Protection of Environment & Biodiversity vs Union of India*<sup>20</sup> it came up for scrutiny albeit incidentally. In this case the National Green Tribunal (‘NGT’), Principal Bench, presided by Justice Swatanter Kumar stayed the operation of a Notification<sup>21</sup> issued by MoEFCC which exempted real-estate projects upto 1,50,000 sq.m built up area from the need for undergoing environmental impact assessment (‘EIA’) and obtaining Environmental Clearance from MoEF/ State Level Environment Impact Assessment Authorities (‘SEIAA’). The court further quashed the provision of the notification which exempted the operation of the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 for Building and Construction projects upto 150,000 Sq Mts.

In this case, a Notification was challenged by a group of petitioners on various grounds including the reason for the exemption was ‘ease of doing responsible business’ and the same cannot be a ground for exempting the application of environmental law. Most significantly, all the exemptions

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<sup>20</sup> Original Application No. 677 Of 2016 (m.a. No. 148/2017), The National Green Tribunal Principal Bench New Delhi

<sup>21</sup> S.o. 3999(e) Dated 9th December, 2016 Issued By The Ministry Of Environment, Forest And Climate Change, New Delhi

were ironically done by stating that the exclusion of the application of environmental law was essential in order to improve the quality of the environment.

The court while staying the operation of the impugned notification observed that “While exercising powers under a subordinate legislation in furtherance to Section 3 and Rule 5, the authority cannot in exercise of its subordinate legislation exclude the operation of a substantive law that is Water Act, 1974 and Air Act, 1981 enacted by the Parliament. This would suffer from the vices of excessive legislation. It is strange that the MoEF&CC, a delegate under the said provision could venture upon excluding the application and enforcing of a Parliament Act without even making any amendment under that act or the rules framed under that act. This action of the MoEF&CC cannot stand the scrutiny of law.”

The notification that was challenged in this case was issued by the MoEFCC under sub-section (1) and clause (v) of sub-section (2) of section 3 of the EP Act. This notification was issued by the MoEFCC in order to make an amendment in the 2006 EIA Notification so as to exclude a class of projects from the effective application of the EC regime envisaged under the Notification. One interesting thing to note here is that the MoEFCC cited ‘providing Housing to the poor’ and ‘ease of doing responsible business’ as two rationale for excluding the class of project from the ambit of EC. Thus this explains the kind of ‘take it for granted’ approach taken by the MoEFCC and how the two provisions of the EP Act empowered the happening of such unriddled exercise of legislative powers by a delegatee authority.

Thus clearly, the two provisions of the EP Act are ultra vires of the parliament and hence the Notification issued by the MoEFCC under is ipso facto null and void.

## **5. Environmental Rights of People**

The Supreme Court in *Subhash Kumar v. State of Bihar*<sup>22</sup> held that Article 21 includes the right to a wholesome environment. The court here followed an expansive interpretation of the word “life” in Article 21 by including environmental protection in Right to Life. This position was again reaffirmed in *Virender Gaur v. State of Haryana*<sup>23</sup> where it was held that enjoyment of life and the right to live with dignity includes the protection and preservation of the environment and without it, life could not be enjoyed. Further in the case of *M.C. Mehta vs Union of India*<sup>24</sup>, the court held that Article 39(e), 47 and 48A collectively cast a duty on the State to secure public health and environment protection. Thus by studying the above cases one could conclude that Healthy Environment is a fundamental right of people and the state has an inherent duty to protect it.

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<sup>22</sup> 1991 AIR 420; 1991 SCR (1) 5

<sup>23</sup> (1994) SCC 577

<sup>24</sup> (1997) 2 SCC 653

Further in the realms of the International Law arena there are certain documents that India has subscribed to, which would be worthy of a mention here.

Proclamation 1 of the Stockholm Declaration quite emphatically affirms the right to the environment as a basic human right.

Principle 10 of the Rio Declaration affirms quite categorically that environmental issues are best handled with participation of all the concerned citizens.

Principle 17 of the Rio Declaration affirms the importance of EIA as an instrument to ascertain the significant impact of industrial projects.

Principle 22 of the Rio Declaration expounds on the importance of acknowledging the vital role played by the stakeholders (local communities) of the environment in environmental management and affirms the need to recognise their rights.

Target 18 of 'The Aichi Targets' calls for respecting the traditional knowledge of the indigenous and local communities in preserving the environment and allowing full and effective participation of them, at all relevant levels."<sup>25</sup><sup>26</sup><sup>27</sup>

From the above sources, the place of Right to Environmental Protection under the realms of the Constitution of India could be ascertained and further the substantive vis-à-vis procedural rights that needs to be adhered to in the light of the obligation casted upon by the International Law can also be ascertained.

## **6. Re-Legislating the EP Act in Accordance with the and in due Acknowledgment of the Environmental Rights of People**

The current act envisaged to lay down the substantive and procedural rights having been found inappropriate, it requires to be replaced or atleast amended so as to accommodate and consolidate the various substantive as well as procedural rights discussed above. The present gaps in the EP Act, especially those discussed above could be effectively addressed through the Bali Guidelines. The Bali Guidelines formally known as

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<sup>25</sup> "The Aichi Biodiversity targets were included in the Strategic Plan for Biodiversity for the 2011-2020 period adopted by the 10th meeting of the Conference of the Parties of the Convention on Biological Diversity. The world including India was supposed to meet these targets by 2020. But unfortunately no country including India were able to meet these targets on time refer Ishan Kukreti, World hasn't met a single Aichi biodiversity target" Leaked UN Report Down To Earth (2020), <https://www.downtoearth.org.in/news/wildlife-biodiversity/world-hasn-t-met-a-single-aichi-biodiversity-target-leaked-un-report-73314> (last visited May 2, 2021).

<sup>26</sup> Strategic Plan For Biodiversity 2011-2020 And The Aichi Targets "Living In Harmony With Nature". Target No 18 Comes Under The Heading: "Strategic Goal E: Enhance Implementation Through Participatory Planning, Knowledge Management And Capacity Building"

<sup>27</sup> This Aichi Target is comparable to the 12<sup>th</sup> Biodiversity Target *referred* Addendum 2014 To National Biodiversity Action Plan (NBAP) 2008, (Pg. No. 31 to 32) available at <https://www.cbd.int/doc/world/in/in-nbsap-v3-en.pdf> (last visited May 2, 2021)

“Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters” was unanimously adopted by Special Session of the UNEP Governing Council, Global Ministerial Environment Forum (GMEF) in Bali, Indonesia<sup>28</sup>. This guideline seeks to assist “countries in filling possible gaps in their respective relevant national legislation, and where relevant and appropriate in sub-national legal norms and regulations ensuring consistency at all levels to facilitate broad access to information, public participation and access to justice in environmental matters”.

## **7. Conclusion**

It is high time for India to amend its main legislation empowering it to construct its Environmental Protection regime. India must acknowledge the pitfalls of succumbing to short term economic outcomes and thus must commit to put in place a sound Environmental Protection regime with concrete emphasis on the substantive and procedural rights that it is duty bound to put in place.

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<sup>28</sup> It was adopted in February 2010.

# Banker's Right to Lien Under Indian Contract Act, 1872

\*Ms. Diya Panchori

## ABSTRACT

Lien provides right to a person to retain his sum amount, therefore, provide right to sell goods or security to settle the amount. Bankers are provided with a general lien, where right are provided them under Section 171 of Indian Contract Act, 1872 to retain the sum amount from the security that is being bailed to them. The study focuses to find the banker's right to lien, banker's right to set-off, create a distinction between right to lien and right to set-off and to determine various circumstances where right to lien is not being provided to the banks. the study found that banks have been conferred with many rights, but there is certain situation where the banks cannot exercise their right to lien. Few suggestions have been made by author through which the rights of banks as well as customers can be strengthened.

**Keywords:** Right to Lien, Banker's Lien, Right to Set-Off, Bailed Goods.

## 1. Introduction

The term "lien" refers to the right of a person, typically an unpaid seller, to retain and withhold in his or her possession any type of commodities or securities belonging to another until particular legal debts owed to the person who is retaining the assets are settled<sup>1</sup>. The power or right to sell the goods or security is not something that is granted by a lien; rather, a lien grants the right to keep the commodities or security in question. This form of charge is distinct from others in that it is not based on an implied or explicit agreement; rather, it is derived from the dealings that take place between the parties.

The right to a lien is expressly recognized by both the Indian Contracts Act, 1872 and the Sale of Goods Act, 1930. There are two types of liens:

- ❖ Particular Lien; and
- ❖ General Lien<sup>2</sup>.

