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(HNLU JLSS)

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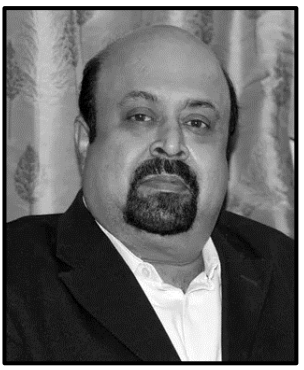

From the Editor-in-Chief

Dear Readers,

The HNLU JLSS 2023, Vol. IX, Issue - I, presents a rich tapestry of legal scholarship covering a diverse range of topics. It is a commendable job by the editorial team to take up this herculean time bound task for editing and publishing this volume in a timebound manner. This volume is all set to have a second part shortly to accommodate other submissions which are found to be qualified for publication. This collection of articles reflects the intellectual depth and breadth of contemporary legal discourse.

In the article '**Gender Sustainability and Fisheries**' **Dr. Hazra** sheds light on the difficulties faced by women in the fishing industry. Despite constituting half of the workforce in small-scale fisheries, women's labour remains largely unrecognized. The article emphasizes the changing roles of women in maritime policy, governance, and science advocating for their inclusion in policies addressing environmental goals and sustainability.

Dr. Manoj Kumar in his article '**Law of Abortion Vis-à-vis Right to Privacy in India**' critically analyses the legal confines within which abortion is permissible, exploring its interface with a woman's right to privacy. The article delves into provisions of the Indian Penal Code and the Medical Termination of Pregnancy Act, 1971, along with international and national judicial decisions.

In the article-'**Vulnerabilities and Agony of Migrant Workers**' **Abhilash Arun Sapre and Surbhi Meshram** address the challenges faced by female migrant workers in India, focusing on the impact of the COVID-19 pandemic. The authors highlight gender norms and disparities, emphasizing the need for a rights-based approach to migrant women's policy. The article advocates for safe transportation, prevention of workplace exploitation and abuse, and access to healthcare services.

Calista Chettiar in the **article 'Clayton's Rule of Appropriation'** explores the intricacies of Clayton's Rule of Appropriation, examining its origin in the Clayton's case. The article provides insights into the

way payments are appropriated by debtors and creditors. The author discusses the rule's application in India and abroad, highlighting its benefits, challenges, and positive impact on payment application and appropriation.

In the article '**Class Inequalities of Criminal Justice System**' **Arzoo Srivastava** sheds light on class disparities in the criminal justice system. Tracing the history of India's criminal justice system, the author analyses legal provisions and judicial decisions regarding dying declarations. The article emphasizes the need for transparency, training for judicial stakeholders, and examination of socio-economic backgrounds in addressing unconscious biases.

Abdul Hannan Qazi in the article '**Healing through Erasure: Exploring a Right to be Forgotten**' addresses the objectification of women resulting from recent social trends. Focusing on non-consensual sexual content, the article explores statutory provisions and legislative gaps, emphasizing the need to preserve victims' identity and integrity. Qazi advocates for responsible and ethical technology use.

In the article '**Judiciary and Social Media: Perils and Possibilities**' **Dr. Deepak Kumar Srivastava** analyses the intersection of the judiciary and social media. Referring to the Shreya Singhal Case, the article discusses the right of judges to use social networks and the need for regulations. It explores global social media regulations and their impact on judges, advocates, and jurists.

Mayank Parashar in the article '**Impact of Merger and Acquisitions on Indian Companies**' traces the history of mergers and acquisitions in India, examining their impact. The author discusses major mergers and acquisitions, emphasizing the complexity and evolution of the regulatory framework. The article underscores the importance of cultural alignment and effective communication in successful M&A deals.

In the **topic** '**Securitization of Non-performing Assets in Banking Laws**' **Chaitanya Tendulkar** explores the securitization process of Non-Performing Assets (NPAs) within banking rules. The article examines the impact of NPAs on financial organizations and emphasizes the necessity of robust risk management, transparency, and clear regulations to promote responsible securitization and economic progress.

Teena Sundarbanshi in the article '**A Concept of Police Encounter in Existing Law**' addresses police encounters, their purposes, reasons, and impact on society and the legal system. The author highlights the need for amendments in existing laws and impartial investigations to prevent misuse, emphasizing the temporary peace brought by encounters and the potential for future offenses.

In the article '**Trade Mark Protection in Metaverse: An Analysis in Indian Perspective**' **Vijay Kumar Singh and Dr. Rana Navneet Roy** deal with trade mark use in the metaverse, analysing challenges and the adequacy of present trademark law in India. The authors advocate for necessary changes, such as provisions for registering trademarks exclusively for the metaverse or the real world.

Dr. Avinash Samal in the article '**Political Empowerment of Tribal Women in Odisha**' examines empowerment of tribal women in terms of their representation, role perception, participation, and performance in panchayati raj institutions. Based on both secondary as well as primary data, it attempts to find out how the higher social and economic status enjoyed by tribal women in terms of their contribution to household economy and resultant gender equality has contributed to their participation and performance in panchayats.

'**Evaluating the Effectiveness of Zero FIR in Ensuring Justice for Victims of Sexual Offences in India**' **by Shreya Shreeja** critically evaluates the effectiveness of Zero FIR in providing impartial justice to victims of sexual offenses in India. The article suggests a need for monitoring, evaluation, and public awareness due to the procedure's lack of clarity.

Kalash Jain and Shreyansh Agrawal in their article **'Breaking the Cycle: Confronting India's Female Infanticide Crisis**' by Kalash Jain explore the issue of female infanticide, addressing social, religious, and gender stereotype perspectives. Emphasizing the need for social mobilization, political will, and widespread awareness, the authors assert that legislative reforms alone cannot resolve this social ill.

Joyita Ghosh in the article '**Scientific Enhancement or Ethical Dilemmas: Navigating Stem Cells Through Medicine and Cosmetics**' traces the evolution of stem-cell research, exploring its contributions to regenerative medicine and the beauty industry. The article analyses social, ethical, and moral dilemmas arising from embryonic stem cell research and examines existing legal provisions in India, addressing potential loopholes.

The article '**Animal Rights Legislation in India: A Critical Analysis**' by **Shweta Tyagi** provides a critical analysis of the legal framework for animal rights in India. The article examines legislations, case laws, and highlights the lack of implementation the laws and suggests that animal care teaching programmes should be introduced in the schools and universities to create awareness on animal rights.

Srinivas Katkuri in the article, **'Securing Our Digital World: Emerging Cyber security and Cyber Forensics Challenges,'** examines the intricate interplay between technological progressions, legal frameworks and investigatory methodologies and highlights the multifaceted nature of modern cyber challenges and recommends the

adopting of a holistic cyber security framework for combating emerging cyber threats.

Anurag Mondal in the Article, **Critiquing Hans Kelsen's Pure Theory of Law** from a Third World Perspective, examines the theory given by Han's Kelsen and the features distinguishing it from Austin's theory. It further analyses Kelsen's views on law and state and critically examines the pure theory of law from a third world perspective.

Jagatpal Choudhary in the Article, Anubhava Mantapa: Exploring the Philosophical and Sociological Foundations of Lingayatism in Medieval India, explores the history, architecture and significance of Anubhava Mantapa, a unique structure located in the city of Hampi, in Karnatak. The Article analyses the historical and cultural importance of Anubhava Mantapa, the religion Virasaivism practiced at that time and importance given to women and their human rights even at that time.

This edition as in the past is a veritable trove of diverse and analytical writings which will enhance the readers of understanding the selected themes.

Prof (Dr.) V. C. Vivekanandan
Vice-Chancellor
HNLU, Raipur

Contents

Gender Sustainability and Fisheries

Dr. Ayan Hazra*

1. Introduction

Poor, small-scale fishermen make up the majority of fishermen and fish growers. More than just lack of money, their poverty also includes lack of property ownership, high levels of debt, inadequate access to healthcare, education, and financial resources, as well as political and geographic exclusion. Women are frequently the most vulnerable and experience the worst of these limitations and difficulties. Fishing is frequently associated with men, especially when it includes boats, equipment, and extended periods at sea. Over a half of the workforce in the fisheries industry is made up of women, who play a significant role in the industry. Women are active participants in all aspects of the value chain, including leadership, marketing, trading, and harvesting. Yet, ongoing disparities in the treatment of men and women prohibit women from fully engaging in market prosperity and decision-making, which ultimately limits the sector's potential.[1]

Nonetheless, women are equally important in the upkeep of machinery, seafood processing, and marketing. Also, they fish a lot. Yet, women's roles are frequently given less credit. According to the FAO, they made up about half of the workforce in small-scale fisheries in 2010 and even more in inland fisheries. They handle the majority of the pre-harvesting and post-harvesting chores. Yet, because these jobs aren't often acknowledged, information isn't frequently acquired, and women's labour is largely unrecognised.[2] For instance, a significant amount of the labour in gleaning for mollusks is performed by women, however this activity is hardly mentioned in most fisheries statistics. Along with many other unpaid pre- and post-harvest duties that go unrecognised or are undercounted as work, women also do things like fix traps, gather bait, make fisherman's food, and keep accounts. Yet, studies have shown that women perform an astonishing amount of labour in the fishing industry. In fishing villages, the home frequently serves as an economic entity where men and women typically play complementary responsibilities. Women are in charge of land-based operations including net weaving, fish processing, and marketing, while males are responsible for fish collecting. In addition, women are

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[1] Ferrant G. and Kolev A., *The economic cost of gender-based discrimination in social institutions,* OECD Development Centre Issues Paper (2016) http:/ www.oecd.org/dev/development-gender/SIGI_cost.

[2] *Voluntary guidelines for securing sustainable small-scale fisheries in the context of food security and poverty eradication*, FOOD AND AGRICULTURE ORGANISATIONS OF THE UNITED NATIONS (2015) https://www.fao.org/voluntary-guidelines-small-scale-fisheries/en/.

still in charge of supporting the household's fishing business and preserving social networks and support systems. Women play a variety of tasks in the fishing industry, and their domestic responsibilities help to ensure both household and national food security. Unfortunately, women's contributions are not given the same acknowledgment as men's are.

2. Social Exclusion: What Is It?

Social exclusion is a complex, diverse process. Individuals who are socially deprived lack assets, entitlements, goods, and services or experience attempts to deny them, and thus are unable to participate in the common interpersonal contacts and activities that other people of a society can enjoy, whether in the context of the economy, the social world, culture, or politics.

3. Who are excluded from society?

Social exclusion can be a little bit difficult to describe however, the instances of publicly ostracised individuals can vary depending on their social situations. For instance, in some nations, elders have a great level of respect and make decisions for their families and communities. Elders' participation in decision-making is, however, highly limited in some communities where they are viewed as a burden and unfit for contemporary life. Who you are is your identity.

Your tasks, obligations, social standing, and privileges are determined by your gender, age, and membership in certain family and social groupings. Being socially excluded and being marginalised are the same thing. These people have little power and little opportunity to participate in decision-making, even if they work in a sector like coastal fishing or aquaculture. Women usually do not get many opportunities to utilise the governmental initiatives related to services and technical knowledge. Accessing financial services like loans or subsidies is more challenging for them. Having to rely on the kindness of strangers and being at risk of poverty are two consequences of social exclusion. For instance, having a disability may limit a young woman's prospects to land an occupation or start a connection, making her more susceptible to scarcity and marginalisation.

It is obvious that diverse identities lead to different experiences of hardship and poverty. For instance, when household finances are tight, boys' education may receive greater attention than girls' schooling. Boys might have improved financial options in future lifetime with more schooling, therefore their upbringings will be distinct from their sisters in the household. Although gendered characters and relations differ between cultures, generally speaking, women find it difficult to exercise their civil dignity, have partial admission to resources that may be used to generate revenue, and have little influence over policymaking. Some people lack access to

services for family planning or self-control over their reproductive and sexual health.

Women are particularly susceptible to abuse, exploitation, and misery since their basic human rights aren't always upheld, they have reduced economic and productive assets, and they are subject to unequal societal norms and power dynamics. People react differently to suffering and poverty early on.

4. The Issues Women Face

Fishing-related jobs for women come from aquaculture, small-scale fishing, selling fish, and fish processing; larger vessels are used less frequently for commercial fishing. The main issues that women face in the fishing environment is:

- The fact that they can only play supporting roles. The fishing industry has traditionally included women, although they often receive neither social nor financial compensation for their job. This is mostly due to the fact that they become active both within and outside of the community at times when they aren't most noticeable. Women frequently have no say in how much revenue is earned from fishing businesses.

- Management and positions of power are underrepresented by women. The major difficulties are reportedly time constraints and a lack of faith in their ability to hold such positions.

5. Fishing and Gender Roles

Gender roles receive less emphasis despite the considerable contribution that women make to fisheries. This may lead to policies or programmes failing to help fishing communities' livelihoods or lessen their vulnerability. It is more likely that initiatives to progress the lives of small-scale fishermen and their families will be effective if they address the often "invisible" role of women in these industries. The roles and obligations of the sexes are frequently established in fishing households. As a result, households experience several revenue streams. Fish can be difficult to come by, even from male relatives, for women who purchase it for processing and marketing. While preparing development initiatives, it is important to take into account these intricate relationships and gender interactions.[3]

Despite the fact that women may pay the majority of the costs associated with gender inequality and disparities in society, these issues have a significant influence. Negative effects on women will result in prolonged poverty for all societal members because they are the primary family carers.

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[3] MC Arenas and A Lentisco, *Mainstreaming Gender into project Cycle Management in the fisheries sector*, FOOD AND AGRICULTURE ORGANISATIONS OF THE UNITED NATIONS (2011) https://www.fao.org/3/ba0004e/ba0004e00.pdf.

6. Social Inclusion for Growth

"Social inclusion" refers to highlighting gender issues in all facets of carrying out policies and programmes, from implementation to evaluation, to ensure that benefits are distributed equally. Females participation is now widely acknowledged to be crucial to sustaining economic expansion and growth. The problems are significantly more complicated when they relate to fisheries because fisherwomen aren't included in all of the industry's activities. They are ostracised despite having made considerable contributions to both households and communities. Poor control and access to productive resources are the main causes of this. Also, there is a need to increase their involvement in governance and decision-making for aquaculture as a whole. Because of social, cultural, political, and economic factors, women frequently lack access to things that are simple for males. Although overcoming them may not be simple, affirmative action policies can guarantee that changes are made. In the underdeveloped world, small-scale fisheries are the norm. Therefore, it is crucial to consider the community's position in the context of fisheries growth.

Some Gender Concepts

- According to the definition of gender, it is "a notion that means social distinctions between women and men, as opposed to biological ones, that have been learnt, are dynamic through time, and have significant variances both across and within cultures."

- Gender equality is the equivalent satisfaction of rights, prospects, facilities, and capitals by females and men; gender equity is the process of treating women and men fairly and justly to achieve gender equality; gender analysis is a methodical process of determining significant elements making a contribution to gender disparities so that they can be adequately addressed.

- The study of variations in situations, demands, enrollment, resources available for growth and development, asset control, decision-making authority, etc. between men and women in their given gender roles serves as the foundation for women's empowerment and is known as gender analysis.

Source: http://www.rflp.org/ (Regional Fisheries Livelihoods Programme for South and Southeast Asia)]

Seas, rivers, lakes, ponds, and other natural resources associated to fishing are communal resources. In practise, there is no prohibition on use, although access is typically controlled by customs and traditions. Access might also be limited by international and regional

agreements. Ponds for aquaculture are privately held, and the owners are typically men. Women are not involved in decision-making where customary rights are practised. In the community, men make the majority of the decisions. Hence, access is likewise controlled by men. This is one of the reasons that so few women actually go fishing in the ocean. Women's fishing is, at best, supporting in nature and smaller in scope and operation. Fisheries development initiatives that put a male-centric emphasis on improving fish productivity. There are women who fish in inshore waters, and any development work done along the shoreline will affect their ability to do so. This is a fact that is virtually ever acknowledged. As a result, numerous occupations done by women have been restricted or outlawed while planning and developing fisheries management policies. Land and large fishing equipment are also owned and passed down through males.

Traditionally, women were the ones who made nets. Women built and repaired the fishing nets while the men went fishing. Females contribution in net mending decreased due to mechanisation of the net-making process and the production of netting yarn. Women are also leaving the industry due to the size and variety of nets that are being used. Now, the gear is being made and repaired by fisherman themselves. Many fish wives have been "economically displaced" as a result of the mechanisation of craft and equipment. Another crucial resource that affects how big an organisation can operate is credit. Informal sources have historically dominated the rural finance market. Large scale merchants or auctioneers fund all marketing, craft, and gear-related operations in the fishing industry. [4]Women have a very hard time getting credit to support their endeavours. Because trade and finance are so intertwined, women typically receive loans via their husbands and other male relatives. Credit obtained by women for certain purposes, though, is occasionally found being redirected for family needs. Women fish sellers typically have to deal with high transportation costs, fluctuating pricing, and travel at strange hours. Health issues are also a result of really poor facilities.

Enhancing women's utilization of the assets mentioned previously represents one of the most crucial methods to increase their levels of involvement. To do this, state-level policy instruments are required. this. Community customs are challenging to alter, yet legal requirements must be observed. A beginning point will be specific regulations that require women to participate in local decision-making bodies. In India, the Panchayati Raj Act's adoption led a sharp rise in the representation of females in local self-government. In numerous nations, Self-Help-Groups (SHGs) have facilitated easier access to finance. Women in small units are brought together through SHGs,

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[4] *Gender policies for responsible fisheries- Policies to gender equity and livelihoods in small-scale fisheries,* FOOD AND AGRICULTURE ORGANISATIONS OF THE UNITED NATIONS (2007), https://www.fao.org/documents/card/es/c/b30f53cd-ae74-5eaa-b092-a8f5e81317e0.

which encourage saving and offer short-term loans with lower interest rates, to engage in productive activities. Cooperatives can play the same role on a greater scale. Gender mainstreaming also highlights the importance of equal access to technology and skill development in the fishing industry.

Since that women dominate post-harvest activities, linked technology can significantly contribute to female empowerment. Improved fish handling, curing, drying, and processing technology have increased the income of women. The process of developing technology is typically gender-neutral but it must consider how well-equipped women are to handle or use technology.

7. Why gender concerns are crucial in the fishing industry

Effective and efficient fisheries development must include the roles played by both men and women in the industry for a number of reasons, not the least of which are the obvious worries about justice, equality of opportunity, and discrimination:

- Women substantial role in the fishing industry, especially in small-scale fisheries and more and more in capture fishing and other pursuits. Improved management and development plans and initiatives that cover all of the operations in the sector, not just those performed out by men, can be established by recognizing the role they play.

- In addition to fishing, women contribute significantly to other fishery-related activities. They are primarily responsible for marketing as well as processing fish and fisheries products. These responsibilities are essential to the industry even though they are frequently considerably different from those of males. To ignore these operations is to ignore a sizable chunk of the industry.[5]

- Many types of knowledge are produced by the various work that women conduct. Women, for instance, are more likely than men to know the greatest fishing spots and how much these fish will sell for. We can only fully comprehend the fishing industry and effectively manage its development if we have an awareness of both females and males experiences and expertise.

- The use of women's expertise and knowledge is constrained by the underrepresentation of women in decision-making.

- There are extremely few women in administrative positions with authority to make decisions. Many women who work in the fishing industry have low self-esteem, which may be a reflection of social norms that place men above women in certain environments. This

[5] *Id.*

decreases women's participation and restricts their capacity to fully empower themselves and participate of what they are capable.

- Often, women don't attend meetings conducted by organisations for fisherman. The majority of fishing projects are male-centric, and women's involvement in planning, programming, and management is minimal. As a result, women's knowledge and needs are not given enough consideration, which eventually reduces the efficacy of such plans, programmes, etc.
- The fishing industry has relatively few policies and initiatives that take gender issues into account, which results in the exclusion of a sizeable percentage of the fisheries sector from programme development and assistance as well as equal opportunity.

8. Employment Opportunities Based on Gender

The real participation of women in the industry is anticipated to rise in the future as reporting quality increases and policies are implemented aimed at enhancing women's capacity for decision-making in the industry. Men and women play different roles in the value chain of the fishing industry, and the socioeconomic position of each party affects the power dynamics.[6] Both men and women can play dominant roles or hold jobs that place them in high reliance. Around half of the people engaging in fisheries development initiatives are women. Women are now the majority of fish entrepreneurs in several developing countries, controlling large sums of money and finance-based fish firms that produce huge benefits for communities and families. More than 180 million people receive direct income and employment from the aquaculture and fisheries industries globally. In developing nations, women generally perform low-paying jobs including dumping the day's harvest to be transported to shops or fish processing plants, drying and preparing fish, and producing byproducts from fish waste. Transportation, funding for new investments, and technological challenges are frequently more problematic for women than for men. Their plight is made worse by the market, where they are exposed to fluctuations in the price of their produce or when social, cultural, and/or political limitations limit their ability to trade outside of their immediate surroundings.

9. Gender Parity and Women's Authorization in Aquaculture and Fishing Industries

To guarantee that their rights and requirements are appropriately protected and met, men and women should be granted equal rights and be permitted to take part in the expansion of fisheries and aquaculture. Although though equal rights are recognised by

[6] Y. Diei-Ouadi, K. Holvoet & A. Randrianantoandro, *A decisive impact in natural resource sustainability: Key gender considerations in post-harvest fisheries*, 29 NATURE & FAUNE 20 (2014).

international human rights law, women continue to be disadvantaged despite an increase in their workload and responsibilities. Women must have access to physical and financial resources in order to build their own fishing industry, meet their requirements, and fulfil their objectives due to their significant contribution to the post-harvest subsector. To increase the effectiveness, profitability, and sustainability of their operations as well as to provide proper infrastructure, gear, technologies, and market access, it is required to give them training and official education. Their businesses will be supported, their revenue potential will expand, and their marginalisation will decrease as a result. But there is always a chance that men will dominate new income-generating opportunities that have historically been filled by women. For instance, as demonstrated by the growth of the mussel cultivation business in India, which was historically dominated by women, men now predominate since the technology has become more lucrative.

Furthermore, necessary is giving the female population equal say in the profit margins and the value chain. Being a woman who frequently works in low-status, low-paying, unplanned, and provisional employment that disqualifies them from getting social assistance makes this issue more pertinent. Female traders must be given the knowledge, access, and information necessary to learn about fish marketing and preservation in order for them to advance in the value chain and be able to purchase and maintain fresher fish. Overfishing is occurring as a result of the growing need for fish and marine resources, so it's important to make better use of the current world catches while cutting back on waste and losses.[7] As a result, gender-specific labour divisions should be considered in fisheries strategy. The chances presented by fishing should be evaluated from a gender lens using a consultative approach to avoid adding extra time demands on women and to foster broad cultural and social acceptance. Aquaculture must be encouraged in ways that care women's empowerment. Men and women must both profit equally from any fishing endeavours if communities are to experience long-lasting improvements in their social and economic conditions.

10. Gender Issues in Fishing Policies and Planning Procedures

The idea of gender is concerned with how social, political, and economic contexts—rather than biological factors—determine the roles and interactions between men and women. In many cultures, women and men have unequal power relationships, which disadvantages women in terms of their capacity to manage resources, access services, take advantage of new possibilities, and deal with enduring changes

[7] *Report of the Workshop on Gender Roles and Issues in Artisanal Fisheries in West Africa, Lome, Togo*, FOOD AND AGRICULTURE ORGANISATIONS OF THE UNITED NATIONS (1996), https://www.fao.org/documents/card/en/c/d9f7e8b1-ed34-5be3-ac72-702182708448.

that have an impact on their life. To address these difficulties, gender policies are required. In the past, many organisations in charge of managing fishing resources have exclusively worked with and for men, and their policies have a propensity to focus on the harvesting industry, where men predominate. Programs for the growth of the fishing industry have prioritised the demands and goals of men while downplaying the significance of women in the industry. Eventually, it has become apparent that the paradigm has shifted and that the women's community is now welcome to engage in institutional organisation and planning. It is crucial to recognise and prioritise the desires and requirements of the both women and men in order to guarantee sustainable and fair policy benefits. While creating and implementing fisheries policy, they must effectively take into account the priorities and interests of women. The importance of women in the production, processing, and marketing of fish in artisanal fisheries has been acknowledged on a global scale, and efforts have been made to include them in all development initiatives by adopting special actions to address gender politics and women's empowerment. For gender inclusion in the growth of fisheries to be a priority, both corporate and public entities must strongly support this on a national and worldwide level, including in decision- and policy-making. In the fisheries sector, women must be fairly represented in positions of leadership and decision-making. Equal chances for men and women should exist in companies, non-traditional activities, and decision-making processes. While dealing with problems relating to the management of fishery resources, it is crucial to take into account the subsistence benefits of all parties intricate through the value chain.[8]

Development strategies have historically focused on women who work as fish processors in small-scale fisheries. Men have been involved in fishing-related developmental activities that involve resource management or resource exploitation, but women have not been included in planning "mainstream" fisheries operations. The management of fisheries resources must also be connected to other aspects of the fish distribution chain, and those who are involved in fishing and who are impacted by regulations must be involved in the planning stage. Moreover, gender mainstreaming needs significant political commitment, including the creation of budgets for each gender. Men and women in certain nations with developed fish processing industries are paid equally for the same work, but there are very few higher-paid professions held by women. Receiving, cleaning, sorting, filleting, processing, packaging, storing, and marketing fish and fish products make up the majority of their job. Due to the high levels of smoke released from the smoking oven in some nations where the seafood smoking process is customary and primarily done by the female community, they are confronted with health risks. Many African and some Asian nations have adopted modern fish-smoking

[8] *Gender and Water Alliance* (2006) www.genderandwater.org.

technology to address this issue, which is renowned for its effective management of smoke and toxins created during the smoking process. By using this method, less fuel is required while offering five times greater load capacity than conventional barrel furnaces or even enhanced ovens. In regards to food security, this technology also assists fish processors in meeting the highest global safety and quality requirements, allowing them to gain access to bigger and more lucrative markets. According to studies done in various nations, women who work in the expanding seafood export processing business, where they are obliged to spend a lot of time away from home, find it difficult to advance in other areas of their lives. They frequently deal with unfavourable working circumstances and lower pay than men.[9]

11. Possible Fishery Business for Women

By offering work possibilities and certain income-generating activities, fisherwomen can become economically empowered. The mobility of fishermen is constrained. They therefore require some environmentally friendly innovations, which could boost the family's revenue. There is ample data to show that, given the right conditions, women can make a significant economic contribution to the country. Making fisherwomen self-sufficient is the primary objective in their growth in order to better their circumstances. Women should be supported in their personal, professional, and social responsibilities as well as given opportunity to learn new technology that will help them contribute to the economy.

These are a few examples of small-scale aquaculture and fishing businesses that have been tried out and proven to be profitable endeavours for raising the standard of life for fisherwomen.

- Backyard hatchery technology for seed production of shrimp and finfish
- Mud crab fattening technology
- Mussel culture
- Edible oyster culture
- Marine and freshwater pearl production
- Technology for breeding and seed production of pearl spot fish
- Fish and shellfish farming
- Ornamental fish culture
- Seaweed collection and culture
- Fishery estates
- Small scale industry for fish and prawn feed production

Post-harvest activities and value addition

[9] Kleiber, Danika, Leila M. Harris, and Amanda CJ Vincent, *Gender and small-scale fisheries: a case for counting women and beyond,* 16.4 FISH AND FISHERIES 547-562 (2015).

12. Ideas for Taking Care of Gender Issues

To address the gender concerns in the fishing, aquaculture, and fish processing industries, the following recommendations are made. To paint a complete picture of the contributions of both men and women and to properly recognise the so-called "invisible" labour of fisherwomen, gender-disaggregated data gathering is advocated. Gender-responsive research and gender-mainstreaming course curricula in fisheries education can hasten this. It is essential to gender-sensitize fishing communities so that males do not ignore the needs, desires, and worries of women and so that women are aware of their own requirements and actively participate in various activities to receive benefits on an equitable basis. To include more women in the value chain, a marketing infrastructure that supports them must be created. The results of group efforts are very positive. Women can join self-help organisations and effectively use microfinance to create new businesses or to complement their income-generating contributions to the household. Thus, it is important to promote the development and growth of women's self-help organisations. Women's ability to obtain loans and finance must be made easier. In order to support the desires and requirements of both genders, gender views are crucial in the fishing industry. This makes it possible for it to have a comprehensive strategy that addresses every sector involved in primary production and its supporting industries. In order to target development, it's necessary to analyse the challenges and place them in the right perspective. Women should be permitted to participate in decision-making for all aspects of the fishing industry, including planning, building infrastructure, and organisational structure. Enhancing management duties and strengthening resource allocation processes for women's unions and organisations.

Encouraging women to take part in aquaculture-related non-land-based occupations such seed production, feed collecting and processing, and aquatic product production. locating appropriate collateral to provide women with access to finance and other services.

Building up neighbourhood-based organisations to deal with the rising financial and social obligations. delivering skill development for diversified income. promoting women's access to opportunities by removing obstacles like male land access preferences and the cost of joining new groups, Organizing government and non-governmental groups to deliver primary healthcare to migrant and mobile fisherwomen; addressing unsafe working conditions with rules of conduct that include safety from sexual harassment; and working to elevate the value of women's labour, boost self-esteem, and achieve gender equity. Companies of all sizes should make sure that rules of conduct are present and followed.

13. Conclusion

Political and policy makers must promote sustainable fisheries, seafood, and aquaculture production on a worldwide basis in order to provide food security for a population that is expanding. Women's roles in maritime policy, governance, and science are changing, and it is important to consider how their perspectives could assist to achieving important environmental goals. For the environmental, social, & economic sustainability of fish farming, timely decision-making processes for climate change mitigation and adaptation are essential to avoid the penalties of inaction. It is past time to remove restrictions on women's participation in and access to governing venues. Successful policies must take into account the variety of gendered roles and identities as well as the root causes of inequality in order to harmonise how we advance the appropriate use of ocean biodiversity. The importance of different gender views in reducing the negative effects of extraordinary climate change cannot be overstated. To establish ocean governance that is focused on sustainability and takes into account both social and environmental factors, policy initiatives must include gender equality. Females are key players in the fishing industry who are seen as having recognised capabilities for inclusivity and collaborative capacities by communities that support sustainable growth. Eliminating gender-based violence and advancing women's human rights, such as income, schooling, access to healthcare, and reproductive freedoms, as well as information access and engagement with decision-making processes, will greatly reduce the current gender gaps and improve women's skills to make a contribution to commercial fishing and fisheries. The effective attainment of sustainability in society and the environment through sound ocean governance is what is at stake, not only justice or a power struggle between genders, as is sometimes asserted in the study of gender studies. The possibility that preservation and growth interventions will accomplish their intended results of reducing poverty and enhancing food production in coastal communities is raised when programmes take into account and are tailored to the gendered family and community dynamics. Also, a more thorough awareness of the regional social dynamics that may affect the efficacy of these treatments is ensured by analysing and integrating gender dynamics into the planning and creation of fisheries-related interventions. Enhancing women's ability to generate income and increase their bargaining power along the entire value chain of the fishing industry will have a significant positive impact on the sustainability and effectiveness of fishery-related interventions while also promoting fair economic, social, and health outcomes.

Law of Abortion *vis-à-vis* Right to Privacy in India

Dr. Manoj Kumar*

1. Introduction

The Medical Termination of Pregnancy Act, 1971 is one of the important social legislations in India which deals with law of abortion and gives autonomy to women with respect to taking decision whether to give birth to the child or not. The legislation is also an important measure taken in respect of family planning and controlling population growth. In recent past abortion has become popular as the facilities for accessing abortion have increased not only in urban areas but also in rural settings too and education has brought awareness among people that abortion is a healthy measure. The Act has legalised abortion in certain circumstances which has cast a positive impact and has reduced the instances of illegal abortions as now abortions are carried out by qualified medical practitioners in qualified hospitals.

The Act is a landmark legislative measure in modernising the Indian society and has brought out social transformation through the instrument of law. It has resulted in ensuring women empowerment, socio- economic development and population control. It has also broken the orthodox concept that abortion is sinful and against religious notions and emancipated women from this dogmatic belief. However, it is tough to ascertain the extent to which this limited decriminalisation has resulted in prohibition of illegal abortion, ensured life and health of pregnant women and controlled maternal morbidity. There are several factors viz. psychological, sociological, financial, technical and administrative which play a vital role in ensuring effective implementation of the Act and more so co-operation of the people is a very important factor. Further, the success or failure of the Act is dependent on attitude of public, actions of governments and effort of medical practitioners, social workers, NGOs, educators, politicians and religious leaders.

Abortion is an act through which the life of the foetus or embryo is destroyed in the women's womb or the pregnant uterus emptied prematurely. It may be categorized as natural, accidental, spontaneous, or artificial depending upon the nature and circumstances under which it occurs. All abortions do not attract criminal liability but artificial or induced abortion unless exempted under the law which is defined in law as “an untimely delivery

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voluntarily procured with intent to destroy the foetus."[1] It can be carried out "at any time before the natural birth of the child."[2]

The right to privacy of a person relates to some fundamental aspects of one's life such as marriage, procreation, use of contraception, family planning, family matters etc. According to Thomas Cooley, "privacy simply means protecting a person's right to seclusion." According to Professor Allan Westin, it means "the state of solitude for small group of intimacy." The report by a panel in 1967 of US President's office of Science and Technology defines it as "the right to privacy is the right of individual to decide for himself how much he will share with others his thoughts, his feelings and the facts of his personal life." This right has its root in freedom of choice of a person. It has emerged out of the concept of personal liberty. Its scope is very wide to include within its sweep women's right to determine if she wants to terminate the pregnancy. Abortion is therefore a personal matter which falls within the domain of women's right to privacy.

In the light of this backdrop, an attempt has been made in this paper to analyse the confines of law within which abortion is permissible and also to see how far it has its interface with the right to privacy of a woman.

2. Legal Perspective of Abortion in India

The word 'abortion' has not found place in the Indian Penal Code, 1860 which is general criminal law in India. The Code has not defined the terms "miscarriage" or even "unborn child". Miscarriage is synonymous to abortion and means "expulsion of the embryo- foetus at any time before it reaches full growth." According to Medical Jurisprudence "miscarriage technically refers to spontaneous abortion, whereas voluntarily causing miscarriage, stands for criminal abortion. Legally, miscarriage means the premature expulsion of the product of conception, an ovum or a foetus, from the uterus, at any time before the full term is reached. Medically, three distinct terms, viz., abortion, miscarriage and premature labour are used to denote the expulsion of a foetus at different stages of gestation. The term abortion is used only when an ovum is expelled within the first three months of pregnancy, before placenta is formed. Miscarriage is used when foetus is expelled from the fourth to seventh month of gestation, before it is viable, while premature labour is the delivery of a viable

[1] Induced abortion is also classified into two categories- therapeutic abortion and elective abortion. Therapeutic abortion is "an abortion which is induced to preserve the health of the mother when her life is in danger or when it is found that the child if born will be a disabled one." If abortion is caused due to other reason, it is called elective abortion.

[2] *Queen Empress* v. *Adamma*, (1886) ILR 9 Mad. 369.

child possibly capable of being reared, before it has become fully matured."[3]

Voluntary causing miscarriage has been interpreted as illegal abortion and attracts criminal liability under the Code. The Code has made provisions dealing with miscarriage or induced abortion in sections 312 to 316. Causing abortion as well as accessing abortion both have been criminalised under the Code.[4] "A woman who causes herself to miscarry" is brought within the scope of the provisions.[5] It has made "causing miscarriage" a grave offence and "causing miscarriage with the consent" or "without the consent" of the woman is offence and attracts punishment under sections 312 and 313 respectively. Section 312 of the Code has defined the term "causing miscarriage".[6]

Any person who "voluntarily causes a woman with child to miscarry" is punishable.[7] However, miscarriage caused in good faith to save the life of the pregnant woman is not punishable.[8] Further, miscarriage of a "woman be quick with child" is punishable in aggravated manner.[9] The terms woman with child has been interpreted to mean "as soon as gestation begins" and a "woman be quick with child" means when "motion of the foetus is felt by the mother." When due to medical emergency life of the mother is at threat and to save the life of the mother destruction of the child is necessary then causing abortion is allowed.

3. Inadequate Law to Control Illegal Abortions

The legal provisions related to abortion in the Code in sections 312 to 316 were very strict. Any abortion carried out in violation of the provisions of these laws was held illegal and attracted criminal liability. Section 312 of the Code provided for "three years of imprisonment and/or a fine" as punishment. In certain circumstances where accessing abortion was very much necessary, women resorted to illegal abortions which were carried out in very unhygienic and unsafe manner sometimes by medical practitioners and many a times by untrained persons. According to an estimate "prior to the enactment

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[3] JAISING P. MODI, JUSTICE K. KANNAN (ED.), A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY 325 (LexisNexis 2018).

[4] The IPC's provisions regulating abortion, enacted in 1860, closely resemble to the UK's Offences Against the Person Act, 1861.

[5] The Indian Penal Code, 1860, Explanation to § 312.

[6] "Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

[7] The Indian Penal Code, 1860, § 312.

[8] *Ibid.*

[9] *Ibid.*

of the Medical Termination of Pregnancy Act, 1971 as many as five million induced abortions were carried out in India every year, of which more than 3 million were illegal, and approximately one- seventh of women who became pregnant were resorting to back street abortions at the hands of inexperienced and unqualified persons, such as quacks and paramedical personnel like nurses, midwives etc. in strict secrecy to avoid the horror of law, through a variety of crude and unhygienic methods for paltry sums of money with all the risks of morbidity and mortality. At times greedy doctors would exploit helpless victims by extorting a huge sum of money for terminating a pregnancy."[10]

4. Liberalisation of the Law of Abortion

In order to control the incidents of illegal abortions it was thought to liberalise the law of abortion. Further, it is said that "the state finding the soft measures of family planning largely ineffective, resorted to a policy of sterilization and liberalization of abortion law."[11] Visualising "the gravity and magnitude of the enormous increase in population and its adverse effect on the one hand, and hardships caused to women as a result of the draconian law of miscarriage on the other", the Government of India in 1964 constituted a committee, known as the Shantilal Shah Committee, headed by Dr. Shantilal H. Shah "to study the question of liberalization of the law of miscarriage/ abortion as contained in section 312 of the IPC which makes induced abortions illegal except to save the life of the women." The committee made "a careful study of the pros and cons of the entire issue and took into account a pragmatic view of the socio-economic and legal problems involved in cases of unwanted pregnancies and recommended to the Government of India, for amendment in the outdated and outlived law of miscarriage contained in section 312 of the IPC."[12]

The committee observed that "whatever may be the moral and ethical feelings that are proposed by the society as a whole on the question of induced abortion, it is an incontrovertible fact that a number of mothers are prepared to risk their lives by undergoing an illegal abortion rather than carrying that particular child to term."[13] The committee submitted a comprehensive report suggesting various situations justifying termination of pregnancy. It recommended that "abortion should be allowed not only to save the life of the pregnant women, but also to avoid grave injury to her physical or mental health arising due to pregnancy caused by sexual assault, rape etc."[14] In order

[10] Siddhivinayak S Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 INTERNATIONAL JOURNAL ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (2004).
[11] C. L. Anand, *A Critical Examination of Laws Relating to Access to All Forms of Contraceptives*, 24(4) *Civil and Military Law Journal* 251 (1968).
[12] Shantilal H. Shah, *Report of the Committee to Study the Question of Legalisation of Abortion*, (Ministry of Health and Family Planning, New Delhi, 1967)
[13] *Ibid.*
[14] *Ibid.*

to deal with the problem of illegal abortion and consequently to check the extremely high rate of maternal mortality and morbidity the Committee recommended "the decriminalisation of abortion in specific compassionate circumstances."[15]

5. The Medical Termination of Pregnancy Act, 1971

The Government of India considered the suggestions made in the report of Dr. Shantilal Shah committee and enacted the Medical Termination of Pregnancy Act, 1971 which came into effect on 1st April 1972. The rule making power was vested with the government under section 6 of the Act which government exercised and framed the Medical Termination of Pregnancy Rules, 1975[16] for effective implementation of the provisions of the Act. It may importantly be noted that the government focused its attention on liberalising the law of abortion as a supplementary measure of its family planning programme to control the unprecedented population growth but it denied any link between the Medical Termination of Pregnancy Bill and the Family Planning Programme while introducing the Bill in the Parliament in order to avoid any conflict which could have arisen between different religious or fundamentalist group.

There were three main objects and reasons behind enacting the Act viz., "(i) health measures, when there is a danger to the life or to the physical or mental health of the women; or (ii) humanitarian grounds, such as when pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman, etc. or (iii) eugenic grounds, when there is a substantial risk that the child, if born would suffer from deformities and disease."

The Medical Termination of Pregnancy Act, 1971 is minor Act which has eight sections only. The object of this Act is, in addition to controlling high incidents of illegal abortion, to grant women right to privacy which includes "the right to space and limit pregnancies i.e. whether or not to bear children; and to decide about her own body" and "to encourage a reduction in the rate of population growth by permitting termination of an unwanted pregnancy on the ground of failure of contraceptive device resulting in pregnancy of the woman besides many other grounds."[17]

Abortion though punishable under the Indian Penal Code was legalized when caused in certain circumstances with the passing of this Act.

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[15] *Ibid.*

[16] The Medical Termination of Pregnancy Rules, 1975 has been repealed and replaced by the Medical Termination of Pregnancy Rules, 2003.

[17] The Medical Termination of Pregnancy Act, 1971, the statement of objects and reasons.

The Act permits abortion in certain specific circumstances within the period prescribed during pregnancy by registered medical practitioners and under prescribed conditions. The Act provided an easy way out for women with unwanted pregnancies. The Act is a landmark legislation and has brought out social transformation through the instrumentality of law.[18] It helped a lot in checking population growth, planning families, safeguarding health of women and controlling the birth of a child that is to be born with deformities after amniocentesis.[19]

The Act does not introduce a right to abortion, rather it focuses "on enabling access to legal and regulated abortion services within government hospitals and decriminalises abortion in certain circumstances." Section 3 of the Act which talks about "when pregnancies may be terminated by registered medical practitioners" is the main provision of law which has liberalised the mandate of section 312 of the Code and has allowed abortion to be carried out in several situations. The Act allows "a registered medical practitioner to terminate pregnancy in accordance with the provisions of the Act"[20] and such practitioner cannot be held criminally liable for any offence for that matter."[21] The Act allows "abortion by a registered medical practitioner in two stages: First, a single RMP's opinion is necessary for abortions up to 20 weeks after conception; Second, for pregnancies between 20 to 24 weeks old, the opinion of two RMPs' is required to determine if the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or if there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously 'handicapped' before agreeing to terminate the woman's pregnancy."[22] It says that "in determining whether the continuance of a pregnancy would involve such risk of injury to the health of the pregnant woman, account may be taken of the pregnant woman's actual or reasonably foreseeable environment."[23]

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[18] Poonam Pradhan Saxena, *Abortion as Ground for Divorce under Hindu Law*, 29 JOURNAL OF INDIAN LAW INSTITUTE 421 (1987).

[19] Amniocentesis is the most common technique available for sex determination. It was introduced as an aid to detect any abnormally in the unborn child. But, after an open advertisement for sex determination, the authorities realised that a monster has been growing under the guise of ante- natal service. Amniocentesis involves inserting a needle through the abdomen into the amniotic sac which contains the foetus. About 15 CC of amniotic fluid which contains foetal cells is removed. The cells are either observed directly or cultured for 3 to 4 weeks. The test is done in 16th week of pregnancy. About 70 genetic diseases can be detected by chromosomal study of the foetal cells. One of its other uses is to detect the sex of the foetus. This latter test was originally used in cases where there was the possibility of a genetic disease such as hemophilia. See, Sandhya Srinivasan, The Blatant Misuse of Amniocentesis, Eve's Weekly, 18 (June 7- 13, 1986).

[20] The Medical Termination of Pregnancy Act, 1971, § 2(d).

[21] *Id.*, §. 3(1).

[22] *Id.* §. 3(2).

[23] *Id.*, § 3(3).

Further, MTP Rules, 2003 as amended in 2021 in Rule 3B. talks about "women eligible for termination of pregnancy up to twenty-four weeks". It states seven "categories of women who shall be eligible for termination of pregnancy for a period up to twenty -four weeks" such as: "survivors of sexual assault or rape or incest; minors; change of marital status during the ongoing pregnancy (widowhood and divorce); women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016]; mentally ill women including mental retardation; the foetal malformation that has a substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and women with pregnancy in humanitarian settings or disasters or emergency situations as may be declared by the Government."[24]

Further, where the length of the pregnancy does not exceed twenty weeks and it has occurred "as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."[25] Also, "where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman" for the purpose of accessing abortion.[26] The Act significantly states that "the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board."[27] It is the duty of "every State Government and Union territory to constitute a Medical Board for the purposes of this Act."[28] The Medical Board is required to "consist of a Gynaecologist; a Paediatrician; a Radiologist or Sonologist; and such other number of members as may be notified in the Official Gazette by the State Government or Union territory."[29] It mandates that "no pregnancy can be terminated without the consent of the woman, and in the case of a woman who has not attained the age of eighteen, or if she is a lunatic, without the consent in writing of her guardian."[30]

Termination of pregnancy can be made only at "a hospital established or maintained by Government, or a place approved by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as

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[24] Medical Termination of Pregnancy Rules, 2003. Rule 3B.
[25] The Medical Termination of Pregnancy Act, 1971, § 3(2), Explanation 1.
[26] *Id.*, §. 3(2), Explanation 2.
[27] *Id.*, § 3(2B).
[28] *Id.*, § 3(2C).
[29] *Id.*, § 3(2D).
[30] *Id.*, § 3(4) of the MTPA.

the Chairperson of the Committee."[31] However, in case of emergency the restrictions related to place where the termination of pregnancy is to be made and "the length of pregnancy as well as the requirement of the opinion of two registered medical practitioners is not applicable and can be waived where the registered medical practitioner terminating the pregnancy is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman."[32] In this situation the requirement that the registered medical practitioner must possess experience or training in gynaecology and obstetrics is waived.[33] The Act has not defined the term "life" neither it has been defined in any other legislation and therefore it is subject matter of interpretation by the courts.[34]

The Act has also some penalty provisions. It states that "the termination of pregnancy by a person who is not a registered medical practitioner is an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years."[35] Further, "termination of pregnancy in a place other than the designated place is also punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years."[36] Also, the Act imposes vicarious liability upon "the owner of a place which is not approved place for the purpose of termination of pregnancy and such owner shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years."[37] It clarifies that "the expression owner in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act."[38]

The Act has also made provision for protection of privacy of a woman and mandates that "No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorised by any law for the time being in force"[39] the contravention of which is punishable with "imprisonment which may extend to one year, or with fine, or with both."[40] The Act empowers "the Central Government to make rules to carry out the provisions of the Act for its proper and effective implementation."[41] The rules may relate to "experience and

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[31] *Id.*, § 4.
[32] *Id.*, § 5(1).
[33] *Id.*, § 5, Explanation 2.
[34] *Attorney General* v. *X,* [1992] 1 IR 1.
[35] The Medical Termination of Pregnancy Act, 1971, § 5(2).
[36] *Id.*, § 5(3).
[37] *Id.*, § 5(4).
[38] *Id.*, § 5, Explanation 1.
[39] *Id.*, § 5A(1).
[40] *Id.*, § 5A(2).
[41] *Id.*, § 6.

training required for a RMP under the Act; categories of women who may be allowed to access abortion; the norms for the RMP whose opinion is required for termination of pregnancy at different gestational age; the powers and functions of the Medical Board and such other matters which may be required for the purposes of the Act."[42] The Central Government in view of its power under section 6 had made the Medical Termination of Pregnancy Rules, 1975 which has now been repealed and replaced by the Medical Termination of Pregnancy Rules, 2003. Further, the Medical Termination of Pregnancy Rules, 2003 has been amended in the year 2021 by the Medical Termination of Pregnancy (Amendment) Rules, 2021.

The amended rules have further liberalised the access to abortion but they have not removed the fundamental shortcomings of the Act and still a woman has not been given full right to access abortion as per her desire. The law has yet not conferred upon the woman the reproductive autonomy. The Act has vested power in "the State Government to make regulations under the Act."[43] Any wilful contravention or wilful failure of compliance "of any regulations made in respect of implementation of the Act is punishable with fine which may extend to 1000 rupees."[44] It has afforded "legal protection to the doctors for any damage caused or likely to be caused by anything done or intended to be done in good faith for the purposes of termination of pregnancy"[45] meaning thereby, "a doctor is exempted from criminal liability for causing miscarriage if it is proved that he acted in good faith to procure the termination of pregnancy."[46]

The Act liberalized the law of abortion in India however it has some inherent shortcomings in view of the modern trends in society. Though the Act has recognized "changes in a pregnant woman's marital status with her spouses — such as divorce and widowhood — it does not address the situation for unmarried women." The Act has provided "a highly regulated procedure for abortion whereby the law transfers the decision-making power from the pregnant woman to the RMP and provides great discretion to the RMP to determine whether abortion should be provided or not."

6. Right to Privacy vis-à-vis Abortion: American Perspective

The right to privacy and family life has a very wide application. The US Supreme Court in *Griswold* v. *Connecticut*,[47] encountered the issue of right to privacy for the first time wherein the executive directors of New Heaven Planned Parenthood Centre were convicted under a state law forbidding the use of contraceptives or advice as to their use. The

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[42] *Id.*, § 6(2).
[43] *Id.*, § 7.
[44] *Id.*, § 7(3).
[45] *Id.*, § 8.
[46] *Ibid.*
[47] 381 U.S. 479 (1965).

Court held the defendants liable under the "general aiding and abetting statute for giving married persons birth control advice." However, the court found that this case involves the issue of constitutionality of anti-contraceptive statutes i.e. "whether it is constitutional for a state to make it a crime for a married couple to use a contraceptive device." Justice Douglas held that "this law interfered with the right to privacy of individuals." The court found this right within the penumbra of several fundamental constitutional guarantees. The court also accepted the proposition that "liberty in the Fourteenth Amendment protects these personal rights that are fundamental, and is not confined to the specific terms of bill of rights." Ninth amendment too was wrapped to support this view and it was asserted that the right to privacy of the married couples in their bedroom exists along with the fundamental rights specifically mentioned.

Same right was again at stake in *Eisenstand* v. *Baird*,[48] wherein "a Massachusetts statute made it illegal for single person to obtain contraceptives in order to prevent pregnancy." The court held that "the statute is neither a health measure nor deterrent to pre-marital sexual relations but a prohibition resisting up on moral judgements. It was a violation of equal protection for the state to legislate that different treatment be accorded to persons placed by a statute into different classes based on criteria wholly unrelated to the objective of the statute." Furthermore, Justice Brennan observed that "if the right to privacy means anything, it is right of individual, married or single, to be free from unwarranted governmental instruction into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Thus, the Court ruled that "the Fourteenth Amendment provides liberty to unmarried couples to use contraception as their constitutional right to privacy."

In 1972, the Supreme Court of America pronounced two landmark judgments in *Roe* v. *Wade*,[49] and *Doe* v. *Bolton*,[50] which settled *inter alia* the two questions of constitutionality of the abortion laws of the two American states. In *Roe* v. *Wade*,[51] Jane Roe was an unwed mother who wanted to terminate her pregnancy under safe clinical conditions but the state of Texas denied it. Further, she could not afford to go to another state jurisdiction to secure abortion in safe condition. Therefore, she challenged "the constitutional validity of Texas abortion statute on the ground of privacy, which provides abortion only when the life of the pregnant woman is threatened by the continuation of the pregnancy." The petitioner pleaded that "the state criminal abortion laws were unconstitutionally vague and that they have breached her right of personal privacy, protected by the First, Fourth, Fifth, Ninth and Fourteenth amendments to the US Constitution." The state of

[48] 405 U.S. 438 (1972).
[49] 410 U.S. 113 (1973).
[50] 410 U.S. 179 (1973).
[51] 410 U.S. 113 (1973).

Texas contended that "the state's determination to recognise and protect parental life from the after conception constitutes 'a compelling state interest' and that the foetus is a 'person' within the language and meaning of the 'due process' clause of the Fourteenth amendment to the US Constitution."

The Supreme Court of USA did not look into the issue of when life begins and said that "when those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary is not in a position to speculate as to the answer." However, regarding the "state's important and legitimate interest in the health of the mother", the court observed that "in the light of the present medical knowledge [the compelling point] is at approximately the end of the first trimester year... That until the end of the first trimester mortality in abortion may be less than mortality in abortion in normal childbirth. It follows that, from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this are requirements as to the qualifications of the person who is to perform the abortion, as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or maybe a clinic..."[52]

In the light of this observation the Apex Court held that "the Texas criminal abortion statute restricting legal abortion without regard to pregnancy stage; and other interest involved' is violative of the due process clause of the Fourteenth Amendment to the US Constitution, which protects against States' action the right to privacy, including women's qualified right to terminate her pregnancy." Harry Blackman, J. observed that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interest in regulation."

In *Doe* v. *Bolton*,[53] the petitioner was a poor married woman of the state of Georgia who wanted to terminate her pregnancy because she was apprehensive that she will not be able to properly rear the child due to her poverty. She could not care for her earlier issues due to poverty and had to keep them in a foster- home. The law in "Georgia permitted abortion only in cases of rape, severe foetal deformity, or the possibility of severe or fatal injury to the mother." There were other procedural requirements which were to be also complied with such as "the requirement that the procedure be approved in writing by three physicians and by a three-member special committee that either (1) continued pregnancy would endanger the pregnant woman's life or 'seriously and permanently' injure her health; or (2) the foetus would 'very likely be born with a grave, permanent and irremediable mental or physical defect'; or (3) the pregnancy resulted from rape or incest."

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[52] 410 U.S. 113 (1973) at 163.
[53] 410 U.S. 179 (1973).

But the plaintiff failed to satisfy some procedural conditions for the abortion. She challenged these procedural requirements as unconstitutional. It was resisted by the State of Georgia on "three main grounds: *first*, right to privacy was not absolute right; *second*, unborn child is not a person within the meaning of the Fourteenth Amendment of the US Constitution; *third*, the state has an interest in the health, protection and the existence of 'potential of independent human existence' justifying the state abortion laws." The US Supreme Court held most of the conditions of the abortion law of Georgia invalid including the medical approval. The Court referred to the "right to privacy, which applies to matters involving marriage, procreation, contraception, family relationships, child rearing, and education." The majority declared the statute unconstitutional. Justice Blackmun observed that "as a constitutional matter, the right to privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The gist of the judgement is that "the right to privacy, though not explicitly mentioned in the constitution, is protected by the 'due process clause' of the Fourteenth Amendment and that the right to an abortion is fundamental and can therefore, be regulated only on the basis of compelling state interest." In *Zbaraz* v. *Hartigan*,[54] the US Supreme Court depreciated as an undue interference with privacy rights a state law providing for "reflection delays" whereby an abortion patient after her initial request for an abortion returns after one week of reflection before her request is granted.

The decision in *Planned Parenthood of South Eastern Pennsylvania* v. *Casey*,[55] of the US Supreme Court gave birth to many controversies wherein the issues involved were "five provisions of the Pennsylvania Abortion Control Act, 1982 which were added by the 1988 and 1989 amendments to the Act." These provisions "require that women seeking an abortion must give her informed consent prior to the procedure, and specified that she be provided with certain information at least 24 hours before the abortion is performed; mandate the informed consent of one parent for a minor (expectant mother) to obtain an abortion, but provides a judicial bypass process; command that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; define a medical emergency that will excuse compliance with the foregoing requirements; and impose certain reporting requirements on facilities providing abortion services."

The petitioners sought a declaratory judgement declaring that "each of the provisions, namely, informed consent, parent consent, espousal notice, reporting requirements and public disclosure of clinics are violative of the Fourteenth Amendment of the US

[54] 484 U.S. 171 (1987).
[55] 505 U.S. 833 (1992).

Constitution." The Supreme Court upheld the decision of the Court of Appeal which has partly affirmed and partly reversed the amendments, strike down the provision related to husband notification and upheld the other provisions. As recognised in *Roe case,* the court upheld "the women's limited right to abortion." It observed that "restrictions could be allowed as long as they do not place an undue burden on women right." Most parts of the controversial Pennsylvania law were held valid which made it more difficult for women to get their pregnancy terminated.

New benchmark was set by the court to test the constitutional validity of the limitations imposed by the state to access abortion.

The court held that "the 'undue burden test' instead of trimester framework is to be adopted for determining whether state regulation has some purpose of placing substantial obstacles in the path of a woman for seeking abortion before viability. The constitutional protection of the women's decision to terminate her pregnancy is derived from the due process clause of the Fourteenth Amendment. It declares that no state shall deprive any person of life, liberty or property without due process of law. The due process clause of the Fourteenth Amendment is applied to both substantive law and procedural matters." The Supreme Court permitted states to put strict conditions for accessing abortion but did not altogether outlaw it. The right of a woman to access abortion continued to be recognized.

In *Dobbs* v. *Jackson Women's Health Organization*,[56] wherein the State of Mississippi sought to invalidate *Roe* v. *Wade,*[57] and outlaw nearly all abortions at and after 15 weeks gestation, the US Supreme Court held that "access to abortion is not a constitutional right so as to become a part of an individual's right to privacy and thereby not immune from government interference." The court observed that "the substantive fundamental right to access abortion was not the part of American civilisation and it did not qualify to be a right *per se* until the decision was given in *Roe* v. *Wade case.*"[58] The US Supreme Court overruled *Roe* and *Casey* judgments as being "egregiously wrong". The gist of the majority judgment is that "there is absolutely no basis for finding a right to abortion in the text of the constitution." The Court opined that "*Roe* judgment failed to consider that the right to an abortion was not grounded in the constitutional text." It observed that "*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe's* faulty historical analysis." The majority while overruling *Roe* and *Casey* judgments held that "the authority to regulate abortion must be returned to the people and their elected representative."

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[56] 142 S. Ct. 2228 (2022).
[57] 410 U.S. 113 (1973).
[58] 410 U.S. 113 (1973).

7. Right to Privacy Vis-A- Vis Abortion: Indian Perspective

The fundamental rights enshrined in the Indian constitution are the Indian counterparts of those provisions in the American constitution except for the distinguishing feature of the Indian constitution which requires the cautious use of the American judicial precedents. The decisions of the US Supreme Court have been drawn freely in ascertaining the contents of the fundamental rights as opposed to the restrictions which they are subjected to. The term liberty has been classified as 'personal' in India. Here, liberty can be curtailed under the procedure established by law. But in the United States of America, due process clause provides for more stringent test in order to validate any move to curtail liberty of a person.

In *A. K. Gopalan* v. *State of Madras*,[59] the Supreme Court by a majority decision held that contrary to what will be in United States, here in India it is easy to interfere with personal liberty of a person. Here the law under which liberty is curtailed must be duly passed by the competent legislative authority. However, in its subsequent decision in *S. N. Sarkar* v. *State of Bengal*,[60] the Apex Court held that "the state act which interferes with the life and liberty of individual should not only be according to the procedure established by law but also be reasonable." By holding so, the court gave a new dimension to the concept of personal liberty. The judgment made the constitutionality test of the state action similar to that of United States. Thus, unreasonable restrictions put on Indian Women seeking termination of pregnancy may not satisfy the constitutional validity test as they affect their liberty. Again, in *Maneka Gandhi* v. *Union of India*,[61] the court resurrected the American procedural due process by curtailing personal liberty in more effective way.

The plea of right to privacy has not been readily accepted by the Indian Courts in initial days. However, later on the courts in India have recognised the right to privacy based on the concept of civil right as well as on social customs. The Allahabad High Court in *Nihal* v. *Chand Bhagwan Dei,*[62] expressed the view that "the right to privacy based on social custom is different from the right to privacy based on natural modesty and human morality, the latter is not confined to any class, creed or race and it is the birth right of a human being and is shared and should be observed, though the right should not be exercised in an oppressive way."

The constitution of India has not recognised the 'right to privacy' in express terms. It was incidentally taken up in *Kharak Singh* v. *State of U.P.*,[63] wherein the issue was "whether surveillance of the petitioner

[59] AIR 1950 S.C. 27.
[60] AIR 1973 SC 1425.
[61] AIR 1978 SC 597.
[62] AIR 1935 All. 1002.
[63] AIR 1963 S.C. 1295.

under U. P. Police Regulations amounts to infringement of fundamental rights." The Apex Court investigated into the American position on privacy and referred to the Fourth and Fifth Amendments and observed that "as such our constitution does not confer any right to privacy but an unauthorised intrusion into persons' home and disturbance caused to him thereby is as it were the violation of common law rights of man- an ultimate essential of ordered liberty, if not of the very concept of civilization." Thus, the court held the regulation invalid which permitted domiciliary visits as it amounted to executive intrusion. Subba Rao J., with Shah J. concurring, was more emphatic in his dissent and said that "the word 'liberty' in article 21 is comprehensive enough to include privacy also although our constitution doesn't expressly declare right to privacy as a fundamental right but the right is essential ingredient of personal liberty." In 1975 the Supreme Court well established the "right to privacy as a part of article 21 of the Constitution of India" in *Govind* v. *State of M.P.*[64]

Raising the important question regarding "right to privacy" in *Govind* v. *State of M.P.,*[65] the court found *Kharak Singh case,*[66] inadequate for the point. Hence referred to American case law to see whether in that country the right to privacy treated as part of bill of rights. The court opined that "individual autonomy is central concern of any system of limited government." The court did not expand the definition of privacy because it is not expressly mentioned in the constitution, however it accepted that it "relates and overlaps with the concept of liberty" and held that "the concept of privacy must be based on a fundamental right implicit in the concept of liberty." While referring to the fundamental rights and liberties of citizens guaranteed by the constitution, Justice Mathew wrote- "The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India, and the right to freedom of speech and expression create an independent right of privacy as an emanation from them which one can be characterized as a fundamental right, we do not think that the right is absolute."[67]

The right to privacy is not an absolute right but it is essential to protect the personal intimacies of the family, marriage, motherhood, procreation and child bearing. The right to privacy being not absolute can be interfered with in the interest of health, medical standards and parental life. The Supreme Court feels that the right to privacy must be subject to restrictions based on compelling public interest.[68]

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[64] AIR 1975 SC 1378.
[65] AIR 1975 S.C. 1378.
[66] AIR 1963 S.C. 1295.
[67] *Id.* at 1385.
[68] *Id.* at 1386.

The dissenting opinion of Justice Subba Rao in *Kharak Singh case*,[69] and later judgments of the Supreme Court in *Sarkar case,*[70] and *Govind case,*[71] are very important in respect of legal issues related to abortion law of India. Keeping in view the judicial behaviour with regard to right to privacy Government of India on 10th October 1975 notified revised rules of the Medical Termination of Pregnancy Act, 1972 where it seems the legislature has given due recognition to the right to privacy as far as abortion is concerned.

In *R. Rajagopal* v. *State of Tamil Nadu*,[72] the Apex Court took some positive steps in respect of defining the right to privacy. The court tried to make a balance between the fundamental rights viz. right to privacy and the freedom of speech and expression which may sometimes give rise to conflict and held that "the right to privacy is implied in the right to life and personal liberty granted to citizens of the country by article 21. It is a right to be let alone. A citizen has a right to safeguard the privacy of its own, his family, marriage, procreation, motherhood, childbearing, education among other matters."

In *K.S. Puttaswamy* v. *Union of India*,[73] a retired Karnataka High Court judge challenged the Scheme of the government through which it sought to provide "a unique identification number" to people which is commonly known as Aadhar, as violative of right to privacy since "the unique identification number was based on individual's biometric data and obtaining it gradually became a mandatory requirement in accessing public utilities and filing tax returns." Since right to privacy is not explicitly mentioned in the Constitution of India, a nine- judge bench of the Supreme Court delved on to decide the constitutional status of the right to privacy. The bench unanimously declared privacy to be constitutionally protected right and held that "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India and as part of the freedoms guaranteed by Part III of the Constitution. The right was deemed to include 'at its core the preservation of personal intimacies' including, but not limited to, 'procreation' and the 'right to be left alone'."[74] The reproductive right of a person including the right to access abortion is thus firmly grounded in the right to privacy and its root lies in the concept of "liberty", "autonomy", and "dignity."

The Puttaswamy judgement has given rise to a causal connection between the right to privacy and the issue of pregnancy. Justice Chandrachud referred to the two landmark cases of the US Supreme Court viz. *Griswold* v. *Connecticut*,[75] wherein the "prohibition on the

[69] AIR 1963 S.C. 1295.
[70] AIR 1973 SC 1425.
[71] AIR 1975 S.C. 1378.
[72] AIR 1995 SC 264.
[73] 2017 10 SCC 263.
[74] *Ibid.*
[75] 381 U.S. 479 (1965).

possession, sale and distribution of contraceptives to married couples" was held invalid; and *Roe* v. *Wade,*[76] that legalized abortion and analysed how "access to contraception and abortion are a part of a woman's rights to privacy and liberty as found under the 'due process clause' of the Fourteenth Amendment of the US Constitution." The US Supreme Court in *Griswold case,*[77] held that "constitutional guarantees, created 'zones of privacy' within marital relationships and that these zones of privacy must be 'protected from abridgment by the Government'." This led to emergence of reproductive rights doctrine wherein individuals are at liberty to use contraception free from state interference and exercise autonomy over their reproductive health.

In the *Puttaswamy case*, the term "liberty" was defined as the "right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures." It was held that "any curtailment of liberty, to be constitutionally valid, 'must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does not amount to an unreasonable restriction within the meaning of Article 19(2) of the Constitution." The Medical Termination of Pregnancy Act, 1971 decriminalised access to abortion in certain circumstances, however "a constitutional right to privacy provides a privacy-based justification for a right to abortion."

8. Judicial Perspective on Abortion by Unmarried Women in India

In *X* v. *Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi,*[78] an unmarried girl who got unwanted pregnancy, wanted to terminate it. The legal position states that a pregnancy od a period up to 24 weeks may be terminated only if there is danger to the life of the pregnant woman. She approached the Delhi High Court for an interim relief but she could not succeed. She preferred appeal in the Supreme Court and sought relief contending that "she is not emotionally and financially ready to bear a child." The Apex Court held that "all women are entitled to safe and legal abortions and there is no rationale in excluding unmarried women from the ambit of Rule 3B of MTP Rules which mentions the categories of women who can seek abortion of pregnancy in the term 20-24 weeks."

The Apex Court opined that the "right to reproductive autonomy was a *sine qua non* with the right to bodily autonomy" and held that "the decision to carry the pregnancy or terminate it is firmly rooted in the right to bodily autonomy and decisional autonomy of the pregnant woman." The Court deliberated on "bodily autonomy of women" and held that "the right to decisional autonomy also means that women may choose the course of their lives. Besides physical consequences,

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[76] 410 U.S. 113 (1973).
[77] 381 U.S. 479 (1965).
[78] 2022 SCC OnLine SC 905

unwanted pregnancies which women are forced to carry to term may have cascading effects for the rest of her life by interrupting her education, her career, or affecting her mental wellbeing." The Court took into account the "social stigma faced by an unwed pregnant woman" and observed that "if women with unwanted pregnancies are forced to carry their pregnancies to term, the state would be stripping them of the right to determine the immediate and long-term path their lives would take. Depriving women of autonomy not only over their bodies but also over their lives would be an affront to their dignity. The right to choose for oneself – be it as significant as choosing the course of one's life or as mundane as one's day-to-day activities – forms a part of the right to dignity. It is this right which would be under attack if women were forced to continue with unwanted pregnancies." The Supreme Court also observed that "the right of every woman to make reproductive choices without undue interference from the state is central to the idea of human dignity." The Court directed the "State to ensure the dissemination of 'information regarding reproduction and safe sexual practices', without which the right to bodily autonomy and dignity could not be realized in full."

The judgment in *X case,*[79] is in sharp contrast with that of *Dobb's judgment*.[80] The two cases contrast each other in the sense that in the later, the US Supreme Court invalidated the right to abortion which stood the test of time for almost half a century and could not read the right to abortion neither in the US Constitution nor in the Fourteenth Amendment, whereas in the former the Indian Supreme Court not only recognised the "right to equality and equal protection" of the pregnant women but also the "right to bodily autonomy and right of a pregnant woman – married or unmarried – to choose."

It is also significant to note that Justice D.Y. Chandrachud in *X* Case,[81] held that "the meaning of rape must be held to include 'marital rape' for the purpose of the Medical Termination of Pregnancy Act and Rules." The Court observed that "Married women may also form part of the class of survivors of sexual assault or rape. The ordinary meaning of the word 'rape' is sexual intercourse with a person, without their consent or against their will, regardless of whether such forced intercourse occurs in the context of matrimony. A woman may become pregnant as a result of non-consensual sexual intercourse performed upon her by her husband."

