FOREWORD

Mr. Y. R. Sadasiva Reddy

Law as an Instrument of Social change and it promotes the neutrality of thoughts, behavior and inculcates the idea of social transformation and emancipation of social fabric. It is engrained in social institutions and economic networks, thereby influencing the course of law, and directing the legal change, developing as general conditions of human activity prescribed by the State for its members.

The present book LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION elucidates on issues and challenges across the spectrum such as Constitution and the Common-man, Democracy and National Securities, Gender Justice and Feminist Jurisprudence, Industrial and Environmental Issues, Intellectual Property Laws, Relationship between Law, Society and Religion and Mass Media as Watchdog of Democracy, to mention a few from the extensive but inclusive list. The competence of Indian legal system to both lead and follow social transformation with commitment to multiculturalism, empowerment, and modernism, along with its diverse approaches about relations between law and social transformation and the major spheres of pluralism, empowerment and modernization are the course of the discussion, where it touches upon a large spectrum of human and social actions.

I pray, the book will be an added resource towards students and teachers of Law, Anthropology, Sociology, Lawyers, Judges, Legislators, Social Activists, NGOs, Administrators, Government, and the Inquisitive Learners of the Nation. I would like to congratulate the editors in accomplishing such a herculean task of compiling this book on various topics for the benefit of all.

Warm Wishes,

Mr. Y. R. Sadasiva Reddy
Sr. Advocate
Member, Bar Council of India

MESSAGE FROM THE VICE CHANCELLOR

Prof. (Dr.) Anubha Singh

Rule of law and social justice are concepts that have been debated around for many decades, forming socio-legal discourses at different times, for different reasons. These dialogues also influenced policy agendas and normative orientations of a society. Legal institutions cannot be considered as alien to the socio-political affairs of the related community. The study of law should not be divorced from socio-political context, in which they are implemented. Although current education system clearly distinguishes law, politics, society etc. as different academic disciplines, scholars from these versatile areas of study have frequently borrowed from other disciplines in their research. This academic interdependence is nothing but a replica of our society where these domains are integrated in such a way that one cannot think of society without law and the law detached from society. Research in law and society brings new rigor to investigate the appropriateness of existing laws and it also provides a space for new policy making. I hope this effort from School of Law to mobilise scholars from different realms of knowledge will have a great impact on socio-legal studies. It is my immense pleasure to congratulate School of Law towards bringing this book LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION and applaud the Editorial Board as well as the contributors for their efforts.

Prof. (Dr.) Anubha Singh
Vice-Chancellor,
Alliance University,
Bengaluru

MESSAGE

Prof. (Dr.) Dilip Ukey

It is a matter of great pride and privilege to be part of the National Conference on Law and Social-Transformation [NCLS]-2021 organised by Alliance School of Law, Alliance University, Bengaluru. I am happy to know that Alliance School of Law is bringing the research by academicians and industry experts as an edited book. The larger area of this book LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION is indeed the need of the hour. No one can deny the need of a sensible interdependence of legal and social domains for the smooth functioning of society. There are concrete examples in history regarding how the alienation between legal and social domains led those societies into the verge of violent revolutions, civil wars, etc. We must acknowledge the contributions of quality legal education and its impact on social transformation as this process of quality legal education prepares not only technical but also ethical base for the legal profession. As Aristotle remarked "Law is order and good law is good order". At present, if we must go with Aristotelian principle, we must acknowledge the need of sensible legal education and research to have a good law and good social order. This edited book is a great initiative in this way, and I wish all the best for all the editors and authors on this contribution.

Prof. (Dr.) Dilip Ukey
Vice Chancellor
Maharashtra National Law University
Mumbai

MESSAGE FROM DEAN SCHOOL OF LAW

Dr Kiran Dennis Gardner

It is my pleasure to put forth in your hand this edited book LEX MUTATIO: LAW AND SOCIAL -TRANSFORMATION comprising of selected research papers presented at virtual ***National Conference on Law and Social Transformation 2021 [NCLS-2021]*** held by Alliance School of Law, Alliance University, Bengaluru.

We are indeed in a transitional phase. Covid pandemic has forced us to adopt technology overnight. The Conference that was planned offline had to be converted to virtual mode. Digital technology is empowering learners. Effective use of technology has become the tool to deepen, accelerate and enhance learning. Webinars and digital platforms are opening more avenues for learning. Information is available on click of mouse. Educational institutes are now required to focus on the skills of Critical thinking, Creativity, Problem Solving and Collaborations as this would be the skills required in this changing times.

I thank the participants who adapted to the changing times and joined us through virtual mode. This edited book LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION consists of research papers on different legal issues. The contributions are from diverse backgrounds on the issues of law and examining them from the lens of society, economy, gender, and various other variables, making this book an interesting piece of literary work. This book will surely provide insight to the readers to conduct further research in the area of their interest and in the next conference we would deliberate them.

Thanking you all for your contribution.

Happy Reading

Prof. (Dr.) Kiran Dennis Gardner
Dean, Alliance School of Law
Alliance University, Bengaluru

ACKNOWLEDGEMENT

The Editors of this book LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION would like to thank the Management of Alliance University, Bengaluru for not only encouraging School of Law in organizing the National Conference on Law and Social Transformation [NCLS]-2021 but whole heartedly facilitating in publication of this book.

We would like to thank our Hon'ble Pro-Chancellor Mr. Abhay Chebbi and Vice Chancellor Dr Anubha Singh for inspiring and motivating us at every juncture of the journey in preparation of this book. We would also like to thank all the officials of Vice-Chancellor's office for his constant support and facilitating at each step, without their active contribution publication of this book would have not been possible.

We would also like to thank our Librarian Dr. Prakash I N and his staff for being continuously working with the editors in checking for plagiarism and coordinating with the publishers. Each one played his/her part beautifully as a team to make this publication possible.

We express our sincere gratitude towards the authors and co-authors contributing their knowledge base towards different areas depicting how law impacts social transformation. We are sure that your contribution will immensely benefit the researchers and pave the way for further socio-legal research.

We thank all our Faculty Members, Administrative Staff and all those who have worked tirelessly in editing, compiling and seeing to it that the book is published on time. It is all because of their efforts that the book is in hand before the conference.

Last but not the least, we thank Almighty God for showering his blessings on us and showing us the right path in doing the things that are required for the academic growth of legal fraternity.

Editorial Committee
LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION

PREFACE

The book, LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION comprises of scholarly papers relating to different areas of law and its ramifications in the contemporary society. It elucidates the existing state of affairs of Indian Media, Gender Justice, Feminist Jurisprudence, Appointment of Judges, Surrogacy, Sexual Harassment, Rights of Transgender, Environmental Crime, Waste Management, Trade in relation to Wildlife Species, Cybercrimes, Patenting of Life-forms, Artificial Intelligence, etc. to mention a few from plethora of issues. The law and society are dynamic interdependent organisms progressing parallelly into social transformations. Law is embedded in social institutions and a slight variance in the social factors may lead to a need for legal change and, so is the reciprocity of the law and the society, the *vice versa* holds true. The book addresses the multiple socio-legal issues required to be re-analysed, re-evaluated and re-considered, raising relevant questions, to accommodate the transformations in the society and endorse feasible solutions for the same.

The book will provide readers an insight of the ubiquitous socio-legal transitions and the extent of existing legal mechanism to accommodate such change. The suggestions to the issues addressed herein, will help the reader to implore *sui-generis* thoughts and project light towards further research.

Editorial Committee
LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION

INTRODUCTION

Legal system, both impacts and reflects the social aspects of that society. There are continued efforts to describe, analyze and improvise our understanding of the relationship between law and society. These larger domains shape the society and human behavior continuously throughout the history in such a way that no one can deny its contributions. Every society having its own customs, traditions and practices leading to the ascription of a certain meaning to the way of life in that community. These factors cannot be neglected while making policies and implementing laws. In this way the social system influences the whole process of law making and execution. On the other hand, laws and legal institutions have the potential to push the society into completely new dimensions. We have great examples to show that how a legal change can bring social transformations in communities.

The study of any society without knowing its legal system will be vague and the study of any legal institution without knowing its social realities will be baseless. It flows in both the ways like cycle, i.e. society changes law and on the other hand law changes society. In the process of evolution, society undergoes structural and normative changes demanding new laws, modifications in existing laws and sometimes demanding for the removal of a law. Setting up of commissions and committees to report the performance of legal institutions and policy decisions are nothing but an effort to understand the relevance of these policy/legal structures. Laws can be used as a tool of social transformation as we have examples like how Indian society changed its attitude with the legalization of Homosexuality in India. Policies and laws regarding Untouchability, Gender Equality etc. brought larger Social Reforms in Indian context and there are examples in other societies of the world on how a law can change the age-old mind set of communities. Legal machinery can make Gender Equality as a norm in a society and the same legal system can also convince a society to treat Untouchability as an Unethical act. In this way, there is an inseparable relation between the legal system and socio-transformations. Thus, research on this interdisciplinary area always remained as the need of the hour irrespective of time and space.

The present book is a bouquet of innovative ideas which reflects the flux of law in rapidly changing society. The careful screening of papers presented in *National Conference on Law and Social-Transformation [NCLS 2021]* to bring about a collection of novel ideas contributed by legal scholars at various level and the experiences of the same has been portrayed in here addressing different aspects of law and social change under various themes such as, business

laws where issue such as cross border insolvency challenges, aspects on corporate funding, marine insurance and other issues related to it.

The next theme is Constitution and the Common man wherein issues relating to Equal Rights of Transgender, Indian media in upholding Democracy, Gender Parity in the Supreme Court of India: a Road to Transformative Constitution, issues in appointment of Judges to the Supreme Court, differential aspects relating to Fundamental Rights, reconciling discrepancies in Anti-defection Law are being enunciated.

The next theme of the book is Sustainable Development, addressing Climate change, pecuniary principle towards significance of the Sustainable Development in India, Biodiversity protection, Invasive Alien Species and other related issues.

Under the theme Criminal law issues such as Socio-legal analysis of acid attack in India, Rationale Sentencing, Sports Violence and its liability are being detailed.

The theme Intellectual Property Laws throw light on issues such as Artificial Intelligence in Medical practice, Food Patenting, Patenting of Lifeforms, Copyright and issues of other IPR protection regimes.

The theme Media as watchdog of Democracy and Law, expanse on News Media and its role, Media and Democracy and related issues, which has been discussed at length.

Industrial and Environment law deals in issues such as Environmental Criminal Lability, Waste Management regulations and regulations towards Environmental Justice.

The next theme Democracy and National Securities Law, voices on issues relating to failure of the Empathic Justice to the victims of the terrorism.

The theme Gender Justice and Feminist Jurisprudence talks about LGBT Rights, Decriminalization of Homosexuality in India, Law and Gender Inequality, Marital Rape, Sexual Harassment against Women and many such dynamic issues.

Under the theme Legal Education and Research, areas such as Judicial Process in realization of Right to Education in India, Education and Social Change and related issues are being discussed.

The theme Law, Medicine and Ethics, speaks about Euthanasia, Future Doctors, Medical Negligence, Artificial Intelligence in Medical Practice and other issues being discussed.

The theme Personal Laws in changing times, discus about changing concept of Marriage, influence of Modernization and Westernization on Personal Laws and similar issues are being discussed.

Lastly, the theme Public Finance and Taxation issues relating to impact of Information and Communication Technology on Exercise of Taxing Powers and related issues are being discussed.

This literary work highlights some untrodden path of academic research and discussions. Such assemblage of research papers of multiple dimensions is a rare occurrence that will provide readers to contemplate upon large variety of issues. Law does not work in isolation, it has its impact on society and in turn changes in the society values leads to new laws. I am sure this book will encourage readers to take up socio-legal research which will enrich the community at large.

Editorial Committee
LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION

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CHAPTER 1

BUSINESS LAWS, TAXATION, INDUSTRIAL AND ENVIRONMENTAL ISSUES

(1)

CHALLENGES IN CROSS BORDER INSOLVENCY LAW REGIME

Santhy Saraswathy [1]

INTRODUCTION

The present decade has witnessed the rapid increase in cross border trade and services. It has become difficult to confine the trade, services and investment and matters incidental thereto in the strait jacket of domestic activities. The countries which have adopted open trade policy and open for international trade and investments are experiencing a rapid economic growth. However, for international trade and investment and integrating with the global economy a country must have a hassle free insolvency law regime. The main problem with the insolvency regime is the delay and the freezing of capital for that particular period for which the insolvency proceedings and causing the diminishing value of assets.

The emergence of transnational companies, parent cooperation with group of subsidiary companies, companies having operation and employees across the globe and joint ventures of companies incorporated in different nations has tremendously increased the cross border trade. The concept of cross border trade in today's era is much complex with the involvement of multiple key players what it used to be in the beginning of the twenty first century. This has again led to the complexity of insolvency regime. It has become mandatory for the nations to have cross border insolvency law to address the cross border insolvency cases emerging from cross border financial transaction. UNCITRAL Model Law on Cross-Border Insolvency has defined cross border insolvency as, 'those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place'[2].

In the case of cross border insolvencies, the delay will be much more and the aggrieved parties will not be having any certainty of their legal claim and most of the time they are forced to settle down for much less than their actual claim. The growth in the field of information technology with a speedy exchange of documents and enabling transfer of funds in fraction of time has made the international trade process faster but in cases of insolvencies enabling the

[1] Research Scholar, Govt. Law College, Trivandrum
[2] UNICITRAL Model Law on Cross- Border Insolvency (1997) at https://uncitral.un.org.

defaulting corporate to transfer the intangible assets to some other nation can pose a challenge to the existing insolvency legal framework of the domestic country. A legal infrastructure for cross border insolvency law of any country guarantees a legal certainty for trade and investment as well as to safeguard the economic and social interest of that particular country.

THEORIES OF CROSS BORDER INSOLVENCY

Territorial approach: - This is a traditional approach. In the territorial approach, each country exercises its own sovereignty and domestic jurisdiction over its citizens and assets and hence apply domestic insolvency laws in relation to all the debtor's property and all of the creditors located within its jurisdiction. The foreign creditors or debtors have to join as party in the domestic insolvency proceedings. There was no scope for extraterritorial application of domestic insolvency law as well recognition of foreign insolvency proceedings. Hence this approach is not applicable to resolve the complex cross border insolvency proceedings.

Universal approach: - The universal approach thrives for single forum for adjudication of all insolvency proceedings irrespective of the physical location of the parties, place where the claim aroused or location of the assets. But this is not practically possible to compel the states to give up the element of their sovereignty. Some countries came forward and formed a hybrid system and applied modified universal approach by recognizing extraterritorial insolvency laws. In a modified universal approach, the main jurisdiction is given to the court where the center of main interest of the cooperation is located. The other courts serve as the ancillary courts. The former court proceedings are recognized as the foreign main proceedings. United Kingdom was the country who accepted the universal approach and from last two centuries they haven recognizing the foreign proceeding initiated in other countries.

There was a shift from the classical territorial approach but universal approach was never accepted in its pure form. Both the theories never emphasized on cooperation, coordination or communication between the nations.

SIGNIFICANCE OF CROSS BORDER INSOLVENCY LAW

At present the cross border insolvency cases ranges from simple cross border insolvency proceedings with single corporations having assets and foreign creditors spread across the world to complex cross border insolvency cases which involves group of cooperation, subsidiaries, assets, operations and creditors spreads across multiple countries. At present the size and turnover of the cooperation are growing exorbitantly. The cooperation can take

advantages of the differences in domestic insolvency laws and inaccessibility to an insolvency proceeding in a different country will affect the economic and social growth of the claimant nation. Vice versa the delay in resolving of cross border proceedings due to duplicity of insolvency proceeding will stall the financial market as well as diminish the value of assets. Hence there is an expedient need of uniform cross border insolvency law acceptable by majority of nation based on the general principles of cooperation, coordination and communication between the courts and other key players of the insolvency proceedings.

EXISTING GLOBAL PRINCIPLES AND GUIDELINES

With the increased awareness of the need of cross border insolvency law which necessitated a globally uniform cross border insolvency law. The practitioners and key players who were directly involved in the problem, approached UNCITRAL created in 1966 originally entrusted with the task of making a harmony and unification of international trade for coming up with a model draft for cross border insolvency law. The Model law proposed by UNCITRAL in 1997 is inclined to modify universal approach. The UNCITRAL model law forms a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime. It lay downs a legislative framework for judicial cooperation between states, and providing right to access to foreign representative or insolvency resolution practitioner in domestic insolvency proceedings and recognition of foreign insolvency proceedings.

The UNCITRAL model law contained a guide to enactment and interpretation. It has comprehensively supplemented the model law containing 32 Articles. Subsequently, in 2004, 2010 and 2013 published UNCITRAL legislative guide on Insolvency law. The model law is founded on four cornerstones of access, recognition, relief and cooperation which are the essential elements of cross border insolvency law. The first chapter deals with general provisions or concessions to the nations who are implementing the Model law[3]**.** The model law recognizes the supremacy of the sovereign states and allows the nation to exempt certain legal entities from the purview of Cross border insolvency law and not to include the provisions of model law which is contrary to the public policy of that particular nation[4]. The second chapter of the UNCITRAL model law gives the framework of access of foreign representatives and

[3] MOHAN, S. Chandra. Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?. (2012). International Insolvency Review. 21, (3), 199-223. Research Collection School Of Law. Available at: https://ink.library.smu.edu.sg/sol_research/1145.

[4] Id at p 15.

foreign creditors of foreign insolvency proceedings to domestic court. The third chapter deals with recognition of decisions of foreign courts and foreign representative who was appointed in those foreign court proceeding. The fourth chapter deals with cooperation and coordination between the foreign courts and foreign representatives. The fifth chapter deals with the coordination of courts in the instances of concurrent proceedings.

Though the Model law has received much applause and commendation in last two decades only twenty-two countries have adopted the model law. The UNCITRAL model law was first adopted by Eritrea an African country which got independence in 1991. Japan, Mexico and South Africa adopted the Model law in 2000. Currently there are states like United States of America, Australia, European Union, Canada, Cayman Islands, Colombia, Greece, Ireland, Mauritius, Montenegro, New Zealand, Poland, Romania, Serbia, Slovenia, and South Korea and is under consideration in India. Indian draft has departed from the Model Law in that it only applies to foreign proceedings in respect of "corporate debtors"[5].

CHALLENGES OF THE EXISTING LAW

The UNCITRAL Model had not considered the significance of reciprocity which is the major element and essence of international negotiations[6]. It recommends the countries to extend the assistance, cooperation and communication to foreign courts of the countries who have not adopted the UNCITRAL model law.

The model law has not referred to the giant transnational cooperation's who has made their strong roots across the globe. With their subsidiaries and operational offices an information technology network they can influence the economic policies, economic growth rates, employment of the companies. Many of the Trans national cooperation have outgrown developing countries in respect of assets. The interference of this entities has led to the erosion of sovereignty in matter of economic policies and they have emerged as a threat to democracy. The confinement of cross border insolvency law as a branch of private international law will not resolve the issues of cross border insolvency.