Particular Lien pertains to right to hold the property against the due payment and get released once the due payment is paid. General Lien is

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<sup>1</sup> Mondaq. *India: Banker's Right to Lien Under Section 171 Of Indian Contract Act*. February 21, 2022

<sup>2</sup> Ipleaders, *Critical analysis of the Importance of Lien and its kinds*. July 13, 2020

the right to own property, even if unrelated to the claim due, they may own assets of similar value to those owed payment. Therefore, it can pertain to any pending amount and the bailee (i.e., to whom possession is transferred temporarily) gets the authority to retain goods pertaining to any transaction which is unpaid. General Lien is applicable to Bankers, Factors, Wharfinger, Solicitor, etc.

When a banker is entrusted with the care of valuables such as gold ornaments and critical documents, he is said to be acting in the capacity of a bailee<sup>3</sup>. If this is the case, then he is obligated to return the same items whenever they are requested, which prevents him from making the most of his time with them. Therefore, a banker only functions as a bailee when he receives items for safe custody; he does not operate in this capacity when he gets money for deposit into an account. In *Chettinad Mercantile Bank Ltd. v/s P.L.A. Pichammai Achi*<sup>4</sup>, it was held that a banker has the right to keep possession of items delivered to him to the long periods as long as customer does not repay the amount he is indebted towards the bank, and therefore bank may hold the items and dispose of the amount is not being paid. The case laid that the bank may exercise his right until and unless he recovers the sum amount that is due to him by the customer.

Section 171 of Indian Contracts Act, 1872<sup>5</sup> mentions, "Bankers....may, in absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them". Bank Right to Lien includes all bills of exchange, checks and sums transferred or paid to him. Two of the partnership firms held two different accounts with the Bank which had the same set of partners in the case of ***Jaikishen Dass Jinda Ram v. Central Bank of India Ltd***<sup>6</sup>, where the Court determined that even though there are two independent firms involved, they are not two separate legal entities and cannot be "distinguished from the people who form them," so the bank was allowed to divert funds from one firm to pay off an overdraft of another firm. Unless the banker can demonstrate an agreement to exercise his right, all valuables deposited with him are subject to his lien. Thereby, the case restricted the right of bank to exercise his right when the account even though belong to same person but has been registered with two different firms, restricting it to be exercised directly.

## 2. Research Objectives

- ❖ To determine rights of bankers under right to lien
- ❖ To analyze right to set-off available to bankers
- ❖ To study the non-permissibility concerning right to lien

## 3. Limitations of the Paper

<sup>3</sup> Legal Service India, Bailment and Bank liability.

<sup>4</sup> *Chettinad Mercantile Bank Ltd. v/s P.L.A. Pichammai Achi*, (1945) 2 MLJ 100

<sup>5</sup> Section 171, Indian Contract Act, 1872

<sup>6</sup> *Jaikishen Dass Jinda Ram v. Central Bank of India Ltd*, AIR 1960 P H 1

The collection of data for this study was based on secondary data therefore, there may arise reliability issues. The study of this paper is limited to rights in bankers under right to lien and does not study rights of other such as factors, solicitor, etc. The study does not focus on the rights of customers against the bankers and this may act as limitation of the paper.

#### 4. Review of Literature

**E. Gordan & K. Natarajan (2016)**<sup>7</sup> in their book, “Banking: Theory, Law and Practice” emphasised in the relationship between Customer and Banks. Authors while talking about banker’s lien in their book considered it to be “special feature”, where bankers can exercise his right on goods and securities entrusted to the bank and established as “right to retain the goods as security”. The authors discussed various circumstances where banks can exercise their right to lien as qua banker (i.e., in capacity as banker) such as no existence of any other agreement inconsistent with right to lien, possession to be lawful and entrusted property not for any specific purpose.

**Amit Chaturvedi (2022)**<sup>8</sup> in his article “Understanding banker’s right to lien and set off” establishes right to lien available to banker, as an instrument to make use of it in the event that the borrower makes any kind of default. However, in order to exercise this legally granted authority, a bank must first determine the justification behind their actions. They have a responsibility to make sure that the only amount that is authorized to be recouped from the borrower's asset is the correct one, and that they do so in accordance with Sections 170 and 171 of the Indian Contract Act, which was passed in 1872. When there is an express contract, a banker ought not to carry out the lien.

**Reserve Bank of India**<sup>9</sup> talks about even if the debt has passed the statute of limitations, a bank is able to assert its lien rights. Even after the statute of limitations has passed, a customer has the right to commence legal action against a banker for the non-release of assets they have purchased. This is due to the fact that the banker holds any goods that are a security deposit from a customer in the capacity of a trustee.

**Khushboo Asrani (2021)**<sup>10</sup> in “Banker’s Right to Lien & Set-Off” where General Lien is a better debt-securing tool. It has restrictions and hazards, especially regarding liability. If a general operator wants to execute a lien and resolves to see it through commercial talks, it may be tough. Despite hazards, liens continue to help and support operators. A well-written Lien provision can help operators. In Lien world wide’s terminals, the group and subsidiary of a company, debt and liabilities range from traditional terminal services.

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<sup>7</sup> E. Gordan & K. Natarajan, *Banking: Theory, Law and Practice* 27 (25<sup>th</sup> ed. 2016)

<sup>8</sup> Ipleaders, understanding banker’s right to lien and set off, August 25, 2022

<sup>9</sup> Reserve Bank of India, [rbi.org.in](http://rbi.org.in)

<sup>10</sup> Law Insider, *Banker’s Right to Lien & Set Off*, February 8, 2021

## 5. Banker's Right to Lien under General Lien

In the event that the customer defaults, it gives him the authority to sell the products and securities. Such a right of lien is commonly referred to as an "implied pledge" because it resembles a pledge<sup>11</sup>. Therefore, the banker gets the benefits of a pledge and may sell the securities after properly notifying the consumer. This privilege is also accessible for general balance on bailed items.

The bank may utilize the revenues of such collection, barring specific instructions to the contrary, to lower the customer's debit balance. Apart from any specific collateral, the banker's lien serves as insurance against losses on loans, overdrafts, and other credit facilities."

Banker's Right to Lien is as mention a, "Implied Pledged", where banker has right to sell all the securities and assets after notifying the bailor. The banker has right to lien when:

- ❖ Securities or Assets is in the possession of banker
- ❖ The bailed security is not for any particular purpose
- ❖ The possession of the security is lawfully obtained
- ❖ There is no other contract contrary to lien<sup>12</sup>

The banker can only exercise its "Right to Lien", over the goods pledged, to recover the dues and sell the goods to reimburse for dues.

In the absence of a contract, the banker has a broad lien on any items and securities entrusted to him. He cannot utilise his general lien right if:

- a) He has been handed the goods and securities as the customer's trustee or agent.; and
- b) the customer and banker have entered into an express or implied contract that contradicts with his general lien right.

Therefore, banker cannot claim assets or securities, which are entrusted for specific purpose.

In the case of *Davendra Kumar v. Chaudhary Gulab Singh*<sup>13</sup>, the Nagpur High Court declared that when valuables and securities are deposited for a specific reason, like safekeeping, the banker does not have a general lien on them. This is because accepting the goods for a specific reason means that the general lien is not enforceable.

## 6. Right to Set-Off Exercised by Bankers

The right of set-off allows a debtor to examine the whole amount owed

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<sup>11</sup> Supra (n 3)

<sup>12</sup> JAIB KAIIB, Banker's Rights- Right to Lien

<sup>13</sup> Davendra Kumar v. Chaudhary Gulab Singh, AIR 1943 R J 542

to him by a creditor before the creditor can attempt to collect the debt. In other words, the debtor is only liable for the balance due once the claims of both the debtor and the creditor have been consolidated. A banker has the same right to set off as other debtors, which enables him to merge two accounts under one customer's name and balance the credit and debit amounts in each account. For a Right to Set-Off to be exercised there are certain essentials or conditions:

- ❖ The transfer of amount must be from the customer account or prima facie belong to the customer
- ❖ The account of credit and debt should be held by the same bank
- ❖ The customer must be holder of account in the same capacity
- ❖ The debt must be due to the bank<sup>14</sup>

For instance, if A has a \$7,000 bank overdraft and a \$3,000 credit amount in his savings account, the banker can merge the two accounts and just ask for the remaining \$5,000 in payment. If there is no explicit agreement to the contrary, the banker may use this right of set-off after giving notice on the client notifying them.

The right to set-off may be only exercised in the absence of a contrary agreement. When there is a stated or implied agreement that conflicts with the right of setoff, the banker cannot use it. The general lien will not apply if the consumer and the banker have an express contract establishing a security lien.

In another case of *Radha Raman Choudhary & Others v. Chota Nagpur Banking Association Ltd*<sup>15</sup>, “the plaintiff's father possessed a fixed deposit and four hand notes in favour of the bank. Plaintiff's father died, and the bank transferred the fixed deposit account to the plaintiff in exchange for his debts. The bank adjusted the plaintiffs' fixed deposit against the hand note dues. Plaintiffs sued the bank for the altered deposit amount. The high court distinguished between a lien and setoff. Bank can't combine a customer's personal and joint accounts”.