The Court tried to "make abortion services more accessible" and considered the social reality that rapes involve social stigma and thereby people not readily report its occurrence specifically when it is committed in familial setting, and held that "women do not need to seek recourse to formal legal proceedings before being able to access

[79] MANU/SC/0914/2022.
[80] 142 S. Ct. 2228 (2022).
[81] MANU/SC/0914/2022.

abortion services. Such an interpretation would be in consonance with the legislative intent behind the Medical Termination of Pregnancy Act, 1971. In such cases the legal presumption as to the mental trauma suffered by the survivor comes into play." Thus, after a detailed deliberation on the issue the Court held that "exclusion of unmarried women who conceive out of live-in relationship from the Medical Termination of Pregnancy Rules is unconstitutional."

The observations of the Apex Court in *X Case*,[82] that in cases of pregnancy and termination that the term rape means also "marital rape" has paved the path for criminalisation of marital rape also. The Court has held that "since the foetus relies on the woman's body to sustain therefore the decision to terminate is firmly rooted in their right of bodily autonomy." The Court has remarkably observed that "the law in modern times is shedding the notion that marriage is a precondition to the rights of individuals." This could very well be cited to counter the argument of the State that "state has a compelling state interest in preserving the institution of marriage even when it violates bodily autonomy." Also, Justice D.Y. Chandrachud has rightly observed in *K.S. Puttaswamy* v. *Union of India*,[83] that "Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognized."

The Apex Court also noted that Registered Medical Practitioners must refrain from imposing extra-legal conditions for abortions and observed that "These extra-legal requirements have no basis in law… it is only the woman's consent (or her guardian's consent if she is a minor or mentally ill) which is material. RMPs must refrain from imposing extra-legal conditions on women seeking to terminate their pregnancy in accordance with the law. They need only ensure that the provisions of the MTP Act, along with the accompanying rules and regulations, are complied with."

The court observed that "the woman alone has the right over her body. A woman can become pregnant by choice irrespective of her marital status. In case the pregnancy is wanted, it is equally shared by both the partners. However, in case of an unwanted or incidental pregnancy, the burden invariably falls on the pregnant woman affecting her mental and physical health. Article 21 of the Constitution recognizes and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. Importantly, it is the woman alone who has the right over her body and is the ultimate decisionmaker on the question of whether she wants to undergo an abortion." Also, the Apex Court observed that "The decision to have or not to have an abortion is borne out of complicated life circumstances, which only the woman can choose on her own terms without external interference or influence. Reproductive autonomy requires that every

[82] MANU/SC/0914/2022.
[83] 2017 10 SCC 263.

pregnant woman has the intrinsic right to choose to undergo or not to undergo abortion without any consent or authorization from a third party."

9. Conclusion

Right to privacy has various dimensions. Basically, it relates to personal affairs of an individual i.e. his health condition or illness or diseases he is suffering from, his intimate relationship with somebody, relationship between spouses, personal conversations etc. It is the "right of a person to be let alone." In recent years right to privacy has gained importance and people have become more concerned about their right to privacy as more and more intrusions into the life of persons are becoming the normal order of the day. It is a normal human instinct to keep certain things of his life secret from public and share only with close persons.

There is no specifically guaranteed right to privacy in the Indian Constitution. However, certain interests of individuals are safeguarded under some statutory laws[84] such as "privileged communication", "withholding of documents", "domestic affairs", "matrimonial rights" etc. The Indian judiciary through creative interpretation has also evolved some rights and interests similar to privacy which are not specifically mentioned in the Constitution e.g. right to free enjoyment, right to sleep, right to human dignity etc. in a number of cases.

Abortion is a subject which has its interface with some intricate issues of law, medicine and morality. The problem of unwanted pregnancy and its termination is a perennial problem which cannot have a definite solution. There has always been a debate between abolitionists of the controls on abortion and the proponents of a ban on it due to wide divergence in moral and policy perspectives. Those who stand for the ban do so basically for the protection of human life, at whatever stage of development it may be however, the basic position of the abolitionists of the ban is that the decision to have an abortion or not is the private affair of the woman and no one has a right to restrict her choice. Partly because of the more liberal attitudes towards sex and individual freedom and partly due to the harmful consequences of illegal abortions, the law of abortion was liberalised in India by enactment of the Medical Termination of Pregnancy Act, 1971.

The right to access abortion is a part of right to life and personal liberty which includes right to privacy. It is a basic human right of women in terms of their bodily autonomy. It is private individual conduct which falls within the fold of the "right to privacy." This right is the very basis on which the right to access abortion rests as part of

[84] The Constitution of India, 1950; The Indian Penal Code, 1860; the Indian Evidence Act, 1872 etc.

their right to liberty. It is very much essential to be recognised in order to ensure women empowerment and gender equality. Women in modern times are not confined within the four walls and meaningfully contributing to socio- economic development of the nation and for that matter they need autonomy and independence over their body. Thus, any unreasonable restriction over their bodily autonomy would cause deprivation in them of their ability to decide about their family structure and also health, education, employment and their constructive role in personal, professional and social life. There are several international human rights instruments which have expressly recognised the right of the women to get opportunity and meaningfully participate in the development process which ensures their right to life with human dignity. State may intervene in a very limited manner in view of its obligation to maintain public heath but cannot put unreasonable restrictions neither could take away this right altogether. Therefore, it is high time to take a very balanced and pragmatic approach in the matter of abortion and since it is a personal matter, the decision in this respect must be vested with women and state could be allowed to intervene only when it is required in respect of maintaining public health. Where one's religious beliefs are against it, one should be free to refrain. Indeed, it is not foreseeable that the state will at one point embark on forced abortions. The other side of the coin is that people desiring abortion in free conscience should also be entitled to it without hindrance.

Vulnerabilities & Agony of Migrant Workers: Discerning through the Standpoint of Women Labourers in India

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1. Introduction

Migration has been a crucial aspect of human history, shaped by various factors such as economic opportunities, political instability, and environmental changes. In present-day India, labour movement from rural areas plays a significant role in the socio-economic landscape. Migrant workers, the backbone of industries, have contributed substantially to India's economic progress. However, beneath the growth narrative lies a deep-rooted system that disproportionately affects many migrant workers. Specifically, women labourers. The challenges they face have been further amplified during COVID-19, highlighting the urgent need to understand the plight of women migrant workers in this extraordinary situation.[1]

Historically, labour migration in India has been predominantly male-dominated, with women confined to domestic roles in their places of origin. However, recent years have witnessed an increase in the participation of women in labour migration.[2] Evolving socio-economic dynamics, opportunities in rural areas, and aspirations for empowerment have driven women to seek employment in distant and often unfamiliar urban environments. This transition has not only transformed gender dynamics within India's labour migration paradigm but has also exposed women to unique vulnerabilities and obstacles.[3]

This study aims to investigate the challenges and hardships faced by female migrant workers in India, specifically focusing on how the COVID-19 pandemic has affected them. We aim to understand aspects

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[1] S. Irudaya Rajan, P. Sivakumar & Aditya Srinivasan, *The COVID-19 Pandemic and Internal Labour Migration in India: A 'Crisis of Mobility,'* 63 INDIAN J. LABOUR ECON. 1021 (2020), https://doi.org/10.1007/s41027-020-00293-8.
[2] Suvir Chandna & Basudeb Guha-Khasnobis, *Socio-Economic Impact of COVID-19 on Women Migrant Workers Evidence*, UNDP (2021), https://www.undp.org/publications/socio-economic-impact-covid-19-women-migrant-workers (last visited Oct 13, 2021).
[3] Abdul Azeez E P et al., *The impact of COVID-19 on migrant women workers in India*, 62 EURASIAN GEOGR. ECON. 93 (2021), https://doi.org/10.1080/15387216.2020.1843513.

of their lives during this unprecedented crisis, from why they chose to migrate to their working conditions, social support systems, and experiences with discrimination and violence. By examining these women's perspectives, we hope to shed light on the factors that influenced their decisions, shaped their experiences, and ultimately impacted their well-being in the complex migration dynamic and global health crises. Women in India have far too many responsibilities, such as administering the household chores, engaging in childcare, and assisting their Spouses in farming and other family businesses, especially in rural areas. However, their participation in employment is unpaid, and their contribution has never been valued in monetary terms as it has been seen as part of their obligation bestowed by customs. "The 'invisibility' of their economic contribution, especially in rural regions, and traditional interpretations of such notions as 'labour,' 'economic activities,' productivity, and work location are significant reasons for disregarding female employment as a specific category in study and policy."[4]

Many women have entered the workforce and started working for pay in recent years. Although women's participation in the labour force is increasing, it is still far behind men's.[5] Men focus on more valuable remunerative work, whereas women are primarily relegated to unpaid and casual labour. Women are more likely than men to work in the unorganised economy. Their revenues are essential for them to stay alive. "Women are disproportionately represented in the messy and informal sector in quasi and relatively low-paying industries such as temporary and casual labour, part-time jobs, home-based work, self-employment, and operating in small companies."[6] They suffer major work-related issues and limits, such as less pay, instability, wage discrimination, an uncomfortable work relationship, no maternity leave benefits, and a lack of medical and accident coverage, to name a few. Female farmworkers are exploited both horizontally and vertically in rural areas. As a result, "it is vital to discourse issues and evaluate the sort of policy reforms and institutional transformations required for the liberation and strengthening of rural women workers."[7]

2. Methodology

For our study we adopted a research methodology. To gather data we conducted a search, in known databases like Scopus, Web of Science and Google Scholar. Throughout our search we utilized keywords such as 'Women workers,' 'Social security for women labourers' 'Covid 19 and Migrant workers,' and 'legal protection, for a

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[4] *Id.*

[5] GOVENRMENT OF INDIA, *Employment and Unemployment Situation in India 2009-10*, 531 NSS 66TH ROUND (2011).

[6] Lalita Panicker, *Protect the rights of women migrant workers - Hindustan Times*, https://www.hindustantimes.com/opinion/protect-the-rights-of-women-migrant-workers-101618664001450.html (last visited Oct 13, 2021).

[7] *Id.*

migrant worker.' These keywords aided us in locating literature and studies related to these subjects.' "The other secondary information sources include the authentic websites of the Indian Government and reports related to the women migrant workers. Some critical information from Newspaper articles in The Hindu, The Indian Express, India Spend, and Economic and Political Weekly were extracted and included in this review. The main findings and suggestions are used in the way forward section."

3. Assessment of International Standards and Indian Legal Framework for Labours and Migrant Workers

International Labour Rights Standards are centered on decent work. However, Social Security is a fundamental right of all human beings, including workers who have daily struggles with work and are temporarily or permanently inept at performing for reasons beyond their control. The first attempts at social security were taken during the French Revolution when one Declaration of the Rights of Man was published. It was written as an exposition to the French Constitution 1793, which asserted, among other things, that public support is a sacred duty. Every member of a society has a right to social security, according to Article 22 of the Universal Declaration of Human Rights.

The ILO Declaration on Fundamental Principles and Rights at Work is a noteworthy watershed moment. Development must lead to the betterment of the lifestyles of individuals, and it must, therefore, guarantee the fulfillment of fundamental human necessities whatsoever.[8]Another international instrument that grants employees social, economic, and cultural rights is the United Nations' International Covenant on Socio-economic and Cultural Rights so that people can utilize their right to determination and trail their social, economic, and cultural growth without hindrance.[9]

Articles 19 (d), (e), and (g) of the Indian Constitution provide "all citizens have the right to migrate freely across the territory of India; to reside and settle in any portion of the territory of India; and to practice any profession, or to carry on any occupation, trade, or business."[10] Article 39 of the Directive Principles of State Policy expressly declares that "all people, men, and women alike, have the right to adequate means of subsistence;"[11] "The health and strength of employees, men, and women, as well as the young age of children, are not misused," and "people are not coerced to enter avocations unsuited to their age or strength by economic necessity." "The State shall secure, by appropriate legislation or economic organisation or in any other way, to all workers, agricultural, industrial, or otherwise, work, a living

[8] Alison Reid, Elena Rhonda-Perez & Marc B. Schenker, *Migrant workers, essential work, and COVID-19*, 64 AMERICAN JOURNAL OF INDUSTRIAL MEDICINE (2021).
[9] *Id.*
[10] Indian Constitution. 1950. Art.19
[11] Indian Constituion. 1950. Art.39

wage, and working conditions ensuring a decent standard of living and full enjoyment of leisure and social and cultural opportunities," says Article 43.

Several laws have been enacted that indirectly pertain to non-permanent employment with one of the most immediate examples being the Interstate Migrant Workers Act. The objective of this legislation is to safeguard the rights of labourers moving between states and provide them with government support. Additionally, the Ministry of Labour and Employment (MOLE) has approved other legislations, including the Minimum Wages Act of 1948 the Contract Labour (Regulation and Abolition) Act of 1970 the Bonded Labour System (Abolition) Act of 1976 the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act of 1996 as well as the Unorganised Workers' Social Security Act of 2008, among others.

The Ministry of Labour and Employment (MOLE) was founded to safeguard workers' rights in both the organised and unorganised sectors, over and above, to secure safety by affording social security and fostering a benign and salubrious labour environment. In 2009, the National Policy on Workplace Safety, Health, and Environment was announced to reduce "business-related wounds, sicknesses, fatalities, crises, and loss of national assets". This policy recognizes a "safe and sound workplace as a key human right," stating that "social fairness and monetary progress cannot be achieved" in the country without "sheltered, clean conditions as well as solid working conditions."

Like all work laws, the policy focuses solely on business-related wounds and infections. During the COVID-19 pandemic, transient workers usually stayed in unsanitary, overcrowded, and hazardous environments such as work sites, slum neighborhoods, or construction projects, where social distance was vital. Any existing labour regulations do not address the proliferation of a pandemic or labourer's propensity to 'non-work related' health risks, particularly incompetent mobile workers in the informal segments.

4. Ramifications of the Covid-19 Pandemic on Female Migrant Workers

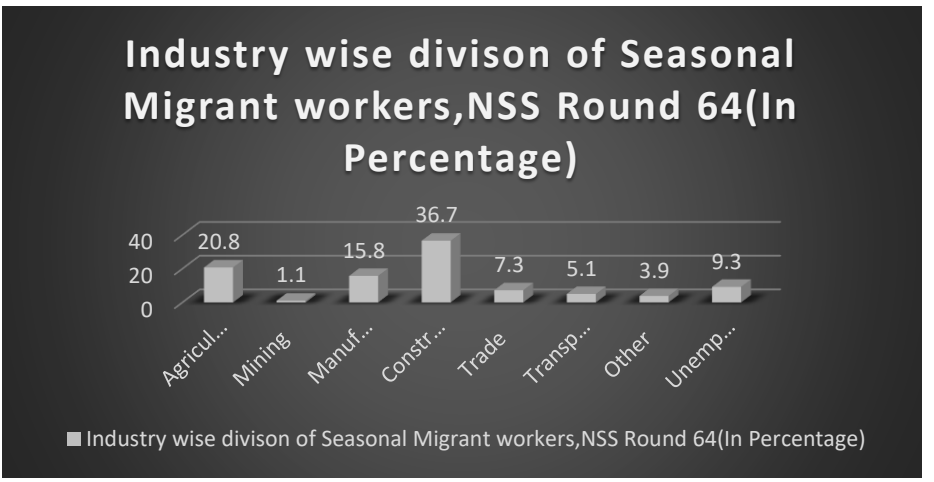
India has the largest workforce, with nearly 450 million people operating in the unorganised economy. Around 90% of women labour in the informal economy, with 20% working in cities, per a study [12]. In India, the unorganised sector is perilous and uncontrolled, with no social security guarantee. COVID-19 is anticipated to have an elongated-term bearing on the informal sectors' labour force since they are the most susceptible population and are notably further prone to

[12] T Dr.Geetika, Singh & Anvita Gupta, *Women Working in Informal Sector in India: A saga of Lopsided Utilization of Human Capital*, 4 IPEDR.COM 534 (2011), http://www.ipedr.com/vol4/106-M00051.pdf.

the ongoing global contagion.[13] COVID-19, According to[14], will have long-term implications for underprivileged individuals in the informal sector. In India, the Coronavirus has infected over 30 million citizens. COVID-19 is capable of infecting persons of all ages and gender. Conversely, sometimes, women may be in higher jeopardy as they are disadvantaged and have a dearth of resources and information or because they work in the health and social care sectors. Women constitute a large part of all healthcare professionals in India, accounting for more than 80% of nurse practitioners. Nevertheless, women are predominantly underrepresented in decision-making responsibilities in the healthcare industry and are rewarded far less than their male co-workers.[15] Severe poverty and food constraint are already a challenge for most labourers in the underground economy.[16]

5. Unreliable data after NSS Round 64(2007-2008)

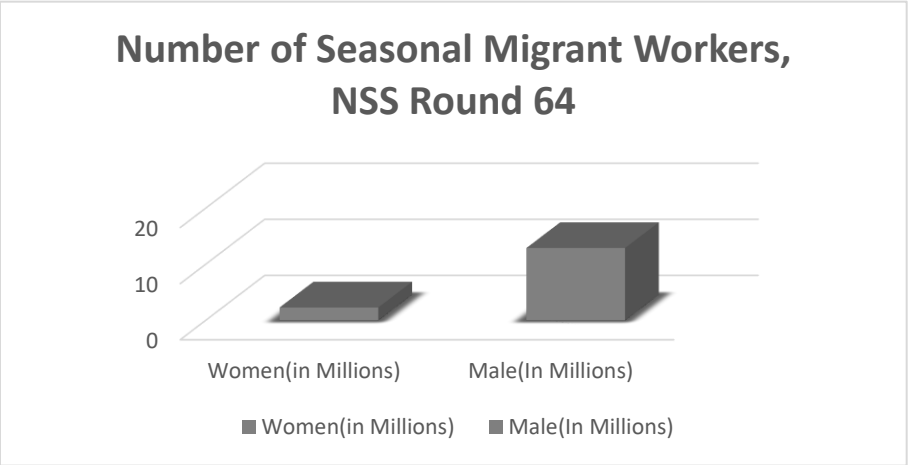
Figure 1



Source-Migration in India Report, NSS Round 64[17]

[13] SHINEY CHAKRABORTY, *Impact of COVID-19 National Lockdown on Women Informal Workers in Delhi*, (2020).
[14] Paliath Shreehari, *A Year After Exodus, No Reliable Data Or Policy On Migrant Workers*, INDIASPEND (2021), https://www.indiaspend.com/governance/migrant-workers-no-reliable-data-or-policy-737499 (last visited Jun 6, 2022).
[15] "Your questions answered: Women and COVID-19 in India | UN Women – Headquarters, UN WOMEN (2021), https://www.unwomen.org/en/news/stories/2021/7/faq-women-and-covid-19-in-india (last visited Jun 3, 2022)."
[16] AZEEZ E P et al., *supra* note 5.
[17] INDIA, *supra* note at, 7.

Figure 2



Source-Migration in India Report, NSS Round 64[18]

The figures indicate the industry-wise division of seasonal migrant workers and the number of women and males working as seasonal migrant labourers. Around 2.3 million women are seasonal migrant workers, as per 2007-2008 data. The National Sample Survey last performed a migration survey in 2007-08.[19] A migrant is someone whose former dwelling was distinct from their present one and who lived there for six months or longer. Approximately 29 of each hundred individuals recorded in the survey were migrants.

Throughout 2020, the government implemented two important data-related initiatives: It first determined to conduct an All-India Survey on Migration. The absence of dependable records or record keeping of the migrant workforce hampered efforts to bring together well-being measures such as providing vital supplies and reinforcement material to distraught migrant workers and their family units. The government then began constructing and unveiling a countrywide databank of unorganised labour. The government notified Parliament in September 2020[20]that it had no statistics on the deaths of migrant labourers returning to their houses during the initial months of the lockdown. It also claimed that it had no data on work losses caused by the lockdown among migrant workers. At the local, State, and national levels, migrant workers continue to be undercounted and undocumented, according to a December 2020

[18] *Id.*
[19] Aswathy Rachel Varughese & Indrajit Bairagya, *Group-based educational inequalities in India: Have major education policy interventions been effective?*, 73 INT. J. EDUC. DEV. 102159 (2020).
[20] AZEEZ E P et al., *supra* note, at 5.

International Labour Organization study [21] co-authored with Aajeevika Buearau and CMID. According to the research, a crossing point between workers and public institutions can be developed only if dependable datasets are at all authority parallels.

According to Varma of Aajeevika Bureau, the Census and the NSS data[22] have never recorded the actual figures of persons that moved for employment, particularly periodic refugees who are susceptible due to the utter deprivation of social security in their life. This must be addressed by building institutional mechanisms to track migrants' movements and enable them to qualify for several laws and benefit programs.

A nationwide record of workers, together with the forms of the recurring migrant labour force and information about their origin and destination, preceding occupation details, and the type of their competency, should be unveiled as soon as possible, according to December 2020 Parliamentary Standing Committee. As per reports, the first rough policy on migrant labour published by the NITI Aayog made analogous remarks on the call for reliable information. [23]

According to a Government response in March 2021 in the Parliament [24], the Labour Ministry in the Centre is currently developing a nationwide databank of unorganised employees to create welfare and social security programs. Construction (37 percent), agriculture (21 percent), and manufacturing (16 percent) employ the bulk of seasonal migrants. With 55 million daily-wage workers, the construction industry engages most migrant workers in India, generating around Nine Percent of the Nation's GDP. Each year, over nine million workers migrate from rural setups to urban regions to pursue vocation on building sites and in workshops [25]. As a result, the focal point of this study will be on migrant workers in the construction industry, which consumes a considerable segment of the country's internal migrant workforce and thus also plays a significant role in determining seasonal migration trends.

Because of the pandemic and subsequent attempts to manage it, migrant workers in many countries have encountered severe social,

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[21] "ILO, ROAD MAP FOR DEVELOPING A POLICY FRAMEWORK FOR THE INCLUSION OF INTERNAL MIGRANT WORKERS IN INDIA" (2020).

[22] R. B. Bhagat et al., "*The COVID-19, migration and livelihood in India: Challenges and policy issues*", 17 MIGR. LETT. 705 (2020).

[23] "MINISTRY OF HOUSING AND URBAN POVERTY ALLEVIATION, *REPORT OF THE WORKING GROUP ON MIGRATION*", (2017).

[24] Ministry O F Labour & L O K Sabha, *Government of india ministry of labour and employment lok sabha unstarred question no. 1056*(2021).

[25] Subhomay Saha, "Karan Peer & Shrabani Saha, *India's migrant construction workers: An analysis of their welfare framework*, DOWN TO EARTH, 2021, https://www.downtoearth.org.in/news/governance/india-s-migrant-construction-workers-an-analysis-of-their-welfare-framework-79551" (last visited Jun 21, 2022).

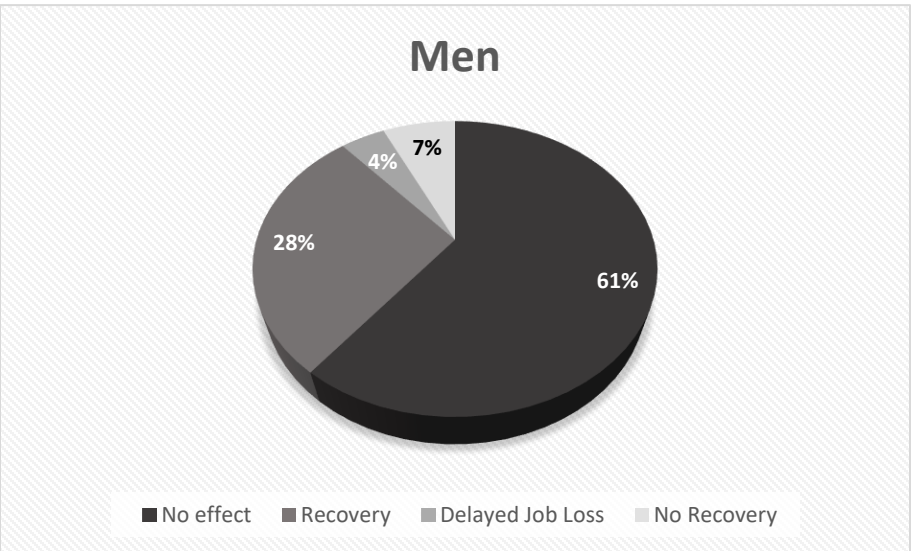
economic, and structural challenges [26]. They were terrified of falling into poverty since they lost their employment opportunities. As per the latest research, the pandemic has exacerbated existing disparities, making life more difficult for disadvantaged and foreign workers[27].COVID-19 disproportionately affects the lives and earnings of vulnerable groups in South Asian nations, mainly migrant labourers in India. [28]

Migrant workers, especially females, face several disadvantages due to their poverty and position as informal workers. Women risk losing their jobs, becoming susceptible to violation of human rights, and catching diseases. COVID-19 (UN Women, 2020). Women may be disproportionately harmed since they are perceived as less capable in many circumstances, resulting in a lower social position and standing. [29]

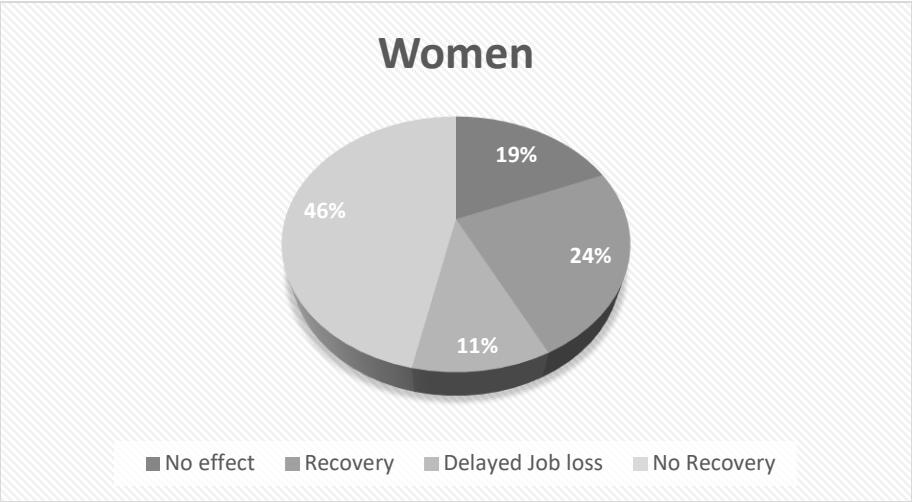
6. Women and Unemployment during Covid 19

The disparity, in wages and the unpaid caregiving responsibilities have forced women to leave their jobs leading them into poverty. Before the pandemic women, in India were earning a fraction of what men earned. The COVID 19 crisis has worsened this problem causing more women to face unemployment not in India but as well.

Figure 3



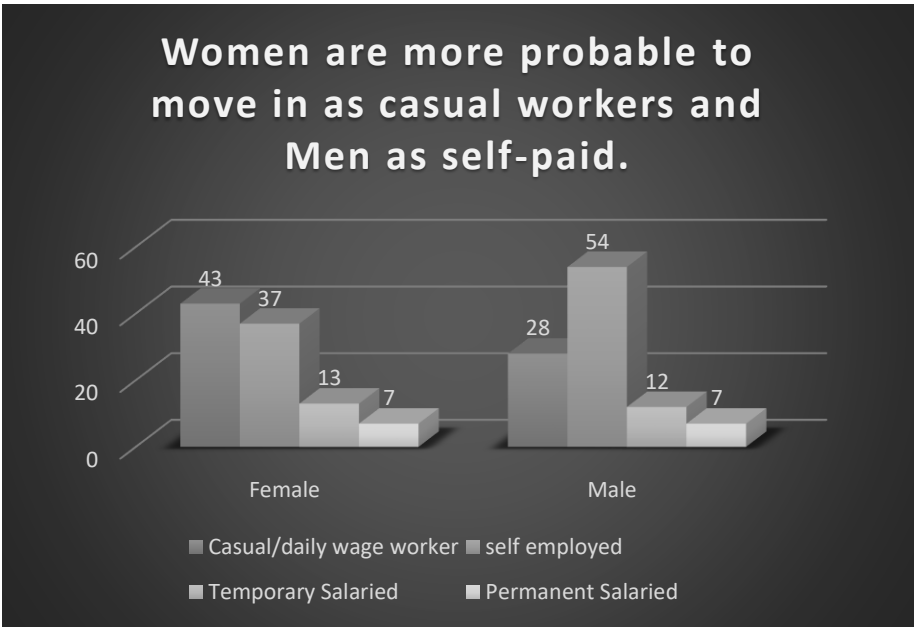
[26]"Laura Foley & Nicola Piper, *COVID-19 and women migrant workers": Impacts and implications*, 30 (2020), https://publications.iom.int/es/node/2430.
[27] UN, *COVID-19 and its economic toll on women: The story behind the numbers | UN Women – Headquarters*, UN WOMEN (2020), https://www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women (last visited Jun 21, 2022).
[28] Bhagat et al., *supra* note at, 24.
[29] CHAKRABORTY, *supra* note at, 15.



Source- Data is for December 2019-April 2020-December 2020, and authors' calculations are based on CMIE-CPHS.

'No effect: did not lose work during a lockdown or after.
Recovery: lost work during the lockdown and recovered by Dec.
Delayed job loss: did not lose work during lockdown but lost it by Dec.
No recovery: lost work during the lockdown and did not recover by Dec'
[30]

Figure 4



[30] Azim Premji University, *State of Working India 2021*, AZIM PREMJI UNIV. (2021).

One-half of the males relocated into self-employment (Figure 4.)[31]. A trivial proportion is twenty-eight percent, moving in as daily wage labourers. Women approx. fourty percent, in contrast, moved in as daily wage workers, and a comparatively lower number came out as self-employed (approx. 37 percent).

Corresponding to a recent evaluation by the Center for Sustainable Employment at Azim Premji University in India, just seven per hundred males drifted from their employment for the duration of the first lockdown in 2020, compared to forty-seven per hundred women workers who lost their occupations and did not resume work by the expiration of the year. In the informal, casual sector, women were significantly inferior. Rural women in casual industries accounted for Eighty percent of work adrift this year, during March and April 2021.

In India women bear a load of unpaid caregiving responsibilities compared to men. They willingly take on ten times many household duties and dedicate 4.5 hours each day to caring for children, the elderly and those who are unwell. As the crisis unfolded the amount of care and domestic work they had to handle increased by 30%. If our policies and actions do not intentionally prioritize and utilize the capabilities of women it could have long term consequences, for their socio well being. There is a risk that women may permanently exit the workforce, which would not reverse progress towards gender equality but also result in significant economic losses, in terms of GDP.[32]

COVID-19 has devastated the lives of Indian female migrant labourers and their family units. According to a telephonic appraisal of migrant labourers in Northern India, well over Ninety-Two percent have drifted from their work, and Forty-Two percent are still unable to feed their families[33]. Despite their importance in the urban economy, social security and policy measures have mostly disregarded women, impeding their integration into Indian cities. Because of the widespread lockdown, thousands of migrant workers were forced to flee their homes. Discovering that many people perished on this cruise due to starvation was devastating. Migrant workers who opted to remain in their separate urban enclaves faced comparable difficulties.[34]

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[31] *Id.*

[32] *Id.*

[33] Aarya Venugopal et al.,"*Voices of the Invisible Citizens: A Rapid Assessment on the Impact of COVID-19 Lockdown on Internal Migrant Workers*, PEOPLE'S ARCH. RURAL INDIA" (2020), https://ruralindiaonline.org/en/library/resource/voices-of-the-invisible-citizens/.

[34] Faraz Khan & Kashif Mnasoor,"*COVID-19 impact: Informal economy workers excluded from most govt measures, be it cash transfers or tax benefits - Business News , Firstpost*, FIRSTPOST.COM 1 (2020), https://www.firstpost.com/business/covid-19-impact-informal-economy-workers-excluded-from-most-govt-measures-be-it-cash-transfers-or-tax-benefits-8354051.html" (last visited Jun 21, 2022).

In addition to losing livelihood and income, the pandemic impacted the lives of migratory female workers. Despite this, no scholarly study has been conducted on the epidemic's effects on India's migrant working population. Against this backdrop, this study aimed to investigate the consequences of COVID-19 on migrant wage earners and their family units from the standpoint of female migrant workers who persisted in their communities and homes throughout the lockdown.

Migrant workers are compelled to return to their settlements as Covid-19 levels rise across the country. The issue of sexual identity, on the other hand, has received little attention in all of this. The effect of migration on women differs from that on males in the Covid-driven migration process. Women's migration is recognised as a result of them shifting to areas where their spouses have jobs rather than as a result of their own. This might explain why they are frequently disregarded when addressing the problems that migrant workers encounter. Even though many women work in the locations they go to, marriage is the key reason for many of them to relocate. As with most crises, the forced mass relocation that occurred last year and has just been revived has an uneven gender incidence.

In most situations, women are left to raise children and relatives at home while men migrate. This hinders their return to traditional occupations such as agriculture, elderly and child care, and household management.[35] Many lost the local affiliates, knowledge, and skills required to participate in various assistance programs. Last year, the National Commission for Women (NCW) advised the Ministry of Women and Child Development to preserve the rights of female migrants. This includes providing nursing mothers with nutritional food and drinking water, restricting separation from family or children if feasible, giving sanitary napkins, and taking special care to protect the dignity and safety of breastfeeding women. The advisory mentioned protection from withdrawal from their homes, effectively responding to gender-based abuse, inclusive redressal mechanisms, medical care in migrant clusters, including mental health care, access to interaction with their families and distress relieving initiatives, and access to sanitation facilities such as masks, disinfectants, and soaps.

Most states have hesitated to comply with these recommendations if they have responded. Many migrant women's isolation centers, shelters, and road journeys to home are dangerous places with inadequate resources or security standards. Numerous female migrants have had to make countless sacrifices, even those who stay in cities and those who return. Residents of urban ghettos have mostly been kept in their houses with their out-of-school children, unable to leave their homes for fear of exposure to the virus, compounding their stress and anxiety. Because all healthcare personnel are being called

[35] Foley and Piper, *supra* note at, 28.

to action to counter the outbreak, many migrant women lack access to health services for various reasons. Many migrant women lack access to health services due to various considerations and the fact that all healthcare providers are under pressure to respond to the crisis[36].

7. Role of Judiciary in safeguarding rights of Women migrant workers during COVID-19

In May 2020, the Supreme Court of India, comprising the bench of Hon'ble Justice Ashok Bhushan, Sanjay Kishan Kaul, and M.R. Shah, took note of the situation faced by stranded workers.[37] The Court independently recognized this issue without any petitions from individuals or organizations. To address the needs of these workers, the Supreme Court issued a series of instructions. It mandated both the state governments to ensure the safe transportation of stranded migrants back to their hometowns. This was an acknowledgment of these workers' "right to return home,"[38] including women who often traveled with their families. The Court stressed the importance of providing workers with food, water, and sanitation facilities throughout their journey.

Additionally, authorities were instructed not to charge them for train or bus tickets. Governments were directed to collect data on stranded workers and women to ensure that necessary assistance was provided. This data played a role in planning and executing migrant transportation effectively. Furthermore, the Supreme Court actively monitored the implementation of its instructions by seeking updates from governments regarding progress made in transporting stranded migrants and providing them with necessary support.

Swaraj Abhiyan, a governmental organization, filed a Public Interest Litigation (PIL) in the Supreme Court of India in May 2020.[39] The PIL aimed to address the food and nutrition needs of populations affected by the pandemic. It emphasized the importance of the right to food under Article 21 (to Life) of the Indian Constitution. The argument was that the government was responsible for ensuring no one suffered from hunger during this time. The Supreme Court, with Justices N.V. Ramana, Sanjay Kishan Kaul, and B.R. Gavai on its bench, issued directives to both state governments. These directives included provisions for distributing ration and cooked meals among those in need, migrant labourers, and other vulnerable groups. The Court actively monitored these directives' implementation by requesting government' reports and updates regarding food distribution and relief measures. It also stressed transparency in displaying information about food distribution centers, ration shops, and available supplies

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[36] Panicker, 2021.
[37] Reepak Kansal v. Union of India,2021 writ petition no.539,2021
[38] *Id.*
[39] Swaraj Abhiyan v. Union of India,2020

as factors in ensuring access to food for everyone—especially women and children who were recognized as particularly vulnerable during this pandemic.

8. The Way Forward

Women migrants are considerably more prone to obscurity and lack of protection due to their occupation in the urban informal sector. Domestic, home-based, regular production and construction work comprise a significant workforce. Because there are no written contracts in these industries, workers are frequently subjected to coercive and exploitative working conditions. Migrant women often have little control over their earnings and must work excessive hours. They also frequently operate in hazardous environments and are subjected to gender-based abuse. [40]. Not everyone experiences the impacts of a crisis, such as the COVID 19, in the same way. Women often encounter obstacles because of prevailing gender norms and disparities. To ensure a robust and fair recovery it is essential to engage women and girls in influencing our policies, investments and initiatives.

As per the United Nations Development Programme's latest report, the Socio-Economic Bearing of COVID-19 on Female Migrant Workers [41], food security, economic assistance, governmental healthcare insurance, and safeguarding against domestic abuse are all vital factors in moving forward from the unresolved COVID-19 catastrophe for Indian women migrant workers.[42]

During the pandemic, women migrant workers in India had to juggle earning a living and unpaid care duties at home. The findings show that women's wages were cut in half during the pandemic, with 56 percent reporting an increase in unpaid care duties.[43] This research adds to our understanding of how the crisis impacts individuals in a broader sense. It is a contribution to the global research that highlights the severe impact of the pandemic on women worldwide. Moreover this study equips policymakers with insights and data to inform their endeavors in reconstruction. It brings a glimmer of hope amidst the hardships faced by women. Also acknowledges their vital roles, in guiding their families and communities during these challenging times. According to the report, a robust recovery from the pandemic necessitates an integrated social safety system for migrant workers, including preventive, promotional, protective, and transformative interventions applied through a crisis-responsive lens.

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[40] Abhishek Sekharan, "*A Year Since the Lockdown, Women Migrant Workers Remain Unrecognised*, THE WIRE, 2021, https://thewire.in/women/women-migrant-workers-india-lockdown" (last visited Oct 13, 2021).

[41] CHANDNA AND GUHA-KHASNOBIS, *supra* note, at 4.

[42] *Id.*

[43] Azim Premji University, *supra* note 32.

The government's new National Policy on Migrant Workers disregards migrant women's specialised needs and interests. Now would be an opportune time to implement a rights-based approach to migrant women's policy. Only if the government addresses the institutional and other challenges that make women migrants invisible can they be treated, along with their vulnerabilities. Its up-gradation and skills programs must emphasize women in the informal sector, especially migrating women. Long-term technological improvements such as artificial intelligence are expected to make migrant women the most vulnerable to precarity and job loss over the next decade. Even in domestic employment and home-based work sectors, the pandemic has deepened how technology mediates work.

In light of this, the researcher in this study proposes the following measures to alleviate the situation: concerted efforts are needed to target women in the informal economy, particularly migratory women, for skill training and up-gradation. Such interventions should aim to deconstruct gender-based skill recognition and designations while also considering the rapidly changing role of technology in the future workplace.

Most crucially, while attempts to improve voting portability and access to social security and health care are commendable, they must consider the unique demands of women workers. Quality and affordable child care, road pedestrianization, street lighting, affordable and accessible sanitation, dependable public transportation, and comprehensive sexual and reproductive health services are among them. These must be incorporated as vital public services to advance communal city ownership. Many of these changes must be accompanied by a dramatic re-imagination of who owns the city, constructed it, and lives there. Regardless of the inhumane conditions in which migrant workers are treated, the researcher wonders under what circumstances migrant workers are forced to travel to their workplaces amid the COVID-19 pandemic when the entire nation is anticipating a second wave of the novel Coronavirus's spread. The difficulties that migrant employees face are more complicated. Examining the migration pattern reveals that migrant workers contribute more to the country's economic progress but are not regarded and safeguarded as they should be. The Central and state governments must take the necessary actions like Providing financial assistance and support to women migrant workers affected by the pandemic, ensuring access to healthcare and essential services for women migrant workers, and strengthening laws and enforcement mechanisms to prevent exploitation and abuse the workplace, implementing measures to support women migrant workers in finding new employment opportunities, Providing safe and affordable transportation for women migrant workers to return to their home states and enforce the appropriate policies to defend the interests of them. Migrant workers must be exposed to national policy through awareness programs, and their well-being must be facilitated and promoted.

Clayton's Rule of Appropriation

Calista Chettiar*

1. Introduction

Clayton's Rule of Appropriation of Payments arose out of the ***Devaynes v Noble***[1] lawsuit widely known as Clayton's case which took place in England. In this case, it was decided that the debtor can plead with the creditor to apply the payment to any of his obligations if he is in debt to the creditor multiple and different debts, and if the creditor approves of it, he is trapped by it. Appropriation alludes to the 'Application' of Payments. The Indian Contract Act of 1872, Sections 59[2] to 61[3], define specific processes for the Appropriation of Payments in the event of a creditor and a debtor. Creditors must take these factors into account when deciding which debts to apply a payment to; conversely, they may be tempted to allocate payments to accounts from which they are less likely to receive a rapid and easy return of funds. If no one specifies an appropriation, the law will assume responsibility and allocate the funds appropriately. The scope of Clayton's Rule extends to cases where a person owes multiple debts, and the collection should be addressed to only one individual. The rule does not apply in circumstances when the debtor owes just one obligation, the debt is to be paid in numerous cyclical payments, or the dues have been combined into a solo decree. In addition, the rule does not apply in circumstances where the principal amount and interest are levied on a solo debt or if the interest is due on a decree. The core notion seems to be that 'When payment is made, it is to be employed according to the payer's desires, not the receivers. If the person to whom the money is given does not agree to use it according to the desires of the person who is giving it to him, he has the right to refuse it and assert his legal rights.'

The principle established in Clayton's Case preserves its full force only between a bank and its client. If the rule advocated in Clayton's Case were put into effect, it would enrich a chosen handful of investors to the detriment of a majority. The rule in question, however, does not apply in all situations and at all times: for starters, it does not apply unless the payment is adequate to totally discharge the debt for which it is paid; and, secondly, it only applies when the debtor appropriates the payment at the time it is made. One of the plus points of the Clayton's Case Rule is that through this rule reciprocal rights of the debtor and the creditor when a payment is about to be made or has

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[1] Devaynes v. Noble, (1816) 35 ER 781.

[2] The Indian Contract Act, 1872, § 59 No. 9 of 1872, 1872 (India).

[3] The Indian Contract Act, 1872, § 61 No. 9 of 1872, 1872 (India).

already been made in respect of debts owed by the former to the latter is given. The Clayton's Rule of Appropriation of Payment could be applied to discharge the partnership debt as well. This rule can also help in running accounts like cash credit and overdraft accounts. The Clayton rule is a common law that governs how money-based assets are distributed from a bank account. It is beneficial in various areas like Appropriation based on receipts and payments received, when a debtor fails to notify the creditor and the creditor fails to act, when the debtor expresses an interest when the debtor does not express an interest, and when the circumstances are not indicative, part-payment is applied first to the interest and then to the principal., etc. The paper studies the advantage and disadvantages of the rule in Clayton's Case. It also studies the exceptions of the Clayton's Rule of Appropriation of Payment.

2. Clayton's Rule

A. How did Clayton's Rule of Appropriation come into being?

It all started off in 1809, when Devaynes, a partner in a banking firm, passed away. His demise ended his relationship with other banking house representatives. His four previous partners, on the other hand, never changed the name of their firm. They stayed in business until 1810 when they declared bankruptcy. In light of this, the dilemma of whether or not Devaynes' estate is liable for the financial institution's accrued and unpaid debts arose after his demise. Several categories of creditors were discovered, and sample cases were undertaken for each. When Devaynes died unexpectedly, the litigator whose firm was functioning as his personal representative, Clayton, had $1,713 in his chequing account at the financial institution. Clayton continued to use Devaynes' account after he died. His debt was greater than it was when the banking house went bankrupt than it was when Devaynes died. Following Devaynes' demise, his minimum balance was £453. Mr. Clayton asserted that he was authorized to apply his subsequent withdrawals to his claim against the existing partners, culminating in no further repayment of the £453, because he had two separate claims to the £453: one against the estate and one against the existing partners. Without any other arrangements, the estate alleged that the indebtedness was mitigated proportionally with each withdrawal and that the earliest payments were reimbursed first as seen in the firm's passbooks and statements of account. The judge, Sir William Grant MR, ruled that the estate of the deceased partner was not obligated to Clayton since the firm's commitments to Clayton had been fully discharged by the payments made by the surviving partners before the partner's demise. So was born the rule in ***Devaynes v Noble***[4] which is more popularly referred to as Clayton's Case.

[4] Devaynes v. Noble, (1816) 35 ER 781.

B. How does the Appropriation of Payments work between the creditor and the debtor and how are the payments appropriated between the creditor and the debtor by the Law?

Appropriation implies 'application or allotment,' while payment involves discharging a debt with a certain amount of money. As a result, appropriation of payments refers to the application of a specific sum paid by a person to the settlement of one or more of the person's debts owed to others. Sections 59[5] to 61[6] of the Indian Contract Act of 1872 control the manner in which payments are appropriated. These sections outline the broad principles that the debtor must undertake when assessing how to apportion payments made to the creditor.

Appropriation by a debtor is defined by Section 59[7] of the Indian Contract Act, which states that whenever a borrower acquires multiple debts from a similar lender and owes them back via asking the lender to apportion a particular payment to a certain debt and the lender complies, the borrower is deemed to be indebted for the appropriation. This is the preferred technique if there are several debts to be redeemed instead of just one. The core right of a borrower is the right to appropriate payment made for the borrower's welfare. In the era of actual payment as well as the execution of the particular payment due, the lender has a duty or obligation to hearken to a borrower who communicates his or her intentions. The money must be earmarked for the settlement of a certain debt. If the borrower gives no inkling, the court will examine the circumstances of the appropriation of the payment. When a debtor lends a creditor varied and distinct amounts of money, Section 59[8] of the Indian Contract Act is used. However, if there is only one debt, this section will not apply, even if it is to be paid in instalments.

Section 60[9], which enables a creditor to make an appropriation, is the second principle. If the debtor makes a payment without appropriation, the creditor may utilize the amount to wipe away any outstanding debt at his discretion. He may, for example, use the money to pay off a past-due debt or a debt with a simple or lower interest rate. The court found that where a mortgagor deposited money in court without specifying whether it was for principal or interest, the conventional rule that such money should be applied first to interest and charges and then to principal would apply.

Section 61[10] contains the third principle. The provision applies when no party makes an appropriation. The law has the authority to appropriate the money in this circumstance, and the law wants to clear

[5] The Indian Contract Act, 1872, § 59 No. 9 of 1872, 1872 (India).
[6] The Indian Contract Act, 1872, § 61. No. 9 of 1872, 1872 (India).
[7] The Indian Contract Act, 1872, § 59 No. 9 of 1872, 1872 (India).
[8] The Indian Contract Act, 1872, § 59 No. 9 of 1872, 1872 (India).
[9] The Indian Contract Act, 1872, § 60 No. 9 of 1872, 1872 (India).
[10] The Indian Contract Act, 1872, § 61 No. 9 of 1872, 1872 (India).

the debts in the order that they were incurred. The following is from the section: "When neither party makes an appropriation, the payment will be applied to the payment of debts in the order in which they were incurred, whether they are current or not (time-barred). If the debts are of equal standing, the payment will be allocated proportionally to each."

C. To what other scenarios can Clayton's Case be implemented?

The Court of Appeal returned to this point some 60 years later, in ***Re Diplock [1948] Ch. 465***[11]. The administrators of Caleb Diplock's estates had already contributed about £203,000 to 139 charities prior to when the next of kindred rendered the gift null and void, retaining a residuary bequest of roughly £263,000 that was allocated "for charitable or benevolent... causes" designated by the executors. Attempts to backtrack into and out of bank accounts housed by certain of the institutions raised red flags as part of the quest to retrieve the estate. In assessing whether or not the rule applied in Clayton's Case, the Court of Appeal predicated on an account kept by Dr. Barnardo, which clearly demonstrated that a gift of £3,000 had been incorporated into the appraised value of some loan shares if the principle had been enforced. The court determined that the rule was applicable, and the assets could be linked to the pertinent stock. Sir Wilfrid Greene MR remarked in his ruling that if the mixed fund had not been employed, they would be entitled to rateable charges. The scenario is identical when the claimants are a single recipient and a volunteer, and we argue the same principle.

D. What does Clayton's Rule of Appropriation have on the securities?

Deeley v Lloyds Bank Limited[12] depicts the scenario. Mr. Glaze handed the bank a loan to fund a £2,500 overdraft, according to the facts. Mrs. Deeley, his sister, was later offered a second charge in order to safeguard the cash she had loaned him. After being apprised of the second charge, the bank persisted to administer the overdrawn current account in the exact same manner as before. The bank eventually foreclosed and liquidated the mortgaged property at auctions for the exact amount needed to settle the loan. Almost six years later, Mrs. Deeley initiated an action, alleging that the bank's loan had compromised primacy under Clayton's Case rule because the outstanding balance to the bank at the beginning of the subsequent charge, in which the bank had pre-eminence, had been compensated prior to the bank claiming ownership and selling the mortgaged property. Mrs. Deeley lost at the very first instance and the Court of Appeal, alleging that the parties' actions had exempted the norm, but she triumphed in the House of Lords. For such a situation, the bank

[11] In Re Diplock [1948] Ch. 465.
[12] Deeley v. Lloyds Bank Limited, [1912] AC 75.

has a simple and direct remedy: turn off the account and allocate subsequent transactions to a different account. The manager at Lloyds Bank had a similar policy, but he ignored it. Precautions against such failures are currently (and have long been) taken by mandating the security to be an ongoing guarantee for the account's amount owed from period to period. Clayton's Case rule will continue to apply in full effect in the absence of such a clause or any other extraordinary circumstances.

E. How are the presumptions raised by Clayton's Case rebutted?

In Clayton's Case, the rule is a presumption that can be rebutted in numerous ways:

a) Rebutted by evidence raising another presumption - This case of Clayton's was initially decided on the basis of inferences drawn from the evidence presented in court. It became so established that it could only be disregarded in future circumstances with a clear intent to do so or by mutual consent. The rule established in Clayton's Case is highly helpful, and it is not possible to successfully challenge it absent evidence of a conflicting agreement or circumstances from which an alternative intention must be inferred.

b) Rebutted by trade practice - Customers of insolvent stock brokers who had committed their customers' shares to the bank to satisfy their debts were entangled in a series of lawsuits sparked by the 1929 stock market crash and the Great Depression. Shares purchased on behalf of clients who had not paid in full might be pledged by a broker, but not shares for which payment had been received in full. In the event that a broker declares bankruptcy, the bank will sell the shares. As a result, a single container contained an inextricable mixture of securities or money. The owners of the pledged shares asserted their property rights in a common fund. Given Clayton's position of authority, it was reasonable to apply the rule in his favor. The focus of this case is withdrawals from a common pool of funds. The courts, on the other hand, have found in favor of the plaintiffs, citing precedent from the United States. The remaining securities and the fund of money were recognized as joint assets in which the security and fund of money owners shared ownership. On a pro-rata basis, pledged securities were shared. "Debt load sharing" was the term used. Only when the proprietor of committed assets was able to recognize his actual shares, or when the owner of committed assets was unable to recognize his actual shares, was there an exemption to this rule. If only the earnings from their sale hadn't even been horribly mixed together with other securities or cash.

c) Rebutted by an absence of evidence - The Clayton's Case rule cannot be used if the order in which deposits are made is unknown. A solicitor utilized trust funds from his general trust account to settle a mortgage in Re Cohen. There was no evidence presented to show in what order the trust funds were settled in that account. The case does not state whether there was no evidence or whether counsel failed to lead it. The loan was never paid off. Beneficiaries of the trust account claimed they had a right to track the account. The beneficiaries of the solicitor's trust funds were seen to be on an equal footing with beneficiaries of a trust established by the mortgage: In Clayton's Case, the notion was - that ties the initial payments into the first drawings, cannot be applied in the lack of presence of evidence on that point.

3. Judicial Precedents

In the case of ***Jia Ram v Sulakhan Mal***[13], the scope of provisions 59, 60, and 61 of the Contract Act was first addressed. In the matter of ***Jia Ram v. Sulakhan Mal***[14], it was decided that both the principal and interest would apply in this instance. M has three loans that he owes to N: On April 1st, I took Rs 2000. On May 1st, a total of Rs 5000 was stolen. On July 1st, a total of Rs 6000 was taken. If he pays Rs. 4000, the money should be used to pay off the first and second loans in full, with the remaining funds going to the third loan. It outlined a number of conditions that must be met in order for the instances to be within the scope of the provisions in question. The first prerequisite for these sections to apply is that the debtor owes more than one obligation and that all of the debts are aimed toward one individual only. The section's scope does not include situations in which a person owes multiple debts to many claimants. The parts do not apply to situations in which the debtor owes just one obligation, the debt is to be paid in monthly installments, or the debts have been combined into a single decree.

Another principle was brought out in the case of ***Chase v Box***[15], which said that when money is paid without fear, the ordinary rule should be applied, which is to designate the money first to the interests and then to the initial sum.

In the case of ***Meghraj v Bayabai***[16], the court concluded that if interest is also accrued on the principal amount of the debts, any payment made by the debtor should be applied first to the sinking of the interest and then to the principal sum after the interest has been

[13] Jia Ram v. Sulakhan Mal, AIR 1941 Lahore 386.
[14] Jia Ram v. Sulakhan Mal, AIR 1941 Lahore 386.
[15] Chase v. Box, 1702 2 Freeman 26122 ER 1197.
[16] Meghraj v. Bayabai, 1970 1 SCR 523.

satisfied. It further said that the debtor bears the duty of proving that the sums paid were acceptable to the creditor.

In the case of ***Kamaleshwari Prasad v Gangadhar Mal***[17], the court held that in the absence of any notification from the debtor, the creditor has the right to use the payment for the appropriation of a debt that is forbidden by the Limitation Act, 1963. This offers the creditor an edge in recovering a time-barred debt. However, by the delivery of the judgment, he is not entitled to recover the debt that has been forbidden by statute. If interest is accrued in addition to the principal, the creditor has the right to appropriate the money first to the interest and subsequently to the principal if the debtor has failed to communicate his desire to appropriate directly or impliedly.

Kailash Chandra Gaur v. Central Bank of India and Ors[18]., In this case, the learned Advocate for the appellant argued that the respondent Bank failed to apply Clayton's Rule, i.e., the 1st respondent Bank failed to notify the appellant that, upon his resignation and revocation of the guarantee, a decision would be made on the liability that existed on the date of revocation of the guarantee. In addition, the Bank did not reserve the right to alter future credits toward future advances. That, absent a contract to the contrary, all subsequent credits would be applied to the discharge of an earlier obligation that existed prior to the revocation date, and that if this approach had been adopted and enforced, the appellant would not be held liable in any way. In fact, even after applying Clayton's Rule, the Bank has not proven whether any responsibility occurred. Because there is no evidence that the respondent Bank used Clayton's Rule, the judge determined that the appellant is not responsible to pay any money to the respondent Bank.

In the case of ***Swaziland Building Society v. Fonteyn Investments (Pty.) Ltd.,***[19] the judge decreed that Clayton's case law holds applicability to current bank accounts under our law when neither the customer nor the bank has made an effective appropriation (**Devaynes v. Noble**[20]). For as long as the in duplum rule prevents interest from accruing, all funds deposited into the account should go toward paying the interest due first, before being used toward repaying the principal.

[17] Kamaleshwari Prasad v. Gangadhar Mal, AIR 1940 Pat 52.
[18] Kailash Chandra Gaur v. Central Bank of India and Ors., (2006) BC 194.
[19] Swaziland Building Society v. Fonteyn Investments (Pty.) Ltd., 2008 SCC OnLine SZHC 45.
[20] Devaynes v. Noble, (1816) 35 ER 781.

4. Critical Analysis

Some of the loopholes that were found in Clayton's Rule of Appropriation of Payments are:

- The rule's application between the Depositor and the Bank and Other Interests - The in duplum rule is generally useful in cases involving a depositor and their bank. There are typically no issues in determining how debt and credit transactions within a single bank account are allocated when withdrawals are viewed in the same order as deposits. While the rule has been used in the past to give credit to different loans, this is not common practice now, and it may not apply in situations where there is a single debt with secured and unsecured portions. However, recent cases have not shown any problems with the rule's application in this context. The main concern is the rule's application when interests other than those of the depositor and bank are involved.

- The requirement of the Rule in Clayton's Case - A plaintiff with an equitable interest is also authorized to an equitable lien or levy on the funds or its traceable product, in supplementary to any other personal remedies available in equity. These security measures exist regardless of when withdrawals are processed relative to deposits. Clayton's Case rule may have been superfluous in settling either of these issues, suggesting it should be scrapped.

- Application of the Rule when interests other than the depositor's and his bank are involved - The necessity of a fiduciary relationship -: The Clayton's Case rule is often untenable when utilized in real banking cases concerning the co-mingling of several people's funds. In certain cases, one beneficiary of a fund may be compelled to take the entirety of the damage while all other claims are adjudicated. The rule's applicability notwithstanding, it's not apparent what transpires when an individual possesses an equitable and legal title to a fund's assets yet has had that title erroneously taken away from them. They have few alternatives for recourse, and the legal ones are frequently insufficient.

Suggestions

Some of the suggestions are:

- In cases where parties other than the borrower and the bank are concerned, Clayton's rule needs to be adjusted or done away with altogether.

- In addition to the obvious perks, mandating pari passu allocation among claimants would additionally do away with the provision adopted in the Clayton's Case.

- There is no criterion or assumption that assesses disbursements from a fund against contributions in the proportion they occurred, beyond the establishment of rights between a debtor and a creditor. So, a brand-new benchmark should be constructed for all subsequent cases.

5. Conclusion

The heart of the concept is that under the appropriation of payment, the debtor has the first right to appropriate payment according to his wishes to the specific debt that he desires, provided that his intention is explicitly communicated to the creditor, either directly or implicitly (Section 59[21]). There is no obligation on the part of the creditor to accept the appropriation. Only once he accepts the appropriation does he become bound. However, if he refuses to accept, he must refund the entire sum to the debtor. If the debtor has not indicated that the payment should be allocated to a specific obligation, the right of appropriation passes to the creditor, who is free to allocate the payment to whatever debt he chooses (Section 60[22]). Finally, if no party expresses an intention to appropriate a specific debt, the law steps in and assumes the power to appropriate the payment either according to the time of the debts or proportionately to each debt if all the debts are of the same time period (Section 61[23]).

This demonstrates that the abovementioned sections should be read together rather than separately, as one section establishes the conditions for the applicability of the next section. Furthermore, these only apply when a debtor owes the creditor multiple discrete loans rather than a single installment debt.

[21] The Indian Contract Act, 1872, § 59 No. 9 of 1872, 1872 (India).
[22] The Indian Contract Act, 1872, § 60 No. 9 of 1872, 1872 (India).
[23] The Indian Contract Act, 1872, § 61, No. 9 of 1872, 1872 (India).

Class Inequalities in Criminal Justice System: Disparities in Judicial Decisions on Dying Declaration

Arzoo Srivastava*

Introduction

"Injustice anywhere is a threat to justice everywhere."

-Martin Luther King Jr.

The first thing that comes to our mind when we hear the word "criminal justice system" in India, is the deeply-entrenched inequalities, the lacuna in the functioning of the system, unfairness and the poor access to justice among various other things. But what exactly do we mean by the word "criminal justice system"? In our constantly changing society, the meaning of the words "crime", and "criminal" have changed throughout the history of time. What may not have been a crime at one point may be a crime now or vice versa. For example, Slavery was legal and common in many areas of the world until the 19th and 20th centuries, when it was abolished and proclaimed a crime against humanity by numerous governments. Attached to it is the meaning of the term "justice," which being dependent on an action being referred to as criminal, alters with the change in the meaning of "crime." For example, before the abolition of slavery, if the competent authority penalized a person for keeping a slave, it may have been called injustice from the legal point of view, but the same would-be justice now.

"Criminal Justice System", is a concept of three words that seems quite easy to understand, but which is actually surrounded by various complexities. The meaning of the word as a whole has not been given even in the Black's Law Dictionary which is one of the best and most frequently used legal dictionaries used by judges, academicians, and practitioners all over the world. However, if we see each word of "criminal justice system" in isolation, then the meanings of the words "criminal" and "justice" are given in the Black's Law Dictionary.

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According to the Black's Law Dictionary,[1] Criminal means-

a. "Having the character of a crime; in the nature of a crime or connected with the administration of penal justice."

b. "One who has committed a criminal offense or one who has been convicted of a crime."

Justice means, "The fair and proper administration of laws."

According to the Oxford English Dictionary,[2] the word "system" means "an organized set of ideas or theories or a particular way of doing something"

Therefore, criminal justice system may be defined as "*The fair and proper administration of law by the competent authority to a person who has been convicted of a crime or committed an offense which is criminal in nature, according to the way prescribed by law.*" While the first part of the definition, i.e, 'the fair and proper administration of law" deals with the substantive provisions of law and the principles of justice, equity and good conscience, the second part, i.e., "way prescribed by law" deal with the procedural aspects of law.

This research paper attempts to provide a detailed discussion on the inequalities in the criminal justice system and its relation with the class of accused. The scope of this paper with respect to analyzing judicial decisions is restricted to the provision of the dying declaration defined in Section 32(1) of the Indian Evidence Act, 1872. The research paper will also examine the history of the criminal justice system, the logic behind the provisions of the Dying Declaration, and, finally, offer improvements for the system after critically examining all relevant information.

1. History of the Criminal Justice System and the Provision of Dying Declaration

1) History of Criminal Justice System

In the words of Thomas Hobbes, "of the voluntary acts of every man, the object is some good to himself". Throughout the history of time, crimes have been committed by human being's for fulfilling their own interest. It is true, that there may be situations where someone may have committed a crime for someone else, but the end goal is always the benefit of oneself, be it by money, by advantage to them or their loved ones, or to just satisfy one's ego. As crimes begin to rise, different civilizations started to come up with their own separate laws, and therefore, the history of the criminal justice system can be traced back to ancient times. It has been written in the Mahabharata that, "A king who fails to safeguard his subjects after vowing to do so should

[1] CRIMINAL, BLACK'S LAW DICTIONARY (2020).
[2] SYSTEM, THE OXFORD ENGLISH DICTIONARY (1991).

be killed like a rabid dog," and "The people should execute a monarch who does not protect them but deprives them of their property and possessions and who does not listen to anyone's advice or instruction. Such a ruler is misfortune, not a king." The norms demonstrate that sovereignty was predicated on an implicit theory of social contract, and that the King lost his monarchy if he disobeyed the traditional accord.

The criminal justice system in ancient India was built on the notion of dharma, which dictated the principles of ethical behavior.[3] The highest authority was the king, who received his power from dharma and was required to preserve it. The rules were taken from a variety of sources, including the Vedas, Puranas, and Smritis. Fines, jail, banishment, mutilation, and death were all suitable penalties for the offences. The concepts of democracy and republicanism affected the criminal justice system in ancient Greece and Rome.[4] The laws were created by the people or their representatives and were written down. The courts were made up of ordinary residents who served as judges and jurors. The legal process included the allegation, defence, and verdict. The penalties were similarly equal to the offences and included fines, exile, enslavement, and death. The feudal system and the church dominated the criminal justice system in medieval Europe. Custom, tradition, and religion served as the foundation for the laws. Secular and religious courts were established. The judicial method included ordeals, combat trials, and compurgation. Torture, mutilation, stake burning, and hanging were among the cruel and terrible penalties.

All of this has altered substantially in modern times, with various reforms implemented in the criminal justice system as a result of the influence of enlightenment, humanism, and rationality. Today's laws are founded on logic, natural rights, and the social compact. The courts are unbiased and independent. The legal process includes the assumption of innocence, due process, and a fair trial. Inhumane and reformatory penalties include incarceration, probation, parole, and community service.[5]

2) Dying Declaration

It is on one latin maxim that the concept of dying declaration is based "*Nemo moriturus praesumitur mentiri*" which translates to "no one who is on the point of death should be presumed to be lying". This maxim reflects the belief of human being that "nobody would meet his maker with a lie in their mouth." We can see cases of dying declaration from as far back as 1202, but these rules were vague and were crystallized only after the judgement of R v. Pembroki[6]. If we look back at the history of the dying statement in common law, we can see that

[3] M. MONIR, THE TEXT BOOK ON THE LAW OF EVIDENCE (LexisNexis 2020).
[4] *Id.*
[5] *supra* note 3.
[6] R v. Pembroki, 6 How. St. Tr. 1333 (1678).

the norm was applied to both civil and criminal situations. However, in English law, the deathbed declaration is only valid in circumstances of homicide and manslaughter. The Indian stance is the same as it was under common law, and it applies to civil actions as well. When Richard the Lionhearted ruled in the 12th century, and Christianity was widely practised, judges assumed that people who are on the verge of being murdered would be hesitant to incur God's anger by pronouncing false final words. However, the comments of Charles W. Quick in an essay on Dying Declarations are more pertinent now, as they state, "Anger, a desire for vengeance, and simple shrewdness endure in many people till their last breath... Furthermore, the urge to defend one's own behavior and get the approval of one's friends may lead to conscious or unconscious deception, even in extreme cases."

2. Rationale Behind the Provision of Dying Declaration in India

"But liars we can never trust,
Even when they say what is true.
And he who does one fault at first
And lies to hide it, makes it two.

Have we not known, nor heard, nor read
How God does hate deceit and wrong?
How Ananias was struck dead,
Caught with a lie upon his tongue?

So did his wife Sapphira die,
When she came in, and grew so bold
As to confirm that wicked lie,
Which just before her husband told.

The Lord delights in them that speak
The words of truth; but every liar
Must have his portion in the lake
That burns with brimstone and with fire."

- Issac Watts

Dying declaration, as previously stated, is based on the idea that a human on verge of dying can't lie as humans fear god's wrath, and would not want to meet God with a lie in their mouth. When a person whose death is impending makes an oral or written proclamation, as mentioned by Mathew Arnold, it is assumed that " The truth is on the dying man's lips."[7]

It can be argued that the society has changed, and humans have become more selfish than ever and they don't fear anything if it is of

[7] Eric Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75(2) THE UNIVERSITY OF CHICAGO LAW REVIEW *853-883* (2008).

their interest. They will even lie on their deathbed out of spite for fulfilling their selfish interest. However, the law still believes in the truthfulness of a dying man, and a dying declaration is considered a substantive proof of evidence.

Section 32 (1) of the Indian Evidence Act, of 1872 states: "Statements of relevant facts made by a deceased person, whether written or verbal, are relevant when the statement is made by a person as to the cause of his death, or any of the circumstances of the transaction that resulted in his death, in cases where the cause of that person's death is called into question."

The definition consists of two parts-

1. "Cause of his death"
2. "Circumstances of the transaction which resulted in his death."

While the first part is what is generally the principle on dying declaration in various jurisdiction, the second part is based on "a policy of the law keeping in view the peculiar social circumstances in India."[8] While the first parts needs death as a component of the offence, the second part does not. Indian law on the nature and scope of dying pronouncements differs greatly from English law, which allows only utterances directly linked to the cause of death. The second half of Clause (1) of Section 32, namely "the circumstances of the transaction which resulted in his death, in cases where the cause of that person's death is in dispute" is not found in English Law.[9] However, what constitutes "peculiar social circumstances" hasn't been elaborated upon anywhere.

Moreover, in Re Shk Tinoo[10] and R v. Ujrail,[11],it was stated that before a dying proclamation could be acknowledged, it had to be proven that the individual making it knew he was dying or felt he was on the verge of death. The rule itself was quite similar to the English law excluding the fact that the person making hope might have hope that he will recover and not die.

3. Inequalities Relating to the Class of Accused

Article 14 of the Indian Constitution states, "Within the territory of India, the State shall not deny any individual equality before the law or equal protection under the law. Discrimination on the basis of religion, race, caste, gender, or place of birth is prohibited." Article 21 states that "No one should be deprived of his life or personal liberty unless in accordance with the legal procedure." Persons' lives, liberty, and dignity are at the heart of human rights; without these, humans

[8] Ram Swaroop v. State (Govt. of NCT) Of Delhi, Cr. Appeal No. 1327 of 2010 (2017).
[9] *Id.*
[10] In Re: Shk Tinoo, 15 WR 11.
[11] R v. Ujrail, 2 NWP 12.

are no better off than animals. However, these are frequently influenced by the accused's socioeconomic status or political influence.

According to the Arjun Sengupta research, 78% of the Indian population (836 million) now lives on less than Rs 20 per day.[12] Furthermore, a socioeconomic investigation of death row detainees suggests that a disproportionate amount is from low-income, lower-caste, and religious minority households. The majority of death row inmates questioned were economically disadvantaged, based on occupation and landholding, according to a team of NLUD researchers who analysed 373 of the 385 criminals presently on death row across the country.[13]

According to the most recent National Crime Records Bureau (NCRB) data, jails in India are mostly crowded with young men and women who are illiterate or semi-literate and hail from socioeconomically disadvantaged backgrounds. More than 65 percent of undertrial detainees are from the SC, ST, or OBC groups. The majority of them are too impoverished to even pay the bail.[14] Due to the fact that most undertrials are people who are essentially disadvantaged economically, they spend more time in jail due to their lack of not being able to pay these back-door costs, or pay the bail money, or obtain lawyer of their choice.