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[5] Kevin Pullen, Paul Apáthy, Alexander Aitken and John Chetwood, *India proposes to adopt* the uncitral model law on cross-border insolvency, at https://www.herbertsmithfreehills.com/latest-thinking/india-proposes-to-adopt-the-uncitral-model-law-on-cross-border-insolvency.

[6] Supra N2 at p 12.

CONCLUSION

The rapid and complex growth of international trade poses serious challenges to the international insolvency law regime. But compared to the end of the twentieth century, the UNCITRAL model law has brought a light of hope in the area of cross border insolvency laws. The beginning of the twenty first century witnessed the adoption of UNCITRAL Model law by common law countries and United States of America. But the 2008, Lehman brother cross border insolvency case brought out the real gap between the practice and reality of the UNCITRAL model law while dealing with complex transnational cooperation. Till now we have seen the positive side of globalization. But the kind of disparity and depolarization is created by the uncontrolled growth of global market players can be balanced by a strong international insolvency law regime.

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(2)

IMPACT OF INFORMATION AND COMMUNICATION TECHNOLOGY ON EXERCISE OF TAXING POWERS- AN INDIAN EXPERIENCE

RenukaV.*

INTRODUCTION

History says that the taxation laws have always succumbed to changes in accordance with the needs of the hour. The law of taxation has been developed as a part of the fiscal sovereignty of nation-state for amassing wealth. The collection of tax has been justified as a token for the

Welfare functions facilitated by the nation-state in the modern world. But when the industrial development promoted trade and commerce beyond the borders, the international community has come up with rules and regulations to facilitate and encourage the same across the globe without any hinderances. The law of taxation also underwent changes.

For instance, the test of permanent establishment has been adopted at a time when the international community has to balance the growth of international trade on one side and to regulate the attribution of profits.[1] The existing international taxation rules are designed in accordance with the fixed place of presence as postulated by the permanent establishment test. [2] These rules have been framed for regulating business activities based on a brick mortar system initiated by the advancements in industrial revolution. The taxation rules of nation-states thus became part of international legal regime.[3]

Quite interestingly, advancements of Information and Communication Technology have taken away the challenges of international trade, viz. time, distance, and fixed place.[4] Real time

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[1]Michael Kobetsky, International Taxation of Permanent Establishments-Principles and Policy, Chapter 4 , 106-151 (2011).

[2] Vide Article 5 of OECD MTC.

[3]Reuven S. Avi-Yonah - International Tax as International Law_ An Analysis of the International Tax Regime Cambridge University Press (2007). : Peter Harris, David Oliver - International Commercial Tax (Cambridge Tax Law Series) (2010).

[4]Lee, G., Shao, B., & Vinze, A. (2018). The role of ICT as a double-edged sword in fostering societal transformations. *Journal of the Association for Information Systems*, *19*(3), Article 1. doi: 10.17705/1jais.0049.: Madon, S. (2000). The Internet and socio-economic development: Exploring the interaction. Information Technology & People, 13(2), 85–101. doi: 10.1108/09593840010339835: Narcyz Roztocki, Piotr Soja & Heinz Roland Weistroffer (2019) The role of information and communication technologies in socioeconomic development: towards a multi-dimensional framework, Information Technology for Development, 25:2, 171-183,

communications and transactions are now possible at the tip of a finger. Not only that, digitalisation has put forth new models for conducting business like advertising-based revenue models, digital content purchase, selling of goods and services, subscription based revenues, selling of user data and customised market research, etc. [5] At this juncture, the challenges put forth and the changes incorporated into the law of taxation requires a relook. This paper, thus focusing upon the concept of permanent establishment and the subsequent changes adopted into this concept for validating its effectiveness. This paper hence shall briefly identify the responses of international community so as to discuss and also the responses of Indian taxation regime.

HISTORICAL RELEVANCE OF PERMANENT ESTABLISHMENT

After Second World War the world has witnessed drastic development in the cross border relations by the establishment of different international organizations and also the role of information technology to accelerate international relations is well-known.[6] The rapid growth of e-commerce models had taken the international trade related activities from cross border transactions to borderless one.[7]

The ripples of these can be seen in all sectors of a civilised society and law is not an exception. The settled principles of law are established to regulate all the activities of a brick mortar system. But digitalisation of the economy created totally new world where activities are done with new ideals and through new medium, methods, and models. Even though there is a virtual world, the existence of the same is based on the activities those are more or less connected with the real world. Here, the real challenge is how we can regulate the transactions between and through different worlds having different characteristics.

Like all other laws, the taxation law also faces challenges to enforce its concepts and allied principles effectively. The principles of taxation are generally domestic in nature. Later, by the

DOI: 10.1080/02681102.2019.1596654.: M Castells, The Rise of the Network Society, (2nd ed. Oxford,1996).: Rosenberg, The Social Impact of Computers, (3rd ed. London, 2004).: Paschal, Reshaping Communications, (Preston 2001): Stephen Tansey, Business, Information Technology and Society, Routledge (1812).: Christian Fuchs, Internet and Society: Social Theory in the Information Age, Routledge, 2008.: Nick Heap, Information Technology and Society: A Read, Sage Publications Ltd, 1995. : Luciano Floridi ,The Ethics of Information, OUP 2013.: Luciano Floridi, Information- A Very Short Introduction, OUP, 2010.: Theories of the Information Society Frank Webster(2006).: Andrew Murray, Information Technology Law: The law and society (2010).

[5] The report on Action 1 ("Tax Challenges of the Digital Economy") of the Base Erosion and Profits Shifting (BEPS) Action Plan released on September 16th, 2014.

[6] *Supra* n.4.

[7] Michael Kobetsky, International Taxation of Permanent Establishments-Principles and Policy, Chapter 4, 106-151 (2011).

growth of cross border transactions, certain principles have been developed for regulating international transactions. The international community has widely accepted the concept of permanent establishment for sharing profit between the resident and the source country. This concept allows a source country to collect tax on the income generated from her economy if the enterprise has certain degree of permanence within the host country jurisdiction. The concept of permanent establishment has later become the relevant tool for balancing both resident and source principles globally.

The definitions of the legal terms are always in tune with the needs of the society at a particular time and certain legal frameworks also leave space for the future developments as well so as to reduce the gap between law and social change. As it is so, an analysis of the existing definition of permanent establishment shall depict the compatibility of the same in the digital world. For the same the scope of permanent establishment as per article 5 of OECD to regulate e-commerce operations is critically analysed.

ANALYSING THE OECD DEFINITION OF PERMANENT ESTABLISHMENT

The definition of article 5 of the OECD Model Tax Convention on Income and Capital Permanent establishment is defined under Article 5 as a fixed place of business through which the business of an enterprise is wholly or partly carried on. The definition itself demands certain degree of permanence for allocating profits based on source and residence principles. The intended nature of a permanent establishment can also be inferred from paragraph 2 of the permanent establishment. As per the same, a place of management, a branch, an office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources constitute a permanent establishment. While analysing the list provided one of the feature of a permanent establishment is presence in a fixed place or substantial nexus with the taxing country.

There are certain specific exclusions to the definition of permanent establishment listed in paragraph 4 of article 5 which include the use of facilities for storage, display or delivery of goods and concludes if the overall activity of the fixed place of business is of a preparatory or auxiliary character, it will not constitute permanent establishment for the purpose of profit sharing under article 5.

The question to be discussed here is how compatible this definition for the needs of a virtual world. The OECD while analysing relevance of e-commerce addressed the effect of the same on permanent establishment at Ottawa Conference held in 1998. After a detailed discussions

in the succeeding sessions, OECD decided to extend the existing definition to e-commerce operations by inserting a chapter on the commentary on OECD Convention rather than amending the age old definition. The commentary on the Article discusses the extension of the permanent establishment in ecommerce transactions.

The OECD identified the physical presence of server as the criteria for determining permanent establishment for the profit sharing in e-commerce operations. For the same, a distinction is making between a website and a server. The internet website is only a combination of software and data and hence it is not a tangible property for the purpose of establishing nexus with a particular country. At the same time, a computer server upon which a website is stored and through which it is accessible is a piece of equipment having a physical presence for that enterprise for the purpose of profit sharing. Hence permanent establishment concept for e-commerce operations is generally based on the location of a server primarily and a website cannot be treated as a permanent establishment due to lack of physical presence.

A website, hence, shall not create a place of business as there is no facility such as premises or in certain instances, machinery or equipment. Hence the primary rationale for choosing a server as a permanent establishment is its permanence. This distinction shall exclude those enterprises operating through a website hosted on the server of an Internet Service Provider (ISP). It is clearly mentioned in the commentary that the contracts between the ISP and the enterprise for sharing the space of the latter shall not make the server at the disposal of the enterprise. The enterprise can only determine whether to host its website on the server. In this context, this enterprise shall never constitute a physical presence at that place since it is not tangible. From the above discussions the intention of the drafters to define the nature of website with conventional characteristics of permanent establishment is quite visible.

The OECD recognized server as a permanent establishment for the purpose of taxation based on the existing notions. Now what is required is to analyse whether this raise any practical difficulties or concerns to existing legal jurisdictions for taxation and to analyse whether there is any necessity to reconsider the virtual permanent establishment concept based on server. The OECD has been keenly watching the development of ecommerce and its impact over taxation concepts including permanent establishment.

E-COMMERCE TRANSACTIONS AN ANALYSIS

The information technology facilitated direct marketing without any intermediary or even without any establishment. For instance, by virtue of technology advancement a retailer can effectively perform the same functions from a virtual world. The direct transactions between all kinds of consumers including individuals, enterprises and even governments are possible.[8] These kinds of transactions with the help of computer equipment are popularly known as e-commerce transactions.

Hence e-commerce can be defined as method of doing e-commerce activities using computer equipment. There are different models for conducting e-commerce are evolving regularly using a range of digital technologies and among them three models are particularly transformative. It includes,[9]

i. Business models that use online platforms
ii. Subscription e-commerce business models
iii. Online-offline e-commerce business models

In traditional economy the place of transaction and the item of transaction are traceable. The laws of taxation are developed considering the tangible nature of situs of transaction and the economic presence of the transaction. The different models of e-commerce operations discussed above highlight the fact that, unlike traditional business models, the transactions through the e-commerce mechanisms do not demand any place of business and hence it is very difficult to identify the economic attachment of different transactions. In that context, how to determine the permanent establishment of e-transactions is a legal difficulty.

While addressing the issue the OECD adapted the physical world definition to an altogether new medium of virtual economy without making any changes to the definition under paragraph 1 of Article 5. The community adopted the definition without analysing the nature of activities of e-commerce transactions. For instance, the OECD does not recognize website as permanent establishment as it is intangible in nature but they come to this conclusion without analysing the nature of activities those have been done through a website.

[8] OECD Addressing the Tax Challenges of the Digital Economy, 2014.
[9] OECD (2019), Unpacking E-commerce: Business Models, Trends and Policies, OECD Publishing.

CONCEPT OF PERMANENT ESTABLISHMENT

The concept of PE has placed in the League of Nations Model Tax Convention, 1927 itself so as to enable avoidance of double taxation and to propose more clarity to the international taxation regime and later the same has been a permanent principle to determine the obligations of nation-states over formulating taxing policies.[10] Article 5 of the OECD Model Tax Convention on Income and Capital defines permanent establishment (herein after as PE) as a fixed place of business through which the business of an enterprise is wholly or partly carried on.[11] The definition itself demands certain degree of permanence for allocating profits based on source and residence principles.[12] The question that shall arise here is how can this definition be adapted to a virtual world where the very existence is not permanent and real.

The OECD has been continuously analysing the developments in day to day business activities in digital economy and has identified challenges from digital economy as one of the main focuses of Base Erosion and Profit Shifting (BEPS) Action. As a part of the same, OECD released 15 Action Plans. Action Plan 1 is dealing with Tax Challenges in the Digital Economy.[13] The Action Plan 1 proposes various potential options to address the challenges put forth by different business models like equalization of levy and significant economic presence.

Action Plan 7 of the BEPS is for regulating the artificial avoidance of tax payments.[14] Tax treaties generally provide that the business profits of a foreign enterprise are taxable in a nation-state only to the extent that the enterprise has in that nation-state a permanent establishment to which the profits are attributable.[15] Therefore permanent establishment is the crucial factor for determining the profit allocation and imposing taxation. The current permanent establishment definition provided by the OECD Model requires structural transformation in tune with the nature of digitalised economy.

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[10] Mitchell B. Carroll, Global Perspectives of an International Tax Lawyer (Hicksville, New York, Exposition Press, 1978).

[11] Vide Article 5 of the Model Tax Convention on Income and on Capital 2017 (Full Version) DOI: *https://doi.org/10.1787/g2g972ee-enl, OECD Publishing.*

[12] Vide Paragraph 2, Article 5.

[13] *https://www.oecd.org/ctp/BEPSActionPlan.pdf* (visited and accessed on October 2018, 2 pm IST).

[14] Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7-2015 Final Report. http://www.oecd.org/tax/treaties/revised-discussion-draft-beps-action-7-pe-status.pdf (Accessed on 28/02/2020 at 4:30 pm).

[15] Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7-2015 Final Report. http://www.oecd.org/tax/treaties/revised-discussion-draft-beps-action-7-pe-status.pdf (Accessed on 28/02/2020 at 4:30 pm).

OECD BEPS Action 7 proposes several changes to the definition of permanent establishment in the OECD Model Tax Convention to counter the BEPS.[16] The proposed changes have been covering different dimensions and modes of the e-commerce activities. The first proposed change is to ensure the taxable presence of a foreign enterprise if it is performing its activities through an intermediary in a jurisdiction unless the intermediary is performing these activities in the course of an independent agencies.[17] Secondly, to restrict the tendencies of taking advantage of the exceptions to the definition of permanent establishment.[18] Here OECD is trying to regulate the practices of taking advantage of exceptions identified by fragmenting cohesive business activities through activities that are preparatory or auxiliary in nature. The proposal also discusses the situation of splitting up of contracts among closely related enterprises only for the purpose of avoiding significant taxable presence so as to avoid taxation.[19]

OECD has been discussing with G20 states as well to lay down a global consensus-based solution. Subsequently it has come up with two main proposals to address these challenges,[20] viz. one comprehensive solution of updating corporate tax rules in such a way to addressing the existing concerns as well as an interim solution of Digital Service Tax on the gross revenues resulting from the supply of certain digital services that will tackle the problems in a targeted way until the comprehensive solution is in place. But these are not a final or finest solution while considering the gravity of issues at present. [21]

International legal solution to these challenges is not an easy target. The nation states willingness to take apart the power to tax is crucial. Taxation is a symbol of power as well as a source of public finance. Thus, the nation-states always show a natural tendency to protect the same. This in away raises challenges for an international solution. The nation-states have been coming up with unilateral measures to tax the digital transactions by extending the concept permanent establishment or by redefining the same in tune with the needs of the hour.

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[16] *https://www.oecd.org/tax/beps/beps-actions/action7/* (Accessed o 27/02/2020 at 5.00 pm).
[17] *Supra* note 16.
[18] *Supra* note 16.
[19] *Supra* note 16.
[20] *https://www.lexology.com/library/detail.aspx?g=5b609b46-77bb-4061-b091-11333b1f5f9e* (Visited and accessed on 10-11-2018, 5 pm IST).: *https://home.kpmg.com/xx/en/home/insights/2018/03/etf-360-oecd-and-eu-council-digital-economy.html (*Visited and accessed on 10-11-2018, 5 pm IST).
[21] vide. The Report on Action 7 of the BEPS Action Plan (Preventing the Artificial Avoidance of Permanent Establishment Status). Under this mandate, the Committee on Fiscal Affairs has been releasing discussion drafts at different period of time.

INDIAN REFLECTIONS- AN OVERVIEW

India being a hub of larger consumer base or business, the measures to adapt with the new generation economy is always in air.[22] It is clear from the provisions of Income Tax Act, 1961 (herein after as IT Act) that in India income of a non-resident shall be subject to taxation only if that income has received or deemed to be received through a business connection, directly or indirectly in India.[23] It is quite clear from Section 9 that business connection shall be claimed only if there is habitual exercise of activities by the parties concerned within the territory of India. Section 92F[24] of the IT Act further reiterates the same by defining permanent establishment as a fixed place of business through which the business of the enterprise is wholly or partly carried on. But to what extend these provisions have relevance for extending taxation rights of India over a foreign investor requires further discussion.

The Indian legal system incorporated Equalization of Levy (EL) as an initial step towards the changing nature of the economy vide Finance Act in 2016 through Chapter VIII Sections 163 to 180 as a first step to impose tax on online e commerce business. [25] It has been introduced as a direct tax imposing upon Non-resident service providers who earn revenue from India at the rate of 6%. Later the Finance Act 2018[26] has amended Section 9 (1) (i) of the IT Act by introducing 'the rule of significant presence, to bring non-resident within the taxing framework. As per clause 4 of the Act, 2018, significant presence can be treated as a business connection for the purpose of taxation. As per this clause significant economic presence[27] any transaction of a non-resident in India can be treated for the purpose determining significant economic

[22] In 2016 the Central Board of Direct Taxes (CBDT), Department of Revenue, Ministry of Finance directed to form a Committee for detailing the business models for e-commerce, the direct tax issues in regard to e-commerce transactions and a suggested approach to deal with these issues under different business models.
[23]Vide Sections 5 and 9 (1) of the Act.
[24] Vide Section 92 F of the Act, 1961.
[25] For details ref. the Committee on Taxation of E-Commerce formed by the Central Board of Direct Taxes, 2016, pp. 81-83.
[26] The Act shall come into effect on April1, 2019.
[27] "Explanation 2A.—For the removal of doubts, it is hereby clarified that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—
(a) transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or
(b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means:
Provided that the transactions or activities shall constitute significant economic presence in India, whether or not,—
(i) the agreement for such transactions or activities is entered in India; or
(ii) the non-resident has a residence or place of business in India; or
(iii) the non-resident renders services in India:"

presence if the aggregate payments arising from such transactions during the previous year exceed a specific threshold.[28] Likewise this clause also recognizes the possibility of ring fencing the business of those non-residents who have more than a certain number of users in India through digital means.[29]

Thus, the new amendment has broaden the scope of the provision by diluting the situs and nexus based rule of fixed place for taxation whereby a non-resident shall also be subject to taxation. The idea of business connection within permanent establishment has been expanded to cover the digitalised business models. But the implication of this provision is still in limbo as section 90 (2) of the Act, 1961 mandates to adopt only that law which is more beneficial to the tax payer, i.e. either the domestic law or the tax treaty. Therefore, the only option available is to adopt the new rule with the consent of the bilateral party to the treaty or to await for a global consensus to invoke the new rule. The developments in India make it clear that the authority of the permanent establishment principle has been reaffirmed by expanding the scope of business connection and thereby the taxing power of the source country.

The European Commission has already published proposals to impose 3 % tax on the major technology based companies with global revenues above 750 million euro a year. This actually turns eyes into the responses of other nation-states so as to reach a point of consensus. In the meantime, France has introduced the GAFA Tax (Google, Apple, Facebook and Amazon Tax) law. This law intends to impose tax on the digital giants having no permanent establishment within France under the conventional principles of international taxation. As per this law a levy can be imposed at the rate of 3 %.