#### Advantages from Set-off to Banks

- It is beneficial on the conditions where customer/ debtor might be at a risk of defaulting
- Provides legal access to debtor's funds

### 7. Distinction Between Lien and Set-Off

- The Right to Lien is concerned with the rights of the creditor, who holds the securities or assets of debtor therefore, to retain them

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<sup>14</sup> Supra (n 7)

<sup>15</sup> *Radha Raman Choudhary & Others v. Chota Nagpur Banking Association Ltd*, AIR 1944 Pat. 368

until the debt is cleared by the debtor. Whereas, set-off is a cross claim for the liquidated sum amount which is mutual claims or debit and credit.

- For Right to lien to be claimed by Banker, the creditor (i.e., Banker) should have possession of securities or assets of the debtor. Whereas, for set-off to be exercised the claim amount that is due from the same parties under same rights.
- Lien is an indirect charge on the security or assets in possession of the banks, whereas, in the case of set-off the sum amount can be claimed and right arises automatically after the death or insolvency
- Right of lien is an implied right available to the bankers and to exercise the rights to set off, notifying the customer is essential.
- As long as the money is designated for a certain purpose, the banker's right of lien might be attached to it. Because it is no longer considered a distinct sum for a specific purpose, the bank does not have the right to deduct it from the total.
- It is important to note that a banker's lien and the bank's right to set-off are not the same thing. A lien can only be placed on securities and property that are currently held by the bank. The concept of set-off pertains to monetary matters and can result from the operation of the law, the terms of a contract, or the customary practices of the marketplace.

### **8. When Right to Lien will not be Permissible to Bankers**

As previously stated, even in the absence of any contract that would conflict with such a right, a banker is permitted to exercise his right of lien on the goods that have been entrusted to him in his capacity as a banker<sup>16</sup>. Due to this, the following instances in which the right of lien cannot be used are provided:

- a. **Deposits for safekeeping:** When a client gives his valuables to a banker for safekeeping, such as securities, decorations, or documents, for example, the client is acting as a bailee or trustee toward the banker and giving the banker the charge of guarding the client's possessions from theft, fire, or other dangers. There is a presumption that there is a contract that conflicts with the lien right.

For a instance, if a customer instructs a banker to sell some shares at or above a specified price, and those shares do not sell, the banker will not be allowed to exercise his right of lien on those same

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<sup>16</sup> TaxDose, Exceptions to the Right of General Lien

shares because they were supplied to him for a specific purpose, creating an incompatible contract.

- b. **When there is an Implied contract not relevant with Lien:** The general lien right changes to the particular lien right. Circumstances that demonstrate an express agreement at odds with the right of general lien nullify the banker's right.

In the case of **Vijay Kumar v. M/s. Jullundur Body Builders, Delhi & Ors**<sup>17</sup>, “on behalf of its client, Syndicate Bank granted a bank guarantee of Rs. 90,000. The client deposited two duly discharged fixed deposit receipts with the bank as security, along with a letter saying the deposits would stay there as long as the bank was still owed money. This claim was dismissed because the reverse of the letter merely created a claim on the bank guarantee. The Court ruled that the customer's letter was on a standard printed form and that the lines written on the deposit receipt were straightforward and precise. They reveal what the parties were thinking. Written word overcomes printed word. The banker's right was not a general lien.”

- c. **Credit and Debit should be held by same person:** Credit and liability should be considered same. For instance, if a person has a current account or a deposit account and there is a debt due from a company, then the right to lien is not relevant because credit and liability do not exist in the same rights. In this scenario, the bank would not be liable for the debt due from the company.
- d. **Securities left negligently:** Securities that were negligently deposited with the banker. The banker does not have the legal power to place a lien on the customer's possessions or documents if they are left in his custody by accident or because of negligence.
- e. **No Right to Lien on Money:** The banker has a right of set-off, but the money that was deposited is not subject to a lien on their behalf. The power of lien that a banker possesses extends to movable property and securities that are delivered to him. The money that is deposited in a bank and the credit balance that is carried over from one day to the next do not meet the criteria for goods or securities.
- f. **If limitation period is pre-decided**<sup>18</sup>: Even if the debt has passed the statute of limitations, a bank is able to assert its lien rights. Even after the statute of limitations has passed, a customer has the right to commence legal action against a banker for the non-release of assets they have purchased. This is due to the fact that the banker holds any goods that are a security deposit from a customer in the capacity of a trustee. The security deposit is not

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<sup>17</sup> Vijay Kumar v. M/s. Jullundur Body Builders, Delhi & Ors, ILR 1981 Delhi 516

<sup>18</sup> Supra (n 8)

intended to be transferred to the banker, nor can the banker acquire any title to the security deposit outside of the context of legal proceedings.

## **9. Suggestions**

- In certain cases, where right to lien is non-permissible becomes concern for the banks. The regulations should be much more simplified for banks to cope up with their non-performing assets (NPAs).
- There is existence of limitation period, which act are hinderance for banks to claim their right. There should be introduction of sub-clause, where exceptional clauses should be introduced to incentivize banker's rights.
- The provision where bankers can only claim asset of security, if it is being held in the same banks. There should be introduction of laws, which fill the gap therefore, providing rights to banks to settle their claims.
- The customers right to save their property, security or assets are not protected by law as much as the rights of bankers are protected. As to, in some cases extending the time to pay the loan to save their security.
- The right to lien on money is not available to bankers, even though with the rights to set-off can be exercised, the bank may not be able to claim the whole debt as the credit value may not always be equal to debit value.

## **10. Conclusion**

When it comes to securing an outstanding debt, the General Lien is a significantly more effective and efficient tool. However, it is subject to the limitations and hazards that are inherent to itself, in particular with regard to the possibility of legal liability that arises out of it. If there are mutual demands between the bank and the customer or when customer fails to pay its due amount to the bank—that is when the bank is able to enforce its lien. If the borrower falls behind in payments, the banker can use their "Right to Lien," a legal claim against the borrower's property. To use its legal authority, a bank must first justify its actions. They must verify that the right amount is recouped from the borrower's asset in accordance with Sections of the act which has been emphasized in various judgements. They must follow the Indian Contract Act. A banker shouldn't execute a lien when there's an express contract.

# Mob Lynching, Hate Speech and Vigilantism in India

\*Ms. Simran Walia

## ABSTRACT

In the last years, the incidents of mob lynching have surged in India in which primary targets are minority communities including Muslims and Dalits. The essay will analyse the usual pattern of crime noticed in the events of group lynching by studying the distinctive facts of various cases like the Alwar, Nowhatta and Jharkhand mob lynching case; and also as to how important a codified legislation has become in order to protect the minority communities from such violence. A significant contribution in escalating these crimes has also been done by various social media and messaging platforms, like facebook and whatsapp, by tactically spreading hate speech and misinformation against the minority communities.

**Keywords:** Mob lynching, Vigilantism, misinformation, hate speech, social media.

## 1. Introduction

'Mob Lynching', a form of violence, is generally defined as when a group, under the pretext of delivering justice, kills the assumed lawbreaker after tormenting him and causing him mental and physical mutilation whereas 'Vigilantism' is defined as when a group of people takes law in their hand without any legal authority. The incidents of mob lynching, like the Dadri case, the Alwar case, and the Dhule lynching case, have become very frequent in India. In most cases, the mob lynching was done on the pretext that the killed person had either consumed beef or had slaughtered a cow and in most cases, these incidents were an outcome of hurt religious sentiments. Although on the face of it, these incidents may seem like unprompted events, it was found after research and investigation that some of these crimes were pre-planned to influence and dominate the other community.<sup>1</sup>

The perpetrators have made wide and strategic use of social media websites by sharing sensitive photographs and videos with thousands of people within a short period. These photographs and videos invoke a feeling of abhor and suspicion against the minority community of the country. The spread of misinformation through social media websites is a problem that is faced by all the countries of the world, but in India,

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<sup>1</sup> Ishan Gupta, *Mob Violence and Vigilantism in India*, World Affairs: The Journal of International Issues, Vol. 23, No. 4, October – December 2019, pp. 152-172.

where millions of Whatsapp and Facebook users are present, the situation becomes alarming. Some people like the vigilantes from the religious or political groups might not appear to be the actual offenders of the crime but behind the curtains, these people occasionally act as a provocative force.

These matters of inciting public mischief are dealt according to the provision mentioned in Section 505<sup>2</sup> of the IPC (Indian Penal Code). While those individuals who are directly involved in the lynching incidents are tried under the law, those who act as provocative forces behind these mob lynching incidents are not always tried in the court of law.

The Supreme Court in *Tehseen Poonawala v. Union of India & Others* stated that:

"No one has the authority to enter into the said field and harbor the feeling that he is the law and the punisher himself. A country where the rule of law prevails does not allow any such thought. It, in fact, commands for ostracisation of such thoughts with immediacy."<sup>3</sup>

The Supreme Court also stated that "In a civilized society, it is the fear of the law that prevents crime."<sup>4</sup> Therefore, legislation enacted specifically to deal with mob lynching crimes would help to prevent these incidents in society.