Furthermore, many scholars believe that when one political party controls the political world, the likelihood of a court deciding against the government reduces.[15] When the court of the country try to act against the ruling party, it may encounter various court-curbing and court-packing practices. The ruling government's retaliatory actions may include doing amendments to limit the power of the organ of judiciary, the maximum strength of the court may be drecreased, impeachment of judges, replacing the judges to more friendly ones, cutting the court's budget, passing laws aimed at overturning court decisions, or simply failing to implement court rulings.[16] Furthermore, Transparency International (TI 2011) found that 45% of those who had interaction with the judiciary between July 2009 and July 2010 had

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[12] Arjun K. Sengupta, *Report of National Commission for Enterprises in the Unorganised Sector on Social Security for the unorganized sector*, D.O.No.A-25021/21/2006-NCEUS (2007).

[13] *Three-Quarters of Death Row Prisoners Are from Lower Castes or Religious Minorities*, THE WIRE, < https://thewire.in/law/three-quarters-of-death-row-prisoners-are-from-lower-castes-or-religious-minorities> (last visited 2 Oct., 2023)

[14] Prison Statistics India-2021, National Crime Records Bureau, https://ncrb.gov.in/sites/default/files/PSI-2021/Executive_ncrb_Summary-2021.pdf, (last visited 22 Sept. 2023).

[15] Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L. REV. 583 (2001).

[16] JULIO RIOS-FIGUEROA, INSTITUTIONS FOR CONSTITUTIONAL JUSTICE IN LATIN AMERICA, IN COURTS IN LATIN AMERICA (Cambridge University Press 2011).

paid a bribe to the judiciary.[17] The most prevalent reason for paying bribes was to "speed up the process." This is also closely related to the accused's socioeconomic level, as persons from lower socioeconomic strata are frequently unable to pay for these items, resulting in justice being denied to them for extended periods of time.

Inequality based on an accused's class is a severe issue that undermines the fairness and justice of the criminal trial process in India. Discrimination based on class can occur at any point of the trial, including arrest, investigation, interrogation, evidence collecting, witness questioning, conviction, and punishment. There are some main factors that are the reason for these inequalities-

1. The accused's financial situation, influences their capacity to pay for legal assistance, bail, and other trial-related fees.
2. The accused's social standing, determines how they are treated by the police, the judiciary, and the media.
3. The accused's political position, which influences their access to power and influence in the court system.

These factors can create a situation where the rich and powerful accused enjoy more privileges and protections than the poor and marginalized accused. Therefore, it is important to ensure that the legal system is inclusive and equitable and takes step to curb such instances of discrimination.

4. Analysis of Judicial Decisions: Dying Declaration

As stated by the Greek philosopher Aristotle, “The ordering of society is centred on justice.” It is for this very reason that judiciary is the bedrock of the criminal justice system, and therefore, it very important that it promotes fairness and is free from any type of influence. The constitution has various safeguards to ensure the independence, impartiality, and integrity. Article 50 of the Indian Constitution states that the State shall take efforts to separate the Judiciary from the Executive within the State's Public Services. Further, The UN’s Basic Principles on Judicial Independence, 1985, states that “The independence of the court should be safeguarded by the state and established in the country's Constitution or legislation. It is the responsibility of all governmental and non-governmental entities to respect and uphold the independence of the judiciary.”[18] However, despite the various principles of law accepted internationally,

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[17]*Police, Then Judiciary Most Corrupt Public Institutions in South*, TRANSPARENCY.ORG, <https://www.transparency.org/en/press/police-then-judiciary-most-corrupt-public-institutions-in-south-asia-reveal> (last visited 2 Oct., 2023).

[18]Basic principles on the independence of the judiciary, OHCHR, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary (last visited 27 Sept, 2023).

and the various provisions in the Indian Constitution itself, the Indian Judiciary is losing the trust of the people. It is mainly due to the corruption that is blatantly visible now and manifests itself in the various facets of the criminal justice system. Judicial corruption takes place mainly in two forms, *first,* via legislative or executive branch political meddling in the judicial process, *and second*, by taking bribes. This section will analyze judicial decisions to support this stance.

1) Dying Declaration based on Suicide Note

a) **National Commission of Women v. State of Delhi & Anr**[19]

Sunita, a 21-year-old woman, poisoned herself on April 14, 2003. She left a suicide note in her handwriting, blaming her death on Amit, her former instructor and boyfriend. Amit had promised to marry her but had subsequently deceived her and threatened to expose her, she stated. He also made her have sex with other people. She felt exploited and helpless, so she resolved to take her own life. Amit was arrested and charged with assisting in her suicide. The court convicted him guilty of the crime based mostly on the suicide letter as a dying declaration.

b) **The State of M.P. v. Mohd.Shahid & Anr**.[20]

The court stated that "Evidence about the cause of death is important not only to the cause of death of the individual giving the statement, but also to the circumstances of the transaction that resulted in death. The prosecutrix's attempt to express that the accused were hungry (for sex) and that she became their meal (victim) in the suicide letter plainly implies that she was raped and that she did not want to live a life of dishonour. The complete reading of the deathbed declaration does not exonerate the guilty, notwithstanding her request that they not be punished. This type of suicide letter is considered a dying statement and is admissible under Section 32 of the Evidence Act of 1872."

[19] National Commission of Women v. State of Delhi, S.L.P. (Crl.) No. 2506 of 2009.
[20] The State of M.P. v. Mohd.Shahid & Anr.,Criminal Appeal No. 541/2000.

c) **Sharad Birdhichand Sarda v. State of Maharashtra**[21]

The court stated that "Section 32 does not refer just to homicide but also to suicide, thus any of the elements that may be essential to show a case of homicide would also be relevant to prove a case of suicide."

Moreover, in a recent Gujarat HC case, the court refused to quash the FIR and stated that "The suicide note, which serves as the foundation for the FIR, is nothing more than the deceased's last confession. The suicide letter plainly demonstrates that there is a prima facie case of incitement for the deceased to commit suicide."

The above instances demonstrate that a Dying statement, if credible and accurate, is accepted ipso facto as evidence in a court of law. The notion of confirmation of evidence in conjunction with any deathbed pronouncement is only a prudence guideline. A court of law must accept any statement made by the deceased, even if it is in the form of suicide notes, as long as the declaration is free of any contradiction or imperfection that would raise legitimate doubts about its reliability. Because the posture of a dying man is considered sombre and serene, the Court of law acknowledges the authenticity of his/her declaration.

The Contrast

1) State v Gopal Goyal Kanda (Geetika Sharma Suicide Case)

This case is a classic example of political influence in the functioning of judiciary. The Geetika Sharma suicide case, in which Haryana MLA Gopal Kanda was involved, has been a long-running and contentious court fight. Geetika Sharma, a former flight hostess with Gopal Kanda's MDLR airlines, committed suicide in 2012. She left a suicide note accusing Gopal Kanda and his accomplice, Aruna Chadha, of pressuring her to commit herself.

The court while acquitting Kanda, in 2023, stated that,

a) "It was a well-established legal concept that instigation had to be the proximate cause of suicide, and if the dead had adequate time to ponder on the claimed incitement before committing himself, it did not amount to abetment to suicide."

b) "The likelihood of someone acquainted to dead Geetika Sharma phoning deceased Geetika Sharma on 04.08.2012 and inciting her to commit suicide cannot be ruled out."

[21] Sharad Birdhi Chand Sarda v. State of Maharashtra, 1984 AIR 1622.

First Point

The court said that "The claimed incitement had to be the immediate cause of suicide, and if the dead had adequate time to deliberate on the purported instigation before committing himself, it did not amount to abetment to suicide."

However, in the case of Sharad Birdichand Sarda's case,[22] for the cases of dying declaration, the court stated that, "The test of closeness cannot be too literalized and realistically reduced to a cut-and-dried formula of universal application in order to be imprisoned in a strait-jacket. *For example, where death is the logical culmination of a long-running drama and is, in effect, the story's finale, the statement regarding each step directly related to the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Statements relating to or providing an instant motivation may sometimes be admissible as part of the transaction of death.*"

Second point

Analysis of some points from her Suicide Letter:

1. Two people responsible for my death are "Arun Chadha" and "Gopal Goyal Kanda" Both of them have broken my heart and misused me for their own benefit.

2. Gopal Goyal Kanda is a fraud. He always keeps bad intentions towards girls.

In light of these two points in this letter, it is clear that the chance of any person instigating her to commit suicide when the letter clearly mentions the people responsible is close to zero. As illustrated in the above cases, the courts have convicted people on the basis of dying declaration on less evidence than in this case. A dying declaration is a substantive piece of evidence that needs no corroboration if it is reliable. However, in the present case, the letters were also corroborated by the call records of the victim with her mother. Further, her mother also committed suicide soon after the death of her daughter, and left the suicide letter at the same place Geetika had left. Moreover, it can't be expected of a person to fulfil all the intricacies of law. In the case of Paniben v State of Gujarat[23], it was stated by the court that, "Merely because dying declaration does not contain the details as to the occurrence, it is not to be rejected."

[22] *Id.*
[23] Paniben v. State of Gujarat, AIR 1992 SC 1817.

2) Cases of Dowry Death

a) **Paniben v. State of Gujarat**[24]

In this case, the court convicted the accused who was the mother-in-law of the victim. The accused poured kerosene oil on the victim and set fire when she was sleeping all alone in the 'osri' of the house. The accused gave a dying declaration stating that her mother-in-law poured kerosene on her and set fire. The Trial Court and High Court came to the conclusion that "The person who died may have killed himself. Furthermore, it was possible that someone else had burned her alive. Because she held a grudge against her mother-in-law, she named her in her dying statement. As a result of the inherent disability, the deathbed declaration could not be accepted. As a result, the prosecution was found to have failed to show that the dead was burned alive by the accused." However, the Supreme Court reversed the judgment and convicted the accused. Various principles governing the provision of dying declaration were stated in the judgment.

b) **Sayarabano Alias Sultanabegum v. State of Maharashtra**[25]

This is an example of numerous declarations of death. The offence in question was a violation of Section 302 of the IPC. There was a fight between the accused and the dead, during which the prosecution claimed the appellant spilled paraffin from the lamp on the deceased, causing the deceased to catch fire and eventually die. The dead blamed her catching fire on an accident in her first dying pronouncement.When the Special Judicial Magistrate was called the next day for the dying declaration, she presented a different story in which the accused was accused of throwing a kerosene lamp on her and also of beating her after listening to his mother. The dead passed away a week later.

Held- This Court held that "There is considerable evidence that the appellant used to abuse and mistreat the deceased before to the occurrence in issue. Other evidence must be assessed in light of the aforementioned reality. Both courts, in our opinion, were correct in relying on the dead's second dying declaration, regarding it as truthful revelation of facts by the deceased." The accused were convicted.

The Contrast

c) **Heeralal v. State of M.P**.[26]

This is another example of multiple dying declarations with facts identical to the previous one. The dead declared unequivocally in her first dying declaration that she attempted to set herself ablaze by

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[24] *Id.*
[25] Sayarabano Alias Sultanabegum v. State of Maharashtra, (2007) 12 SCC 562.
[26] Heeralal v. State of M.P, (2009) 12 SCC 671.

pouring paraffin on herself. However, the second dying declaration included the opposite assertion.

Held- The Court determined that convicting the appellant would be risky given the apparent differences in the two deathbed declarations.

Analysis-

It should be mentioned that the deceased's connection with the appellant was also strained since she was not attractive. In addition, her brother-in-law attempted to rape her, and they called a Panchayat. Further, seven witnesses testified from the side of the deceased. In the above case, the court convicted the accused based on past evidence of cruelty, but the same was not done in the present case which shows clear discrepancy.

d) **Sudhakar & Anr v. State of Maharashtra**[27]

In this case, the deceased who was a victim of rape committed suicide after 5 and a half months. The court noted, "The deceased's statement should be closely related to the actual transaction. According to the facts, the deceased's statement describing the circumstances in which she was allegedly raped by two accused was recorded by police 11 days after the incident, and she committed herself 512 months later. There was nothing indicating the deceased's intention to commit suicide as a result of the humiliation she suffered as a result of rape at the time of making the statement, nor did the circumstances stated in the statement suggest that a person making such a statement would, under normal circumstances, commit suicide after a lapse of 512 months."

Held- The remarks were deemed inadmissible under Section 32 of the Indian Evidence Act because they did not constitute a dying declaration. Furthermore, due to the delay in filing the FIR, medical examination, non-examination of the crucial witness, and hostile testimony from other witnesses, it was determined that the prosecution had failed to prove beyond a reasonable doubt the accusation for an offence punishable under Sections 376/34 IPC as well.

Analysis-

The court while delivering the decision failed to understand that how one person copes with trauma can't be put in straight-jacket formula by the court. Rape is not just physical assault, but it is also psychological abuse. It is difficult to forget. Following a rape, the most common reactions are anxiety and acute terror. According to some study, this peaks approximately three weeks following the rape; nevertheless, for a large proportion of survivors, it can linger for more

[27] Sudhakar v. State of Maharashtra, AIR 2000 SC 2602.

than a year.[28] Furthermore, 94% of raped survivors develop post-traumatic stress disorder (PTSD) symptoms in the two weeks after the rape.[29] Further, 30% of women report symptoms of PTSD 9 months after the rape.[30] Therefore, it can be said that there was indeed a nexus between the death of the victim and the said act.

5. Conclusion and probable reforms

Based on the above information, it is clear that there are discrepancies in the decisions of the court even when the evidence presented may be exactly the same as it may have been in a case where the accused was convicted. The main factors that lead to the creation of these disparities are the class status of the accused, political influence of the accused, or the error made by the judiciary itself. While the error may be corrected, the decisions based on class, and influence are the one that are the hurdles in the proper functioning of the judiciary, and, in turn, the criminal justice system of India. There are a few reforms that may be brought to bring some change in these conditions. They are as follows:

1) There must be a stronger separation of powers:

The separation of powers between the executive, legislative, and judicial departments must be strengthened by explicitly articulating their separate tasks and responsibilities in the constitution or legal framework. This helps to keep one branch from overly influencing or weakening the others. A clear division of powers aids in the establishment and protection of judicial independence. Judges should be free to make decisions based on the law and the constitution rather than political factors, and they should not be subjected to undue influence or pressure from the executive or legislative branches. Politicians and government officials are less inclined to seek political intervention when they recognise and appreciate the limits of their own and the judiciary's jurisdiction. These limits are reinforced by a clear division of authorities.

2) Training to tackle bias in judicial decisions:

There is a need for mandated training programmes for judges, attorneys, and law enforcement officers to address unconscious biases that may influence decision-making. These programmes should focus on raising knowledge of socioeconomic inequalities and provide measures for reducing their influence on the criminal justice system.

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[28] Foa, Olasov, & Steketee, *The traumatic impact of child sexual abuse: A conceptualization*, 55 AM. J. ORTHO., 530-54 (1987).
[29] D.S. Riggs, T. Murdock, W. Walsh, *A Prospective Examination Of Post-Traumatic Stress Disorder In Rape Victims*, J. TRAUMATIC STRESS, 455-475 (1992).
[30] J. R. T. Davidson & E. B. Foa (Eds.), Posttraumatic Stress Disorder: DSM-IV® and Beyond 23-36 (American Psychiatric Association Publishing 1992).

3) There must be more transparency in judicial decisions:

While the Supreme Court's rulings are available on its website, there is still a need to improve judicial transparency by forcing judges to submit written justifications for their sentence decisions. These explanations should clarify the elements examined, including socioeconomic considerations, to ensure that judgements can be scrutinised and prejudice is reduced.

4) Review Committee and analysis of data on a periodical basis.

It is necessary to create review panels with the power to investigate situations where socioeconomic discrepancies are detected. In circumstances where inequities in judgements and sentencing are detected, these agencies can investigate, evaluate, and propose adjustments. Furthermore, there must be a thorough examination of data pertaining to the socioeconomic backgrounds of accused persons and the results of their cases. This data should be recorded on a regular basis and made available to the public so that any trends of inequity may be identified.

5) There is a need to make public access to information much easier:

Court documents, judgments, and proceedings must be made widely accessible to the public. Citizens and organizations can scrutinize court actions and highlight any anomalies or biases as a result of this transparency.

Healing Through Erasure: Exploring the Right to be Forgotten as a Remedy for the Victims of Non-Consensual Sexual Content

Abdul Hannan Qazi*

1. Introduction

The modern world has witnessed a rampant upgradation in science and technology. Though technology has proved to be beneficial for human beings in a number of ways, it has brought with itself a host of evils that ought to be tackled. Progress that is devoid of innovational ethics lays down suicidal tracks which witness the slaughter of humanity with each passing day. One such crime that is a resultant of this phenomenon is non-consensual sexual content such as voyeurism and deepfakes. In the traditional sense, voyeurism may not be dependent upon technology but the availability of devices which facilitate voyeurism has expedited this crime.

A recent incident of voyeurism occurred in the Chandigarh University wherein obscene videos of university students were recovered from the mobile of a female student.[1] In fact, recording and publishing acts of public sexual violence must also be dealt with strictly. Recently, in Manipur, a video of two women who were being sexually assaulted in public went viral.[2] In a civilised society, the most irrational person would also be able to conclude that not just the actual perpetrators but the person who filmed the whole incident must also account for his act. While reporting on the Kathua gang rape case, a renowned journalist Rana Ayyub was attacked by a deepfake porn video which was circulated as a part of some political vendetta.[3]

The underlying problem is that some cases come in the limelight as they are reported but majority of the cases of non-consensual sexual content go unreported. Moreover, it is not about the content itself, but more about the bodily privacy of men and women which is an inherent aspect of their humanity. Many people argue for the acceptance of pornography not realising that much of the content on pornographic

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[1] Pawan Tiwari, *Chandigarh University Video Leak Case: 2nd Clip Found on Girl's Phone*, TIMES OF INDIA (Sept. 20, 2022), https://timesofindia.indiatimes.com/city/chandigarh/new-twist-another-private-video-found-on-girls-mobile/articleshow/94313224.cms.

[2] *What is Happening in India's Manipur?*, AL JAZEERA (Jul. 21, 2023), https://www.aljazeera.com/news/2023/7/21/what-is-happening-in-indias-manipur.

[3] Rana Ayyub, *I Was The Victim Of A Deepfake Porn Plot Intended To Silence Me*, HUFFPOST (Nov. 21, 2018), https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316.

websites accounts for non-consensual porn comprising of voyeurism, deepfakes and revenge porn. Though pornography is not the scope of this paper, but mentioning it becomes inevitable as it is the porn industry that promotes the publication and consumption of such content.

Often viewed as a victimless crime, this offence is taken lightly by the police and the enforcement agencies. It must be realised that such an utter disregard for a person's bodily autonomy and privacy is one of the most heinous crimes that humanity has ever witnessed. Furthermore, in majority of the cases, women are the victims of this crime as research suggests that males are more likely to have voyeuristic tendencies than females.[4] This was the reason why the legislature introduced section 354C[5] of the IPC as a gender specific offence. The scope of this article will be limited to understanding the current legal landscape of such offences in India and how privacy jurisprudence can be extended to incorporate the right to be forgotten in such cases.

2. Legislative Provisions Against Non-Consensual Sexual Content

As the scope of this paper is limited to non-consensual sexual content, we won't be diving into the moral discourse of obscenity and pornography. Rather, the main concern of this section is to discuss such content as a gross human rights violation and the existing remedies that are in place. The primary offences which fall under this category are voyeurism and deepfakes. Few years the ago, the Union Minister Smriti Irani, spotted a camera in the trial room of the retail giant Fabindia.[6] This was one such case which came into limelight due to the popularity of the victim but many such incidents go undetected and unreported. Sections 354C[7] and 509[8] of the Indian Penal Code and section 66E[9] of the Information Technology Act, 2000 were rightly attracted in this case. These sections combined, serve as a good mechanism against such cases. But the existence of legislation does not end this problem. The fact of the matter is that such crimes are hidden crimes and in the normal course of action, it becomes difficult to identify the criminals in such cases. Moreover, as the victims are completely oblivious of the fact that a crime has been perpetrated against them, such cases are not reported until and unless they come to the knowledge of the victim.

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[4] *Voyeuristic Disorder*, PSYCHOLOGY TODAY (April 4, 2022), https://www.psychologytoday.com/intl/conditions/voyeuristic-disorder.
[5] The Indian Penal Code, § 354C No. 45, 1860 (India).
[6] Press Trust of India, *Smriti Irani Case: Goa Police Identifies Accused Fabindia Staffer*, NDTV (April 12, 2015), https://www.ndtv.com/india-news/smriti-irani-case-goa-police-identifies-accused-fabindia-staffer-754185.
[7] *Supra* Note 5
[8] *Supra* Note 5 at § 509.
[9] The Information Technology Act, § 66E, No. 21, Acts of Parliament, 2000 (India).

The Indian legal system does have a legislative mechanism to deal with such content but the efficacy of its implementation is subject to scrutiny. For instance, section 354C was added by the Criminal Law (Amendment) Act, 2013 after the outrageous 'Nirbhaya Gang Rape' on the recommendations of Justice J. S. Verma Committee.[10] This section states, "Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image…"[11] From the language of the section, it can be deciphered that this provision is gender-specific and related to offences committed only against women. The undesirability of such jargon is conspicuous but in this specific case, this lacuna can be resolved by invoking section 66E of the Information Technology Act which states, "Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished…"[12] In cases, of non-consensual sexual content, it is understood that such content is transmitted[13] and captured[14] within the meaning of section 66E and is not limited to private watching.

Both section 354C of the IPC and 66E of the IT Act, deal with the breach of privacy. After comparing the language of both the sections, one could easily conclude that section 66E of the IT Act has a broader ambit than section 354C in the electronic realm. Section 66E of the IT Act is gender neutral. Section 66E of the IT Act includes public places where a person would expect reasonable privacy[15] but there is no such explanation in section 354C of the IPC. Therefore, in the context of voyeurism for the purpose of non-consensual sexual content, these sections can be invoked to punish the offender.

Another category of the same offence is deepfakes. The growth of Artificial Intelligence has led to a lot of concerns among the academic and juristic circles. Though beneficial in many ways, this technology has a tendency to violate human rights. One of the concerns revolving around AI technology is the production of deepfakes. Deepfakes are based on machine-learning algorithms which are capable enough to produce fake content of an individual's identity.[16] In the words of Franklin Foer, "Deepfakes are one of the cruellest, most invasive forms

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[10] Shivani Kabra, *Voyeurism: A Comparative Study*, 6.2 NLIU LR, 120-121 (2017).
[11] *Supra* Note 5.
[12] *Supra* Note 9.
[13] *Supra* Note 5, Explanation (a): "transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons.
[14] *Id.* Explanation (b): "capture", with respect to an image, means to videotape, photograph, film or record by any means.
[15] *Supra* Note 5, Explanation (e).
[16] Mohit Kar and Shreya Sahoo, *Deepfakes and its Iniquities: Regulating the Dark Side of AI*, 5.1 NLUO SLJ, 45 (2020).

of identity theft invented in the internet era."[17] We discussed the case of Rana Ayyub that how she became a victim of this kind of abuse.[18] A free app known as FakeApp is used for the purpose of creating pornographic content by superimposing the image of another person on a porn performer. Web based tools such as 'Porn World Doppelganger', 'Porn Star By Face', and 'FindPornFace' are used by deepfake creators to find a porn lookalike. Such platforms are actively being used by people to victimise their classmates, colleagues and other people whom they know.[19]

Therefore, deepfakes have the tendency to violate a person's privacy and modesty by superimposing their images on sexual content without their consent. Section 509 of the IPC and sections 67[20] and 67A[21] of the IT Act can be invoked in such cases. Section 509 is a punitive measure against insulting a woman's modesty. It reads as, "Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman." The problem arises with sections 67 and 67A of the IT Act. Though they are generally regarded as effective measures against such content but in this specific case, the subjective language of section 67 and the objective language of section 67A can serve as legislative loopholes. Section 67 punishes the publication and transmission of obscene material in the electronic form. The word obscenity has been subject to a lot of scrutiny and it is difficult to define what is obscene. Though in this particular situation, it is clear that such an offence can deprave and corrupt young minds and can severely agonise the mental state of the victim. Further, such content is devoid of any artistic, literary or social merit as stipulated in *Ajay Goswami v. Union of India*.[22] As section 67A clearly mentions 'sexually explicit act or conduct', it may be difficult to attract this section in cases of still and suggestive images. Section 4 of the Indecent Representation of Women (Prohibition) Act also prohibits the publication, sale and distribution of films and photographs which contain content that represents women in an indecent manner.[23] According to section 2 of the Act, 'indecent representation of women' means the representation of a

[17] *Id.*
[18] *Supra* Note 3.
[19] Samantha Cole, *People are Using AI to Create Fake Porn of Their Friends and Classmates*, VICE (Jan 27, 2018), https://www.vice.com/en/article/ev5eba/ai-fake-porn-of-friends-deepfakes.
[20] *Supra* Note 9 at § 67.
[21] *Supra* Note 9 at § 67A.
[22] Ajay Goswami v. Union of India, (2007) 1 SCC 143.
[23] The Indecent Representation of Women (Prohibition) Act, 1986, § 4, No. 60, Acts of Parliament 1949 (India).

woman's body or any part thereof which is derogatory and denigrating.[24]

From the above discussion, it is clear that the Indian legislative system is replete with provisions which can be used to tackle the issue of non-consensual sexual content, but one thing that must be considered is that almost all of these provisions are punitive in nature and not remedial. The Bharatiya Nyaya Sanhita, 2023[25] which is the proposed replacement of the Indian Penal Code, does not include any remedial measures in such cases.[26] Even if we were to assume that there exist other ancillary remedies, unless they are made a part of the legislative framework, it would be difficult to access those remedies. When such content is published on the internet and is made viral, even if the offender gets punished for his crime, it is difficult to compensate for the mental agony that the victim goes through. Therefore, there is a need for remedy-based mechanisms within the criminal law.

3. Right to be Forgotten - A Forgotten Remedy

The foregoing section dealt with the punitive legislative provisions that can be invoked in order to curb the problem of non-consensual sexual content. But as it is a matter of privacy jurisprudence, the discourse cannot be limited to criminal jurisprudence. As a human right, right to privacy was recognised in Article 12 of the Universal Declaration of Human Rights.[27] Even before the proclamation of the UDHR, in the case of *Abdul Rahman v. Bhagwan Das*[28], The Allahabad High Court recognised the right of privacy of the Pardah Nasheen ladies and stopped the defendant from building the second storey which would overlook the zanana of the plaintiff. Though privacy right was recognised informally, but from *Abdul Rahman* to *Puttaswamy*, it took 110 years for it to be formally read into the ambit of Article 21. After a turbulent legal journey, the right to privacy was explicitly identified in the case of *K S Puttaswamy v. Union of India.*[29] Further, the right to privacy could be claimed against both State and Non-State actors.[30]

The development of privacy jurisprudence gave rise to the new concept of Right to be Forgotten. In India, this right was initially recognised in *Vasunathan v. Registrar General, High Court of Karnataka*[31] wherein the court held that Right to be Forgotten was in consonance with the western legal trend and the court further said that it must be invoked in sensitive cases concerning women such as

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[24] *Id.,* at § 2(c).
[25] The Bharatiya Nyaya Sanhita Bill, 2023, No. 121, 2023 (India).
[26] *Id.,* at cl. 73-78.
[27] Universal Declaration of Human Rights, 1948, art. 7, G.A. Res. 217A, at U.N. GAOR, 3rd. Sess., 1st plen. Mtg., Doc. A/810 (Dec. 12, 1948).
[28] Abdul Rahman v. Bhagwan Das, (1907) ILR 29 All 582.
[29] K S Puttaswamy v. Union of India, (2017) 10 SCC 1.
[30] *Id.* at para 646.
[31] Vasunathan v. Registrar General, High Court of Karnataka, 2017 SCC Online Kar 424.

rape and outraging of modesty.[32] In *K S Puttaswamy v. Union of India*[33], the court discussed the Data Protection Bill of 2018 which incorporated the principles of Europe's General Data Protection Regulation. The court further said, "These rights include the right to access and correction, the right to data portability and right to be forgotten… Most importantly, consent has been given a crucial status in the draft data protection law. Thus, a primary basis for processing of personal data must be individual consent."[34]

It must be noted that the right to be forgotten debate in India has generally been restricted to online display of case records. In *Jorawar Singh Mundy v. Union of India*[35], the petitioner was an American citizen of Indian origin. He was accused under the NDPS Act but was subsequently acquitted. When he returned to America, he faced a lot of disadvantages due to the availability of the text on the internet. The court directed 'Indian Kanoon' to block the judgement from being accessed by using search engines. In *S J v Union of India*[36] and *XXXX v. YYYY*[37] and many other cases, the courts directed to remove the details of the petitioners' cases by invoking the right to be forgotten.

A landmark judgement of the Odisha High Court is relevant to the current topic at hand. In *Subhranshu Rout v. State of Odisha*[38], the petitioner was accused of recording the rape of the victim. When the victim narrated the incident to her parents, the accused made a Facebook account in the name of the victim and posted her objectionable images. The court viewed this offence from various angles and highlighted various concerns. The court said that information in public domain was like toothpaste, once it was out of the tube, it would never go away.[39] While commenting upon the Right to be Forgotten, the court said, "If the right to be forgotten is not recognised in matters like the present one, any accused will surreptitiously outrage the modesty of the woman and misuse the same in the cyber space unhindered."[40] The court further addressed the loopholes in the Indian legal system by observing that the Indian criminal justice system is sentence oriented and does not concern itself with the victim's loss and suffering. The rights of victims to get such images and videos deleted still remain unaddressed due to lack of legislative mechanism.[41]

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[32] *Id.* at para 9.
[33] *Supra Note 29*.
[34] *Supra* Note 29 at para 223-225.
[35] Jorawar Singh Mundy v. Union of India, 2021 SCC Online Del 2306.
[36] S J v Union of India, (2023) 2 HCC (Del) 520.
[37] XXXX v. YYYY, 2022 SCC Online SC 1123.
[38] *Subhranshu Rout v. State of Odisha,* 2020 SCC Online Ori 878.
[39] *Id.,* at para 5.
[40] *Id.,* at para 13.
[41] *Id.,* at para 16.

In a recent case in Canada, *Her Majesty the Queen v. Ryan Jarvis*[42], the Canadian court allowed an appeal by extending the privacy jurisprudence in a case of voyeurism. In this case, a teacher was accused of recording videos of female students, particularly their breasts. He used a pen camera which focused on the upper body of female students. The trial court was of the opinion that it was not an offence of voyeurism. But when the matter went into appeal, the court thoroughly invoked many facets of privacy jurisprudence and attempted to delineate what would amount to reasonable expectation of privacy. The appeal was finally allowed. Chief Justice Wagner said, "Significantly, the videos had as their predominant theme or focus, the bodies of students, particularly their breasts. In my view, there is no doubt that in recording these videos, Mr. Jarvis acted contrary to the reasonable expectations of privacy that would be held by persons in the circumstances of the students when they were recorded. The circumstances gave rise to a reasonable expectation of privacy, as that expression used in s. 162(1) of the Criminal Code."[43] From this case, we can understand that how the court extended the concept of reasonable bodily privacy even in places which are not private and the act was equated with the traditional notion of voyeurism.

From the above discussion, we can understand that how the courts are trying to extend the meaning of reasonable privacy and how they are urging the legislature to incorporate remedy-based mechanism in cases of non-consensual sexual content. Though the debate around Right to be Forgotten is still a bit new to the Indian judicial discourse, it can still serve as a valid and effective measure if carefully read into criminal jurisprudence of the nation.

4. A Synchrony Between Privacy Law and Criminal Law

Recently the Indian legislature has passed The Digital Personal Data Protection Act, 2023[44] which has finally raised the Right to be Forgotten from a judicial perspective to a statutory right. According to section 8 (7) of the Act, a data fiduciary is obliged to erase the personal data of the data principal if she withdraws her consent or if it is reasonable to assume that the specified purpose is no longer being served.[45] Further, section 12 of the Act entitles the data principal to correct, complete, update and erase her personal data.[46] This is in consonance with Article 17 of European Union's General Data Protection Regulation.[47] As this right has gained a formal recognition in the Indian legislative framework, it must be incorporated into the

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[42] Her Majesty the Queen v. Ryan Jarvis, 2019 SCC Online Can SC 2.
[43] *Id.*
[44] The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India).
[45] *Id.* at sec. 8 (7).
[46] *Id.* at sec. 12.
[47] Aditi Sandeep Malkar, *Right to be Forgotten: Need for Constitutional Recognition in India?,* 3.1 JCLJ, 1361 (2022).

criminal provisions which deal with the offence of non-consensual sexual content. According to section 326A of the Indian Penal Code, an acid attack victim is entitled to a reasonable amount that is necessary for the medical expenses and treatment of such victim.[48] Considering the brutality of acid attacks and the irreparable damage caused to the victim, the legislature included section 326A by way of the Criminal Law (Amendment) Act, 2013 and explicitly provided, "any fine imposed under this section shall be paid to the victim."[49] The reason behind the invocation of this section is to understand that how the legislature was capable of understanding the appropriate remedy in cases of acid attacks. Similarly, a victim of non-consensual sexual content must also be given the appropriate remedy. A victim who undergoes such a traumatic experience, at least deserves to get such content removed which must be provided for within the statutory framework.

In 2019, a Bill was introduced in the American Congress which specifically dealt with deepfakes and made punishable the production of deepfakes which did not comply with the legal requirements. Further, it also established civil remedies which would enable the victims to claim damages.[50] In 2021, Bermuda amended its criminal code and added provisions which dealt with non-consensual sharing of intimate images.[51] The amendment deals with various aspects of non-consensual sexual content such as deepfakes and voyeurism. It is noteworthy to mention that the Right to be forgotten has also been incorporated in Section 199E.[52] Another aspect that must be considered is the easy availability of spy cameras. Spy cameras can be in the form of pen cameras, charger cameras, clock cameras, screw cameras etc.[53] Though the sale of such devices is justified as they are meant for security purposes but their distribution must be regulated by a code of conduct. In the year 2000, the first Code of Practise for use of CCTV cameras was issued.[54] Chapter 2 of the code provided some guiding principles which were rooted in the European Convention on Human Rights. The principles provided that the use of surveillance cameras must take into account its effect on individuals and their privacy and that there must be responsibility and accountability for all surveillance camera activities including images and information collected, held and used.[55]

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[48] *Supra* Note 5 at sec. 326A.
[49] *Supra* Note 5 at sec. 326A.
[50] *Deep Fakes Accountability Act*, CONGRESS.GOV (June 12, 2019), https://www.congress.gov/bill/116th-congress/house-bill/3230.
[51] Criminal Code Amendment (Non-Consensual Sharing of Intimate Images) Act, 2021.
[52] *Id.* at s. 199E.
[53] *Hidden Wireless Cameras*, AMAZON, https://www.amazon.in/s?k=hidden+cameras+wireless&adgrpid=1327112144346237&hvadid=82944767819181&hvbmt=be&hvdev=c&hvlocphy=148996&hvnetw=o&hvqmt=e&hvtargid=kwd-82945389586016%3Aloc-90&hydadcr=19790_1971600&tag=msndeskstdin-21&ref=pd_sl_3qyln4l71u_e.
[54] Rajesh Vellakkat, *Do We Need a Surveillance Camera Code*, PL (IT) May, 84 (2015).
[55] *Id.*, at 86.

Another thing that must be appreciated is the effort of non-State actors in attempting to tackle this problem. An initiative by the name of Stop Non-Consensual Intimate Image Abuse (StopNCII) introduces innovative technology to help people from averting the danger of falling prey to such offences.[56] The Revenge Porn Helpline, an initiative by individuals of UK is a support helpline that helps the victims to delete their non-consensual images from the internet. This helpline has a removal rate of around 90 percent.[57] The SPITE project (Sharing and Publishing Images to Embarrass) provides legal aid to victims of intimate image abuse.[58] It is noteworthy to mention that the latest update on Google enables the users to get their non-consensual or intimate images removed which can be done by submitting a request. But this mechanism may lead to denial of requests and re-submission of requests which may not always deliver the desired result.[59]

All these initiatives are either very region-specific or are obscure for the victims to know about them. This is the reason why the government must formally take up this issue and draft a suitable and comprehensive legislation which is capable of dealing with all aspects of non-consensual sexual content such as voyeurism, deepfakes, revenge porn and other ancillary subjects like child pornography, BDSM etc. Such legislation must incorporate remedies such as damages in the form of monetary compensation for the victims and the deletion of such content from the internet along with penal consequences. In such a manner, the legislation could incorporate aspects of both criminal as well as privacy jurisprudence.

5. Conclusion

In the course of this paper, we have discussed various forms of non-consensual sexual content and the gravity of this offence. Several incidents of dissemination of such content have made it incumbent upon the policy makers to devise suitable policies and legislation in order to deal with this offence. The current Indian laws may offer some kind of punitive measures to perpetrators of such offences but their lack of focus on remedial measures completely discards the future welfare of the victims. Even the Bharatiya Nyaya Sanhita, 2023[60] has failed to consider a remedy-based mechanism for victims of voyeurism and other forms of non-consensual sexual content despite of the

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[56] StopNCII.org, https://stopncii.org/.
[57] *Id.*
[58] Revenge Porn Helpline, https://revengepornhelpline.org.uk/information-and-advice/police-and-law-advice/accessing-free-legal-advice/.
[59] Beverley Thornton, *Google Announces New Policies to Remove Intimate Images from Search Results*, SWGfl (Aug 11, 2023), https://swgfl.org.uk/magazine/google-announces-new-policies-to-remove-intimate-images-from-search-results/.
[60] *Supra* Note 25.

forceful points highlighted in the case of *Subhranshu Rout v. State of Odisha*.[61]

The most important remedy in such cases is the removal of the content to which the victim did not give her consent. Such consent must be erased from the internet by using appropriate technology in order to curb its spread. Further, the victim must be compensated for any reputational loss suffered as a result of such content. The Right to be Forgotten which was initially recognised by the judiciary has now been elevated to the pedestal of a statutory right by way of the Digital Personal Data Protection Act of 2023.[62] The Act has incorporated the Right to be Forgotten and therefore, has opened the avenue for its further development. This right must be invoked in cases where the victim mentally suffers due to the circulation of her content. In this respect, Bermuda's criminal code amendment has paved the way for other nations to ponder upon suitable legislation.

Non-State actors have taken initiatives to tackle this problem but unless the State intervenes with appropriate measures, it would be difficult to devise an effective solution. The easy availability of devices which are used for such crimes, the vastness of the cyber space, the hidden identity of the criminal and the legislative gaps make it difficult to identify, try and punish the criminals. Therefore, the least that can be done in the initial stages of such cases is to preserve the identity and integrity of the victims. Keeping in mind the severity of this crime and the grave psycho-social impact it has on the lives of the victims, people other than the victim must also be responsible enough to report such instances which must be administratively acceptable.

After analysing this issue wholistically, we can conclude that there is a dire need for a legislation which can take into account all the aspects surrounding this issue. It can be argued that owing to the uncertainty of the source of such crimes, there may arise investigative difficulties. Measures that are taken to remedy the situation can in no way completely avert such incidents, but can surely hinder the offenders from committing such acts and can also heal the wounds of the victims to some extent. The law will only come into play when the crime has been committed but before that, it is the duty of the people to make themselves aware and to learn to use the available technology in a responsible and ethical manner.

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[61] *Supra* Note *38*.
[62] *Supra* Note 44.

Judiciary & Social Media: Perils & Possibilities

Richa Singh[*]
Dr. Deepak Srivastava[**]

"Justice is not a cloistered virtue; she must be allowed to suffer in the scrutiny and respectful, even though outspoken, comments of ordinary men."[1]

\- LORD ATKIN

1. Introduction

"Who is God, the judge is God.
Why is he God?
Because he decides who wins and losses, not my opponent.
Who is your opponent, he doesn't exist.
Why does he not exist?
Because he is a mere dissenting voice to the truth I speak."

\- THE GREAT DEBATERS

Being a judge is a position associated with divinity, dignity, integrity and honesty. It can be conspicuously witnessed by the six core tenets enlisted in the Bangalore Judicial Code of Conduct.[2] Thus, a sacramental value, the faith of the entire nation vests in the judiciary.

Social networking sites (*hereinafter* SNS) have become an overarching presence in the society.[3] The existence of courts can be traced back centuries while SNS has existed for hardly two decades. Both are of contrary values: Courts are known for their finality of decisions, precisions, and dignity it is a top-down approach and the apex court's decisions are binding, whereas social media on the other hand encapsulates a wide array of opinions on every point and encourages a breaking down of the old notions to create new ideologies, ways, etc. Not every idea takes shape in reality, but few do, thus, it is a bottom-up approach.

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[1] Andre Paul Terence Ambard v. The Attorney General of Trinidad, (1936) 38 BOMLR 681.
[2] CCPCJ Crime Resolution, Resolution E/2006/INF/2/Add.1 (Jul. 27, 2006). https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2006/ECOSOC/Resolution_2006-23.pdf.
[3] Arnab Ranjan Goswami v. Union of India & Others, MANU/SC/0448/2020.

This paper attempts to analyse, the cloistered world of judges and the realm of gregarious SNS like Facebook, Twitter, Instagram, etc., and what chain reaction occurs at their intersection.

2. Should Judges Use Social Media?

Judges have been reprimanded, removed[4], suspended[5], or have resigned[6] for their use of SNS. Thus, undoubtedly social media has impacted the judicial system. This impact can be witnessed in two folds: '*judges individually'* and '*judiciary as an institution'*. Banning/ restricting/ toto liberty in the context of judges using social media impacts the right to freedom of speech and expression, freedom to trade, right to access, right to be updated with technologies, right to stay in connection with their friends and family. Judges are also humans. However, being a judge comes with certain strings attached, the strings in the sense of restriction in speech and expression, right to trade, form associations, residence, etc. Each action of a human, who is a judge is weighed on a different scale since judges are bound to protect the trust of the public on the judicial institution and uphold the dignity of the institution.

This chapter will first discuss the right enshrined under Article 19(1)(a) and the necessary restrictions pertaining to the same (I.1.), subsequently, the transgression such an allowance would entail on the tenet on the independence of the judiciary would be assessed (I.2.), finally the balancing of both the rights will be done by application of the test of proportionality.

1) From the lens of the rights of judges

a) Freedom of speech and expression

In this era, SNS has become *"the theatre of everyday life"*[7]. In the *Shreya Singhal case,*[8] the apex court recognized the right to use SNS as part of the right to freedom of speech and expression. Thus, it can be conspicuously construed that the said right is vested *qua* a person

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[4] *X1: Next Gen GRC & Ediscovery Law Blog*, (March 29, 2023) https://www.x1.com/2014/02/11/judge-sends-facebook-friend-request-gets-disqualified/ ; Chace v. Loisel, 2014 WL 258620 (Fla. Dist. Ct. App. Jan. 24, 2014).

[5] Dakin Andkone and Tony Marco, *Judge suspended after criticizing Trump in court, on Facebook*, CROSS ROADS TODAY, (May 27, 2019) https://www.crossroadstoday.com/news/national-news/judge-suspended-after-criticizing-trump-in-court-on-facebook/article_636a5472-0b3a-5d31-8038-4407c33f90ad.html.

[6] Associated Press, *2nd Pennsylvania Supreme Court Justice Resigns Amid Porn Email Scandal,* CHICAGO TRIBUNE, (Mar 15, 2016) https://www.chicagotribune.com/nation-world/ct-pennsylvania-supreme-court-justice-resigns-porn-email-20160315-story.html.

[7] ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (Doubleday 1959).

[8] Shreya Singhal v. Union of India, MANU/SC/0329/2015.

being a citizen of India. Hence, judges *qua* citizens are entitled to rights under Article 19(1)(a)[9].

Judges are human too. The apex court in *Kameshwar Case*[10] has held that a person entering government service does not halt him from being a citizen of this land nor robs him of his rights under Article 19. Drawing the inference, it is clear that entering into a government service is not equivalent to relinquishing rights *in toto* although reasonably certain rights are indeed restricted. For instance, in Clause (5) of the *Code of the Restatement of values of judicial life*, rights available under Article 19(1)(g) are reasonably restricted and judges cannot engage in any trade while being judges.[11] Similarly, Article 19(1)(a) rights of judges as individuals are subject to reasonable restrictions.

Restrictions in the form of speaking up against the policies of the government, commenting on the actions of the executive, Parliament- since words of judges are associated with the judicial institution and utmost public faith shall exist in the judiciary for the country to exist efficiently. Many people have been removed, resigned, etc for such statements while being a judge.

Further, Article 50 necessitates the separation of the executive from the judiciary.

b) I.1.b. Right to socialise with friends and family

Each person has the right to socialise with friends and family subject to reasonable restrictions, and it falls under the ambit of Article 21 via 'personal liberty'.[12] Likewise judges, as human beings cannot be restrained from socialising with friends and family, albeit subject to necessary restrictions that the code of conduct and the institution of judiciary expect. Such socialising, in the current era, is inclusive of usage of SNS, thus usage of SNS for that purpose shall be allowed subject to restrictions.

Restrictions in the form of abiding by judicial decorum while conversing with friends and family shall be present.[13] Plethora of cases around the world are also indicative of the same, for instance in Pennsylvania[14] a judge had to resign as a consequence of sending

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[9] INDIA CONST. art. 19, § 1, cl. a

[10] Kameshwar Prasad & Ors. v. State of Bihar, MANU/SC/0410/1962.

[11] Supreme Court of India, *Restatement Of Values Of Judicial Life- Full Court Meeting* (May 7, 1997) https://main.sci.gov.in/pdf/Notice/02112020_090821.pdf.

[12] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, MANU/SC/0517/1981.

[13] UNODC, *Non-Binding Guidelines on the Use of Social Media by Judges* (2019) https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf.

[14] CHICAGO, *supra* note 6.

explicit messages via SNS. Such indecent messages sent via any means are contrary to the expected judicial decorum.

Similarly, the concepts of 'friending', 'following', etc. on SNS are quite different[15] from the real world and thus judges shall be cautious and conscious while accepting and sending friend requests[16].

2) Risks it poses to the judiciary: Independence of the Judiciary

A judiciary of undisputed integrity is the substratum of a robust democracy.[17] Independence of the judiciary is a prerequisite to a fair trial. And thereby allowance of the usage of SNS shall not shake the independence of the judiciary. Thus, the aforementioned allowance necessitates an equilibrium in the interests of the 'judges as individuals' and 'judiciary as an institution'.

It is an institution imbibed with the tenets of independence, impartiality, integrity, propriety, equality, competence, and diligence- as enshrined in the Bangalore Principles. However, the presence of judges in social media leads to the emergence of new issues, which have been listed below:

a) Ex-parte communications

Via SNS, access to other judges, parties or their representatives becomes quite convenient and secretive. It is a problem of utmost magnitude, for when such a scenario is disclosed, the basic tenets of integrity, impartiality, equality, and independence are breached and it will not be wrong to state that such a judge is compromised. Such behaviour is motivated by financial gains, bias, etc.- but in the end, it is bound to entail a *de novo* trial, thereby further burdening the judiciary. There have been strict actions taken against a judge indulging in ex-parte communications for instance:

J. C.S. Karnan, then a judge of Madras High Court was alleged to have indulged in ex-parte communications with a lawyer in a case pending before him and was immediately transferred.[18] In New Jersey,[19] a judge was disqualified for sending a friend request to a defendant.

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[15] UNODC, *supra* note 13 at 5.
[16] X1, *supra* note 4.
[17] UNITED NATIONS OFFICE ON DRUGS & CRIMES, COMMENTARY ON BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (UNODC 2007).
[18] In Re: CS Karnan, Suo Motu C.P.(C) No. 1 of 2017. para 1; *Madras HC Judge Karnan 'asks' lawyer to prepare order in favour of client, clip goes viral*, INDIAN EXPRESS (Feb. 22, 2017); *WhatsApp exchange: Madras HC transfers judge C.S. Karnan*, THE HINDU (Feb. 24, 2017).
[19] Chace, *supra* note 4, at []. X1, *supra* note 4.

b) Flirtatious/ inappropriate communications

Clause 33 of the UNODC Guideline[20] states that judges shall not exhibit any 'improper or embarrassing' conduct on social media, for it impacts the public faith in the judiciary. Mo such instance has been found in India. But in 2017, William O'Neill boasted about his sexual interactions with over 50 women and posted the same on social media[21]- he was criticized by other judges for tarnishing the image of the judiciary and being of low integrity and morals.

c) Comments on actions of Government, legislature, executive, judiciary

Clause 8 of RVJL, 1997[22] provides that judges shall refrain from expressing views/ debating in public or political matters or any matter that might come forth of judiciary subsequently. Words of judges are placed on a different pedestal due to the position they hold thus it is of paramount importance that they shall be used with utmost care and caution. Further, Article 50[23] provides for the separation of the judiciary from the executive. By commenting on the policies of the executive, Judges qua being judge, is also in contravention of the constitutional mandate as well. Though such an instance of an incumbent judge commenting on the policies is unavailable in India, in Texas[24], a judge was suspended for criticizing Trump on Facebook.

d) Easy to influence

SNS is known for tracking the likes, dislikes, orientations, and inclinations[25] of a human, judge's by using social media can easily be assessed and their decisions can be predicted. Such data mining via SNS leads judges to be in a more vulnerable position and easier to influence. Hence, they shall be cautious of interactions & usage of SNS.

e) Prone to online abuse/ harassment

The imminence of SNS has provided immense liberty to citizens and at times it has been used to criticize the judiciary fervently, which is strictly unappreciable. Criticisms in constructive forms to improve the functioning is always welcome, however criticisms, without rationale serve no purpose.

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[20] UNODC, *supra* note 13 at §33.
[21] *William O'Neill: Ohio judge, 70, boasts about sex life in swipe at 'media frenzy' over Al Franken scandal,* ABC NET, (Nov. 18, 2017) https://www.abc.net.au/news/2017-11-18/william-oneill-brags-sex-life-facebook-post/9164758.
[22] RESTATEMENT, *supra* note 11 at §8.
[23] INDIA CONST., *supra* note 9.
[24] CROSS ROADS TODAY, *supra* note 5.
[25] *Privacy and Manipulation: How Social Media Has Affected Political Discourse*, EPW ENGAGE, (Jan. 22, 2021)https://www.epw.in/engage/article/privacy-manipulation-social-media-political-discourse

For instance, in 2020, a comedian tweeted[26] derogatory remarks pertaining to DY Chandrachud, J. (as was then)- and therefore contempt proceedings were incepted.[27] J B Pardiwala stated that SNS shall be mandatorily regulated in the country to preserve the rule of law and criticized personal agenda-driven attacks as dangerous and crossing the *Lakshman Rekha*.[28] Former CJI Ramana stated that- "…noise that is amplified is not necessarily reflective of what is right…" and thus judges shall not be swayed by social media and work independently.[29]

f) Excess time wastage, attempting to become social influencers

There is a new trend going on, and judges of lower courts are enjoying celebrity-like status[30] on social media, not based on the person they are but based on their position[31]. This makes young judges more vulnerable since inquest of attaining celebrity-like status they accept friend requests/ follow requests from unknown individuals. Further, it is bound to have a negative impact on the rationality of individuals for they would spend unnecessarily more time on clicking *SNS-esque* images.

g) Bias/prejudice

The sanctity of the judicial position requires a certain extent of detachment. Though the personal bias of a judge cannot be extinguished[32] however usage of social media impacts. Friending in SNS can entail situations similar to the case of Judge Thomas Placey, who continued hearing the defendant even after being Facebook friends with him, and asserted that he never actually socialized with him and they were not friends.[33] Such a scenario raises questions on judicial, integrity and independence. The old aphorism can elaborate it better that, justice must not only be done; it shall be seen to be

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[26] Kunal Kamra (2020) [*Twitter*] 11 November. https://twitter.com/kunalkamra88/status/1326469753519665153?lang=en.

[27] Shrirang Katneshwarkar v. Kunal Kamra, 2020 SCC Online SC 1041.

[28] *Social Media Needs To Be Regulated': SC Judge Who Heard Nupur Sharma Plea Slams Personal Attacks,* OUTLOOK (Jul 4, 2022) https://www.outlookindia.com/national/-digital-and-social-media-needs-to-be-mandatorily-regulated-sc-judge-who-heard-nupur-sharma-s-plea-news-206542.

[29] *Don't be swayed by social media, Chief Justice of India N V Ramana to judges*, TIMES OF INDIA, (Jul. 1, 2021) https://timesofindia.indiatimes.com/city/ahmedabad/dont-be-swayed-by-social-media-cji-to-judges/articleshow/84001214.cms.

[30] Swapnil Tripathi, *Social media engagement by judges goes against 'expected' aloofness*, THE PRINT, (Jan 06, 2023 11:14 AM) https://theprint.in/opinion/social-media-engagement-by-judges-goes-against-expected-aloofness/1300921/.

[31] Richa Singh (2022) [*Twitter*] 30 December. https://twitter.com/richasingh600/status/1608715835706867714

[32] Purvi Nanda, Mohit Khandelwal, *Judiciary vis-a-vis Social Media Ethics*, INDIA LAW JOURNAL, https://www.indialawjournal.org/archives/volume9/issue-1/article5.html.

[33] Dan Miller, *Cumberland County District Judge Thomas Placey Recuses Himself From Case Over Facebook Flap,* THE PATRIOT NEWS (Oct. 21, 2011) https://www.pennlive.com/midstate/2011/10/district_judge_tom_placey_recu.html.

done.[34] However in a contrary dictum in Texas,[35] it was stated that-mere friending in Facebook does not signify actual friendship and cannot be said to have an element of bias.

However, this paper suggests that Facebook and other SNS are a closeted private cyber arena, the interactions will not be known to the world at large. And the likelihood of bias still exists. And therefore, judges shall refrain from sending friend requests to people who might not be friends actually on SNS. Clause 28 of the Non-Binding Guidelines by UNNDOC reaffirms the same.[36]

3. Regulation of Usage of Social Media by Judges

The earlier chapter has answered in the affirmative the usage of social media by judges is subject to necessary regulation. The question entails are there any regulations present in India or around the world currently? And is it sufficient to address the issues proliferation in SNS usage causes? To answer the same this chapter first assesses any legal framework available in India and also sheds light on a few other legal frameworks around the world though they are persuasive.

1) IN INDIA

It is submitted that currently no specific code of such a nature in India. However, "Restatement of values of Judicial Life"[37] was adopted by a full court meeting of the Supreme Court of India in 1997 and was recommended by the 195th Law Commission Report[38] to be published in the Gazette of India and it was mentioned that any contravention of the same shall be treated as misbehaviour. And proved "misbehaviour" is a ground for removal from office under Article 124(4)[39]. Though they predate the birth of social media, the principles enshrined in the abovementioned code still act as a guiding light in the terrain of cyberspace.

Recently Kerala High Court has adopted a "Code of Conduct for regulating involvement and intervention in social media platforms"[40].

A restrictive usage of the SNS approach has been taken in India. As has been mentioned by Abhinav Chandrachud in his book[41] judges are informally expected to delete their social media accounts on

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[34] Rex v. Sussex Justices,1 KB 256 (1924).
[35] Youkers v. The State of Texas, 400 S.W.3d 200 (Tex. App. 2013).
[36] UNODC, *supra* note 13 at 5.
[37] RESTATEMENT, *supra* note 11.
[38] The Law Commission of Inda, 2006 pg 6.
[39] INDIA CONST., *supra* note 9.
[40] Kerala High Court, *Administrative Meeting Minutes: Code of Conduct for regulating involvement and intervention in social media platforms* (Mar. 22, 2021) https://www-livelaw-in.elibraryhnlu.remotexs.in/pdf_upload/kerala-high-court-issues-draft-code-of-conduct-for-use-of-social-media-by-court-staff-officers-391336.pdf.
[41] ABHINAV CHANDRACHUD, REPUBLIC OF RHETORIC: FREE SPEECH & THE CONSTITUTION OF INDIA 20 (Penguin Books 2017).

appointment as judges. Similarly, recently two advocates had to bear the brunt of their past engagements on social media and they were not appointed as HC Judges even after being recommended by the Apex Court.[42] Similarly, as aforementioned and now being reiterated even Former CJI Ramana & J Pardiwala have indicated non-engagement of judges in SNS.[43] Further, to concretize the stance of the Indian judiciary following statement clarifies the air- i.e.,

'Judges never speak through their tongue, only their judgments'

- J PARDIWALA[44]

2) Around the world

Pari materia with the Indian scenario, a plethora of binding guidelines such as "non-binding guidelines on the use of social media by judges"[45] of the UNODC; American Bar Association's "Judge's Use of Electronic Social Networking Media"[46]; "Australian Guide to Judicial Conduct"[47]; etc. However, the stance enshrined in these is also akin to the Indian stance.

It is of utmost importance that two decades after the creation of SNS, there shall be a concretised written code of conduct for regulating the use of SNS by judges.

4. Impact of SNS On Judges/ Advocates/ Jurists Temporally

The current scenario of hindrance in appointments of *Somasekhar Sunderesan*[48] to Bombay High Court and *R John Sathyan*[49] to Madras HC because of their past engagements in SNS, raises a question of pertinent importance of temporal nature- that the statements made at what time would hinder the dignity of the judiciary? For simplicity, it shall be categorized into three parts: Pre-appointment engagements (a)Pre-Appointment engagements; (b) Post-appointment engagements; and (c)Post-retirement engagements.

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[42] Madan B. Lokur, *The Things We Learnt When the SC Collegium Finally Became 'Transparent'* ,THE WIRE, (Jan. 23, 2023) https://thewire.in/law/the-things-we-learnt-when-the-sc-collegium-finally-became-transparent.
[43] TIMES OF INDIA, *supra* note 29; OUTLOOK, *supra* note 28.
[44] OUTLOOK, *supra* note 28.
[45] UNODC, *supra* note 13 at 5.
[46] American Bar Association, *ABA Standing Comm'n on Ethics & Professional Responsibility, Formal Op. 462, Judge's Use of Electronic Social Networking Media* (Feb. 21, 2013), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf.
[47] M Bromberg, *Right here waiting for you: the new social media chapter in the Australian Guide to Judicial* Conduct, 27 JJA 123 (2018) https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/right_here_waiting_for_you.html#ftn.d5e10247.
[48] THE WIRE, *supra* note 42.
[49] THE WIRE, *supra* note 42.

1) Pre-Appointment engagements

In a temporal context, the judges/to-be judges are held accountable for not only their current engagement in SNS but even their antedated engagements. The recent cases of hindrance in the elevations of *Somasekhar Sunderesan*[50] to Bombay High Court and *R John Sathyan*[51] to Madras High Court because of their engagements in social media is a testament to the impact on the lives of persons aspiring to be judges. The recent wave has transparently indicated that any advocate, jurist, etc. desirous of being a judge shall be strictly wary of exercising their Article 19(1) (a) rights, for they can be penalized for any engagement in social media at any juncture of their life without any law of limitation being applicable, nor any speaking order being made available to them.

The aforementioned hindrances in elevations have been selectively criticized by J Madan B. Lokur, Former SC Judge- recently on the grounds of their lack of transparency.

At this juncture, it shall be clarified that this paper is not discussing the correctness/ wrongness of the aforesaid decision. However, it is strongly suggested that such penalizing shall be done under some statutory provision that is constitutional as well keeping in light the tenets of transparency, due process, etc. However, in the current scenario, the procedure is neither transparent, nor clear, nor concrete. In light of the same, the constitutionality of these actions stays in the dark.

2) Post Appointment

Post appointment, as aforementioned as a matter of practice Supreme Court or High Court Judges shall delete the account. [52] However, there have been instances of a High Court Judge interacting with a lawyer presenting a case before him via WhatsApp[53], or a HC judge badmouthing brother and sister judges on Facebook, while being a Judge.[54]

Notably, the practice of refraining from social media is not followed in District Courts and more than thousands of accounts of judges in

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[50] THE WIRE, *supra* note 42.
[51] THE WIRE, *supra* note 42.
[52] ABHINAV, *supra* note 41, at 20.
[53] HINDU, *supra* note 18; INDIAN EXPRESS, *supra* note 18.
[54] Meera Emanuel, *Madras High Court directs blocking of derogatory remarks by former judge CS Karnan on social media,* BAR & BENCH, (Nov 10, 202) https://www.barandbench.com/news/litigation/madras-high-court-order-against-upload-of-derogatory-remarks-cs-karnan; *His Tirades Going Unabated' : Madras High Court Directs Blocking Of Ex-HC Judge Karnan's Videos With Obscene Allegations Against Judges & Their Families,* LIVE LAW NEWS NETWORK, (Nov 10, 2020) https://www.livelaw.in.elibraryhnlu.remotexs.in/top-stories/his-tirades-going-unabated-madras-high-court-directs-blocking-of-ex-hc-judge-karnans-videos-with-obscene-allegations-against-judges-their-families-165734.

lower courts can be found in social media, though generally abiding by the judicial conduct codes but at times certain instances have been questioned.[55]

3) Post Retirement

Post-retirement, commenting on political issues, executive matters, and even direct involvement in politics[56] is allowed. Thus, the restrictions enshrined in the 1997 Code[57], and the expected aloofness of the judges are barred till the pre-appointment and post-appointment phases and do not trinkles forward to the post-retirement phases. For instance, Former J (R) Markandey Katju's Twitter Account[58] is a testament to his constant and meaningful engagement in SNS. Even after retirement judges ought to uphold the code of judicial conduct.

5. Conclusion

The intersection of judiciary and social media brings both perils and possibilities, as it introduces a new dimension to legal processes, public discourse, and the administration of justice. In navigating the complex relationship between the judiciary and social media, striking a balance between the advantageous positive aspects and vindicating the potential risks is crucial for preserving the integrity of the judicial system. Social networking sites acts as a means of decentralization, inclusion, access, judicial advancement, connectivity with communities. Hence judges may be permitted to use the sites albeit in a regulated and reasonable manner.

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[55] Jyoti Yadav, *Can women judges do naagin dance at house party? No, only male judges can flex on Instagram*, THE PRINT, (Nov. 11, 2022) https://theprint.in/features/can-women-judges-do-naagin-dance-at-house-party-no-only-male-judges-can-flex-on-instagram/1210290/ (last visited Mar. 29, 2023).

[56] *President nominates former CJI Ranjan Gogoi to the Rajya Sabha*, ET ONLINE, (Mar. 17, 2020) https://economictimes.indiatimes.com/news/politics-and-nation/president-nominates-former-cji-ranjan-gogoi-to-the-rajya-sabha/articleshow/74660293.cms(last visited Mar. 29, 2023).

[57] RESTATEMENT, *supra* note 11.

[58] Markandey Katju [*Twitter*] Available at: https://twitter.com/mkatju?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor. (Accessed: Mar. 29, 2023).

Impact of Mergers and Acquisitions on Indian Companies

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Grace Bhaduria[**]

1. Introduction

In a merger and acquisition (M& A), the acquired company knowingly transfers its assets and liabilities to the acquiring entity. To protect their business against failure, many businesses choose to merge with another entity. A winning strategy is to move forward with M&A with profitable, similar businesses. M&A offer businesses fantastic chances to expand and increase stakeholder wealth. M&A boosts value and effectiveness, which raises the value of the stakeholder.

It goes without saying that both parties to an M&A deal will have different perceptions about the value of a target company: The company's seller wants to sell it for as much money as feasible, while the buyer would strive to pay the least amount possible.

While M&A deals can boost business expansion and provide access to new markets or product and service options, they also present a special set of difficulties. Through the acquisition, the acquirer can take control of the target, but it may be expensive and give the acquirer access to both the target's assets and liabilities, which may be significant.

M&A deals come with their own set of difficulties, but they can also spur growth internally and provide access to new markets or product and service offerings. Buying the target gives the buyer authority over it, but doing so can be expensive and provide the buyer access to both the business and potentially large liabilities of the target.[1]

2. Objectives of the Study

The present study has the following objectives:

- Benefits of M & A on Indian Companies

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[1] Picardo, E. *How M&A can affect a company*. INVESTOPEDIA. (Nov. 22, 2022). https://www.investopedia.com/articles/investing/102914/how-mergers-and-acquisitions-can-affect-company.asp.

- To study the challenges faced by the Indian companies
- To study the role played by the Indian government in promoting M & A in the country.
- To analyze and study real-life examples of successful and unsuccessful M&A deals in India
- To provide recommendations for future M & A in India.

3. History of M & A in India

The history of M&A in India can be traced back to the 1950s when the government nationalized several industries, including banking, insurance, and heavy engineering. The government's emphasis on public sector enterprises and protectionist policies restricted the role of private enterprises in the economy. However, with the liberalization of the Indian economy in the early 1990s, private sector companies were given more freedom to participate in M&A activities. The 1990s saw a surge in M&A activity in India, driven by the opening up of the economy and the need for Indian companies to compete globally. The Indian government also implemented several reforms aimed at creating a favorable environment for M&A activity. The most significant of these reforms was the introduction of the ***Foreign Direct Investment (FDI) policy***,[2] which allowed foreign companies to invest in Indian companies. Since then, M&A activity in India has continued to grow, with both domestic and international companies participating in deals across various sectors. Some of the most notable M&A deals in India include Tata Steel's acquisition of Corus, Hindalco's acquisition of Novelis, and Bharti Airtel's acquisition of Zain Africa. In recent years, the government has continued to implement reforms to make the M&A process easier for companies and attract more foreign investment. Today, M&A activity in India is driven by a growing economy, the need for consolidation in various sectors, and the government's push to attract more foreign investment.

- 1987: Hindustan Lever acquires Brooke Bond, creating India's largest consumer goods company at the time
- 1995: Tata Tea acquires Tetley Tea, making Tata the world's second-largest tea company
- 2006: Tata Steel acquires Corus, making it the fifth-largest steel company in the world

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[2] *Foreign Direct Investment (FDI) - definition, types of FDI, FDI in India. UPSC economy*, BYJUS (March 10, 2023) https://byjus.com/free-ias-prep/fdi/

- 2007: Vodafone acquires a controlling stake in Hutchison Essar, one of India's largest mobile operators
- 2010: Bharti Airtel acquires Zain's Africa operations, making it the fifth-largest mobile operator in the world
- 2016: Reliance Communications merges with Aircel, creating India's fourth-largest telecom operator
- 2018: Walmart acquires a 77% stake in Flipkart, India's largest e-commerce company
- 2020: Reliance Industries sells a 20% stake in its oil-to-chemicals business to Saudi Aramco for $15 billion, one of India's largest FDI deals

This timeline highlights the growth of M&A activity in India over the years, with both domestic and foreign companies making significant investments in the country[3].

4. Impact of M &A on Indian Economy

The impact of M&A on the Indian economy has been significant. M&A activity has played a key role in shaping the Indian economy by fostering industry consolidation, promoting foreign investment, and improving the competitiveness of Indian companies.[4] Some of the major impacts of M&A on the Indian economy are:

- ***Industry consolidation***: M&A activity has led to industry consolidation, particularly in sectors such as telecom, banking, and pharmaceuticals. Consolidation has resulted in larger, more efficient companies with greater economies of scale, which have been able to compete more effectively in domestic and global markets.
- ***Foreign investment:*** M&A has been a major driver of foreign investment in India. Foreign companies have acquired Indian firms to gain access to the Indian market and to leverage the country's skilled workforce and low-cost manufacturing capabilities. This has led to increased inflows of foreign capital into the country.
- ***Improved competitiveness***: M&A has enabled Indian companies to acquire new technology, expertise, and market access, which have improved their competitiveness. This has

[3] Pandya VU, Street L, Street L. *Mergers and Acquisitions Trends—The Indian Experience*, 9(1) INT'L JOURNAL OF BUSINESS ADM 44-54 (2018).
[4] Amishsoni, M. *A Study on Mergers and Acquisition and Its Impact on Shareholders Wealth,* 18 IOSR JOURNAL OF BUSINESS AND MANAGEMENT 79-86 (2016).

resulted in Indian companies expanding their operations and becoming more competitive in domestic and global markets.

- ***Job creation***: M&A activity has resulted in the creation of new jobs in India, particularly in the manufacturing and services sectors. This has helped to reduce unemployment and improve the standard of living for many Indians.

- ***Challenges***: However, M&A activity has also faced challenges, such as regulatory hurdles, cultural differences, and integration issues. These challenges can make M&A transactions more difficult and can lead to failure if not properly managed.

Overall, the impact of M&A on the Indian economy has been positive, with significant benefits for Indian companies, foreign investors, and the overall economy. However, it is important for policymakers and companies to continue to address the challenges associated with M&A and to ensure that the benefits of M&A are maximized for all stakeholders.