THE JUDICIAL RESPONSES-AN OVERVIEW

It is clear from the above discussions that the courts can play a significant role to determine permanent establishment in India. Indian courts have been facing multitude of situations on similar issues especially the tribunals. For instance *in the matter of Verizon Communications Singapore Ltd*[30] the court had acknowledged the changing nature of business models where the physical presence become insignificant. In *the matter of Galileo International Inc* the court while determining the Delhi Tribunal held that the presence of computer systems which are used by the subscribers is enough to constitute permanent establishment in Indian domain and

[28] *supra* note 27.
[29] *supra* note 27.
[30] Verizon Communications vs The Income Tax Officer [2014] 361 ITR 575 (Mad)

the presence of main server is not a prerequisite. At the same time in Right Florists Pvt. Ltd case[31] the Kolkatta Tribunal is taking a different stand. While considering the question of virtual presence through a website, the presence of Google and Yahoo through websites having serves outside India shall not come within Indian tax framework. Hence, it can be analysed from the above discussion that the tribunals have differences of opinion over the traditional physical presence test to determine tax jurisdictions. As it is so, it can be hoped that the decisions from higher courts shall settle the issue in future.

CONCLUSION

Law being a tool of social control, it has to be framed and reframed in tune with the changing nature of the society. From the very origin of test of permanent establishment establishes its purpose. It is nothing but to regulate business activities based on traditional model. Digitalisation facilitated real time transaction without any physical presence in other place whereby barriers of time and space become obsolete. Even though, global community identified the challenges of digital economy, it faces the greater challenge of fixing a global consensus to resolve the same. Meanwhile, the national jurisdictions have come up with their own tools to regulate tax avoidance and India is not an exception. Recently, the legislative authorities have widened the scope of business connection within India by introducing the rule of significance test. But the unilateral approach of India shall not regulate base erosion within the nation as the bilateral treaties are based on model taxation conventions only. Hence, it can be concluded that in effect, the legal system has become a mute spectator who observing how this unregulated digital business models have been taking benefits out of the loopholes in the traditional taxation framework. On the other hand new business models have been evolving day by day and the rules are lagging behind.

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A DECADE OF THE NATIONAL GREEN TRIBUNAL ACT, 2010- AN ANALYSIS

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INTRODUCTION

The history of environmental governance in post-independent India started when the then Prime Minister, Indira Gandhi, returned from the United Nations (UN) Conference on Human, Environment and Development in Stockholm in 1972.It was the first global conference on the environment. Twenty six principles were declared in this conference and it is the *Magna Carta* on Human environment.[1]In view of the Stockholm Conference on Human Environment and growing awareness of the Environmental crises in the country, India made an amendment to its Constitution and added direct provisions for the protection of the environment.[2]To enforce this directive, the Indian Judiciary has played a proactive role in environmental enforcement and compliance.[3] The second major development has been the jurisprudence arising from some remarkable judicial pronouncements, more specifically related to Article 21 of the Constitution on the 'right to life'.[4]

THE GENESIS OF ENVIRONMENTAL COURTS IN INDIA

Post the Bhopal disaster, and due to the euphoria created by the Rio Summit there was a clamor for dedicated environmental dispute resolution mechanisms in India. It was thought that stand alone environmental courts would render better environmental justice to masses. In line with

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[1] S.C. Shasthri, Environmental Law, Eastern Book Company , (5th edn.2015)

[2]See 42nd Constitutional Amendment, 1976The Constitutional directive under Article 48A & Fundamental Duties under 51(A) (g) establishes normative prescriptions that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country" and every citizen shall be duty-bound "to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creature.

[3] P.Leelakrishnan ; Environmental Law in India; Eastern Book Company; 170 (2nd edn 2008),

[4]A wave of environmental litigation resulted from public interest Litigations under Article 32 and 226 of the constitution of India. Supreme Court has expanded and liberalised the rule of *'Locus Standi*'. As a result of this expansion, all the social activists, NGO's, lawyers, public spirited citizens, etc. are now entitled to file a writ on behalf of the person whose right has been infringed. In addition to this, a court is also entitled to take *suo moto* cognisance of matters involving the abuse of environment through letters addressed to sitting judges.

this approach the National Environment Tribunal Act, 1995 was passed by the Indian Parliament as a consequence of the Rio de Janeiro Conference[5] and the Central Government established the National Environment Tribunal under the mandate of the Act.[6] The main objective of the tribunal was to compensate those affected by handling of harmful substances.[7]

National Environment Appellate Authority Act, (NEAA) of 1997 was passed specifically for the purpose of regulating certain industries, operations or processes or class of industries, operations or processes restricted under the Environment (Protection) Act, 1986. Ministry of Environment and Forests, Government of India established NEAA to address the environment clearances and related issues required in certain restricted areas. However, the Authority become defunct and the Act was repealed.[8] The measures for adjudication of environmental degradation thus, remained on paper.The Indian policymakers or the legislature did not see any rationale in the creation of a new system of special courts to exclusively adjudicate upon environmental problems as a priority prior to the opening up of the economy in the post 1990 era.

JUDICIAL APPROACH

A few landmark judgements delivered by the apex court endorsed the need for specific environmental courts.[9] In *Environment Legal action v. Union of India*,[10] the Supreme Court

[5] Banga, R., & Das, A. (Eds.), Twenty Years of India's Liberalization: Experience and Lessons. (United Nations Conference on Trade and Development, New York and Geneva) 2012

[6] Namita Wahi, *Environment Tribunals in India: From the NEAA to the National Green Tribunal*, Law and Other Things, January 13, 2010 available at: https://lawandotherthings.com/2010/01/environment-tribunals-in-india-fro/ (accessed on:25/07/19 at 5:30 pm)

[7] *Id.*

[8] See Banga, R *Supra n*.5

[9] See for example M.C. Mehta v. Union of India, (1986)2 S.C.C 176 and Indian Council for Enviro-Legal Action v. Union of India, (1996)3 S.C.C 212

[10] *Supra* n. 9. In this case, an environmentalist organisation brought to light the woes of people living in the vicinity of chemical industrial plants in Buhari is a small village in Udaipur District of Rajasthan. To its north is a major industrial establishment, Hindustan Zinc ltd., a public sector concern had established a chemical plant to produce Oleum. The real calamity occurred when a sister concern, Silver chemicals commenced production of 'H' acid in a plant located within the same complex. 'H' acid was meant for export exclusively. Its manufacture gives rise to enormous quantities of highly toxic effluents--in particular, iron-based and gypsum-based sludge--which if not properly treated, pose threat to Mother Earth. It poisons the earth, the water and everything that comes in contact with it. The water in the wells and streams has turned dark and dirty rendering it unfit for human consumption. It has become unfit for cattle to drink and for irrigating land/ the soil has become polluted rendering it unfit for cultivation, the mainstay of the villagers. It spread disease, death and disaster in the village. The villager rose in revolt leading to the imposition of sec. 144 CrPC by the District Magistrate in the area and the closure of the Silver Chemicals in Jan 1989. It is averred by the respondents that both the units, Sliver Chemicals and Jyoti Chemicals have stopped manufacturing 'H' acid since Jan. 1989 and are closed, yet the consequence of their action remain--the sludge, the long-lasting damage to earth, to underground water, to human being, to cattle and the village economy. It was with this contention that this writ petition was addressed. The Court held that the Company was absolutely liable for the environmental degradation caused by the production of 'H' acid. It was up to the company to pay for the pollution and redo the environmental damage and wrong caused by its industrial

observed that Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner. Following this the court in *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.),*[11] referred to the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists/technically qualified persons, as a part of the judicial process, after an elaborate discussion of the views of jurists of various countries.

In *A.P Pollution Control Board v. Prof. M.V. Nayudu*,[12] Hon'ble M. Jagannadha Rao, J. opined that since most of the statutes dealing with environment are by Parliament, the Law Commission could kindly consider the question of review of the Environmental Laws and the need for constitution of Environmental Courts with experts in Environmental Law, in addition to judicial members in the light of experience in other countries.[13]

Following the said observations of the Supreme Court of India, the Law Commission of India undertook a detailed study of the subject for the establishment of "Environment Courts" in India.[14] The Commission has prepared a report recommending the laws on "Environmental

activity. Sec. 3 and 4 of the EPA, 1986 empowers the government to recovery cost of the pollution and sue the same for redoing the harm caused to the environment. The 'polluter pays principle' was explained by the court: "Once the activity carried on by an industry inherently harasses the environment by its activity irrespective of the fact whether it took reasonable care while carrying on such activity.

[11] See 1999(2)SCC 718. In this case, Suvarna oils and derivatives engaged in the production of castor oil derivations sent an application to the Government of Andhra Pradesh (A.P.) to issue a licence for establishment of Industry. Government of India issued a letter of intent that issuance of licence was subject to certain conditions. Thus consent was rejected by Andhra Pradesh Pollution Control Board. Aggrieved by rejection, Company appealed under Appellate Authority. It directed the A.P Pollution Control Board to give its consent for establishment of a factory on conditions which deemed fit. A PIL was filed stating this order was arbitrary. The respondent company applied to the High Court. It issued necessary directions to issue NOC to the company. A.P. Pollution Control Board went in Appeal under Article 136 to the Supreme Court against an order of High Court. The court dealt with the problem at length in judgement. On the basis of the opinion of a single scientist produced by the industry, The High Court of A.P concluded that if the industry became operational it would not pose any hazard to drinking water. According to J. Jagannath Rao, Principle of precaution is based on the theory that it is better to error the side of caution and environmental harm which may end became irreversible and based on scientific uncertainty and inadequacies of science.

[12] 2001(2)SCC62

[13] *Id.* The Supreme Court, referred to the serious differences in the constitution of appellate authorities under plenary as well as delegated legislation (the reference here is to the appellate authorities constituted under the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981), and pointed out that except in one State where the appellate authority was manned by a retired High Court Judge, in other States they were manned only by bureaucrats. These appellate authorities were not having either judicial or environment back-up on the Bench. The Supreme Court opined that the Law Commission could, therefore, examine the disparities in the constitution of these quasi-judicial bodies and suggest a new scheme so that there could be uniformity in the structure of the quasi-judicial bodies which supervise the orders passed by administrative or public authorities, including orders of the Government. For instance, these 5 appellate bodies can examine the correctness of the decision of a pollution control board to grant or refuse a no-objection certificate to the industry in terms of the Water Act. Environmental Courts have advocated in two earlier judgments also.

[14] One Hundred Eighty Sixth Report on Proposal to Constitute Environment Courts (September 2003): Law Commission of India.

Courts and suggested that Courts must be established to reduce the pressure and burden on the High Courts and Supreme Court.[15] These Courts will be Courts of fact and law, exercising all powers of a civil court in its original jurisdiction.[16] They will also have appellate judicial powers against orders passed by the concerned authorities under the Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981 and The Environment (Protection) Act, 1986 with an enabling provision that the Central Government may notify these Courts as appellate courts under other environment-related Acts as well.[17] Such a law can be made under Art. 253 of the Constitution of India, read with Entry 13A of List I of Schedule VII to give effect to decisions taken in Stockholm Conference of 1972 and Rio Conference of 1992".[18] In its recommendation, the Commission proposed for setting up of environmental courts with judicial members and technical experts. The commission also recommended that the proposed Environment Courts will be established initially at the National level and later many more courts may be established in other parts of the country.[19] According to the law commission, along with these establishments, the court will be accessible to citizens from the remotest part of the country.[20]

THE NATIONAL GREEN TRIBUNAL

GENESIS & INITIAL CONCERNS

After years of deliberation, the National Green Tribunal Bill was introduced in the Indian Parliament on July 29, 2009.[21] The National Green Tribunal Act 2010, replaced the earlier National Environmental Appellate Authority (NEAA) with The National Green Tribunal (NGT)[22] which has wider scope and coverage than NEAA.[23] This judicial body was meant to deal exclusively with the environmental laws and to provide citizens with the right to the environment. The main bench of NGT is in Delhi, the national capital of India. The other branches are in Bhopal, Chennai and Kolkata.[24] The Tribunal aimed to offer effective and fast

[15] *Id.* p.87-95
[16] *Id.* p. 117-135
[17] *Id.* p.196-158
[18] *Id.p.*105-115
[19] *Id.* p.3
[20] *Id.* 136-158
[21] Balaji, J., The Hindu, Lok Sabha passes green tribunal Bill *available at http://www.hindu.com/2010/05/01/sto*ries/2010050164201400.htm
[22] PRS Legislative Research,National Green Tribunal Bill,2009, *available at: https://www.prsindia.org/uploads/media/Green%20Tribunal/Final%20Version%20-%20National%20Green%20Tribunal%20Bill.pdf (accessed on 26/07/19 at 5:00 pm)*
[23] *Id.*
[24] *Id.*

redressal of cases related to environmental protection and conservation of natural resources and forests.[25] National Green Tribunal Act is path-breaking legislation envisaged to provide a new dimension to environment adjudication by curtailing delays and imparting objectivity. The Tribunal, given its composition and jurisdiction, including wide powers to settle environment dispute and providing relief, compensation including restitution of environment, is envisaged to be a specialized environmental adjudicatory body having both original as well as appellate jurisdiction.

The structurisation of the legislation raised certain initial concerns. At the very inception of the Act the concern was raised that the Act would erode the right of various individuals and NGOs, who through private and social action litigations, were able to assert their fundamental rights in the ecological context by moving the high court of a state in which they resided.[26] The environmental litigation was therefore also a public affair. It was lamented that the Law Commission, while pleading for a common specialised court for the entire country, did not examine the merits of the existing decentralised system. While taking away the jurisdiction of the high courts and civil courts in environmental matters, it was obligatory to ensure better institutional access, which according to many observers was devoid in the new Tribunal's structurisation. It was criticised as structurally and functionally inadequate to satisfy people's needs in a vast country, that were better met by a well-established network of high courts. It was argued that due to lack of access, thousands of grievances related to environmental issues do not reach the adjudicatory mechanism at all which would be antithetical to the concept of "just, quick and cheap" judicial remedy.

THE WORKING OF THE TRIBUNAL

It is a fact that India is among the few nations to have introduced a Judicial Tribunal, being the National Green Tribunal, with both original and appellate jurisdictions to address the environmental concerns, as well as to redress the aggrieved persons in relation to matters relating to environment[27]

The years that the National Green Tribunal has functioned, it has delivered several significant judgments on range of issues from across the country. This court can rightly be called 'special'

[25] *Id.*
[26]Desai, Bharat H., & Balraj Sandhu *On the Quest for Green Courts in India*.3 Journal of Court Innovation 79–110 (2010)
[27] Justice Swatanter Kumar , About the Journal And the NGT, National Green Tribunal; International Journal on Environment; VOL.I of 2014,

because India is the third country following Australia and New Zealand to have such a system.[28] The National Green Tribunal is India's first dedicated environmental court with a wide jurisdiction to deal with not only violations of environmental laws, but also to provide for compensation, relief and restoration of the ecology in accordance with the 'Polluter Pays' principle and powers to enforce the 'precautionary principle'.[29] While discussing the subject of environmental justice in India, Gill argued that 'the involvement of technical experts in decision-making promotes better environmental results while simultaneously recognising the uncertainty in science' and also stated that 'India's record as a progressive jurisdiction in environmental matters through its proactive judiciary is internationally recognised'.[30] This Tribunal is no doubt an important step in the access to justice on matters concerning the environment and its mandate is much wider than earlier environmental Courts and Authorities and other such Courts.

However the working of the Tribunal for a decade has not been without challenges. An analysis brings out certain pertinent issues that need to be addressed.

COMPOSITION AND QUALIFICATION OF THE MEMBERS

Chapter II (Establishment of the Tribunal) of the National Green Tribunal Act, 2010 deals with provisions relating to composition, qualification, terms of appointment and removal of members of National Green Tribunal. The tribunal shall consist of a full-time chairperson, judicial members and expert members. The minimum number of judicial and expert member prescribed is ten in each category and maximum number is twenty in each category. [31]Another important provision included in the law is that the chairperson, if find necessary, may invite any person or more person having specialized knowledge and experience in a particular case before the tribunal to assist the same in that case.[32]Though has been a steady growth in the

[28] Gill GN,T*he National Green Tribunal of India: a sustainable future through the principles of international environmental law.* Envtl L Rev 16:183–202. (2014) at *https://doi.org/10.1350/enlr.2014.16.3.217*
[29]*Id*
[30] Gill GN, *Environmental justice in India: the National Green Tribunal and expert members,* transnational environmental law, Cambridge University Press 5:1 175–205 (2016)
[31]Usually judges form different high courts and Supreme Courts are appointed as judicial members and Chairperson of the tribunal. Beside the judicial members, the tribunal also consists of subject experts. The numbers of subject experts are also the same as judicial numbers. Subject experts in the tribunal work as full-time employees and their number will be not less than ten but subject to maximum twenty. The balance in number of the judicial and expert member is kept so that the equal representations from both the groups are possible. Expert members are doctorate degree holder either in physical sciences or life sciences. Engineering postgraduates can also act as an expert member. The experts must have experience of fifteen years in the relevant field including five years practical experience in the field of environment related issues.
[32] Section .4(2) of the Act

number of cases filed before the main bench as well as the regional benches there is a marked reluctance from the part of the Government to fill the bench-membership and allocate necessary staff and resources for their expeditious working leading to mounting backlog of cases.[33]Seventy percent of the bench positions are currently vacant.[34] Another intrusion occurred through the Finance Act, 2017

> The Department of Revenue, Ministry of Finance vide notification dated 1 June 2017, in exercise of its powers under section 184 of the Finance Act 2017, notified the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017 (new rules). The new rules give unbridled power to the central government to provide for the appointment, term of office, salaries and allowances, registration, removal, and other terms and conditions of service of the chairpersons and members of the tribunal including the NGT. For instance, the new rules have altered the terms of the NGT Act 2010 by allowing a non-judicial member to be the chairperson of the tribunal. Section 5 of the NGT Act 2010 states that the chairperson of the NGT must have been a judge of the Supreme Court or a Chief Justice of a High Court. As per the new rules, a person can be appointed as a chairperson of the NGT if he is, or has been, or is qualified to be a judge of Supreme Court; or is, or has been, Chief Justice of a High Court; or has, for a period of not less than three years, held office as a judicial or expert member or is a person of ability, integrity, and standing, and having special knowledge of, and professional experience of, not less than 25 years in law, including five years of practical experience in the field of environment and forests. The qualifications to become an expert or judicial member at the NGT are also diluted, while giving greater bureaucratic control over the selection procedure. [35]

These rules are perceived as having potential to erode the independence of the NGT and thus part of a systematic attempt to weaken the institution.[36]

JURISDICTIONAL QUESTIONS

[33]Gitanjali Nain Gill, *The Power Struggles of the National Green Tribunal of India: The Rise and Fall?,* Asian Journal of Law and Society, 35,1-42(2018)

[34]Sahu, Geetonjoy *Ecocide by Design? Under Modi, Vacancies at the National Green Tribunal Reach 70%*,(2018) https://thewire.in/223978/ngt-political-apathy-vacancies/ (accessed 27 April 2018).
[35] Gill,*Supra* n.33 at 34
[36] *Supra* n.33

The NGT has both original and appellate jurisdiction which is amenable to wide interpretation from the provisions of the Act.[37]But allegation of overstepping of limits are often raised against the forum.