## **2. Hate Speech and Hate Crimes**

### **2.1 Defining Hate and Hate Speech:**

In a world where everyone is connected through social media and is free to express his/her views, the thin line between criticizing an issue with good intent and hate speech with an intent to incite violence against any other community has become vague because even the criticism with good intention may have violent implications and may disrupt the peace and tranquility of the society. The Observer Research Foundation has defined 'hate' as an action or an expression inciting violence, hostility, or discrimination against a targeted social or demographic group. A speech inciting, encouraging, or advocating violence may also be included. On the other hand, 'hate speech' is defined as any speech or writing, which is abusive or threatening in nature, expressing hatred and distrust against any particular community which can be based on religion, race, or sexual orientation.

Nowadays, the internet is free from any kind of geographical and other obstacles. With its transformative potential, radical ideas and

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<sup>2</sup>The Indian Penal Code, 1860, No. 45, Acts of Parliament. § 505 (1860).

<sup>3</sup> *Tehseen S. Poonawalla v. Union of India*, 2018 SCC OnLine SC 696.

<sup>4</sup> *Id.*

misinformation can reach faraway places within a few seconds and can incite hatred and violence among the members of different communities in society. Many mechanisms have been suggested by various organizations like the International Convention on Civil and Political Rights (ICCPR), and the Rabat Plan of Action to contour hate speech and protect citizens from violence and discrimination. The T. K. Vishwanathan Committee, which was formed in 2017, also recommended certain modifications to the IPC (Indian Penal Code), the CrPC (Code of Criminal Procedure), and the IT (Information Technology) Act that includes strict punishment for online hate speech.<sup>5</sup>

In India, a narrative has been developed that, unfortunately, widens the gap between Hindus and Muslims. This narrative is a result of various mob lynching incidents, disruption of law and order due to 'cow slaughter', questioning of patriotic feelings of Muslims towards India, public backlash against Hindu-Muslim marriages, and the classification of those individuals who encourage Hindu-Muslim unity as 'terrorist sympathizers'.<sup>6</sup> In India, religion is a very sensitive topic. When any flaw of religion in India is rectified by the Parliament, like the abolition of Triple Talaq or Sati pratha, it is viewed in a negative context. Nowadays, religious crimes in India are very frequent. Suppression of minority communities and violence in the pretext of religion has also become a part of our daily life.<sup>7</sup>

## **2.2 Incidents of Mob Lynching:**

### **2.2.1 Alwar Mob Lynching Case of 2017:**

In this case, 55-year-old Pehlu Khan from Jaisinghpur village was the victim. He was one of the few dairy farmers in Jaisinghpur and he went to Jaipur intending to purchase more cows to increase his milk production for the month of Ramadan.<sup>8</sup> While he was returning to his village with the purchased cows, he was stopped by 200 cow vigilantes. Pehlu Khan showed the vigilantes the papers of sale and purchase of the cattle and ensured them that the cows were bought for dairy farming but the mob tore the papers and dragged Khan out of his vehicle. Pehlu Khan was hit by the mob with rods and sticks and he later succumbed to his injuries.

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<sup>5</sup> Maya Mirchandani, *Digital Hatred, real violence: Majoritarian radicalization and social media in India*, (2018) Occasional papers, available at <https://www.orfonline.org/research/43665-digital-hatred-real-violence-majoritarian-radicalisation-and-social-media-in-india/>.

<sup>6</sup> *Id.*

<sup>7</sup> Durai, Hashika and Niranjana k., *A Study on Religious Laws and Religious Crimes in India*, (2019) SSRN, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3442697](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3442697).

<sup>8</sup> Abhishek Angad, *Alwar Attack: Gau Rakshaks killed a dairy farmer, not cattle smuggler*, The Indian Express, 7 April 2017.

Only 3 persons were arrested by the police in this case. The incident was widely criticized in the whole country and Union Minister Rajnath Singh assured that justice would be provided. On the other hand, some politicians, like Rajasthan's Home Minister Gulab Chand Kataria and Parliamentary Affairs Minister Mukhtar Abbas Naqvi, either defended the cow vigilantes or denied the occurrence of the said crime.

### **2.2.2 Nowhatta Mob Lynching Case of 2017:**

Mohammad Ayub Pandith, who was the deputy superintendent in the security wing of J&K police, was deployed in the Jamia Masjid in civilian clothes on the holy night of Laylat al-Qadar for the security of devotees. Outside the Mosque, he was called and questioned by a few miscreants about his identity. Rumors about Pandith were spread in the mob that he was in a security agency or he belonged to RAW or CID or that he was a Kashmiri Pandit due to his last name 'Pandith'. He tried to escape by firing three shots. But, this injured only a few people and he was beaten by the mob. He was stripped naked and attacked with rods, sticks, stones, etc. His body was found in a mutilated state.<sup>9</sup>

The Nowhatta Mob Lynching Case of 2017 was particularly different because the victim was a police officer who was deployed to preserve peace, tranquility and law and order in the region and this incident showed that the crimes of mob lynching are not restricted to one single community (Muslims) because he was mistaken to be a Kashmiri Pandit. The lynching incident and the involvement of terrorists from the Hizbul Mujahidin terrorist organization in the crime depicted the poor condition of law and order in the state of Jammu & Kashmir.<sup>10</sup>

### **2.2.3 Jharkhand Mob Lynching Case of 2016:**

In the Jharkhand Mob Lynching Case of 2016, there were two victims. One was 32 years old Muslim named Mazlum Ansari and the other was a 12-year-old minor boy named Imtiaz Khan. Both of them were going to a cattle market in the Chatra district of Jharkhand to sell their oxen. On their way, they were attacked by a tribal group in the Balumath forest. Both of them were beaten to death and then hanged from a tree which was evident from the injury marks on their dead bodies. On investigation by the police, it was stated the crime was committed with the motive to loot

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<sup>9</sup> Kamaljit Kaur Sandhu, *Ayub Pandith Lynching: Jammu and Kashmir cop was Stripped, Dragged and Beaten with Rods*, India Today, 16 July 2017, online at <https://www.indiatoday.in>.

<sup>10</sup> *Supra* Note 1.

money and cattle from the victims.<sup>11</sup> This incident depicts how the offenders frequently use religion to commit crimes that are motivated by greed.

### **3. Circulation of Misinformation through Social Media Platforms**

#### **a. Social Media: Response and Responsibility:**

Due to cheap and easy access to the internet and smartphones, social media users in India have increased manifolds. These users access the platform for positive as well as negative purposes. In recent times, the platform has given room to hate speech, misinformation, and fake news which has increased the incidents of mob lynching and communal violence in the country. For Example, in 2017, Muslims in North 24 Parganas dist. were infuriated by a social media post in which it was mentioned that a Hindu family, after converting to Islam, had returned to Hinduism. This instigated communal violence between Hindus and Muslims in the city.<sup>12</sup>

It is a challenging task for executives to control hate speech on social media platforms. As a result, the representatives of the major social media platforms, particularly Twitter and Facebook, were held accountable for spreading hate speech and instigation on their websites and for not removing fake, discriminatory, and instigating posts from their social media platforms which resulted in communal violence in the country. But, for a long, these platforms have managed to escape from legal liability by stating the fact that these companies are not content providers and they only provide a platform for people to express their views and opinions.<sup>13</sup>

It is very evident from the increasing incidents of mob lynching and communal violence that new rules and regulations to counter hate speech on the internet are the need of the hour. It is very crucial to understand how a tweet or social media post can instigate communal violence in the country and what roles are played by some social media influencers in spreading hate speech on social media platforms.

#### **b. WhatsApp Lynching:**

Recently, a messaging application known as WhatsApp has been widely used by the perpetrators to spread hate speech and false information which has invoked the incidents of mob lynching and communal violence in India. These incidents have become so common that they are referred to by the term 'WhatsApp Lynching'. In the Malegaon district of Maharashtra, five people, including a two-

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<sup>11</sup> Shamil Shams, *Two Muslim Cowherds hanged in Eastern India*, Deutsche Welle, 19 March 2016, online at <https://www.dw.com>.

<sup>12</sup> *Supra* Note 4.

<sup>13</sup> *Id.*

year-old child, were attacked by a mob because they suspected the victims to be kidnappers. The mob was instigated by a WhatsApp forwarded message which asked people to be careful of child-lifters.<sup>14</sup> In addition to these messages, the pictures and videos of lynchings are also widely circulated by the perpetrators on WhatsApp.