5. Benefits that Indian Companies can Gain Through M&A

M&A have become an increasingly popular strategy for Indian companies to expand their operations and achieve growth. Through M&A, Indian companies can gain numerous benefits, including increased market share, access to new technology and intellectual property, enhanced product portfolios, and economies of scale. M&A allows companies to leverage their respective strengths and combine resources to create a stronger, more competitive entity. Additionally, M&A can provide companies with a faster way to enter new markets, as opposed to attempting to do so through organic growth, which can be time-consuming and risky. By acquiring another company, Indian firms can also reduce competition and consolidate their position within their respective industries. Overall, M&A can be an effective tool for Indian companies looking to enhance their competitiveness and achieve strategic goals.

6. Indian companies can gain several benefits through M&A, some of which are:

- *Increased market share*: M&A can help companies to expand their market share in existing markets and enter new markets. This can provide a competitive advantage and increase profitability.

- *Access to new technology and intellectual property:* M&A can provide companies with access to new technology and intellectual property, which can help them to innovate and develop new products and services.

- *Economies of scale:* M&A can led to economies of scale, which can help companies to reduce costs and increase efficiency.
- *Diversification of product and service offerings*: M&A can help companies to diversify their product and service offerings, which can reduce their reliance on a single product or service and help them to better withstand market fluctuations.
- *Synergy*: M&A can create synergy between the merging entities, which can result in greater efficiency, reduced costs, and increased profitability.
- *Enhanced brand value:* M&A can help companies to enhance their brand value and reputation, which can lead to increased customer loyalty and a greater share of the market.

7. Challenges Faced by Indian Companies During M&A

M&A in India is a complex prospect primarily because of the character of its company holdings. Most of the companies in India are promoter held and their purpose of executing deals is different from that of enterprises operated by professional management.[5] Also, in order to avoid problems after deals, the regulatory structure needs to be thoroughly examined as it is still changing. Following are some challenges faced by Indian companies during M & A:

- ***LLPs being merged into the company***: An LLP could be merged into a company under the former Companies Act, or Companies Act 1956. The CA 2013 does not, however, allow for this merger. The only remaining option for an LLP to merge with the company is to become a corporation and then submit the merger plan. Although this may be a fixed stance, there is still uncertainty from the perspective of a foreign investor. Yet, the inability to use a merger as an exit strategy may deter some investors from choosing the LLP structure.
- ***Uncertainty in the understanding of the appointed date:*** According to Section 232(6) of CA 2013, the scheme must be understood to be in operation as of the designated date and not before or after that date. Practically speaking, a "appointed date" in the scheme is defined as either a particular date on a calendar or a date based on an event, as may be commercially agreed. The regulatory authorities have objected in the case of an event-based date, claiming that the assigned date must be

[5] Israel, R., Singhania, P., & Sharma, P., *Key challenges in Indian M&A and exits,* LEXOLOGY (Sept. 4, 2020) https://www.lexology.com/library/detail.aspx?g=aa477882-1ce7-4583-affc-df7fc93ad780.

a calendar date and cannot be open-ended depending on an event.

- ***Long-Drawn Out***: The process in India to have a merger approved is very drawn out. The applicant firms must notify the statutory authorities, according to Rule 8 of The Companies (Compromise, Arrangements, and Amalgamations) Regulations, 2016. The Central Government, Income Tax Authorities, Competition Commission, ROC, etc. are among the parties who must be informed. It also takes at least 7 to 8 months for NCLT to approve any merger arrangement.

8. Role of Government in Promoting M &A in India

The Indian government has played an important role in promoting M&A activity in the country. Over the years, the government has made significant changes in regulations and policies aimed at making the M&A process easier for companies and creating a favorable environment for M&A activity. One of the major initiatives taken by the government was the introduction of the Competition Act, of 2002, which replaced the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The Competition Act, which came into force in 2003, aims to prevent anti-competitive practices and promote fair competition in the market. The act has helped to create a level playing field for companies and has increased transparency and efficiency in the M&A process. In addition, the Indian government has also introduced various policies and initiatives aimed at promoting foreign investment and easing foreign direct investment (FDI) regulations. This has helped to attract foreign companies to invest in India and has led to increased M&A activity in the country. The government has also introduced various tax incentives and exemptions for companies engaging in M&A activity, further promoting the growth of the sector.

Moreover, the government has also set up specialized bodies and agencies to oversee and regulate M&A activity in the country, such as the Securities and Exchange Board of India (SEBI) and the Competition Commission of India (CCI). These bodies are responsible for ensuring compliance with regulations and promoting fair competition in the market, thus boosting investor confidence and encouraging more M&A activity in India. Also, the Indian government has been instrumental in promoting M&A activity in the country by introducing various policies and initiatives aimed at making the process easier for companies, attracting foreign investment, and promoting fair competition in the market. The continued support of the government will be critical in ensuring the success of future M&A deals in India.

9. Real-Life Examples of Successful and Unsuccessful M&A Deals in India

No two mergers and acquisitions (M&A) have the same result, as you might expect given the variety of M&As and the extensive work involved in the process. Some things go smoothly, while others fail. India has recently seen a lot of successful mergers and acquisitions, including ONGC-Imperial Energy and Ranbaxy-Daiichi Sankyo. There were, however, a few transactions that fell through.

Successful M&A deals in India

- ***Mittal Steel-Arcelor Steel***

There have been many mergers and acquisitions during the recession. The term "Butterfly effect" has become indelible due to the financial crisis's cascading effects on the world economy. This also applied to Europe. Many businesses were devalued during the recession, which allowed cash-rich organizations to go on a buying binge[6].

In this round of acquisitions, the Indian company Mittal Steel merged with Arcelor Steel for a $33.1 billion price. ArcelorMittal, the business that resulted from the merger, is currently one of the biggest steel producers in the world.

- ***Vodafone-Idea***

The likely cause of this one can be ascribed to a variety of factors. While the industry in India was already facing numerous difficulties, the introduction of Jio served as the business venture of both companies' respective divisions fatal blow.

The 2G fraud was still rippling for both firms at the time, and Vodafone was also engaged in a tax dispute with India. The combined company, Vodafone-Idea, was now only second to Airtel. In terms of pay, the businesses' stakes in the merger are nearly equal; Idea owns 54.9% and Vodafone 45.1%.[7]

- ***Tata Motors-Jaguar***

This one has a well-known legend associated with it! According to reports, Tata expressed interest in selling Ford a portion of Tata Motors

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[6] Noria Corporations, *Mittal Steel Announces Merger Agreement with Arcelor,* RELIABLE PLANT (June 26, 2006) https://www.reliableplant.com/Read/1839/mittal-steel-announces-merger-agreement-with-arcelor-.

[7] *M&A in Telecom Industry: A case study on vodafone india and idea merger*, IJCLP (Aug 6, 2021). https://ijclp.com/mergers-and-acquisition-in-telecom-industry-a-case-study-on-vodafone-india-and-idea-merger/.

a decade before to this agreement. Ford, however, humiliated the business in addition to declining. However, as a result of Jaguar's following losses, Ford was compelled to sell the company to Tata Motors for $2.3 billion in 2008.

Moreover, Jaguar had been reporting losses prior to the aforementioned acquisition. However in 2019, ten years after the acquisition, it not only made up for these losses but also claimed a $3400 profit[8].

Unsuccessful M&A deals in India.

- ***HDFC and Max Life***

As a private company, HDFC sought to be listed. Without going through the lengthy Initial Public Offering process, the merger would automatically list it on the stock exchange. The combination was advantageous because it would avoid the complexities of an IPO and significantly reduce costs. It was a reverse merger because a listed firm and a non-listed company were going to merge. The Insurance Regulatory and Development Board, a sectoral authority, rejected the proposed merger (IRDB). The Insurance Act's, 1938 Section 35 prohibits the merging of an insurance company with a company that is not an insurance company.[9]

- ***IDFC and Shriram Finance***

In Shriram Ltd, a public company at the time of the merger, the promoters held 33.77% of the shares, followed by domestic institutional investors (5.58%) and foreign institutional investors (22.42%). Piramal Enterprise Limited and Dynasty Acquisitions Ltd (FPI) were a couple of the investors. An Indian conglomerate is known as Shriram Group. The holding company for two publicly traded corporations is Shriram Capital Shriram City Union Finance Ltd. Ltd. Shriram Transport Financing[10].

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[8] Francis, A. *Case study: Tata Motor's acquisition of Jaguar and land rover*. MBA KNOWLEDGE BASE (Sep. 13, 2018) https://www.mbaknol.com/management-case-studies/case-study-of-tata-motor-acquisition-of-jaguar-and-land-rover/.

[9] Mahendru, M. *Regulatory issues in a merger: A case of HDFC Standard Life Insurance and Max Life Insurance* (April, 2018) https://www.researchgate.net/publication/324537762_Regulatory_issues_in_merger_A_case_of_HDFC_Standard_Life_Insurance_and_Max_Life_Insurance.

[10] Cherian T, *IDFC, Shriram merger called off over share swap disagreement*, THE HINDU BUSINESSLINE (Jan 8, 2018) https://www.thehindubusinessline.com/money-and-banking/idfc-shriram-12-b-merger-called-off-on-differences-over-swap-ratio/article64285553.ece.

Several IDFC investors wanted a 60% premium out of worry that their swap holdings might decrease. Due to its inability to reduce its investment below 40%, IDFC Ltd was unable to adequately compensate Shriram Transport. Shriram's stockholders were concerned about Holding Company Discount. Both parties did not agree with the arrangement or the valuation.

10. Recommendations for Future M&A in India.

Several considerations must be taken into account when considering whether to pursue an M&A. They include business-related considerations, thorough due diligence, and spotting potential financial or cultural snags, or any unfavourable effects on current or potential clients. Before to closing their arrangements, the buyer must identify the linked obligations, legal risks, contingent liabilities, and much more.

- ***Cutting down on the seller's transaction costs:*** The tax system presents one of the main difficulties in an M&A. There are several ways to acquire a firm, including whole stock sales and IP sales alone. Each has its own unique set of tax burdens, such as corporate tax, GST, and dividend tax. While carrying out M&A deals, it's crucial to think about the appropriate deal structure to maximize tax savings.

- ***Rival bidders:*** Contrary to popular belief, a buyer should not believe they are the only one with an interest in the target company. A wise buyer bases its price specifications on its own examination of the market, the prospects, and the compatibility of the target firms. Instead of choosing the initial offer, a target organization must investigate several offers in order to bring in the best offer.

- ***Timelines that are clearly defined***: Although M&A negotiations between large corporations can last for months or even years, the strategic goals of these transactions are frequently time-based. So, it's crucial to create a roadmap with checkpoints and due dates to make sure the procedure stays on course.

- ***Cross-border differences:*** Prior to purchasing a foreign company, it is crucial to take into account the variations in accounting standards, labor legislation, and environmental requirements. In India, the number of rigorous and conflicting legislation limiting cross-border transfers of vital corporate data has grown quickly.

- ***Employee turnover***: Because mergers and acquisitions frequently lead to staff attrition, managing employee turnover during these transactions can be difficult. The buyer can wish to replace or reduce the workforce, which might be disastrous and lower morale

among the remaining employees. Also, keeping key personnel who are familiar with the company and the current work culture is crucial.

11. Conclusion

In conclusion, the paper highlights the benefits and challenges of mergers and acquisitions (M&A) for Indian companies. The paper provides a comprehensive analysis of the history of M&A in India, including the government's role in promoting M&A activity. The paper also examines the challenges that Indian companies face during M&A, including regulatory hurdles, cultural differences, and integration issues. The authors emphasize the importance of cultural alignment and effective communication between merging entities to ensure successful M&A deals. The paper provides real-life examples of successful and unsuccessful M&A deals in India and offers practical recommendations for companies considering an M&A deal in India. The authors stress the need for companies to carefully evaluate potential M&A opportunities, conduct thorough due diligence, and effectively manage the post-merger integration process. The paper highlights the potential of M&A to impact Indian companies and the economy significantly and emphasizes the need for cooperation between the government and companies to maximize its benefits.

The authors provided valuable insights for practitioners, policymakers, and researchers interested in M&A activity in India. M&A activity in India presents various challenges for companies, especially due to the character of its company holdings and the ever-changing regulatory structure. Despite these challenges, the Indian government has taken significant steps to promote M&A activity in the country, introducing policies, initiatives, and regulations to make the process easier and more favorable for companies. These efforts have led to both successful and unsuccessful M&A deals in India, with Mittal Steel-Arcelor Steel and Vodafone-Idea being notable examples. The continued support of the government and the implementation of effective policies will be crucial in ensuring the success of future M&A deals in India.

Securitization of Non-Performing Assets in Banking Law: An In-depth Analysis

Chaitanya Tendulkar*

1. Introduction

As a channel for capital flows, credit, and economic stability, the banking sector continues to play a vital role in the worldwide financial system. It is the engine of economic growth and development by facilitating the distribution of resources from savers to borrowers. However, like any other industry, the banking sector is dealing with its own set of challenges, the most important of which is the presence of non-performing assets (NPAs).

1) Non-Performing Assets

Non-performing assets, commonly known as NPAs are financial instruments, usually loans and advances, that cease to generate income for banks due to the borrower's inability or unwillingness to repay principal or interest NPAs are a thing a repeated concern in the banking industry, other than the important role of banks in the economy Shadow is casting. The persistence of NPAs in a bank's portfolio can have far-reaching consequences. It destroys a bank's profitability, hampers its ability to lend, and ultimately threatens its standing. A domino effect is created when NPA's are not managed properly which affects the economic environment as well as the individual banks.

2) Securitization And Its Implications in Banking Law

To meet the challenges posed by NPAs, banks and financial institutions have turned to a form of financing called securitization Securitization is a complex process in which NPAs are consolidated into marketable and tradable securities for investors. It is a way for banks to convert underperforming illiquid assets into liquid instruments that can be sold. Securitization is not only an investment but also a legal endeavor linked to banking law.[1] Legislative provisions and policy guidelines which govern securitization are important in the process of managing NPAs, protecting investor interests and maintaining the stability of the financial system. Strong relationship between securitization and an understanding of the banking regulatory network is essential to understand the dynamics of NPA activity.

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[1] RAYNES, SYLVAIN AND ANN RUTLEDGE, THE ANALYSIS OF STRUCTURED SECURITIES 103 (Oxford University Press 2003).

3) Research Objectives

This paper initiates a comprehensive analysis of the protection of non-performing assets in the banking regulatory framework. Our goals are as follows:

- To analyse how NPAs affect banks and the overall economy, including their causes and effects.
- To better understand the legal foundation for this financial instrument by examining the securitization process in greater depth.
- To provide a thorough analysis of this complex investing phenomena and to evaluate the risks and difficulties involved in the hedging of NPAs.
- To find real-world case studies that demonstrate effective NPA protection, illuminate the tactics utilised, and explain the results.
- To weigh the benefits and drawbacks of securitization and offer insightful analysis into how effective it is as a tool for banks to manage their NPAs.

Therefore, we will present a thorough overview of the changing NPA management and securitization landscape in order to evaluate the most recent regulatory developments and anticipate future trends in banking laws.

2. Non-Performing Assets (NPAs) In Banking

1) Definition and Categorization of NPAs

Financial instruments, often loans, advances, or other loans, are classified as non-performing assets (NPAs) in the banking sector if the borrower claims they have ceased to generate income for the bank because they are unable or unwilling to make agreed-upon principle or interest payments. NPAs are often divided into many categories according to their levels of delinquency or loss.

- Substandard Assets: Loans or advances categorised as NPAs within a given time frame, often 12 to 24 months, are referred to as substandard assets. A substantial likelihood of either no recovery or a slow recovery exists for these assets.
- Doubtful Assets: NPAs that continue to be irregular for a long time, sometimes more than 24 months, are referred to as doubtful assets. About whether these assets can be recovered, there is a great deal of doubt.
- Loss Assets: Assets subject to loss: Assets subject to loss are those for which the bank or financial institution has determined the entire degree of the loss, either by internal audit or external audit. The value of these assets is recorded in the bank's records as irredeemable, and they are not recoupable.

2) Causes of NPA In Banking Sectors

NPAs in the banking sector is caused by several circumstances, including but not limited to:

- Economic distress: A downturn or recession may lead to fewer possibilities for businesses, lower borrower profitability, and a higher risk of default.[2]
- Non-Provision for Loans: Due to poor banking practises, such as a lack of investigation or lax credit requirements, loans may be given to defaulting borrowers.[3]
- External Factors: Unforeseen external factors beyond the control of the banking companies can make it difficult for people and corporations to repay their debt, including natural catastrophes, political unrest, and the global financial crisis.

• Fraud and misconduct: High Debt and bankruptcy are possible outcomes of cases of fraudulent behaviour or misconduct on the part of borrowers.

3) Impact of NPA On Bank Performance

A bank's portfolio of non-performing assets (NPAs) may have a big impact on the bank and the entire banking sector:

- NPAs destroy profitability because interest revenue is lost and provisions must be made for potential losses, which lowers a bank's income and profits.
- Reduced credit capacity: Banks with high levels of NPAs may find it challenging to offer further credit, reducing their ability to support economic growth and development.
- Risks to financial stability: The growth of non-performing assets (NPAs) in the banking industry may represent a systemic risk that, if not adequately handled, might cause the financial system to become unstable.[4]

For banks, regulators, and policymakers to address this vital issue and guarantee the stability and resilience of the banking industry, it is crucial that they have a thorough understanding of the categories, causes, and effects of NPAs.

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[2] Mishra, S., & Narayanan, K., *Determinants of Non-Performing Assets in Indian Banking Sector: An Econometric Approach*, 20(2) PARADIGM 140-162 (2016).
[3] Pathak, R. D., & Tiwari, M. *Credit Risk Assessment in Banking Sector: A Comparative Analysis of Public and Private Banks*, 2(1) JOURNAL OF BUSINESS AND ECONOMIC REVIEW 47-60 (2017).
[4] *Supra* note 2.

3. Securitization As a Tool for NPA Management

3.1 Background

Currently, a framework specifically for the securitization of standard assests is in place in India. The Reserve Bank of India (RBI) issued the "Master Direction - Reserve Bank of India (Securitization of Standard Assets) Regulations, 2021" (also known as the "SSA Regulations")[5] in September 2021, which principally deals with the securitization of standard assets. It is vital to remember that routine assessments do not include non-performing loans under the SSA Regulations. According to the SSA Regulations, only those loans with delinquency periods of up to 89 days are eligible for securitization.

There is a different alternative accessible for assets that become non-performing, which means they are more than 89 days past due when the debtor has not cleared all dues. The "Master Direction - Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021" (also known as the "TLE Directions")[6] permits the sale of certain assets at the moment. The procedure for selling distressed assets, including non-performing ones, is described in this framework. While there is a technical process for "securitizing" non-performing loans (NPLs) through the issuance of "security receipts" (SRs), it is important to emphasise that this framework for issuing and investing in SRs differs significantly from the typical practises of standard securitization in the industry.[7][8] The sale of assets via the TLE channel is subject to a strict set of rules, including total independence from the seller's finances and a lack of customary tranche division. Consequently, there is a large decline in the value of these troubled loan pools. It's also important to remember that the majority of the non-performing loans (NPLs) that are having trouble right now are either retail loans or re-performing loans. Asset Reconstruction Companies (ARCs) frequently lack the specialised knowledge necessary for this specific asset class and frequently concentrate on wholesale transactions, hence these retail loan portfolios are not generally offered for sale through this channel.[9]

3.2 What Is Securitization? And Its Many Forms

Securitization is a financial practise that involves converting illiquid assets, frequently in the form of loans, into tradable

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[5] Master Direction – Reserve Bank of India (Securitisation of Standard Assets) Directions, Dated 04 September, 2021 and updated as on December 05,2022

[6] Master Direction – Reserve Bank of India (Transfer of Loan Exposures) Directions, Dated September 24, 2021 and updated as on December 05, 2022

[7] The Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002

[8] Master Circular - Asset Reconstruction Companies, Dated April 01, 2022 Updated as on October 14, 2022

[9] Claire A. Hill, *Whole Business Securitization in Emerging Markets*, 12 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 2 (2002).

securities.[10] These securities are an investment in the cash flows produced by the underlying property. Securitization may involve many types of documentation, such as:

- Asset-Backed Securities (ABS): In this type of security, a collection of financial assets, such as loans or mortgages, are bundled together and given to a special purpose vehicle (SPV). The SPV issues securities, typically in the form of bonds, to investors who are supported by coin flows produced by the underlying assets.[11]
- Mortgage-Backed Securities (MBS) are a subset of ABS, and in most situations, they are backed by residential or commercial mortgages.[12]
- Collateralized Debt Obligations (CDOs): CDOs are well-known financial instruments that combine various debt instruments, such as bonds, loans, and securities. Then, they are split up into unique tranches with varying degrees of risk and reward.[13]

3.3 Securitization's function in the management of NPAs

Banks manage their non-performing assets (NPAs) through securitization since it offers several advantages, including the following:

- Enhancing Liquidity: Banks can turn untradeable assets like NPAs into marketable securities by securitizing them. By offering these assets to investors, this process enables banks to raise funds on the spot, improving their liquidity situation.[14]
- Risk shift: With securitization, banks can shift the credit risk brought on by NPAs to the buyers of the securities. With the use of this risk swap, banks may reduce their exposure to losses resulting from asset failures.[15]
- Capital Efficiency: When NPAs are packaged into securities and sold to a special purpose vehicle, they are often removed off the bank's balance sheet. Banks will be able to allocate capital more effectively as a result of a decrease in the regulatory capital requirements imposed on them.[16]

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[10] FABOZZI, F. J., & BHATTACHARYA, INTRODUCTION TO SECURITIZATION (John Wiley & Sons 2011).
[11] VAN DEVENTER, D. R., IMAI, K., & MESLER, M., ADVANCED FINANCIAL RISK MANAGEMENT: TOOLS AND TECHNIQUES FOR INTEGRATED CREDIT RISK AND INTEREST RATE RISK MANAGEMENT (John Wiley & Sons 2005).
[12] Supra 9
[13] TAVAKOLI, J. M., STRUCTURED FINANCE AND COLLATERALIZED DEBT OBLIGATIONS: NEW DEVELOPMENTS IN CASH AND SYNTHETIC SECURITIZATION (John Wiley & Sons 2006).
[14] Greenbaum, S. I., & Thakor, A. V. , *Bank Funding Modes: Securitization versus Deposits*, 9(3) JOURNAL OF BANKING AND FINANCE 357-382. (1985).
[15] Morgan, D. P., *Rating Banks: Risk and Uncertainty in an Opaque Industry*, 92(4) AMERICAN ECONOMIC REVIEW 874-888 (2002).
[16] Supra 10

- Focus on Core Banking Activities: By unloading non-performing assets (NPAs) through securitization, banks may focus their resources and attention on banking activities, including lending and customer care, rather than managing troubled assets.[17]

3.4 Successful Securitization Programmes

This methods efficiency in managing NPAs has been confirmed by several successful securitization packages. Typical illustrations include:

- United States mortgage-backed securities: In order for banks to spread out mortgage risk and enhance homeownership chances, the securitization of mortgage loans was a key factor in the development of the U. S. housing market.[18]
- Indian Securitization Market: Banks have securitized a wide range of assets, including consumer loans, car loans, and farm loans, in India, which has seen a growth in the sector. In the Indian banking industry, these packages have helped to effectively manage NPAs.[19]
- European ABS Market: To reduce the impact of non-performing assets (NPAs) on their balance sheets and to improve regional economic balance, European banks have applied for securitization.

These illustrations highlight how securitization may be used as a tool for NPA management across a range of economic markets and asset classes while maintaining its adaptability and flexibility.[20]

4. Legal Framework for Securitization In Banking

1) The Legal System of Securities in India

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002[21] is the main piece of legislation governing securitization in India. This legislation permits banks and financial institutions to seize and sell non-performing assets (NPAs) without the requirement for court

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[17] Fabozzi, F. J., & Kothari, V., *Introduction to Securitization*, 33(5) THE JOURNAL OF PORTFOLIO MANAGEMENT 101-102 (2007).
[18] *About Ginnie Mae*, Ginnie Mae https://www.ginniemae.gov/pages/default.aspx.
[19] Reserve Bank of India, *Report on Trend and Progress of Banking in India 2019-20* (2021) https://www.sbfnetwork.org/wp-content/assets/policy-library/910_India_Report_on_Trend_and_Progress_of_Banking_in_India_2019-2020_RBI.PDF.
[20] European Central Bank, Financial Stability Review (Nov. 2019) https://www.ecb.europa.eu/pub/financial-stability/fsr/html/ecb.fsr201911~facad0251f.en.html.
[21] The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54 of 2002 (India).

supervision. It also offers a thorough structure for the securitization process. The SARFAESI Act's main clauses are as follows:

The SARFAESI Act permits the creation of asset reconstruction companies (ARCs), which buy non-performing assets (NPAs) from banks and offer security receipts to banks and qualified institutional buyers (QIBs).

Enforcement of Security Interest: In the event of a borrower failure, the legislation gives banks the authority to enforce their security interests, making it easier to collect debt by seizing and selling the secured assets.

In India, securities are controlled by a thorough regulatory system that consists of the following essential components.

- Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI) Act, 2002: The SARFAESI Act of 2002 governs the securitization, reconstruction, and enforcement of financial assets. The SARFAESI Act gives banks and other financial institutions the authority to establish security interests in financial assets. These institutions also have the freedom to buy and sell assets without interference from the courts, and Section 13 of the SARFAESI Act specifies the implementation processes.
- The Reserve Bank of India (RBI): The RBI provides recommendations and guidelines to banks and financial organisations regarding securitization transactions. These rules include advice on risk management, prudent behaviour, and enough money.
- National Housing Bank (NHB): Housing financing in India is securitized through the National Housing Bank (NHB), which oversees these transactions. For mortgage financing firms involved in security operations, it offers advice.
- Stamp Duty Laws: Various papers pertaining to securities transactions, such as deeds of assignment and mortgages, are subject to the stamp duty rules that are specific to each state in India.

2) Non-Performing Loan Issue Compounding by Circular of November 12, 2021

On November 12, 2021, the Reserve Bank of India (RBI) released a circular titled 'Prudential norms on Income Recognition, Asset Classification, and Provisioning pertaining to Advances – Clarifications'.[22] This circular introduced changes to the criteria for upgrading Non-Performing Assets (NPAs) to standard assets. The

[22] RBI Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances – Clarifications Dated November 12, 2021

revised norms specified that a loan account could only be upgraded to a 'standard' asset if the borrower fully cleared all outstanding interest and principal payments. This alteration led to more stringent conditions for upgrading NPA accounts, resulting in a significant increase in NPA numbers, which is expected to continue rising. Given the sale of these NPAs under the Transfer of Loan Exposures (TLE) scheme resulting in substantial losses and the limited capabilities of Asset Reconstruction Companies (ARCs) in handling retail NPAs, there is a growing need for a framework addressing the securitization of NPAs. It was decided to create a framework for securitizing distressed assets in accordance to the Statement on Developmental and Regulatory Policies dated September 30, 2022.[23] In addition to the current Asset Reconstruction Company (ARC) method, this framework is comparable to the one utilised for securitizing standard assets. Because of this, on January 25, 2023, the Reserve Bank of India (RBI) published a Discussion Paper on the Securitization of Stressed Assets Framework (SSAF) and solicited feedback until February 28, 2023.[24] This research article goes into more detail about this paper's contents.

3) The Legal System of Securities in the United States

The Securities and Exchange Commission (SEC), which has a significant role in regulating the issuance and exposure of securities, is one of the federal and state agencies that regulate securities in the United States. The following are examples of significant American legal requirements and laws:

- Securities Act of 1933: Federal law governing the issuing and selling of securities to the general public. Documentation guidelines for securities as well as disclosure standards for securities are included.[25]
- Securities Exchange Act of 1934: This law governs stock exchanges and secondary market trading of securities, as well as secondary market trading of securities derivatives.[26]
- Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act): Due to the financial crisis of 2008, this legislation was implemented, and it had a substantial impact on protection, including risk retention requirements for asset-backed securities backers.[27]
- State Law: The laws regulating secured transactions in each state in the United States may differ from one another, and

[23] RBI Statement on Developmental and Regulatory Policies Dated September 30, 2022
[24] *RBI Discussion Paper on Securitisation of Stressed Assets Framework*, RESERVE BANK OF INDIA (Jan. 25, 2023)
https://www.rbi.org.in/Scripts/PublicationsView.aspx?id=21728.
[25] Securities Act, 1933, Pub. L. No. 73-22, 48 Stat. 74, 1933, (United States).
[26] Securities Exchange Act, 1934, Pub. L. No. 73-291, 48 Stat. 881, 1934, (United States).
[27] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 2010, (United States).

these differences may have an impact on the establishment and equity of security interests in secured property.

4) Role of Government and Regulatory Authorities

a) India

In India, the Reserve Bank of India (RBI) plays a key role in overseeing and regulating banks and other financial institutions that engage in securitization operations. In order to ensure sound and responsible management of NPAs and the securitization process, the RBI issues directives, and circulars.

The issuing and trading of security receipts, as well as activities connected to securitization on the securities market, are all governed by the Securities and Exchange Board of India (SEBI). Transparency and investor security are ensured in securitization transactions by SEBI.

b) USA

The Securities and Exchange Commission (SEC): To protect investors and keep fair and effective markets, the SEC controls the offering and sale of securities, including those issued in securitization transactions.

The Consumer Financial Protection Bureau (CFPB): The CFPB focuses on consumer safety and has control over specific securitization-related features, particularly those that concern consumer financial products.

The Federal Reserve: The Federal Reserve is in charge of regulating the risk retention requirements for securitizations and making sure that banks have effective risk management procedures.

In the U. S. mortgage-backed securities market, government-backed organisations like Fannie Mae and Freddie Mac also play significant roles, providing stability and liquidity to the housing finance industry. In order to allow securitization while protecting investors' interests and preserving the credibility of the financial markets, legal and regulatory frameworks have been developed in both India and the USA.

5) Securitization Types Worldwide

The most common practise in the US is agency securitizations, which include the idea of "Re-performing Loans. " Mortgage-Backed Securities (MBS) are created from these loans through securitization. In an MBS trust that is supported by the agency, these loans are put when they are securitized. Through this support, it is guaranteed that

the agency would provide additional money to assure the timely payment of principle and interest to MBS investors.[28]

In 2016, the Italian government launched the Garanzia Cartolarizzazione Sofferenze (GACS) programme. It entails combining Non-Performing Loans (NPLs) into a special-purpose vehicle with various seniority tranches. Government backing is also a part of the plan. The senior tranches of securitization deals, however, are only backed by the government after these tranches are rated BBB or above.

The 2019 launch of the "Hercules Asset Protection Scheme" (HAPS) in Greece is noteworthy. Although there are some differences, particularly in terms of less stringent requirements (such as the absence of an investment-grade rating requirement for the senior tranche), the ECB's "An Empirical Study of Securitizations of Non-Performing Loans" report from May 2022[29] states that HAPS draws significant inspiration from the GACS scheme.

The securitization of standard or substandard assets is not expressly prohibited under securitization laws on a worldwide scale. This leaves it up to the investors and originators to decide whether to add non-performing loans to the pool or not. Therefore, these pools may be wholly made up of standard assets, entirely be made up of substandard assets, or both. However, a number of global regulators, including the Basel Committee on Banking Supervision[30], have recently mandated capital requirements for pools that are predominantly made up of non-performing loans (NPLs).

To put into practise the Basel criteria controlling the securitization of non-performing loans (NPLs), the Prudential Regulatory Authority of the United Kingdom has released Policy Statement 24/21 (PS 24/21).[31]

5. Process Of Securitization

In the securitization process, loans or receivables are combined with illiquid assets to create marketable, liquid securities. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act of 2002 governs this method in India, where it is controlled by the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI). The Indian securitization process is evaluated in depth below, along with pertinent parts and governmental approvals:

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[28] Basics of Fannie Mae Single-Family Reperforming Loan (RPL) Securitization, Dec 2022.
[29] Boudiaf, Ismael Alexander, and Fernando Gonzalez Miranda, *An empirical study of securitisations of non-performing loans,* ECB OCCASIONAL PAPER 292 (2022).
[30] Basel Committee on Banking Supervision CRE Calculation of RWA for credit Risk CRE45 Securitisations of nonperforming loans Version effective as of 01 Jan 2023.
[31] Policy Statement | PS24/21 Implementation of Basel standards: Non-performing loan securitisations, Bank of England Prudential Regulation Authority Published on October 2021.

Step 1: *Collection and selection of property* (Section 5 of the SARFAESI Act) i. e., Asset Identification: Banks choose a pool of non-performing assets (NPAs), which often have a uniform nature and consist of a portfolio of defaulted loans or concerned assets. The basis for the securitization deal is these assets.[32]

The total amount of financial assets that are acceptable is calculated by banks and other financial institutions; this amount may also include non-performing assets (NPAs) or other credit facilities. A mortgage, a vehicle loan, are examples of the same assets that are frequently present.

Step 2: *Establishment of a Special Purpose Vehicle* (SPV) (Section 3 of the SARFAESI Act): A Special Purpose Vehicle (SPV) is created to ring-fence the securitized property. A special purpose vehicle (SPV) is typically set up as a trust or independent company to hold and manage assets intended for protection. The securitized property will be separately maintained and controlled by the SPV, a legal body.[33]

Step 3: *Asset Transfer* (Section 5, SARFAESI Act): The bank or originator transfers the identified pool of financial assets to the SPV. This transfer involves the sale of assets to the SPV, and the bank receives consideration in the form of securities or cash. The bank transfers the NPAs it has identified to the SPV. This change is crucial because it removes the asset off the bank's balance sheet and reduces its exposure to these troubled assets.[34]

Step 4: *Structure the transaction:* Different classes of securities, referred to as tranches, with various risk profiles will be created as a result of the securitization transaction's structural design. Typically, senior tranches have better credit ratings and lower yields, whereas junior tranches are riskier but have larger potential profits.[35]

Step 5: *Issuance of Securities:* The SPV issues securities often in the form of pass-through certificates (PTCs), backed by the securitized assets as the fifth step in the process. The money required by the SPV to reimburse the bank for the transferred assets are provided by the sale of these securities to investors in the primary market.[36]

Step 6: *Payment cascade:* The SPV collects and distributes cash flows from the securitized assets, such as loan repayments or recoveries, in accordance with a predetermined payment cascade. According to the risk hierarchy, payments are made to senior tranches before junior tranches.[37]

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[32] Section 5 SARFAESI Act 2002
[33] Section 3 SARFAESI ACT 2002
[34] Supra 32
[35] Supra 16
[36] Supra 10
[37] Supra 12

Step 7: *Investor Reporting and Servicing:* Investor reporting and asset servicing are the responsibility of the SPV. This entails keeping an eye on the underlying property's performance, collecting payments, ensuring timely payments to investors, and ensuring that the securitization's terms are being followed.[38]

Step 8: *Regulatory Compliance* (Section 17 of SARFAESI Act): Throughout the process, the securitization must abide by legal standards, such as those imposed by the RBI and SEBI for reporting, accounting, and risk retention.[39]

Step 9: *Ongoing Monitoring and Reporting*: The performance of the securitized assets must be tracked by banks and other financial institutions engaged in securitization, and necessary reports must be submitted to regulatory authorities.

6. Due Diligence and Documentation for Securitization

Complete documentation and due diligence procedures are necessary for the effective securitization of non-performing assets (NPAs) in order to ensure legal compliance and investor confidence:

1) Documentation:

- *The Pooling and Servicing Agreement* (PSA), which includes the servicer, trustee, and investors, describes the rights and duties of all parties involved in the securitization.
- Offering Memorandum: This document provides information to buyers regarding the securitized assets, the transaction's structure, risk considerations, and legal disclosures.
- A *prospectus* is prepared in accordance with securities laws and regulations if the securities are publicly presented in order to give potential investors specific information about the presentation.

2) Due Diligence:

- *Legal Due Diligence:* Legal professionals conduct due diligence to ensure that all legal requirements, including the establishment of the SPV, the transfer of assets, and adherence to regulatory frameworks, are satisfied.
- *Credit due diligence:* Involves credit analysts examining the quality of the securitized assets as well as their historical performance, default rates, and recovery projections.

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[38] Financial Stability Board. (2012). Principles for Sound Residential Mortgage Underwriting Practices.

[39] Section 17 SARFAESI ACT 2002.

- *Operational due diligence:* Involves investigating the policies and procedures in place for maintaining the property, collecting payments, and managing investor reports.

- *Regulatory Due Diligence:* As part of due diligence, you must also confirm that all regulations are being followed, including duties for disclosure and risk retention.

In order to limit risks, give investors transparency, and ensure that the securitization transaction is successfully executed, thorough documentation and due diligence procedures are essential.

7. NPA Securitization: Risks and Challenges

1) Risks Related to Securitizing NPAs

Banks and investors must carefully manage the risks associated with securitizing non-performing assets (NPAs), which include a variety of potential threats to the financial system. The following are the primary risks involved with securitizing NPAs:

- *Risk of Credit:* Investors might be at risk of losses if recoveries are less than anticipated since underlying NPAs may have a chance for improved solvency.[40]

- *Market Risk:* The value of assets and securities that are insured may change as a result of changes in the market, interest rates, and overall state of the economy.[41]

- *Liquidity Risk:* Low market liquidity might make it difficult to sell covered assets or securities during a crisis, which could lead to losses or liquidity problems.[42]

- *Operational Risk:* Mistakes or issues with asset, collection, or investor reporting may cause financial losses or legal issues.[43]

- *Risks associated with the law and regulations*: Significant risks might arise from changes in the legislation or regulations, from breaking the law, or from legal disputes involving securitization.[44]

- *Structural risk:* Depending on the portfolio's structure and how different tranches are prioritised, some investors may be

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[40] FABOZZI, F. J., & MODIGLIANI, F., MORTGAGE AND ASSET-BACKED SECURITIES FOR THE NON-FINANCIAL CORPORATION: WHAT YOU NEED TO KNOW (Harvard Business Press 1992)
[41] *Supra* note 10.
[42] *Supra* note 12.
[43] Morgan, D. P., *Rating Banks: Risk and Uncertainty in an Opaque Industry,* 92(4) AMERICAN ECONOMIC REVIEW 874-888 (2002).
[44] GREUNING, H. V., & BRATANOVIC, S. B., ANALYZING AND MANAGING BANKING RISK: A FRAMEWORK FOR ASSESSING CORPORATE GOVERNANCE AND FINANCIAL RISK (World Bank Publications 2009).

exposed to a lot of risk, especially if the performance of the underlying assets declines.[45]

- *Risk to reputation*: Bad press or a negative public opinion of how NPAs should be handled might harm banks' and the financial sector's reputations.[46]

2) Challenges Faced by Banks in Implementing Securitization Strategies

Although there are advantages to securitization, there are also a number of difficulties that banks must overcome when using it to deal with NPAs:

- *Asset quality assessment*: The securitization system is questionable since it might be difficult to determine the quality of NPAs and estimate recovery.[47]
- *Regulatory compliance*: Significant resources and knowledge are need to comply with complicated regulatory standards, such as risk retention laws and disclosure duties.[48]
- *Concerns:* About asset quality and operational efficiency may make it challenging to win over investors to securitization deals involving NPAs.[49]
- *Market swings*: Variations in the price and demand for securitized NPA assets can have an impact on the feasibility of transactions as well as on the state of the market and investor confidence.[50]
- *Accounting and Reporting*: It can be difficult and time-consuming to comply with accounting and reporting rules, such as those relating to fair value and disclosure obligations.[51]
- *Complexity of Servicing:* Effectively managing the collection of defaulting debtors and managing the servicing of distressed assets calls for specialised knowledge and resources.[52]

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[45] *Supra* note 16.
[46] Acharya, V. V., & Richardson, M., *Causes of the Financial Crisis. Critical Review,* 21(2-3) A JOURNAL OF POLITICS AND SOCIETY 195-210 (2009).
[47] Gorton, G., & Metrick, A., *Securitized Banking and the Run-on Repo,* 104(3) JOURNAL OF FINANCIAL ECONOMICS 425-451 (2012).
[48] Basel Committee on Banking Supervision. (2016). Basel III: Finalising Post-Crisis Reforms.
[49] Supra 17
[50] Supra 19
[51] Supra 10
[52] Financial Accounting Standards Board. (2016). Accounting Standards Codification (ASC) 860: Transfers and Servicing.

- *Agency Risk:* Dealing with several parties, such as trustees, rating agencies, and servicers, introduces counterparty risk that banks must control.[53]

In order to successfully securitize NPAs, addressing these issues necessitates strong risk management, strong due diligence, regulatory compliance, and good communication with investors.

8. Securitization's Advantages and Disadvantages

1) Benefits Of Securitization For Banks

Banks may manage their non-performing assets (NPAs) more effectively by using securitization.

- Lower risk: Banks' exposure to debtors they can't fight head-on is reduced thanks to the securitization of non-performing assets (NPAs), which allows banks to transfer credit risk to investors.
- Increasing liquidity: By selling fixed assets and turning non-cash NPAs into cash, banks can strengthen their liquidity.
- Efficient use of capital: Securitization can free up capital formerly linked to NPAs, allowing banks to utilise it more effectively.
- Portfolio diversification: By dispersing the risk associated with NPAs, banks may diversify the asset holdings in their asset portfolios.
- Securitization can assist banks in adhering to regulatory criteria including capital adequacy requirements and risk retention guidelines.

2) Disadvantages of Securitization for Banks

Banks nevertheless face significant disadvantages and difficulties despite their benefits:

- The securitization process is complicated and calls for specialised knowledge due to its operational, legal, and accounting complications.
- Costs: The securitization transaction has several expenses, such as regulatory, rating agency, and service fees, which can reduce profitability.
- Reputational risk: Banks need to control the risk to their reputation from the security of NPAs, particularly if the issue is scrutinised by the public.

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[53] Supra 16

- Investor trust: Given worries about asset quality and operational efficiency, persuading investors to take part in NPA protection may be difficult.
- Market Sensitivity: Market circumstances may have an impact on the price and demand for the embedded assets, which might jeopardise the transaction's success.

3) Analysing Securitization As a Tool for NPA Management

Securitization's efficiency as a technique for managing NPAs depends on several variables, including the state of the economy as a whole and conditions particular to individual banks. By decreasing risk, enhancing liquidity, and promoting the effective use of capital, securitization may, if done effectively, be extremely beneficial to banks. However, securitization is not a one-size-fits-all approach, and investor trust, regulatory compliance, and due diligence are key components of its success. Securitization may either stabilise or worsen economic conditions, thus it is also important to consider how it will affect the larger financial system. Securitization has many advantages for effective management of NPA, but it also has drawbacks and difficulties that need be properly examined. To assess if securitization is a successful method of managing NPAs, banks should compare these elements to their unique needs and the state of the market.

9. Case Studies

1) Axis Bank's NPA Securitization in India

One of the top private sector banks in India, Axis Bank, struggled greatly with its non-performing assets (NPAs), especially in its retail lending portfolio. The bank made the decision to securitize some of its NPAs in order to resolve this problem.[54]

The following techniques were used by Axis Bank to securitize NPAs:

- Asset selection: To build a securitization portfolio that appealed to a wide range of investors, the bank carefully picked a pool of NPAs with a variety of characteristics.
- Securitization transaction structure: To accommodate investors with different risk preferences, the securitization transaction was designed to establish numerous tranches. In contrast to junior tranches, which may have given larger returns but entailed greater risk, senior tranches had lower yields but higher credit quality.[55]

[54] The Economic Times. (2017). Axis Bank sells Rs 1,330-crore NPA loans to Edelweiss ARC.

[55] *Axis Bank's Alistair Borthwick on the challenges and opportunities of asset securitisation,* THE ECONOMIC TIMES (2017).

- Investor outreach: Axis Bank carried out a thorough investor outreach programme, supplying prospective investors with comprehensive details regarding the securitized assets, credit upgrades, and recovery expectations.
- Compliance with Laws and Regulations: The bank made sure that all laws and regulations were followed, including those relating to disclosure requirements and compliance with the Reserve Bank of India's securitization rules.[56]

The results of the NPA securitization by Axis Bank were favourable:

The bank was able to unload some of its non-performing assets (NPAs), lowering its exposure to troubled assets and boosting its capital adequacy.[57]

The cash flows for investors in the senior tranches were predictable and they benefited from stable cash flows whilst the potential returns for investors in the junior tranches were larger and more in line with the investors risk preference.[58]

2) Retail Loan Securitization by ICICI Bank

One of the major private sector banks in India, ICICI Bank, experienced issues with NPAs in its portfolio of retail loans, which included personal loans. The bank started a programme for the securitization of retail loans to deal with this problem.

Results and strategies used were:

- Creating a diverse securitization pool required the bank to split its retail loan portfolio based on risk type and asset classes.[59]
- ICICI Bank provided credit enhancements, over-collateralization, and other measures to improve the securitized assets' credit quality.[60]
- Transparency: The bank was always open and forthcoming with investors, giving them comprehensive details about the underlying assets and security arrangement.
- Asset management: To increase investor trust, it was crucial to handle invested funds effectively, including collection and reporting.

The retail credit securitization outcomes for ICICI Bank were favourable:

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[56] *Guidelines on Securitisation of Standard Assets,* RESERVE BANK OF INDIA (2021).
[57] *Axis Bank to sell Rs 2,000-crore NPAs to Edelweiss ARC,* BUSINESS STANDARD (2017).
[58] *Axis Bank recasts 25 accounts worth Rs 13,789 crore,* THE ECONOMIC TIMES (2018).
[59] *ICICI Bank to sell loans of Rs 2,580 crore to asset reconstruction firms,* BUSINESS TODAY (2018).
[60] *Id.*

The bank lessened the load of its NPAs and contributed a sizable amount of money for further lending activity. Invested assets generated stable and steady income for investors, helped along by robust credit expansion. The program's success increased investor trust and cleared the path for more securitization deals by the Bank. These case studies demonstrate how Indian banks, including Axis Bank and ICICI Bank, have effectively used different securitization strategies to improve their capital positions to address NPA challenges, reduce risk exposure, and create investment opportunities that are appealing to various types of investors.

10. Questions Arising Out of RBI Discussion Paper

1) Should Standard Assets be Included in the Securitization of Stressed Assets Framework Or should it just apply to NPAs up to a particular threshold?

From my perspective, it should not be restricted solely to Non-Performing Assets (NPAs). Except for Simple, Transparent, and Comparable (STC) securitization, which explicitly excludes NPAs, this should be determined by the dynamics of the market forces.

2) Which assets should be qualified for the securitization of stressed assets?

The concept behind Minimum Risk Retention (MRR) is to ensure that the originator maintains an ongoing interest in the asset pool, preventing the adoption of an originate-to-sell model that could lead to lower originating and norms for underwriting. However, the originator has already shown continued interest in the pool for Non-Performing Assesses. The goal right now is to remove these assets off the books since they are no longer performing, even after maintaining a level of interest. As a result, putting MRR requirements on these loans may seem unnecessary. However, European Regulations have mandated a 5% MRR for non-performing loans.[61]

3) Resolution Manager under the Framework for Securitization of Stressed Assets

The discussion paper addresses the role of a "resolution manager, "emphasizing its critical importance due to its involvement in the resolution and recovery processes of the underlying exposures and its reporting responsibilities to financial regulators. However, in most cases, the originator is expected to continue serving as the primary servicer, eliminating the immediate need for appointing a separate

[61] Regulation (Eu) 2021/557 Of The European Parliament And Of The Council of 31 March 2021 amending Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation to help the recovery from the COVID-19 crisis.

resolution manager. This does not imply that the originator will no longer be involved in the structure.

Introducing a regulatory requirement for a resolution manager may appear unnecessary, given that the originator typically continues to service the transaction in the majority of cases. If there arises a situation where a resolution manager is deemed necessary, it could naturally develop within the market. If the parties involved choose to engage the services of a "specialized servicer" or a resolution manager, as referred to by the RBI, they should have the freedom to make that choice. However, imposing regulations that mandate an independent servicer may not be required. Therefore, it is advisable not to enforce a separate "resolution manager" requirement, as it does not seem necessary. If the need arises, market forces can organically facilitate the development of such a role.

4) Capital Requirement

A capital structure built on the External Ratings Based Approach (ERBA) is presented in the discussion paper. This framework comprises setting a Risk Weight (RW) floor of 100% and a minimum non-refundable purchase price discount (NRPPD) of 50%. NRPPD is the difference between the outstanding balance of the exposures in the underlying pool and the total consideration obtained by selling securitization notes backed by these underlying exposures to outside investors, as described in the RBI discussion paper. In accordance with Basel regulations, regulated companies may apply a 100% RW to the senior tranche of the NPA securitization where NRPPD is equal to or more than 50%. In order to meet the eligibility requirements under the Special Securitization Assignment Framework, the RBI has proposed a minimum NRPPD of 50%. However, it's worth considering the possibility of allowing a lower NRPPD within the SSAF, but with a higher prescribed RW for NPA pools having an NRPPD below 50%. It is worth noting that the PRA in the UK has opted to maintain the NRPPD at 50%.[62]

5) The Need for Due Diligence

Usually, investors do their own due diligence. The hiring of a resolution manager is regarded unnecessary and not advised, as previously suggested, thus there is no longer a requirement for the resolution manager to exercise due diligence. Investor due diligence should be handled according to the current framework described in the SSA directives.

6) Enhancement Of Credit: Should it be allowed?

[62] *Supra* note 32.

Credit enhancement plays a vital role in structured finance transactions by providing support to the overall structure and offering protection to the senior tranches within that structure up to a specified extent. Consequently, it is reasonable and advisable to permit credit enhancement in NPL securitization as well. This can help mitigate risks and enhance the attractiveness of NPL securitization to investors, contributing to the overall stability and success of such transactions.

7) Conclusion of the Discussion Paper

The discussion paper indeed represents a positive step, especially considering the potential to create a new market for non-performing loans (NPLs), particularly retail and re-performing loans. The implementation of these guidelines could give financial institutions an additional option for managing non-performing assets, especially in light of the possibility that non-performing assets (NPAs) will increase in number and appear on the balance sheets of banks and non-banking financial companies (NBFCs) as a result of the Reserve Bank of India's circular dated November 12, 2021. However, it is crucial for the RBI to address the critical questions raised in the discussion paper before the final guidelines are put into practice. Ensuring that these issues are appropriately tackled will be essential for the success of NPL securitization in India.

11. Future Trends and Regulatory Changes in India

1) India's Recent Regulatory Changes

India has undergone considerable regulatory changes in the banking and securities sectors in recent years to address non-performing assets (NPAs):

a. *The Insolvency and Bankruptcy Code* (IBC), which was implemented in 2016, modified how NPAs are determined by establishing a timeline for insolvency procedures. It allows banks to begin lending once paperwork has been submitted, which expedites the collecting process.[63]

b. *Asset Reconstruction Companies* (ARCs): To improve the role of ARCs in resolving NPAs, the Reserve Bank of India has adopted several methods. These ARCs permit the holding of long-term securities and incorporate widely accepted rules for foreign investment.[64]

c. (*SARFAESI) Act Amendments*: To enable banks and other financial institutions to recover non-performing assets (NPAs)

[63] Insolvency and Bankruptcy Board of India. (n.d.). Insolvency and Bankruptcy Code, 2016.
[64] Reserve Bank of India. (2021). FAQs on Foreign Investment in Asset Reconstruction Companies (ARCs).

without the need for judicial involvement, the SARFAESI Act was amended.[65]

d. *Loan Sales to Securitization businesses*: In order to streamline the securitization of NPAs, the RBI released rules that allow banks to sell loans directly to securitization businesses.

2) Changes in India That Are Expected

There will likely be more changes to the banking and securitization scene in India:

a) *Digitization:* The detection and resolution of NPAs in banking systems will be made more efficient and the incidence of NPAs would be decreased through digitization.

b) *Improved risk assessment*: Banks are expected to use artificial intelligence and sophisticated analytics to do risk assessments that are more accurate and that can identify possible NPAs earlier.

c) 3.*Regulatory Framework*: India can enact new laws that are compliant with global best practises and will bolster the securitization market.

d) *Asset Quality Assessment*: Stress testing and periodic asset quality assessments may become standard procedures to find various NPAs of banks' weak points.

e) *Strengthening the IBC*: In order to improve efficiency and handle any issues that arise during actual implementation, the IBC is expected to go through further improvements.

f) *Enhanced Transparency*: Regulatory authorities may focus on enhancing transparency in the securitization process, including stricter disclosure requirements and standardized reporting.

g) *Green Securitization*: With the increased attention being given to environmental issues, there may be a drive for green securitization, in which NPAs associated with ecologically beneficial projects are securitized to draw in eco-aware investors.

h) *International Alignment*: In order to encourage foreign investment and enable cross-border securitization transactions, India may align its regulatory framework with international norms.

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[65] Reserve Bank of India. (n.d.). Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002.

The legal system in India is changing to resolve the challenges associated with NPAs and provide an ideal environment for securitization. The foundation has been set by recent modifications, but more are expected to come in the form of enhancing current frameworks, incorporating new technology, and following international trends. For the Indian banking industry to achieve financial stability and growth in economy, effective management, and securitization of NPAs would be essential.

12. Conclusion

1) Main Insights and Findings

This research study brought about some important conclusions and insights via an in-depth examination of Non-Performing Assets (NPAs) and securitization within the context of banking law:

Non-performing loans and distressed assets, often known as NPAs, present serious difficulties for banks and can have a considerable impact on the stability and well-being of the financial system. By turning illiquid assets into marketable securities, securitization, a potent financial, enables banks to lower the risks associated with NPAs. Asset identification, special purpose vehicles (SPVs), asset transfers, structuring, securitization, payment waterfalls, investor reporting, and regulatory compliance are all included in the securitization process. Successful collateral requires thorough paperwork and due diligence, including contracts like the Pooling and Servicing Agreement (PSA), Memorandums of Offer, Prospectus, and others. Credit risk, market risk, liquidity risk, operational risk, legal and regulatory risk, and systemic risk are among the risks connected with securities. Asset quality evaluations, regulatory compliance, investor confidence, market sentiment, service complexity, and accounting/reporting requirements are among the difficulties in putting securitization procedures into practise. Extensive case studies from a range of sectors demonstrate how securitization may lower NPAs, boost liquidity, and optimise capital allocation. Risk reduction, increased liquidity, capital efficiency, portfolio diversification, and regulatory compliance are all advantages of securitization. Complexity, expense, reputational risk, investor confidence, and market mood are drawbacks.

2) Recommendations

The following suggestions are made for banks and policymakers based on the results and insights:

a) For Banks:

- Robust Risk Management: Use of robust risk management to precisely gauge NPA quality and project recovery prior to securitization.

- Conduct thorough due diligence to guarantee effective coverage, considering legal, credit, operational, and regulatory risks.
- Transparent communication with investors helps to increase investor confidence while also clearly outlining secured assets and transaction procedures.
- Embrace technology to help in NPA identification, due diligence, and security measures to increase speed and accuracy.
- Action Plan: Keep in mind market circumstances, legislative changes, and investor appetite when using securities as a strategic tool.

b) For Policymakers*:*

- Clarity in regulations: Establish a clear and uniform regulatory framework that encourages safeguards obligations while safeguarding investor interests.
- Increased transparency, reporting, and risk exposure requirements will help investors be protected and the integrity of the market will be upheld.
- Encourage the incorporation of environmental and social governance (ESG) considerations into security procedures to support a sustainable economy.
- Collaboration across borders: Promote the growth of the worldwide market by working together to provide unified regulations for cross-border security transactions.
- Monitoring and evaluating: It is important to continuously assess how well security measures are working to manage NPAs and to evaluate how the regulations should be changed to reflect shifting market conditions.

To sum up, securitization is a potent instrument for banks to manage non-performing assets (NPAs), but its effectiveness depends on cautious risk management, thorough due diligence, and regulatory backing. In order to promote responsible securitization and eventually support financial stability and economic progress, policymakers play a critical role in creating the right environment.

A Concept of Police Encounter in Existing Law and its Socio-Legal Impact: An Analysis of the Present Scenario

Teena Sundarbanshi*

1. Introduction

The world of law and justice is complicated due to various contradictory definitions and perspectives which are delivered by society and jurists as per their changing needs, norms, and culture from time to time. These definitions support various contradictory characteristics which should be present in law at the time.[1] Many times these contradictions in the definitions of law create more complications to understand the law, its object, aim, nature, purpose, ideal output, etc. Like law, a concept of justice is even more difficult to understand because according to circumstances a concept of justice is also subject to certain changes. Law is often thought of as the ultimate expression of justice in society. But, justice is truly more than just the law.[2] This contradiction to understand the law and justice creates a space for a term like an encounter. This space and loopholes have given the reason to the people and authorities to justify the term like encounters and support it accordingly to satisfy their needs.

The definition of ideal law is difficult yet ideal law tried to be defined in various ways. An ideal law should be powerful and independent one. Generally, an ideal law should have all capabilities to deal with each circumstance and necessity which arose in society while establishing the law, order, justice, and peace. The objective of the law is to govern a live association peacefully because the law requires peace in society. The peaceful condition of society can be realized if a balance of interest of each society member is truly guaranteed by law including police officers and criminals. It is the aim and objective of the law to protect an individual, his property, his life and successfully deal with every circumstance which is a barrier to achieving this aim and object of the law.

Every legislature tries to enact an ideal law. No doubt flexibility and necessity are two important points of ideal law. A legislature knows about the importance of necessity, and flexibility hence, in order to make law self-sufficient, the legislature enacted provisions

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[1] Alan V. Johnson, *A Definition and the Concept of Law*, 15 JSTOR 45 (1997)

[2] MARGOT A. HURLBERT (ED.), PURSUING JUSTICE: AN INTRODUCTION TO STUDIES, 50 (Fernwood Publishing 2020)

like an encounter and empower police authority to discharge their duty as per the requirement of their respective post and necessity. The power of an encounter by police is a part of that flexibility of law, privileges, and necessity that has been granted to a police officer to deal with sudden, life-threatening, and harmful circumstances.

2. Origin of Police Encounter

Encounter is extrajudicial killing [3]by police or other governmental authorities for maintenance of law and order in society, protection of own life and other's life, prevention of the sudden attack and prevents the escape of hardcore criminals from the custody of the law. Though an encounter word is not directly mentioned anywhere but still indirectly there is certain substantive and procedural law that is providing a power of an encounter to police officers.

In the Criminal Procedure Code, 1973 provision of arrest is describing the concept of an encounter [4] which is empowering police officers to cause death to an accused of death or imprisonment of life as the last option to prevent his escape. In Indian Penal Code 1860 is prescribed a provision of encounter in a chapter of General Defense for the protection of human beings and their property. In the Indian Penal Code 1973, even the common man can exercise the power of private defense without holding any governmental post to deal with a necessity. In the Indian Penal Code 1860, Circumstances and necessities are important which allow a human being to kill another human being as the last option for protecting his life, others' life, and property. [5] Indian Penal Code 1869 and Criminal Procedure Code 1973 were prepared by the British hence though a provision of encounter is mentioned in this code still encounter word is kept intentionally missing to avoid unnecessary contradiction. "Encounter" word is originated and implemented in India between a period of 1990s and the mid-20th century [6] to deal with the underworld, terrorists, and other famous anti-social elements that were considered as a deep threat to the maintenance of law and order.

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[3] BLACK LAW DICTIONARY 79 (Henry Campbell 1995).

[4] The Criminal Procedure Code 1976, § 46 (3) defined the concept of Police Encounter as: "Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life".

[5] Indian Penal Code 1860, Chapter IV, § 76 to 106 defining the concept of General Exception as: "Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it".

[6]M.P. Nathamel, *The Malady of Fake Encounters*, DECCAN HERLAND, (Oct. 11, 2021) https://www.deccanherald.com/opinion/comment/the-malady-of-fake-encounters-1039363.

3. The Object behind the Police Encounter

An encounter is an unexpected and sudden event. Many times police received information about the presence of hardcore criminals and the chances of their arrest; to do an immediate attack on the offender it is necessary to have all arms and weapons as well as permission to use that arms accordingly. Law is understood about the seriousness of these situations hence allowing a police officer to use all necessary steps which are required for the arrest of offenders or to prevent the escape of criminals. Ideally, an encounter should be an accident that occurred only during arrest and self-defence, otherwise than no police are allowed to kill anyone. Unfortunately, a *Mumbai* police accepted methods of encounter as a part of their day-to-day life to deal with the existence of socially mal-famous criminals who were successfully able to escape from the custody of law due to some existing lacuna in the procedure of laws. However, this method of the encounter was considered useful due to its effect and contribution to establishing peace, law, and order in the society. it is also successfully established fear in the mind of anti-social elements during the period of 19th and mid of 20th centuries.

Though initially a practice of encounter was chosen in good faith as the last option to maintain law order in society [7]but gradually thereafter it becomes a common practice amongst police officers of India. This common practice is known as a "Fake encounter" or "Plan encounter"[8]Many times these encounters were planned to gain some personal benefits or political benefits or to deal with the pressure of the public to arrest an accused within a very short time.[9] There was one era where most of the police encounters were recognized as plan one which spoiled an image of Indian law and order on a national as well as international level. Indian police encounter was known as a weapon of human rights violation. Even Society was under terror due to these encounters.

National Crime Record Bureau of India published data of cases which was registered against police for violation of human right.[10] In this, the percentage of registered accused is higher than acquitted or convicted. In this data out of 100 near above 89 accused against whom a case is registered been killed where an acquitted or convicted

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[7] Jason Burke, *Mumbai's Infamous Police Encounter Squad' Dream Of Comeback*, INDIA NEWS, (Mar. 6, 2011) https://www.theguardian.com/world/2011/mar/06/mumbai-police-encounter-squad-return.

[8] Mrunal, *Rights Issues; Supreme Court Guidelines On Fake Encounters And Under Trail Prisoners*, MRUNAL, (Feb. 2, 2018) https://mrunal.org/2014/10/rights-issue-supreme-court-guidelines-fake-encounters-undertrial.

[9] Phalguni Rao *NHRC Registered 1,782 Fake Encounter Cases Between 2000-2017, Uttar Pradesh Alone Accounts For 44.55%*, INDIA TODAY, (Feb. 2, 2018) https://www.firstpost.com/india/nhrc-registered-1782-fake-encounter-cases-between-2000-2017-uttar-pradesh-alone-accounts-for-44-55-4332125.html.

[10] National Crime Record Bureau, *Crime in India* 3 (2018) https://ncrb.gov.in/sites/default/files/CII%202018%20SNAPSHOTS%20STATES.pdf.

is killed as only1.[11] A ratio of encounters is counted as upon every 89/1. This kind of practice creates terror in the mind of society due to the arbitrary action of the police. Law machinery showed a serious concern due to violence and ignorance of the procedure of law. Judiciary and human rights commission criticized encounter due to serious violation of rule of law, the procedure of law, fundamental rights, and human rights till today national, international media12 and judiciary continue with their point of view.

4. Impact of Encounter on Society and Law Machinery

An encounter leaves a bad impact on society. In fact, any kind of killing or violence leaves a bad impact on society but this time people celebrated this encounter as quick means of justice. There are several reasons behind this encounter. According to people, justice should be quick and instant. As per the present procedure, justice gets delayed and many times people did not get the expected outcome as well. Hence this method of justice is celebrated by the people. Although people had good intention behind their celebration still the Sociologists are worried about this celebration because its leads a society toward violence and acceptance of violence. This celebration had shown a faith of society on violence and shattered faith of people on existing law, procedure, justice which is established under rule of law. It is an accepted fact that every society wants peace and terror-free environment in their surrounding without any effort, risk and involvement in the procedure of law.

It can be stated that an encounter is providing this so-called justice and illusionary safety to these law-abiding citizens. Society considered a weapon of encounter is useful because they never thought to be victimized by this encounter. As per the common people and their perspective they are law-abiding citizens and only criminals died in such encounters. People have a positive perception about encounters due to articles which used to publish in the daily newspaper about mal-famous criminals and their encounters but there are so many encounters which are never published and reported in media because it's not subject to cover stories. Hence people have a good perception for the encounter and they are successfully able to justify it as means of justice. Law should be followed by those who are part of this machinery but practices like encounters deliver a wrong message to society about the use and misuse of law. Encounters result in the acceptance of violence in society. Law machinery is witnessing its effect in the form of mob lynching. Now people do not find any fault in taking the law into their hands.[12] These all behaviours of People push them towards violence

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[11] Ibid.

[12] S.R. Darapuri, *Encounters Lead to Acceptance of Violence in Society by Former Inspector General of Police, Uttar Pradesh,* DHDE (Sep. 7, 2021)

as a believer of the retributive theory [13]of justice. Hence common people started to believe on the encounter as the quick method to do justice and celebrated it accordingly.

5. Impact on Law Machinery

Like society, a law fraternity gets impacted by this human killing. Many times police authorities get impacted by an encounter personally, professionally, and psychologically. As encounter is a procedure which is purely based on violence which is mostly leads to revenge only. In one hand due to the provision of Police encounter a police authorities feel more powerful, more aggressive and protected in the law but on the other hand feel insecure and less comfortable about their safety and safety of their family members. Many times most encounter specialist is caught under charges of corruption, face fake legal action for violation of human rights; they lose their jobs and many times destroy their life during an inquiry of encounter.[14]

An encounter leaves a bad impact on the law as well as the machinery of law. A rule of law is the basis of all laws. [15]In the constitution of India, a rule of law is placed as fundamental of all laws[16] and it must be protected and implemented by all a person's including government officers and police authorities for the benefit of all. Natural justice, human rights are inseparable parts of rule of law. Indian criminal law is based on rule of law and other unique principles that are known as "innocent until proven guilty" [17] and preservation of this principle is the responsibility of the judiciary. India is a democratic country that followed rule of law as well as a principle of reformation theory. India never supports legal or illegal violence directly or indirectly. Even India has not accepted the concept of judicial killing as rule.

Judiciary is responsible to punish an accused on basis of the decided principle of law. Judiciary is duty-bound to preserve the integrity of criminal law but in the encounter, human rights; the principle of natural justice, fundamental rights, and other fundamental of criminal law is brutally violated without assurance of justice or without following due process of law.

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https://www.deccanherald.com/specials/insight/encounters-lead-to-acceptance-of-violence-in-society 759856.html.

[13]John Mayer, *Retributive Justice and Penology,* BRITANNICA (Sep. 12, 2014) https://www.britannica.com/topic/retributive-justice.

[14] *Supra* note 13.

[15] Robbert Stain, *Rule of Law Symposium Rule of Law: What Does It Mean*?, 18 MINNESOTA JOURNAL OF INTERNATIONAL LAW, 1 (2009).

[16] Constitution of India 1950, Article 21 (Right to life and liberty), Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

[17]Griun Brown, *Burden of Proof,* GRGB LAW LLP, https://www.grgblaw.com/wisconsin-trial-lawyers/burden-of-proof-innocent-proven.

6. Guidelines for Police Encounter

India is democratic country which follows the rule of law as well as the principle of reformative theory. India never supported legal or illegal violence in any form. Even in India we never accepted the judicial killing as rule. In the constitution of India, the Rule of Law is placed as basis of all the laws. Natural Justice, Human Rights are inseparable part of it. Indian criminal law is based upon the rule of law and other unique principal. Judiciary is responsible to preserve these principal and connected rights with it. Hence judiciary has delivered the guidelines for the police encounter so that actual rational behind the police encounter can be achieved without any harm.

As encounter is affected the credibility of rule of law hence Hon'ble Supreme Court is worried about an encounter as a method of quick justice without any trial. Encounter is looking like a necessary evil for the safety of police and society from a sudden attack by anti-social elements hence it cannot be completely abolished but it can be bound within a limitation of law and procedure so that misused can be prevented. Hence Hon'ble Supreme Court and NHRC time to time used to deliver a various guidelines to protect the interest of every member of society. Hon'ble Supreme Court delivered guidelines[18] for the encounter to protect the integrity of rule of law. These guidelines cover each and every action which needs to be taken by police as part of encounters like from receiving a tip of crime to the redress of grievances. These guidelines were formed to curb unnecessary use of encounters for professional success or any other influence. Every person who breaks the law or takes the law in his own hand will be subject to investigation and no one is an subject of exception for it including law machinery because in India rule of law is prevail and not a rule by law.

7. Guidelines of National Human Right Commission

In India, a National Human Right Commission is the one who is duty bound to observe the Human rights, its implementation and accountable for its violation. An encounter is considered as a serious violation of human rights hence National Human Rights Commission is very much concerned about the frequent use of encounters by police. To curb this frequent use and fake encounter National Human Rights Commission issue guidelines so that human rights can be preserved. This guideline is formed as a solution to prevent an increasing complaint rate of encounters.[19] This guideline was recently

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[18] PUCL v. State of Maharashtra, (1997) 3 SCC 433.