> NGT has been accused of overstepping its jurisdiction and taking actions for which it has not been empowered under the NGT Act. Three issues have frequently cropped up. First, does NGT have powers to take cognisance of a matter on its own and take action upon it-the power of suomotu. Second, can NGT review and direct change in rules and regulations-the power of judicial review. Third, can NGT take up any case which can be termed as "substantial question of environment?[38]
>
> Though some jurist maintain that *suo motu* powers is important for the proper functioning of the tribunal, doubts have been raised whether this power can be assumed by an interpretation of the provisions of the statue.
>
> Neither the MOEF nor the High Courts have been accommodative of the tribunal's assuming the power of judicial review invoking "ancillary and inherent powers necessary in the interest of justice".
>
> > The NGT's self-defined expansion of powers to include judicial review reflects further territorial extension at the potential cost of alienation and challenge by the High Courts that previously and exclusively enjoyed the exercise of these powers. For example, the Bombay High Court in *Central Indian Ayush Drugs Manufacturers Association v. State of Maharashtra* decided that the NGT does

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[37] Section 14 of the Act states thus: Tribunal to settle disputes. –

1. The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I.

2. The Tribunal shall hear the disputes arising from the questions referred to in sub-section (1) and settle such disputes and pass order thereon.

3. No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose:

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days.

[38] Yukti Choudhary, *Down The Earth* (June 15 2015) available *at https://www.downtoearth.org.in/coverage/tribunal-on-trial-47400*

> not possess power to adjudicate upon the vires or validity of any enactment in Schedule I or of subordinate legislation framed under such enactment. Increasing tribunalization is viewed by some High Courts as serious jurisdictional encroachment, thereby causing institutional confusion, collusion, and complexity.[39]

The liberal construction of "substantial question relating to environment" has also been criticized as the term itself is considered ambiguous. Based on this, the tribunal held that "the jurisdiction of the tribunal is thus, very wide. Once a case has nexus with the environment, the tribunal's jurisdiction can be invoked. Even cases which have indirect adverse impact on the environment can be considered by the tribunal. "However all commentators do not concur with this view.[40]

CONCLUSION

In the year that the National Green Tribunal has functioned, it has delivered several significant judgments on range of issues from across the country. This Tribunal is therefore an important step in the access to justice on matters concerning the environment and its mandate is much wider than earlier environmental Courts and Authorities and other such Courts. This court can rightly be called 'special' because India is the third country following Australia and New Zealand to have such a system. Today, the NGT stands at a crossroads. Without the replacement of qualified bench members and the formal renewal of support from key actors this novel experiment in bringing environmental justice to masses is bound to fail.

[39]Gill *Supr*a n.33 at 24

[40] Rajeev Dhavan, for example thinks that although environment is a part of Article 21 of the constitution, NGT cannot use it to strike down any legislation/order. *Supra* n.38

(4)

INVASIVE ALIEN SPECIES: BIODIVERSITY PROTECTION TOWARDS THE UNSEEN THREAT TO SUSTAINABLE DEVELOPMENT AND CLIMATE CHANGE

Gyanashree Dutta[1]

INTRODUCTION

In today's world, environmental protection is one of the key issues that draws everyone's attention. Less concern has been shown in the earlier days for environmental protection. Yet still, the ecosystem is impaired by several human activities, knowingly or unknowingly. 4,80,000 IAS are expected to have been introduced into the different environments. Sadly, due to climate change, their global distribution and influence is increasing. There has been an unprecedented pace of new introductions in recent years, as well as a rapid expansion of current biological invasions.

Invasive Alien Species (IAS) is the most underestimated threat to sustainable development and climate change today. Complexity gradually increases, and there is growing evidence of how climate change aggravates invasive species' already devastating effects. This in turn has adverse repercussions on ecosystem sustainability. By shifting native flora and fauna, including rare species, IAS can now dominate natural systems and can alter the structure and function of the ecosystem, and this affects the sustainability of the environment. In many regions of the world, these IAS expand at an increasing rate. In order to combat the IAS problem in India's climate change and sustainable development scenario, it is important to answer what are the various steps involved in developing a dedicated IAS law in the scenario of climate change and sustainable development. In order to integrate the law on IAS in the context of climate change and sustainable development, an adaptive management approach is thus, very important.

Climate change allows many alien species to spread and evolve and creates new ways for them to become invasive. Invasive action encourages an environmentally sound, cross-sectoral, and regional approach to invasive species. It refers to knowledge about processes or practices expected to have a significant impact on biodiversity conservation and ecologically sustainable use. The legal policymakers can no longer ignore the problem of Invasive Species,

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sustainable development, and climate change. Article 8(h) of the 1992 Convention on Biological Diversity (CBD) calls on contracting parties to "prevent, regulate or eradicate" alien organisms that threaten ecosystems, habitats or species .[2] Article 1(2) of the UNFCCC states that "Climate change means a change in climate that is directly or indirectly due to human activities that changes the composition of the global atmosphere, as well as the natural climate fluctuations observed over similar periods of time.[3] "Our Common Future", also known as the Brundtland Report (Report of the World Commission on Environment and Development, 1987), defines Sustainable Development as: Sustainable development is growth that meets the present needs, without undermining future generations' ability to meet their own needs.

Invasive alien species (IAS) are those species introduced from outside into a habitat or ecosystem that may threaten its biodiversity by direct predation on native species[4], modifying habitat[5] or introducing pests and diseases. Invasive species are considered a major threat to biological diversity second only to habitat destruction. [6] Article 2 of Convention on Biological Diversity (hereinafter CBD) explains it as all alien species which threaten ecosystems, habitats or species[7].Under the IUCN System, "Invasive aliens species means an alien species which becomes established in natural or semi-natural eco-systems or habitat; is an agent of change, and threatens native biological diversity"[8]. They also encompass those alien species which spreads outside the realm of human control. The introduced species can offer economic and socio-cultural benefits, especially in sectors such as agriculture and forestry.[9] Alien species may compete with native species through predation, resource competition, aggression or hybridization[10]. Today, climate change and Invasive Alien Species (IAS) are two of the major

[2] Convention on Biological Diversity, Article 8(h), available at https://www.cbd.int/doc/legal/cbd-en.pdf

[3] *https://unfccc.int/resource/docs/convkp/conveng.pdf*

[4]Carol Brown, "Tilapia and Environment", 4(2) Ted Case Studies, Case No.206 (1995) available at http://www.american.edu/TED/perch.html

[5] Clare shine, Nattley Williams, and Lothar Gundling, A Guide to Designing Legal and Institutional Frameworks on Aliens Species (IUCN 2000). See also UN Environment Programme Fact-sheet on Yellow-eyed penguin, available at http://www.unep-wcmc.org/species/data/data/species_sheets/yellowwey.html

[6] *Ibid*.

[7]*Ibid.* The explanation covers two categories of alien species: The first one corresponds to the meaning of invasiveness, which includes alien species that escape from human control, go beyond the intended physical boundaries and cause environmental damage. The second one covers alien species that can be controlled, but capable of damaging native ecosystems. For example, alien tree species in monoculture plantation that poison ground water by releasing resins.

[8] See generally *Guidelines for the Prevention of Biodiversity Loss due to Biological Invasion*(IUCN, 2000)

[9] Jeffrey McNeeley J, "An Introduction to Human Dimensions of Invasive Alien Species" in Jeffrey A, Mc Neely (ed.), The Great Reshuffling, Human Dimensions of Invasive alien Species Help Feed the Global Economy (2001).

[10] Randall J., Non-Governmental Organization Perspective on Invasive Species Management. Paper presented at the GISP workshop on Management and Early Warming Systems, Kuala Lampur, Malaysia, (22-27 March, 1999).

threats to biodiversity. This, in turn, is posing a serious threat to the sustainable development. The complexity of these two interactions is gradually increasing, and there is growing evidence that climate change is exacerbating the already devastating effects of the invasive species. In the context of climate change and sustainable development, the existing legal structure for IAS mitigation is inadequate in nature.

INTERACTION BETWEEN IAS, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT – A GROWING GLOBAL THREAT

Environmental change stressors like climate change and instability and land-use transition are key drivers of change in the environment. Invasive species, or non-native species that cause damage or impact to human health, also cause significant environmental changes and the services that they provide. There is little understanding of the effects of climate change on invasive species and their combined effects on biodiversity, and these changes differ with environmental and species characteristics on a regional basis. In some cases, climate change may create additional incentives for invasion or create unsafe conditions for some invasive species.[11]

Globalization has facilitated the movement of human beings and products around the world over the last few decades, leading to a rise in the number of species introduced outside of their natural ranges.[12] Climate change induced extreme climate events like hurricanes, droughts and floods will move IAS to new areas and reduce habitat resistance to invasions. Climate change will encourage the development of many new incursions, with its unpredictable results and alter the already established geographic range of invasive species. The interconnection between climate change events and IAS is not immediately visible.

The biggest issue in relation to climate change, IAS and sustainable development is that there is no proper legislation that governs this issue. Legal politicians have for quite a long time neglected this issue too. Today, there is broad agreement among the scientific community that global climate change is a reality and will have many biological impacts.[13] The scientific

[11] Effects of Climate Change on Aquatic Invasive Species and Implications for Management and Research, National Center for Environmental Assessment Office of Research and Development U.S. Environmental Protection Agency Washington, DC 20460

[12] International Union for Conservation of Nature (IUCN), Issues Brief, November 2017, available at iucn.org.

[13] Global Strategy for Addressing the problem of Invasive Alien Species, A. McNeely, A result of the Global Invasive Species Programme (GISP), 7 August, 2000.

community is also of the view that the problem of IAS and climate change will have a severe impact on the sustainable development as a whole.

Invasive species kill livelihoods, cause malnutrition, threaten entire countries and regions economic prosperity and increase the loss of biodiversity. Urgent action is needed if the UN's vision to achieve food security and sustainable agriculture, economic growth and prosperity, and protect our habitats, is to be achieved.[14] Invasive species disproportionately affect vulnerable communities in poor rural areas, especially in the developing countries, which rely for their livelihoods on natural resources, healthy ecosystems, trade, and tourism. Invasives drive food insecurity and hinder continued development investments.[15]

JEOPARDIZING THE SUSTAINABLE DEVELOPMENT GOALS

The international community has set itself the goal to reach all SDGs by the end of the next decade, but many of these will not be accomplished unless substantial progress is made in dealing with invasive species. A specific target was set in SDG 15 to "introduce measures to prevent the introduction of invasive alien species and substantially reduce the impact by 2020. In 2015 world leaders embraced seventeen Sustainable Development Goals (SDGs). The risk posed by invasive species has a major impact on almost all SDGs, making them a key factor in preventing progress towards the global agenda for sustainable development. Some of the serious impacts are:

1) Higher production costs and reduced yields lead to lower incomes and increased poverty (SDG1). Invasive species such as Tuta absoluta, Fall Armyworm or Parthenium have been known to reduce crop yields by more than 90%, with devastating results for smallholder farmers. This in turn reduces the sustainability of the ecosystem.[16]
2) Decreased crop yields and higher food prices directly affect food security (SDG2). Staples including maize and rice are seriously threatened by 'fall Armyworm' spread. The 2016 Tuta absoluta outbreak in Nigeria made tomatoes – a nutritious staple – unaffordable to most of the population.[17]

[14]Rangi Dennis,"Invasive Species:The Hidden Threat to Sustainable Development", available at https://www.invasive-species.org/wp-content/uploads/sites/2/2019/02/Invasive-Species-The-hidden-threat-to-sustainable-development.pdf
[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid*.

3) Many health issues occur in humans due to IAS. Parthenium can cause respiratory problems and dermatitis. Floating water hyacinth mats are a mosquito habitat which increases the spread of mosquito borne diseases. [18]

4) The invasive species disproportionately affect children and women (SDG4 and SDG5). In many countries, weeding is still done by hand, and is often left to women and children.

5) Invasive species reduce water quality and effect on aquatic biodiversity (SDG6 and SDG14). Freshwater systems are threatened by aquatic weeds including Salvinia molesta, water hyacinth, and Pistia stratiotes.

6) IAS also affect the ecosystem and the biodiversity (SDG13 and SDG15). IAS leads to desertification and increases vulnerability to the impacts of climate change in ecosystems and natural environments. They are the second major biodiversity hazard after habitat loss and can reduce the resources of native plants by up to 90%.[19]

HARMING THE ECONOMIC GROWTH

SDG8 is aimed at promoting sustainable economic growth. Worldwide, IAS harm is projected at over US$ 1.4 trillion per year, accounting for around 5 per cent of the global economy. [20]

DISTRACTING BIODIVERSITY AND ECOSYSTEMS

SDG15: Life on Land strives to stop biodiversity losses and to preserve and avoid endangered species from extinction. By 2020, it aims to implement measures to prevent the introduction and substantially reduce the impact on land and water habitats of invasive species and to control or eliminate priority species.

Invasive species represent a major cause of biodiversity loss. Analysis of the IUCN Red List reveals that they are the second most common threat to the extinction of a species, and the most common cause in mammals, reptiles, amphibians.[21]

CONFRONTING CLIMATE CHANGE

In every nation on every continent, climate change is now visible, destroying economies and impacting lives. SDG13 projects at "taking serious action to tackle the influence of climate

[18] *Ibid.*
[19] *Ibid*.
[20] *Ibid.*
[21] *Ibid*.

change." Invasive species are a major factor in exacerbating the impact of climate change that prevents population from dealing with its consequences and reducing resistance. Climate change encourages the spread and development of many non-native species and provides them with new opportunities to become invasive, thus reducing habitat resistance to biological invasions.

HOW TO RESPOND WITH THE CRISIS?

There are three possible ways. They are:

1) **Prevention: -** This involves developing and implement biosecurity policies to prevent invasive species from entering and spreading and raise awareness of possible environmental threats.

2) **Early detection and rapid response: -** This includes capacity building to develop and implement surveillance and emergency response plans for identifying and removing new invasions.

3) **Proper control :-**This includes scaling up current invasive species management solutions; implementing policy control options; and ensuring that those living in rural areas have access to best practices and locally oriented approaches, and are actively involved in their implementation.

Thus, incorporating aspects of biosecurity and IAS management into progress work could have a vital impact in reducing the threat to sustainable development from invasive species.

The effects of climate change are not yet fully understood despite exhaustive study. [22]A 2010 World Bank sponsored study revealed at least three possible direct synergies between the two.[23] They are:

1) First, climate change would offer new ways for invasive species to compete with native species. Invasive species are usually more adaptable than native species for reasons that are not yet understood.[24]

[22] Robin Kundis Craig, "Stationarity Is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law, Harv. Envtl. L. Rev. 9, 38 (2010).
[23] A. Strifling David, "An Ecosystem – Based Approach to Slowing the Synergistic Effects of Invasive Species and Climate Change",available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1191&context=delpf
[24] Robert L. Glicksman, Ecosystem Resilience to Disruptions Linked to Global Climate Change: an Adaptive Approach to Federal 87 NEB. L. REV. 833, 848 (2009) Land Management.

2) Secondly, some philosophers and conservationists supported the idea of "assisted migration" by which humans would enable the physical movement of animals whose continued existence is threatened by changing environmental situations to a less dangerous place.[25]

3) Thirdly, the emergence of invasive species is likely to increase the vulnerability of an ecosystem to climate change-related stressors and lessen its potential for carbon sequestration.[26]

BATTLING THE ISSUE OF IAS IN THE CONTEXT OF CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT: THE INDIAN CASE

Management strategies spanning decades have yet to generate any meaningful ground-level results. The whole scenario is alarming considering the worsening impact that climate change could have on the spread of IAS. Compounding on the legal front the difficulties in handling IAS is the lack of a system of law in India that addresses multiple challenges faced by invasive species through varied landscapes.[27]

Presently there is no comprehensive legislation to deal with invasive alien species[28]in India, though there are some policies and regulations spanning almost a century having bearing on the issue[29]. India's national efforts have gained momentum in the past decade owing to her obligations under various international instruments especially the CBD[30]. But still her management paradigm related to the issue is more or less fragmented[31]. The legal response to

[25] Alejandro E. Camacho, Assisted Migration: Redefining Nature and Natural Resource Law Under Climate Change, 27 YALE J. ON REG. 171, 173 (2010)

[26] Stanley w. Burgiel, Adrianna A. Muir, Invasive Species, Climate Change and Ecosystem-Based Adaptation: Addressing Multiple Drivers of Global Change 4 (2010)

[27] *Ibid.*

[28] National Biodiversity Strategy and Action Plan (MOEF 2008), p.13

[29] "Bioinvasion and Global Environmental Governance: The Transnational Policy Network on Invasive *Alien Species* and *India's Actions* on IAS," available at *https://www.cbd.int/invasive/doc/legislation/India.pdf*.for detailed discussion

[30] See India's Fourth National Report to the Convention on Biological Diversity (New Delhi, MOEF, 2009),p 63.

[31] The strategy for invasive species management involves mainly regulation of introduction of exotic living materials, their quarantine clearance and release for research and direct use. In general, MOA deals with cultivated plants, fish and farm livestock including poultry. It has projects on eradication and management of invasive weedy plants, pathogens, pests and harmful fish. The MOEF deals with all forest materials and wild animals. It also supports and co-ordinates programmes on eradication/control / utilization of such species in different forest areas and conducts material surveys on their spread, prepares reports on damage caused and undertakes restorative measures. India's Fourth National Report to the Convention on Biological Diversity, acknowledged the need "to develop a unified national system for regulation of introduction and management of all IAS across jurisdiction of all concerned ministries and relevant sectors. India's Fourth National Report to the Convention on Biological Diversity (MOEF 2002), p.63.

the issue still date also reflects the lack of integration. More than a dozen existing national legal instruments have bearing on matters connected with invasive species problem to lesser or greater extent[32].

PLANNING A STEADFAST LAW ON IAS: THE FIRST STEP

FUNDAMENTAL PRINCIPLES, METHODS AND INSTRUMENTS:

Examination of relevant international agreements and state practices shows the common methods, legal principles and tools that are important for invasive species management.[33] Such seasoned legal and policy resources provide valuable insights into the creation of new legal structures in other jurisdictions.