Many initiatives have been taken by governmental, non-governmental, and private organizations to aware people of fake news and misinformation present on the internet. For example, in Kerala government schools, students are taught to identify false information and to segregate reliable and non-reliable sources.<sup>15</sup> In Tripura, internet and SMS services were banned by the government for at least 48 hours to curb the spread of misinformation about child lifters.<sup>16</sup>

It has been observed from experience from these campaigns that curbing the spread of fake news is a very difficult task as some people do not trust the government to be a reliable source. The steps taken by the government to restrict the use of social media websites are often criticized by the citizens and are viewed as steps taken to restrict the fundamental right of people to free speech and expression.

#### **4. Legislative Provisions & Judicial Stance**

##### **4.1 Legal Protection against Hate Speech and Communal Violence in India:**

The freedom of speech and expression is one of the fundamental rights which is given to every citizen of the country under Article 19(1)(a)<sup>17</sup> of the Indian. But, simultaneously on the other hand reasonable restrictions are placed on this right under article 19(2) on the grounds of security of the state, public order, morality, decency, incitement to offense, friendly relations with foreign nations, etc.<sup>18</sup> In India, hate speech or its publication is also punishable under various legislations like the Indian Penal Code (IPC), Code of Criminal Procedure (CrPC), etc.

Section 95 of CrPC empowers the government to penalize, cancel or ban certain publications, like newspapers or books if they in any way promote communal violence or disharmony in the country.<sup>19</sup> In addition to this, the promotion of communal violence or disharmony

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<sup>14</sup> Mateen Hafeez, *Now, Group of Five Saved from being Lynched in Malegaon*, The Times of India, 3 July 2018, online at <https://timesofindia.indiatimes.com>.

<sup>15</sup> Soutik Biswas, *On the Frontline of India's WhatsApp Fake News War*, BBC News, 20 August 2018, online at <https://www.bbc.com>.

<sup>16</sup> *Ban on Internet across Tripura, Prohibitory Orders at Madhav Bari*, The Times of India, 10 January 2019, online at <https://timesofindia.indiatimes.com>.

<sup>17</sup> INDIA CONST. art. 19, cl. 1.

<sup>18</sup> INDIA CONST. art. 19, cl. 2.

<sup>19</sup> The Code of Criminal Procedure, 1973. § 95.

is also punishable under some sections of IPC like sections 124A, 153A, 153B, 292, 293, and 295A.

Section 153 of IPC states that whoever promotes hatred among various groups on grounds of religion, race, caste, community, place of birth, residence, etc. or commits any act which is detrimental to the preservation of peace and harmony in the country should be punishable with imprisonment which can be extended up to 3 years, or with a fine, or with both.<sup>20</sup>

According to sec 505 of the IPC, any person who produces, publishes, or disseminates any any piece of information which contains misinformation or distressing news with an intention to promote a feeling of enmity, hatred, ill-will on the grounds of religion, language, caste, community, place of birth, etc. shall be punished with imprisonment which can be extended up to 3 years, or with fine, or with both.<sup>21</sup>

The term for imprisonment and fine which can be given to perpetrators instigating or committing crimes of communal violence or mob lynching in connection with elections is also mentioned in section 125 of the Peoples Representation Act, 1951.

Although lynching crimes in India are charged under the offenses of murder, rioting, unlawful assembly, etc. the Indian Penal Code does not recognize 'lynching' as an offense and no provisions have been specified that specifically deal with these crimes. Therefore, it is very evident that anti-lynching legislation is the need of the hour to instill fear amongst perpetrators and to deal with such incidents.

#### **4.2 Judicial Stance:**

In 2018 in the landmark case of *Tehseen S. Poonawalla v. Union of India*, the Supreme Court bench comprising then CJI Dipak Misra, Justice AM Khanwilker and Justice DY Chandrachud described the crimes of lynching as "horrendous acts of mobocracy". The judges gave effective suggestions and guidelines. They asked the legislators to enact a new law that deals specifically with mob lynching cases and provides punishment for such offenses to create a sense of fear among people so that they do not commit such crimes. Supreme Court also ordered the government to take various preventive measures to deal with these crimes like the designation of police officers in every district to stop the incidents of mob lynching, identification of areas where these crimes were committed frequently, preparation of a compensation scheme for the victims of mob lynching incidents, etc.<sup>22</sup> These suggestions influenced the state government of Manipur which passed an anti-lynching law obeying

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<sup>20</sup>The Indian Penal Code, 1860, No. 45, Acts of Parliament. § 153 (1860).

<sup>21</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament. § 505 (1860).

<sup>22</sup> *Supra* Note 3.

the directions of the Supreme Court in the state. The law defined the obligations and responsibilities of the government and police administration in Manipur in dealing with the incidents of mob lynching.<sup>23</sup>

The Supreme Court has also observed the misuse of social media platforms by perpetrators in provoking the incidents of mob lynching and so it has issued effective guidelines to curb the misuse and has asked the police administration to issue FIR against those perpetrators. The Supreme Court bench also mentioned that if any police officer does not perform their duty properly, he/she would be held accountable for such actions and his/her act would be considered an act of deliberate negligence.

Despite the absence of particular provisions to deal with the crimes of mob lynching in the Indian Penal Code or Code of Criminal Procedure, the courts in India are deciding on these matters for a long time. For example, in *Nandini Sundar v. the State of Chhattisgarh*<sup>24</sup>, the court was of the view that it is the duty of the state to avert internal disturbances and to maintain peace and tranquility in the state. In *Arumugam Servai v. State of Tamil Nadu*, the court took action against the police officers and held them responsible for not initiating criminal proceedings against the accused.<sup>25</sup>

## **5. Conclusion**

There has been an increasing trend of hate speech in India. Any mob must not be allowed to take law into its own hands in a democratic country. When the perpetrators who incite or provoke mob lynching incidents are not punished by law adequately, it promotes mobocracy and encourages others to take law into their own hands. An accused is always innocent until proven guilty by the law. But the vigilantes and perpetrators see themselves as justice providers. A democratic government must take steps to safeguard the rights of all citizens and in order to maintain peace and tranquility in the country. In India, an anti-lynching law is very essential to instill a sense of fear amongst the perpetrators so that they think twice before delivering justice without trial.

The parliament must follow the directions given by the Hon'ble SC and enact a law that contains preventive, punitive, and remedial measures so that justice is served to the victims and the offenders are punished adequately. Further, steps should be taken by the judiciary to provide speedy trial and speedy justice to the victims. The police officers must investigate and lodge FRI against the perpetrators as early as

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<sup>23</sup> *Manipur Assembly Passes Anti-Mob Violence Bill*, The Wire, 23 December 2018, online at <https://thewire.in>.

<sup>24</sup> *Nandini Sundar v. the State of Chhattisgarh*, 2011 SCC OnLine SC 892.

<sup>25</sup> *Arumugam Servai v. State of Tamil Nadu*, 2011 SCC OnLine SC 658.

possible. A compensation scheme should be started by the government for providing relief to the victims of the mental and physical trauma faced by them and the victims should be given free legal help in their fight for justice. Lastly, strict actions should be taken against police officers if they fail to perform their duties and for their deliberately negligent acts.

The recent increase in the spread of false news and misinformation through social media platforms is of serious concern and its implications have been experienced in various mob lynching incidents. Although these crimes are punished under various sections of the IPC or CrPC, there is an urgent requirement for awareness campaigns, technological improvements, and new legal enactments to handle the crimes of group lynching, hate speech, and communal violence.

# Analysis of the 39th Constitutional Amendment

**\*Mr. Shiva Verma**

## ABSTRACT

This is a legislative commentary on 39<sup>th</sup> Constitutional Amendment which was passed on August 10<sup>th</sup> 1975. This legislative commentary delves deep into its nitigrities. This commentary covers the amendment in five sub-parts. This commentary initially gives a brief on the background and other necessary details of this amendment under its introduction. In the second part this commentary deals with incorporation of Article 329A to Part XV of the constitution. Thereafter the commentary deals with necessary details of influence of laws under the IXth schedule and protection under 31B in the third sub-part. Subsequently this commentary then gives a critique on this amendment in the fourth sub-part. Summarizing all the details given and authorities cited the commentary will conclude its statement in the fifth sub-part.

**Keywords:** 39<sup>th</sup> Constitutional Amendment, Article 329A, Part XV, IXth Schedule, Article 31B

## 1. Introduction

Following the adoption of the 39th Amendment to the Indian Constitution on August 10, 1975, elections for the positions of President, Vice President, Prime Minister, and Speaker of the Lok Sabha were no longer subject to judicial review. It was put into effect during the Emergency, which lasted from 1975 to 1977.