[19] Drushti, *In Depth: Encounter- Supreme Court Guidelines,* DRISHTI IAS (Dec. 24, 2019), https://www.drishtiias.com/loksabha-rajyasabha-discussions/in-depth-encounter-supreme-court-guidelines.

extended by the National Human Rights Commission.[20] A National Human Rights Commission created Human Rights Manual for law machinery which is responsible for the execution and implementation of the law. As per the observation of these guidelines, it can be stated that encounter is part of law machinery subject to it must be justified, necessary and should be done under a procedure of law for the protection of innocent. These guidelines informed that any procedure prescribed by law is not a tool to provide any undue advantages to the police or criminal but it is a barrier which intentionally created for ultimate assurance of proper justice so that no one can be punished without any proven offenses. These guidelines prevent police as well as criminal to take any kind of undue advantage of the law and its mercy hence any encounter other than these guidelines is a serious concern by the judiciary and Human right commission.

8. Recent Police Encounter and its Impact

Although there is end numbers of guidelines is in existences still, recently a society becomes a witness of two encounters. The first encounter was *Vikas Dubey* who was mal famous history-sheeter come politicians. The *Vikas Dubey* was not new in the criminal world. He was a part of the crime since the nineties. There are sixty-one grievous criminal cases and many murders cases were registered in his name. Many time Police arrested him but due to lack of evidence or witnesses, he got bail, liberty, and freedom to survive in society.[21] His freedom created a terror in the mind of people and makes a mockery of the law. He is killed by police officers in an encounter. The second encounter was the *Hydrabad* rape encounter in which four accused were killed.[22]

These two encounters are completely different in nature due to the background of the accused. As in *Vikas Dubey* encounter *Vikas Dubey* is socially mal famous and socially proven accused but legally not punishable one due to unavailability of witnesses but other hand this four accused who were suspected to be a rapist is not known to anyone. The guilt of these four rapists is remaining a mystery forever. These two encounters point it out towards advantages and disadvantages of the procedure of encounter because in the case of

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[20]National Human Rights Commission, India, *Human Rights Violation-NHRC Guidelines on Policing Chapter-III* 83-91 (2011), https://nhrc.nic.in/sites/default/files/Manual On Human Rights for Police Officers.pdf.

[21] Abhishek Chakraborti, *UP Gangster Vikas Dubey, Killed In Encounter, Faced 61 Cases, 8 For Murder: Police Records* NDTV (July 11, 2020) https://www.ndtv.com/india-news/up-gangster-vikas-dubey-killed-in-encounter-faced-61-cases-8-for-murder-police-records-2260943.

[22] Srinath Vudali, *Hyderabad Encounter: All Four Accused In Telangana Doctor's Rape-Murder Killed*, THE TIMES OF INDIA, (Dec. 6, 2019) https://timesofindia.indiatimes.com/hyderabad-encounter-all-four-accused-in-telangana-doctors-rape-murder-killed/articleshow/72395746.cms?from=mdr.

Vikas Dubey encounter looks like socially justified because somewhere existing available machinery of law were proven to be fail to punish him or curtail his liberty permanently or temporarily. In *Vikas Dubey* case law failed to achieve an main object of law that is security and safety of society due to lack of shreds of evidence or witnesses. On other hand, *Hydrabad* rape case encounter cannot be supported certainly because unavailability of the background of the suspected accused. There is lots of chance of innocent killing by the police under the pressure of the public. The encounter is nothing but the output of certain existing lacunas in law which forced a police to do encounter and compel the public to support it accordingly.

9. Law and Its limitation

Law has its own limitations in the form of basic principles which need to be followed while delivering the justice. Law is an instrument of justice hence a certain set of principles is mandatory for the law to follow in order to deliver a perfect justice or near to perfection. Law has its limitation which is intentionally created for ultimate assurance of proper justice so that no one can be punished without any proven offenses but the way some anti-social elements are taking undue advantage of this limitation of law then gradually this limitation converted into a lacuna [23] . Law often cannot gain community support without the support of other social institutions [24] this lacuna goes to worst.

Many time police arrested an accused for trial and punishment but as per a rule of law, no one should be killed by law without any justified reason. Judiciary wants to assure about the criminality of the accused beyond any reasonable doubt hence while curtailing the liberty of any accused law impose a burden of proof [25] on the prosecution to prove the guilt of the accused. In order to prove the guilt of the accused prosecution require witnesses and pieces of evidence to demand the punishment for the offenders. This burden of proof on the prosecution to prove the guilt of the accused can be considered as a lacuna of law because the law is dependable on society for the witnesses. Society is under the terror of criminals hence no witness come forward to support a law. As result accused get released on the ground of lack of evidence by the judiciary.

In short, though police arrest a criminal after taking all a life-threatening risks still a journey of justice remains incomplete due to lack of evidence and witnesses. This kind of release of accuse

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[23] LORE RUTZ-BURRI, FUNCTIONS AND LIMITATIONS OF LAW- INTRODUCTION TO THE AMERICAN CRIMINAL JUSTICE SYSTEM 25 (Pressbook Publications 1976).

[24] HAZEL KERPER, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 11(West Publishing Co 1976).

[25] Indian Evidence Act 1872, § 101 of chapter VII defines the Burden of Proof as: "When a person is bound to prove the existence of a fact, the burden to provide evidence for the same lies upon him".

empowers an anti-social element to do future offenses without any terror of law and procedure as well as let down duty-bound police officers in the journey of law. This kind of release compels a society to re-think about law and capacity of law to protect them. These incidences of release compel everyone to think about a concept of retributive justice rather than the reformative principle of law. Everyone wants justice and peace as per the procedure established by law but when law fails to deliver justice due to the certain procedure of law then that procedure is considered a serious lacuna in the law. Presently in one hand a law that exists today is completely depends upon society to complete a procedure of justice in form of witnesses and on the other hand society is depending on law for peace and justice in form of punishment to criminals but both are bound by their own limitations and not ready to cooperate with each other. Ideally in order to complete various responsibilities law has to be self sufficient and should not be depend on any other to an achieve an ultimate end of the law that is justice especially in cases of hardcore and socially proven criminals.

Like in case of *Vikas Dubey,* A terror of *Vikas Dubey* was known by law and society very well still his liberty is sufficiently created a terror and helplessness in the mind of people. This liberty is a make a mockery of law in eyes of people. This liberty has given the massage to the people about the helplessness of law to protect them from the socially ill famous, socially proven hardcore criminals. This dependency on witnesses can be considered as a lacuna of law. It is a vicious circle. This vicious circle of dependency provokes a practice-like encounter. This lacuna of law can be formed in way of the diagram.

Society ⇨ Safety & punishment to criminal ⇨ law Justice Machinery ⇨ Witness ⇨ Society

This chain of dependency and lacuna can be traced like this. There is a society that needs peace and safety. The law has the authority to provide that safety and punishment to criminals subject to the availability of witnesses. This witness is available from society only but society is under the terror of this hard-core criminal hence not ready to be a witness. As a result law is not getting any support from society and become an unable to punish criminals. The liberty and unpunished criminals is somewhere proving the incapacity of law to provide a safety to the society. So overall expectation of support from society to deliver justice and punish criminals is a form of lacuna especially in the case of socially mal famous criminals.

The object of punishment is to protect society from mischievous and undesirable elements[26] but law, unfortunately, delaying the main object in name of the procedure. Ideally, justice should not be

[26] K.D. GAUR, TEXT BOOK ON INDIAN PENAL CODE, 150 (Lexis Nexis 2019).

compromised in name of the procedure. This lacuna forces police to do encounter and force the public to cherish an encounter of this socio-legal-mal-famous criminal because according to people if an encounter does not occur then criminals will be free in society without any fear. Law is somewhere fails to create a fear in the mind of criminals though ideal law should create some fear in the mind of criminals because more than law a fear of law is more important.[27]

10. Raising Rate of Crime and Encounter

Though encounter is practiced as a tool to maintain peace in society by police after sacrificing human rights, rule of law, and other procedures of law still an encounter not able to curb a crime.[28] As per data crime is increasing continuously to the state where the encounter rate is high.[29] Overall encounter is not considered as a successful method to curb crime though it creates terror in the mind of people. Here it can be stated that encounter is not a tool for curbing a crime though it is accepted under compulsion of some circumstances.

As per the above discussion, it can be concluded that a rule of law is the only procedure that can grant justice to everyone otherwise than that violence or any form of method near to violence can never able to establish law and peace in society. Here it can be stated that some procedure of law that is beneficial for anti-social elements deserves to be changed as per time and circumstances. In India legislature already took initiative as per changing socio-legal circumstances. There are certain laws are enacted in India[30] in order to punish the offender and remove a lacuna. The legislature needs to create a law, especially for a hardcore and socially mal famous criminal to establish law and peace in society.

11. Conclusion and Suggestions

Encounter is the result of limitation possessed by law, police, judiciary, and society in form of procedure or other reasons mentioned above but whatever reasons it may still encounter is neither substitute for justice nor a justified way to curb a crime because a method of encounter though bring temporary peace and justice in society still it never be able to curb crime permanently

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[27] Dr. H.C. Upadyay *More Than Law, the Fear Of Law Is Important*!, HANS NEWS SERVICES (May 4, 2020) https://www.thehansindia.com/news/national/more-than-law-the-fear-of-law-is-important-620644.

[28] Abid Shah, *Why Do Police Encounter And Its Horrors Fail To Curb Crime?,* NATIONAL HERALD (Dec. 7, 2012)https://www.nationalheraldindia.com/opinion/why-do-police-encounter-and-its-horrors-fail-to-curb-crime.

[29] Dipankar Ghose, *NCRB Data: 7% Rise In Crimes Against Women,* INDIAN EXPRESS (Sep. 30, 2020) https://indianexpress.com/article/india/ncrb-data-7-rise-in-crimes-against-women-6636529/.

[30] The Scheduled Castes and The Scheduled Tribes (Prevention Of Atrocities) Act, 1989 (Act No. 33 of 1989).

because it leads motive of revenge for future offenses. Encounter never leaves a good impact on society as well as on the machinery of law. The machinery of law is duty-bound to follow a rule of law, preserve safety and peace in society as well as preserve a faith of society on the law. A law should be created according to the need of a society which able to protect society and able to protect the faith of people on law machinery.

As per the above analysis, it can conclude that though an encounter looks like a quick method of justice still there is no substitute for justice which is delivered after following a procedure of rule of law. In rule of law, justice is delivered after being assured about the criminality of the accused beyond reasonable doubt but simultaneously it is also true that law should focus on justice rather than any procedure which creates violence, terror, and dissatisfaction in society and unable to deal with necessity because necessity is more important than any law hence ideally law should have the ability to deal with every circumstance. Law should be completely independent and free from any limitation which creates a barrier to curb a crime and criminal and criminality though this is an ideal situation which is difficult to achieve especially in a procedural limitation of law that's a reason encounter look like a necessary evil for protection of society because it creates a fear in the mind of criminals as well as provide safety and power of general defence to police while dealing with criminal still police officer must use a method of encounter as per guidelines of Hon'ble Supreme court and National human right commission in absence of any concrete legislature so that integrity of rule of law, future safety, and maintenance of peace can be maintained in society.

In order to remove this lacuna of law, restoration of faith of people on law machinery following suggestions might prove to be helpful:

1. Self-defence is the main reason for encounters; therefore, the state should provide all efficient equipment to police for their self-defences so that they should not be compelled to kill hardcore criminals under the pressure of life-threatening circumstances.

2. In order to remove the procedural lacunas, Burden of proof should be transfer on the shoulder of hardcore and socially mal famous criminal instead of prosecution.

3. The criminals against whom an end number of cases is registered, Like many murder cases, habitual rape etc then these offenders should not be subject of any mercy or procedural protection of laws.

4. Bail should not be granted to the socio-legal- mal-famous hardcore offenders because these criminals do not deserve the

protection of law. The release of this offenders deliver the scare and unsafely for the society.

5. There must be strict law for the socially mal-famous criminal who is accepted and well recognized infamous criminal in society but in the eyes of law used to be acquitted due to absence of witnesses and evidences.

6. Society needs to change in their attitude. It should have faith on the existing law machinery. It should not create unnecessary pressure on police to arrest the accused because unnecessary pressure most of the time does not bring justice but leads an innocent or less powerful person toward victimization or punishment without any order or procedure of law.

India is the country which is governed by the Rule of Law. Legislature and Law Machinery is bind to protect integrity of the Rule of Law as well as safety and security of the people. Ideally encounter should not be exists in any country specially in those country which is based upon the democratic principal and reformatory theory of punishment, however after analysing the present scenario, existing law, its lacuna and existing socio-legal condition its seems difficult to abolish the encounter completely specially in the absence of legislature which successfully curb deal with the hardcore criminals and their terror in the society. There are socio-legally mal famous and well recognised offenders who are taking the undue advantages of these lacunas. Hence after analysing the present scenario it can be stated that there is a need of necessary amendments in the existing law and procedure which can curb the criminals, their terror so that there should be good alternatives for the police encounter. In absence of such piece of legislature, the police encounter must be investigated in impartial manner to prevent its misuse.

Trademark Protection in Metaverse: An Analysis in Indian Perspective

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1. Introduction

The term "metaverse" has become popular in recent years in the high-tech industry. The well-known social media firm "Facebook" officially changed its name to "Meta" on October 28, 2021, and promised to devote all of its future to the virtual reality industry. As a result, an increasing number of businesses are making investments in or expanding into the "metaverse" sector. Intellectual Property Rights (IPR) protection is gaining importance as one of the most significant commercial assets in the "Metaverse". Daily human engagement with the metaverse for an array of purposes has raised some concerns about the applicability of relevant laws. Through this study, the researcher tries to comprehend how current IP laws apply to IPR infringement in the metaverse.

Metaverse is virtual world where the identity of a human is an avatar created and controlled by them, where they interact with each other in a three-dimensional world that mimics reality. It is a place where there is no distinction between the boundaries of real and virtual world. This is possible through the fusion of virtual reality (VR) and augmented reality (AR).[1] It is basically an extended version of the real world where everything related to real world is converted in virtual world and everything is possible from taking virtual trips through your avatars to becoming a superhero.[2] In short, it is basically a virtual universe that provides experience in digital world that is similar to real life and also provides experience that might not be possible in real world.

2. Historical Development of Metaverse

The term 'metaverse' is not recently carved out, it was first used by Neal Stephenson in 1992 in his novel 'Snow Crash'. It was also

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[1] Shawaiz Nisar, IP PROTECTION IN THE METAVERSE - TRADEMARK - INDIA IP PROTECTION IN THE METAVERSE - TRADEMARK - INDIA (2022), https://www.mondaq.com/india/trademark/1173882/ip-protection-in-the-metaverse (last visited Jan 20, 2023)
[2] IPR CHALLENGES IN THE METAVERSE SURANA SURANA, https://suranaandsurana.com/2022/06/30/ipr-challenges-in-the-metaverse/ (last visited Jan 20, 2023)

discussed in Hollywood movies like The Matrix series, Spy kids, etc. and computer games like Minecraft and Roblox.[3] It has further developed in assets such as Non-Fungible Tokens (NFTs) which is based on blockchain technology. Moreover, companies are using it as a commercial space to advertise their products and services such as avatar clothing, virtual real estate, and virtual restaurants offering digital food. Popular brands such as Nike, Adidas, Louis Vuitton, etc are working to expand their digital footprint in metaverse[4] for instance, the fashion brand 'Balenciaga' launched a collection inspired its models to dress characters of Fortnite where players are permitted to buy and wear the digital replica of the Balenciaga's outfits. Facebook has been renamed to 'Meta' to create its existence in virtual reality business. Other prominent tech companies like Microsoft, gaming companies like NVidia and Roblox are constantly attempting to acquire the real estate in the metaverse as much as they can. The concept of metaverse is at nascent stage and is still evolving which makes it difficult to determine as to what problems and challenges it will face in future.

3. Metaverse and Trade Marks

The IP laws are made with an intent to protect the exclusive rights over trade mark, copyright, patents, industrial designs, and trade secrets. IP laws focus more on intangible aspects than physical aspects. General civil legislations regulate the ownership of physical property, but IP laws regulate the ownership of intangible property. Due to this reason right of inventors, owners, designers, etc. must be respected while dealing in metaverse.

Trade mark laws do protect trade mark either registered or unregistered. If trade mark is used by any person on goods and services to pass the goods or render services without permission of proprietor amounts to infringement or passing off. But in virtual world, trade mark bearing goods are sold (which is not taking place in real world) without authorisation of proprietor amounts infringement is not easy to answer. Thus, it become very important to analyse the Trade mark Act, 1999 to answer such questions.

As per section 2 (zb) of the Trade Marks Act, 1999, 'Trade Mark' is defined as "a mark capable of being represented graphically and which can distinguish the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and-

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[3] FUTURE OF INDIAN IP RIGHTS IN THE METAVERSE LAW.ASIA, https://law.asia/future-india-ip-rights-metaverse (last visited Jan 20, 2023)

[4] TRADEMARK PROTECTION IN THE METAVERSE PERSPECTIVE JD SUPRA, https://www.jdsupra.com/legalnews/trademark-protection-in-the-metaverse-9430347/ (last visited Jan 20, 2023)

(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and

(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark."

In layman's language, it a distinguishing mark or group of marks that aid consumers in determining the origin of a goods or service.

4. Digital Marks under the Definition of Mark

All the products and services are of certain brand which have a specific trade mark to identify and distinguish the goods and service. As per section 2 (1)(m) 'mark' includes "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof". In other words, a mark is anything that facilitates the identification of the good or service. The use of a mark shall be construed as "a reference to the use of printed or other visual representation of the mark."[5] The visual representation here means that any graphical presentation which can be seen. Any mark which can be graphically represented will be considered as mark for the purpose of trade mark act.

'Graphical representation' means "the representation of a trade mark for goods or services represented or capable of being represented in paper form and includes representation in digitised form."[6]

A plain reading of above sections makes it clear that a trade mark is a mark being used in printed or visual representation form which also includes a mark represented in digital form. Therefore, it can be asserted that a mark includes a digital mark which can be used either in real world or in digital world say metaverse and it is a subject matter of being registered and protected under the trade mark act.

[5] The Trade Marks Act, 1999, § 2(2)(b), No. 47, Act of Parliament, 1999 (India).
[6] The Trade Marks Rules, 2017, Rule 2(k) G.S.R 879 of 2017 (India).

5. Use of Trade Mark in Metaverse

Metaverse is the combination of both virtual and real world which is used by not just people but is also a platform for brands to expand their business and engage with their existing customers and create some new ones. In metaverse products or services which are procured are of certain brands either real or fictional, which are advertised for the purpose of identification and trade of its digital merchandise. Various brands are beginning to join the metaverse by applying for trade mark registration of their digital creation and assets. They are expanding their digital footprints for instance; McDonald's has filed trade mark for virtual restaurants offering home delivery. However, development of metaverse may raise new legal issues in the field of trade mark infringement and registration, as metaverse is a virtual world which has no territorial limit on the contrary trade mark has territorial jurisdiction and are regulated only by legislations of India. New and advanced legislations and new ways of proactive trade mark registrations system for all the virtual products and services are required to protect the infringement. Moreover, it is unclear as how trade marks will be protected in the metaverse.

6. Registration of Digital Marks for the Purpose of Metaverse

Trade mark protects the identity and reputation of a company as a trade mark owner has the exclusive right to prevent others from using such registered mark. Registration of trade mark provides the right to sue for infringement of trade mark. Though the registration is not mandatory, but it should be registered to prevent unauthorised use of brand's identity. The good thing is that the law protects trade mark not only in real world but also in metaverse. Also, since, trade mark has jurisdictional application therefore it must be registered in all the jurisdictions to prevent infringement.

Now the question is whether digital marks also entitle to get registered?

Digital marks are supposed to be registered to avail the remedy of infringement and to distinguish between registered and unregistered marks. Brands who have already registered their trade marks in real world need to get it registered for the metaverse as well because some products and services may be different as they are in digital form and for those registration is done in different category. However, they will be a confusion regarding the process of registering the digital marks and under what category.

"For securing trade mark registration of virtual goods and services a digital specification that is in line with the guidelines under

Nice Classification of goods and services should be followed. Some possible classes that may cover digital goods and services are:

- Downloadable virtual goods, namely in Class 9
- Retail store services featuring virtual goods in Class 35
- Providing non-downloadable virtual goods in virtual environments and social networking sites for entertainment purposes in Class 41
- Computer services, namely, creating an on-line virtual environment for the selling and purchasing of digital currency, virtual currency, cryptocurrency, digital and blockchain assets, digitized assets, digital tokens, crypto tokens, and utility tokens in Class 42"[7]

It can be deemed that a digital mark is capable of being registered and the owner will then have all the remedies in case of infringement which a trade mark owner has in real world. Prominent brands such as Nike, Adidas, Samsung, Louis Vuitton, etc have applied for trade mark for virtual goods and services in classes 9,35 and 41.

7. Infringement of Trade Mark in Metaverse

The assertion that the existing laws and regulations on India related to trade mark protection does not apply in the metaverse is incorrect. However, it is still unclear that whether trade mark infringement is possible in metaverse because as of now there is no case related to trade mark infringement in metaverse in India. It is difficult to determine what goods and services are protected in metaverse because it is not necessary that the goods in real world have same characteristic in metaverse. For this reason, it will be up to the officers and courts to determine whether there is a degree of similarity between virtual and physical goods as well as whether consumers will assume that both of these types of goods—which are branded with the same (or similar) marks—had the same commercial origin. In metaverse trade marks are mostly used in form of advertising. A person is allowed to use a trade mark if he is authorised by the trade mark owner or if he has attained license to use such mark. In any other case the use of trade mark will constitute as infringement. Section 29 of trade mark act has very wide ambit and include infringement of trade marks in metaverse.

8. Infringement of Registered Trade Mark

Under this head, the paper only deals with the concerns when any third party uses a registered trade mark in metaverse without

[7] TRADEMARK PROTECTION IN THE METAVERSE PERSPECTIVE JD SUPRA, https://www.jdsupra.com/legalnews/trademark-protection-in-the-metaverse-9430347/ (last visited Jan 20, 2023)

permission or licence of the proprietor. Before discussing the infringement issue directly, the paper will focus on graphical representation of a mark and its coverage under different relevant provisions of trade mark law in India.

According to section 2(1) (zb)[8], first and the most important condition of a trade mark is that "a mark must be capable of represented graphically". The term graphical representation is cleared by the Rule 2(1) (ii)[9] that "graphical representation means the representation of a trade mark for goods or services represented or capable of being represented in paper form and includes representation in digitised form"[10]. By joint reading the definitions of trade mark and graphical representation, this can be concluded that graphical representation of a mark includes both tangible and digital forms. Thus, if any person uses a trade mark in digital form, it is treated as graphical representation and fulfils the first and the most important essential of graphical representation.

Now the next question that comes to our mind that if it comes within the ambit of graphical representation, the use of mark should be to differentiate the goods and services of one person to another person. Here important point is relating the goods passed or services rendered by one person to another person. In metaverse, goods are not actually passed, or services are not rendered to another person in real world. This is to be analysed that the goods sold/passed, or services rendered in virtual world would come within the ambit of trade mark law in India. In this furtherance, the definition of goods is to be seen. According to the Trade Marks Act, 1999, goods[11] means "anything which is the subject of trade or manufacture". It connotes that goods are sold (bearing trade mark) in the real world while doing trade or manufacture. But anything, bearing an existing trade mark, subject to sale in metaverse is at different footing because such sale is not taking place in real world rather virtual world. No goods are passed from one person to another person. For example, a user buys any outfits, bearing a trade mark, for its avatar. This outfit is sold to user in metaverse, and user can use it till he is the user of metaverse or part of metaverse. The moment he quits the metaverse, he will loss all such buy goods because he did not receive or got the things really.

Now the next question that comes to our mind is that if such things are not falling within the ambit of goods/services, how such use of trade mark of another by third party in metaverse can be treated as infringement of trade mark or passing off. For this purpose, we must see the meaning of trade mark infringement.

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[8] The Trade Marks Act, 1999, No. 47, Act of Parliament , 1999 (India).
[9] The Trade Marks Rules, 2017, G.S.R 879 of 2017 (India).
[10] *Id.*
[11] The Trade Marks Act, 1999,§ Section 2(1) (j), No. 47, Act of Parliament , 1999 (India).

Section 29 of the Act says that:

"Infringement of registered trade marks.-

(1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses during trade, a mark which because of-

(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

(3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.

(4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses during trade, a mark which—

(a) is identical with or like the registered trade mark; and

(b) is used in relation to goods or services which are not like those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the

name, of his business concern dealing in goods or services in respect of which the trade mark is registered.

(6) For the purposes of this section, a person uses a registered mark, if he-

(a) affixes it to goods or the packaging thereof.

(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark.

(c) imports or exports goods under the mark; or

(d) uses the registered trade mark on business papers or in advertising.

(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or **for advertising goods or services**, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly."

If we read the highlighted parts of section 29 of the Act, we easily find that use (without permission or licence) of trade mark of any proprietor by third party in metaverse will lead trade mark infringement. For example, if a person uses a registered mark on business papers or in advertisement, if use of mark is against the reputation of the trade mark of proprietor and even visual representation of trade mark by third party for his profit is sufficient to constitute trade mark infringement.

9. Infringement of Unregistered Trade Marks

Section 29 of the Trade Marks Act does not cover infringement of unregistered trade marks. It is well settled that for registered trade marks, the remedy of lawsuit is available but not for unregistered trade marks. For such marks, the remedy of passing off is available. To avail the remedy of passing off certain factors must be taken into consideration as laid down in case *Cadillac healthcare ltd. V. Cadillac pharma*[12] which are as follows:

- "To check the nature of the marks which includes word marks, label marks and composite marks.
- To check the degree of similarity between such marks which include ideological and phonetic similarity.
- To check the similarity of nature, performance and character of the goods of both traders involved.
- To identify the class of consumers who might buy the goods based on the marks they require, their intelligence, education and the degree of care they might employ in buying or consuming such goods.
- To check the nature of the goods for which they are used as trade marks.
- To identify the mode of purchase when buying such goods.
- Any other such related circumstances which may be relevant in the matter of dissimilarity between such competitive marks."

Now the question is that whether remedy of passing off is available for digital goods and services?

In metaverse there is no actual or physical transfer of goods so the remedy of passing off is not available in infringement of unregistered goods in metaverse. On the other hand, services are provided in digital form as well, so the transfer of service in metaverse is similar to transfer in real world. Therefore, the remedy of passing off is available in case of infringement of unregistered services in metaverse.

10. Problem of Limited Territorial Application

An action for infringement of trade mark in metaverse can be brought but territorial jurisdiction in metaverse is still a problem in trade mark registration. To prevent infringement, it needs to be registered within every nation. But still it is unclear as to what extent

[12] Cadillac healthcare ltd v. Cadillac pharma (2001) (2) PTC 541 SC.

trade marks will be protected from infringement in virtual world because it has no territorial boundaries. Issues such as identification of infringer and application of IPR laws will still be there.

Some metaverses contain governing rules that users must accept before using the metaverse. In addition, there are guidelines for conflicts involving issues in the metaverse. These regulations must be analysed considering how different jurisdictions have regarded the development of public international law in respect to resolving disputes.

It's interesting to note that courts in India have on occasion used the "long-arm jurisdiction" test established by the U.S. Supreme Court in the "International Shoe v. Washington case" to settle issues concerning computer networks. For instance, the court evaluated the definition of a computer network to decide whether Delhi courts had the authority to issue a global injunction in "Swami Ramdev & Anr. v. Facebook & Ors."[13]

Further, in cases where the issue is connected to in rem rights of parties, Indian courts are also taking arbitration into consideration as a potential means of settling disputes. The lack of clarity in applying the laws from other jurisdictions may raise serious concerns when conflicts pertaining to the products having the application of laws from other jurisdictions may raise severe concerns when the conflicts pertaining to the products that are made available and used in the metaverse, even though observations in such circumstances may serve as the primary guiding principle to resolve disputes between parties.

As mentioned above, traditional trade mark law principles have been used by courts to resolve issues in the metaverse. Yet, several aspects of trade mark law require reconsideration. Licensing is one of these areas. It could be controversial to create a goods or services in the metaverse, which would be based on a license obtained in the real world. Can a licensee who has previously been given permission to produce and market ready-made clothing in the real world utilise that permission to sell the same clothing in the metaverse?

11. Relevant Judicial Decisions

Metaverse is still a new and developing concept which is the reason why there is no abundance of decided cases related to trade mark infringement in metaverse. There are cases of trade mark infringement in metaverse across countries but there is no such case in India yet.

[13] Swami Ramdev & Anr v. Facebook & Ors (2019) CS(OS)27/2019.

1) *Minsky* v. *Linden Research*[14]

In this case, the plaintiff opened his art gallery in the virtual reality simulation game Second Life under the name "SLART." A user-created avatar in the well-known game was notghing but utilizing SLART GARDEN as its virtual art gallery when the plaintiff registered the mark SLART with the "United States Patent and Trade mark Office (USPTO)". The lawsuit was ultimately settled; therefore, the court never reached a conclusion regarding its merits.

Taser International v Linden Research[15] dealt with the replication of Taser-branded high-voltage stun pistols in Second Life. However, the suit was ultimately withdrawn by the plaintiff.

***2) ESS Entertainment 2000* v. *Rock Star Videos*[16]**

The Court has determined in this case that the "fictitious depiction of the real-life strip club trade mark logo within GTA, one of the first metaverses, is not the trade mark infringement as it is an expression of creative freedom allowed by the first amendment to the United States Constitution". As a result, determining the exact form of use and the intention behind the use is critical.

In some circumstances, however, the unauthorised use of trade marks in the Metaverse is strongly discussed. The key area of contention was nothing but the "nature of unauthorised trade mark usage, as to whether it is minor, incapable of causing public confusion, or not intended to generate wealth".

3) *AM General vs. Activision Blizzard*[17]

The fact of this case was very simple. AM General, the Humvee truck's maker sued Activision Blizzard for trade mark infringement because Activision used the truck in its Call of Duty video game. The request of Activision Blizzard for summary judgement under the First Amendment was upheld by the Court in this case, which stated that "defendant's use of Humvees in Call of Duty games has artistic relevance" and that "featuring actual vehicles used by military operations around the world in video games about simulated modern warfare surely evokes a sense of realism and lifelikeness." It, therefore, fulfils the requirements of the Rogers test. Roger's test is found in case of Rogers v. Grimaldi[18] where the court laid down two criteria to determine whether the prior permission is required to use a trade mark:

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[14] Minsky v. Linden Research Case No. 1:08-cv-819-LEK-DRH.
[15] Taser International v. Linden Research (2009) 2:2009cv00811.
[16] ESS Entertainment 2000 v. Rock Star Videos 547 F.3d 1095 (9th Cir. 2008).
[17] AM General v. Activision Blizzard No. 1:2017cv08644.
[18] Rogers v. Grimaldi 875 F.2d 994 (2d Cir. 1989)

(a) the use of trade mark is artistically related to the defendant's work; and

(b) such use is explicitly misleading.[19]

4) Hermes International v. Mason Rothchild[20]

In this case Hermes was successful in suing artist Mason Rothchild for trade mark infringement after he distributed "Meta Birkin" NFTs that closely resembled the renowned Hermes Birkin handbag. This case created a precedent for the enforcement of trade mark rights in the digital world.

5) Nike Inc. v. StockX LLC[21]

In this case Nike, a well-known manufacturer of athletic gear, filed a lawsuit against StockX, claiming that StockX was illegally producing, promoting, and selling NFTs with Nike's trade marked logo on them. Nike asserts that StockX is taking advantage of its goodwill and deceiving customers by charging exorbitant rates. Nike asserts that this is preventing it from entering the digital market successfully.

6) *Tata Sons Limited* v. *Greenpeace International*[22]

The Court decided that the "unauthorised use of the petitioner's trade mark in a game made by the defendant to promote environmental causes and criticize the defendant was only a parody, and hence would not constitute trade mark infringement".

7) Roblox Corporation et. al., v. WowWee Grp. Ltd. et. al.[23]

In this case the online gaming community Roblox claims that WowWee toy manufacturers violated their trade mark by recreating the popular Roblox avatars as a range of toys and misleading customers into thinking that Roblox approved those products.

12. Conclusion and Suggestions

Now we may conclude that the use of mark either in printed form or other form including virtual form is treated as use of mark. Now the moot question is that can a third party be allowed to use the existing trade mark without the permission or licence of proprietor?

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[19] THE METAVERSE, NFTS AND IP RIGHTS: TO REGULATE OR NOT TO REGULATE? WIPO, https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.html (last visited Jan 20, 2023)

[20] Hermes International v. Mason Rothchild 22-cv-384 (JSR).

[21] Nike Inc. v. Stockx LLC Civil Action 1:22-cv-00983-VEC.

[22] Tata Sons Limited v. Greenpeace International 2011 SCC online Del 466

[23] Roblox Corporation et. Al., v. Wowwee Grp. Ltd. Et. Al 22-cv-04476-SI

According to section 2(b) use of mark also includes virtual use thus this can be said that without the permission or licence of proprietor, mark cannot be used by third party even in virtual form. But the answer is not so simple here because any mark or trade mark is used by the proprietor to make his goods and services distinguished from others or to avoid confusion, deception etc. in relation those goods and services which are transacted in real world. But in metaverse, actual transaction of goods and services are not taking place in real world rather in virtual world. In virtual world by the help of NFT (non-fungible tokens), avatar of any person buys the goods or avails services in virtual world. Here, no actual goods and services are taking place rather it is used by avatar through the user. But if we read carefully section 29 of the Act, 1999, we can easily conclude that not in all cases but in some situation use of registered trade mark by third party without permission or licence may be as trade mark infringement in India. No doubt, third party by using already exiting trade mark of others in metaverse will make money due to increase of its users of metaverse. This is difficult to say that such use of trade mark will result infringement of trade mark or passing off because the third party is not carrying any business in the name of trade mark of others or third party is not actually passing off any goods or services in the name of others. But, here, third party is making money by using such trade mark thus it may result under the category of undue enrichment rather than infringement of trade mark or passing off. From the above discussion and close scrutiny of the various sections of the Trade mark Act,1999 (like sections 2 (1)(zb), 2 (1) (j), 2 (b), 27, 29), it is clear that the Act, 1999 is adequate to meet the challenges put by the use of existing trade mark of proprietor by someone in metaverse. Still there are some issues which must be addressed by the express provisions of the trade mark law thus some changes in law is require. There are few suggestions for amendments which are as following-

1. There should be provisions for use the trade mark of the proprietor without his authorisation in metaverse by third party.
2. If any person uses the trade mark in metaverse without authorization of proprietor and makes money out of that, he has to share profit with proprietor.
3. There should be express provisions for registration of trade mark to be used in metaverse that cannot be used in real world or visa-versa.
4. A trade mark to be used in metaverse should not be deceptive, identical, similar etc. to a trade mark to be used in real world.
5. Express categorisation of remedy should be provided if any person uses the trade mark of the proprietor without his authorisation in metaverse if it does not amounts to infringement or passing off.

Political Empowerment of Tribal Women in Odisha: A Study on their Representation, Role Perception, Participation and Performance in Panchayats

Avinash Samal*

1. Introduction:

The issue of women in development which began crystallizing in 1975 – the International Women's Year – has now reached a level, when it is no longer possible for national governments not to include women as direct participants in the process of development. Following the United Nations' declaration of *Women's Development Decade (1975-85)*, the media as well as various forums have been highlighting women's issues, particularly those relating to greater equity for women and their role in development. Women's relationship with development being very complex and problematic, while the issues concerning women and their role in the development process have been increasingly examined over the years, the ways of addressing these issues have varied as the understanding of women's position in development, and of gender roles themselves, have grown. Whereas the problems faced by women of different strata have been highlighted repeatedly, their prospect has not received the same attention. Further, when it comes to tribal women, hardly anything seems to have been done to reduce the element of drudgery in their lives.

It is a global fact that tribal women are the real protectors of biological diversity. These women, on whose labouring shoulders the entire society in the tribal pockets seems to rest, get little returns and no recognition. Despite their contribution to the family and the nation, hardly anything seems to have been done to deal with their problems. Land alienation, displacement, lack of opportunity for employment, acute poverty, illiteracy, underdevelopment, misappropriation of wages and the product of labour, sexual abuse and lack of political representation are the hallmarks of life in most of the tribal communities. The very hierarchical values that render such communities at the bottom rung of the society render women the worst sufferers within these communities.[1]

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[1] Achyut Das and Vindhya Das, *Development and Tribal Women*, 28 ECONOMIC AND POLITICAL WEEKLY 4 (1992).

2. Status and Problems of Tribal Women

The status of women is described in terms of their position in the social, economic, political, educational and cultural field as well as the roles performed by them within the family, the community and the society. The tribal women in Odisha often work harder than men and they constitute the main source of support for their families. In fact, they play an important role in their household economy and the entire family economy and management depends on them. Starting with the process of shifting cultivation, the contribution of tribal women has been indispensable in the field of agriculture and other allied activities. In addition to performing reproductive roles and domestic duties such as collecting forest produce like fuel, fodder and water etc., tribal women participate in most of the economic and social institutions, contributing immensely to their household economy. The important roles they play in social, economic and cultural life, not only suggests a fairly higher status of tribal women but also the gender equality prevalent among the sexes in most of the tribal communities in Odisha.

To romanticize the position of tribal women in traditional tribal societies is a common pastime, even among the NGOs and activists who work in tribal areas. It is an easy enough pit to fall into. Tribal women certainly do enjoy far more freedom and independence than their counterparts in the mainstream Indian society. Compared to the Hindu, Muslim or Christian societies, the tribal way of life seems to provide a more equal existence and a fair status to women. But a correct assessment of the status of tribal women cannot be made without taking into account the problems they face. Hence, while examining the position of tribal women, it needs to be done through a close understanding of their social and economic problems.

Mostly, the tribals live in far-flung areas of remote forests and inaccessible hill tracts. The restriction on their rights to have access to the forests has caused much pressure on tribal women to walk long distances for bringing fuel wood, fodder, fruits, medicines and other forest produce.[2] Besides, it is a widely known fact that tribal women contribute substantially to their family's economy, which is vital for subsistence. Unlike their counterparts in the mainstream Indian society, tribal women work hard to supplement the family income. However, the shrinkage of traditional forest-based employment has forced many tribal women to work as landless labourers.

Despite their hard work tribals are leading a poverty-stricken life. In this, women are the worst sufferers. Poverty hits them the hardest. The health of tribal women is extremely poor. Malnourishment and anaemia are the common health problems for a tribal woman.

[2] *Id.*

Generally, pregnancy spells the beginning of the end for her. A vivacious, laughing and carefree girl gets completely transformed almost overnight by the time her child is born. She begins to look haggard after the first child. And after two or three, she ages rapidly. This probably is an important factor in the ugly process of her being abandoned by her husband.[3] Further, lack of medical facilities leads to a higher incidence of infant and maternal mortality among the tribes. Though tribal women are hard working and are engaged, very often, in strenuous works like agriculture, construction and mines as daily-wage labourers, not many attempts have been made to set-up crèches to care for their children.

On the social front, men deserting their wives for younger women are seen very often in most of the tribal communities. Sometimes, women (wives) do desert their husbands because of alcohol addiction and excessive violence. The menace of alcohol is a major problem for the tribal women who fall victim to the oppression of their drunkard husbands almost every night. It reaches its peak on Saturday nights, when men get their wages. Some women, who are otherwise strong, tolerate the men's drunkenness and others, who cannot, desert their husbands. In either case, whether husbands desert their wives or wives desert their husbands, women are the worst sufferers.

Externally, the women have also been facing the worst onslaught by the non-tribals. The sexual freedom within the tribal society is seen by the non-tribal outsiders as an opportunity for cheap fun. In most of the tribal villages, one would find many young tribal women becoming unwed mothers, the fathers being non-tribal customers.[4] One can find cases of tribal girls being kept as servants who have been forcibly sterilized. There are also examples of outsider money lenders marrying tribal girls to facilitate the purchase of tribal land.[5] Stories of non-tribal social workers exploiting tribal women sexually are also not uncommon.

On the other hand, tribal societies seem to care little or nothing about protecting their girls or women. A woman has no entitlements. On being widowed she is at the mercy of her sons to whom the land passes and in the absence of sons, the land is taken up by her brothers-in-law. Worse still in the case of divorce, which is not uncommon, the woman is just sent back to her parents without any belonging. She does not even have any right over her children.[6]

Even otherwise, due to land alienation and displacement which are caused by the setting up of large dams and projects, women are

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[3] Mari Thekkekara, *Tribal Women: The Trauma of Transition,* 43 SOCIAL ACTION 23- 32 (1993).
[4] *supra* note 1.
[5] *supra* note 1.
[6] *Id.*

affected more than their male counterparts. The personal experience of the author during his filed visit to the drought affected Kalahandi and Rayagada districts of Odisha shows that over the years, tribal women have virtually been torn out of their natural environment, making them subject to day-to-day exploitation by the people from within and without.

3. Empowering the Tribal Women

Empowerment of Women is currently a much talked about concept in the discourse of development. During the 1950s and the 1960s, under the welfare approach, women were included in programmes for vulnerable groups. They were either passive recipients or a part of 'relief aid'. They were a delivery channel for welfare and their role in producing wealth was ignored. But subsequently, in most of the gender studies[7] and feminist movements which seek to lead women out of the impasse, development is defined in terms of personal empowerment of women in both private and public space. Attempts are being made to energize women, enrich their knowledge and equip them for empowerment. What is this empowerment then? What are its parameters?

The concept of empowerment is of recent origin and it arose mainly from the writings and grassroots experiences of the people involved in the development of the so-called third world countries. It is an approach (quite different from the mainstream models of economic growth as propounded in neoclassical and Keynesian doctrines), which aims at providing information, awareness, education and other productive assets to the poor and the people without a voice to work for their own development and towards bringing a change in the existing imbalances in power relations. As an approach to development, empowerment places emphasis on autonomy in the decision-making of locally organized communities, their economic self-reliance, participatory democracy and experimental social learning.

John Friedmann (1992) defines empowerment as the politics of an alternative development with its claims to inclusive democracy, appropriate economic growth, gender equality and intergenerational equity. He argues that people's empowerment – and for that matter their collective self-empowerment – lies at the heart of the practice of an alternative development and is based on the foundations of 'human rights', 'citizen rights' and 'human flourishing'. Friedmann observes that every household in pursuit of their life and livelihood

[7] SEN, GITA AND C. GROWN, DEVELOPMENT CRISIS AND ALTERNATIVE VISIONS: THIRD WORLD WOMEN'S PERSPECTIVES, (Monthly review Press, New York 1987); Moser Caroline, *Gender planning in the Third World: meeting practical and strategic gender needs,* 17(11) WORLD DEVELOPMENT 1799-825 (1989).

dispose over three kinds of power, i.e. social, political and psychological.

Social power is concerned with access to certain 'bases' of household production such as information, knowledge and skills, participation in social organizations and financial resources.

Political power concerns the access of individual household members to the process by which decisions, particularly those that affect their own future are made. Political power is thus not only the power to vote, it is as well the power of voice and of collective action.

Psychological power refers to an individual's sense of potencies which is demonstrated in self-confident behaviour. Though psychological empowerment is often seen as a result of successful action in the social or political domains, an increased sense of potency will have a recursive, positive effect on a household's continuing struggle to increase its effective political and social power.

Thus, empowerment includes the empowerment of households and their individual members in all three senses. If poverty is a condition of relative disempowerment with respect to a household's access to specified bases of social power, then a key to overcoming the mass poverty is the social and political empowerment of the poor.[8] The long-term objective of social and political empowerment is to rebalance the power structure in a society by making state action more accountable, strengthening the powers of civil society in the management of its own affairs and making corporate business more socially responsible.

Speaking on empowerment,[9] referred to 'critical dialogue' as a process of 'situated pedagogy' – a collaborative discourse and reciprocity, in which thought, action and reflection are combined in informed, enlightened and committed action to dismantle and counter the hegemonic structures that support oppression. All it means is an increased awareness and accessibility to educational and developmental resources including literacy and information as a means of empowerment.

Understood in the above perspective, empowerment of tribal women would mean giving them the power (social, economic and political), which will enable them to have a decisive voice in the matter of economic affairs of the family, organize and represent themselves in self-governmental institutions and other forums, participate in the collective process of decision-making and become

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[8] FRIEDMANN, JOHN, EMPOWERMENT: THE POLITICS OF ALTERNATIVE DEVELOPMENT (Oxford:Blackwell 1992).

[9] SHOR AND O. FRIERE, A PEDAGOGY FOR LIBERATION, SOUTH HADLEY MASSACHUSETTS (Bergin & Garvey Publishers 1987).

active agents in the process of their own development and of the society. Thus the parameters of empowerment may be as follows:

- Providing them with the wherewithal for economic independence;
- Building a positive self-image and self-confidence among women through education and awareness programmes;
- Developing in them the ability to think critically;
- Building group cohesion and fostering equal participation and decision-making, and
- Encouraging group action in bringing about a change in the society.

Instead of the 'top-down' and 'target-oriented' approach of most of the government-sponsored development programmes which rarely meet the demands of the marginalized and needy women, a 'bottom up' participatory approach is needed where the priorities and commitment to the cause of women takes maximum precedence. Besides, women must be made conscious of their rights and responsibilities by imparting to them necessary education, developing their skills and competence and giving them political power to take decisions on their own along with economic self-sufficiency.

In this context that the political empowerment of tribals in general and tribal women in particular through the 73rd Constitution Amendment Act 1992 and the Panchayats Extension to Scheduled Areas Act 1996 assumes importance. An attempt has therefore been made in the following sections to discuss the representation of tribals and tribal women by examining the provisions of the above two Acts.

4. Panchayats in the Tribal Areas

With an aim to strengthen the democratic institutions at the grassroots level and make them vibrant, the Government of India, in 1992, enacted the Constitution 73rd and 74th Amendment Acts to empower the people for effective participation in local governance. The Constitution 73rd and 74th Amendment inserted Part IX (Article 243 to 243ZG) in the Constitution to ensure a Panchayati Raj system with certain revolutionary and progressive measures. Making periodic and compulsory elections to the local Panchayati Raj bodies a constitutional obligation of the state, the constitutional amendment brought in some important measures like reservations for Scheduled Castes, Scheduled Tribes, Other Backward Classes and women, and many other radical provisions to ensure more decentralization and peoples' participation in local governance and development process.

Making reservation for women belonging to Scheduled Castes and Scheduled Tribes in the Panchayats at every level, the Act provides that the number of seats to be reserved for scheduled tribes out of the total number of seats to be filled in by direct election will be determined in proportion to their numerical strength in the total population of a Panchayat. Article 243D (2) specifies that out of the seats so reserved, one-third of the seats will be reserved for the women belonging to Scheduled Castes and Scheduled Tribes. Further, in clause (4) of Article 243D, the Act provides that the office of the Chairperson in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes/Scheduled Tribes and Women in such a manner as the legislature of a state may, by law, provide.

Excluding the operation of Part IX of the Constitution to the fifth schedule areas, the Parliament had withdrawn the legislative power of the state legislatures and the special powers conferred on the governors to make regulations for the scheduled areas on the Panchayati Raj set-up. Taking into consideration the special conditions that exist in the scheduled areas, the parliament reserved to itself the power to make separate legislation with necessary modifications for the scheduled areas.

5. Panchayats Extension to Scheduled Areas (PESA) Act 1996

After a long debate and discussion on the Dillip Singh Bhuria Committee recommendations, the Parliament, in December 1996, passed the Panchayats Extension to Scheduled Areas (PESA) Act 1996. Providing panchayats for the scheduled areas with a difference, the Act states that the tribal community of a scheduled area as a whole will be a "coherent and united working organization" in the form of a 'Gram Sabha'. The PESA Act 1996 has made it mandatory for the States having scheduled areas to make specific provisions for giving wide-ranging powers to the tribals on matters relating to decision-making and the development of their community. Technically, when the Act refers to extending the provisions of Part IX of the Constitution to the fifth schedule areas; politically, it gives radical governance powers to the tribal community and recognizes its traditional community rights over local natural resources. It not only accepts the validity of "customary law, social and religious practices, and traditional management practices of community resources", but also directs the state governments not to make any law which is inconsistent with these. Accepting a clear-cut role for the community, it gives wide-ranging powers to *Gram Sabhas*, which had hitherto been denied to them by the lawmakers of the country.

Consequent upon the enactment of the PESA Act 1996, while some states enacted laws in conformity with the central Act, giving wide-ranging powers to the people in general, and the gram sabhas in

particular, some of the states have come out with laws that have diluted the very essence of the Act. Specific mention must be made of the State of Orissa, which has a substantial percentage of tribal population with scheduled areas covering around 44.70 per cent of the total land area of the state. In conformity with the Panchayats Extension to the Scheduled Areas Act 1996, Orissa extended the Panchayats to the scheduled areas by enacting the Orissa Gram Panchayat (Amendment) Act 1997, Orissa Panchayat Samiti (Amendment) Act 1997, and Orissa Zilla Parishad (Amendment) Act 1997. Though the latest Panchayati Raj Acts have resulted in the representation of a fairly large number of scheduled tribes, as the experience suggests, the performance of Panchayati Raj Institutions (PRIs) in the scheduled areas of tribal concentration have not been very encouraging due to lack of effective and meaningful participation of tribals.

It is in this context that we examine role perception, participation and performance of elected tribal representatives in decentralized governance in general and tribal women representatives in particular. With a view to examine the role of tribals in decentralized governance and tribal development, an inquiry was made to assess their role and performance in terms of their representation, awareness, perceptions and participation in decision-making activities so far as panchayat and other developmental works are concerned. The findings from the field are presented in the following sections.

6. Representation of Tribals in PRIs

Following the provision of reservation for Scheduled Castes and Scheduled Tribes according to the proportion of their population in the panchayats at respective levels, a large number of scheduled tribes were elected to the panchayats at various levels. In addition to the membership positions, reservations were also made for leadership positions at all levels. As far as women are concerned, it was stipulated that not less than one-third of the seats should be reserved for women in all positions at all levels. In addition, the provision was also made that in the Gram Panchayat, if a Sarpanch elected is not a woman, the position of Naib-Sarpanch should be reserved for Women. Tables 1, 2 and 3 given below present the representation of scheduled castes, scheduled tribes and women in seven Gram Panchayats and two Panchayat Samitis where the field study was carried out.

Table 1

Representation of Scheduled Tribes in the Selected Gram Panchayats (Ward Members)

Name of the G. P.	General	Scheduled Castes	Scheduled Tribes	Women	Total No. of Ward Members
1. Biswanathpur	8 (3)	4 (1)	5 (2)	6	17
2. Lanjigarh	5 (2)	3 (1)	4 (1)	4	12
3. Malijubang	4 (1)	3 (1)	6 (2)	4	13
4. Chheliamal	6 (2)	3 (1)	2 (1)	4	11
5. Karlapada	6 (2)	4 (1)	4 (2)	5	14
6. Duarsuni	5 (2)	3 (1)	5 (1)	4	13
7. Jugsaipatna	5 (1)	1 (1)	5 (2)	4	11
Total	39 (13)	21(7)	31 (11)	31	91

Note: Figures in the parenthesis indicate representation of women members

Table 2

Representation of Scheduled Tribes in the Selected Gram Panchayats (Sarpanch and Naib-Sarpanch)

Name of the G. P.	Sarpanch			Naib-Sarpanch		
	Gen	SC	ST	Gen	SC	ST
1. Biswanathpur	1	-	-	-	-	1
2. Lanjigarh	1	-	-	-	-	1
3. Malijubang	1	-	-	-	1	-
4. Chheliamal	1	-	-	-	1	-
5. Karlapada	1	-	-	-	1	-
6. Duarsuni	1	-	-	1	-	-
7. Jugsaipatna	-	-	1	1	-	-
Total	6	-	1	2	3	2

Table 3

Representation of Scheduled Tribes in the Selected Panchayat Samitis
(Chairperson, Vice-Chairperson and Samiti Members)

Name of the Panchayat Samiti	Chairman			Vice-Chairman			Samiti Member		
	Gen	SC	ST	Gen	SC	ST	Gen	SC	ST
Lanjigarh	1	-	-	-	-	1	3	3 (1)	6 (3)
Bhawanipatna	1	-	-	-	1		11(4)	3	9 (3)
Total	2	-	-	-	1	1	14(4)	6 (1)	15(6)

Note:

1. Figures in the parenthesis indicate representation of women members
2. Total number of Samiti Members: 35 (12 +23).

The data presented in Table 1 shows that out of a total of 91 ward members elected to seven gram panchayats, 31 scheduled tribe representatives including 11 women members could get themselves represented in the gram panchayats. Observations from the field revealed that in most of the Gram Panchayats in the interior highland areas, ward members were elected unopposed. From an analysis of the causes of such behaviour, it was found that the election of a large number of tribal ward members as unopposed reflected not the unanimity among the people of a ward to elect a person of common choice but lack of interest among the people to contest the election and take part in panchayat activities. As far as the position of Sarpanch is concerned, the data show that except one all the seats had gone to the non-tribals (Table 2). In case of Naib-Sarpanch, while the scheduled tribes had occupied 2 seats, the scheduled castes had won 3 seats.

Coming to Samiti Members in the two Panchayat Samitis of Lanjigarh and Bhawanipatna, out of a total of 35 Samiti Members, scheduled tribes had won 15, of which 6 seats were won by women. Of the two leadership positions of Chairperson and Vice-Chairperson, when the non-tribal people had occupied the chairperson position in both the Samitis, the scheduled tribes and scheduled castes had won one each from the Vice-Chairperson position. Thus, the data show that though scheduled tribes could get adequately represented so far as membership positions are concerned, they could not occupy the leadership positions in the village as well as Panchayat Samitis.

7. Leadership Pattern

The pattern of leadership in panchayati raj institutions provides an indication of the changing attitudes and perception of people towards politics in general and the institutions of decentralized governance and development in particular. This also reflects the level of interest of different sections of people in panchayati raj institutions. The leadership pattern of scheduled tribes in terms of their gender, education and occupation are presented in Table 4 to Table 6.

Table 4

Leadership Pattern among the Scheduled Tribes in the selected Gram Panchayats and Panchayat Samitis (by Gender)

Category of Positions	Gender		Total
	Male	Female	
Ward Member	20 (65%)	11 (35%)	31 (11)
Sarpanch	1 (100%)	-	1 (0)
Naib-Sarpanch	-	2 (100%)	2 (2)
Samiti Member	9 (60%)	6 (40%)	15 (6)
Chairperson	-	-	-
Vice-Chairperson	-	1 (100%)	1 (1)
Total	30 (60%)	20 (40%)	50 (20)

Though the representation of women in panchayats in large number can be attributed to the provision of reservation (Table 4), it is to be observed that while the provision of reservation is only for not less one-third of the seats, the over all percentage of representation of scheduled tribes in this case had gone up to 40 per cent.

Table 5

Leadership Pattern among the Scheduled Tribes in the selected G. Ps. and Panchayat Samitis (By Education)

Category of Positions	Education					Total
	Illiterate	Primary	Middle	Secondary	College & Above	
Ward Member	19	7	4	1	-	31
Sarpanch	-	-	1	-	-	1
Naib-Sarpanch	-	1	1	-	-	2
Samiti Member	3	7	5	-	-	15
Chairperson	-	-	-	-	-	--
Vice-Chairperson	-	-	1	-	-	1
Total	22	15	12	1	-	50

Table 6

Leadership Pattern among the Scheduled Tribes in selected GPs and Panchayat Samitis

(By Occupation)

Category of Positions	Occupation					Total
	Medium Farmer	Small Farmer	Marginal Farmer	Agrl. Labour	Business	
Ward Member	5	18	6	-	2	31
Sarpanch	1	-	-	-	-	1
Naib-Sarpanch	-	-	-	2	-	2
Samiti Member	7	4	4	-	-	15
Chairperson	-	-	-	-	-	-
Vice-Chairperson	1	-	-	-	-	1
Total	14	22	10	2	2	50

While the representation of a smaller number of literate or educated people (Table 5) in the PRIs at various levels in various positions reflect the lower rate of literacy among the scheduled tribes, the data on the occupational background of the scheduled tribe (Table 6) representatives show their lower level of socio-economic status. Though the lower socio-economic status of scheduled tribes cannot be a disqualification for holding various positions in the panchayats, it is important that for effective management of the affairs of PRIs, they are made aware of the powers and functions, and other activities of panchayats through training and orientation programs.

8. Awareness, Perception and Participation

People's participation in decision-making constitutes one of the greatest virtues of decentralised governance and development. In fact, it is being regarded as one of the main attributes of good governance. It is through effective people's participation that transparency and accountability in governance and development can be ensured. And for effective participation, one needs to have adequate information, awareness about the system they manage and right kind of perception about its activities and the overall objectives. As far as panchayati raj institutions in tribal Odisha are concerned, it is important that the members of panchayats at various levels should be aware of its powers and functions, its role in the rural development and the procedures of its functioning.

Keeping this in mind the inquiry was conducted about the awareness, perception and participation tribal representatives in general and the tribal women members of panchayats in particular at different levels of panchayats. The assessment was made through an interview schedule asking questions of specific importance and recording their responses with scores such as higher, lower or

average. The details of their responses regarding awareness, perception and participation are presented in Table 7, 8 and 9.

Table 7

Awareness about the Powers, Functions and other Activities of PRIs

Category of Persons	Aware	Partially Aware	Not Aware	Total
Ward Member	9 (29%)	8 (26%)	14 (45%)	31
Sarpanch	1 (100%)	--	--	1
Naib-Sarpanch	1 (50%)	1 (50%)	--	2
Samiti Member	4 (27%)	4 (27%)	7 (46%)	15
Chairperson	--	--	--	--
Vice-Chairperson	1 (100%)	--	--	1
Total	15 (30%)	13(26%)	22 (44%)	50

Table 8

Perception about their Role as Members of Panchayat Raj Institutions

Category of Persons	Higher	Average	Lower	Can't Say	Total
Ward Member	3 (9.67%)	16 (51.61%)	8 (25.80%)	4 (12.90%)	31
Sarpanch	-	1 (100%)	-	-	1
Naib-Sarpanch	-	2 (100%)	-	-	2
Samiti Member	3 (20%)	3 (20%)	6 (40%)	3 (20%)	15
Chairperson	-	-	-	-	-
Vice-Chairperson	-	1 (100%)	-	-	1
Total	6 (12%)	23 (46%)	14 (28%)	7 (14%)	50 (100%)

It can be seen from Table 7 that the extent of awareness of scheduled tribes at the overall level is very low. While 29 per cent of the ward members disclosed that they are aware of the powers, functions, and activities of panchayats, 26 per cent ward members responded that they are partially aware of the things. What is more surprising is that 45 per cent of the ward members are not aware of the powers, functions and the over all goals and objectives of the village panchayat. However, the level of awareness among the people in leadership positions like sarpanch, naib-sarpanch and vice-chairperson was higher. Thus keeping in mind the significance of the positions they hold and the responsibilities they have to shoulder as members of PRIs which has to play an important role in the development of rural areas, it is important that they are made aware of their duties and responsibilities.

As far as perceptions of ward members are concerned, while 51.61 per cent had an average perception about the panchayat and their role

in governance and development activities, only 9.67 had a higher perception. Further, it was surprising to note that 4 ward members (12.90%) disclosed that they 'can't say'. Even the Sarpanches, Samiti Members and Naib-Sarpanches including the Vice-Chairperson had only average perception about their role as representatives of panchayats as institutions of decentralized governance and development. Overall, while only 12 percent of representatives had higher perception and 46 percent had an average perception, 28 percent of respondents had a lower perception about their role as members of panchayats as an agent of change and development.

Table 9

Participation of Scheduled Tribes in Panchayat Activities

Category of Persons	Higher	Average	Lower	Total
Ward Member	8 (25.80%)	8 (25.80%)	15 (48.38%)	31
Sarpanch	1 (100%)	-	-	1
Naib-Sarpanch	2 (100%)	-	-	2
Samiti Member	3 (20%)	7 (47%)	5 (33%)	15
Chairperson	-	-	-	-
Vice-Chairperson	1 (100%)	-	-	1
Total	15 (30%)	15 (30%)	20 (40%)	50 (100%)

Coming to the participation of members in the panchayat activities, when people in the leadership positions had a higher level of participation, it can be observed from Table 9 that the ordinary members of the panchayats at both the levels had a lower level of participation. The lowest is among the ward members (48.38%), which is not a very good trend as far as decentralised governance is concerned.

Observations from the field and interviews with members revealed that the participation of tribal women in decision-making, planning and other developmental activities of the Gram Panchayat was very much limited. As the data shows, the tribal ward members had very little awareness and perception about decentralized governance and its role in rural development. While the ward members come to attend the Gram Panchayat meetings only when the Sarpanch or Panchayat Secretary calls them, they hardly participate in the discussions and debates. Whatever the Sarpanch says, they agree to it and carry the message back to their respective villages/wards. They hardly open their mouth in the meetings and interact on panchayat matters. The reality is that as ward member or Sarpanch, most of them do not know that they have a very important role to play in the development of their village and gram panchayat. Their election as ward member or Samiti member does not make much difference to them in their day-to-day life.

They do not feel so. They do not even realize that they have great responsibilities towards the people who have elected them.

So far as Sarpanch and Samiti Members are concerned, they too have very limited knowledge about the functions of Gram Panchayat and Panchayat Samiti and hardly open their mouth in the Panchayat Samiti meetings. Even they do not have adequate knowledge about their powers and responsibilities and the role they should play in the development of their Gram Panchayat. The block officials and the Panchayat Samiti Chairperson dominate the discussions and decide everything. Thus, a close look at the findings from the data presented above reveals that like the panchayats in the plains, the major problem facing the PRIs in tribal areas is also lack of people's participation in the affairs of panchayats.

Therefore, in the next section an attempt has been made to analyze as to how the problem of women's participation in Panchayati Raj institutions can be improved and what are the avenues available for doing the same.

9. Improving Tribal Women's Participation in Panchayats

While it is true that for successful functioning, PRIs require, among other things, devolution of adequate powers and functions, autonomy – political, administrative and financial – and an enabling environment, effective participation of people is crucial for improving its performance and accountability. But unfortunately, peoples' participation in local government institutions in India has been the biggest problem.

Theoretically speaking, participation of the people in governance and development programs depends on three factors. These are:

- Ability to Participate
- Willingness to participate, and
- The opportunities or the scope provided for participation.

The ability to participate in the management of affairs of one's own village or community or an organization is very important in the sense that in order to contribute meaningfully and substantially to the decision-making one should have the ability to do so. It refers to education, information, awareness and understanding of the issues and problems afflicting the people and the ways and means through which it could be solved.

As far as opportunities or scope provided for participation is concerned, Panchayati Raj Institutions at the lower level with its mechanism for Gram Sabha provides ample opportunity for people's participation including tribal women in governance and development activities. In addition, several self-help groups and neighborhood

organizations have come up at the village and local levels providing a solid platform for participation of women and other disadvantaged sections.

Willingness to participate is also a very important determinant as it brings in sincerity and commitment to the cause of public life. People with the ability and willingness to participate in public affairs can bring in qualitative changes in the kind of decisions that are made, and this ultimately affects the life of the people. This, however, depends upon the socio-psychological framework of society, groups, and individuals.

This is where the Civil Society Organizations like Voluntary Organizations/Non-Governmental Organizations can play an active role in mobilizing peoples' participation in decentralized governance and development by empowering women and other disadvantaged sections of society in terms of providing the required knowledge and access to information, awareness and other productive assets.

10. Concluding Observations

Based on the discussion held above and the perceptions gathered during the course of the research, it can be concluded that political empowerment of tribal women through representation in PRIs can bring meaningful result only when they become economically self-sufficient and socially conscious. There is a critical need for increasing the level of education and training them to develop their skills and competence. Further, creating awareness through sensitization can go a long way to help them develop critical thinking and perceive their roles properly. Once they perceive their roles properly, along with information and increasing awareness, tribal women members can surely perform better in the functioning of panchayati raj institutions at various levels.

Evaluating the Effectiveness of Zero FIR in Ensuring Justice for Victims of Sexual Offences in India

Shreya Shreeja*

1. Introduction

Throughout the course of human history, practically every community and religion has reached the conclusion that sexual crimes are acts that fall under the category of criminal behavior. It's a heinous violation of someone's human rights, and it has to stop. When sexual offenses are committed with competence, they assume the form of sexual violence, which results in severe and permanent harm to the victim's bodily and emotional well-being.

The human species may have made strides in terms of technology and professional development, but these advancements have come at the expense of individuals' moral fiber and temperament. In India, crimes relating to sexual conduct are governed under Chapter XVI, from S.375[1] to S.377 of the Indian Penal Code, 1860.[2] This particular Chapter deals with rape, the punishment for rape, gang rape, and unnatural sexual offences.

The IPC underwent preliminary amendments, including the concept of aggravated or custodial rape, consequent to the exoneration of police officials in the **Mathura Rape Case**[3] in 1972, on the grounds of the victim's acquiescence.

It was only after the tragic **Nirbhaya Gang Rape Case**[4], when on May 10th, 2013, the Home Ministry issued an advisory to all states and union territories based on the report of the Justice Verma Committee[5], instructing police to file Zero FIRs whenever an informant comes forward with details of a cognizable crime, regardless of the jurisdiction in which the crime occurred. The main rationale behind introducing this was to prevent the delay which would normally take

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[1] Indian Penal Code, 1860, § 375, Act No. 45, Acts of Imperial Legislative Council, 1860 (India).

[2] Indian Penal Code, 1860, § 377, Act No. 45, Acts of Imperial Legislative Council, 1860 (India).

[3] *Tukaram & Anr. v. State of Maharashtra*, AIR 1979 SC 185.

[4] *Mukesh v. State (NCT of Delhi)*, AIR 2017 SC 2161.

[5] Justice Verma, Report of the Committee on Amendments to Criminal Law (January 23, 2013).

place if the aggrieved party were to actually search for the correct jurisdiction before attempting to file an FIR.

The Zero First Information Report could be registered under the authority of any police station, unlike the traditional First Information Report (FIR) for criminal offences, which must be filed at the station with jurisdiction over the location where the crime was committed.

2. Literature Review

"Zero First Information Report: Indian Laws and Practices, Dr. P.K. Pandey (2020)"[6]

- The author has deeply analyzed the concept of Zero First Information Report, and has also unearthed various legal provisions that are associated with the same.
- Various landmark judicial precedents have been cited by the author, along with various guidelines that have been laid down by the courts when it comes to the filing of a Zero FIR.
- The author has also mentioned in-depth the correct procedure that needs to be kept in mind while registering for a Zero FIR. A concluding observation is also present at the latter half of the paper.

"Zero FIR: A FIR Without Jurisdiction, Kushagra Goyal & Ananya Garg (2020)"[7]

- The authors start off by explaining what they mean by 'Zero FIRs,' which are reports filed with police regardless of the jurisdiction in which the incident occurred. They state that the Zero FIRs concept was implemented to remove barriers to filing police reports, especially for female victims of crime.
- Some of the criticisms of Zero FIRs are also discussed in the article. These criticisms include fears that police officers will abuse the provision and that people will file false complaints.
- The authors conclude by pointing out how crucial it is to weigh the advantages of Zero FIRs against their potential drawbacks.

"Analyzing the rights provided to the Rape victim, Ayush Thakur (2021)"[8]

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[6] Dr. P.K. Pandey, *Zero First Information Report: Indian Laws and Practices*, 40 Studies in Indian Place Names (2020) https://dx.doi.org/10.2139/ssrn.3567857

[7] Kushagra Goyal & Ananya Garg, *Zero FIR: A FIR Without Jurisdiction*, 1 Lex Forti (2020) https://lexforti.com/legal-news/wp-content/uploads/2020/06/Zero-FIR-Final-Paper.pdf

[8] Ayush Thakur, *Analyzing the rights provided to the Rape victim*, 1 Jus Corpus Law Journal (2021) https://www.juscorpus.com/wp-content/uploads/2021/11/98.-Ayush-Thakur.pdf

- The paper emphasizes the victim's right to privacy, as well as their access to medical care and legal representation. Some of the obstacles that victims must overcome to exercise their rights are also addressed, and recommendations for better enforcing the law are made.
- This study highlights the significance of a detailed support system for the recovery and rehabilitation of rape victims, as well as the need for increased awareness and empathy towards these victims.
- Substantial light has also been shed upon the concept of Zero FIR, which was first introduced after the heart-wrenching rape case of Nirbhaya. Some loopholes in the implementation of the same have also been jotted down by the author.

3. Research Questions

1) How did the concept of Zero FIR originate?
2) How is documentation and reporting process done with regards to Zero FIR?
3) How have landmark precedents, changes in legislation and amendments shaped the efficacy of Zero FIR, especially when it comes to sexual offences in India?
4) In what ways can public awareness campaigns contribute to a more profound understanding of Zero FIR?
5) What are some suggestions which could smoothen the process of filing Zero FIR, so than more victims of sexual offences are encouraged to come forward and file one?

4. What is the First Information Report?

Despite the fact that filing a First Information Report under S.154[9] of the Code of Criminal Procedure 1973 initiates the investigation process, there is no clear definition of FIR in the Code or any other status or legislation.