IUCN acknowledges that:

> "A systematic, legal and systemic response to threats from alien invasive species by each country is a prerequisite for the protection of biological diversity at national regional and global levels. Effective reaction steps rely on the availability of national legislation providing for both preventive and remedial action. These legislations should also create specific administrative accountabilities, detailed organizational requirements, and proactive responsibility for actual and potential threats from alien invasive species, which should be incorporated."[34]

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[32] Some important Central legislation on the subject are,
The Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009 , The Plant Quarantine (Regulation of Import into India) Order, 2003 ,The Destructive Insects and Pests Act, 1914 and amendments, The Plants, Fruits & Seeds (Regulation of Import into India) Order (1989) (PFS Order 1989) ,Livestock Importation Act, 1898 and the Livestock Importation (Amendment) Act, 2001 ,Environment Protection Act, 1986 ,The Biological Diversity Act, 2002 Indian Forest Act, 1927 ,Wildlife (Protection) Act, 1972 ,Forest (Conservation) Act, 1980
State level legislative efforts include: The Madras Agricultural Pests and Diseases Act 1919
The Travancore Plant Pests and Plant Diseases Regulation 1919
The Coorg Agricultural Pests and Diseases Act, 1933
The Patiala Destructive Insects and Pests Act, 1943
The Bombay Agricultural Pests and Diseases Act, 1947
The Rewa State Agricultural Pests and Diseases Act, 1947
The East Punjab Agricultural Pests, Diseases and Noxious Weeds Act, 1949
The East Punjab Agricultural Pests, Diseases and Noxious Weeds Act, 1949 as extended to Himachal Pradesh
The Assam Agricultural Pests and Diseases Act,1950

[33] Section 2, IUCN guide, *supra* n.6

[34] IUCN Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species (IUCN, Gland Switzerland, 2000).

Therefore, legal systems designed for this reason should have complementarities in place to promote the same. Prevention of IAS in the climate change scenario appears insufficient within the existing legal structure in India. Although there are some quarantine guidelines, a constructive protective strategy does not seem to notify the system as a whole. Precautionary approach guides decision making in cases of scientific uncertainty[35]. Principle 15 of Rio Declaration which formulates the approach lays down that "where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation"[36]. The inherent scientific uncertainly and difficulty in making accurate predictions about invasiveness of alien species makes it a fit case for application the principle[37]. The approach justifies application of risk analysis to all activities that propose to introduce an alien species[38].

Also important is polluter pays Theory or cost recovery.[39] This requires polluters to bear the full cost of environmental damage caused by their actions, which may include remedial or cleaning up costs. There are many "legal resources" designed to turn these methods into real practice.[40] The Convention on Biodiversity aims to use Environmental Impact Assessment, a tool for general environmental management, for the managing of biodiversity in common and invasive alien species in particular.

It is a formal process or instrument through which potential threats to the environment posed by a project are foreseen and discussed earlier in the planning and design of the project.[41] The process should take into account considerations such as long-term and transboundary effects

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35 Principle 16 of the Rio Declaration. See also Agne Sirinskiene, "The Status of Precautionary Principle: Moving Towards a Rule of Customary Law", 4(118) *Jurisprudence*, 349-364 (2009)

36 Rio Declaration, principle 15. Precautionary principle is being adopted by several international instruments, including the CBD, the Bio-safety Protocol, and the SPS Agreement (Article 5.7 in a limited way). The FAO Code of Conduct on Responsible Fisheries also recommends such an approach

37 IUCN Guide supra n.2 at 34. Many national laws expressly or impliedly inculcate the principle. For example, New Zealand's legislation on intentional introductions provides that all persons exercising function, powers and duties under the Act must take account of the need for caution in managing adverse effects where there is scientific and technical uncertainly about those effects (Hazardous substances and New Organism Act of 1996)

38 Ibid.

39 The Trail Smelter Arbitration between United States and Canada is a prominent example where there was recourse to the principle. See Trail Smelter Arbitration (United States v. Canada) Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)

40 Bean M., "Legal Authorities for Controlling Alien Species: a Survey of Tools and their Effectiveness", in Sandland et.al. (eds), Invasive Species and Biodiversity Management (Kluwer Academic Publishers, 1999)

41 Principles of Environmental Impact Assessment Best Practice(International Association for Impact Assessment,1999)

of such species, alternative approach, possibilities of regular analysis and monitoring, etc. in the case of alien species problem.[42]

ASSIMILATING THE LAW WITH ADAPTIVE CONTROL APPROACH: THE SECOND STEP

It is essentially a natural resource management model based on the premise that a systematic, iterative approach to environmental management can be called for with limited knowledge about natural systems.[43] The concept was developed by C.S. Holling and Walters. Its nature is an iterative, gradual decision-making process based on a continuous process of tracking decision-making results and adjusting decisions accordingly.[44]

As a resource management model, adaptive management is very distinct from conventional resource decision-making approaches, where little testing, learning or modification is performed after a first choice has been made. Thus, it is learning-by-doing.[45] The added benefit of adaptive management, therefore, lies in the ability to help guide policymakers' decisions that must tackle complex issues with a high degree of uncertainty.[46]

Thus, climate change and sustainable development provides an impetus and prospect to 'scale up' adaptive management values, structuring them into the fabric of law and control in a variety of new resource management frameworks especially relating to Invasive Alien Species.

CONCLUSION

Invasive Alien Species (IAS) is the most underestimated threat to sustainable development and climate change today. It follows from the discussion that an adaptive approach to management led by a proper legal system will help to reduce the issue of IAS and sustainable development due to climate change. In order to create awareness among people, more and more training and awareness programs need to be coordinated. A new comprehensive federal law will enable the legislators and policymakers to reduce this problem. In order to look into the future, a

[42] IUCN Guide, *supra* n.6 at 36

[43] Making Good use of Adaptive Management White Paper #1104 (Center for Progressive Reform, April 2011), p.5

[44] Biologist Simon Levin defined adaptive management concisely as "maintaining flexibility in management structures and adjusting rules and regimes on the basis of monitoring and other sources of new data". Simon Levin, FRAGILE DOMINIONM (1999), p.200 cited in Ruhl supra n.285

[45]Environmental Law Institute, *Legal and Policy Tools to Adapt Biodiversity Management to Climate Change* (Resource Manual Final Draft ,2010) at 11.

[46]Joseph Arvai et al, Adaptive Management of the Global Climate Problem": Bridging the Gap Between Climate Research and Climate Policy", 78 Climate Change 217-225, 218 (2006).

sustainable development approach towards combatting the issues of IAS and climate change is very important. An ecosystem-based approach would be a low-risk alternative to counter invasive species and climate change-induced impacts, although we are uncertain as to the exact extent of those impacts. Therefore, the incorporation of IAS into climate change and sustainable development policies is very crucial. Thus, protecting the biodiversity from Invasive Alien Species towards the unseen threat to climate change and sustainable development is the need of the hour.

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(5)

CORPORATE LIABILITY IN RELATION TO ENVIRONMENTAL CRIME: A LEGAL APPROACH

Shaji.M[1]

INTRODUCTION

Human beings have utilized the various environmental resources in countless and unprecedented manners, resulting into many violations and environmental crime, which has adversely affected the ecosystem and environment, including flora and fauna and human beings[2]. Many corporations have been accused of making public nuisance or being an offender under the law of torts. Various environmental pollution (such as air and water pollution), wildlife, hazardous waste and specified plant and animal items dealing crimes come under the umbrella of environmental crime; hence, environmental crime is very complex and indistinct terminology. Many industries, such as manufacturing industries (sugar, caustic soda, pesticides, dyes and dye intermediate, cement, paper, leather tanneries, etc.), processing industries (electroplating, stone crushing, jute, synthetic and rubber, etc.) and refineries (oil and petrochemical) industries, which are engaged in the various activities, can potentially harm the environment and ecosystem, which a major cause of pollution in India.

The environment is becoming less capable of sustaining the growing impact of our economic development. At the same time providing compensation to the victims of the environmental harm is directed by tortious liability. The developmental process of corporate liability can be visualized through some ground breaking court cases and judgements

CONSTITUTION AND ENVIRONMENT

Moreover, every individual has certain fundamental right to live in pollution free environment. The individuals residing near polluted air, water or land frequently suffered from a high stress

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[2] Hodas, D. R. (1989). Private actions for public nuisance: Common law citizen suits for relief from environmental harm. *Ecology LQ*, *16*, 88

level. Such conditions allude towards the concern about the health of people and associated economic burden[3].

The Indian Constitutions has given certain fundamental rights to each and every Indian citizen, such as the right of enjoyment of pollution free air and water comes under Article 21; state's duty to "raise the level of nutrition and the standard of living and to improve public health" under Article 47 and directive principles of state policy, which directs respective states to improve the public's wellbeing and standard of living under Article 48A .The state has an additional duty to safeguard the environment, including forest and wildlife protection in the directive principles of states under Article 48-A while under Section 51-A, every citizen has a duty towards safeguarding and taking care of the natural environment. The purpose of all the fundamental rights is that the state should provide an environment, i.e., pollution free environment to live. However, in case of failure to do so, any citizen can approach the court and register a PIL against the polluting corporate or authority. One such case is the *Vellore citizens Welfare Forum* vs. *UOI and others*[4]. In this case, the Supreme Court of India directed the polluting industries to follow and maintain the CPCB standards so as to provide pollution free environment under article 21. The court used both precautionary and polluter pays principle to impose fine of Rs.10000/- on each polluting tanneries, situated in the North Arcot Ambedkar districts, Tamil Nadu.

JUDICIAL APPROACH

The corporate criminal liability has been introduced in many developed and developing countries, including India. The developmental process of corporate liability can be visualized through some ground breaking court cases and judgement which are discussed below.

The nightmare and most devastating case of corporate negligence is the Bhopal Gas tragedy and it is the largest civil suit in the legal history of India, prior to this catastrophe, there were few incidents from the Union Carbide pesticide plant, which were totally neglected, such as worker killed while handling phosgene (December, 1981), 25 workers hospitalized due to leakage of chlorine, MIC and hydrochloric acid from pipes (February, 1982) and a massive chlorine gas leak that affected 16 workers and people from the neighbourhood (December, 1982). In view of all these cases, the state legislative assembly had addressed the risk associated

[3] Gill, D. A., Picou, J. S., & Ritchie, L. A. (2012). The Exxon Valdez and BP oil spills: A comparison of initial social and psychological impacts. *American Behavioral Scientist*, *56*(1), 3-23.
[4] AIR 1996 S.C. 2715

with such plant operation in Bhopal. But, the investigation committee concluded that there was no risk in operating the plant and it is safe[5].

Leak of poisonous methyl isocynate (MIC) gas from the industrial unit had occurred on 2nd and 3rd December 1984 in Bhopal, reported that 41 tons of MIC gas escaped from the Union Carbide plant with a very feeble chance of escape from affected area and poor knowledge about the MIC antidote. Bhopal gas tragedy killed not only human beings but also animals and responsible for the hazardous effect on plants and other living creatures. In the case of *Union Carbide Corporation* vs. *Union of India* [6]*etc*, the Supreme Court of India started the doctrine of absolute liability trend without any exemption. The court disposed the case with the judgement saying that "an enterprise is strictly and absolutely liable to reply every individual person who is affected by the accident and such risks are not subjected to any exemption.

Another industrial disaster, which was the oleum gas leakage case of Delhi. In the case of *M.C. Mehta & Anr. Etc.* vs. *Union of India & Ors. Etc.* 17 February, 1986, a major leakage of oleum gas had occurred on 4th and 6th December 1985 from one of the industrial units of Shriram Foods and Fertilizers industry, engaged in the production of caustic and chlorine. The industrial plant failure happened due to a series of mechanical and human errors, which had led to hazardous impact on human health and immediate environment. The Supreme Court judgement of the above particular case has brought the doctrine of absolute liability into Indian judiciary system. In this case, a Public Interest Litigation (PIL) was filed by M. C. Mehta, regarding the compensation with a plea emphasising on stopping the manufacturing plant to restart. However, the Supreme Court of India had decided to grant the permission to restart the industrial plant with certain sets of rules and regulation with a bank guarantee to furnish compensation claims of worker or persons living in a neighbourhood. The court also directed that the court permission shall be withdrawn if another gas leak happens in the future. This case had brought the doctrine of absolute liability, which establishes that any company dealing with either production, storage or both are absolutely liable for injuries, which are the result of the escape of such dangerous substances into the environment[7].

Other cases where the Indian judiciary system has tried to control and identify the corporate minds and tried to implement the corporate criminal liability. In all these cases the directing

[5] Bisarya, R. K., & Puri, S. (2005). The Bhopal gas tragedy—a perspective. *Journal of Loss Prevention in the Process Industries*, *18*(4-6), 209-212

[6] AIR 1989 SCC (2) 540

[7] Dari, S. S. (2012). A Study of Corporate Social Responsibility, Mass Tort and Environment Protection. *J. Educ. & Soc. Research*, *2*, 133.

authority was held responsible on behalf of corporation and were prosecuted in cases where the corporation was not charged. One such case is the *U.P Pollution Control Board* v. *Modi Distillery*[8], where the industrial unit discharged its highly noxious and polluted trade effluents into a local drain and polluted the nearby river. The company was held responsible for the violating the Water (Prevention and Control of Pollution) Act of 1974. The Supreme Court of India held responsible the manager of the company for the company's act because the company cannot be prosecuted for the act. The court said that "there was a technical fault on the part of the company to furnish the requisite information called for by the Board directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit". Although, the complaint was defective, but can be fixable and the person in-charge for the conduct of the company should be prosecuted.

Hence, in such cases the court penalizes the corporation for creating nuisance. One such case is the *Anil Hada* v. *Indian Acrylic Limited* - the Supreme Court of India held responsible the company's director under the section 138 for violating the law. Hence, the corporate criminal liability has rapidly grown in India due to the landmark verdict from the Indian judiciary. Moreover, corporate criminal liability is the one branch of law that ensures that the corporation should be held accountable for their illegal activities. However, there is another problem pertaining to moral issues that are involved in the case of environmental crimes.

POSITION IN USA, UK, NIGERIA-A COMPARATIVE STUDY

Other countries, such as United States of America and United Kingdom, the judicial system can hold any corporation liable for the intent of crime by adopting the doctrine of attribution towards, hence any corporation can be liable for acts that are committed by the 'directing minds', such as directors and managers, whose action are proved to be beneficial for the company development. the case of *U.S*. v. *CITGO,* pertaining to the corporate environmental crime and stated that the CITGO Petroleum and Refining Corporation was prosecuted after seven years of initial conviction for violating the Clean Air Act in United States. Further the study also concluded that the Crime Victim's Right Act might provide justice for environmental crime and their victims[9].

[8] AIR 1128, 1987 SCR (3) 798

[9] Ozymy, J., & Jarrell, M. (2015). Corporate Environmental Crime and Environmental Victimization: Exploring [New] Legal Precedents for Securing Recognition and Restitution for Environmental Justice Communities. *Environmental Justice*, *8*(2), 47-50.

The relationship between 'race, ethnicity, poverty and penalty outcomes' regarding the corporate environmental crime and its prosecution in the United States and studied total 245 cases from 2005 – 2010. They reported that fine imposition did not depend upon the demographics of the victims pertaining to environmental crime. This study also pointed out that the severity of the crime is the best predictor for imposing penalties on the corporations that were prosecuted for engaging in environmental crime.

The scope of the corporate criminal liability in Nigeria with respect to the principles and laws for determining the liability of the corporation towards different crimes. The researcher proposed and set the procedural steps in the cases corporate crime and emphasized that "plea bargaining should be greatly encouraged." The study also concluded that monetary fines, termination and loss of licence of the company and seizure of the goods must be preferred over the imprisonment of the concerned authority in case of corporate crimes.

CONCLUSION

The corruption at governmental and non-governmental level has initiated and promoted many scandals which include corruption and bribery in many environmental projects. In India, the most cases under the corporate criminal liability are disposed of without any stringent punishment and the punishment that is imposed is monetary only. The scams and the environmental crime committed by the corporate sector have shed some light towards the challenges faced by the Indian judicial system at multiple levels, depending upon the magnitude of the crime, powers and reach of the corporate sector as compared to any individual committing crime. However, pointed out that the compliance towards judicial also depends upon the size and sophistication of companies and industry characteristics, such as the location of the industry. Once corporation crime comes and held for guilty for the environmental crime, then the imposition of penal on such companies becomes another problem since corporations are supposed to do not possess their own mind. Therefore, corporations were not counted as liable for environmental crime for a long time owing to the requirement of "*mens rea* or the intention to commit the offence" thereby making it difficult for imposing any imprisonment, fine or both. However, corporations had lost their immunity owing to the certain Supreme Court judgements, which held corporation and its officials liable for the committing an

environmental crime. Any corporation can be held responsible for the offences with the help of the doctrine of attribution, which involves *'mens rea.*

The moral issues in environmental crime and pointed out that the problem of harmonizing the regulatory field with criminal environmental legislations whenever the endeavour is more superficial. The study also pointed out that the effective use of criminal sanctions can be useful for a felony conviction and imprisonment in case of environmental crimes. The Judicial process and system should be able to apply the appropriate administrative, civil and criminal sanctions against both types of offenders, i.e., individual or corporation. However, there are considerable differences between the substantive and criminal procedural laws and its implementation with respective to liability. The present corporate criminal liability has not been effective in addressing the growing water pollution in India. Requirement of reform measures in the corporate criminal liability to make it more effective in reducing the environmental crime.

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CHAPTER 2

GENDER JUSTICE AND FEMINIST JURISPRUDENCE

(1)

CHANGING PERCEPTIONS TOWARDS LGBT IN INDIA

Prof. Mihir Dash[1]

Anusha K.[2]

INTRODUCTION

Many social scientists have seemed to regard nihilism only as a minor inconvenience[3]. However, it is only when the rights of the majority are violated, that the need for justice is seen by many. The Supreme Court of India has given a new dimension to the Right to Life guaranteed under Article 21 of the Constitution which not only includes mere physical rights but also an ambit of human dignity[4]. The recent landmark judgement of Navtej Singh Johar v. Union of India[5] which decriminalised consensual homosexual sex and repealed Section 377 of the Indian Penal Code which terms homosexuality as an 'unnatural offense,' as it violates the fundamental rights of Articles 14 and 21 that guarantee Right to Equality, Right to Life, and Right to Privacy. Another dimension of the landmark judgement was the recognition and gender identification of the transgender community ensuring equal civil rights such as the right to vote, right to marry, right to education, and several other rights enjoyed by the citizens of India. The Supreme Court judgement on decriminalising homosexuality and identifying transgender community can be seen as a success story about the ability of the Constitution of India to adapt itself to changing times and provide justice to every single Indian, regardless of caste, class, creed, gender or sexuality.[6]

However, amidst the celebrated judgment, the Government of India has taken a regressive step in 2019 by introducing the Transgender Persons (Protection of Rights) Bill[7], which has been heavily criticised on the grounds that it was violative of the landmark judgement of NALSA v. Union of India[8]. The bill violates the Right to Privacy[9] under Article 21 of the Constitution,

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[3] Strauss L, Natural Rights & History (University of Chicago Press 1953) https://philpapers.org/rec/STRNRA-3
[4] Maneka Gandhi v. UOI 1978 2 SCR 621
[5] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[6] Dixit P, 'Navtej Singh Johar V Union Of India: Decriminalising India'S Sodomy Law' [2019] The International Journal of Human Rights https://doi.org/10.1080/13642987.2019.1690465
[7] Transgender Persons (Protection of Rights) Bill,2019
[8] National Legal Services Authority v. Union of India [2014] 5 SCC 438
[9] Justice K.S. Puttaswamy V. Union of India (2017) 10 SCC 1

whereby it requires a transgender to obtain a certificate from the magistrate which can be obtained only after a sex reassignment surgery[10] which was directed not to be mandatory in the NALSA case. The introduction of the bill did not deliver justice to the community as assured by the judiciary in its decisions. An expected consequence of the Navtej Singh Johar judgement as guaranteed and upheld by the judiciary was identification of the transgender community as the third gender with freedom to enjoy all the rights enshrined in the Constitution. The transgender community has always been considered as the most insignificant community in the Indian subcontinent and has been deprived of basic rights enjoyed by every citizen for several decades now.