With Indira Gandhi at the helm of the Congress Party, the highest court in the land was asked to rule on whether or not to overturn a decision made by a lower court that declared Gandhi's election to be invalid due to irregularities in the voting process. This decision had declared Gandhi's election to be invalid and null and void. Raj Narain made these allegations against Indira Gandhi while she was running for office. He claimed that she had abused the power that she held as prime minister. After that, the Allahabad High Court came to the conclusion that she was responsible for the crime, and as a result, she was immediately expelled from the Lok Sabha. Additionally, the highest court ordered that she step down from her position as prime minister and banned her from running in any future elections for a period of six years. Earlier on that day, Prime Minister Indira Gandhi lodged an appeal against the decision with the Supreme Court, and she was ultimately successful. Her request to be reinstated as a member of Parliament was denied, but the court did grant her bail so that

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she could continue serving as prime minister for another six months while the case was being heard. Indira Gandhi might have been successful in persuading the President to dismiss the case if it had been brought before the Supreme Court in the same manner as it had been brought before the lower courts. Indira Gandhi, who was the prime minister of India at the time, worked hard to get the 39th Amendment Act passed so that she would not be removed from office and so that she could maintain her position as leader of India. In addition, she passed the 42nd Amendment Act, which included clauses 4 and 5 of Article 368 and made it so that constitutional amendments could not be challenged in any Indian court. *Indira Gandhi v. Raj Narain* later invalidated the 39th amendment and bolstered the Doctrine of Basic Structure established in **Kesavananda Bharati v. State of Kerala**<sup>1</sup>.

According to Article 71 of the Constitution, any questions or concerns regarding the election of the President or Vice President are to be directed to the Supreme Court for resolution. According to the same clause, all issues pertaining to elections are required to be governed by legislation. The Representation of the People Act, which was enacted in 1951, outlines the procedures that are to be followed in order to select both the Prime Minister and the Speaker. In accordance with the Act, the High Court possesses the authority to consider a petition directed against either of them.

The people were responsible for selecting all of the elected officials, including the speaker of the house, the prime minister, the president, and the vice president. The law absolves the President of any legal responsibility for actions taken while he is in office or on his own initiative. A priori, any question regarding his election ought to be brought up in a setting other than a court, not a court of law. This is because courts are places where laws are made. The Vice President, the Prime Minister, and the Office Speaker All Have the Same Justification The same justification applies to each of these positions. In addition, the bill states that any existing court has the ability to challenge a law that has been approved by parliament and establishes a new location for the adjudication of election disputes involving the individuals who hold the high posts listed above.

## **2. Incorporation Of Article 329a To Part XV Of The Constitution**

Insertion of new article **329A**- In **Part XV** of the Constitution after **article 329** shall be inserted namely: **329A**, Special provision as to elections to Parliament is a case of Prime Minister and Speaker:

- (1) subject to the provisions of **Chapter II of Part V [except clause B of clause 1 of article 102]**, no election.

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<sup>1</sup> (1973) 4 SCC 225; AIR 1973 SC 1461

(a) to either House of Parliament of a person who holds the office of prime minister at the time of such election or is appointed as prime minister after such election,

(b) to the house of the people of a person who holds the office of speaker of the house at the time of such election or who is chosen as a speaker for that house after such election, shall be called in question, except before such authority **[not being any such authority as is referred to in clause (b) of article 329]** or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any Court,

(3) Where any person is appointed as prime minister or, as the case may be, chosen to the office of the speaker of the House of the people, while an election petition referred to in clause (b) of article 329 in respect of his election to either House of Parliament, or as the case may be, to the house of the people is pending, such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be, being chosen to the office of the Speaker of the house of the People, but such election may be called in question and any such law as is referred to in clause (1).

### **3. Influence Of Laws Under the IXth Schedule And Protection Under 31b**

In the past, when litigation demonstrated that progressive legislation created in the public interest was in jeopardy, recourse was available through the Ninth Schedule. This was the case because the Ninth Schedule allowed for judicial review of the legislation. It is necessary to make use of this equipment once more at this time. Courts have been asked to rule on whether or not these statutes are constitutional because it is argued that they go against the Constitution. Therefore, with regard to the nationalisation of failing textile companies in 1974. It has since been challenged in the Supreme Court and other High courts that the legislation that was enacted by Parliament to prevent the smuggling of goods and the diversion of foreign currency had a negative impact on the national economy. It has been suggested that these and other significant and one-of-a-kind laws that ought to be safeguarded by article 31b be included on the Ninth Schedule. The Ninth Schedule currently contains a number of state laws that have already been included that pertain to land reforms and restrictions on the ownership of agricultural land. These laws have been amended multiple times to make the protection of article 31b's requirements obligatory.

#### 4. Critique

The darkest period in the history of a democratic nation such as India is considered to be the time when Indira Gandhi declared a state of internal emergency. In addition, during this time period, the 39th Amendment Act was proposed in Parliament, and it was ultimately approved by a vote of a majority of the members present. Because this amendment was put into effect, it became impossible for anyone to challenge the legitimacy of her election victory, despite the fact that it was obtained through fraudulent means. The provisions of Articles 71(2) and 329A were inserted into the Indian Constitution via Clause (4) of the 39th Amendment Act of 1975. These clauses stated that any disputes regarding the election of four high officials—the President, Vice-President, Prime Minister, and Speaker of the Lok Sabha—must be resolved in accordance with legal channels and procedures, and that any court orders invalidating an election that were issued prior to the commencement of those orders must be considered null and void. The clauses also stated that any court orders invalidating an election that were issued after the commencement of those orders must be considered null and void. In the case of **Indira Gandhi v. Raj Narain**<sup>2</sup>, however, this amendment was considered by the court and ruled to be unconstitutional and null. Therefore, the Supreme Court overturned the Constitution's 39th amendment as its first decision.

#### 5. Conclusion

After the 39th Amendment to the Indian Constitution was ratified on August 10, 1975, the elections of the President, Vice President, Prime Minister, and Speaker of the House were no longer subject to judicial review. This was the case until the 39th Amendment was ratified. Between those years (1975 and 1977), the implementation took place. The government of the House of Representatives, which is led by Indira Gandhi, has submitted a petition to the Supreme Court of India in an effort to prevent the court from hearing that Gandhi's election was invalidated by the Allahabad High Court due to unethical electoral practises. The petition was submitted by Indira Gandhi. After being found guilty by the Allahabad High Court, Ms. Indira Gandhi was promptly kicked out of the House of Commons. In addition to ordering her resignation as prime minister, the High Court disqualified her from voting in elections for the next six years and barred her from holding public office again during that time. On the same day, Indira Gandhi appealed the decision of the lower court to the Supreme Court, where it was affirmed. The court granted bail and allowed her to continue serving as prime minister for an additional six months while the matter was resolved, but it denied her request to be reinstated as a member of parliament. The court granted bail and allowed her to continue serving as prime minister while the matter was resolved. The request was granted after the President of India was successfully persuaded to declare a state of emergency on the grounds that India is currently under attack from an outside force. As Mrs. Gandhi came to the

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<sup>2</sup> State of Uttar Pradesh v. Raj Narain (1975) AIR 865, 1975 SCR (3) 333

realisation that she would be put to death if the proceedings in the Supreme Court continued as they had been, she issued her rule. During this time, Indira Gandhi worked to ensure that the 39th Amendment was ratified so that she could maintain her position in Indian politics and avoid being kicked out of the country. In addition, the Prime Minister added Articles 4 and 5 to Section 368, which resulted in the elimination of all limitations placed on the ability of Parliament to amend the Constitution and made it impossible for amendments to be challenged in Indian courts. In a later case, **Indira Gandhi v. Raj Narain**<sup>3</sup>, the **39th Amendment** was repealed, and in **Kesavananda Bharati v. Kerala**<sup>4</sup>, the basic structure doctrine was strengthened.

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<sup>3</sup> 1975 AIR 1590 1975 SCC (2) 159

<sup>4</sup> (1973) 4 SCC 225; AIR 1973 SC 1461

# Commentary On “Section 114A Of the Indian Evidence Act Of 1872”

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## **ABSTRACT**

The Indian Evidence Act of 1872, can be termed as a cornerstone of Indian Penal law which establishes what forms of evidence are admissible in any criminal trial. Evidence, in any criminal trial, is one of the most important factors affecting the decision of a case. The inherent power of evidence in a case is the reason the necessity of the “Indian Evidence Act of 1872” became essential. Therefore, the formulation of the Act, is one of the most important steps taken by Indian jurists towards establishing a fairer and more efficient judiciary.

India as a nation has however, still not been able to provide adequate justice to all its citizens. This is especially common in cases of rape, where various victims were treated as accomplices in their cases and unfairly judged. The Apex Court earlier, has through a catena of judgements established that, any victim of rape who came forward and alleges that she was raped would have to provide evidence to corroborate the same as a matter of prudence. Without such corroboration, the victim’s plea would not be considered as one made with a genuine intention to obtain justice for the crime that has been committed against them. This posed a precarious situation in front of Indian jurists. In order to help solve this moral dilemma that arose owing to this existing understanding. Section 114A was inserted into the Indian Evidence Act. This paper will analyse this provision, its relevance and provide recommendations to improve this provision.