A First Information Report is defined as "the statement of the maker of the report at a police station before a police officer recorded in the manner provided by the provisions of the Code,"[10] according to the Rajasthan High Court's stance in **State of Rajasthan v. Shiv Singh**[11].

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[9] The Code of Criminal Procedure, 1973, § 154, Act No. 2 of 1974 (India).
[10] *State of Rajasthan v. Shiv Singh*, 1962 RAJLW 132.
[11] *Ibid.*

FIR is a concise report detailing the circumstances surrounding a criminal act. If the FIR is to serve its intended purpose of initiating the investigation, it must contain information that indicates that the crime was committed.

Furthermore, it is not required that the information would include insignificant details. The document is not intended to be a comprehensive account of the prosecution's case, but it should include some hard facts.

The court in the case of **Patai alias Krishna Kumar v. State of UP**[12] ruled that a coded message detailing an event is not a First Information Report. The caller's intention is not to file a police report, but rather to summon an officer to the scene.

5. Justice Verma Committee Report: The Origin of Zero FIR

Pursuant to the need for expeditious adjudication and stricter penalties for perpetrators of sexual assault against women, a three-member Committee led by Justice J.S. Verma, former Chief Justice of the hon'ble Supreme Court of India, was established on December 23, 2012, with the mandate to propose revisions to the Criminal Law. The panel of the Committee consisted of Justice Leila Seth, a former High Court Judge, and Gopal Subramanium, a former Solicitor General of India, among other members.[13]

The report was duly submitted by the Committee on 23rd January, 2013. The report included proposals for reforming the laws governing rape, sexual harassment, trafficking, and sexual abuse of children, as well as medical examinations of victims, revisions to the police, electoral, and educational systems.

As per the report, there was a suggestion to promote the online submission of FIRs. Additionally, it was recommended that police officers have a duty to aid victims of sexual offenses regardless of the jurisdiction of the crime. This was called the concept of Zero FIR.

Now, there is a strong analogy between Zero FIR and a traditional police report. The only distinction between a First Information Report (FIR) and a Zero FIR is that the former can only be filed at a police station with jurisdiction over the incident at hand, while the latter can be filed at any police station worldwide.

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[12] *Patai alias Krishna Kumar v. State of UP*, AIR 2009 SC 1262.

[13] Harsimran Kalra, *Justice Verma Committee Report Summary*, PRS Legislative Research (January 25, 2013), https://prsindia.org/files/policy/policy_committee_reports/1359132636--Justice%20Verma%20Committee%20Report%20Summary_0.pdf

Determining whether the crime in question is cognizable or not is a prerequisite to filing a First Information Report (FIR). The cognizable offence is a serious one, like rape, theft, murder, robbery, etc.

6. Registration of Zero FIR

The First Information Report (FIR) for a legally actionable crime is typically filed at the police station with jurisdiction over the location where the crime was committed, but Zero FIR can be filed at any police station.

When someone reports an offence to the police that isn't within the jurisdiction of the station where the report was filed, the report is entered as a Zero FIR and sent to the station with jurisdiction so that the remaining legal requirements, including the assigning of a case number, can be fulfilled. As a result, the victim/informant has a simple outlet to use.

In **Baljeet Singh v. State NCT of Delhi & Anr.**[14], the Delhi High Court ordered that an FIR should be transferred to a different police station if it is clear from reading the report that the offence occurred in a different jurisdiction. A 'Zero' FIR is what the police usually submit in these situations before sending the file to the correct department.

In **Bhum Singh Uday Singh Kachhway v. State of Maharashtra & Ors.**[15], the Bombay High Court ruled that when an officer in charge of a police station acquires any information about the execution of a cognizable offence that occurred within the jurisdiction of some other police station, it is his duty to investigate. The officer in charge of the police station can then diarize a "0" as the case number on the First Information Report and send it on to the police station with jurisdiction or local limits so that an investigation can be conducted.

Additionally, police should be directed to file a 'Zero' FIR if it becomes clear during the FIR registration process that the offence was not committed within the police station's jurisdiction.

It must be stated unequivocally that wasting time on figuring out which court has jurisdiction causes problems for victims and gives criminals a chance to evade justice. Police officers should be warned that they face criminal charges under S.166A[16] of the Indian Penal Code or disciplinary action from their respective departments if they fail to file an FIR after learning of a potentially criminal incident.

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[14] *Baljeet Singh v. State NCT of Delhi & Anr.*, 2018 SCC Online Del 10565.

[15] *Bhum Singh Uday Singh Kachhway v. State of Maharashtra & Ors.*, 2013 SCC Online Bom 154.

[16] Indian Penal Code, 1860, § 166A, Act No. 45, Acts of Imperial Legislative Council, 1860 (India).

In addition to recording the essential details of the incident in the General Diary as required by the Police Act or Police Regulations, the Ministry of Home Affairs issued a follow-up advisory on 5th February, 2014 stating that the FIR must be registered in the FIR/Register book.

Despite solid evidence provided at the time of reporting in the case of **Bimla Rawal & Ors. v. NCT of Delhi**[17], the Delhi police refused to file a Zero FIR in regards to the incident that occurred in Mumbai. The Delhi High Court ordered transfer of the case to the police station with jurisdiction over the area where the incident occurred in 2007.

In addition, the Supreme Court stressed the importance of recording all police operations in the police station's general diary to promote transparency and honesty in crime prevention.

In this advisory, the Ministry specifically mentioned that a Zero FIR would be filed even if the crime had been committed beyond the police station's jurisdiction, and that the file would be forwarded to the appropriate police station in accordance with S.170[18] of the Code of Criminal Procedure.

On October 12, 2015, the Ministry of Home Affairs issued another advisory stating that a FIR must be filed regardless of territorial jurisdiction whenever information is received about a possible cognizable offence, as per S.154(1)[19] of the Criminal Procedure Code.

As per the Supreme Court's Constitution Bench decision in **Lalita Kumari v. Govt. of Uttar Pradesh**[20], disciplinary measures will be taken against defaulting officers who fail to file a First Information Report (FIR) when they have received information indicating the commission of a cognizable offence, citing concerns over the court's jurisdiction.

It is important to remember that filing a FIR is the initial stage in the process. Therefore, all States/Union Territories must guarantee that everyone who goes to the police to file a FIR will be treated with the utmost fairness and promptness.

In **Sakshi v. Union of India**[21], as per the ruling given by the Delhi High Court, police cannot reject a complaint or FIR on the grounds that the crime did not happen within Delhi. The complaint was to be documented as a "Zero" FIR and forwarded to the relevant police station per the court's orders.

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[17] *Bimla Rawal & Ors. v. NCT of Delhi*, 2003 (1) AWC 344 SC.
[18] The Code of Criminal Procedure, 1973, § 170, Act No. 2 of 1974 (India).
[19] The Code of Criminal Procedure, 1973, § 154(1), Act No. 2 of 1974 (India).
[20] *Lalita Kumari v. Govt. Of Uttar Pradesh*, AIR 2013 SC 999.
[21] *Sakshi v. Union of India*, AIR 2004 SC 3566.

The Delhi High Court ruled in **Kirti Vashisht v. State & Ors.**[22] that in case of a cognizable offence, a Zero FIR must be filed by the police station that initially received the complaint, and then conveyed to the police station where the alleged crime took place.

7. Evaluating Efficacy of Zero FIR W.R.T. Sexual Offences in India

The Zero FIR's validity is the same as that of the standard FIR. After filing a Zero FIR, the complainant can see if it has been forwarded to the appropriate police department and request an investigation to be conducted without any further delay.

For instance, in the case of **Asharam Bapu**[23], the parents of a 16-year-old filed a Zero FIR against the defendant in Delhi, despite the fact that the sexual abuse of their daughter occurred at Asharam's Ashram in Jodhpur, Rajasthan. The investigation was then taken over by the Jodhpur police, who ultimately made an arrest in the case. This was the same man who had the temerity to assert that the victim bore equal culpability as those in charge of the sexual assault.

In the case of **Satvinder Kaur v. State of NCT of Delhi**[24], the Delhi High Court ruled that offences covered by the Protection of Children from Sexual Offenses Act, 2012, as well as the Indian Penal Code, 1860, are eligible for Zero FIR registration.

Recently, amidst the ongoing conflict in Manipur, an FIR was lodged following the reported occurrence on May 4, in which two Manipuri women were disrobed and publicly marched in the Thoubal district.

Following that, a second Zero FIR was lodged at the identical police station regarding the kidnapping, sexual assault, and homicide of two Kuki-Zomi women on May 5th. The instances entailed severe acts of violence and required authorities over a month to forward the allegations to the appropriate police station for inquiry.

According to reports, a Zero FIR was filed at Saikul police station in Kangpokpi district, the hometown of both victims, based on the testimony given by the mother of the younger victim. The FIR was then transferred to the Porompat police station in the Imphal East district on June 13th.[25]

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[22] *Kirti Vashisht v. State & Ors.*, 2019 SCC Online Del 11713.

[23] *Asharam Bapu v. Union of India & Ors.*, 2013 SCC Online SC 949.

[24] *Satvinder Kaur v. State of NCT of Delhi*, 2019 SCC Online Del 8126.

[25] Ashita Singh, *Manipur Violence: What is Zero FIR, Being Filed Across Northeastern State; Its Need and Significance Explained*, English Jagran (July 25, 2023) https://english.jagran.com/india/manipur-violence-what-is-zero-fir-being-filed-across-northeastern-state-its-need-and-significance-explained-10089688 (last visited November 23, 2023).

The Ministry of Railways has also made it easier for passengers on active trains to report crimes as a measure to enhance railway safety and security. An FIR form is available from the Traveling Ticket Examiner (TTE), which can be filed at the subsequent police station the train stops at. If the incident occurred outside of that police station's jurisdiction, a Zero FIR is filed and the case is transferred to the appropriate government railway police station.[26]

8. Critical Analysis

In India, a Zero FIR is a First Information Report that is lodged at a police station that is not necessarily the one is located in the closest proximity to the location of the crime. It is used in situations in which the local police station maintains its refusal to register a First Information Report.

The legal principle known as Zero FIR was conceived as a means of addressing the issue of delays in the administration of justice that can occur when questions of jurisdiction are involved, especially introduced for the welfare and speedy justice for the victims of sexual assault. Zero FIR may appear to be a workable solution to the issue of sluggish justice, but it is not without its fair share of its fair share of serious problems. A significant issue is the lack of clarity surrounding the procedure for submitting a Zero FIR.

FIR itself has not been explicitly defined under CrPC, as well as Zero FIR, due to which this procedure is not governed by any strict rules, so the steps can be interpreted in a number of different ways. In addition, there is evidence that some law enforcement personnel have used the Zero FIR system inappropriately for the purposes of harassment or political gain. By filing a Zero FIR against a person who was not involved in the crime, the police have the potential to violate the rights of that person.

Even though a Zero FIR has been submitted, there is still no assurance that the case will be resolved in a timely manner. This is an additional problem. The victim is given the opportunity to file a First Report of Incident at any local police station. If the investigation and the court proceedings were still subject to the same laws of jurisdiction, there is a possibility that justice will be delayed even further.

The recent upsurge of Zero FIRs lodged in Manipur has posed hurdles for the police in carrying out investigations. The advancement of investigations has been impeded due to escalating tensions and restricted entry to victims.

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[26] *Zero FIR: Right of a citizen to file FIR at any nearest police station irrespective of territorial jurisdiction*, POSH at Work (October 18, 2021), https://poshatwork.com/zero-fir-right-citizen-to-file-fir-nearest-police-station-irrespectivef-territorial-jurisdiction/

The transfer of complaints to the appropriate police station for investigation has been delayed, causing a further delay in the process and potentially impacting the results of the cases. A standard operating procedure and a guideline are required in order to prevent the inappropriate utilization of Zero FIRs. Along with filing a Zero FIR, steps should be taken to hasten the conclusion of the case and deliver justice to the victim as quickly as is humanly possible.

9. Suggestions

While Zero FIR is a good thing for redressal of victims, there are some legal issues with the way it's being implemented that need fixing. There is some reluctance on the part of the police to file a case under Zero FIR. Many law enforcement officials either aren't aware of the provision or mistake its scope for something else, so they refuse to file a report.

Many police officers are not aware of the provision or misunderstand the scope of the provision, leading to them refusing to register a case. There is a severe need to monitor and evaluate when it comes to the filing of Zero FIR in the police stations, for the purpose of effective utilization of the same.

The provision of Zero FIR and its scope needs to be taught in detail to police officers. By doing so, they will be better able to comprehend the provision and respond promptly to the victim's needs.

Also, awareness in the general public needs to be spread, so that people, especially women know that they can file an FIR from anywhere hassle-free. Legal Aid Societies from law institutes should also incorporate an initiative so as to educate the less knowledgeable regarding the same, so as to ensure fair distribution of justice.

While some legal experts maintain that only cognizable crimes should be reported, others insist that Zero FIR should be used for all crimes. This lack of clarity in the law creates unnecessary confusion and slows down the process of bringing justice to the victim. It is essential that such ambiguity be eliminated so that justice can be administered fairly.

10. Conclusion

In summation, it can be stated that the concept of Zero First Information Report (FIR) has played a pivotal role in obviating bureaucratic impediments and expediting the dispensation of justice for victims of injustice in India.

The Justice Verma Committee Report has shed significant light on the imperative need to prevent any delay in the filing of FIRs, thereby expediting the administration of justice. Notable legal precedents,

including but not limited to **Lalita Kumari v. Govt. of Uttar Pradesh**[27], **Kirti Vashisht v. State & Ors.**[28], and **Sakshi v. Union of India**[29], have underscored the importance of police officers filing Zero FIRs without regard for jurisdictional limitations.

The Zero FIR framework has contributed to the reduction of police brutality, increased the likelihood that officers will act fairly and impartially, and sped up the rate at which they respond to scenes of crime, which is the need of the hour given the gravity of serious offences related to sexual assaults holds.

Although Zero FIR may present obstacles and downsides, such as the possibility of misuse and jurisdictional complications, its advantages in terms of prioritizing the needs of victims and ensuring swift action in instances of sexual assault and domestic violence are indisputable.

[27] *Supra* n.20.
[28] *Supra* n.22.
[29] *Supra* n.21.

Breaking the Cycle: Confronting India's Female Infanticide Crisis

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Shreyansh Agrawal[**]

1. Introduction

One of the most contentious and hotly contested issues in the world today is gender inequality. It is a type of inequality where men are treated more favorably than women. One of the most terrible manifestations of gender discrimination is female infanticide. *It can be defined as the killing or murder of girl infants within one year of birth.* Female infanticide's historical roots have not yet been discovered. Instead, it is said that at the time, among all savages and all barbarians of the lower, medium, and occasionally even upper stages, women occupied an accessible and highly valued position. Infanticide at that time is thought to be almost impossible.[1] But with time, a revolution overthrew the female line and instituted the male lineage. It was the result of the patriarchal nature of the Indian society. The old and narrow-mindedness of the males led to the beginning of domination over females. People started giving higher cultural importance to sons than daughters. In early times, it was widely believed that a son brings pride to his mother and family. They were considered the right hand of their fathers, and daughters were supposed to be physically, mentally, biologically, and psychologically weak. Later began the phenomenon of infanticide, which, even after being in preparation for such a long time, was first discovered only in December 1789 (by Jonathan Duncan, a British resident of Benares).[2] The influence and impact of this practice have only increased with time. In post-colonial India, it crossed all the limits. The government decided not to interfere in religious matters. The punishments for these crimes were also reduced. Dowry, which was earlier a willful system of giving gifts to the groom's family, became an essential condition for any marriage. This change acted as a stimulus to an already devastated state of women. Daughters were now considered a liability in poor or middle-class families. Most people at that time were impoverished and couldn't afford the expenses incurred in their daughter's marriage.

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[1] Pramod K. Srivastava, *Female Infanticide in 19th-Century India: A Genocide*, DEPT. OF WEST. HIS. 270, 272 (2014).

[2] Brun M, 'Institutions Collide: A Study of "Caste-Based" Collective Criminality and Female Infanticide in India, 1789-1871'

Moreover, modern technology in those days even led to the beginning of female foeticide (*the practice of killing/aborting a fetus*). It aggravated the already worsening situation. People got a new way of getting rid of their daughters. In the case of Centre for Enquiry into Health and Allied Themes (CEHAT) V. Union of India, it has held that unfortunately, advanced medical technology is abused to abort a girl child before she is born. The foetus of a girl child is aborted by qualified and unqualified doctors or compounders, fully aware that this is immoral and unethical, and may even constitute an offence. This has impacted the general sex ratio in a number of states where there is an unhindered prevalence of female infanticide.[3] In this paper, this practice has been looked at from the three aspects that are believed to play a significant role in the existence of this practice. They are also known as social facts and are discussed below.

2. Social Facts

Social facts are the ways of acting, feeling, and thinking that are external to an individual and are endued with the power of coercion by which they exercise control over an individual. Institutions, statutes, roles, laws, beliefs, population, distribution, urbanization, etc. are examples of social facts. They are generally objective. The more a person tries to avoid them, the more they are exerted on him. In all possible ways, society tries to stop the person who wishes to escape the law. And even if he succeeds, they exercise a constraint on him. The problems that occur in society are aggravated because of them. Some of these social facts, like gender, caste, and religion, have also enlarged the issue of infanticide. All these social facts have been discussed below in detail.

3. Gender

Gender has always been one of the primary reasons behind this practice. This concept has been created by individuals socially through interacting with one another and their environment. As humans make it, it is a social construct. Lewontin describes these constructs under social constructivism. They are the structures that are constructed by society and exist as developing subjective reality. Religion, caste, race, gender, and nationality all come under social constructs. They are severely criticized because they narrowly focus on society and culture and hinder its development. They set general perceptions in the minds of ordinary people, which become more potent by the passage of time. They can also be termed *gender stereotypes*. Women have remained to be the primary victim of such perceptions. These beliefs are deeply entrenched in our society and have far-reaching consequences. Preconceived notions about the traits and roles men and women

[3] (2001) 5 SCC 577

should play are known as gender stereotypes.[4] ***Is it used to define and distinguish the genders?*** Wrongfully set stereotypes can either be hostile or antagonistic or sometimes even both. These stereotypes are rarely unjust for men, and the condition is just the opposite in the case of women, i.e., they are seldom just for them.

An example of such wrongful stereotyping can be the failure to criminalize marital rapes. The social view of women as the sexual property of males is the foundation for this. The failure to successfully investigate, convict, and sentence sexual violence against women because, for instance, it is believed that women should avoid sexual assault by clothing modestly and acting otherwise.[5] They limit their work area and prevent them from developing their abilities. Simply put, preconceptions contributed to the division of labor between men and women, with women typically allocated the task of performing the majority of domestic work. They are considered a minority and not leaders. They are assumed to be incompetent until proven otherwise.

Gender stereotyping can also be similar to gender roles in many ways. "Gender roles are the roles that men and women are expected to occupy based on sex." "They are the result of interactions between people and their settings, and they provide clues for people as to what behavior and sex are suitable."[6] ***Does Gender Stereotypes led the problem of Gender Infanticide or Is there any nexus between gender stereotypes and Gender Infanticide?*** Gender roles are a part of societal roles that people play as social group members. It can be seen by the fact that women are given roles like running a house, cooking food, washing clothes, rearing a child, etc. They are believed to be more nurturing than men and hence must look up to the family. Their lives remain restricted, and they cannot do anything according to their will. Before marriage, they must follow their fathers and, after marriage, their husbands. ***Can we still say that females are independent when even they are following their father or husband?*** They don't get an equal share in the property of their father. They are not entitled to receive proper education and are engaged in household chores from the early years of their life. They are not offered jobs, and even if offered, their salary is less than their male counterparts. They are married as soon as they attain the age of maturity and sometimes even before (child marriage). In hospitals/medical professionals, their stereotypical role has been defined as a handmaiden to the senior and all-knowing doctors. The lack of equal treatment (between male and female physicians) is also visible among medical groups.

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[4] *Gender Stereotyping*, UNHR OFFICE OF THE HIGH COMM. (Mar. 25, 2021, 10:00 AM), https://www.ohchr.org/en/issues/women/wrgs/pages/genderstereotypes.aspx.
[5] *Id.*
[6] *Id.* at 335.

"At least in thought and perception, women in medicine and most other scientific areas continue to be placed in a subservient role to that of the dominating man."[7] People, even voters, also hold stereotypical views regarding the gender of the candidate. Women politicians, for example, are thought to be experts on so-called women's issues and have the capacity to address them. They are believed to possess feminine traits, such as warmth and sensitivity.[8] Lewontin worked very hard to make people understand that sex differences are nothing else but only ascribed to the consequences of chromosomal differences between males and males. But, the number of people who could understand this fact is significantly less. The theory of biological determinism clearly mentions that "Inequality has remained a prominent social fact and with it, a unique social dissonance has emerged." All these stereotypes weaken the position of women in society, increase the demand for boys, and increase the instances of female infanticide.

4. Religion

There is also a religious aspect of infanticide. This has been considered as a grave sin in many of the religions. They completely reject the idea of infanticide. Given below are the four beliefs and their perspectives on infanticide.

- ***Islam*** has always criticized infanticide. This practice was widely prevalent in pre-Islamic Arabia. People at that time generally consider it as a technique of birth control. Many people believe that they used to bury alive a female newborn. Prophet Muhammad, who is supposed to be the founder of Islam, had a female child named Fatima, and he had a profound love for her.[9] It was during the time of Muhammad that female infanticide was strictly forbidden. *It was dealt with utmost seriousness and considered similar to an adult murder.* Quran, revealed during the same time, also explicitly prohibited the practice. It is clearly said in Surah 17 v 31, "You shall not kill your children for fear of want. We will provide for them and for you. To kill them is a grievous sin." This is also written in Surah Al-Inaam (6:40) that *Qad Khasiral-lazina qatalu auladahum safa ham baghaire ilmi* which means that they are lost indeed who kill their children foolishly.[10]

- ***Christianity*** has also rejected the practice of infanticide. *The teachings of Didache tell that a child should neither be aborted nor be slew. They consider this act of exposing a child to death as*

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[7] Frances K.Conley, *Gender Stereotyping and the Medical Profession*, 24 JOURNAL OF CLZ. SCI. TEACHING 17, 18 (1994).
[8] Kira Sanbonmatsu & Kathleen Dolan, *Do Gender Stereotypes Transcend Party*, 62 POL. RESEARCH QUAR. 485, 485 (2009).
[9] Hasan Kurshid, *Quran condemns killing of girls*, HINDU. TIMES, Mar. 08, 2006.
[10] *Id.*

wicked. Some even believed infanticide to be a crime that deserves punishment. A Christian treatise called Didache mstates, "There are two ways – the ways of life and death, and how they differ. Hence, refrain from having an abortion or killing a newborn child."[11] Numerous passages describe the eternal punishment for those who kill their children in any way, including the Apocalypse of Peter and the Ecologae Propheticae of Clement of Alexandria (be it abortion, infanticide, or exposure).[12]

- One of the most gender-neutral religions has always been ***Sikhism***. It states outright that both men and women are equal. According to the *Rahitnamans* (code of conduct), *having contact or relationship with those who indulge in such practices is prohibited*. Neo-natal sex identification, selective abortions, and infanticide are all banned in this culture.[13]

- ***Hinduism*** has also been in opposition to infanticide as well as feticide/abortion. According to Hinduism, the fetus doesn't develop into a person; instead, it is a person from the beginning. It contains a revived soul that should be handled properly.[14] Many Hindus even believe that having children is a social responsibility rather than just an individual's expression of personal preference. This prohibits them from killing their child. It was written by British Broadcasting Corporation that, in cases of abortion, the Hindus act in a way that results in the least harm to all the parties involved, like the mother, fetus, society, etc. But, in Hindu culture, men are considered the better providers, and the son preference society is created. Biases can be seen among people. ***Does it mean that Hinduism, as a religion, promotes female infanticide in any way?*** "Hindus practice ahimsa, or non-violence, because they believe all life is precious and should be respected and revered. Because all living things are manifestations of the Almighty Being, all life is precious."[15]

- It can therefore be easily inferred that no religion in itself favors infanticide. The condition of women may vary from religion to religion. The position of women in the Quran appears to be slightly better (compared with Hindu scriptures). In Islam, women even

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[11] Louise Gosbell, *As long as it's healthy: What can we learn from early Christianity's resistance to infanticide and exposure*, ABC RELIGION AND ETHICS (Mar. 26, 2021, 12:15 PM), https://www.abc.net.au/religion/early-christianitys-resistance-to-infanticide-and-exposure/10898016.

[12] *Id.*

[13] *Female infanticide*, BRITISH BROADCASTING CORPORATION (Mar. 26, 2021, 10:20 PM), http://www.bbc.co.uk/ethics/abortion/medical/infanticide_1.shtml#top.

[14] *Hinduism and abortion*, BRITISH BROADCASTING CORPORATION (Mar. 26, 2021, 11:15 PM), https://www.bbc.co.uk/religion/religions/hinduism/hinduethics/abortion_1.shtml.

[15] *supra* note at 13.

possess the right to hold and inherit property, and they can also give divorce to their husbands. But these norms are very complex in practice than what they are seen. Many people in every religion modify or wrongly interpret a religion's sayings and misuse them for their own benefit. It can be easily demonstrated by how prevalent infanticide was among Rajput and other Hindu castes, but Hinduism in itself doesn't support this practice (as we have seen above). Despite the religious ban, it is still in practice because, in many cases, the cultural preference for sons overrules religion. Similarly, in other religions, some people (in order to empower themselves) manipulate the teachings of religion and make others do such a sin as killing a newborn.

5. Caste

This is another factor behind the practice of female infanticide in India. It is one of the various types of social inequalities and comes under a closed stratification system. His parents and caste exogamy determine the status of a person is also prohibited.

Sec Ratios by Religious Community			
	1991	2001	2011
Christian	994	1009	1023
Buddhist	952	953	965
Jain	946	940	954
Muslim	930	936	951
Hindu	925	931	939
Sikh	888	893	903
India	**927**	**933**	**943**

Figure 1 (Source: Census, 2011)

When Duncan first found the prevalence of this practice, it was among Rajkumar Rajputs of Jaunpur district. It was discovered by him that there was a great prominence of infanticide among the Rajputs of undivided Punjab, Rajasthan, UP, Malwa, and Saurashtra. Infanticide among Jadeja (Rajput clan of peninsular Gujarat) was prevalent, so no female children existed in their taluks.[16] It was also found among other castes like Jats, Gujars, Ahirs, and Khutris in Uttar Pradesh; Lewa Patidars in Gujarat; moyal Brahmins in undivided Punjab, etc., were under the same category.[17] They don't hesitate to kill their daughters to maintain their socioeconomic status, prove their caste dominance, and save their pride and money. Figure 1 clearly shows the difference between the number of girls and boys among various castes in North

[16] L.S. Vishwanath, *Female Infanticide: The Colonial Experience*, 39 ECO. AND POL. WEEKLY 2313, 2315 (2004).
[17] L.S. Vishwanath, *Female Foetecide and Infanticide*, 36 ECO. & POL. WEEKLY 3411, 3411 (2001).

India. It can be seen that the gap among some castes is vast and even further increasing with time. The colonial data and 2001 census found that the practice of infanticide among jats in Punjab is 150 years old.[18] It has led to a decline in the proportion of girls per thousand males. In 1856, a special officer was appointed to investigate female infanticide in 418 villages of the Benares division.

Three hundred-eight villages were female deficient, and 62 were devoid of children below six years old. Figure 2 shows a drastic decline in the sex ratio from 2001 to 2021 All the efforts and hard work to stop this practice have been in vain. Even today, it is prevalent in many states of the country. According to a NITI Aayog's report on sex ratio at birth, number of females has dropped from 906 in 2012-14 to 900 in 2013-15 and 898 in 2014-16 and 933 in 2022-2023.. Overall, SRB (sex ratio at birth) dropped in 17 states, and Gujarat remained the worst-performing state.[19] and top performing rate is Chhattisgarh worst performing is Haryana.

In 2007, there were 903 females in front of 1000 males, which reduced to 877 in 2016.[20] SRB in some states has reached as low as 840 or even below. It is 806 in Andhra Pradesh and Rajasthan, 837 in Bihar, 825 in Uttarakhand, and 840 in Tamil Nadu.[21] This results in a scarcity of girls which further becomes the root cause of many problems. Men, unable to get married, are left with no option but to import brides from other areas. The shortage of women binds men and their families to engage in women trafficking and leads to increased sexual violence. A survey in Haryana found that out of the total married women, more than 9000 were imported from other states. Imported brides rarely have a good background or culture and are treated like slaves. They are married at an early age (child marriage), resulting in childhood pregnancies. As a result of such early-age pregnancies, the health of girls (mothers) is severely affected. Unable to handle such pregnancies, many girls die, increasing maternal death rates. The children that are born from underaged girls are also impaired. They are sometimes too weak to survive and eventually die. Their death results in an increased infant mortality rate (death of young children below the age of 1).

The natural causes behind such killing crimes are pride, poverty, avarice, and superstition combined.[22] Under the illusion of pride of race, people consider it better to kill their daughter instead of marrying them into the clans that are equal or lower to them (in social status).

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[18] *supra* note at 2316.
[19] Priyanka Pulla, *What are the consequences of India's falling sex ratio*, THE HINDU, Mar. 3, 2018.
[20] *Missing at birth: on sex selective abortion and infanticide,* THE HINDU, Mar. 09, 2020.
[21] *Id.*
[22] Fendall Curie, *Female Infanticide in India*, 2 LAW MAG. & REV. MONTHLY 338, 340 (1873).

Moreover, some people also fear the dishonor they would face if their daughters were destined for celibacy. This blend of pride and fear results in a considerable expenditure on daughters' marriage. Profligacy, among certain castes, is considered a matter of pride and honor. It is said that "the Rajput will throw away his birthright to celebrate a marriage."[23] The condition is so bad that a girl is killed on the assumption that she will bring shame and poverty in the future.

To maintain a dominant position in society, men have always downgraded women. But, there have always been some people who opposed this system or constantly tried to abolish this system. Women like Savitribai Phule, Tarabai Shinde, Fatima Sheikh, Sharmila Rege, etc., have greatly empowered women. The government has made constant efforts. Many acts and schemes like the abolition of Sati practice (1829), the Widow Remarriage Act (1856), the Prohibition of Dowry Act, 1961 the Prohibition of Child Marriage Act, 2006 The Muslim Women (Protection of Rights on Marriage) Act, 2019 and Beti Bachao Beti Padhao Scheme, etc. have been passed by it. They have proved effective in strengthening the position of women. But, because of the lack of proper implementation of such acts, their impact remained limited. Another reason behind it is also the conservative thinking of people. Many people are not ready to accept that women can be equal to them. And until this thought is prevalent in people's minds, the condition of women cannot be improved. So, it becomes essential to transform the overall thinking of people and make them realize that women are not less than men in any way. Then only people will accept them and practice infanticide, and foeticide would stop.

Solutions & Suggestions

a) Change in the ideologies and perspectives

People who live in rural communities and are in need of transformation in their thoughts and viewpoints regarding females are those who belong to groups that are backward and needy. They ought to cherish the girl children's birth and see them as devoted family members. They must adopt positive views of girls and believe that when they grow and change in a healthy way, they will not only become useful members of their families and communities but also productive citizens of the nation. Consequently, as these individuals' thoughts and viewpoints shift, they will effectively and critically commit to reducing the crimes of female foeticide and female infanticide.[24]

b) Enactment of statutes and policies

The primary goal of the numerous policies, initiatives, programs, and tactics that the Indian government has carried out is to raise

[23] *Id.* at 340.
[24] Jena DKC, 'Female Foeticide in India : A Serious Challenge for the Society

community knowledge about the importance of girl children's birth rather than viewing them as burdens. The primary goal of the Indian government's Beti Bachao Beti Padhao campaign is to raise public awareness of the need to protect girls and give them access to better education. The initial funding for the initiative was Rs. 100 crores. The states of Haryana, Punjab, Delhi, Uttarakhand, Uttar Pradesh, and Bihar are the primary targets of this campaign. As a result, it is frequently stated that using laws and strategies will significantly contribute to the control of the practices of female infanticide and female foeticide.[25]

c) Promoting Education Acquisition

Education is perceived as a tool that provides females with knowledge and understanding not just of academic topics but also of several other aspects that would enable them to benefit in multiple ways. When the girls have an education, they will be able to distinguish between what is proper and wrong, effectively support their daily settings, and instill the virtues of diligence, ethics, conscientiousness, and morality in order to become contributing members of the community. females education centres should be built in rural regions to encourage females to pursue higher education. These centres will give girls the chance to improve their literacy abilities and learn about a variety of academic subjects. This makes it possible to say that raising awareness of education in rural regions will also help society treat females with decency and respect and stop the actions of female infanticide and female foeticide.[26]

d) Promoting Girls' Skill Development

The guardians must frame the idea that as girls' abilities grow, better career choices will become available to them. Agriculture is thought to be the primary employment in rural areas. Beyond agriculture, the people labour in a variety of jobs including food production, pottery making, silk weaving, handicrafts, and artwork creation. It is imperative that parents teach their daughters effective skills for handling work-related tasks. When the girls reach a certain level of development, they will assist their parents with the manufacturing and production operations as well as the product's marketing. Developing girls' skills in this way can help to value their

[25] Dagar R, 'INSTITUTE FOR DEVELOPMENT AND COMMUNICATION, CHANDIGARH'
[26] Koradia K and others, 'Female Foeticide and Infanticide: An Educational Programme for Adolescents of Jaipur City' [2013] International Journal Of Social Sciences & Interdisciplinary Research <https://www.semanticscholar.org/paper/Female-Foeticide-and-Infanticide%3A-an-Educational-of-Koradia-Sharma/aa1f54c9e05b9eca330ac492057f4ac15a85ea6f> accessed 24 November 2023

birth and lessen the incidence of female infanticide and female foeticide.[27]

6. Conclusion

To Sum up, both urban and rural residents must be conscious of the needs of female children in society in addition to those of male children. Female infanticide is a social ills and sin that cannot be resolved by reformative legislation or statutes alone. The public needs to be informed about reforming laws that contain specific facts that serve as a deterrence. Many women are under pressure to get tested and seek an abortion if they are found to be pregnant. It is necessary to instill a new spirit that proclaims having a female child is not a curse. She is not a liability. A change can be made by social mobilization, political will, and the creation of widespread awareness. In addition to raising awareness, the fear of being shunned by the community has been shown to influence people's attitudes and behaviours.

Nonetheless, the Indian government has been making efforts to improve the standing of female children in the nation and encourage their education through a number of initiatives and stratigies. These have undoubtedly helped to improve girl's standing in society, but much more work has to be done before girls and boys are truly viewed equally.

[27] Bano N and others, 'A Critical Review: Problem of Female Foeticide and Female Infanticide in India'

Scientific Enhancement or Ethical Dilemmas: Navigating Stem Cells Through Medicine and Cosmetics

Joyita Ghosh[*]

1. Introduction

Since ancient times, humans have possessed a deep-seated desire to survive and thrive, seeking ways to extend their lifespans and enhance their well-being. From the earliest civilizations, there have been experimentations with natural remedies and healing practices to modern scientific breakthroughs; the quest for a longer, healthier life has been a central theme in human history. This quest for an enhanced quality of life has led to profound pharmacology, surgery, genetics, and public health breakthroughs. It has driven researchers and healthcare professionals to explore new frontiers, pushing the boundaries of what is possible in terms of disease prevention, treatment, and overall well-being.

Previously, plants and herbs, which contain many medicinal values, have been used to use their healing powers in their daily lives. Since ancient times, there has been development in medicine, and it evolved through generations into our present medication. The research is more comprehensive than plants and herbs. With its evolution came technological advancement, which started research in areas beyond the limits. Due to research, we now have advanced biological advancements in genetics and the like. Thus, when scientific research crosses the line of ethical and moral issues, it becomes necessary to develop basic guidelines not to violate basic human rights as they are considered fundamental rights. These guidelines and rules not only help give humans rights but also provide a safety net to prevent any violation and safeguard human dignity and equality.

2. Stem Cell Research

Science has evolved, and along with technology, its evolution has been incredible. Stem cell Research is one of the latest aspects that came into light in the fields of biotechnology. Biologically, stem cells are living cells that can develop into a variety of cell types and are essential for medical research in addition to therapy.[1] Extensive research has been going on in this field where researchers are in search

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[1] Jesse K. Biehl & Brenda Russell, *Introduction to Stem Cell Therapy*, 24 J CARDIOVASC NURS 98 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4104807/ (last visited Oct 9, 2023).

of something that can help the body heal itself using the substance that the body creates. A stem cell is nothing but cells generated from one cell and into different types of cells. They renew themselves and keep on developing from one another by dividing themselves even though they have been inactive for a very long time.[2] This is a new stream of research where many unique aspects are discovered daily. Its study is helping researchers to understand the working mechanism of stem cells, their development from a single cell its function as a regenerative source, and how this can be helpful to humans and animals.

Researchers not only working for these ways but also doing research on how stem cells can be used in various aspects like in the field of medicine, cosmetics, etc. and what can be the effects to such a new substance, as it can help in replacing diseased or damaged cells and have a breakthrough in the fields.

3. Historical Background

Stem cell research began when the concept of cell regeneration was known to human kind, which dates back to the 19th century, which started with stem cell research on the tissues in lower organisms like flatworms. Between 1960-70s, the discovery of stem cells was a big thing. In 1960s, two Canadian Scientists, Dr James Till and Ernest McCulloch, conducted groundbreaking experiments that led to the discovery of stem cells. This became the foundation for the further exploration in this new area[3]. In the 20th century, researchers began to study embryonic stem cells (ESCs) in mice and made some significant progress; thus, this became the foundation for future studies on human ESCs. Around 1998, James Thompson and his team at the University of Wisconsin-Madison successfully, for the first time, isolated and cultured human embryonic stem cells[4]. This breakthrough opened the door for human stem cell research. Thus, in 2000, ethical debates began when Scottish scientists' successful cloning of a sheep demonstrated the potential to create a genetically identical organism[5]. Thus came the debates, particularly surrounding the destruction of embryos and the implications of such research on human beings. Soon after, stem cell-based therapies entered clinical trials for various conditions like diabetes, heart disease, etc. Among the treatments, some started showing promising results, and thus,

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[2] Stem cells: Therapy, controversy, and research, https://www.medicalnewstoday.com/articles/200904 (last visited Nov 24, 2023).

[3] Stem cells and regenerative medicine — future perspectives, https://cdnsciencepub.com/doi/10.1139/y2012-007 (last visited Oct 9, 2023).

[4] Terry Devitt, UW-Madison scientists guide human skin cells to an embryonic state, available at https://news.wisc.edu/uw-madison-scientists-guide-human-skin-cells-to-embryonic-state/ (last visited Oct 9, 2023).

[5] Seyedeh Leila Nabavizadeh et al., *Cloning: A Review on Bioethics, Legal, Jurisprudence and Regenerative Issues in Iran*, 5 WORLD J PLAST SURG 213 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5109382/ (last visited Oct 9, 2023).

many rules and regulations started being formulated in order to keep the rights of humans safe. Various Countries and organisations have established ethical guidelines for stem cell research. The guidelines address issues such as informed consent, human subjects, and the handling of human tissue samples. With a legal framework in place, this research started to become involved in international collaborations. Legal agreements and protocols are in place to facilitate cross-border research, data sharing, and the harmonization of regulatory standards to ensure consistency and ethical practices.

4. Types[6]

There are several different types of stem cell research being covered. Stem cells can currently be extracted from two types of cells: Embryonic stem cells and adult stem cells. Both have separate research areas. Most research is conducted on the stem cells retrieved from unused embryos, which result from in-vitro fertilization procedures, and the second type comes from the fully developed tissues such as the brain, skin, and bone marrow. Research from these stem cells is in small quantity since there are only a small no of stem cells in these tissues. The main issue or controversy arises when the human embryonic stem cells research are conducted, which raises few questions, like whether it is a violation of human rights or if killing the unfertilized embryo are justified etc.

5. Stem cell research in the field of Medicine and Cosmetics

The stem cell research in the field of medicine and cosmetics varies across different countries.

1) Medicine[7]

Stem cell research in medicine holds great promise for the development of regenerative therapies and treatments. Stem cells have the unique ability to self-renew and differentiate into specialized cell types, making them valuable for repairing or replacing damaged or diseased tissues. Some key areas of application include:

a. Regenerative medicine: Stem cells can be used to regenerate damaged or lost tissues and organs. This includes potential treatments for conditions such as spinal cord injuries, Parkinson's disease, Alzheimer's disease, heart disease, diabetes, and various types of tissue damage.
b. Tissue engineering: Stem cells can be used to develop engineered tissues and organs for transplantation. This

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[6] What Are Stem Cells?, https://www.stanfordchildrens.org/en/topic/default?id=what-are-stem-cells-160-38 (last visited Oct 9, 2023).

[7] Stem cells: What they are and what they do - Mayo Clinic, https://www.mayoclinic.org/tests-procedures/bone-marrow-transplant/in-depth/stem-cells/art-20048117 (last visited Oct 9, 2023).

approach aims to address the limitations of organ transplantation by creating organs that are tailored to the patient, reducing the risk of organ rejection.

c. Drug testing and disease modeling: Stem cells can be used to create disease-specific cell models to study the development and progression of diseases and to test the efficacy and safety of drugs. This enables better understanding of diseases and more targeted drug development.

2) Cosmetics

Stem cell research has shown potential in cosmetics as well by providing new avenues for improving patient outcomes and addressing aesthetic concerns. For example, research-derived products such as platelet-rich plasma and adipose-derived stem cells have been utilized to enhance the effectiveness of cosmetic procedures, such as facial rejuvenation and wrinkle reduction . Some of the key areas where stem cells are being explored for their cosmetic benefits include:

a. Anti-Aging Treatments: Stem cells, particularly those derived from adipose tissue or bone marrow, can be used in anti-aging procedures. They may promote the regeneration of skin cells, collagen, and elastin, leading to smoother, firmer, and more youthful-looking skin.

b. Hair Restoration: Stem cell therapies are being investigated for hair loss and thinning. Stem cells may stimulate hair follicle growth and improve the quality of existing hair.

c. Scar Reduction: Stem cells can aid in scar reduction and skin healing. They may help minimize the appearance of scars, including acne scars, by promoting tissue regeneration.

d. Skin Rejuvenation: Stem cell-based serums and creams are used in skincare products to rejuvenate the skin and improve its texture and elasticity. These products can enhance the overall appearance of the skin.

e. Fat Transfer: Stem cells are often used in fat transfer procedures for facial and body contouring. They can enhance the survival and longevity of transferred fat cells, leading to more natural and long-lasting results.

f. Wound Healing: Stem cells can accelerate wound healing, which is essential in cosmetic procedures to minimize downtime and reduce the risk of complications.

6. Legal Issues Pertaining to Stem Cell Research

While many individuals are now well-informed about the potential medical advancements that stem cell research could bring, there is

limited awareness regarding the numerous ethical concerns tied to this research. The dominant focus of the ethical debate revolves around the moral implications of using human embryos for the betterment of others. Although this matter holds significant importance, it is crucial to acknowledge and address other essential ethical considerations related to stem cell research that have not received adequate attention in public discourse. Hence, it is necessary to broaden our analysis and engage in a broader discussion on these matters.

In this article, I examine the ethical and policy implications of stem cell research by highlighting three key factors that require further discussion in the ongoing debate- Social, Ethical & Moral Issue.

1) Social Issue[8]

In recent years, stem cells have gained some renewed interest as part of precision medicine because of the advent of human stem cell research and the establishment of accessible stem cell banks. Despite this, it is important to take into account the potential impact of these innovations on healthcare disparities. To ensure social justice, it is crucial to acknowledge that the socioeconomic conditions and their distribution can affect individual health. Despite socioeconomic status differences, it is important to recognize that different individuals have different needs, and steps should be taken to address inequalities and meet those needs. Parties living in unequal socioeconomic conditions might require different interventions to achieve common outcomes. Distributive justice, which focuses on equitable access to and distribution of resources across diverse genetic, ethnic, and socioeconomic backgrounds, should be emphasized in this discussion. Furthermore, it is important to consider a wide range of health conditions and diseases.

However, it is also essential to consider factors like literacy and health awareness, as they impact a patient's ability to access healthcare and make informed treatment decisions. Religious and cultural sensitivity also play a role in how patients and their families choose and accept treatment options. These considerations become especially significant when dealing with emerging technologies like stem cell medicine, which adds complexity to the field. Tailoring biological treatments to individual patients, such as those involving stem cells, pose significant challenges, including high costs and limited accessibility. These treatments are often concentrated in major cities with sufficient funding and industry support, creating social barriers and injustice for many segments of the population.

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[8] Ranjeet Singh Mahla, *Stem Cells Applications in Regenerative Medicine and Disease Therapeutics*, 2016 INT J CELL BIOL 6940283 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4969512/ (last visited Nov 24, 2023).

2) Ethical issues[9]

An informed consent is a basic requirement in research involving human subjects. Studies involving human embryos are particularly sensitive to this principle. Many people reject all embryo research and some support specific forms, but opinions vary widely among the public and potential embryo donors. It may also be ethically problematic if infertility research later transitions to commercial stem cell research if initially acceptable as infertility research. A consent process that encompasses future use of donated embryos is crucial to addressing this diversity of views. Aside from their special emotional and moral significance, reproductive materials are often handled with care because they are often infected with life-threatening diseases.

Research on embryos and human embryonic stem cells (hESCs) is also highly sensitive to donor confidentiality. Donors may be exposed to unwanted public attention or harassment if confidentiality is breached. The loss or theft of sensitive donor data and deliberate breaches of donor confidentiality are recent examples that demonstrate the importance of safeguarding donor confidentiality. This challenge can be addressed by implementing strict security measures such as secure storage rooms, password-protected access, limited access, electronic entry records, regular monitoring of access, copy protection, double encryption, and the safeguarding of encryption keys by high-ranking officials not involved in stem cell research in order to address it. Moreover, computers storing such data should not be connected to the Internet to minimize risks.

Ethical concerns have also been raised regarding the use of somatic cell nuclear transfer (SCNT) for human reproduction. Cloning errors in animals have resulted in severe congenital defects, making it highly risky for human application. Additionally, some argue that SCNT undermines human dignity and contradicts traditional moral, religious, and cultural values. Cloning for reproductive purposes is widely deemed morally objectionable and is illegal in several jurisdictions due to concerns that it reduces children to products of a designed process rather than unique individuals and disrupts natural generational boundaries.

3) Moral Issue[10]

The question of when human life commences is a deeply contentious and morally significant issue, closely tied to debates about abortion and stem cell research. This dispute essentially revolves

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[9] Endocr Rev, Ethical Issues in Stem Cell Research - PMC, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2726839/doi: 10.1210/er.2008-0031 (last visited Oct 9, 2023).

[10] Dietmar Mieth, *Going to the Roots of the Stem Cell Debate*, 1 EMBO REP 4 (2000), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1083695/ (last visited Oct 9, 2023).

around a fundamental disagreement between two groups: those who assert that human life begins at the moment of conception and those who contend that it achieves moral personhood at a later stage of development. Some individuals, guided by their religious beliefs and moral convictions, firmly maintain that an embryo is a person from the instant of conception, endowing it with rights and interests equivalent to a born child. Consequently, they perceive any interference with an embryo, such as creating embryonic stem cell lines, as morally equivalent to taking a human life.

In contrast, there are those who hold a different viewpoint on the moral status of the embryo. They argue that moral personhood is reached at a later stage than fertilization and that the early embryo, while deserving special respect as a potential human being, can be ethically utilized for specific types of research under careful oversight and with informed consent from donors. This middle-ground perspective recognizes the embryo's potential while seeking to strike a balance between respecting its intrinsic value and advancing scientific knowledge for the betterment of humanity.

It is crucial to acknowledge that within the pro-life movement, there is not a unanimous opposition to human embryonic stem cell research. Certain pro-life leaders, such as former First Lady Nancy Reagan and Senator Orrin Hatch, advocate for stem cell research utilizing frozen embryos that would otherwise be discarded[11]. They see this as consistent with pro-life and pro-family values, arguing that the moral imperative lies in using these embryos to save and enhance lives, thereby preventing their wasteful disposal. The complex ethical discussions concerning the beginning of human life continue to challenge our society's core values and principles, prompting ongoing conversations about the sanctity of life and the pursuit of scientific advancement.

Another aspect which is facing problem is regarding the Intellectual property and commercialization. Stem cell research is encountering significant challenges in the realm of intellectual property rights and commercialization. The strong commercial potential of stem cell technologies has led to patent disputes and legal battles, such as the highly publicized case involving the Broad Institute and the University of California over the CRISPR gene-editing technology. These disputes can slow down research and development efforts, divert resources towards litigation, and hinder the broader scientific community's access to critical technologies.

One of the complexities lies in the diversity of intellectual property within stem cell research. For instance, researchers might hold patents for specific stem cell lines, techniques for cell reprogramming, or

[11] *supra* note 10.

methods for differentiating stem cells into specialized cell types. This intricate web of intellectual property claims can create challenges in determining who has the right to use which technologies and under what conditions[12].

Balancing the rights of inventors or research institutions with the broader goal of facilitating access to essential stem cell technologies remains a significant challenge. Striking this balance is essential for promoting scientific progress and ensuring that ground-breaking discoveries in stem cell research can be used to develop novel therapies and benefit society as a whole.

7. Development of Stem Cell Research in India

India's efforts to manage and oversee stem cell research were prompted by the increasing worries regarding unregulated and unverified stem cell treatments provided at clinics during the mid-2000s. In order to address this issue, the Indian Council of Medical Research initially introduced ethical guidelines in 2000 on a non-binding basis, which were subsequently revised in 2006[13]. However, these guidelines did not have regulatory measures for enforcement.

In order to meet the requirement for efficient regulation of stem cell research, the Indian Council of Medical Research partnered with the Department of Biotechnology to develop the "Guidelines for Stem Cell Research and Therapy" in 2007. These guidelines were designed to define ethical norms for SCR and proposed a formal authorization process along with continuous supervision of SCR endeavours. Furthermore, they imposed limitations on clinical application of stem cells, allowing their use exclusively within authorized clinical trials.

The Indian government has been instrumental in providing financial support and grants for the development of infrastructure and operational activities related to stem cell research. In 2013, comprehensive guidelines were established as the National Guidelines for Stem Cell Research, which aimed at addressing intricate ethical, social, and legal concerns associated with SCR[14]. These guidelines signify a significant achievement in regulating the field in India, promoting rigorous scientific reasoning while safeguarding against the premature commercialization of unverified stem cell therapies.

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[12] Stem Cells: Intellectual Property Issues in Regenerative Medicine - PMC, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3883125/ (last visited Nov 24, 2023).

[13] Sapan Kumar Behera et al., *Indian Council of Medical Research's National Ethical Guidelines for Biomedical and Health Research Involving Human Participants: The Way Forward from 2006 to 2017*, 10 PERSPECT CLIN RES 108 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6647898/ (last visited Nov 24, 2023).

[14] National Guidelines for Stem Cell Research and Therapy, available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=116030 (last visited Oct 10, 2023).

Significantly, the National Guidelines for Stem Cell Research introduced important revisions. These include the requirement for mandatory registration of both the Institutional Committee for Stem Cell Research and the Institutional Ethics Committee with the National Apex Committee for Stem Cell Research and Therapy as well as Central Drugs Standard Control Organization. The guidelines also emphasized that clinical trials should only be conducted at institutes with registered IC-SCR and IEC, ensuring that research is carried out in facilities certified under Good Manufacturing Practice and Good Laboratory Practice. Additionally, medical professionals involved in clinical research are now required to possess postgraduate qualifications approved by the Medical Council of India in their respective fields. Through these amendments, India demonstrates its dedication to advancing stem cell research while upholding ethical principles and prioritizing patient safety.

8. Stem Cell Research in India: A Blend of Tradition and Modernity in Cosmetics and Medicine

Applied to cosmetics and medicine, Indian stem cell research offers unique characteristics. Indian healthcare practices and scientific advancements are distinguished by this blend of tradition and modernity.

As stem cell technology progresses, cosmetic clinics in India are harnessing its potential to revolutionize a range of cosmetic procedures. The stem cell facial uses serums or creams infused with stem cells to rejuvenate and increase the elasticity of the skin. Further research is being conducted to study stem cell therapy derived from adipose tissue or hair follicles as a way to promote hair growth and improve the quality of hair, addressing concerns related to thin and lost hair.

Scar reduction treatments, such as acne scar therapies, can be achieved using stem cells beyond skincare and hair care. In addition to assisting in tissue regeneration, their regenerative properties can make the skin smoother and more elastic. As a result of stem cell use coupled with fat transfer procedures in cosmetic surgeries such as facial and body contouring, more natural and long-lasting cosmetic outcomes can be achieved. As a result of these advancements, stem cell research in India has contributed significantly to the development of cosmetics practices there. Although India has followed the global trends but with some unique aspects[15].

1) Plant-Derived Stem Cells: Indian research in cosmetology often focuses on plant-derived stem cells. India is rich in biodiversity,

[15] Maya Valeska Gozali& Bingrong Zhou,, Effective Treatments of Atrophic Acne Scars - PMC, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4445894/ (last visited Nov 24, 2023).

and researchers have explored the potential of plant stem cells from native flora, such as apples, saffron, and lotus, in skincare products. These unique botanical resources offer a distinctive approach to cosmetic applications.

2) Ayurvedic and Traditional Knowledge: India has a deep-rooted tradition of Ayurveda and traditional medicine. Indian researchers and cosmetologists sometimes integrate Ayurvedic principles and ingredients into stem cell-based cosmetology. This blending of ancient wisdom with modern stem cell technology results in innovative cosmetic treatments.

3) Diverse Patient Population: India's diverse population includes individuals with various skin types and concerns. This diversity has led to research that caters to a wide range of cosmetic needs and challenges. Researchers in India may develop stem cell-based treatments tailored to address specific concerns in different ethnic groups.

4) Cost-Effective Solutions: Given the cost-conscious nature of the Indian market, researchers often strive to develop cost-effective stem cell-based cosmetology solutions. This approach ensures that a broader segment of the population can access and benefit from these treatments.

5) Local Collaborations: Collaborations between Indian research institutions, cosmetology clinics, and traditional medicine practitioners have resulted in a holistic approach to cosmetology. This synergy between different domains of healthcare and wellness is a unique feature of Indian research.

6) Cultural and Regional Considerations: Indian research takes into account cultural and regional preferences when developing cosmetic treatments. This includes considering factors such as traditional beauty practices and local preferences for skincare ingredients.

7) Regulatory Framework: India has its regulatory framework for the use of stem cells in cosmetics and healthcare. Researchers and cosmetologists must adhere to these guidelines, ensuring that treatments are conducted safely and ethically.

In the field of medicine[16], it has several unique aspects and contributions

[16] Bryn Lander, Halla Thorsteinsdóttir, Peter A Singer, Abdallah S Daaret al., *Harnessing Stem Cells for Health Needs in India*, 3 CELL STEM CELL 11 (2008), available at https://www.sciencedirect.com/science/article/pii/S1934590908002944 (last visited Nov 24, 2023).

1) Ayurvedic and Traditional Medicine Integration: India has a long history of traditional medicine, including Ayurveda. Researchers often blend traditional healing practices with stem cell research. This integration can lead to novel approaches to treating various medical conditions.

2) Diverse Patient Populations: India's population is incredibly diverse in terms of genetics, ethnicity, and health conditions. Researchers in India have the advantage of studying the effects of stem cell-based therapies on a wide range of patient populations, allowing for more comprehensive insights into treatment outcomes.

3) Cost-Effective Healthcare Solutions: India's healthcare landscape includes a focus on cost-effective treatments. Stem cell therapies developed in India often prioritize affordability without compromising safety and efficacy. This approach can make advanced treatments accessible to a larger segment of the population.

4) Regulatory Framework: India has established its regulatory framework for stem cell research and clinical applications. These regulations ensure ethical practices and patient safety while promoting advancements in the field.

5) Collaborations with Traditional Healers: Collaborations between modern medical researchers and traditional healers are not uncommon in India. Such partnerships can lead to innovative approaches to using stem cells in combination with traditional remedies for specific conditions.

6) Tropical Diseases Research: India's tropical climate makes it an ideal location for researching diseases like malaria and dengue fever. Stem cell research in India often involves studying these diseases and developing potential treatments.

7) Cultural Sensitivity[17]: Researchers in India are attuned to cultural and religious factors that may influence healthcare decisions. This sensitivity can impact the development and implementation of stem cell therapies, ensuring they align with cultural beliefs and practices.

8) Large-Scale Clinical Trials: India's large population and robust healthcare infrastructure make it an attractive location for conducting large-scale clinical trials. This facilitates the testing and validation of stem cell-based treatments on a significant scale.

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[17] Sanjay Mittal, *Stem Cell Research: The India Perspective*, 4 PERSPECT CLIN RES 105 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3601694/ (last visited Nov 24, 2023).

9) Stem Cell Banking and Registries: India has established stem cell banks and registries, contributing to the availability of stem cells for various medical applications, including transplants and research.

10) Combating Endemic Diseases: Researchers in India have a unique opportunity to focus on diseases endemic to the region, such as tuberculosis. Stem cell-based research efforts are directed toward understanding and treating these conditions.

9. Challenges faced by India in legal aspect

1) Scientific Research Infrastructure: India still faces challenges in terms of research infrastructure and resources compared to developed countries. This includes access to state-of-the-art laboratories, advanced equipment, and funding for stem cell research. Limited resources may hinder the pace of scientific advancements and the ability to compete globally.

2) Translation to Clinical Applications: While there have been scientific breakthroughs in stem cell research in India, the translation of these findings into clinical applications is still limited. This gap arises due to several factors, including a lack of well-established clinical trial infrastructure, regulatory constraints, and a scarcity of funding for early-stage clinical trials.

3) Regulatory Framework: India's regulatory framework for stem cell research is still evolving. Although guidelines have been issued by the Indian Council of Medical Research (ICMR), there is a need for more comprehensive legislation specifically addressing stem cell research and therapy. Greater clarity in the regulations and the establishment of a robust regulatory framework can provide a clear pathway for stem cell researchers, ensuring ethical and safe practices.

4) Industry Collaboration: Collaboration between academia, industry, and regulatory authorities is crucial for the advancement and commercialization of stem cell therapies. While steps have been taken to foster collaborations, there is still a need to streamline the process and strengthen partnerships between research institutions, industry players, and government agencies to facilitate the development and commercialization of stem cell therapies.

5) Awareness and Education: Increasing public awareness and understanding of stem cell research is essential. Educating the general public, healthcare professionals, and policymakers about the potential benefits and limitations of stem cell research can facilitate discussions and ethical decision-making informed by scientific evidence.

10. ICMR Guidelines 2017[18]

According to NGSCR 2017, all human stem cell studies conducted in the country must adhere to ethical and scientific guidelines. According to these regulations, all individuals involved in biomedical research, specifically stem cell research, must comply with a variety of requirements. It stresses the importance of upholding ethics and scientific standards among stakeholders involved in stem cell research in India. For stem cell research to be conducted ethically, all participants must provide informed consent and their personal information must remain confidential, as well as their safety and well-being. For stem cell research to be successful, strict evaluation and monitoring should be conducted according to established guidelines. National Stem Cell Research and Therapy Committee, as well as Institutional Stem Cell Research and Therapy Committee, would play important roles both on the national and institutional levels. Research protocols would be reviewed and approved by these committees, as well as ongoing studies would be closely monitored.

For the purpose of ensuring transparency regarding ongoing research, India has created the National Registry of Human Embryonic Stem Cell Research. Researchers and individuals can access information about these research activities through this registry, which provides information on the status of various therapies.

Although in the United States, the FDA regulates human cells and tissues for transplant purposes via the Centre for Biologics Evaluation Research, these specific measures are not explicitly outlined in India's Stem Cell Research Guidelines. It wasn't until 2002 that the Indian Council for Medical Research and the Department of Biotechnology proposed guidelines for monitoring stem cell-related research nationwide[19]. A framework for regulating and monitoring stem cell research in India was introduced by the Indian government in 2007 called the National Guidelines for Stem Cell Research (NGSCR).

NGSCR is governed by the Drugs and Cosmetics Act, 1940[20] and its Rules. The Guidelines explain how to conduct stem cell research, deal with stem cell material, and address ethical considerations. Moreover, the guidelines emphasize registration with the National Apex Committee for Stem Cell Research and Therapy as well as with the

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[18] Title: National Guidelines for Stem Cell Research-2017
Available at:
https://dbtindia.gov.in/sites/default/files/National_Guidelines_StemCellResearch-2017.pdf
(Accessed: 09.10.2023)

[19] Title: Guidelines for Stem Cell Research and Therapy-2007
Available at :
https://main.icmr.nic.in/sites/default/files/guidelines/stem_cell_guidelines_2007_0.pdf (Accessed: 24.11.2023)

[20] Drugs and Cosmetics Act, 1940, Act No. 23 of 1940

Central Drug Standard Control Organization for the Institutional Stem Cell Research and Ethics Committees.

The ICMR Guidelines for Stem Cell Research, 2017, provide a comprehensive framework for the ethical and scientific conduct of stem cell research in India. While I cannot provide the complete text of the guidelines, here is an outline of the key areas covered in these guidelines:

1) Committee Registration: Institutional Committees must register with relevant national authorities.

2) Clinical Trial Standards[21]: Ensure that clinical trials are conducted in certified facilities with appropriate practices and authorization.

3) Video Consent[22]: To make video consent mandatory, following the guidelines of the CDSCO.

4) Disease Screening: Require mandatory screening for diseases and genetic risk factors.

5) Levels of Manipulation[23]: Before using SCPDs for clinical purposes, they may undergo processing that can introduce contamination and change their properties. The level and type of manipulation can vary, leading to different levels of manipulation for SCR. Different approvals are required for each level.

    a) Minimal: If the processing does not alter the quantity, biological properties, and functions of cells or tissues required for reconstruction, repair, or replacement, it includes procedures such as using bone marrow, peripheral blood, or umbilical cord blood-derived cells, or bone marrow concentrate via intravenous route. This processing to be done within 72 hours by obtaining approvals from CDSCO, IC-SCR, and IEC.

    b) Substantial: Ex vivo changes can be made to the cell population without altering their characteristics and function. However, if the processing affects the original properties of adipose tissue for use in reconstruction, repair, or replacement, it may be considered more than minimally manipulated. And in such case one has to obtain CDSCO approval after IC-SCR and IEC clearances.

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[21] Nithya J Gogtay, Renju Ravi & Urmila M Thatte, *Regulatory Requirements for Clinical Trials in India: What Academicians Need to Know*, 61 INDIAN J ANAESTH 192 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5372399/ (last visited Nov 24, 2023).

[22] Parvan A Shetty et al., *Audiovisual Recording of the Consenting Process in Clinical Research: Experiences from a Tertiary Referral Center*, 9 PERSPECT CLIN RES 44 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5799953/ (last visited Nov 24, 2023).

[23] Section 7, National Guidelines for Stem Cell Research, 2017

c) Major: Changing the genetic and epigenetic makeup of stem cells or cultured cells can alter their quantity, biological traits, and function. This can be done through methods like transdifferentiating, transduction, and gene delivery for specific cell selection and expansion. For this, one has to obtain CDSCO approval after NAC-SCRT, IC-SCR, and IEC clearances.

   i. In vitro studies[24]:

      a. For in vitro studies, except with well-established human stem cell lines, prior approval from the IEC and IC-SCR is necessary.

      b. Studies involving preimplantation human embryos within 14 days of fertilization or primitive streak formation also require prior approval.

   ii. Preclinical Testing[25]:

      a. For human studies, approval from the Ethical Committee is required.

      b. Approval from the Animal Ethical Committee (IAEC) is needed for small animals, while for large animals and non-human primates, approval from the Committee for the Purpose of Control and Supervision of Experiments on Animals (CPSEA) is necessary.

      c. Certain safety studies such as toxicity and Genotoxicity are mandatory.

      d. A follow-up period of at least 2 years is compulsory, along with the establishment of Data Safety Monitoring Boards and the reporting of any adverse events.

   iii. Banking of Biological Materials[26]: CDSCO-licensed institutions can utilize umbilical cord blood and ESC/iPSC lines, but commercial banking of other biological materials is prohibited. These materials can only be released to institutions with registered IC-SCR and IEC.

   iv. Import of Stem Cell Lines[27]: No objection certificate is not required for basic research; however, import clearance from CDSCO is necessary for stem cell lines from overseas used in clinical trials.

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[24] National Guidelines for Stem Cell Research-2017, Point 10,
[25] Id, Point 11,
[26] Id, Point 14,
[27] Id Point 17

v. Export of Indigenously Developed Cell Lines: Clearances from IEC and IC-SCR are required, and submission of the material transfer agreement is necessary during the research proposal review.

vi. Stem Cell Culture, Characterization, and Validation: This provides protocols and standards for culturing, characterizing, and validating stem cells used in research, along with recommendations to ensure the quality, safety, and potency of stem cell lines.

vii. Intellectual Property Rights: This Guidelines involves addressing intellectual property rights linked to stem cell research and innovation, while also promoting ethical practices in patenting, commercialization, and technology transfer.

11. Loopholes in the Legal Framework

Despite these regulations, there are still gaps in the scientific, operational, and regulatory aspects of stem cell research in India compared to developed countries[28].

Efforts are being made by Indian regulators to address these challenges.

While the guidelines aim to ensure the ethical conduct of stem cell research and protect the rights and safety of participants, there may be certain potential loopholes or challenges in the enforcement and implementation of the legal framework. Some of these issues include:

1) Unregulated stem cell clinics: Despite the guidelines, there have been instances of unregulated stem cell clinics operating in India. These clinics often make unsubstantiated claims about the efficacy of their treatments, putting patients at risk. This highlights a gap in enforcement and monitoring, which allows such clinics to continue their practices.

2) Lack of legal consequences: While the guidelines provide for disciplinary, civil, and criminal action for violations, the enforcement and consequences for non-compliance are not always effectively implemented. This may lead to misconduct in stem cell research and therapies without adequate repercussions.

3) Transparency and reporting: The guidelines require researchers to report their stem cell research projects to the ICMR and the National Apex Committee for Stem Cell Research and Therapy (NAC-SCRT). However, there may be gaps in the reporting process,

[28] Clinical Research Environment in India: Challenges and Proposed Solutions - PMC, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4290669/ (last visited Oct 9, 2023).

which makes it challenging to maintain transparency and accountability.

4) Cross-border issues: Stem cell research and therapies often involve cross-border collaborations and concerns. The legal framework in one country may not align with the rules and regulations in another, posing challenges in terms of harmonization and ensuring consistent ethical and legal practices.

Addressing these loopholes and challenges requires a concerted effort from various stakeholders, including the government, regulatory bodies, and healthcare professionals. Strengthening the enforcement of the legal framework, increasing awareness among researchers and patients, and implementing stricter penalties for violations can help minimize the potential loopholes in the legal framework surrounding stem cell research in India.

12. Concerns

The Ministry of Health and Family Welfare's proposed amendments to the Drugs and Cosmetics Rules, 1945, have faced objections from the Indian Council of Medical Research (ICMR). These amendments, notified on April 4, 2018[29], aim to exclude "minimally" manipulated stem cells from being classified as new drugs. However, this contradicts the guidelines set in 2017 and circumvents the requirement for clinical trial approval prior to market authorization. The objections from the ICMR were submitted on April 29, 2018. If these amendments are approved, it could potentially legitimize unproven stem cell therapies in India.

Furthermore, various commercial entities involved in umbilical cord blood preservation have expressed their belief that individuals should be allowed to store their biological materials for future use. These entities have also raised concerns regarding the recently implemented guidelines that restrict the commercial banking of biological materials. For example, LifeCell, a company based in Chennai, argues that banking is primarily a matter of storage rather than utilization. They contend that if there were concerns about utilization, restrictions on the release of stored stem cells could have been imposed, but such measures have not been taken into consideration[30].

13. Conclusion

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[29] Amendments to Indian Drugs and Cosmetics Act and Rules Pertaining to Blood Banks in Armed Forces - PMC, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4925635/ (last visited Oct 9, 2023).

[30] Carlo Petrini, *Umbilical Cord Blood Collection, Storage and Use: Ethical Issues*, 8 BLOOD TRANSFUS 139 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2906192/ (last visited Oct 9, 2023).

Over the last decade, discussions about embryonic stem cells have changed a lot. We've looked closely at the ethical concerns, which has helped progress happen quickly. Using stem cells in medicine and cosmetics brings both exciting scientific possibilities and ethical challenges. While the potential benefits are huge, it's important to handle the ethical aspects carefully.

To make sure we're doing things ethically, we need to understand different viewpoints and guidelines, like the National Guidelines for Stem Cell Research (NGSCR). In India, it's crucial to go beyond guidelines and create stronger laws. The current guidelines aren't strong enough, so we need legal rules to better oversee and ensure ethics in stem cell research.

Moving to a more solid legal framework is important for accountability and ethical behavior. The current lack of legal enforcement in guidelines could lead to ethical problems. We need strict laws to guide the system, promoting innovation while maintaining ethical standards.