HISTORY OF HOMOSEXUALITY IN INDIA

Although homosexuality has a long history in India, the gay movement is relatively nascent. Until recently, most homosexuals in India did not have many social and cultural avenues to express their sexuality. This is changing now, thanks to greater awareness and education. Religion has played a significant role in shaping Indian customs and traditions. While homosexuality has not been explicitly mentioned in the religious texts central to Hinduism the largest religion in India, some interpretations have been viewed as condemning homosexuality. Scholars differ in their views of the position of homosexuality within India's main religious traditions. Some scholars argue that homosexuality was both prevalent and accepted in ancient Hindu society. The Manusmriti, the oldest codes of conduct that were followed by Hindus, included mention of homosexual practices, but only as something to be regulated. Though homosexuality was considered a part of sexual practices, it was not always well-accepted. There were punishments prescribed for homosexual behaviour. In the Dharmashastras, male homoerotic activity was punished via a ritual bath or the payment of a small fine.

With the advent of Islam, there was not much of a change. Though Islamic theologians explicitly condemned homosexuality as a serious crime and held that the Prophet advocated the severest punishment for sodomy, Islamic culture in India also had a Persian influence, wherein homoeroticism is celebrated in Sufi mystical poetry, with the relationship between the divine and humans expressed in homoerotic metaphors.

Unlike the West, the Hindu society does not have the concept of 'sexual orientation' that classifies males on the basis of who they desire. However, there was a strong, ancient concept

[10] section 2(k), Transgender Persons (Protection of Rights) Bill,2019

of third gender, which was for individuals who have both strong male and female elements in them. According to Sanskrit texts such as the Naradasmriti and the Sushruta Samhita, this third gender includes what is called contemporarily as homosexuals, transgenders, bisexuals, and the intersexed (LGBTI). Third genders were described in ancient Vedic texts as males who have a female nature – referring to homosexual men or feminine-gendered males. The gender/sexual role of third genders has for long been predominantly associated with receiving penetration from men, just like the gender/sexual role of manhood has been to penetrate men, women, or third genders.

India's fluid gender and sexual norms did not fit into the strict Victorian conceptions of appropriate sexual behaviour. As the British Empire grew more powerful in the Indian subcontinent in the early 19th Century, so did their ideas about culture, society, and law. Viewing local notions of sexuality as barbaric, British officials imposed Western, Judeo-Christian sexual norms on colonial subjects. Before the British, homosexuality was not illegal in India. However, by 1861 the British had consolidated their rule over India and were enforcing Section 377 of their penal code, which could punish those who committed sodomy or other homosexual acts with life in prison. When India gained its Independence in 1947, this statute remained, becoming Section 377 of the Indian Penal Code. In fact, Section 377, or a similar statute, was imposed in forty-two former colonies, including Pakistan, Bangladesh, and Sri Lanka. Nepal, which was never formally colonised by Great Britain, also adopted anti-sodomy laws based on India's British-influenced penal code.

RECRIMINALISING AND DECRIMINALISING HOMOSEXUALITY

There have been several ups and downs in the long nine-year battle to repeal Section 377 and decriminalise homosexual activity in India.

The first petition concerning this matter was filed by the Naz Foundation in 2004. Although the plea was dismissed in the Delhi high court due to lack of locus standi, the Supreme Court held that the provision was violative of Sections 14, 15, and 21 of the Constitution. The learned judges while delivering the landmark judgment in the Naz Foundation case went on to quote that "The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as "deviants' or 'different' are not on that score excluded or ostracized. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and nondiscrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so

passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.**"**[11]

Later in 2013, a separate writ was filed in the High Court of Delhi challenging the previous judgment contending that although the concept of sexual intercourse only for the purpose of conception was outdated, at the same time an act of sexual intercourse between anyone other than a male and female was against the order of nature. A divisional bench read down the provision of Section 377 and observed that a minuscule fraction of the country's population constitute lesbians, gays, bisexuals, or transgenders, and in more than 150 years, less than 200 persons have been prosecuted for committing offences under Section 377 IPC, and this cannot be made sound basis for declaring that Section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.[12]

Finally, in the year 2018 the Supreme Court entertained another petition seeking to declare 'right to sexuality and sexual autonomy' and 'right to choice of a sexual partner' to be part of the Right to Life guaranteed under Article 21 of the Constitution of India, and further to declare Section 377 of the Indian Penal Code to be unconstitutional. A bench of five learned judges read down the provision of Section 377 of IPC and stated that the members of the LGBT community like any other citizen have full range of Constitutional Rights and Liberties guaranteed by the Constitution. While overruling the previous judgment that criminalised consensual homosexual sex between two adults, the Court asserted that "The choice of whom to partner, the ability to find fulfillment in sexual intimacies, and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation."[13]

COMPARATIVE ANALYSIS OF THE TRANSGENDER RIGHTS PRE- AND POST-THE NALSA JUDGEMENT

- Pre-NALSA Judgement

  In the recent years, there has been a substantial effort to uplift the transgender community and progress made towards recognition of the transgender as the third gender. However, the

[11] Naz Foundation v. Govt of NCT of Delhi 2009 (111) DRJ
[12] Suresh Kumar Kaushal and Another v Naz Foundation and Others (2014) 1 SCC
[13] Navtej Singh Johar and another v. Union of India and Others (2018) 10 SCC

community is still battling for basic and fundamental rights enjoyed by individuals especially the right to be recognised without medical certification and defy the conventional system of categorising gender into male and female based on genitalia. The history of transgender and transsexuality in India can be traced back to the Indian mythology [14] and the Vedic period where they were conferred power to give blessings on auspicious occasions.[15] However, legislation introduced during the British colonisation criminalised non-procreative sexualities as public indecency as an extension of law followed in England,[16] followed by the Criminal Tribes Act of 1871,[17] which labelled the entire community as criminals and accused them of castrating and emasculating children to involve them in acts of unnatural sex, and accordingly banned transgenders from residing with male children under the age of seventeen years. This was later replaced by the Habitual Offenders Act of 1952,[18] which viewed the entire transgender community as professional sodomites. The discrimination and social attitude of unacceptability continued after the colonisation and was reflected in the repealed provision of Section 377 of the Indian Penal Code, because of which begging and prostitution were the only sources of income for transgenders till the late 1990's.

The marginalisation of the transgender community still continues at a very alarming rate at the contemporary times despite of several welfare policies in action to uplift the community as well as schemes to ensure protection of their socio-economic rights. One of the major initiatives to ensure equality of opportunity to safeguard their economic interest is the Welfare Board for Transgenders set up by various states[19] and umbrella scholarships and vocational training to transgenders, regardless of which there is a huge disparity between the literacy rates of the general population and the transgender population. Close to 69% of the transgender community lives in rural areas and villages with as low as 46% literacy rates due to non-acceptance in schools and educational institutions.[20]

[14] National Legal Services Authority v. Union of India [2014] 5 SCC 438
[15] Narrain S, Being A Eunuch https://www.countercurrents.org/gen-narrain141003.html
[16] British Buggery Act,1533.
[17] Criminal tribes act, 1871.
[18] Habitual offenders act, 1952.
[19] Tamil Nadu transgender welfare board. (2012). United Nations Development Programme. https://www.undp.org/content/dam/india/docs/HIV_and_development/the-case-of-tamil-nadu-transgender-welfare-board--insights-for-d.pdf
[20] Nagarajan, R. (2014). First count of third gender in census: 4.9 lakh. *Times of India*. https://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms

- Post-NALSA Judgement

The main issues raised in the NALSA case among various other issues was whether the scope of fundamental right of freedom of speech and expression[21] could be extended to expression of self-identified gender in case of transgenders and whether right to live with dignity under Right to Life[22] included 'personal autonomy' and 'right to self-determination' which have also been stated in the Universal Declaration of Human Rights which India is a party to.[23] The petition filed by the community states that since they are recognised as neither male nor female, nor are they recognised as the third gender, they are deprived of several social and cultural rights and privileges which are enjoyed by other citizens of the community and hence are violative of Articles 14, 15, 16, and 21 of the Constitution.

An important concept to understand before analysing the landmark judicial precedent is definition of transgender. The original definition of the term included people who live the opposite gender role of their anatomy,[24] and this was expanded to include individuals who practiced cross-dressing. There are several international treaties and legislations adopted and introduced by foreign countries which the Supreme Court has taken reference to in the NALSA judgement and cleared the position of transgender rights in India where the Court has firstly differentiated between the terms 'hijras,' 'eunuchs,' and other terms commonly used interchangeably,[25] and held that the discrimination faced by community is violative of Right to Equality guaranteed under Article 14, stressing on the discrimination faced in the field of healthcare since they are more prone to HIV/AIDS. The Court further held that a transgender has the liberty to choose the gender he/she wants to represent and express it freely under Article 19-1(a) and Article 21 of the Constitution. The Court finally ordered the following for the welfare of the transgender community[26]

a. The recognition of transgenders as the third gender to ensure protection of their fundamental rights enshrined in Part Three of the Constitution.

[21] Article 19 1(a), Constitution of India, 1950.
[22] Article 21, Constitution of India, 1950.
[23] article 3,6,7, Universal Declaration of Human Rights, 1948.
[24] Feinberg L, *Transgender Warriors* (Beacon Press 1996)
[25] National Legal Services Authority v. Union of India [2014] 5 SCC 438 [para 48]
[26] National Legal Services Authority v. Union of India [2014] 5 SCC 438 [para 135]

b. The State and Central Governments to treat them as socially backward classes and extend reservation in education and public employment.

c. The States and Centre to frame various social welfare schemes for their betterment.

However, a different approach was taken by the court in the case of Suresh Kaushal and Another. V. Naz Foundation and Others,[27] which held that the LBGT community constitute a very miniscule part of the population and hence it is not a sustainable basis to deny right to privacy. This approach was not only erroneous but also highly criticised on the grounds that it violated fundamental rights and hence highly unsustainable and it would be wrong to accept the retrograde and regressive decision. The decision was reversed in the case of Navtej Singh Johar and Others. V. Union of India[28] which held that being a fraction of population is not a valid justification to deprive a community of their fundamental rights. Further, the Right to Privacy which was held as an important dimension of Article 21 in the case of K.S Puttuswamy (Retd.) v. Union of India[29] was directed to be secured to the LBGT community to choose not to reveal their sexuality.

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL 2019

The Transgender Persons (Protection of Rights) Bill 2019 was passed by the Rajya Sabha even though it was heavily criticised by the Opposition. The Opposition urged the Upper House to send the bill for further scrutiny as certain provisions of the bill violated certain rights of the transgender community. Grace Banu, a Dalit transgender right activist, gave a statement after the bill was passed that the bill was "murder of gender justice," She also stated that the transgender community has opposed the bill from the very beginning as it does not uplift them. The transgender community and activists speaking against the bill said that their only hope left was the Indian Constitution and they will keep criticising the legislature till their rights are being recognized[30].

The bill covers protection of transgender rights against discrimination, where it specified that there should be no discrimination against transgender persons in educational institutions, governmental institutions, while leasing properties, for medical and health care facilities, and using other public services. The activists were of the opinion that the bill fails to explain the

[27] Suresh Kaushal and anr. v. Naz Foundation and ors [2014] 1 SCC 1
[28] Navtej Singh johar and ors. v. Union of India [2018] 10 SCC 1
[29] K.S Puttuswamy(Retd) v. Union of India [2017] 19 SCC 1
[30] Vijayta Lalwani, What next for transgender people, as India clears a bill that activists call "murder of gender justice"? QUARTZ INDIA

correct context of discrimination against the transgender community, and there were no penal provisions introduced for those who will discriminate. The bill also gave a transgender person the right to self-perceived gender identity with a clause that the transgender person should file an application with the district magistrate and receive a gender certificate. In certain cases where a person undergoes sex reassignment surgery another application is to be filed to the district magistrate to receive another certificate of gender identity.[31] This clause received a lot of criticism from the community and activists as the right and power conferred by the bill was limited. The bill also included that there should be a National Council of Transgender Persons who can advise the government on formulating rules and policies for the development and to uplift the community.

The major reasons why the bill was highly criticised are that it does not give transgenders the absolute right to gender identity; there are no reservations made for transgender people and penalties are only mentioned for sexual abuse; and there were no penal provisions mentioned for grave offences like rapes committed against transgender persons.[32]

PROBLEM STATEMENT

The concept of LGBT in India has always been subjected to discussion and criticism. Despite of the landmark legal victory decriminalising consensual homosexual sex, the main challenge faced by the LGBT community is lack of social acceptance. Although various studies have suggested that society has been growing more comfortable with LGBT, some people still perceive it as a strictly 'unnatural' sexual orientation that should be suppressed, while some others perceive it as a 'lifestyle choice,' akin to a fashion statement. For LGBT, coming to terms with their gender continues to be difficult due to this.

Data from the archives of World Value Survey (WVS) show that social perception towards homosexuality has generally improved around the world. The target of this survey included male, female, as well as transgenders from the ages of 16 to 66. The results from the period of 2009-13 shows that the score of India in accepting homosexuality is 2.99, ranking eighty-second in the world, ahead of most African and Islamic countries.[33] Also, in a recent survey conducted jointly by Azim Premji University and Lok Niti at the Delhi-based Centre for the Study of Developing Societies, about 15,222 respondents were asked: 'Sexual relationships

[31] Section 2(k), The Transgender Person (Protection of Rights) Act, 2019
[32] Vijayta Lalwani (n 1)
[33] < http://www.worldvaluessurvey.org/wvs.jsp> last accessed 30-04-2019

between two men or two women should be accepted in society,' to which 46% disagreed, 28% agreed, and 26% were neutral.

The younger generation is more aware and more open to thinking about their sexuality, and would be expected to have more positive perceptions towards LGBT. This study examines the perceptions of young students towards LGBT.

RESEARCH METHODOLOGY

The objective of the study is to investigate the social acceptance of LGBT among young students in India. Social acceptance is conceptualised in terms of the awareness/exposure to the LGBT community, knowledge, contact, openness/tolerance, trust/sensitivity, engagement, cooperation, and assimilation. Awareness/exposure can be thought of as the first stage, wherein the subjects are aware about the concept of LGBT. Knowledge is the next stage, with the subjects learning more about the concept. The next stage, contact, involves the subjects actually coming into contact with LGBT persons. With continued contact, the next stage is openness and tolerance, wherein subjects come to accept LGBT as a part of their daily life. The next stage is trust/sensitivity, wherein the subjects start to accept LGBT persons for who they are. The last stages, engagement, cooperation, and assimilation, are based on trust, and represent the ultimate social acceptance of the LGBT community.

The study is an exploratory study of social acceptance of LGBT. The data for the study was collected using a structured, self-administered questionnaire (see Appendix). The respondents for the study were undergraduate and postgraduate students of a law school in Bengaluru, India. The sample size for the study was seventy-one students. The respondents were selected by convenient sampling. The students were from diverse backgrounds, representing a good cross-section of educated Indian youth. In terms of gender, 54.92% of the respondents were female, 26.26% were male, 18.3% were anonymous/did not reveal their gender. In terms of age, 43.66% of the respondents were aged between 15 – 20 years, 49.29% were aged between 20 – 25 years, 5.53% were aged between 25 – 30 years, and 1.40% were above the age of 30 years.

HYPOTHESIS

The level of social acceptance of the LGBT community has not yet reached the openness stage: society is still not comfortable with the concept of LGBT, and LGBT persons are still afraid to be open about their identity.

To test the hypothesis, a cumulative scale was constructed using the items corresponding to awareness, knowledge, contact, openness, and tolerance as discussed above. The null hypothesis was taken as H_0: $\mu \geq 4$ against the alternative hypothesis H_1: $\mu < 4$.

SCOPE

The scope of the study is limited to investigating the perceptions and social acceptance of LGBT among young law students using survey methods.

ANALYSIS

It was found that 73.23% of the respondents identified themselves as straight; 9.85% identified themselves each as bisexual and other categories; 7.04% identified as gay; 2.81% as lesbian; and 1.4% identified themselves each as transgender male, transgender female, and pansexual. As the study objective was to examine social acceptance, the analysis was focused on the responses of the respondents who identified themselves as straight. Of these respondents, 55.77% were female, 28.85% were male, and 15.38% did not reveal their gender; also, 40.38% were aged 15 – 20 years, 50.00% were aged 20 – 25 years, 7.69% were aged 25 – 30 years, and 1.92% were aged 30 years or above.

In terms of awareness, 73.08% of the respondents who identified themselves as straight were aware of the recent judgment by the Supreme Court that decriminalised certain provisions of Section 377, while 15.38% were not aware, and 11.54% did not answer. This suggests that overall awareness of the current LGBT issues is moderate, despite the high-profile nature of the case and the extensive coverage in the media. This calls to question the effectiveness of the media in propagating information about LGBT, which will be discussed further below.

In terms of knowledge, 51.92% of the respondents who identified themselves as straight perceived that LGBT is a natural phenomenon, 23.08% did not perceive this, while 25.00% did not answer. This suggests that there is still lack of general knowledge about LGBT. Again, this may be attributed to a failure on the part of the media, to be discussed below.

In terms of the role of media, 63.46% of the respondents who identified themselves as straight perceived that the media had facilitated the ‘coming out’ of LGBT, 26.92% did not perceive this, while 9.62% did not answer. Also, 63.46% of the respondents who identified themselves as straight perceived that the representation of LGBT in media to be stereotypical, 34.62% perceived it to be realistic, while 1.92% did not answer. Further, 76.92% of the respondents who identified themselves as straight perceived that the media should promote more

progressive portrayals of the LGBT community, 13.46% did not perceive this, while 9.62% did not answer. Thus, there was a perception that the media has not been progressive enough in its portrayal of the LGBT community, and that a progressive media is critical for enabling awareness and knowledge of the LGBT community.

In terms of contact, 67.31% of the respondents who identified themselves as straight had friends or acquaintances who were LGBT, out of which 77.14% said that their LGBT friends/acquaintances were open about their LGBT identity, while 17.14% said that they were not open, and 5.71% did not answer. This suggests that moderate levels of exposure and openness amongst the student community.