## **1. Introduction**

The Indian Evidence Act of 1872, <sup>1</sup>is a crucial legislation in penal law which establishes what forms of evidence are admissible in any criminal trial. Evidence, in any criminal trial, is one of the most important factors affecting the decision of a case. A piece of evidence always has the possibility of turning the tides of the case. This power of evidence is the reason the necessity of the Indian Evidence Act became essential. Without a legislation that adequately explains admissible evidence, a lot of inappropriate material would be unfairly presented in a trial to prejudice the Court against some party to the trial and thereby violate the parties right to a fair hearing granted to them by Articles 21 <sup>2</sup>and 14 <sup>3</sup>of the

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<sup>1</sup> Indian Evidence Act, 1872, No. 01, Acts of Parliament, 1872

<sup>2</sup> INDIA CONST. art. 21.

<sup>3</sup> INDIA CONST. art. 14.

Constitution of India. Therefore, the formulation of the Indian Evidence Act<sup>4</sup>, is one of the most important steps taken by Indian jurists towards establishing a fairer and more efficient judiciary.

India as a nation has however, still not been able to provide adequate justice to all its citizens. This is especially common in cases of rape, where various victims were treated as accomplices in their cases and unfairly judged. The Apex Court earlier, has through a catena of judgements established that, any victim of rape who came forward and alleges that she was raped would have to provide evidence to corroborate the same as a matter of prudence. Without such corroboration, the victim’s plea would not be considered as one made with a genuine intention to obtain justice for the crime that has been committed against them. The Court however, failed to take into consideration that in cases of rape, there is very rarely any direct evidence that a victim could provide to corroborate her claims as the perpetrator tends to choose to rape the victim in a secluded place in order to avoid any unwanted witnesses to the offence. This inherent discrimination against a victim of rape led to great outrage after the case of **“Tukaram vs The State of Maharashtra”**<sup>5</sup> popularly known as the **“Mathura Rape Case”**. In this case, a young girl was mercilessly raped while being held in the custody of police in the compound of Delhi Ganj Police Station in Maharashtra by two policemen. While deciding the case, the Supreme Court chose to acquit the two accused policemen and they noted in their observations,

***“Because the girl was used to sex, she might have incited the cops who were drunk at the time, to have intercourse with her”.***

This was one of the most controversial views to ever be taken by an Indian Court and adequately explains the views that existed at the time that the Judiciary used to hold in cases of rape. The outrage caused by the observations and decision of the judges in the Mathura Rape Case eventually led to amendments in the Indian Evidence Act, and Section 114A<sup>6</sup> was inserted vide the “Criminal Law Amendment Act, 1983” to help change the views held by the judiciary on the burden of proof in rape cases and provide adequate justice to victims of rape. This paper will discuss and critically analyse Section 114A and its relevance in Indian jurisprudence.

## **2. Understanding Section 114A Of The Indian Evidence Act**

**“Section 114 of the Indian Evidence Act”**<sup>7</sup> essentially provides the courts by with the power to ***“presume the existence of certain facts”*** which any reasonable person would believe to exist when viewed in concurrence with the surrounding facts and circumstances of the case.

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<sup>4</sup> *supra*-1

<sup>5</sup> *Tukaram vs The State of Maharashtra*, 1979 SCR (1) 810

<sup>6</sup> Indian Evidence Act, 1872, § 114A, No. 01, Acts of Parliament, 1872

<sup>7</sup> Indian Evidence Act, 1872, § 114, No. 01, Acts of Parliament, 1872

For example, to facilitate better understanding we look at the case of **Tulsa vs Durghatiya**<sup>8</sup>. In this case, the Apex Court observed that -

*“If two partners lived together for an extended period of time as husband and wife, there would be a **presumption in favour of wedlock**; nevertheless, this presumption is not definite and it can be rebutted. When rebutting, **the burden of proof would fall heavily on the individual seeking to deny the relationship's legal basis** or in general seeking to deny the presumed fact”*

Section 114A<sup>9</sup> however, is slightly different from the general provision given in Section 114<sup>10</sup>. Section 114A<sup>11</sup> lays down the mandate for the court to presume the “**‘absence’ of consent in certain prosecutions for rape and not the existence of something.**” The introduction of this provision was one which marked an imminent shift in the paradigm of Indian Jurisprudence and is undisputedly of great importance. It had led to a complete shift of the burden of proof in certain rape prosecutions which helped facilitate the adequate adjudication of rape cases.

Section 114A states that-

***“[114A. Presumption as to absence of consent in certain prosecution for rape-***

***In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.***

***Explanation: - In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).’.”***

**This provision can be divided into separate parts to facilitate easier understanding-**

- a. There is a prosecution for the offence of rape under Section 376(2) of the Indian Penal Code.
- b. There has to have been some form of sexual intercourse that has been committed by the accused which has to have been proved for Section

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<sup>8</sup> Tulsa vs Durghatiya, 2008 (4) SCC 520

<sup>9</sup> *supra*-6

<sup>10</sup> *supra*-7

<sup>11</sup> *supra*-6

114A <sup>12</sup>to be applicable. There must be no question regarding the occurrence of sexual intercourse in the situation,

- c. The victim expressly states that there was no consent from her side to the sexual intercourse. This must be the question in the case for Section 114A <sup>13</sup>to be applicable.

If these 3 pre-requisites are satisfied by the facts and circumstances of the case, then Section 114A <sup>14</sup>is invoked and the Court shall presume in accordance with the power accorded to them, that there was an absence of consent on the part of the victim to the sexual intercourse, which occurred and the onus to disprove this, falls upon the perpetrator of the crime.

### 3. Critical Analysis Of “Section 114A Of The Indian Evidence Act”

While, pre-amendment, the notion of Indian Courts regarding the need for corroboration of a rape victim’s claims to not consenting as explained earlier did cause extreme outrage and was vehemently criticised, people failed to understand that these courts were only following the existing law. In the Indian Evidence Act, Section 101 of the Act <sup>15</sup>very explicitly laid down that -

***“the burden of proof lies on the person making any claim or asserting any fact. Whoever wants the court to give any decision in his favour, must prove that the facts pertaining to that request exist.”***

The existence of this provision was the reasoning of the courts behind needing corroboration of any victim’s pleas of rape. However, such a reasoning does present an extremely problematic moral dilemma. In my opinion, the best explanation to solve this moral dilemma is given in the case of ***Bharwada Bhoginbhai Hirjibhai vs State of Gujarat***<sup>16</sup> where the Supreme Court stated in their judgement-

***“in the Indian setting, refusal to act on the testimony of a victim of sexual assault in absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted lens tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominant society.”***

This is by far one of the most appropriate views that has been taken by the court when dealing with the presumptions being made under

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<sup>12</sup> *supra*-6

<sup>13</sup> *supra*-6

<sup>14</sup> *supra*-6

<sup>15</sup> Indian Evidence Act, 1872, § 101, No. 01, Acts of Parliament, 1872

<sup>16</sup> *Bharwada Bhoginbhai Hirjibhai vs State of Gujarat*, 1983 SCR (3) 280

Section 114A of the Indian Evidence Act<sup>17</sup>. They have elaborately understood the patriarchal structure of the Indian subcontinent and its immense pressure on any woman in society. Therefore, not providing the woman with an opportunity to be protected by justice when she raises a plea against a rape committed on her is extremely intolerable and only promotes the already inherent patriarchal structure that suppresses women. Since, India is slowly trying to escape the clutches of this patriarchal structure, the importance of a provision like Section 114A<sup>18</sup> increases tenfold.

Keeping this in mind, the need to understand whether Section 114A<sup>19</sup> which is such a necessary provision had been implemented effectively and used adequately to reduce suppression of women from the beginning becomes important.

Once the implementation was done in 1983, it was seen that the provision was not effective enough because Courts did not believe in enforcing the provision and on multiple occasions diluted the provisions. One of the most famous occurrences of the same was in the case of “**Banti alias Balvinder Singh vs State of Madhya Pradesh**”<sup>20</sup>. In this case, the prosecutrix was abducted by 5 men and then subjected to rape by them. 5 days after the incident, the woman filed a complaint against the offenders and the matter went to the High Court. The High Court using the reasoning that the prosecutrix’s conduct of filing the complaint 5 days after the incident was lax on her part and denoted that the story of the prosecutrix was not true. The Court went on to say that they did not wish to believe the story about the occurrence of sexual intercourse and that there was no proof to corroborate her claim. They did not bother to further investigate into the occurrence of sexual intercourse either. If the sexual intercourse had been proved, then Section 114A<sup>21</sup> could have been applied to the present case and justice could have been given to the prosecutrix. But the Court’s indifference to Section 114A was explicitly evident in their decision since the accused were acquitted in the case and the prosecutrix’s story was deemed as unsatisfactory.

However, with the passage of time, the need of Section 114A<sup>22</sup> was better understood by some Courts. But the real obstacle that faces the effective implementation is that, while some courts are beginning to understand the importance of the provision, there is still a widespread indifference to the provision that is highly prevalent in society.