Balancing scientific progress and ethics is vital for India. Instead of picking one over the other, we should see them both as essential to responsible research. Collaboration among scientists, ethicists, policymakers, and the public is key, ensuring ethical considerations grow with scientific standards. Regular checks on the laws will keep them in line with changes.

Education and awareness are crucial. Researchers need to know the ethical implications of their work. Training programs on ethical guidelines empower scientists to do research responsibly. This approach ensures India moves ahead in stem cell research with a mix of scientific progress and ethical responsibility.

India can improve its laws by including diverse cultural and ethical perspectives. Listening to different communities helps create a thoughtful and inclusive approach. Working with other countries exposes Indian researchers to the best practices globally. Dealing with patents is vital for India's growth. Protecting intellectual property rights encourages innovation and helps in scientific and economic advancement, putting India at the forefront globally.

Concerns about ethics in moving from labs to clinics, especially regarding early embryos, still exist but are less of a hindrance than before. Debates about ethics, morals, and laws for using stem cells in therapy continue. Even though there are worries about destroying embryos, it's wise to explore other solutions. If ending unfertilized embryos can save lives without strongly going against ethics, it raises a crucial question: does it violate fundamental rights or the right to life? Stem cell research, with better funding and more public understanding, offers hope for people with otherwise incurable

diseases. Thus to answer the question of whether terminating unfertilized embryos for the purpose of saving lives infringes on fundamental rights or the right to life is complex and multifaceted. It necessitates a careful consideration of philosophical, religious, and legal perspectives, as well as an exploration of consequentialist ethics. As technology advances and our understanding of these ethical dimensions evolves, the debate will likely continue to shape the ethical frameworks guiding stem cell research and its applications.

'Nothing that you do in science is guaranteed to result in benefits for mankind. Any discovery, I believe, is morally neutral and it can be turned either to constructive ends or destructive ends. That's not the fault of science.' Highlighted by Arthur W. Galston.

Animal Rights Legislation in India: A Critical Analysis

Shweta Tyagi*

1. Introduction

Rights are a group of privileges that people have just by virtue of being alive. These rights, which shield people against infringement by others or by the state, may be based on natural law, morality, or judicial systems. In addition to civil and political rights like the right to free speech, due process, and the right to vote, there are also economic, social, and cultural rights like the right to a sufficient standard of living, healthcare, and education. The promotion of justice, equality, and human dignity depends on the acknowledgment and preservation of rights, which is why they are the foundation of democratic society.

2. What are Animal Rights?

Animal rights, which generally refers to the view that all animals should have the right to live without suffering and exploitation, is the idea that some non-human animals have a right to be free from human use and exploitation. There are numerous competing philosophical stances and ideas on this complicated and divisive subject.

Animal rights are fundamentally based on the notion that since animals are sentient beings with their own interests and needs, they ought to be treated with the same respect as people. This implies that all forms of exploitation, cruelty, and suffering against animals should be prohibited. Animals shouldn't be utilised for human reasons like food, clothing, entertainment, or study, according to proponents of animal rights. They also contend that animals shouldn't be treated like property and should have the same legal rights as people, such as the right to life, liberty, and the pursuit of happiness.

3. What is Cruelty?

Cruelty is the willful infliction of pain, suffering, or harm on another person or group, frequently with the aim of doing so for the perpetrator's personal gratification or enjoyment. It is regarded as ethically repugnant and involves a lack of empathy, compassion, and respect for the worth and welfare of others.

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4. What is Animal Cruelty?

Any deliberate Act of violence or negligence that results in pain or suffering for an animal is referred to as animal cruelty. Abuse can take many different forms, from neglecting an animal's basic requirements for food, water, and shelter to physical abuse such beating or kicking. Additional instances include keeping animals in captivity, exploiting them in cruel or stressful ways for amusement, and animal fighting. Animal abuse is a major problem that can have a harmful impAct on human civilization in addition to harming animals. It is commonly acknowledged as a type of abuse that is immoral and prohibited in many nations.

Recent years have seen a major expansion of the animal rights movement, with more organisations and people speaking out in favour of animals. Legislative reforms brought about by the movement include the addition of animal welfare provisions in laws all across the world. One of the most extensive pieces of legislation on the subject may be found in the United States, where the Animal Welfare Act of 1966 offers government safeguards for both captive and research animals.

The animal rights movement has expanded, but it still faces numerous obstacles. The idea that animals shouldn't be given the same rights as people because they don't have the same moral capacities as people is one of the fundamental objections to animal rights. Furthermore, there is considerable disagreement regarding what exActly qualifies as animal rights, and there is no one definition that is generally acknowledged. In addition, much work needs to be done before animal rights are completely reflected in the law.

As a result, it may be said that the subject of animal rights is significant, difficult, and should be viewed from a range of philosophical views. It is a movement that is growing and has already resulted in a number of substantial reforms to the law. The movement still faces numerous obstacles, and there is still a long way to go before animal rights are completely acknowledged and protected by the law.

5. Animal Rights Legislation in India

Animal rights are not specifically protected by the Indian Constitution. Yet, a number of clauses in the Constitution and other pieces of legislation offer tangential protection for the welfare of animals.

Every person has a fundamental responsibility to preserve and enhance the natural environment, including forests, lakes, rivers, and animals, as well as to have compassion for all living things, according to Article 51A(g) of the Constitution.

To protect their welfare and stop abuse, the Ministry of Environment, Forests, and Climate Change has recently released rules

for the management and maintenance of captive elephants. Generally, even though the Indian Constitution does not have explicit provisions for protecting animal rights, a number of laws and regulations do indirectly protect the welfare of animals. It is crucial to successfully implement these regulations and keep pushing for greater animal protection and treatment.

Many sections of the Indian Criminal Code (IPC) protect the rights of animals. These rules are intended to stop animal abuse and to hold offenders accountable.

It is illegal to conduct mischief by murdering, poisoning, maiming, or rendering useless any animal that belongs to another person, according to Section 428 of the IPC. This violation carries a maximum two-year sentence in jail, a fine, or both. Similar to Section 429, which makes it illegal to kill or injure any animal, whether or not it belongs to the perpetrator, it is punishable by up to five years in prison, a fine, or both.

In India, the safeguarding of animal rights is of utmost significance. To offer stronger legal protection for animals and to include provisions for the preservation of their habitats, India's animal rights laws are changing and evolving. This paper will examine several animal rights laws in India, starting with the 1972 Wildlife (Protection) Act and concluding with the 2016 Animal Cruelty Act.

The primary law in India that safeguards wildlife from poaching and illegal hunting is the Wildlife (Protection) Act of 1972. The Act is divided into six schedules, with Schedule I animals receiving the highest level of protection and being considered to be the most endangered. Additionally, the Act forbids any Actions that might endanger wild animals, their habitats, or the environment.

In order to ensure that animal abuse of any form was not permitted, the Prevention of Cruelty to Animals Act of 1960 was passed. Anyone found guilty of treating animals cruelly, such as by beating, maiming, torturing, or otherwise mistreating them, faces fines and imprisonment under the Act. Also, the Act forbids cruel Acts like performing circus Acts and using animals in tests without anesthesia. To safeguard the environment and its resources, the Environment Protection Act of 1986 was passed. The Act forbids any Actions that might jeopardise or pollute the environment and also allows for the preservation of rare species and the repair of harmed environments. It also calls for the regulation of any sectors of the economy that might be contributing to environmental damage.

In place to protect the welfare of animals kept in captivity and control the operations of any zoos or circuses, the Central Zoo Authority of India was established in 1992. The Authority's principal

goal is to make sure that captive animals receive the finest care and that their rights are upheld.

In a bid to promote animal welfare and guarantee that animals are treated with respect and humanity, the Animal Welfare Board of India was founded in 1962. The board is in charge of putting animal protection laws into effect as well as giving advice on legislation pertaining to animal welfare.

The Animal Cruelty Act of 2016 was created to ensure that all forms of animal cruelty are severely punished and that anyone found guilty will be sentenced to imprisonment, a fine, or both. The Act forbids all sorts of animal abuse and also offers stray animals protection.

6. Critical Analysis of Various Animal Rights Legislation In India

Constitutional Provisions

Under the Constitution of India, various Articles were made to protect and preserve the rights of animals in India.

Part IV of the constitution states The Directive Principles of State Policy , under which Article 48 states, organization of agriculture and animal husbandry, which empowers the state to organize agriculture and animal husbandry on modern and scientific lines and shall also preserve the breeds and prohibit the slaughtering of cows and calves and other milch and draught animals.

Article 48A declares, Protection and improvement of environment and safeguarding of forest and wild life, and states that the state shall make effort in protecting and safeguarding the environment the forest and the wild life.

Part IVA of the Constitution declares Fundamental Duties of every citizen of India, which imposes a duty on the citizens under Article 51A (g) to protect and improve the natural environment.

The Constitution of India also imposes a power on the parliament and the legislatures of states under Article 246 read with Seventh Schedule of the Constitution to make laws for the prevention of cruelty to animals and for the protection of wild animals and birds.

Under Article 243G read with Eleventh Schedule of the Constitution empowers the Panchayet to make laws on Animal husbandry, dairying and poultry.

Article 243W read with Twelfth Schedule of the Constitution, makes provisions for the Municipalities to make laws for cattle pounds and for the prevention of cruelty to animals.

Indian Penal Code, 1860

Section 428 of the Indian Penal Code, 1860, provides punishment for committing mischief by killing or maiming any animal of the value of 10 rupees with imprisonment for two years or with fine or with both.

Section 429 of the Indian Penal Code, 1860, deals with the punishment for killing or maiming any described animal of any value or of the value of 50 rupees or upwards with the imprisonment of five years or with fine or with both.

Wildlife (Protection) Act of 1972

One of the most significant pieces of legislation in India for the protection of wildlife is the Wildlife (Protection) Act of 1972. This law was passed in response to the urgent need to protect the nation's declining wildlife and its habitats. Since its establishment, the Act has undergone numerous revisions, but its primary goal has remained the same: to safeguard India's flora and animals from overuse and extinction. The Wildlife (Protection) Act of 1972 in India will be examined critically, and its success in fulfilling its stated goals will be assessed.

A thorough legislative framework for the defence of wild animals, birds, and plants is established under the Wildlife (Protection) Act of 1972. The Act calls for the creation of national parks, animal sanctuaries, and other types of protected places so that species can coexist peacefully. The Act also outlaws the trading in endangered species' products as well as hunting and poaching of those species. The Act also provides for local communities' participation in the conservation effort and acknowledges the significance of local communities in animal conservation.

The Act's execution, however, has not been at all satisfying. The proper implementation of the statute has been hampered by the pervasive corruption and lack of political will. The infrastructure and resources required by law enforcement organisations to successfully combat wildlife crime are lacking. Further undermining the effectiveness of the Act is the judiciary system's cumbersome speed of justice delivery.

Moreover, the Act did not deal with what led to animal exploitation in the first place. The primary causes of species extinction, habitat loss and fragmentation, are not addressed by the Act, which instead largely regulates the hunting and trading of animals. Wildlife habitats have been lost as a result of the increased human population and their needs for more land, food, and other resources. To solve these difficulties, the Act needs to be changed, and habitat protection and restoration should receive more attention.

The Wildlife (Protection) Act of 1972 also has a big problem with the lack of stakeholder involvement in conservation. Although the Act acknowledges the importance of local communities in wildlife protection, their involvement has been very low. To guarantee that the neighbourhood communities are fairly represented in the conservation process, the legislation needs to be changed. The local populations have a plethora of customs and expertise that can aid in conservation efforts.

In conclusion, the 1972 Wildlife (Protection) Act is a key piece of law for India's efforts to conserve wildlife. Yet, there are substantial holes that need to be filled and the Act's implementation has been anything but successful. To guarantee that it tackles the fundamental reasons for habitat degradation and animal exploitation, the Act has to be modified. To effectively combat wildlife crime, the Act's implementation must be enhanced and the law enforcement agencies must have enough funding. The Act must also guarantee stakeholder involvement in the conservation effort, especially from the local communities that are most impActed by animal conservation laws. To reflect the evolving requirements of India's wildlife conservation, the Act has to be amended.

The Prevention of Cruelty to Animals Act of 1960

A key piece of law that India established in order to stop animal cruelty is [4]the Prevention of Cruelty to Animals Act of 1960. The main goal of the Act's introduction was to stop the mistreatment and cruelty of animals. By placing prohibitions on numerous forms of animal maltreatment, including as animal fights, transportation, and killing, it seeks to protect animals from needless suffering.

Despite the Act's noble objectives, its efficacy has been questioned for a long time. Some claim that the Act has been effective in reducing animal cruelty, while others claim it has failed to stop animal suffering in India. Hence, it is crucial to evaluate the Act objectively and determine how it affects animal welfare.

The Act's ambiguous language is one of its major drawbacks, making it difficult to enforce. The Act's hazy definition of what constitutes animal cruelty has caused inconsistent application and interpretation. The vagueness of the law has also resulted in loopholes that have let animal abusers get away with their crimes. Animal cruelty is punishable by jail and fines under the Act, however these penalties are rarely carried out, and perpetrators frequently get away with a warning.

The Act's exclusion of animals employed for research, competition, or entertainment is another restriction. Animal mistreatment has gone undetected in these locations as a result of this exclusion. For instance, despite the Act's prohibition on animal fighting, bullfighting,

cockfighting, and dogfighting are nevertheless common in India. Similar to this, it is still common prActice to expose animals to invasive and painful treatments for the purpose of scientific research.

However, the Act does not address the underlying fActors that contribute to animal cruelty, such as ignorance and poverty. A major contributing fActor to animal cruelty in India is poverty, which leads many people to engage in cruel behaviours including abandoning pets, mistreating animals during the slaughter process, or using animals as slave labour. The provisions of the Act do not address the fundamental socioeconomic problems that underpin animal cruelty in the nation.

Finally, insufficient enforcement measures have made it difficult to put the Act into prActice. In order to execute the provision, the Act requires the appointment of animal welfare officers and the creation of animal welfare boards. Nevertheless, due to a lack of funding, a lack of political will, and corruption, these efforts have been ineffectual. The ability of the animal welfare boards to properly enforce the law is limited, and animal welfare personnel are frequently overworked and underpaid. Ergo, the Act's flaws have precluded it from serving as a useful tool for stopping animal abuse in India. The Act's ineffectiveness has been attributed to its ambiguous language, exclusion of specific animal uses, failure to address the underlying causes of animal cruelty, and insufficient enforcement procedures. To correct these flaws and enhance animal care in India, the Act has to be updated. The Act should be expanded to embrace all animals used for experiments, sports, or entertainment, and specific language must be added to define animal cruelty. The Act's execution must be reinforced as well, with more funding given to animal welfare officers and harsher penalties for violators.

The Environment Protection Act of 1986

A key piece of legislation that was passed to safeguard and enhance the environment was India's Environment Protection Act of 1986. The Act outlines measures for protecting the environment and for preventing, reducing, and controlling environmental contamination. Additionally, it creates a number of organisations and authorities to guarantee adherence to and enforce environmental regulations. Yet, a thorough examination of the statute exposes a number of drawbacks and difficulties.

The Environment Protection Act of 1986's lack of clarity and precision is one of its main drawbacks. The Act's ambiguous and nonspecific phrasing makes it challenging to understand and apply. Due to this uncertainty, the Act's application has been confusing and inconsistent. For instance, there is no definition of important phrases like "pollution" and "environmental damage" in the Act, allowing leeway for interpretation.

Inadequate enforcement and monitoring methods are another issue with the Environment Protection

Act of 1986. In order to monitor environmental regulations and enforce them, the Act calls for the establishment of organisations like the Central Pollution Control Board (CPCB) and the State Pollution Control Board (SPCB). Yet, these authorities have come under fire for lacking the resources, the manpower, and the authority needed to oversee compliance. As a result, a number of harmful industries continue to operate without facing consequences.

The Act has also drawn criticism for its constrained application. The Act ignores other substantial causes of pollution like vehicle emissions and agricultural prActices in favour of addressing industrial pollution. This Act's narrow scope is a serious flaw since it makes it less effective at addressing the full range of environmental problems that the nation faces.

The Act is an important piece of legislation that has contributed to increasing awareness of environmental protection in India. Its limitations and difficulties draw attention to the need for more thorough and reliable environmental organisations and laws. To solve these issues and ensure that environmental regulations are effectively implemented and enforced in India, the Act has to be reviewed and amended.

The Central Zoo Authority of India, 1992

Under the Wildlife (Protection) Act, 1972, the Central Zoo Authority (CZA) of India was set up in 1992 with the purpose of maintaining and regulating zoos all across the nation. The authority is in charge of recognising zoos, setting management rules for them, and insuring the welfare of the animals kept there. However, a critique of the CZA exposes a number of drawbacks and difficulties. The CZA's weak enforcement measures are one of its main drawbacks. The authority has come under fire for having insufficient people and the tools necessary to ensure adherence to its rules and regulations. Because of this, many zoos continue to run without upholding the required standards, which results in unfavourable conditions for animals and jeopardises their health.

The CZA's constrained scope is another issue. The authority does not have the jurisdiction to address other critical concerns pertaining to wildlife conservation and animal care, hence its primary concentration is on regulating zoos. For instance, the CZA has limited authority to control prActices that raise concerns for animal welfare, such as wildlife tourism and animal circuses.

The CZA has also come under fire for lacking accountability and transparency. There have been charges of corruption and favouritism in the authority's decision-making procedures, and the recognition of

zoos has been given in some cases without adequate explanation. The public's confidence in the CZA's capacity to successfully administer and regulate zoos is eroded by the lack of accountability and openness.

The Central Zoo Authority of India has been crucial in maintaining and regulating zoos in the nation, however there are still issues that need to be resolved due to its shortcomings. It is necessary to improve the authority's enforcement procedures, broaden its purview to include additional matters pertaining to animal welfare, and make sure that its decision-making procedures are more open and accountable. The CZA can only properly carry out its purpose and guarantee the wellbeing of animals in zoos across India by resolving these challenges.

Animal Welfare Board of India, 1962

The Prevention of Cruelty to Animals Act, 1960, gave the Animal Welfare Board of India (AWBI) the authority to promote animal welfare and stop cruelty to animals. This Act was passed in 1962. The board is crucial in promoting animal welfare and advising the government on matters involving animals. However, a thorough examination of the AWBI exposes a number of drawbacks and difficulties.

The AWBI's inability to enforce laws is one of its main drawbacks. The board is mandated to provide advice and recommendations to the government, but it lacks the power to impose its conclusions. Because the board's recommendations are frequently ignored, its capacity to effectively address concerns relating to animal welfare is undermined by its lack of enforcement capabilities. Another challenge facing the AWBI is its limited resources. The board is severely understaffed and underfunded, which hampers its ability to carry out its mandate effectively. For instance, the board's animal welfare officers, who are responsible for inspecting animal facilities and investigating complaints of animal cruelty, are often overworked and stretched thin.

The AWBI has also come under fire for lacking accountability and transparency. It's not always apparent how the board decides, and there have been claims of corruption and favouritism in the selection of members. Public confidence in the board's ability to successfully promote animal welfare is undermined by a lack of accountability and openness.

In conclusion, the Animal Welfare Board of India has made significant contributions to advancing animal welfare and avoiding cruelty to animals, but there are still issues that need to be resolved. The board's enforcement authority must be increased, it must be given enough funding, and its decision making procedures must be more open and accountable. The AWBI can only properly carry out its mandate and advance animal care throughout India by resolving these problems.

The Animal Cruelty Act of 2016

A significant piece of legislation aiming at stopping and penalising cruelty to animals in India is the Animal Cruelty Act of 2016. The law was enActed as a result of growing public outrage over animal abuse and brutality, particularly in light of prActices like bullfighting, animal sacrifice, and the use of animals in circuses. Although the Act is a significant advancement in animal protection, a comprehensive review reveals various shortcomings and difficulties.

The Animal Cruelty Act of 2016's limited breadth is one of its main drawbacks. The primary goals of the law are to prohibit and punish animal abuse in connection with certain particular prActices, such as animal sacrifice and bullfighting. Yet, there are also additional contexts in which animals are mistreated, including the pet trade, the exploitation of animals for entertainment, and research and testing. Because these situations are not covered by the Act, it is still possible to treat animals cruelly in these situations without facing any consequences.

The Animal Cruelty Act of 2016's limited enforcement options present another difficulty. Although the Act stipulates punishments for anyone found guilty of animal cruelty, enforcement may not be as efficient as intended. In order to report instances of animal cruelty, the law mainly relies on the support of animal welfare organisations and the general public. Unfortunately, many instances of animal cruelty go unreported, raising questions about the capacity of law enforcement organisations to efficiently investigate and bring charges in these situations.

The Act has also drawn criticism for its ambiguous definition of what constitutes animal cruelty. Although the Act contains some rules for what constitutes animal cruelty, there is still a great deal of uncertainty, which can cause misunderstanding and inconsistent enforcement. Concerns exist, for instance, over how the Act would be construed in connection to Activities like the pet trade or the use of animals in circuses, where various stakeholders may have different ideas about what constitutes cruelty.

The Act's emphasis on punishment rather than prevention is another drawback. The statute includes sanctions for individuals found guilty of animal cruelty, but it does not include steps to stop cruelty to animals before it even occurs. In the case of animals maintained in captivity, such as those employed in circuses or kept as pets, where prevention is frequently more successful than punishment after the fAct, this is especially troublesome.

The statute has also received criticism for failing to coordinate with other pertinent pieces of legislation. Concerns exist, for instance, regarding the Act's compatibility with the Wildlife Protection Act of

1972, which offers protection for wildlife species. Concerns exist over the Act's compatibility with other animal protection laws including the 1960 Prevention of Cruelty to Animals Act.

In conclusion, even though the Animal Cruelty Act of 2016 signifies a significant advancement in the protection of animals in India, there are still a number of issues that need to be resolved. Expanding the law's coverage of further instances of animal abuse, bolstering enforcement measures, clarifying definitions of animal cruelty, emphasising prevention over punishment, and coordinating with other pertinent laws are all necessary. The Animal Cruelty Act of 2016 can only properly safeguard the welfare of animals in India by resolving these problems.

7. Tracing the Judicial Precedence of Animal Rights in India

India is not the only country where there has been constant discussion about animal rights. India is a nation with a rich cultural tradition where people revere and hold animals in high regard. Yet, there has been a rise in awareness for animal rights recently, and various court rulings have been made to safeguard them.

Animal Welfare Board of India v. A. Nagaraja and Others[1]

A. Nagaraja and Others is a significant case that raises awareness to the problem of animal cruelty in India. The issue centres on the legitimacy of bull-taming, also known as Jallikattu, a long-standing custom in the Tamil Nadu state in southern India. Jallikattu's legality was contested by the Animal Welfare Board of India (AWBI), which claimed that it was illegal under the 1960 Prevention of Cruelty to Animals Act.

In the traditional sport of Jallikattu, a bull is let loose into a crowd of spectators, and the competitors attempt to take hold of its hump and ride it for as long as they can. The Act is thought to have religious and cultural significance and is regarded as a test of bravery and strength. Animal rights organisations counter that it is inhumane and harms the animals involved unnecessarily.

In 2011, the AWBI petitioned the Supreme Court of India to outlaw Jallikattu. The Prevention of Cruelty to Animals Act, which forbids inflicting undue pain or suffering on animals, was used by the court to initially outlaw the prActice. However, the restriction was repealed in 2017 as a result of outcry from political figures and citizens of Tamil Nadu.

The Supreme Court ruled that if specific rules were put in place to safeguard the security and welfare of the animals involved, Jallikattu might be legalised. These rules mandated the use of humane procedures, such as giving the animals enough food and water and having veterinarians on hand to keep an eye on their wellbeing.

Animal rights organisations criticised the decision, claiming that the laws were insufficient to stop animal cruelty. They emphasised how frequently the rules were broken and how the bulls were physically abused, including being thrashed with rods and stabbed with things with sharp edges. The case emphasises the tension in India between custom and animal rights. While some contend that customs like Jallikattu should be upheld, others contend that if they cause needless animal pain, they ought to be outlawed.

In India, there has been an increase in the number of persons asking for the protection of animals and the enforcement of animal welfare regulations in recent years. The Indian government has also taken Action to address the problem, including prohibiting the use of animals in circuses and toughening the penalty for animal abuse.

In conclusion, there are significant concerns regarding how animals are treated in India after the Animal Welfare Board of India v. A. Nagaraja and Others case. While many people value ancient Activities like Jallikattu, it's crucial to make sure that they're carried out in an ethical and humane way. The case has brought to light the necessity for more stringent laws governing animal welfare and greater public awareness of animal rights in India.

AWBI v. State of Rajasthan[2]

The Supreme Court of India heard the historic case of AWBI v. State of Rajasthan in 2014. The issue concerned how animals, particularly elephants, were treated in circuses and other types of entertainment. The State of Rajasthan and several circus companies were the targets of a complaint brought by the Animal Welfare Board of India (AWBI), which claimed that they had broken numerous rules outlined in the Performing Animals (Registration) Rules of 2001 and the Prevention of Cruelty to Animals Act, 1960.

According to the AWBI, using elephants in circuses is fundamentally cruel and causes great bodily and psychological suffering to the animals. The elephants allegedly underwent rigorous training techniques, such as being thrashed with rods and hooks, to make them execute stunts that were not in their natural repertoire. They were allegedly kept in poor, unhygienic circumstances and frequently chained or tied for long periods of time.

On the other hand, the State of Rajasthan and the circus organisations stated that they were abiding by all applicable laws and regulations and that the elephants were given excellent care.

They argued that the elephants were a crucial component of their operation and that prohibiting their use would cause them to suffer considerable financial losses. [1]

[1] 2014 SCC 7 547

The Supreme Court issued a thorough ruling in favour of the AWBI after hearing arguments from both sides. According to the Court, using elephants in circuses was inhumane and went against their basic rights to life and dignity. The Court also pointed out that there were other entertainment options available and that the use of elephants in circuses was not necessary for the entertainment business. In its ruling, the Court outlawed the use of elephants in circuses completely and gave the State of Rajasthan the responsibility of ensuring that all circuses operating there adhere to the restriction. The Court further ordered the AWBI to take the necessary Actions to guarantee the welfare of the elephants used in circuses and to rehabilitate them.

The ruling in AWBI v. State of Rajasthan has significant ramifications for how animals are treated in India. It emphasises how crucial it is to safeguard animals' wellbeing and acknowledges the intrinsic worth of all sentient beings, including animals. The ruling also serves as a reminder that when it comes to how animals are treated, financial motives cannot take precedence over moral and ethical issues.

The case also emphasises the necessity for stricter enforcement of current animal welfare rules and regulations. If laws are not being efficiently implemented, having them on the books is not sufficient. The AWBI's successful petition in this matter serves as a reminder of the crucial part that citizens.

Other members of civil society may play in holding governments and other organisations responsible for their deeds. In summation, the landmark case AWBI v. State of Rajasthan is a substantial win for animal welfare in India. It conveys a clear message that using animals for entertainment is wrong and that their welfare must always be maintained. The decision in this case should Act as a spur to take more steps to enhance animal welfare and guarantee that animals are treated with the respect and decency they merit.

Gauri Maulekhi v. Union of India[3]

An important case that raises awareness of India's animal welfare problems is Gauri Maulekhi v. Union of India. The lawsuit centres on the smuggling of live animals across the border between India and Burma. Animal rights advocate Gauri Maulekhi petitioned the Supreme Court of India to outlaw the trade.

The petition claimed that the Wildlife Protection Act of 1972 was breached when live animals, notably elephants, were traded across international borders. Also, it made clear that the transAction involves mistreatment of the animals, who were transported inhumanely.

In its ruling, the Supreme Court of India ordered the government to take Action to stop the unlawful trade of animals across international borders. The government was also ordered by the court

to make sure that the animals were not mistreated or subjected to cruelty while being transported.

The verdict was noteworthy because it highlighted the necessity for animal protection and recognised the rights of animals. The case raised awareness of the problem of the widespread illegal trafficking in animals in India.

Animal welfare in India has become a significant concern in recent years, with many people advocating for the enforcement of animal welfare regulations and the defence of animals against brutality. The Indian government has also taken Action to address the problem, including prohibiting the use of animals in circuses and toughening the penalty for animal abuse.

Gauri Maulekhi v. Union of India, in conclusion, is a significant case that emphasises the need for tougher rules to save animals from abuse and illegal trading. The case underscores the importance of ensuring the security and welfare of animals while also recognising their rights. It is an important step towards improving India's treatment of animals and building a more moral and compassionate society.

AWBI v. N. Nagendran and Others[4]

A significant case, AWBI v. N. Nagendran and Others, was considered by the Supreme Court of India in 2017. The issue concerned the usage of elephants for religious processions and other purposes in temples in the Tamil Nadu state.

The Supreme Court received a petition from the Animal Welfare Board of India (AWBI), which claimed that the elephants were being mistreated and cruelly treated. The elephants were being kept in crowded, filthy conditions, receiving insufficient food and water, and being required to work lengthy shifts without a break, according to the AWBI's testimony.

The Tamil Nadu government was ordered by the court to make sure that the elephants were not subjected to any kind of abuse or cruelty. The government was also told by the court to form a committee to keep an eye on the elephants' living conditions and guarantee that they were being handled humanely.

The Court's ruling was noteworthy because it acknowledged how crucial it is to defend animal rights, especially when they conflict with religious customs. The Supreme Court ruled that religious prActices and beliefs must be accorded the same weight as consideration for animal welfare.

The case also demonstrated the necessity for India's animal protection rules to be enforced more strictly. Animal abuse and cruelty

are still common in India despite the passage of laws like the Wildlife Protection Act and the Prevention of Cruelty to Animals Act. The case of AWBI v. N. Nagendran and Others Acted as a reminder for the Indian government to take more serious measures to safeguard animal rights and welfare. [2]

Kennel Club of India (KCI) v. Union of India[3]

The 2013 Madras High Court hearing of Kennel Club of India (KCI) v. Union of India was a landmark case. The lawsuit concerned dog breeding laws in India and the import of pedigree canines.

The Director General of Foreign Trade (DGFT) had issued a notification requiring importers of purebred dogs to get a no-objection certificate (NOC) from the Animal Welfare Board of India. The Kennel Club of India (KCI) has filed a lawsuit in the Madras High Court challenging the notification (AWBI).

The KCI claimed that the notification infringed on their fundamental right to practice their profession of raising pedigree dogs and was made arbitrarily. They also contended that the state governments should be in charge of controlling dog breeding because the AWBI lacked the knowledge necessary to assess the health and well-being of dogs.

The KCI's objections were dismissed by the court, which also affirmed the DGFT's notification. The Court determined that the regulation of dog breeding was required to prevent animal cruelty and that the importation of pedigree dogs was a matter of public interest.

The Court further ruled that the AWBI possessed the knowledge necessary to assess the health and well-being of dogs and that the federal and state governments shared responsibilities for controlling dog breeding.

The case was significant because it highlighted how crucial it is to control dog breeding and the importation of pedigree dogs in order to stop animal cruelty. The case also demonstrated the significance of implementing animal welfare rules in India and the demand for competence in assessing the health and wellbeing of animals.

The KCI v. Union of India case had wide-ranging effects on how dog breeding and the import of pedigree dogs were regulated in India. The case proved that the regulation of dog breeding was required to prevent animal cruelty and that the import of pedigree dogs was a matter of public interest. The case proved that the AWBI has the knowledge necessary to assess the health and wellbeing of dogs and that the central and state governments shared responsibilities for controlling

[2] 2016 SCC ONLINE NGT 722
[3] AIR 2013 (NOC) (Supp) 1439 (Mad.)

dog breeding. Animal welfare advocates and animal lovers in India won the lawsuit. It served as a reminder that human interests and animal welfare must be prioritised equally and that animal welfare rules must be upheld to save animals from neglect and abuse.

To summarise, the Kennel Club of India v. Union of India case marked a dramatic shift in how dog breeding and the import of purebred dogs were regulated in India. The case recognised the function of the AWBI in determining the health and welfare of dogs and acknowledged the significance of controlling dog breeding to prevent animal cruelty. The case served as a reminder that animal welfare rules must be upheld in order to safeguard animals from cruelty and abuse and that human interests and animal welfare must be prioritised equally.

People For Ethical Treatment of Animals (Peta) & Anr. Petitioners v. Union of India & Ors.[6]

Dedicated to advancing the ethical treatment of animals, People for the Ethical Treatment of Animals (PETA) is a global non-profit group. For many years, PETA has been Actively involved in the animal rights movement and has fought for the protection of animals in numerous court cases. PETA brought a lawsuit against the Union of India in 2020, and the Delhi High Court heard it. An landmark victory for animal rights in India was achieved in the issue involving the usage of elephants in circuses.

For many years, there has been controversy about the usage of animals in circuses. Animals are frequently subjected to brutal and inhumane treatment in circuses, including physical abuse, squalor, and a lack of veterinary care. In circuses, elephants in particular are frequently tortured and mistreated. Bullhooks, which are sharp implements used to prod the animals, and other severe techniques like beatings are used to train them. As a result of their care, many elephants in circuses experience physical and mental health issues.

The usage of elephants in circuses was outlawed by a notification that the Indian government issued in 2014. The notification was based on the recommendations of a committee formed to look into how circus animals were treated. The committee proposed a ban on animal use in circuses after concluding that it was cruel and inhumane. Yet, several circuses continued to utilise elephants in spite of the warning.

In 2020, PETA sued the Union of India to enforce the law prohibiting the use of elephants in circuses. According to PETA, the Prevention of Cruelty to Animals Act of 1960, which forbids inflicting needless pain or suffering on animals, is violated by the usage of elephants in circuses. Additionally, PETA claimed that the Indian Constitution's provision of the right to life and dignity was breached by the usage of elephants in circuses.

The Delhi High Court heard the case and upheld the prohibition against using elephants in circuses. The use of elephants in circuses, the court noted, was a blatant instance of animal cruelty, and the ban was required to safeguard the animals. The court further stated that the fundamental rights to life and dignity provided by the Indian Constitution were breached by the usage of elephants in circuses. The ruling represented a significant victory for India's animal rights movement. It delivered a clear message that using animals in circuses is unacceptable and that they must be treated humanely. The ruling also reaffirmed the need to protect the welfare of animals and acknowledged that they have inalienable rights that must be upheld.

The PETA v. Union of India case was a turning point in India's animal rights history. It emphasised the value of protecting animal rights and acknowledged the significance of animal welfare. The case also illustrated the value of Activism and the necessity of using the legal system to save animals. The verdict represented a huge victory for animal rights and established a crucial precedent for disputes involving animal welfare in the future.

The PETA v. Union of India case, in conclusion, was an important win for animal rights in India. The case emphasised the significance of protecting the wellbeing of animals and established that they have inalienable rights that must be upheld. The ruling reaffirmed the ban on elephants in circuses and made it clear that using animals in such shows is unacceptable. The case was a significant win for animal rights and proved the effectiveness of advocacy and legal Action in defending animals. [4]

State of Bihar v. Murad Ali Baig, AIR 1989 SC 1.

This case dealt with the provisions of the Wildlife Protection Act, 1972. It specifically dealt with the hunting of elephants and whether the hunting of elephants is justified under the provisions of the Indian Penal Code and under the necessary provisions of the Wildlife Protection Act. The word, "hunting" has been defined under Section 2(16) of the Wildlife Protection Act, 1972 as follows: "Hunting means- i) the killing or poisoning of any wild animal or captive animal as well as an attempt to do so; ii) capturing, coursing, snaring, trapping, driving or baiting any animal as well as any attempt to do so; iii) injuring or destroying or taking any part of the body of any such animal; iv) in the case of wild birds or reptiles, damaging the eggs of such birds or reptiles or disturbing the eggs or nests of such birds or reptiles." The case further dealt with the provisions of Section 9 of the Act which lays down that, "No person shall hunt any wild animals specified in Schedules I, II, III and IV except as provided under Section 11 and 12 of the Act."

[4] 8 SCC 778

Emphasis was laid upon the provisions of Section 11 and 12 of the Act, which provides a Schedule. Schedule I of the Act contained a list of animals, amphibians, reptiles, fishes, birds and insects, e.g. Himalayan Brown Bears, Black Bucks, Cheetahs, elephants, crocodiles, pythons, whale sharks, sea horses, vultures, etc. Schedule II of the Act covered animals like the Bengal Porcupine, wild dogs, chameleons, etc. Schedule III of the Act covered animals like the barking deer, hog deer, hyenas, etc, however, the Schedule IV covered under its scope hares, pole cats, Indian porcupines and a lot of other species of birds like the cranes, the cuckoos and the bulbuls.

The Supreme Court in this case, held that since the elephant was an animal which fell under the scope and list of animals provided under the Schedule I, it can be assumed that the hunting of elephants is prohibited. The Court was also of the view that the offense of, "hunting" as defined under the Wildlife Protection Act, 1972, is not the same as the offense which is committed under Section 429 of the Indian Penal Code (which provides for the punishment for killing, poisoning, maiming, etc. of any elephants, camel, horse and other animals, the list of which is provided under the ambit of the said section.) The Supreme Court was of the view that the ingredients of the offense provided under the Wildlife Protection Act, 1972 is quite contrary to the ingredients of the offense provided under the scope and ambit of the Indian Penal Code and hence the two offenses are not the same.

Naveen Raheja v. Union of India [(2001) 9 SCC 762].

In this case, the Supreme Court dealt with a gruesome issue. The issue was with regards to the skinning of a tiger in a zoo in Andhra Pradesh. The Supreme Court was in utter shock and dismay when it first heard the fActs of the case. The Court was utterly tormented at the fAct that such a gruesome Act was indulged into by humans, rendering the voiceless animal helpless and in sheer pain and agony. The tiger received no protection from those whose duty it was to protect it and look after its well-being. The Top court of India, therefore, was of the view that it was extremely necessary to summon the chairperson of the Central Zoo Authority to appear before the court in person and to elucidate on what steps and measures were being taken to protect and preserve the tiger population in zoos and reserved forests. The Supreme Court then passed appropriate orders in the said issue and gave the necessary orders with regards to the protection of tigers. The Supreme Court elucidated that it is necessary for the Central Zoo Authority to take cognizance of this issue and take the necessary steps in order to protect the plight of these voiceless creatures as the situation in which they are is quite distressful and far from satisfActory.

8. Analysing The Role of Judiciary in Protecting Animal Rights in India

Animal rights have a long history of being divisive in India, with numerous Activists and organisations calling for more robust legislative safeguards for animals. Despite modest advances in recent years, India's judiciary has mostly fallen short in upholding animal rights, which has resulted in widespread animal cruelty and suffering.

Lack of implementation of current laws and rules is one of the main ways that the judiciary has failed to uphold animal rights. India has a number of regulations in place to protect animals from abuse and neglect, however these laws are frequently ignored or are only occasionally enforced. Particularly in sectors like animal agriculture and experiments on animals, this lack of enforcement has allowed cruelty and abuse to persist.

The judiciary has also failed to uphold animal rights since it hasn't correctly interpreted and understood the laws that already exist. Judges frequently interpret the law in a way that puts human interests ahead of those of animals and fail to acknowledge the full range of animal rights. This has made it possible for sectors like animal testing and agriculture to carry on operating with insufficient regard for the welfare of animals.

Moreover, political and economic influences have frequently influenced the judiciary, resulting in judgements that put the interests of businesses and industries ahead of those of animals. The judiciary frequently sides with these businesses and permits them to continue functioning without sufficient respect for animal welfare. This is particularly obvious in cases where animal agribusiness or animal testing corporations have challenged animal welfare legislation.

Animals are treated as property rather than sentient beings with their own interests and rights by the judiciary, which has failed to acknowledge their inherent worth and value. This has made it possible for industries to treat animals more like commodities than as living beings with individual wants and experiences, which has resulted in widespread brutality and mistreatment.

In conclusion, India's judiciary has mostly failed to uphold animal rights, allowing abuse and cruelty to persist in sectors like animal agriculture and testing on living things. Political and economic pressures, a lack of understanding and application of animal rights, a lack of enforcement of current laws, and a failure to acknowledge the intrinsic value and worth of animals are all contributing fActors to this failure. It is essential for the judiciary to start enforcing current rules and regulations and interpreting them in a way that prioritises animal welfare in order to address these challenges. The judiciary must also

acknowledge the inherent worth of animals and their right to life without suffering from cruelty or other forms of abuse.

9. Addressing The Shortcomings Of Animal Rights Protection In India

Key Areas Requiring Change

Animals have always been revered in India, a nation with a rich cultural history. Despite this, there are still a lot of animals in India that are cruelly treated, mistreated, or exploited. There are several crucial areas that need to change in India in order to safeguard animal rights.

To guarantee that current animal welfare rules are successfully enforced, tougher enforcement[5] methods are first and foremost required. The Prevention of Cruelty to Animals Act of 1960, the Wildlife Protection Act of 1972, and the Indian Criminal Code of 1860 are some of the current laws that protect animals from abuse and cruelty. But these laws are frequently not upheld, and even when they are, the punishments are frequently light. Stronger enforcement measures are required to solve this problem, including more financing for animal welfare organisations, harsher fines for animal abuse, and more extensive public education campaigns to encourage adherence to animal welfare legislation.

Second, legislation to safeguard animal rights needs to be more comprehensive and unambiguous. Several of India's current animal welfare rules are ambiguous and open to interpretation, making it challenging to hold people and organisations responsible for Acts of cruelty or exploitation. More precise and comprehensive law that spells out animal rights and people's and businesses' obligations to uphold them is required to address this problem. This would make it possible to guarantee that animals are sufficiently safeguarded from harm and that those who abuse or exploit them are held accountable.

Thirdly, there is a requirement for more public education and awareness of animal rights. Animals are still frequently seen in India as commodities or property rather than sentient beings with their own rights and interests. More thorough educational initiatives that inform people about animal welfare and the significance of treating animals with compassion and respect are required to address this issue. This would contribute to the development of a more compassionate society that values and defends animals.

Fourth, the issue of animal agriculture in India needs to be addressed. One of the biggest sectors in India is animal agriculture, which is also a major source of animal abuse and exploitation.

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[5] 7 SCC 689

Promoting more ethical and sustainable agricultural prActices, like agroforestry and plant-based agriculture, is necessary to address this problem. Stronger rules on animal agriculture are also required in order to guarantee that animals are sufficiently safeguarded from abuse and exploitation.

Last but not least, India's animal care institutions and organisations want more money. Being understaffed and underfunded makes it challenging for India's numerous animal protection organisations to appropriately safeguard animals from harm. There is a need for more government financing for animal welfare organisations, as well as more corporate sector and individual donor support, to solve this problem.

The important areas of enforcement, legislation, education, animal agriculture, and finance must all be addressed in order to effectively defend animal rights in India. India can build a more equitable and compassionate society where animals are respected and safeguarded from harm by addressing these challenges. In addition to helping animals, this would also help ensure a healthier and more sustainable future for all living things.

10. Suggestions to Tackle the Problems Relating to Protecting Animal Rights

In India, where many animals are subjected to brutality, exploitation, and neglect, protecting animal rights is a major concern. Further research and policy development in the area of animal rights protection are required to address this problem, with an emphasis on improving the regulatory environment and increasing public awareness of and education on animal rights.

At first, further research is required to determine the type and scope of animal abuse and exploitation in India. There has already been some research done on this subject, but much of it is incomplete or antiquated. More thorough and current research that examines the various types of animal cruelty and exploitation, the fActors that contribute to these prActices, and the effects of these prActices on animals, humans, and the environment is required in order to develop more effective policies and regulations for the protection of animal rights.

Creating a national research institute for the defence of animal rights in India is one approach to do this. A wide range of animal rights concerns, including the treatment of animals in agriculture and industry as well as their usage for entertainment and sport, could be the subject of research at this institute. On the basis of the most recent research findings, rules and legislation for the protection of animal rights could also be developed. The institute might also Act as a centre for interAction between academics, decision-makers, and

organisations dedicated to animal welfare, facilitating the conversion of research into useful guidelines for Action.

Second, greater regulatory structures are required to safeguard animals from abuse and exploitation.

The Prevention of Cruelty to Animals Act of 1960, the Wildlife Protection Act of 1972, and the Indian Criminal Code of 1860 are just a few of the animal protection legislation already in place in India. Nevertheless, these laws are frequently not adequately enforced. Stronger regulatory frameworks are required to handle this problem and make sure that animals are well-protected.

Establishing a national animal welfare body in India is one approach to do this. In addition to creating new rules to meet newly emergent animal welfare issues, this authority may be in charge of directing the application and enforcement of animal welfare legislation. The authorities could also use public awareness campaigns and educational initiatives to encourage adherence to animal welfare laws. India can contribute to ensuring that animals are appropriately safeguarded from harm by creating a centralised authority for animal welfare regulation and enforcement.

Thirdly, there is a requirement for more public education and awareness of animal rights. Animals are still frequently seen in India as commodities or property rather than sentient beings with their own rights and interests. More thorough educational initiatives that inform people about animal welfare and the significance of treating animals with compassion and respect are required to address this issue. This would contribute to the development of a more compassionate society that values and defends animals.

Introducing animal care teaching programmes in Indian schools and universities is one approach to do this. Students could learn via these programmes the value of animal welfare, different types of animal abuse and exploitation, and the effects of such behaviours on both animals and the environment. Also, the programmes might encourage students to examine the morality of using animals in research and industry, as well as look into other sustainable and compassionate types of agriculture and business.

Finally, the issue of animal agriculture in India needs to be addressed. One of the biggest sectors in India is animal agriculture, which is also a major source of animal abuse and exploitation. Promoting more ethical and sustainable agricultural prActices, like agroforestry and plant-based agriculture, is necessary to address this problem. Stronger rules on animal agriculture are also required in order to guarantee that animals are sufficiently safeguarded from abuse and exploitation.

Securing Our Digital World: Emerging Cybersecurity and Cyber Forensics Challenges

Dr. Srinivas Katkuri*

1. Introduction

The contemporary landscape of cyber security and cyber forensics stands as a testament to the rapid and transformative evolution of digital technologies. The profound integration of these technologies into various facets of modern life has ushered in unparalleled conveniences, yet simultaneously exposed individuals, organizations, and governments to an array of unprecedented risks and challenges. As the digital realm continues to expand its influence across economic, social, and political domains, the imperative to safeguard digital systems and investigate cyber incidents becomes ever more pressing. In recent years, the proliferation of cyber attacks has grown in scale and sophistication, encompassing diverse vectors such as ransomware assaults, data breaches, and state-sponsored hacking campaigns. These attacks traverse national borders with ease, exploiting the interconnectedness of our globalized world. The escalating prevalence of such incidents underscores the criticality of establishing robust cyber security measures and enhancing the capacity for effective cyber forensics. The concept of cyber security transcends the conventional realm of technical safeguards, extending its purview to encompass legal, regulatory, ethical, and diplomatic dimensions. The adaptation of legal frameworks to accommodate digital offenses and the challenges of transnational cybercrime has emerged as a central concern. Regulatory entities, both at national and international levels, grapple with the task of harmonizing legal norms to address cyber threats while respecting the principles of jurisdiction and sovereignty. As experts argue, the dynamism of the digital domain necessitates a nimble legal framework that can anticipate and address emerging threats effectively.[1] In parallel, the realm of cyber forensics occupies a pivotal role in responding to cyber incidents, as it entails the meticulous process of collecting, analyzing, and preserving digital evidence to attribute cyber attacks to their perpetrators. This field is characterized by a constant cat-and-mouse chase between forensic analysts and cyber criminals, with each technological advancement giving rise to innovative methods of obfuscating digital trails. Moreover, the ever-growing complexity of

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[1] Smith, M., & Cheung, R., *International Cybersecurity Law: An Overview,* 35(1) BERKELEY JOURNAL OF INTERNATIONAL LAW 159-192 (2017).

digital environments, including cloud computing, Internet of Things (IoT) devices, and encrypted communications, introduces challenges in conducting comprehensive and timely cyber investigations.[2]

This interdisciplinary intersection of technology, law, and investigation poses a series of intricate questions and prompts a reevaluation of existing practices. How can nations effectively collaborate on cyber crime investigations, given the variance in legal systems and jurisdictional concerns? How do privacy considerations intersect with the imperatives of uncovering cyber crime evidence? How can law enforcement and intelligence agencies adeptly navigate encrypted communication channels, which may be pivotal in planning and executing cyber attacks? These questions represent only a fraction of the multifaceted inquiries posed by the modern cyber landscape.

The primary objective of this scholarly research article is to thoroughly examine the emerging concerns and obstacles that are inherent within the contexts of cyber security and cyber forensics. Through a meticulous examination of current advancements, legal structures, investigative methodologies, and technological progressions, the objective of this scholarly article is to illuminate the intricate fabric that comprises the modern cyber landscape. Through a systematic examination of notable case studies, regulatory initiatives, and technological innovations, the article aims to provide a holistic understanding of the complexities associated with safeguarding digital systems and conducting effective cyber investigations in the face of evolving threats.

2. Research Questions

a) What are the primary emerging cyber threats that organizations currently face, and how do these threats evolve over time, impacting the overall landscape of cybersecurity?

b) How can advancements in technology, such as artificial intelligence and the Internet of Things, be leveraged to enhance cybersecurity measures, and what challenges do these technological innovations present in terms of security?

c) In the context of cyber forensics, what are the key challenges investigators encounter when analyzing digital evidence, and how can methodologies be adapted to address these challenges in a rapidly changing technological environment?

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[2] Eoghan Casey, *Standardization of forming and expressing preliminary evaluative opinions on digital evidence*, 32 FORENSIC SCIENCE INTERNATIONAL: DIGITAL INVESTIGATION 200888 (2020).

d) How do international collaboration and information-sharing initiatives contribute to strengthening global cybersecurity efforts, and what barriers hinder effective cooperation among nations in addressing cyber threats?

e) What ethical considerations and legal frameworks should guide the practices of cybersecurity professionals and cyber forensic investigators, particularly in light of evolving privacy concerns and the need for responsible data handling?

3. Evolution of Cyber Threats

The evolution of cyber threats has showcased a remarkable and intricate trajectory, mirroring the rapid advancement of digital technologies and their integration into diverse facets of modern society. The skills and tactics of hostile actors looking to exploit weaknesses for monetary gain, political ends, or purely disruptive purposes have grown along with the digital ecosystem. A retrospective examination of this evolution not only underscores the sophistication of contemporary cyber threats but also elucidates the adaptive nature of those responsible for perpetrating them.

4. Emergence of Early Cyber Threats

The nascent stage of cyber threats witnessed the rise of relatively rudimentary attacks that targeted the vulnerabilities of emerging computer networks. The 1980s and 1990s saw the advent of viruses and worms, such as the infamous Morris Worm, which exploited vulnerabilities to propagate themselves across interconnected systems.[3] The motivations behind these early threats were often rooted in curiosity or experimentation rather than malign intent. However, these incidents foreshadowed the potential for widespread disruption and the necessity of safeguarding digital infrastructure.

5. Commercialization of Cybercrime

The turn of the millennium marked a notable shift as cyber threats transitioned from isolated experiments to lucrative criminal enterprises. The rise of e-commerce and online financial transactions introduced new opportunities for illicit financial gain. The proliferation of phishing attacks, wherein deceptive emails aimed to extract sensitive information from unwitting recipients, exemplified the confluence of technological sophistication and social engineering.[4] Moreover, the advent of botnets provided malicious

[3] Spafford E. H. , *The Internet Worm Program: An Analysis Purdue Technical Report* CSD-TR-823 (1989).

[4] Markus Jakobsson & Steven Myers, *Phishing and Countermeasures: Understanding the Increasing Problem of Electronic Identity Theft* , https://www.semanticscholar.org/paper/Phishing-and-Countermeasures%3A-

actors with formidable tools for launching distributed denial-of-service (DDoS) attacks, effectively disrupting online services and extorting businesses for financial gain.[5]

6. Nation-State Cyber Operations

The 21st century has borne witness to the ascendance of cyber threats as a potent tool within the arsenal of nation-states. The Stuxnet worm, discovered in 2010, illuminated the potential for cyber attacks to sabotage critical infrastructure, specifically targeting Iran's nuclear enrichment facilities.[6] This heralded a new era of geopolitical cyber operations, where states leveraged cyber capabilities for espionage, political manipulation, and even potential acts of war. The blurring of lines between criminal and state-sponsored activities presents challenges in attribution and retaliation, rendering the cyber threat landscape all the more complex.

7. The Age of Ransomware

As the spectrum of cyber threats has evolved in recent years, the growth of ransomware attacks has become of the highest priority. Cybercriminals make significant profits by encrypting victim data and demanding cash to decrypt it. The *WannaCry* and *NotPetya* attacks stand out among notable examples because they severely damaged international entities.[7] These cases highlight how important services could be interrupted by cyberattacks and create moral and legal dilemmas regarding paying offenders.

8. AI and Insider Threats

Cyberthreats now take on a new dimension as a result of the quick development of artificial intelligence (AI). Anomalies and patterns suggestive of breaches can be found using machine learning algorithms, which can also be used to automate and optimise attacks.[8] In addition, the human element continues to be a key

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Understanding-the-of-Jakobsson-Myers/7a54d9de33e784128248dbf2e72160250d321aa1 (last visited Aug 25, 2023).

[5] David Dagon, Guofei Gu, Christopher P. Lee & Wenke Wang, *A Taxonomy of Botnet Structures, in* Proceedings of the 23rd Annual Computer Security Applications Conference 268 (2007).

[6] KIM ZETTER, COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD'S FIRST DIGITAL WEAPON (Crown 2014).

[7] Brian Krebs, *Who's Behind the WannaCry Ransomware*?, KREBSONSECURITY (May 15, 2017), https://krebsonsecurity.com/2017/05/whos-behind-the-wannacry-ransomware/.

[8] Daniel S. Berman et al., A SURVEY OF DEEP LEARNING METHODS FOR CYBER SECURITY MDPI (2019), https://www.mdpi.com/2078-2489/10/4/122 (last visited Aug 25, 2023). See also Hanno Kasan & Hein S. Venter, A Survey of Deep Learning Cybersecurity Applications, 50 J. Info. Sec. & App. 102419 (2020).

aspect, with insider threats from unsatisfied workers or corrupted individuals providing serious risks.[9]

9. The Future Landscape of Cyber Threats

As technology continues its unceasing progression, the future landscape of cyber threats appears poised for further complexity. The emergence of quantum computing holds both promise and peril, as it has the potential to render current encryption methods obsolete while also offering advanced defensive capabilities.[10] Moreover, the integration of the Internet of Things (IoT) into critical infrastructure introduces vulnerabilities that may be exploited by malicious actors.[11] It is imperative that anticipatory efforts are undertaken to preemptively address these impending challenges.

10. AI-Driven Transformation of Cyber Threats

The advent of AI has brought about a paradigm shift in the nature of cyber threats. Traditional cyber attacks often relied on well-defined patterns and signatures that could be detected using rule-based systems and signature-based detection mechanisms. However, the application of AI in cyber attacks has enabled threat actors to create more sophisticated and adaptive attacks that can learn and evolve over time. Machine learning algorithms, a subset of AI, allow cyber attackers to automate the process of identifying vulnerabilities, crafting attack strategies, and bypassing security measures.[12]

For instance, AI-powered malware can autonomously mutate its code to evade detection, making it difficult for traditional security solutions to keep pace. Similarly, AI-driven phishing attacks can generate hyper-realistic messages that mimic human communication patterns, increasing the likelihood of successful social engineering exploits. The use of AI in orchestrating large-scale, coordinated attacks, such as Distributed Denial of Service (DDoS) attacks, amplifies the scale and impact of such incidents.[13]

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[9] JOHN M. CARRESE & RICHARD E. HALL, INSIDER THREAT TO INFORMATION SECURITY: U.S. POLICY, PROGRAMS, AND PROGRESS (RAND Corporation 2009).

[10] John Preskill, *Quantum Computing in the NISQ Era and Beyond*, 2 Quantum 79 (2018).

[11] Yuchen Zhu, Anthony D. Joseph & S. Shankar Sastry, *A Taxonomy of Internet of Things for Privacy and Security Considerations,* IEEE INTERNATIONAL CONFERENCE ON PERVASIVE COMPUTING AND COMMUNICATIONS WORKSHOPS 187 (2011).

[12] Razvan Pascanu & Antti Lampinen, *On the State of the Art of Evaluation in Neural Language Models* (2019) (unpublished manuscript), https://arxiv.org/abs/1901.09069. See, Felipe Almeida & Geraldo Xexéo, WORD EMBEDDINGS: A SURVEY ARXIV.ORG (2023), https://arxiv.org/abs/1901.09069 (last visited Aug 25, 2023).

[13] Sushant Swamy & Keisuke Sakaguchi, DeepHoneypot: a Generative Approach to Featurize and Analyze Honey Pot Data, in *Proceedings of the 25th ACM SIGKDD International Conference on Knowledge Discovery & Data Mining* 2614 (2019).

11. Strengthening Cyber Security with AI

While AI has expanded the arsenal of cyber attackers, it also offers a compelling toolkit for bolstering cyber security defenses. AI-powered threat detection and prevention systems leverage machine learning algorithms to analyze vast datasets in real-time, identifying anomalies and patterns indicative of potential threats. These systems can detect zero-day vulnerabilities and previously unknown attack vectors, thereby enhancing the proactive defense posture of organizations.[14]

Moreover, AI-driven security solutions facilitate the rapid analysis of security logs and events, minimizing the time required to identify and respond to security incidents. Behavioral analytics, a subset of AI, can establish baseline behavior for users and systems, thereby enabling the swift identification of deviations from the norm. This enables security teams to identify insider threats, unauthorized access, and anomalous behavior that might be indicative of a breach.[15]

12. Challenges in AI-Enhanced Cyber Security

The integration of AI into cyber security strategies also presents its own set of challenges. One primary concern pertains to the potential for adversarial attacks on AI-based security systems. Adversarial attacks involve manipulating AI algorithms by introducing subtle changes to data inputs, leading the system to make incorrect decisions. These attacks can result in AI systems misclassifying benign activities as malicious or vice versa, thereby undermining the reliability of AI-enhanced security mechanisms.[16]

Furthermore, the opacity of AI algorithms, often referred to as the "black box" problem, poses challenges in explaining the decision-making process of AI systems. In cyber security, understanding the rationale behind an AI-generated alert or identification is crucial for effective response and remediation. Addressing this challenge requires the development of interpretable AI models and techniques that can provide insights into how AI systems arrive at their conclusions.[17]

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[14] Muhammad Khalid & Syed Ali Khayam, *Machine Learning and Security: Generating Intrusion Detection Models Using GANs*, INTERNATIONAL SYMPOSIUM ON RESEARCH IN ATTACKS, INTRUSIONS, AND DEFENSES 91 (2018).

15 Mary F. Theofanos & Jeanne M. Stanton, *Incorporating Machine Learning and Artificial Intelligence into the National Institute of Standards and Technology Cybersecurity Practice Guide 1800 Series: An Introduction*, 5 J. CYBERSECURITY 002 (2019).

[16] Nicolas Papernot et al., *Practical Black-Box Attacks Against Machine Learning*, ACM ON ASIA CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY 506 (2016).

[17] Tiago Carvalho & Daniel De Castro Guedes, *A Survey on Explainability in Machine Learning*, 54 ACM Computing Surveys 1 (2021).

13. Role of AI in Cyber Forensics

In the realm of cyber forensics, AI presents opportunities to streamline and enhance investigative processes. Digital forensics involves the collection, analysis, and preservation of digital evidence to support legal proceedings. The sheer volume and complexity of digital data generated by AI systems necessitate advanced techniques for expeditiously sifting through relevant information during investigations.[18]

AI can aid in the automation of evidence collection and analysis, accelerating the process of identifying relevant files, network activity, and system logs. Natural language processing (NLP) algorithms can extract pertinent information from unstructured textual data, facilitating the identification of communication patterns, timelines, and potential indicators of malicious intent.[19] Additionally, AI-powered tools can reconstruct timelines of events, helping investigators understand the sequence of actions leading up to a cyber incident.

14. Ethical and Legal Considerations

While AI offers transformative potential in the realms of cyber security and cyber forensics, it also raises ethical and legal considerations. The use of AI for offensive purposes, often referred to as "AI cyber weapons," blurs the lines between conventional cyber attacks and the application of AI technology. The attribution of cyber attacks becomes more complex when AI is used to obfuscate the origin of the attack, potentially complicating international responses and diplomatic efforts.[20] Moreover, the integration of AI in cyber investigations prompts discussions about privacy rights and data protection. AI-driven investigations involve the analysis of vast datasets, including personal and sensitive information. Striking a balance between effective investigation and safeguarding individual privacy necessitates robust data protection regulations and guidelines.[21] The integration of AI into the fields of cyber security and cyber forensics introduces both opportunities and challenges. As threat actors continue to harness the power of AI for malicious purposes, defenders must leverage AI to fortify their defenses and

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[18] EOGHAN CASEY, DIGITAL EVIDENCE AND COMPUTER CRIME: FORENSIC SCIENCE, COMPUTERS AND THE INTERNET (Academic Press 2018).

[19] Ahmed Ibrahim, Zainab Shukur & Fatimah Binti Sidi, *Cyber Threat Hunting Using Natural Language Processing Techniques*, PROCEEDINGS OF THE FUTURE TECHNOLOGIES CONFERENCE 1087 (2020).

[20] Panagiotis Arvanitis, Stefan Schauer & Ingo Stengel, *The Weaponization of Artificial Intelligence*, 38 IEEE TECH. & SOC'Y MAG. 43 (2019).

[21] Sandra Wachter, Brent Mittelstadt & Luciano Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, 7 INT'L DATA PRIVACY L. 76 (2017).

respond more effectively to evolving threats. Collaboration between AI researchers, cyber security experts, and legal professionals is essential to devise robust strategies that anticipate and counteract AI-driven cyber attacks.

Furthermore, ongoing research is needed to develop AI algorithms that are resilient to adversarial attacks and to ensure the transparency and accountability of AI systems used in security and investigative contexts. Ethical frameworks must guide the development and deployment of AI in ways that prioritize individual rights, societal well-being, and global security.

The potential of AI to enhance both offensive and defensive capabilities underscores the need for comprehensive research, collaboration, and ethical consideration.

15. Cyber Security: Emerging Issues

The realm of cyber security has become a pivotal arena in the modern digital landscape, driven by the escalating frequency and sophistication of cyber attacks that threaten the integrity, confidentiality, and availability of digital systems. This section delves into a spectrum of emerging challenges that punctuate the domain of cyber security, unraveling the intricacies of each issue while considering their broader implications for individuals, corporations, and governments.

A. Ransomware Attacks

In recent years, ransomware attacks have emerged as a dominant and distressing cyber threat, causing widespread disruption and financial losses across the globe.[22] These attacks entail the malicious encryption of an organization's critical data, followed by a demand for ransom payment in exchange for the decryption key. The insidiousness of ransomware lies not only in its financial repercussions but also in its potential to paralyze vital infrastructures, such as healthcare systems and municipal services.[23]

The evolving landscape of ransomware is characterized by a shift from indiscriminate attacks to more targeted and sophisticated operations. Threat actors have embraced tactics such as “double extortion,” wherein stolen data is not only encrypted but also

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[22] Nicole M. Radziwill, *Countdown to Zero Day: Stuxnet and the Launch of the World’s First Digital Weapon*, 25 QUALITY MANAGEMENT JOURNAL 109 (2018).
[23] Duan van der Merwe & Rossouw von Solms, *Towards a Framework for Managing the Risks Associated with the Insider Threat*, 29 COMPUTERS & SECURITY 274 (2010).

threatened to be publicly released if ransom demands are not met.[24] This escalation adds an extra layer of complexity, as organizations now grapple not only with data recovery but also with potential reputational damage and legal consequences stemming from data breaches.

Furthermore, the proliferation of ransomware-as-a-service (RaaS) platforms has lowered the barrier of entry for aspiring cyber criminals, facilitating the commodification of ransomware attacks.[25]

B. Supply Chain Vulnerabilities: Tackling Third-Party Risks

The digital ecosystem is intricately woven, with organizations heavily reliant on third-party vendors and suppliers for a myriad of services and products. However, this interconnectedness also introduces a significant vulnerability—supply chain attacks. These attacks target the weaker links in the digital supply chain, exploiting them as gateways to infiltrate larger and more secure targets.[26]

The SolarWinds incident of 2020 serves as a poignant example, wherein a state-sponsored actor leveraged a compromised update of SolarWinds software to breach several U.S. government agencies and corporations.[27] This event underscores the insidious nature of supply chain vulnerabilities, as they can remain undetected for extended periods, rendering traditional perimeter defenses insufficient. Addressing supply chain risks necessitates a holistic approach that involves stringent vetting of third-party vendors, continuous monitoring, and implementing robust cyber hygiene practices across the supply chain. Regulatory interventions are also vital to establish accountability and incentivize organizations to adopt resilient supply chain security frameworks.

C. IoT Security: Protecting the Connected Ecosystem

The proliferation of Internet of Things (IoT) devices has engendered unparalleled convenience and efficiency across various

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[24] Ryan P. Breslawski, *Ransomware: Evolution, Mitigation and Prevention*, 17 J. INFO. WARFARE 45 (2018).

[25] Akashdeep Bhardwaj, *Ransomware: Rising threat of new-age digital extortion*, NEW AGE CYBER THREAT MITIGATION FOR CLOUD COMPUTING NETWORKS 1–15 (2023). See also,Deepak Kumar, *Ransomware, Double Extortion, and Regulatory Challenges*, 6 J. CYBER POL'Y 161 (2021).

[26] Liqin Zhang, *Retraction note: Artificial Intelligence Assisted Cyber Threat Assessment and applications for the tourism industry*, JOURNAL OF COMPUTER VIROLOGY AND HACKING TECHNIQUES (2023). See also, Liam O Murchu & Paul C. van Oorschot, *The Security of Modern Password Expiration: An Algorithmic Framework and Empirical Analysis*, 5 IEEE TRANS. INFO. FORENSICS & SECURITY 583 (2010)

[27] Kim Zetter, *The untold story of the boldest supply-chain Hack Ever Wired* (2023), https://www.wired.com/story/the-untold-story-of-solarwinds-the-boldest-supply-chain-hack-ever/ (last visited Aug 25, 2023). See also, Christie Aschwanden, The SolarWinds Hackers Used a New Way to Breach Networks, *Wired* (2021), https://www.wired.com/story/solarwinds-hackers-new-way-breach-networks/.

sectors, from smart homes to industrial automation. However, the proliferation of these interconnected devices has also given rise to a labyrinth of security challenges. IoT devices are often characterized by limited computational resources, making them susceptible to security oversights that can be exploited by malicious actors.[28] Compromised IoT devices can serve as entry points for cyber attacks, leading to the compromise of broader systems or even the creation of extensive botnets for launching large-scale distributed denial-of-service (DDoS) attacks.[29] The Dyn DDoS attack in 2016, which disrupted major online platforms, was orchestrated using a botnet comprised of IoT devices.[30] Securing the IoT ecosystem requires multifaceted measures, including improved device authentication and authorization mechanisms, robust encryption protocols, and regular security updates. As the IoT domain spans both consumer and industrial contexts, collaboration between manufacturers, regulators, and users is pivotal to crafting comprehensive security frameworks.

D. AI and Machine Learning: A Dual-Edged Sword

The integration of artificial intelligence (AI) and machine learning (ML) technologies into the cyber landscape has introduced transformative possibilities in both defensive and offensive contexts. While AI and ML hold promise in enhancing threat detection and response through predictive analytics and anomaly detection, their application in cyber attacks poses profound challenges.[31]

Adversarial machine learning, for instance, involves manipulating AI systems to generate false outputs that can deceive security mechanisms.[32] Attackers can exploit the vulnerabilities of AI algorithms to craft evasive malware or launch more sophisticated phishing campaigns, rendering traditional security solutions less effective.

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[28] Earlence Fernandes et al., *Internet of things security research: A rehash of old ideas or new intellectual challenges?*, 15 IEEE SECURITY & PRIVACY 79–84 (2017). See also, Ming Ma, Yantao Liu & Chi-Fu Lai, Internet of Things Security Research: A Rehash of Old Ideas or New Intellectual Challenges?, 3 IEEE Internet of Things J. 516 (2016).

[29] Constantinos Kolias et al., *DDoS in the IOT: Mirai and other botnets*, 50 COMPUTER 80–84 (2017).

[30] Q1 2017 *State Of The Internet Security Report* | AKAMAI, https://www.akamai.com/site/en/documents/state-of-the-internet/q1-2017-state-of-the-internet-security-report.pdf (last visited Aug 25, 2023).

[31] IEEE Transactions on Information Forensics and Security Publication Information, 16 IEEE TRANSACTIONS ON INFORMATION FORENSICS AND SECURITY (2021). See also, Zhang, Yuxin, et al. "A Survey on AI Security: Technical Challenges, Emerging Directions, and Future Outlooks." *IEEE Transactions on Information Forensics and Security* 16 (2021): 1201-1219.