In terms of tolerance, 76.92% of the respondents who identified themselves as straight perceived that there was a lack of societal acceptance of LGBT in India due to notions such as it was 'against Indian culture' or 'against the natural order,' 13.46% did not perceive this, while 9.62% did not answer. On the other hand, 84.62% of the respondents who identified themselves as straight perceived that acceptance of LGBT has significantly increased in the last two decades. This highlights the general intolerance of Indian society towards LGBT; though there has been some progress in this regard, there is still a long way to go.

In terms of sensitivity, 80.77% of the respondents who identified themselves as straight were willing to be LGBT activists, while 19.23% were not. This suggests that the student community is largely in support of the LGBT community and is willing to champion their cause.

Some of the qualitative findings were as follows. More than 50% of the respondents felt that more education and exposure is needed for improving societal acceptance of LGBT. Also, some respondents felt that it was a personal matter, and that they should not be judged on the basis of their sexual orientation. One response in particular was noteworthy: 'It is difficult to explain to people that being an intersex is not a choice or even sexuality bit a biological gender where though harshly discriminated – it is not easy to hide your gender like the other sexualities.'

The hypothesis test results are presented in the table below.

	Cumulative scale
mean	3.3077
std dev	1.2133
variance	1.4721

kurtosis	-0.6665
skewness	-0.2833
n	52
t Stat	-4.1146
p-value	0.0001

The results of the hypothesis test indicate rejection of the null hypothesis in favour of the alternative hypothesis; i.e. the level of social acceptance of the LGBT community has not yet reached the openness stage.

DISCUSSION

The results of the study suggest that most of the respondents support the LBGT community, in terms of both the legal changes and the social changes to be made. Although repealing of Section 377 was a monumental legal milestone, it has to be taken forward with laws for other aspects such as civil union of LGBTs, by introducing a marriage act or accommodating them under the existing marriage provisions. In fact, the legal changes are a necessary precondition for the social changes. It is undeniable that Section 377 of the Indian Penal Code has been a grave injustice to the community, but the more serious challenge is social acceptance of the LGBT community. A lot of LGBT people are afraid that 'coming out' would cause them shame and ostracism. Repealing Section 377 was necessary not only because the right to choose the sexual partners of minority could not be ignored, but also because of Right to Privacy in Article 21. As observed in the judgment, neither do the courts or the provision of law have the rights or powers of entering one's bedroom. Considering this argument, society also does not have the right to judge a person on the basis of their sexual orientation.

The results of the study suggest that there is a long way to go for social acceptance of LGBT. In particular, the level of social acceptance of the LGBT community has not yet reached the openness stage. Society is still not comfortable with the concept of LGBT, and LGBT persons are often still afraid to be open about their identity. However, first the twin challenges of awareness and knowledge must be overcome. The results of the study indicate that the media has not been effective on these counts. For example, some people still harbour the misconception that LGBT is a lifestyle choice, akin to a fashion statement. Another prevalent misconception is that LGBTs are 'unnatural' sexual orientations that should be suppressed. These has been a matter of extensive debate in the United States of America in the 2010s,

during the fight to decriminalise same sex activity which was achieved in 2015. According to a study published in 1991,[34] results showed that homosexuality is not a choice but biologically determined, where the part of brain that releases sex hormones was found to be twice as large for gay men than for straight men. This was demonstrated in the later study by Proceedings of National Academy of Sciences in the United States of America.[35]

The role of media is critical for dispelling these misconceptions. The results of the study suggest that, though the media has been partially enabling, it is largely dominated by stereotype. The media must propagate more progressive content to further the cause of the LGBT community.

Another tool for spreading awareness and knowledge is education. Sex education must be made inclusive and must be made compulsory for children of all genders once they attain maturity. Education is a very powerful tool which can be used to change people's perspectives about the LGBT community.

The student community is a potentially-dynamic force that can also be mobilised for the LGBT cause. The youth can be further encouraged by providing more forums to be able to come forward and advocate their ideas. Activism unquestionably results in positive changes.

There are some limitations inherent in the study. The sample size for the study was very small, effectively only fifty-two, and the sampling method was convenient sampling, so that the results may not be generalisable. Also, the study was an exploratory study, and the questionnaire used for needs to be tested for reliability and validity. A more detailed study would involve a much larger sample size, selected using, for example, stratified sampling, and more rigorous data collection instruments. In particular, a standardised scale for social acceptance of LGBT has to be constructed to support a more rigourous study. Also, other economic, sociological, cultural, and psychological variables can be considered in further studies to enrichen the analysis.

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APPENDIX: Questionnaire for Data Collection

1. Name: _____
2. Age: 15-20 20-25 25-30 30 and above

3. How do you identify yourself as:
   a. Straight
   b. Lesbian
   c. Gay
   d. Bisexual
   e. Transgender male
   f. Transgender female
   g. Pansexual
   h. Others

4. Have you ever come across an acquaintance or a friend identify themselves as one of the above categories? Y/N
5. Is the person open about their sexual preference? Y/N

   If not, why do you think so? _____
6. Are you aware of the recent judgement by the Supreme Court of India that 62ecriminalized consensual sex between adults and identified the transgender/intersex and the third gender thereby allowing them to enjoy most rights commonly enjoyed by most citizens of India? Y/N
7. Do you think India lacks societal acceptance of LGBTs due to notions such as "against our culture" and/or "against the order of nature"? Y/N
8. Do you think homosexuality and gender queerness/fluidity (common in Indian subcontinent where transgender male known as the *hijras* identify as women) are natural phenomena or as popularly said "a misconception for attention"? Y/N
9. Do you think acceptance of transgender as a third gender has significantly increased in the last two decades? Y/N
10. Do you think increase in number of people from the LGBT community coming out is due to media? Y/N
11. How would you categorise media representation of LGBT? Stereotypical/Realistic
12. Do you think media should accept advertisements and movies portraying progressive content on LGBT community? Y/N
13. Given a chance, would you be an LGBT activist? Y/N
14. Please express your opinion on the current place the LGBT community holds in India and whether any changes can be made to make the community better:

(2)

LAW AND GENDER INEQUALITY – CHANGING STATUS OF WOMEN

Moon Jaiswal[1]

"*Half of the Indian population are…women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have subjected to all inequities, indignities, inequality and discrimination.*"[2]

INTRODUCTION

In Indian history we can get references about the role of women from the beginning of the Indus valley civilization, the first known civilization of India which said to have flourished in 25th century BC. As per historical evidences people of this valley worshiped natural forces and divine power were mostly feminine. The Buddhist age witnessed a serious change in the status of Indian women. Gautama Buddha made the adoption of daughters valid which squashed the general belief that the birth of son was indispensable to attain salvation. Apart from this, women were accepted as nuns in the Buddhist monasteries. Admission of women into the monastic order secured for them a religious status and they played a vital role in propagating Buddhism. The contact of Indian culture with that of the British brought significant improvement in the status of women. During the period, there were two major movements which affected the position of women. These were the Social Reform Movement of the 19th century and the Nationalist Movement of the 20th century. Both these movements raised the issue of equal status of women. The issues which attracted the attention of the 19th century social reformers were Sati, ill treatment of widows, the ban on widow marriage, polygamy, child marriage, denial of access to property rights and education to women. The Reformers thought that by providing women access to education and by enacting progressive legislations, social transformation could be initiated. [3] Personalities like Raja Ram Mohan Roy, Ishwar Chandra Vidyasagar, M.G. Ranade, Aurobindo and others from all parts of the country raised their voice against the unjust practices; while revivalists like Swami Vivekanand and Annie Besant

[1] B.A LLB(Faculty of Law, University of Allahabad), L.L.M(AIALS)
[2]. *Madhu kishwar v. State of Bihar (1996)*.

[3] Mamta Rao, *Law relating to women and children 27 (4th Ed. 2018).*

believed in reviving the old Vedic society, presumed to be ideal from women.[4] Therefore, the attitude, behavior and living pattern of Hindu society changed drastically during the British regime due to education and western impact on the socio-cultural life of India.[5] Therefore, to sum up, women enjoyed a decent status and a fair amount of freedom and equality during the Vedic period. But women suffered a set-back in post-Vedic period and in Medieval period, social evils like Sati, child marriage, female infanticide arose, and they suffered great disabilities. The evil of dowry had become deep-rooted. Polygamy and devadasi system had already spread. The medieval period saw women being oppressed in the feudal social order and patriarchal families. It is nothing but ironical that even today, in contemporary India, despite so many laws, the status of women especially in rural areas is similar to how women were treated in post Vedic and medieval period. And there still prevails gender inequality which thereby results into gender-based crimes and violence against women.

Since then, times have changed a lot, both for the good and bad. Today, after more than 70 years of India attaining independence, the citizens of this developing nation are still struggling and fighting for their basic human rights. And the unfortunate reality is that this struggle is more real for the women of the nation. The reason behind this is that women in our country are not treated equally, and as a consequence to that, they suffer from the menace of gender discrimination, despite constitutional safeguards, several legislations and government policies. Gender discrimination is a direct consequence of gender inequality, which is the root cause of India still being regarded as a "developing" nation and not a "developed" one.

CONCEPT OF GENDER INEQUALITY AND FACTORS RESPONSIBLE FOR IT

The UN Secretary-General, Mr. António Guterres has stated that achieving gender equality and empowering women and girls is the unfinished business of our time, and the greatest human rights challenge in our world.[6]

Gender inequality is an issue mostly discussed on various national and international platforms but is never a discussion within the enclosed domestic household setup. It cannot be denied that it is actually prevailing in every household, so to say in the most safe and unexpected place. Parents have set gender roles at homes, where the boys are supposed to do the duties and girls are expected to be at home. There is a huge difference of treatment towards girls, with respect

[4] Neera Desai & Maithreyi Krishna Raj, *Women and Society in India 38-41 (2nd Ed., Ajanta Publications, New Delhi1987)*
[5] V.K. Dewan, *Law relating to offences against women 33 (2nd Ed., Orient Law House 2000).*
[6] https://www.un.org/en/sections/issues-depth/gender-equality/

to their clothing, education, mannerisms and so and forth. The sons are given more freedom and do not face the same "care and protection" that girls are being provided with.

Therefore, this problem has affected women the most. Equality does not imply that women and men will be equal in every aspect, rather it means that there should be equality in opportunities, equality in terms of employment and equality in terms of basic human and constitutional rights. It is to say that the rights, responsibilities and privileges between men and women won't rely upon whether they are brought into the world female or male. Sex uniformity infers that the interests, needs and priorities of both men and women must be taken into consideration irrespective of any gender biasness. Gender cannot and should not be an automatic disqualification or any determining factor for deciding anything which is significant to anyone.

The problem of gender inequality is simply known as gender biasness, which in simple term means the gender stratification or making differences between a male or a female. According to the United Nations Development Programs Human Development Report (2013), India ranks 132 out of 187 countries on the gender inequality index- lower than Pakistan (123). The report states that all countries in South Asia, with the exception of Afghanistan, were a better place for women than India, with Sri Lanka (75) topping them all.[7]

India is generally referred to as a nation where women are treated like deities but reality is different from this. As gender inequality still prevails, the objective of attaining complete GENDER EQUALITY is yet to be achieved. Gender Discrimination affects many aspects in the lives of women from career development and progress to mental health disorders. While Indian laws on rape, dowry and adultery have women's safety at heart, these highly discriminatory practices are still taking place at an alarming rate, affecting the lives of many women today. That's how this gender biasness ultimately results into gender crimes, negating the purpose of various laws and constitutional safeguards that are provided to women.

Accomplishing gender equality is a herculean task in India. It has been existing since time immemorial and since then, girl child has been considered as undesirable and a burden upon the family, whom the guardians wouldn't fret getting rid of. Oppression towards women starts even before her introduction to the world. The horrifying indecencies of female feticide and child killing demonstrate how merciless the world could be to ladies. Despite the fact that the Indian constitution gives equivalent rights and benefits to people and makes equivalent

[7] Priti Jha & Niti Nagar, *A Study of Gender Inequality in India, Volume 2 Issue 3, IJIP, 2015*

arrangement to improve the status of women in the public eye, a majority of them are still incapable to appreciate the rights and privileges ensured to them.

Traditional value system, low level of literacy, more house hold responsibilities, lack of awareness, non-availability of proper guidance, low mobility, lack of self-confidence, family discouragement and advanced science and technology are some of the factors responsible to create gender disparity in our society.[8]

The most important causes of gender disparity such as poverty, illiteracy, unemployment, social customs, belief and anti-female attitude are discussed below-

- POVERTY:

  Lack of access in terms of monetary stability and self-sufficiency, absence of access to financial assets including credit, land proprietorship and legacy, absence of access to education and negligible participation in the decision-making procedure are mostly the factors liable for this dependency of women on their male counterparts. Hence, poverty comes with this dependency and sets at the foundation of gender biasness in our man driven culture and this money related dependence on the men is itself a huge reason behind gender disparity.

- ILLITERACY:

  Notwithstanding the remarkable endeavors by the nations around the world that have expanded for the basic education, there are roughly 960 million uneducated adults of whom 66% are women. Educational backwardness amongst the girl-child has been the resultant reason for gender inequality. The variations become progressively prominent amongst the male and female education rate, during 2001. The literacy rates for males increased from 56% in 1981 to nearly 76% in 2001. The corresponding change in female literacy rate from 30 to 54%. On the whole the decline on gender gap peaked in 1981 at 26.6% and was 21.7% in 2001 is less impressive. The interstate variation in literacy rate for males was much lower in comparison to females. At the state level female literacy rate varies from 35% in Bihar to 88% in Kerala. In states like Arunachal Pradesh, Assam, Bihar, Jammu and Kashmir and Rajasthan, the female literacy rate is below 50%. The progress towards education by girls is very slow and gender disparities persist at primary, upper primary and secondary stage of education. Girl's account for

[8] http://www.yourarticlelibrary.com/india-2/gender-discrimination-in-india-6-major-causes/47671

only 43.7% of enrolment at primary level, 40 .9 % at upper primary level, 38.6% at secondary level and 36.9% at degree and above level. More over girl's participation in education is still below 50% Gender differences in enrollment are prevailing in all the state at all levels. They are not able to realize full identity and power in all spheres of life only due to illiteracy.[9]

- LACK OF EMPLOYMENT FACILITIES:

  In both rural and urban India, women invest an enormous extent of energy in unpaid home supporting work. Women are not ready to adapt to the new concept of having a work-life balance and move to new occupations on the grounds that their portability will in general be low due to intra-house hold distribution of obligations and domestic duties. Rights and commitments inside a house hold are not divided equally. Moreover child-bearing is completely imposed on women. Time spent in bearing and raising of children affects the financial independence and career of women. In this way ladies are not having the option to be financially independent because of joblessness and their monetary reliance on the male partner is itself a reason for gender inequality.

- SOCIAL CUSTOMS, BELIEFS AND PRACTICES:

  Women are not liberated from social traditions, customs and practices. The customary patrilineal joint family framework confines their job to the household circle, assigning them to a subordinate status, authority and force contrasted with men. Men are seen as the significant suppliers and bread earners of a family. The social stigma that women are housekeepers and should be confined to the four walls of the house is perhaps a viable cause of gender disparity. They should not raise their voice regarding their fortune for the sake of the prestige of the family. In patriarchal society a lot of weightage is given to men.

- LACK OF AWARENESS:

  Women especially from the rural areas and those that are confined only to four walls of domestic marital lives are uninformed of their fundamental rights and capacities. They even don't have the understanding with respect to how the financial and political powers influence them. They acknowledge a wide range of prejudicial practices that endure in our society to a great extent because of their obliviousness and ignorance.

[9] http://www.yourarticlelibrary.com/india-2/gender-discrimination-in-india-6-major-causes/47671

Today if women lag behind a little, it is not their fault but the fault of traditions which have suppressed them for centuries. In order to change the situation along with economic growth social progress is also greatly required. Hence the need of the hour is to effectively combat gender disparity as to promote gender equality by sufficiently empowering the women.

Here comes the role of LAW - STRINGENT LEGAL ACTIONS should be initiated against the crime-doers, STRICT POLICIES should be made in favor of women and the most important of all, in order to empower and uplift the status of women in today's age is to CHANGE THE ORTHODOX MINDSET OF PEOPLE IN TERMS OF GENDER STEREOTYPING.

SIGNIFICANCE OF LEGISLATIONS IN COMBATING GENDER DISPARITY- CONSTITUIONAL SAFEGUARDS AND JUDICIAL PROTECTION

The concept of equality, however, requires equity. The history of social development is also the history of inequality. Inequality between nations, religions, ethnicity, class, caste, race and sexuality. However, the question of women's rights looms large, cutting through all the layers of social stratification. German philosopher and social scientist Friedrich Engels in his classical writing *"Origin of the Family, Private Property and the State"* states that, *"Woman was the first human being that tasted bondage. Woman was a slave before slavery existed"*. The feminist struggle for equal rights has been paved through legislation, be it the Suffragette movement and the right to vote, to employment rights, property rights, rights governing divorce and marriage to child-care and medicine – legislation based on equal rights affects the very values of society, impacting not just the way we vote, but the way we work, live and function as a family, the way we access education, healthcare and justice.[10]

The definition and institutionalization of equal rights at law is an important tool to combat the high degree of gender inequality in India. Gender equality is a constitutional mandate and many laws have been passed to improve the traditionally inferior social and economic status of women. Only a few privileged women benefit from this legal reform. Such legal reform includes the right to receive equal pay, to receive maternity benefits, to own or inherit property, to terminate unwanted pregnancies, and to be protected from cruelty at the hand of husbands through divorce or judicial separation.[11]

[10] https://www.mondaq.com/india/Government-Public-Sector/795312/Women-Centric-Changes-In-Indian-Law.
[11] Dr. Gita Gopal, *Gender and Economic Inequality in India: The Legal Connection*, 13 B. C. Third World L. J. 63 (1993).

CONSTITUTIONAL SAFEGUARDS TO WOMEN -

The concept of gender equality is incorporated very categorically in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favor of women and ARTICLE 15(3) of our constitution is the biggest example of positive discrimination. Within the framework of a democratic polity, our laws, development policies, and plans have aimed at women's advancement in different spheres. India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. The most significant amongst others is the ratification of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1993.[12]

The Indian Constitution has guaranteed various rights and special provisions for women in order to achieve the goal of equality that is enshrined under Article 14 of the constitution. They are as follows-

- Prohibition of state discrimination based on religion, caste, sex, place of birth -Article 15(1)
- Special provision for women and children -Article 15 (3)
- Equality of opportunity in public employment -Article 16 (2)
- Right against exploitation – Articles 23 & 24
- The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood -Article 39(a)
- Equal pay for equal work -Article 39 (d)
- Provision for maternity relief -Article 42
- Protecting the dignity of women -Article 51 A (e)
- Reservation of seats for women in the Panchayaths and municipals bodies -Article 243 D & 243T)[13]

[12]http://mospi.nic.in/sites/default/files/reports_and_publication/cso_social_statices_division/Constitutional&Legal_Rights.pdf
[13] Dr. GD Narayana & Kavya CN, *A sociological study on awareness of human rights among women,* IJAR 2016; 629-632.