For example, when we analyse the case of **Kuldip Singh and Anr. vs the State of Punjab**<sup>23</sup>, most people look at the final outcome of the

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<sup>17</sup> *supra*-6

<sup>18</sup> *supra*-6

<sup>19</sup> *supra*-6

<sup>20</sup> “Banti alias Balvinder Singh vs State of Madhya Pradesh, 1992 CriLJ 715”

<sup>21</sup> *supra*-6

<sup>22</sup> *supra*-6

<sup>23</sup> “Kuldip Singh and Anr. vs the State of Punjab”, 2003 CriLJ 3777

judgement which was passed by the Hon’ble Supreme Court. In this case, the prosecutrix was a young woman who was raped by two men and these men were punished by the Apex Court in their final decision. The Apex Court laid down their observations and stated that if corroboration is being sought for her claims, various sources of information such as medical evidence of the doctor, the actual injuries on her private parts, and her First Information Report can provide such corroboration. However, only proof that the sexual intercourse had occurred was enough to presume that no consent was given and thereby Section 114A <sup>24</sup> can be applied. However, this case needs to be looked at a little more in detail because the case came from the High Court as an appeal and the High Court in their decision had laid down that there is no evidence to corroborate the claims of the witness and similar to the earlier mentioned Balvinder Singh case, the Court did not make an effort to determine there was any occurrence of sexual intercourse. They just relied on the fact that there was an absence of any injuries on the prosecutrix and thereby she would have been a consenting party. The High Court did not attempt to determine the applicability of Section 114A <sup>25</sup> in the present case and chose to acquit the accused instead. Though, the decision of the Supreme Court had overturned the High Court’s decision, this case is a significant example to understand that there are still Courts in the nation who are indifferent to the existence of a provision like Section 114A<sup>26</sup> and thereby do not effectively mete out justice to various victims who deserve it.

#### **Now the real question arises which is-**

**“Why has the implementation of Section 114A been so ineffective?”**

Simply put, the ineffective implementation is owing to one major factor i.e., the tendency of courts to stick rigidly with the obsolete exegesis of the term **“consent”**.

**“The Nirbhaya Rape Case”** was one which spearheaded the need to bring about an understanding of what constitutes consent. The result of the outbursts owing to the Nirbhaya rape case was an introduction of a definition for consent in the IPC <sup>27</sup> vide the **“Criminal Law Amendment Act of 2013”**.

**“Explanation 2 to Section 375 of the Indian Penal Code<sup>28</sup>”** describes consent as –

***“an unequivocal voluntary agreement when the woman communicates a willingness to engage in the specific sexual act***

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<sup>24</sup> *supra*-6

<sup>25</sup> *supra*-6

<sup>26</sup> *supra*-6

<sup>27</sup> Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

<sup>28</sup> Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860

***through words, gestures, or any other means of verbal or nonverbal communication.***<sup>29</sup>

Essentially, the definition wanted to make it very clear that consent will only be considered to be given when it is “affirmative consent”. The definition also removed the ambiguity regarding whether submission (non-resistance) to any physical advances during the offence of rape would constitute as consent. It was clear that only “**affirmative consent**” could be considered as actual consent and submission does not constitute consent. This had originally been laid down by the Apex Court, in the case of **“Tulshidas Kanolkar vs The State of Goa”**<sup>29</sup> in which a mentally challenged girl was raped. Her submission to the advances of the accused as was clearly ruled as not constituting consent as she was not mentally capable to resist the advances and the accused was prosecuted for the offence of rape.

However, even though such a clear-cut definition has been laid out in a legislation, Courts still tend to use an outdated understanding of consent. The most outright evidence of the same is found in the case of **“Mahmood Farooqui vs State (Govt. of NCT of Delhi)”**<sup>30</sup>.

The alleged perpetrator in the case, was charged with forcing involuntary oral sex on the prosecutrix, an American research scholar who had become acquainted with him after many visits. By providing a new interpretation of consent in this case, the Delhi High court weakened its meaning. The interpretation provided by the court was based on the narrative-

***“that it was not unusual for a feeble “no” to be misinterpreted as “yes,” as evidenced by examples of female behaviour. In support of this view, the court noted that while it could be different if the parties were complete strangers, it might be challenging to determine if a feeble “no” amounted to the denial of permission if the parties were acquainted and had engaged in physical contact in the past. As demonstrated in this instance, a lack of permission must be communicated in clear terms; it cannot simply be indicated reluctance or resistance”.***

The Court keeping this interpretation of consent, acquitted the accused in the case. The Delhi High Court in the case has outright disregarded Section 114A <sup>31</sup>and unfairly placed the burden on the victim to prove that the physical advances were resisted against and such resistance was not feeble and were expressed in plain terms. This is not only in complete disregard to Section 114A <sup>32</sup>but it has also disregarded the plain and simple definition of consent given in the **“Indian Penal Code”**. The court has disregarded the fact that the 2013 Amendments

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<sup>29</sup> Tulshidas Kanolkar vs The State of Goa, (2003) 8 SCC 590

<sup>30</sup> “Mahmood Farooqui vs State (Govt. of NCT of Delhi), (2017) 243 DLT 310”

<sup>31</sup> *supra*-6

<sup>32</sup> *supra*-6

**“prohibit courts from using their own standards of consent or extrapolating consent based on the relationship or educational position of the parties. Instead, it demands the application of the affirmative consent approach.”**

This decision of the Court is a prime example of how the implementation of Section 114A <sup>33</sup>has been strongly blocked off by the Courts incorrect understanding of “consent”. The decision of the High Court has also set a dangerous precedent for other cases, where the accused may escape punishment owing to an incorrect exegesis of “consent” which is one of the greatest flaws to exist today.

For an effective implementation of Section 114A, it is therefore, necessary that this apparent flaw of the current judicial system has to be rectified.

#### **4. Conclusion And Recommendations**

Indian jurisprudence has benefited greatly from the provisions for legal presumptions. They have made it simpler for the courts and assisted in determining specific facts from the circumstantial evidence already there. The Indian Evidence Act's Section 114A gives these provisions for legal presumptions, the proper impetus. It describes the courts' authority to draw particular conclusions about a case's facts that flow from the normal course of events. This has been particularly helpful in meting out justice to victims of rape.

We can conclude that the current trend of rising amount of rape cases reported in India in recent years has been a source of learning for the legislators as they have been able to make improvements to Section 114A <sup>34</sup>for better adjudication. But this rising trend is also needs to be questioned strongly. As discussed in the paper, there is the still the extremely apparent flaw in the implementation of the Section which would allow for it to be completely effective which is the tendency of courts to disregard the existence of the Section as a whole.

To ensure that perpetrators are prosecuted, efforts should be made to address the issues with our criminal justice system. Since it can be challenging for any victim of rape to effectively express that there was a complete absence of agreement when the sexual act was forced onto her, it is imperative that **“Section 375 of the Indian Penal Code<sup>35</sup>”** be construed objectively and consequently, Section 114A be given its due consideration. A victim may consent to an accused person's advances because she is afraid of physical harm, so her mere cooperation cannot be interpreted as consent. Judgments like Mahmood Farooqui's undermine the goal of the **“Criminal Law (Amendment) Acts”**, which were essentially

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<sup>34</sup> *supra*-6

<sup>35</sup> *supra*-28

passed to enable the broadening of the definition of rape and raise the intensity of the sentence allowing for more effective prevention of the offence.

There needs to be stronger enforcement of the provision under Section 376 <sup>36</sup>which defines consent because it is only when the entire Judiciary explicitly and wholly understands the meaning of consent, will they be able to deviate from sticking to their traditional understandings of consent. This would consequently increase the stature of Section 114A in the eyes of members of the judicial fraternity which would allow for a more effective implementation of the same.

Additionally, it must also be noted that, as seen from the Farooqui case, many Courts understanding of the presence or absence of consent is still steered by the previous sexual character of the victim. It is a well-established legislation under Section 53A of the Indian Evidence Act, <sup>37</sup>**“the evidence of character or previous sexual experience is not relevant in cases under Section 376.”** Therefore, in addition to the definition of consent, there needs to be a much greater promotion of Section 53A as well to facilitate a proper understanding of the concept of consent without which Section 114A would not have a significant impact in judgements to come.

Justice must come first in all things. By passing laws that uphold the spirit of the constitution, our courts and legislature have worked towards upholding justice. However, The effectiveness of anti-rape laws is deteriorating, and justice is not adequately upheld and this is become more and more evident through the constantly low conviction rates under these laws. To ensure that those who have been wronged receive justice, changes to both the Indian Evidence Act and Indian Penal Code have been made. Therefore, it is the responsibility of the judicial fraternity to make sure that these laws are fully utilised to fulfil the goal for which they were implemented and are not wasted.

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