[32] Biggio, Battista, et al., *Evasion Attacks Against Machine Learning at Test Time*, MACHINE LEARNING AND KNOWLEDGE DISCOVERY IN DATABASES. Springer, 2013. 387-402.

16. Nation-State Cyber Warfare

The concept of nation-state cyber warfare encompasses a broad spectrum of activities, ranging from cyber espionage and data exfiltration to disruptive attacks on critical infrastructure and even acts of war in the cyber domain. The origin of this phenomenon can be traced back to the early 21st century, with pioneering states realizing the potential of exploiting digital vulnerabilities to advance their strategic interests. Notable instances, such as the Stuxnet attack on Iranian nuclear facilities and the alleged Russian interference in the 2016 United States presidential election, serve as watershed moments that spotlight the gravity of this emerging paradigm.[33]

17. Geopolitical Motivations and Objectives

At the heart of nation-state cyber warfare lies a mosaic of geopolitical motivations. States leverage cyber capabilities to achieve an array of objectives, including intelligence gathering, economic espionage, political influence, and even coercive measures in pursuit of strategic advantage. The digital domain offers a cloak of anonymity, enabling states to engage in operations that may be less overt than traditional military actions. By exploiting vulnerabilities in adversary systems, states can extract sensitive information, manipulate public sentiment, and destabilize opponent networks without overtly crossing into open conflict.[34]

18. Attribution Challenges and the Fog of Cyber War

Unlike conventional warfare, where the origin of attacks is often discernible through physical evidence, cyber attacks can be routed through multiple servers, employing techniques to obfuscate their origin. This lack of clear attribution complicates responses and escalations, as states often hesitate to attribute attacks without concrete evidence, fearing the risk of misattribution and unintended escalation. This has led to a landscape where cyber operations can be conducted with a degree of plausible deniability, further blurring the lines between state-sponsored and non-state actors.[35] The lack of consensus on what constitutes an armed attack in the cyber realm, coupled with the absence of a universally accepted framework for attributing cyber operations to states, hampers the establishment of clear red lines and appropriate responses. This has spurred

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[33] Robert S Mueller, *The Mueller report : report on the investigation into Russian interference 2*016 PRESIDENTIAL ELECTION (2019).
[34] Thomas Rid & Ben Buchanan, *Attributing Cyber Attacks*, 38 J. STRATEGIC STUD. 4 (2015).
[35] MICHAEL N. SCHMITT & LIIS VIHUL, *TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS* (Cambridge University Press 2019).

discussions on the need for new norms and agreements tailored to the digital age.[36]

19. Escalation Dynamics and the Risk of Unintended Consequences

The interconnectedness of global networks introduces a crucial dimension to nation-state cyber warfare: the risk of escalation. In the absence of established norms and rules of engagement, cyber incidents can spiral into broader conflicts. An attack targeting critical infrastructure, for instance, could result in physical harm and economic disruption, forcing states to contemplate military responses. The challenge lies in developing mechanisms to manage escalation, ensuring that responses are commensurate with the threat and do not inadvertently trigger larger conflicts. This necessitates not only technological solutions but also diplomatic efforts to establish lines of communication and crisis management protocols.[37]

20. Mitigation Strategies

Efforts to navigate the complex geopolitical landscape of nation-state cyber warfare require a multifaceted approach. Technological advancements in attribution techniques, threat intelligence sharing, and defensive measures play a crucial role in enhancing cyber resilience. However, the solution extends beyond technology, encompassing diplomatic initiatives to establish cyber norms, legal frameworks to address cyber attacks, and strategic deterrence mechanisms. International cooperation is imperative to formulate guidelines that mitigate the risks associated with this evolving paradigm and promote stability in cyberspace.[38]

21. Cyber Forensics: Challenges and Solutions

The efficacy of cyber investigations hinges upon the preservation of digital evidence, which serves as the cornerstone of attributing cyber incidents to their perpetrators. However, the rapid evolution of technologies poses a fundamental challenge to this process. The dynamic nature of digital environments, characterized by the constant generation, modification, and deletion of data, complicates the task of evidence preservation. The advent of cloud computing, which enables the remote storage and processing of data, brings forth novel intricacies for evidence preservation. Traditional practices, such

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[36] David Talbot, *The War on Cyberwar: A New Form of Warfare in the 21st Century*?, 40 J. STRATEGIC STUD. 34 (2017).
[37] JAN KREMER, HACKED WORLD ORDER: HOW NATIONS FIGHT, TRADE, MANEUVER, AND MANIPULATE IN THE DIGITAL AGE (PENGUIN 2019*).*
[38] David E. Sanger, *The Perfect Weapon: War, Sabotage, and Fear in the Cyber Age* (Crown 2018).

as seizing physical hardware, prove insufficient in this context. Instead, investigators are compelled to navigate legal, technical, and jurisdictional hurdles to secure evidence from cloud service providers.[39] The transient nature of cloud data underscores the importance of swift and standardized protocols for preservation, necessitating collaboration between law enforcement and cloud service providers.[40]

22. Encrypted Communications

The adoption of end-to-end encryption, wherein only the communicating parties possess the decryption keys, renders interception efforts by intermediaries futile.[41] This has led to contentious interactions between technology companies and government authorities, where the former advocate for user privacy while the latter emphasize the importance of access to encrypted communications for national security purposes.[42] Striking a balance between privacy rights and the needs of criminal investigations remains an ongoing struggle, prompting calls for multi-stakeholder dialogues and policy interventions.[43]

23. Cloud Forensics: Tracing Data in Virtual Environments

Cloud computing's ascendancy has revolutionized the storage and processing of data, yet simultaneously complicated the task of cyber investigations. The nebulous nature of cloud environments, where data traverses various virtual spaces and jurisdictions, demands specialized techniques for forensic examination. In traditional forensic scenarios, physical hardware served as the locus for evidence collection; cloud forensics necessitates a paradigm shift towards virtual evidence preservation. The dynamic and distributed nature of cloud environments underscores the importance of establishing a robust chain of custody for digital evidence.[44] Forensic experts must meticulously document the entire lifecycle of digital artifacts, encompassing their creation, movement, and modification within the

[39] Quick, Darren, and Kim-Kwang Raymond Choo. "Cloud Storage Forensics: A Research Agenda." *Digital Investigation* 11.4 (2014): 273-283.
[40] Reedy, Elizabeth. "Digital Evidence and the Cloud." *Digital Investigation* 12.1 (2015): 44-55.
[41] Green, Matthew. "The Fallacy of Lawful Access Backdoors." *Harvard Journal of Law & Technology* 29.1 (2015): 267-324.
[42] Denning, Dorothy E., and Peter J. Denning. "Internet Freedom and Encryption." *Communications of the ACM* 60.11 (2017): 24-26.
[43] Froomkin, A. Michael. "Why Metadata Matters." *UCLA Law Review* 62 (2015): 1346-1410.

[44] Ruan, Kevin, Joe Carthy, and Tahar Kechadi. "An Analysis of Digital Forensic Models." *Digital Investigation* 9.2 (2012): 91-100.

cloud ecosystem.[45] Moreover, the challenges posed by data co-mingling – the intermingling of data from multiple clients within the same physical infrastructure – requires advanced methods of data separation and attribution.[46]

24. Anti-Forensics Techniques: Uncovering Hidden Tracks

As cyber criminals continue to refine their techniques, the field of anti-forensics has emerged as a formidable challenge for cyber investigators. Anti-forensics encompasses a spectrum of tactics aimed at obfuscating or destroying digital evidence, thwarting the efforts of forensic analysts. This covert battle necessitates the development of countermeasures that can identify and neutralize these tactics. One prevalent anti-forensics technique involves the manipulation of timestamps and metadata within digital files, obscuring their origins and modification history.[47] Detecting such manipulations requires advanced temporal analysis techniques and the integration of machine learning algorithms.[48] Furthermore, the strategic deployment of data fragmentation and encryption serves as a potent tool in hampering evidence reconstruction.[49] Effective anti-forensic countermeasures demand an understanding of the adversary's techniques and continuous innovation in forensic methodologies.[50]

25. Jurisdictional Complexities in Global Investigations

The borderless nature of cybercrime presents intricate jurisdictional challenges that confound the landscape of cyber investigations. Digital evidence often traverses multiple jurisdictions, rendering traditional legal norms inadequate. The global nature of cyber incidents demands collaborative frameworks that enable seamless cross-border cooperation. Extraterritorial application of domestic laws remains a contentious issue, as it potentially infringes upon the sovereignty of other nations.[51] Mutual Legal Assistance

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[45] Almutairi, Abdulrahman, and Siani Pearson. "Secure Multi-party Computation in Cloud Computing: A Systematic Review." *Journal of Cloud Computing: Advances, Systems and Applications* 3.1 (2014): 1-24.
[46] Casey, Eoghan, and George J. Stellatos. "Data Hiding in Digital Images." *Digital Investigation* 1.3 (2004): 298-305.
[47] Gharibi, Wajeb, Ali Dehghantanha, and Baris Eterovic-Soric. "Anti-Forensics: Survey and Taxonomy of Methods, Detection, and Countermeasures." *Digital Investigation* 28 (2018): 98-120.
[48] Henningsen, Thomas S. "Breaking the Code: Defeating Encrypted Data Recovery Provisions of the Fifth Amendment Privilege." *Harvard Journal of Law & Technology* 19.1 (2006): 57-79.
[49] Baggili, Ibrahim, and Andrew Marrington. "Anti-Forensics: What Is It? What Can We Do About It?" *Digital Investigation* 11.3 (2014): 223-237.
[50] Kerr, Orin S. "Applying the Fourth Amendment to the Internet: A General Approach." *Harvard Law Review* 119.2 (2005): 561-651.
[51] Council of Europe. EUROPEAN CONVENTION ON CYBERCRIME. 2001. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185.

Treaties (MLATs) have traditionally served as a means of facilitating international cooperation, yet their efficacy has been hampered by bureaucratic delays and evolving legal standards.[52] The need for expeditious and effective international cooperation has prompted initiatives to streamline the MLAT process and enhance bilateral and multilateral agreements.[53]

26. Legal And Ethical Considerations

In the intricate landscape of cyber security and cyber forensics, legal and ethical considerations loom large as critical pillars that shape the parameters of investigation and response. As digital interactions intertwine with the fabric of daily life, questions pertaining to data privacy, cross-border data access, and ethical integrity in cyber investigations become increasingly pronounced, demanding meticulous examination.

A. Data Privacy Regulations: Impact on Investigations and Information Sharing

The proliferation of data-driven technologies and the ever-expanding digital footprint of individuals have galvanized the formulation of data privacy regulations across jurisdictions. These regulations, aimed at safeguarding individuals' personal information, engender a complex matrix of challenges and opportunities in the realm of cyber security and forensics. As governments and regulatory bodies grapple with the delicate task of balancing privacy rights with the exigencies of cyber crime investigations, a confluence of divergent interests emerges.[54]

The General Data Protection Regulation (GDPR) of the European Union stands as a paradigmatic exemplar of contemporary data privacy regulations, casting a substantial impact on cyber investigations and information sharing endeavors. The GDPR's provisions, emphasizing consent-based data processing, data subject rights, and stringent data breach reporting, wield far-reaching implications for digital evidence collection and retention protocols.[55] Forensic practitioners, within this framework, encounter an intricate challenge: how to navigate the intricacies of data privacy while

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[52] Jennifer Trahan, *Contributing to cyber peace by maximizing the potential for deterrence*, CYBER PEACE 131–153 (2022).
[53] Bronk, C., & Chertoff, M. (2014). Toward a safer and more secure cyberspace. Journal of International Affairs, 68(1), 131-149.
[54] Alessandro Acquisti, Curtis Taylor & Liad Wagman, *The Economics of Privacy*, 54 JOURNAL OF ECONOMIC LITERATURE 442–492 (2016).
[55] Bygrave, Lee A. "Data Protection Law: Approaching Its Rationale, Logic and Limits." *International and Comparative Law Quarterly* 66.3 (2017): 625-657. See also, Editor: Stephen Mason & Editor: Daniel Seng, ELECTRONIC EVIDENCE (2017).

ensuring that evidence is appropriately collected, preserved, and presented in a manner compliant with regulatory mandates.[56]

Moreover, the GDPR's extraterritorial reach and penalties for non-compliance prompt cross-border implications, particularly in international cyber crime investigations. The friction between differing data protection regimes poses challenges for investigators seeking to access data located beyond their jurisdiction's borders.[57] In this context, the intricate dynamics between data privacy and the imperative to combat cyber threats necessitate novel approaches to harmonize global data privacy norms with the exigencies of cyber investigations.

B. Cross-Border Data Access: Legal and Diplomatic Impediments

The borderless nature of cyber crime necessitates cross-border collaboration to effectively investigate and mitigate digital offenses. However, the pursuit of justice across jurisdictional boundaries is far from seamless, entangled in a web of legal, diplomatic, and political complexities. As forensic professionals strive to access digital evidence stored in foreign territories, a panoply of legal challenges arises, leading to the formulation of bilateral and multilateral agreements to facilitate data access.[58] The challenges in cross-border data access are manifold, often exacerbated by differences in legal systems, evidentiary standards, and definitions of cyber offenses. The mutual legal assistance treaties (MLATs) framework has emerged as a crucial mechanism for cooperation, enabling states to seek and provide assistance in criminal investigations, including cyber crime cases.[59] However, the effectiveness of MLATs is hampered by issues such as delays in response, resource constraints, and the inherent friction between sovereignty and the need for international cooperation.[60] The absence of a standardized approach to cloud data storage and retrieval further underscores the necessity for

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[56] Kenneth C. Laudon & Carol Guercio Traver, E-commerce: Business, Technology, Society (2021).

[57] Kuner, Christopher, and Thomas Cottier. "International Trade in Data: A Promising Area for International Trade Agreements?" *Journal of International Economic Law* 20.3 (2017): 437-462.

[58] Gürses, Seda, Carmela Troncoso, and Sören Preibusch. "Engineering Privacy by Design." *Computer* 44.9 (2011): 116-119

[59] Zagaris, Bruce. "A New Model Mutual Legal Assistance Treaty for the Transfer of Electronically Stored Data." *Berkeley Journal of International Law* 36.1 (2018): 245-276.

[60] Hügel, Sebastian. "Mutual Legal Assistance in the Digital Age: A European Perspective." *Journal of International Law of Peace and Armed Conflict* 30.1 (2017): 70-88

harmonized international frameworks that address the complexities of accessing digital evidence stored across borders.[61]

27. Technological Innovations in Cyber Security and Forensics

In the ever-evolving landscape of cyber security and cyber forensics, technological innovations play a paramount role in shaping the efficacy and resilience of defense mechanisms and investigative procedures. As adversaries continue to employ sophisticated tactics, the development and implementation of advanced technologies have become indispensable to bolstering cyber defenses and enhancing forensic capabilities.

A. Behavioral Analytics: Proactive Threat Detection

The conventional methods of cyber security, often reliant on signature-based detection systems, have proven insufficient in thwarting novel and adaptive cyber threats. Behavioral analytics emerges as a transformative approach, premised on the notion that an understanding of normal system behaviors empowers the identification of anomalous activities indicative of potential breaches.[62] The application of behavioral analytics extends beyond intrusion detection. Its utility spans fraud prevention, insider threat mitigation, and continuous authentication mechanisms. In the context of forensics, behavioral analytics aids in reconstructing sequences of events and discerning patterns of compromise, crucial in attributing cyber-attacks to specific threat actors.[63] Despite its potential, challenges remain, including the need for comprehensive and diverse data sets for training algorithms, the prevention of adversarial evasions, and the assurance of user privacy in the data collection process.[64]

B. Blockchain in Forensic Data Integrity

The proliferation of digital evidence presents an intricate challenge in preserving its integrity throughout the investigation lifecycle. Blockchain technology, renowned for its immutability and

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[61] Yeo, Stanley. "Cross-border Access to Electronic Data in Criminal Investigations: Developing an International Legal Framework for Cloud Data." *International Review of Law, Computers & Technology* 33.1 (2019): 21-37.

[62] Trent, Michael. "Behavioral Analytics: A New Approach to Preventing Cyber Attacks." *Forbes*, March 27, 2020. See also, Seth Azubuike, Cybersecurity attacks: Regulatory and practical approach towards preventing data breach and cyber-attacks in USA, SSRN ELECTRONIC JOURNAL (2021).

[63] Deepak Dutt, COUNCIL POST: BEHAVIORAL ANALYTICS: A PRIVACY-FIRST APPROACH FORBES (2020), https://www.forbes.com/sites/forbestechcouncil/2020/09/11/behavioral-analytics-a-privacy-first-approach/ (last visited Aug 26, 2023).

[64] Abbasi, Ahmed et al. "Behavioral Digital Forensics: Survey and Open Challenges." *Digital Investigation* 26 (2018): 1-23.See also, Shafique Ahmed Awan et al., Digital Forensics and Cyber Forensics Investigation: Security challenges, limitations, open issues, and future direction, 1 INTERNATIONAL JOURNAL OF ELECTRONIC SECURITY AND DIGITAL FORENSICS 1 (2022).

cryptographic foundations, emerges as a promising solution to this conundrum. By enabling the creation of tamper-proof and time-stamped records, blockchain ensures the authenticity and verifiability of digital evidence, safeguarding it against manipulation or spoliation.[65]

The integration of blockchain in forensics introduces transparency and accountability, assuring stakeholders of the veracity of evidence presented in legal proceedings. Smart contracts within blockchain frameworks can automate the authentication process, streamlining the validation of evidence by multiple parties.[66]

C. Quantum Computing and Encryption

The advent of quantum computing poses a dual challenge to cyber security and forensics. While quantum computers hold the potential to unravel contemporary encryption mechanisms, they also offer opportunities to fortify cryptography against quantum-enabled attacks. The imminent arrival of quantum computers necessitates the development of post-quantum cryptographic algorithms capable of resisting the computational power of quantum adversaries.[67] To mitigate the threats posed by quantum computing, researchers are exploring lattice-based, code-based, and multivariate-quadratic-equations-based encryption algorithms, among others. As organizations transition to quantum-safe encryption, challenges arise in standardization, interoperability, and the management of legacy systems. The quantum threat also prompts a reevaluation of long-term data security strategies, encompassing the preservation of data confidentiality and integrity in a post-quantum era.[68]

D. Automation in Cyber Security

The acute shortage of skilled cyber security professionals presents a formidable challenge in managing the ever-expanding threat landscape. Automation, fueled by artificial intelligence (AI) and machine learning (ML), emerges as a pragmatic solution to augment

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[65] Debbiche, Ahmed et al. "Advancements and Open Challenges in Behavioral Digital Forensics." *Journal of Forensic Sciences* 65.5 (2020): 1527-1541.
[66] Azaria, Asaph et al. "Blockchain: A Panacea for Healthcare Cloud-Based Data Security and Privacy?" *Health and Technology* 6.1 (2016): 25-36.
[67] Hughes, David et al. "Blockchain Applications in Forensic Science." *Forensic Science International: Digital Investigation* 31 (2019): e100855.
[68] Bernstein, Daniel J. et al. "Post-Quantum Cryptography." *Nature* 592 (2020): 26-28. See also, Information Technology Laboratory Computer Security Division, POST-QUANTUM CRYPTOGRAPHY STANDARDIZATION - POST-QUANTUM CRYPTOGRAPHY: CSRC CSRC, https://csrc.nist.gov/projects/post-quantum-cryptography/post-quantum-cryptography-standardization (last visited Aug 26, 2023).

human capabilities and bridge the expertise gap.[69] Automated systems can swiftly analyze vast datasets, identify patterns, and execute routine tasks, liberating human analysts to focus on high-value tasks requiring contextual understanding and decision-making. Automation extends its utility to incident response, where AI-driven tools rapidly detect, contain, and remediate cyber incidents, minimizing the impact of breaches. Additionally, automation enhances threat hunting by autonomously identifying subtle indicators of compromise that may elude human analysts.[70] However, the deployment of automation raises ethical concerns regarding bias, accountability, and the potential for adversarial attacks targeting AI-driven defenses.[71]

28. Collaborative Approaches and International Cooperation

The multifaceted and transnational nature of cyber threats necessitates collaborative efforts and international cooperation to effectively counteract and mitigate the evolving challenges that the digital landscape presents.

A. Public-Private Partnerships

The paradigm of cyber security has extended beyond the traditional confines of government agencies and law enforcement bodies, giving rise to the concept of Public-Private Partnerships (PPPs). The holistic nature of cyber threats has prompted both public and private sectors to recognize the synergistic benefits of pooling resources, expertise, and insights. PPPs epitomize collaborative models that underscore shared responsibilities and coordinated efforts to bolster cyber resilience. Government entities, cognizant of the private sector's extensive digital infrastructure and domain expertise, have embraced PPPs to heighten their capacity to detect, respond to, and recover from cyber incidents.[72] These partnerships manifest in various forms, encompassing information exchange, joint threat assessments, and coordinated incident response plans. For instance, the United States' National Institute of Standards and Technology (NIST) has championed the implementation of cybersecurity frameworks that encourage public and private organizations to collaboratively establish best practices and

[69] Mishra, Dhananjay et al. "Automated Cybersecurity Operations: An Analytical Framework." *IEEE Transactions on Dependable and Secure Computing* 15.6 (2018): 1003-1017.
[70] Anagnostopoulos, Aris et al. "AI-Driven Cyber Incident Containment and Recovery." *IEEE Security & Privacy* 17.4 (2019): 14-23.
[71] McMillan, Robert. "The Dangers of Overestimating AI." *The Wall Street Journal*, October 13, 2022.
[72] Peterson, Gregory. "The State of Public-Private Cybersecurity Collaboration." *HARVARD NATIONAL SECURITY JOURNAL* 8 (2017): 231-248.

standards.[73] While PPPs offer considerable promise, challenges persist in achieving optimal collaboration. Discrepancies in priorities, risk perceptions, and proprietary concerns often impede the seamless exchange of information between sectors.[74] Moreover, the intricacies of legal and regulatory frameworks, compounded by potential conflicts of interest, necessitate careful navigation in designing effective PPPs.[75] Nevertheless, as the digital threat landscape continues to evolve, the imperative for these collaborative models remains steadfast.

B. Information Sharing and Threat Intelligence

The swift identification and mitigation of cyber threats hinge upon the expeditious sharing of threat intelligence among stakeholders. Timely exchange of information empowers organizations to adapt their defenses proactively and respond effectively to emerging threats. Information sharing mechanisms, both public and private, have emerged as critical tools to foster collective defense against cyber attacks. Publicly, governmental agencies and international bodies play a pivotal role in disseminating threat intelligence and actionable insights. Platforms such as the United States Computer Emergency Readiness Team (US-CERT) serve as repositories for distributing vulnerability alerts, incident reports, and mitigation strategies.[76] These public initiatives fortify the cyber resilience of private entities by facilitating access to vital information that can inform risk management strategies. Concurrently, private sector-driven initiatives have proliferated, often manifesting in Information Sharing and Analysis Centers (ISACs) specific to industries. These ISACs convene organizations within a sector to exchange anonymized threat data, tactics, and threat indicators.[77] The Financial Services Information Sharing and Analysis Center (FS-ISAC), for instance, amalgamates financial institutions' collective intelligence to anticipate threats that may transcend individual institutions. The efficacy of information sharing hinges on addressing challenges of trust, liability, and proprietary concerns. Legal frameworks that facilitate protected information exchange while respecting privacy rights and competitive interests are essential to ensure the viability of these

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[73] FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY - NIST, https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf (last visited Aug 25, 2023).

[74] Schneier, Bruce. *Beyond Fear: Thinking Sensibly about Security in an Uncertain World*. Springer Science & Business Media, 2003.

[75] Samuelson, Pamela. "Privacy as Intellectual Property?" *Stanford Law Review Online* 64 (2012): 61-65.

[76] UNITED STATES COMPUTER EMERGENCY READINESS TEAM. "ABOUT US-CERT." 2021. https://www.us-cert.cisa.gov/about-us.

[77] Financial Services Information Sharing and Analysis Center. "About FS-ISAC." 2021. https://www.fsisac.com/about-fs-isac.

mechanisms.[78] Moreover, efforts to standardize threat data formats, improve data quality, and foster cross-sector collaboration remain ongoing pursuits to enhance the utility of shared intelligence.[79]

C. Interpol and Cross-Border Cooperation

The interconnectedness of the digital world transcends national boundaries, necessitating robust mechanisms for international collaboration in combating cybercrime. Interpol, the International Criminal Police Organization, plays a central role in facilitating cross-border cooperation in cybercrime investigations and response efforts. Through a range of initiatives, Interpol showcases the efficacy of coordinated global endeavors against the intricate challenges of the digital age.[80] One illustrative case study highlights Interpol's Operation Atlantis, which targeted a sophisticated cybercrime syndicate involved in online financial fraud and money laundering. This operation spanned multiple countries and required close collaboration between law enforcement agencies, financial institutions, and private sector cybersecurity firms. By coordinating intelligence sharing and synchronized operations, the operation led to the dismantling of the criminal network and the arrest of key perpetrators. Additionally, Operation Harken demonstrated the efficacy of Interpol's efforts in countering cyber-enabled financial crimes. In partnership with financial institutions and law enforcement agencies from across the globe, Interpol facilitated the identification and mitigation of fraudulent transactions executed through compromised banking systems.[81] This case underscores the role of international cooperation in promptly responding to cyber threats that traverse geographical and jurisdictional boundaries. These case studies underline the paramount significance of international collaboration in addressing the complexities of cybercrime. However, they also expose challenges such as varying legal standards, data privacy concerns, and the need for seamless information exchange mechanisms.[82] The success of such endeavors

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[78] Spiekermann, Sarah et al. "Security and Privacy in the Market for Stolen Data: A Case Study on Pricing Digital Identities." *Journal of Cybersecurity* 1.2 (2015): 121-128.
[79] Cyber Threat Intelligence League. *Threat Intelligence Sharing: History, Challenges, and Future*. 2019. https://cti-league.com/wp-content/uploads/2019/11/CTI-League-Threat-Intelligence-Sharing.pdf.
[80] Interpol. "Operation Atlantis Disrupts Online Crime Network." 2015. https://www.interpol.int/en/News-and-Events/News/2015/Operation-Atlantis-disrupts-online-crime-network.
[81] Interpol. "Operation Harken: Global Action against Money Mules Sees Results." 2020. https://www.interpol.int/en/News-and-Events/News/2020/Operation-Harken-global-action-against-money-mules-sees-results.
[82] Csonka, Paul, and Eric Goldschein. "Global Collective Action in Cyberspace: Cooperation against Digital Threats." *Global Policy* 8.2 (2017): 235-241. See also, Eric Goldschein - Insider, BUSINESS INSIDER, https://www.businessinsider.com/author/eric-goldschein (last visited Aug 26, 2023).

hinges on the alignment of legal, technical, and diplomatic factors to foster a cohesive and effective response to transnational cyber threats.

29. Conclusion

In the rapidly evolving landscape of cyber security and cyber forensics, the complexities and challenges presented by the digital age demand a comprehensive and strategic approach. This research article has undertaken an in-depth exploration of the emerging issues within these domains, highlighting the intricate interplay between technological advancements, legal frameworks, and investigative methodologies. The contemporary digital milieu underscores the critical importance of safeguarding digital systems and conducting effective cyber investigations. From the escalating threat of ransomware attacks to the complexities of encrypted communications and cross-border data access, this research has illuminated the multifaceted nature of modern cyber challenges. The interwoven realms of cyber security and cyber forensics have prompted a reevaluation of traditional paradigms, necessitating adaptable regulatory frameworks, investment in cyber education, and the integration of advanced technologies.

30. Suggestions

In light of the multifaceted challenges and ever-evolving landscape of cyber security and cyber forensics, a series of informed recommendations emerges as imperative to fortify digital systems, counteract cyber threats, and enhance investigative capabilities.

a) Holistic Cyber Security Frameworks

To effectively combat emerging cyber threats, it is essential for governments and organizations to adopt holistic cyber security frameworks that span technical, legal, and policy dimensions. These frameworks should entail adaptive regulations that can rapidly respond to evolving threats, striking a balance between individual privacy, national security, and effective law enforcement.[83]

b) Cyber Education and Workforce Development

Investments in cyber education and workforce development are pivotal in nurturing a skilled cadre of professionals adept at tackling sophisticated cyber attacks. Academic institutions and training programs should integrate comprehensive cyber security curricula, addressing both theoretical foundations and practical applications. This approach ensures the continuous cultivation of a workforce well-

[83] Schneier, B. (2015). Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World. W. W. Norton & Company.

equipped to adapt to novel threats and employ cutting-edge technologies in cyber defense and forensics.[84]

c) Integration of AI and Automation

The seamless integration of Artificial Intelligence (AI) and automation mechanisms holds transformative potential in strengthening cyber defense and investigative processes. AI-driven algorithms can expedite the detection of anomalies, enabling swift responses to emerging threats.[85] Additionally, automated incident response systems can minimize the impact of breaches, reducing downtime and enhancing recovery efforts.

d) Diplomatic Collaboration and International Conventions

As cyber conflicts transcend geographical boundaries, the development of diplomatic collaboration and international agreements is paramount. Nations should actively engage in dialogues to establish norms of behavior in cyberspace, fostering mutual trust and promoting information sharing.[86]

e) Cyber Security Insurance and Risk Assessment

Incorporating cyber security insurance into risk management strategies can encourage organizations to adopt proactive cyber defense measures. Insurers can incentivize robust security practices by offering lower premiums to entities with comprehensive cyber security protocols in place.[87]

In a world where cyber attacks know no borders and technological progressions continue unabated, the evolution of cyber security and cyber forensics remains ongoing. The challenges presented are intricate and multifaceted, demanding the concerted efforts of governments, organizations, academia, and individuals alike. As new technologies emerge and threats evolve, the research community, legal experts, policy makers, and practitioners must continually adapt to safeguard the digital landscape.

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[84] Disterer, G. (2016). THE ROLE OF HUMAN FACTORS IN CYBERSECURITY. CRC Press.
[85] Ahuja, R., Bhargava, S., & Sharma, S. (2019). Artificial Intelligence in Cyber Security: A Review. Procedia Computer Science, 165, 214-221.
[86] Fidler, D. P. (2017). Cyber Diplomacy: The Quest for Norms in the Digital Age. The Journal of Diplomacy and International Relations, 18(2), 24-42.
[87] Gordon, L. A., & Loeb, M. P. (2002). The Economics of Information Security Investment. ACM Transactions on Information and System Security (TISSEC), 5(4), 438-457.

Critiquing Hans Kelson's Pure Theory of Law from the Third World Perspective

Anurag Mondal*

1. Introduction

Positivism is the intellectual reaction against naturalism. Naturalism states that the moral content of law is of utmost importance. It further asserts that certain rights exist within us that the state can't even violate. The positivist theory of law is termed a theory of practicality.[1] In the 17th and 18th centuries, the focus shifted from morality to rationality or practicality. When people started to question the validity of specific actions or sanctions, positivism emerged. Naturalists believe that law can be found in nature. It points out what the law should be, considering the moral and ethical elements. John Austin improvised Jeremy Bentham's philosophy and put forward his command and sovereign theory. As per Austin, "Law is the command of sovereign" and not something which is regulated by the forces of nature.[2] Hans Kelson said there is a hierarchy of laws, and each law on the higher hierarchy justifies laws on the lower hierarchy. At the same time, Professor H.L.A Hart gave "rules of recognition," an improvised version of Austin's Command theory. While Carl Schmitt says that the sovereign is the one who has the power to declare an emergency.[3] Therefore, it could be said that positivist views law as it is laid down and has to be separated from the law that ought to be.

2. Research Methodology

The methodology I deployed in this research piece is entirely analytical and descriptive. The book by Hans Kelson, "Pure Theory of Law," is the primary source of research methodology.[4] At the same time, various other journal articles on his thesis and proposition are also relied upon to reach a comprehensive understanding of Han Kelson's theory.

This piece also tries to critically examine the standpoint of Han's Kelson. This is because all the assertions he makes and uses to defend

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[1] Mridushi Swarup, *Kelson's Theory of Grundnorm, Manupatra*, MANUPATRA https://manupatra.com/roundup/330/Articles/Article%201.pdf

[2] Ines Gillich, *The Normativity of Principles within the Positivist Theory of International Law*, 41 N.C. J. INT'L L. 1 (2015).

[3] Syed Sami Raza, *On the Disruption of Post-Colonial Constitutional Order: Hans Kelsen or Carl Schmitt,* 6 VIENNA J. ON INT'L CONST. L. 441 (2012).

[4] Muhamad Ridwan Kafara, Criticism of Pure theory through critical legal studies and its relevance to Indonesian legal system, BIRCI Journal, Volume 5, (2022).

his stance are Western-centric, which he believes to be universal. Therefore, it could be felt somewhere that the voices and views purported by the third-world countries had gone unheard.

Therefore, in this piece, we will first try to decode the theory propounded by Hans Kelson, followed by an analysis of Hans Kelson about law and state. Thirdly, we would critically examine the idea of Hans Kelson from a third-world perspective, followed by a conclusion encompassing my personal views as a whole.

3. De-Coding Hans Kelson's Pure Theory of Law

Han Kelson's pure theory of law asserts that law should be taken as it is. Law is an independent branch that needs to be studied exclusively without considering social sciences. He differs from Austin in terms of understanding of law. He does not believe that law comes from the sovereign. As per Kelson, humans have a cognitive faculty, and we are part of nature; therefore, it could be said that whatever we do is entirely separate from social sciences.[5] Since we have this cognitive faculty, it is a part of natural science.

Certain acts always take place in nature, but they will get their legal meaning when the law upholds it. As per Kelson, a hierarchy of norms gives the status of a norm to that of law. Now, if a higher norm does not support a norm, then there is no legal validity, and as a result, it can't be said to be a law. In such a scenario, the norms are considered valid but ineffective.[6] This is because if a norm is effective, it is regarded as an "is" phenomenon, while if it is a valid one, it is an "ought" phenomenon. However, minimum effectiveness is a condition for validity, while the opposite is not applicable. This proves the fact that there is a requirement for some effectiveness. The problem arises: what would qualify as an effective one and what would not is very subjective.

Kelsen outlines these three key elements: firstly, to define the contours of the "legal" and give it a discernible character free of "alien" components like "psychology, sociology, ethics, and political theory;" secondly, to develop and organize the conceptual framework for the legal order and thirdly, to provide a procedure for approving decisions as "legal."[7]

Taking into consideration the first element, it states that when this process of identification is motivated by the need to purge the "legal" of any "alien" aspects, the theory chooses among many formulations of

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[5] Joshua Paine, Kelsen, Legal Normativity, and Formal Justice in International Relations, 26 LJIL 1037 (2013).
[6] Julis Cohen, *The Political element in legal theory: A look at Kelson's Pure Theory*, 88 THE YALE LAW JOURNAL 1 - 38 (1978).
[7] Vijay Kishore Tiwari, *NUJS class lecture on Kelson's Pure theory of law* (September 14, 2023).

its goal in a way that has implications for the sorts of duties and attitudes towards the subject matter that will emerge. On the other hand, a theorist may view components that are not technically "legal" as necessary components that contribute to the existence of the theory's subject matter.[8] This alternative viewpoint revealed several perspectives on how moral and legal responsibilities relate to one another.

The second element, establishing a legal validity test, brings the issue of determining the qualifications of legal authority at the forefront of relevance. The Pure Theory emphasizes establishing what is lawful more than highlighting a legal order's social implications, objectives, or ideal components.[9] This emphasizes the formal boundaries of legal power. To organize one's behavior within the parameters of a legal system, there is a perceived need for certainty and security. Specific requirements must be felt at a certain moment, and location must be reflected in valuational implications when this activity is singled out for special focus.[10]

The final duty of structuring a system of ideas, the "conceptual apparatus" of the theory, could seem unrelated to valuational issues.[11] However, this business venture implies that order and system are preferred. Additionally, the choice and placement of the categories used to build the system inevitably provide a form of order that influences attitudes and behaviour. A different valuational texture is produced than when opposing arrangements are suggested by a theory if the conceptual apparatus is systematized in terms of formal process rather than content or if the idea of "duty" is made primary and "right" derivative.[12]

Norms can be both static and dynamic. Hans Kelson pointed out that if we understand any norms regarding their moral appeal, then they are static, so we must follow them irrespective of the nature and situation. While if the norm is dynamic, then there would be an availability of appeal to which we are bound.

Therefore, a particular norm is being created in accordance with the basic norm. Every society has a parenting norm (rules) called Grundnorm, which is the Backbone of a legal system to which other norms must comply. This Grundnorm is not made by the legislature or the ruler but is based or made on "Popularity," i.e. (Acceptance and

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Muhamad Ridwan Kafara, *Criticism of Pure Theory Through Critical Legal Studies and its Relevance to Indonesian Legal System*, 5 BIRCI JOURNAL (2022).
[12] JULIS COHEN, *Supra* note at 6.

likeliness by many people). Every legal system has one Grundnorm made by "popularity" but could be changed by revolution.[13]

Kelson further asserts that firstly, there is no distinction between private and public norms as both norms arise from the same Grundnorm [common source]. Secondly, substantive law and Procedural laws have common sources of law.[14] [In the legal sense, we need to comply with Grundnorm.] Thirdly, as per Kelson, the question of law [made by statute, but for Kelson, it all derives from Grundnorm, so law and facts are the same] and facts are the same, and finally, as per Kelson, the separation of powers are not necessary.[15] [As all derives its power from Grundnorm and can't go against the Grundnorm, which is supposed to be clear and stable]. This could be identified clearly from the figure (1). But procedural laws are more important for compliance with Grundnorm in case of conflict.[16]

This moral reasoning, as opposed to legal reasoning, is just arbitrary in Kelsen's opinion. In contrast to legal claims, moral assertions cannot be independently proved. Morality is portrayed as a second-class citizen in the world of authoritative reference sources for human behavior.

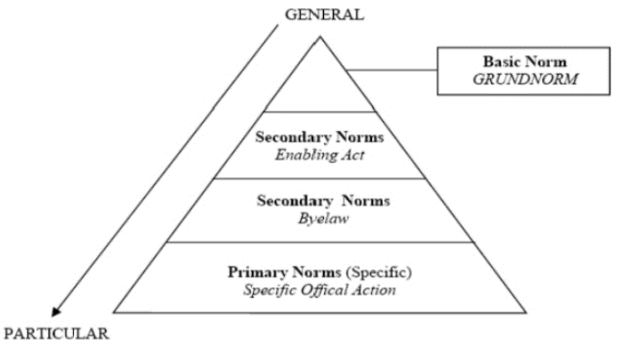

Figure 1[17]

4. Kelson's View on The Interplay Between State and Law

According to Kelsen, the state is an array of standards and cannot be referred to as a group of people since the group of people in question

[13] Syed Sami Raza, *On the Disruption of Post-Colonial Constitutional Order: Hans Kelsen or Carl Schmitt*, 6 VIENNA J. ON INT'L CONST. L. 441 (2012).
[14] Id.
[15] JULIS COHEN,, *Supra* note at 6.
[16] MUHAMAD RIDWAN KAFARA, *Supra* note at 11.
[17] *Id.*

is one that is itself established by rules. States can only be created through rules. Kelsen rejected the notion that a group can act together or reach a consensus on a course of action.[18] All that occurs is that some actions taken by people are, by law, attributed to the body, which does not exist independently of the law.

Legal norms may be divided into two categories: autonomous and heteronomous, which are both influenced by the changing nature of the law.[19] Autonomous legal norms are ones in which the individuals who must abide by them get involved in developing the pertinent rules. Legal norms that tie individuals but do not allow them to participate in creating the rules that bind them are known as heteronomous legal norms. The ability to choose one's course in life (self-determination) is a fundamental premise that serves as a basis for separating the two categories of standards.[20] Regarding the development of constitutional law and the structure of state governance, the distinction between the two categories of norms is crucial.

The contrast between public and private law often results in a division between what is law and what is not (state), where the state is given a distinctive character over other legal issues via state apparatus. The state alludes to one thing, while the law alludes to another. Public law is founded on the idea of "public affairs" and has an ideological bent for political dominance.[21] The separation of public and private law is an argument favoring legal specialization. By converting the contrast between law and the state from extra-systematic to intra-systematic, where the ideology connected with the differentiation between law and the state is, Pure Law Theory relativizes the difference between public and private law.[22]

The traditional hostility between the state and the law also asserts that the state is a "legal being" in the classic dualism between the state and the law. According to public law theory, the state is above everything else and has its own rules.[23] The duality between the state and the law serves an ideological purpose by defending the notion that the law may justify the state and that the state as something justified is distinct from the law as something justifying. The state is the process through which a fact of power becomes a law-controlled society.[24] In terms of law, modern conceptions of the state are based on the Westphalian Peace Treaty's description of the idea of sovereignty. This

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[18] JULIS COHEN, *Supra* note at 6.
[19] MUHAMAD RIDWAN KAFARA, *Supra* note at 11.
[20] Id.
[21] JULIS COHEN, *Supra* note at 6.
[22] *Supra* note at 13.
[23] MUHAMAD RIDWAN KAFARA, *Supra* note at 11.
[24] *Id.*

principle states that a nation's government, acknowledged by other countries, has sovereign power.[25]

A discussion of the state as a legal system, the state as a legal entity, the rule of law, centralization, and decentralization, and the abolition of dualism between the state law and state power exercised by independent governments are all included in Pure Legal Theory's analysis of the identity of the state and law. The idea of the state may be understood if it is viewed as a social structure that is "an order of human behaviour" separated from ideology so that it is removed from metaphysics and mysticism.[26] The state is typically considered a political entity that uses some form of coercion. Therefore, the state is likewise a coercive order in which the coercive element is imposed from man to man.

As a result, Kelsen rejects the notion that the state is a source of power. Guns and the death penalty are two examples of personal weapons that can be used to exercise power, but only the application of laws can be used to attribute such use to the nation-state.[27] As has been stated, it is not the law that causes a person to use such weapons; rather, it is the idea that the law is valid in that person's mind, and it is on that reliance that he chooses to follow such an obligation.

5. Critiquing Han Kelson's Pure Theory of Law

Although Kelson's theory, to a certain extent, solves the intricacies of Austin's theory but, the norm that Kelson is talking about is not very clear. As per Kelson, it is not the common will that creates the law but the pre-supposed thinking by the jurist that helps in the formulation of the law. While we look at the actual picture, it can be seen that the "Grundnorm" is also based on popularity, which is also a means of showcasing the "will" of the people. As a result of which, it comes to square one. This, in turn, raises a big question about the relevance of this entire theory because it is the norm on whose basis such a theory is formulated now; if there is a lack of clarity regarding the norm itself, then the theory loses its relevance.[28]

Moreover, Kelson talks about one Grundnorm that is prevalent in society, but if there exists more than one "Grundnorm" in the society, then what would happen which "Grundnorm" would prevail, to such a query, Kelson has no answer. As per Kelson, private law and public law have no differences because all derive from a common source, which is the "Grundnorm," but when it comes to the application of both these laws, namely the private and the public law then its impact is not the same and as a result of which there exist differences.[29]

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[25] *Id.*
[26] JULIS COHEN, *Supra* note at 6.
[27] VIJAY KISHORE TIWARI, *Supra* note at 7.
[28] MUHAMAD RIDWAN KAFARA, *Supra* note at 11.
[29] *Id.*

The idea has been determined to need a sociological base since it does not refer to social facts or societal requirements. Furthermore, the claim made by Kelsen that any norms other than Grundnorm are not pure is without legal support since, if Grundnorm is a hypothesis or fiction in and of itself, then all other norms based on it are also without legal support. The theory provides no real-world or applicable solutions; it merely gives speculative ideas. Ideological distinctions, which were and still are a significant determinant of legal standards, still need to be addressed by Kelsen's theory of law. Moreover, Kelsen's approach needs to adequately consider the impact of legal dynamics on its application or implications. The context of norms has no bearing on Kelsen's one-sided normative framework.

6. Conclusion

Han Kelson's pure theory of law has its relevance. The ideas of component power and political will are more directly related to the effectiveness of change than the idea of "Grundnorm." The minimal constituent power exists forever. Its existence is tangible. However, the "Grundnorm" is an ex post facto legal principle. The ability of component power's subjects to shift or exchange illustrates how a state's shape can alter. There is no subject for the "Grundnorm." The legal idea of the Grundnorm is theoretically equivalent to the political concept of constituent power. Its propositional or hypothetical nature, nevertheless, is a drawback. Courts that made judgements based on a supposition opened themselves up to political criticism.

Then, as a final resort, they depend on the effectiveness principle. However, they stray from the initial, ostensibly liberal constitutional substantiation. They could have better countered the criticism by looking into and challenging the dictatorial type of government that emerged following the coup. Such a probe would have assisted them in demonstrating the inadequacy of their judicial authority to determine the legality of the new rule. Additionally, a justification for the necessity of the institution of dictatorship and its historical and logical foundation may have helped to restrict its task- and time-bound role.

Anubhava Mantapa: Exploring the Philosophical and Sociological Foundations of Lingayatism in Medieval India

Jagatpal Choudhary[*]
Aditya Choudhary[**]

1. Introduction

Anubhava Mantapa is a unique structure in Hampi, Karnataka, India, dating back to the Vijayanagara Empire. This empire ruled South India from the 14th to the 16th century CE and was known for its grand architecture. Hampi, the capital of the Vijayanagara Empire, is a UNESCO World Heritage Site and is home to many important structures, including *Anubhava Mantapa*. *Anubhava Mantapa* was constructed as a part of the Vitthala Temple complex, which was dedicated to Lord Vitthala, a form of Lord Vishnu. The temple complex was built on the banks of the Tungabhadra River and was considered one of the most important pilgrimage centres of the Vijayanagara Empire. *Anubhava Mantapa* was used for religious ceremonies and was an essential part of the temple complex.

The research will also explore the cultural significance of *Anubhava Mantapa*, which has made it an essential venue for musicians and performers. The structure is often used for cultural events and performances, showcasing India's rich cultural heritage. The Chief Minister of Karnataka recently laid the foundation stone for the 'New *Anubhava Mantapa*' in Basavakalya, where 12th-century poet-philosopher Basaveshwara lived most of his life[1].

The structure's historical and cultural significance has made it an essential destination for tourists interested in Indian history and culture and a popular venue for cultural events and performances. This research paper comprehensively studies *Anubhava Mantapa*, highlighting its importance as a cultural heritage site and its contribution to India's cultural landscape.

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[1] Prof Santishree Dhulipudi Pandit, *India's rich democratic legacy: From Uttaramerur to Anubhava Mandapa,* THE SUNDAY GUARDIAN (June 11, 2023) https://sundayguardianlive.com/opinion/indias-rich-democratic-legacy-from-uttaramerur-to-anubhava-mandapa.

2. *Anubhava Mantapa*: Origin and History

"*Anubhava Mantapa* or *'mahaamane'* was established by lord Basava/Basaweshwara in 1140 AD and is located in Basavakalyan in the Bidar district of Karnataka. It is the first religious parliament in the world. *Anubhava Mantapa* means 'experience pavilion, which was accommodated by mystics, saints and philosophers of the *lingayat* community during that time.' The president of *Anubhava Mantapa* was Allama Prabhu or Prabhu Deva, and various saints throughout present-day Karnataka. The saints and the *shararas* belonged to all strata"[2]. There was no discrimination based on caste, sex, creed or economic status, and all were one, and all were the followers of Lord Shiva. The saints involved in *Anubhava Mantapa* were divided into three categories.

1. *Avatrika Guru*
2. *Sidhha Guru*
3. *Sadhaka Guru*

"Basaweshwara was a prominent figure in the bhakti movement, emphasising devotion to a personal god as a path to spiritual liberation. He strongly advocated social equality and rejected the caste system, which was prevalent in Indian society then"[3]. *Anubhava Mantapa* was a place where people from all castes and backgrounds could discuss and debate spiritual and philosophical ideas. The institution was open to men and women, which was highly unusual for the time, as women were primarily excluded from religious and cultural institutions. The teachings and practices of *Anubhava Mantapa* were based on the principles of *Virasaivism* that emphasised the worship of the god Shiva and the importance of personal experience in spiritual practice[4]. The institution encouraged its members to seek the personal realisation of the divine through introspection and meditation rather than relying solely on external rituals and traditions.

The contributions of *Anubhava Mantapa* to the growth of Kannada language and literature are substantial. Poets, writers, and thinkers who employed the language to communicate their beliefs were common among its ranks. The school was instrumental in disseminating the teachings of Basavanna and *Virashaivism* across southern India.

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[2] *Anubhava Mantapa, Basava Kalyana,* JOURNEYS ACROSS KARNATAKA (Nov 24, 2018) https://karnatakatravel.blogspot.com/2018/11/.

[3] *About Basavanna [1105-1167] Biography & Life History of Basaveshwara*, THE AMBEDKAR TODAY (2019) https://www.ambedkaritetoday.com/2019/04/about-basavana-biography-life-history-basaveshwara.html.

[4] Vijaya Ramaswamy, *Rebels, Mystics or Housewives Women in Virasaivism,* 28 IICQ 316 (2002).

3. *Anubhava Mantapa*: Working and Composition

The House of Religious Experiences was established in 1140 AD and can be considered the most critical achievement of Lord Basava's life. People were elected irrespective of caste, sex, occupation, and economic status. The House of religious experiences comprised seven hundred and seventy saints and many followers"[5]. Among this combination, three hundred were writers; sixty ladies were great saints; thirty were experienced in literature. The social, religious, spiritual, yogic, psychological, economic, and literary issues people face daily were all on the table at that gathering. A famous yogi named Prabhudeva served as president, while Lord Basava led the government in his capacity as prime minister. The voice and editor of *Anubhava Mantapa* was the same person: Channabasava. Members of *Anubhava Mantapa*, like those of today's parliament, were chosen by the Mantapa's higher authority based on spiritual achievement rather than by popular vote. The people of Mantapa enjoyed unrestricted liberty of thought, word, and deed. Members of the *Anubhava Mantapa* were encouraged to talk about anything that interested them.

4. *Anubhava Mantapa*

a) Significance:

Anubhava Mantapa holds tremendous historical and cultural significance. The structure is an actual example of the Vijayanagara Empire's architectural brilliance and is considered one of the most significant structures in Hampi. *Anubhava Mantapa*'s unique acoustic properties have made it an essential venue for musicians and performers, and the structure is often used for cultural events and performances. The Vitthala Temple complex, of which *Anubhava Mantapa* is a part, is considered one of the most important pilgrimage centres in South India. The temple complex attracts thousands of visitors annually, and *Anubhava Mantapa* is one of the main attractions of the complex[6]. The structure's historical and cultural significance has also made it a popular destination for tourists interested in Indian history and culture. *Anubhava Mantapa* is a unique structure in Hampi, Karnataka, India, dating back to the Vijayanagara Empire. This empire ruled South India from the 14th to the 16th century CE and was known for its grand architecture. Hampi,

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[5] *Anubhava Mantapa: First Parliament of The World,* CIVIL SERVICES CHRONICLES https://www.chronicleindia.in/current-affairs/2428-lsquo-anubhava-mantapa-rsquo-first-parliament-of-the-world.

[6] *Anubhava Mantapa in Basavakalya*, DRISHTI IAS (Jan. 7, 2021) https://www.drishtiias.com/daily-updates/daily-news-analysis/anubhava-mantapa-in-basavakalyan-karnataka.

the capital of the Vijayanagara Empire, is a UNESCO World Heritage Site and is home to many important structures, including *Anubhava Mantapa*. Conservation and preservation efforts are also made to protect *Anubhava Mantapa*. The system is a cultural heritage site protected by the Archaeological Survey of India (ASI). The ASI has undertaken various measures to preserve the structure and its surroundings, including developing visitor facilities and implementing conservation and restoration projects.

b) Architecture:

Anubhava Mantapa is a unique structure showcasing the Vijayanagara Empire's architectural brilliance. The system is made of stone and is supported by 100 pillars, each intricately carved with various designs and motifs. The pillars are arranged in a circular pattern and support a dome-shaped ceiling. The ceiling is also intricately carved with designs and motifs, and there is a central opening through which sunlight enters the structure.

The unique aspect of *Anubhava Mantapa*'s architecture is its acoustic properties. The structure is designed so that any sound made inside the mantapa is amplified and heard clearly throughout the system. This unique feature of *Anubhava Mantapa* has made it a popular destination for musicians and performers. *Anubhava Mantapa*'s historical and cultural dimensions have made it a necessary goal for tourists interested in Indian history and culture. The structure's importance as a venue for cultural events and performances has also made it an essential part of India's cultural landscape.

5. The 'Philosophy' of Basaveshawara

According to Basavanna, the muck of society, not the elite, are where social life's foundations are firmly planted. Social democracy can be traced back to Basavanna's establishment of the *Anubhava Mantapa*. According to Basavanna, not genetics but actions make a man great. This entails having faith in every man's inherent worth and value, regardless of his social standing. All citizens, he declared, are workers, some more intelligent than others. He also instilled the importance of hard labour by advocating for it to be treated as a form of religion. He maintained that the 21 upper castes were wrong to look down on those in manual labour and instead should treat them with respect. The Sharanas in the *Anubhava Mantapa* had no caste divisions and accepted everyone as equal[7].

[7] Asha D. and Manjuli B, *Movement for Women Rights in the 12th Century- the role of Basaveshwara and Anubhava Mantapa* 6 ISRJ 3-5 (2016).

a) Spiritual Teachings and Dimensions:

His spiritual discipline brought about a social, religious, and economic revolution in the 12th century, and it was built on the concepts of *Arivu* (correct knowledge), *Achara* (proper behaviour), and *Anubhava* (religious experience). This way promotes *Lingangayoga* (divine unification) from every angle. There is a healthy balance between devotion (*bhakti*), knowledge (*jnana*), and action (*kriya*) in this extensive field of study. It was likely in the year 1154 that he visited Kalyana, presently known as Basavakalyan. His accomplishments in his twelve or thirteen years in Kalyana are remarkable. With the establishment of the Welfare State (Kalyana Rajya), the doors to Dharma were opened to everyone regardless of caste, religion, or gender. He set up a meeting place called *Anubhava Mantapa* where people from all walks of life could talk about religion, politics, economics, and other topics of interest. Thus, the Sharanas gathered together and debated the democratic socialist ideals in the first Parliament of India. He outlined two more rudimentary economic and social tenets. The following are *Kayaka* (acts of God): The implication is that everyone in society should choose a profession and devote himself entirely to it. Equal distribution (*Dasoha*): Equal pay for similar work is necessary. The worker (*Kayakajeevi*) may live well with the money he earns. However, he should keep the resources for the future too[8].

6. Lingayatism: Struggle of Basava

Lingayatism is a different faith from Vedanta's Advaita, Dvaita, and Visistadvaita, just as Buddhism, Christianity, Islam, and Sikhism are. This philosophy, known as *Saktivisistadvaita*, holds that God must be qualified by cosmic energy or Sakti. The vachanas and literature based on vachanas are Lingayatism's canonical texts.

a) Preachings In Lingayatism:

When compared to other Indian religions, Lingayatism stands out as unique. Lingayat society is not made up of a single caste but rather a collection of castes, with its adherents engaging in various professions. The question of whether or not Lingayatism is non-Hindu has sparked several debates. The similarities to Buddhism, Jainism, and Sikhism, as well as the stark contrasts to orthodox Hinduism, have led some researchers to conclude that it is a non-Hindu Faith. However, many prominent people and groups maintain that these religions are all fundamentally Hindu. *'Lingavanta Dharma,' 'Basava Dharma,' 'Vachana Dharma,'* and *'Virasaiva Dharma'* are all interchangeable with *'Dharma.'*

[8] Dr Nalini Waghmare, *Basaveshwara's concept of Kayaka and Dasoha relevance to Modern times,* 42 BASAVA JOURNAL 2 (2013).

b) Lingayatism Vs Virasaivism:

A "Lingavanta" adorns his neck with an "*Istalinga*," a little spherical religious emblem typically wrapped in a silver box or linen. The meaning of "Lingayat" goes beyond that of the previous definition. The initiation or *'diksa'* ceremonies require a follower to wear Istalinga, which indicates that they have completed these steps. The faith established by Lord Basava is known as Basava Dharma. The term 'Vachana Dharma' describes the teachings of the Vachana literature, the canonical texts of the Vachana faith. Virasaivism is a common term that refers to the beliefs of Shiva's most devoted followers[9].

The central tenet of this faith is the donning of Istalinga. There is a religion called Lingayatism, and its adherents are called Lingayats. All Karnataka linguists, historians, and epigraphists disregard it. Scholars agree that Basava is the undisputed father of Lingayatism and that the religion's genesis can be traced back to rejecting Brahmanic tradition. However, among Lingayatism's adherents, whether or not Lingayatism existed before Basava remains contentious. Very few academics have settled the question of whether or not Basava was the religion's original creator. The confusion between Lingayatism and Virasaivism may be to blame. A Virasaiva is not at all like a Lingayat. Surprisingly, a discrete group of people named themselves "Virasaiva" and live in some areas of Tamil Nadu—places like Chidambaram, Mylam, and Pondicherry. There are *'Matha'* (religious centres) of these Virasaivas in Pondicherry and Chidambaram, and their practices are very distinct from those of the pro-Basava Lingayat Maths in Karnataka. A few key distinctions between the two philosophies are as follows. The Virasaivas are devout Shiva worshipers who only honour Shiva; they place 'Lingams' inside silver boxes on their bodies, albeit these boxes differ in concept and shape from those worn by the Lingayats of Karnataka. Lingayatism discourages worship of Brahma, Visnu, and Siva, although Virasaivsim allows worship of the *Sivalingam*, the symbol of Shiva, one of the Hindu Trinity[10].

c) Beliefs in Lingayatism:

Its central tenet is the obligation to dress in Istalinga at all times. The term "Lingayat" refers to a devout adherent of the religion of Lingayatism. Most of Karnataka's historians, literary critics, and epigraphists disregard it. Scholars agree, however, that Basava is Lingayatism's progenitor and that the religion's core tenets are theistic. A person can be a Hindu whether or not they have faith in a higher power. However, as a theistic culture, this is not an example of

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[9] M.P. SAMARTHA, BASAVA'S SPIRITUAL STRUGGLE, (Cambridge University Press 1977).
[10] Allchin, Raymond, *The Attaining of the Void—a Review of some Recent Contributions in English to the Study of Vīraśaivism,* 7.4 RELIGIOUS STUDIES 339-359 (1971).

Lingayatism. This culture has a deep devotion to God, whom they see as the source and defender of all things[11]. By its unique Istalinga worship, "Lingayatism revolutionised the idea and method of worshipping God in idolatrous India." Under a polytheistic sky, this faith's fundamental and foremost tenet is that there is only one God and that God alone is worthy of worship. This new form of prayer, which was instead a physical representation of the Absolute of the Upanishads, brought about a remarkable shift in the image worship of India, widely believed to be an essential component of popular Hinduism in India. Everyone, regardless of their background, social status, gender, or occupation, was given the same initiation into the 'Istalinga' tradition. This principle unlocked the door to the heavenly realm. The idea that one is stuck with his innate caste and profession (known as *'Jati'* or *'Varna'*) from birth was challenged by this principle. Basava, the religion's founder, made the audacious claim that the accurate measure of human grandeur is not the physical construction of a temple out of stone or brick but rather the inner transformation of one's body and mind into a dwelling place for God.

7. *Anubhava Mantapa* and Human Rights

The work of Anubava Mantapa was crucial in advancing and safeguarding human rights. Basaveshwara stepped up and founded Anubava Mantapa to protect people from social evils. The *Anubhava Mantapa*, Basavanna's realisation of his ideal society, religion, and philosophy, opened to the public in AD 26. Therefore, Basaveshwara founded the *Anubhava Mantapa* as a social institution to breathe fresh life into the world. Basaveshwara achieved greatness with the construction of *Anubhava Mantapa*. It was a meeting of historically exceptional people, typically from all over India, to plan and carry out initiatives for the betterment of humanity. Everyone was welcome to join the *Anubhava Mantapa* discussions, regardless of gender, race, religion, social status, or work[12]. The contributions of *Anubhava Mantapa* were crucial in ushering in the Renaissance and humanism. The *Anubhava Mantapa* guarantees everyone, among other things, that the dignity of individual human rights is an integral aspect of this concept. *Anubhava Mantapa* saw the spread of knowledge as a human right. At this gathering in August, topics included the advancement of women's rights, the creation of the Anubava Mantapa, and everything in between. From social reformation to equal chances to self-realisation, all aspects of society and personal life were covered, including those related to religion, spirituality, economics, philosophy,

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[11] Dr. N. G. Mahadevappa, *Lingayatism – An Independent,* LIGAAYAT RELIGION https://lingayatreligion.com/Lingayatism_An_Independent_Religion

[12] R.G. Ghule, *Progressive thoughts of Basaveshwara on Social Justice* (Oct 2015) http://210.212.169.38/xmlui/bitstream/handle/123456789/4160/Progressive%20thoughts%20of%20basaveshwara%20on%20social%20justice.pdf?sequence=1&isAllowed=y.

culture, and literature[13]. "Basaveshwara and other sharanas of the 28 *Anubhava Mantapa* accepted the fundamental principles, which are as summarised below:

a) *All men are equal.*

b) *No man is high or low by birth, sex or occupation.*

c) *There is no discrimination between man and man and between man and woman*

d) *A woman has equal rights with a man to follow the path of self-realisation.*

e) *Each one should follow a profession of his own choice.*

f) *Women must also take up a Kayak.*

g) *All Kayskas are honourable professions; no Kayaka is either low or high.*

h) *Vamas (castes) and Asramas (stages) will be discarded.*

i) *Self-development is to be achieved through Kayaka.*

j) *Renunciation and dwelling in the forest are ruled out as cowardly tendencies to escape from life.*

k) *Inter-caste marriages and free dining should be encouraged.*

l) *Untouchability has no place in society.*

m) *Every man can think about all spiritual and social subjects.*

n) *Reason and experience are the only guiding lights for free thinking and spiritual advancement.*

o) *The language of people should be the medium for imparting spiritual and secular education.*

p) *All men have equal rights to participate in spiritual discussions to acquire spiritual knowledge and to follow the same path of self-realisation.[14]"*

These tenets show that *Anubhava Mantapa* was founded on the ideals of freedom and equality, that it provided fair treatment to all citizens and allowed them to realise their full potential. It also makes it abundantly clear that *Anubhava Mantapa*'s principal focus was

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[13] Nalini Avinash Waghmare, *Gender in Virasaiva Religion* (Poona College, Pune 2016).
[14] Asha D and Manjuli B, *Movement for Women Rights in the 12th Century- the role of Basaveshwara and Anubhava Mantapa*, 3 ISRJ 3 (2016).

encouraging the respect and practice of human rights and fundamental freedom. The *Anubhava Mantapa* did not make any assumptions regarding age, gender, or sexual orientation regarding imparting wisdom. For instance, Siddarama was indoctrinated into Virashaivism by Channabasavanna, a 12-year-old child. Akka Mahadevi, who was only 16 then, is another well-known example. Many women writers who play vachanas started at the *Anubhava Mantapa*. The sharanas worked to alter this stereotypical portrayal of women and promote a positive social climate. Indeed, this stands out in the annual Indian history from the 12th century. Akka Mahadevi is a sublime example of character and devotion; everyone bowed before her in admiration of her spiritual attainments, and she was held in high esteem by Basaveshwara, who advocated for women's equality. *Sattyakka*, *Muktayakka*, *Akkanagamma*, *Neelambike*, *Gangambike*, and *Moolegamahadevi* were only a few illustrious and revered women in Hindu mythology. On occasion, women proved to be more perceptive and logical than men. This exemplifies women's autonomy and equality with males in the *Anubhava Mantapa*. The sharanas, led by Basavanna, founded the *Anubhava Mantapa*, establishing reliable social norms and serving as a foundation for societal cohesion.

To conclude, women were treated equally by all *Shivasharanas* in Karnataka in the 12th Century. *Anubhava Mantapa* was a platform to discuss and express their ideas on real-life aspects and experiences. Shivasharanas also solved the social problems on this platform. The women were given equal opportunities to express their opinions and participate in the discussions in *Anubhava Mantapa*[15]. The Shivasharanas liberated women in the domestic sphere and broader social, religious, and spiritual communities. Women were empowered to realise their full mental, emotional, and spiritual potential and were given the same rights as males. The Shivasharanas have worked tirelessly to create a society where men and women have equal access to spiritual and religious opportunities. Awareness was raised, and women's equality was emphasised through their vachanas. Women working in traditionally devalued professions like prostitution were also gaining social standing.

8. *Anubhava Mantapa*: Influence on Contemporary Indian Society

The influence of the House of religious experience was immense due to its various attractions. The rational approach of the institution, and its simple and rational way of communication, overcame the polytheistic and unquestioning beliefs in the Hindu mind. The new system, which was pragmatic, practical and realistic and the new

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[15] Chinna Ashappa, *Women status in 12th century in North Karnataka; A Sociological Study,*4 IJSR 492 (2015).

concepts of God, soul, salvation, etc., were sowed in the minds of the common mass through community preaching. A direct method of worship and mediation without the intervention of any priest introduced a tremendous change in society along with an increase in the number of mystics. When the iron curtain of priest and temple craft, which had stood between a sincere aspirant and God, was cut, genuine seekers after religion were increasingly attracted to religious values. "Unique preaching of equality charged with accepting God's fatherhood and humanity's brotherhood fascinated the tortured minds and consoled the gasping hearts of the oppressed and distressed masses"[16]. *"The burning zeal of Basava to place religion on a democratic basis, his passionate love for God and his untiring energy in serving humanity added to the glory of Anubhava Mantapa."* Within a short period, the academy became well known as far as the four corners of India and even beyond her borders to Afghanistan and Ceylon. Seekers of truth from Kashmir to Ceylon and Afghanistan to Bengal flocked towards *Kalyana*[17]. Marulu Shankaradeva, a silent aspirant of the Mantapa, is considered a convert from Suphism; Singalada Siddhabasavideva, who wrote a commentary on the Vacanas of Basava, was from Ceylone.

Lingayatims put their faith in Basava because they consider him the Avatarika, Primal Guru, and creator of their faith. Siddhaguru is a category that includes three great saints: Prabhudeva, Cennabasava, Siddharama, and the female saint Akkamahadevi. Sadhaka Gurus had hundreds of other outstanding saints who were the system's many components. Basava also instituted a required method of preachers known as Jangamas, which must be discussed. The Sanskrit term 'jangama' literally translates to "that which moves." In the context of the Lingayat faith, this term refers to a man who travels from one location to another, spreading his message of moral and spiritual uplift. Sthira and Chara are the two primary types of Jangamas. '*Sthira'* staying in a Lingayat monastery (called a "math") requires its residents to engage in "mass education" or preach to the local populace and provide them with the spiritual and ritual guidance they need to grow as individuals and as a community[18]. Chara Jangama constantly moves around, preaching as he goes, without settling himself at any particular place and without accumulating any property of his own.

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[16] *Anubhav Mantapa,* LINGAYAT RELIGION https://lingayatreligion.com/LingayatBasics/Anubhava_Mantapa.

[17] Mallappa B Salagare, *Establishment of Anubhava Mantap and Present Status of Lingayatism,* (2019) https://www.researchgate.net/profile/Mallappa-Salagare/publication/339900206_Establishment_of_Anubhava_Mantap_and_Present_Status_of_Lingayatism/links/5e6b5756458515e555766234/Establishment-of-Anubhava-Mantap-and-Present-Status-of-Lingayatism.pdf

[18] *Id.*

9. Conclusion

Anubhava Mantapa is a philosophical and intellectual hub that challenged established norms, particularly the caste system. It admires the egalitarian and inclusive ideas promoted by Lingayatism. It sparks a spiritual inclination towards the concept of *Anubhava Mantapa* because it is a sacred institution that fosters a direct experiential connection with the divine. It is a personal experience (anubhava) as a path to spiritual realization. It symbolises cultural and philosophical richness in medieval India, which emphasizes its role in preserving and promoting the unique Lingayat tradition. The philosophical principles discussed in the *Anubhava Mantapa* are a philosophical and intellectual hub that challenges established norms, particularly the caste system. The egalitarian and inclusive ideas promoted by Lingayatism are admirable. A new wave of Veerashaiva believers and followers of Basavanna's doctrine was sparked by his establishment of the *Anubhava Mantapa*, which became a magnet for saints from all across India.

Anubhava Mantapa is popularly known for its role in shaping the sociocultural landscape of the time. It was a platform for social reform, particularly in rejecting caste-based discrimination. They might see it as an early example of a movement advocating social equality and justice. The teachings of *Anubhava Mantapa* in the contemporary context are very insightful. The principles and values discussed in the *Anubhava Mantapa* provide insights and guidance in addressing current societal challenges. One must keep in mind the words of former Prime Minister Atal Bihari Vajpayee when they consider India's great democratic heritage: “Governments will come and go, political parties will develop and fade away. India should endure, and its democracy should last forever.” The nation's soul must be safeguarded by upholding the democratic values inherited from past experiences.

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