IMPORTANT LEGISLATIONS PROTECTING WOMEN'S RIGHTS –

Below stated legislations have been extremely instrumental in changing the status of women. These laws owing to its strict provisions have impacted a lot on achieving gender justice and eradicating the menace of gender discrimination.

- The Prohibition of Child Marriage Act, 2006 - Child marriage has been steeped into the Indian culture and tradition since centuries, it has been tough eliminating it. The Prohibition of Child Marriage Act was made effective in 2007. This act defines child marriage as a marriage where the groom or the bride are underage, that is, the bride is under 18 years of age or the boy is younger than 21 years. Parents trying to marry underage girls are subject to action under this law. Since the law makes these marriages illegal, it acts as a major deterrent.

- Dowry Prohibition Act, 1961- According to this act, taking or giving of dowry at the time of the marriage to the bride or the bridegroom and their family is to penalized. Dowry system, giving and taking of dowry, is a norm in India. Dowry is often asked of the bride and her family by the groom and his family. The system has taken strong roots because women after marriage move in with their spouse and in-laws. Also, over the centuries, the lack for economic independence of women and the taboo towards divorce has resulted in bride burning. When demands for dowry even after marriage are not met by the girl's families, many women are tortured, beaten and even burnt. It is one of the major challenges that our society is grappling with. Women openly complaining about it has helped to spread the word and encourage other women to take a stand. Under the Indian Penal Code, If a woman died in her matrimonial home within seven years under unnatural or suspicious circumstanced, a special legal provision was incorporated which is termed as S.304B – Dowry Death. If a woman committed suicide due to harassment for dowry within seven years of her marriage, S.306 of IPC-Abetment to Suicide can be invoked. If the woman was harassed for dowry or was treated with cruelty, S.498A can be invoked. In this case, there is no limitation of seven years after marriage. If her stridhan is not returned to her, S.406 can be invoked, along with S.498A.[14]

- Maternity Benefit Act,1861- This act regulates the employment of women and maternity benefits mandated by law. It states that a woman employee who has worked

[14] https://www.iitk.ac.in/wc/data/Majlis_Legal-rights-of-women.pdf.

in an organization for a period of at least 80 days during the 12 months preceding the date of her expected delivery is entitled to receive maternity benefits, which includes maternity leave, nursing breaks, medical allowance, etc. The aim of the Act is to reduce the occurrence of illegal abortion and consequent maternal mortality and morbidity.[15]

- Maternity Benefit (Amendment) Act, 2017 ("Maternity Amendment")- The year 2017 saw the striking amendment to the Maternity Benefit Act, 1961 ("Maternity Act"). The Maternity Amendment broadens paid maternity leave for women representatives with less than two surviving children, from twelve (12) weeks to twenty-six (26) weeks. A maximum of eight (8) weeks can be taken before the expected delivery date and the remaining after childbirth. Women expecting their third child were also provided with the right to take twelve (12) weeks of paid maternity leave—six (6) weeks before childbirth and six after. The act enables mothers to work from home after completing twenty-six (26) weeks of leave subject to their work profiles and the employer's consent. It also mandates establishments employing 50 or more employees to have a creche which is required to have prescribed facilities and amenities. Women employees have a right to visit the crèche four times a day, including during their rest interval.[16]
- Equal Remuneration Act, 1976- This Act prevents discrimination in terms of remuneration. It provides for payment of equal recompense to men and women workers. [17]

JUDICIAL PROTECTION TO WOMEN -

The Indian Judiciary has time and again proved to be the guardian of women's legal rights by pronouncing such gender-neutral judgements, especially in the last three years, that have been extremely instrumental in empowering the women and have been successful in changing the rigid, conservative approach of society. The nation-wide outrage over the brutal gang rape and subsequent death of Jyoti Singh in New Delhi was the driving force behind the promulgation of the Criminal Law (Amendment) Act, 2013 ("Criminal Law Amendment Act"). The Criminal Law Amendment Act, 2013 that came into force on February 3, 2013 amended as well as inserted new sections in the Indian Penal Code with regard to sexual offences. Some of the new offences recognized by the Criminal Law Amendment Act are acid attacks, voyeurism,

[15] *Ibid.*
[16] https://www.obhanandassociates.com/blog/women-centric-changes-in-indian-law.
[17] *Ibid.*

stalking, intentional disrobing of women and sexual harassment. In 2013, India adopted its first legislation specifically addressing the issue of workplace sexual harassment; the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act") enacted by the Ministry of Women and Child Development, India. Workplace sexual harassment is a form of gender discrimination which violates a woman's fundamental right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution of India. The POSH Act had been enacted with the objective of preventing and protecting women against workplace sexual harassment (which include creation of a hostile work environment) and to address complaints of sexual harassment.[18]

Some of the most important JUDICIAL PROUNCEMENTS that have changed the position of women in the contemporary times are discussed below-

- Decriminalizing the law of **Adultery**-

  On September 27, 2018, a five- judges bench of the Supreme Court of India struck down another British made law, Section 497 of the Indian Penal Code that endorsed the most extreme detainment of five years to men for infidelity. Justice Chandrachud as he remarked that Section 497 was dangerous to lady's poise and furthermore opined that Regard for sexual self-governance must be accentuated. Justice Indu Malhotra noted in her judgment that the Section is discriminatory in nature.

- The ban on the customary practice of "**Triple Talaaq**"-

  The Supreme Court in its milestone judgment of Sayarabano v Union of India articulated on August 22, 2017, put aside the act of "Triple Talaq". The bench pronounced Triple Talaq as an illegal and unconstitutional practise by a 3:2 majority. The judgement proved to be a boon for all the Islamic women who were abandoned by their husbands in such a cruel manner. The judgement conferred the power to the women who can now prosecute their husbands in this regards, by virtue of the Muslim Women (Protection of Rights on Marriage) Act, 2018 in compliance with the verdict of the honorable Supreme Court.

- The **Sabarimala Temple** verdict –

  Supreme Court on September 28, 2019, delivered one of the most keenly awaited judgment in the Sabarimala case. By a 4:1 majority, the Supreme Court permitted entry

[18] https://www.mondaq.com/india/Government-Public-Sector/795312/Women-Centric-Changes-In-Indian-Law.

of women of all age groups to the Sabarimala temple, holding that 'devotion cannot be subjected to gender discrimination'. The lone woman in the bench, Justice Indu Malhotra, dissented. Then Chief Justice Dipak Misra, Justice R F Nariman, Justice AM Khanwilkar and Justice DY Chandrachud constituted the majority. The judgment was delivered in a 2006 PIL filed by Indian Young Lawyers Association challenging the centuries-old tradition of Sabrimala Temple banning entry of women of menstruating age inside the temple. "Woman is not lesser or inferior to man. Patriarchy of religion cannot be permitted to trump over faith. Biological or physiological reasons cannot be accepted in freedom for faith", said Chief Justice Dipak Misra while reading out portions of the judgement written out for himself and Justice AM Khanwilkar. [19]. This judgement of the honorable Supreme court has in practicality been one of the most influential judgements for combating the issue of gender inequality. Women were denied entry into the temple premises on account of menstruation is unconstitutional and regressive in nature. With this judgement, the apex court restored the concept of constitutional morality and also the ideals of the preamble.

CONCLUSION AND SUGGESTIONS

After having discussed all the above-mentioned important aspects of gender inequality in our Indian society, I would like to conclude that progress towards the elimination of gender disparity will be a gradual process as the obstacles are overcome. In my opinion, the real change will be achieved only when the laws that have been enacted are actually implemented and carried out the way it should be. The most brutal Rape case that compelled people to gather on streets and protest, in the year 2012, wherein a 23year old female medical student was gangraped and murdered, is still not wrapped up. The four convicts are on death row and justice is yet to be served. Therefore, I feel that there is an urgent need to make reforms in our criminal justice system as there are a lot of loopholes in these laws that needs to be fixed in order to eradicate these brutal gender crimes.

On the other hand, recently, the honorable Supreme court delivered a significant judgement, very welcoming in such contemporary times. In a historic judgment, the Apex Court has ordered the Centre to ensure that women officers are given permanent commission (PC) in the Army, while adding that the officers will be now eligible for command posting. The Supreme

[19] https://www.obhanandassociates.com/blog/women-centric-changes-in-indian-law.

Court also directed the Centre to grant permanent commission within three months to all women officers in Army who opt for it.[20] The court remarked that the notion about women being the "weaker sex" is constitutionally flawed and that it calls for a change in mindset of the people.

Women's lives are getting better as attitudes change and educational opportunities improve. Law has been a significant tool in overcoming the hurdles of patriarchy, gender stereotyping and eliminating taboos. Our honorable Supreme court have contributed immensely to fight and kick out these age-old notions of morality and culture from our society. From accepting the relationship of Homosexuals (LGBTQ community- section 377 Indian penal code) to banning the traditional custom of Triple Talaq, the people in India are developing a broad- minded approach towards these issues of society. These judgements of the apex court are landmark in nature because they confer a sense of confidence to women of today so that they can stand at par with their male counterparts. Women today are able to muster up the courage to speak and stand against anything that degrades them and deprives them of dignity and respect. They are now well aware and informed of their rights which enable them to raise their voices against any wrong done to them. Fortunately, many of these backward attitudes are breaking down for good. In fact, we are on the cusp of a generational shift in the perception and treatment of women of India. Steadily increasing access to education is helping women gain newfound power and respect. Undoubtedly, education will be the single biggest driver of change for girls and women over the next decade, helping to narrow and eventually eliminate the gender gaps in literacy and workplace participation.

Lastly, I would like to conclude that fundamental or human rights have no gender. They are not gender- specific. Also, gender cannot and should not be a determining factor in today's time and age. A nation prospers only when the women are uplifted and treated at par with the men, when there exists no pay gap between the salaries of men and women (subject to conditions) and when they are economically and financially independent. Financial stability of women is the need of the hour. This will only be possible when there are high literacy rates and that the parents in every household must provide education to daughters. Education, indeed is the biggest mode to eliminate gender inequality, thereby achieving the goal of gender justice in India.

[20] https://www.indiatoday.in/india/story/supreme-court-clears-permanent-commission-for-women-officers-in-army-

(3)

MARITAL RAPE: A PHENOMENON LESS SCRUTINIZED UNDER CRIMINAL LAW

Kartikey Mishra[1]

INTRODUCTION

Rape is a form of violence which is accompanied by cruel intention to have penetrative sexual contact with a woman without her consent and free will.[2] The element of consent plays a huge part in depicting the fact whether a rape is committed or not. A withdrawal of consent even during the sexual intercourse will constitute the commission of the offence of rape. The burden to prove the lack of consent is rested upon the victim. In some instances, the consent is said to be presumed one such instance is marriage. Mainly due to the ideology of husband and wife being one single entity, and the sacramental value of the marriage where the husband is considered to be a superior entity. This is the first form of justification that men as a superior authority have the right to treat women as their chattel, which means a woman does not possess any kind of bodily autonomy in marriage as they are prima facie depicted as 'property' of their husbands.[3] These presumptions are evidently based on preconceived notions of our society that Women are attached to their husband's and have no individual existence in the society, which implies bearing all the criminal acts of there husbands and covering it up within the blanket of marriage. However, such presumptions hold no value in the modern era where marriage has come through eradicating various women related sanctions like sati, Dowry and Domestic violence. The changes in the aforementioned marriage related norms were inspired by the 1970's feminist revolution, where women were given the status of equal citizens with that of men.[4] It is important to understand that rape in any form is an heinous offence which leads to its depiction under criminal offence rather than a civil one (Except Marriage). The brutality of rape committed by the husband upon her wife has more psychological consequences in the life of a married women as she has to face such degree of pain and humiliation day in and day out. Whereas the trauma related to the stranger rape which is outside the realm of marriage has

[1] Student, School of Law, Presidency University, Bengaluru
[2] The Indian Penal Code,1860, Section 375
[3] To Have and to hold: The Marital Rape Exemption and the Fourteenth Amendment,99(6) HARVARD LAW REVIEW 1256 (1986)
[4] Rebecca M. Ryan, The sex right: A legal History of Marital Rape Exemption, 20 Law and Social Enquiry, 944 (1995).

more of a judicial trauma in the form of being highlighted and the news being published across the nation regarding such incident, this is the reason behind criminalizing marital rape as a women is being robbed of her own existence in the marriage and where she has absolutely no right whatsoever with respect to her sexual Autonomy.

Through the course of this paper we will understand why there is a requirement to criminalize marital rape as well its constitutional validity, legal position with respect to the rape laws in India as well as an analysis of international law on marital rape.

HISTORICAL CONCEPT OF MARITAL RAPE

The history of marital rape traces its origin from the family norms and social upbringing of each family member. Family was considered to be a safe, secure and a private heaven where peace and harmony prevailed. However, family has also been the breeding ground for violence against women for centuries.[5] Violence against women back then stemmed from this idea that women gives irrevocable consent to her husband when she gets married to him, which means during the course of the marriage a husband has an absolute right with no reasonable restriction to impose his sexual will over his wife.[6]

This absolute exercise of will and authority leads to women related crimes in India within the realms of marriage, the family structure of the Indian society has taken women's consent for granted for a long time as she has absolutely no right upon her own self rather her life goes into dedicating herself into family affairs and also being silent victims as well to such brutal social norms and culture.

The premise of such irrevocable consent is set form the statement made by Sir Matthew Hale that " the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto, her husband which she cannot retract".[7] This statement clearly depicts the historical perception that a women has no identity after marriage, a question arises here that if the norms are such that a women's constitutional right is being sacrificed after marriage, does marriage really helps a women to live her life with complete dignity? The history clearly signifies this point that there is some sort of violation of women's right to life when she enters the premises of marriage

[5] Preliminary Report submitted by UN Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy (1994).
[6] Sanhita Chakrabarty, Marital Rape: Does Consent Matter? Critical Analysis, https://indianlegalsolution.com/marital-rape-does-consent-matter-critical-analysis/.
[7] Sir Mathew Hale quoted in Rosemarie Tong, Women, Sex and the law (1994).

and familyhood. Such historical accounts and statement tend to also solidify the fact as to how crimes within marriage have been completely overlooked just for the sake of maintaining patriarchal norms. Thus, it can be said that no identity problem through the historical context, establishes how women had to break through the norms of patriarchy and solidify their individual autonomy except for marital rape.

INCIDENCES AND CAUSES OF MARITAL RAPE

It can safely be said as of now that marital rape is a grievous form of domestic violence and it stems mainly from husbands cruel behaviour. One of the reasons is that the want of the husband to show authority in terms of sperm competition which mainly stems because of sexual jealousy as women's will not to have sex with her husband tends to signify that she is in consensual sexual intercourse with another man.[8] Problems such as drugs and alcohol consumption by the husband lead to sexual assault as well.[9] Such incidents raises a question that why women live with such abusive partners in the first place? The answers are clear that most of the married women in India are still uneducated and cannot bear their own living therefore; they face such humiliation and violation of individual rights.

MYTHS AND PERCEPTIONS OF MARITAL RAPE

Gender stereotypes in the society do create specific perceptions or notions regarding women and rape. These generally stem from the thought process of the society that a woman has to protect her sexuality for her husband and any sort of sexual activity a woman indulges into will be termed as the fault of a woman. So much so that even when a rape is committed upon a woman, it's the victim who is seen as the culprit and not the accused. These social connotations confront women in every step of the way in their pursuance of justice even more so when modern day media outlets tend to cover such crimes and sometimes give intricate information regarding the crime committed against the victim. There are certain bias preconceived notions against all the rape victims, which basically has a patriarchal origin some of the myths and perceptions are:

[8] V. Vigneswar and M. Kannappan, A Study on Constitutional Validity of Marital Rape in India with special Reference to Sec 375,119(7) International Journal of Pure and Applied Mathematics,1439, (2018).
[9] Id

VICTIM CAUSES THE VIOLENCE

This is a case of clear gender bias that it's not the man who is guilty but the woman who has exposed herself to such unsafe environment. It's the woman who provokes the offender to commit the offence of rape.[10] Now when the society has such a presumption regarding the rape committed by a stranger, it's easier to grasp that marital rape is much less of a concern for the society as marriage is impliedly a license to commit rape upon woman. In marriage a victim faces this trauma of having raised her own voice against her husband would mean that the character of a woman will be targeted and she will be termed as "house destroyer", as in the society a women is expected to be a knot which ties the entire family and if the knot breaks, social hysteria pursues in the form of character assinationation of a married woman.

THE RESISTANCE OF THE VICTIM WILL DETERMINE THAT IT IS A RAPE

This myth tends to state that to prove an offence of rape one needs to show the battle scares, if a woman fails to do so then it can be termed as consensual intercourse. This perception of rape can completely be dismissed on the grounds that a woman to save herself from further damage has to give her will to the act committed as further resistance can damage her physical wellbeing[11], this is the reason why consent is very important in each case of rape. In the case of marital rape this consent is presumed after the marriage, hence it is left less scrutinized.

WOMEN FALSELY ACCUSING MEN FOR COMMITTING RAPE WITHIN THE MARRIAGE

This perception has been used many a times even during the case of Arnesh Kumar v. State of Bihar, the court Stipulated that section 498A of IPC is being used as a weapon by disgruntled wives rather than a shield.[12]The supporters of such ideology have consistently failed to back it up with evidence. As considering the position of a woman in such scenario is that of a victim, and a victim cannot bring ill repute to her own self. As registration of cases in police lead to insensitive questioning of the officials and various other judicial hurdles, which is exhausting for a victim to go through which makes it highly unlikely that a woman will misuse the law to just falsely prosecute her husband.

[10] Arizona Coalition to End Sexual & Domestic Violence, Sexual Violence Myths and Misconceptions, https://www.acesdv.org/about-sexual-domestic-violence/sexual-violence-myths-misconceptions/
[11] Id
[12] Arnesh Kumar v. State of Bihar, (2014) 9127 SCC

MARITAL RAPE IS A WESTERN CONCEPT

It is argued by various stakeholders of the society that the concept of marriage in India is different from that of west and that in India Marriage is treated as a sacrament and is accompanied by various religious beliefs which cannot be taken away.[13] Marital rape is not a western problem rather it is about human rights, an individual's dignity as well. The law makers have clearly accepted this myth largely due to the unawareness regarding marital amongst the citizens, which is vague as everybody understands the term 'No'. Even if we accept this myth there are instances in the history that signify that such practices which have harmed women's position in marriage have been dealt with by the law makers such as sati prohibition, dowry protection, widow remarriage etc. In order to curb such inhuman practices against woman it took all the social reformers to step in and fight for women's rights even before constitution came into existence, back then such reforms were not termed as western concept rather it highlighted one of the key elements of human right that is individual freedom and a women's identity was protected within the realms of marriage. Such illustrious history regarding women related reforms suggest that the law makers back then didn't term these changes as western concepts rather fought for the rights of women. Therefore, in today's time it becomes imperative for the lawmakers to understand that such myths won't have its existence, especially after the enforcement of the Indian Constitution which protects the dignity of each and every Individual.

THE CONSTITUTIONAL TEST OF MARITAL RAPE

Since, the advent of the Constitution individual freedom and autonomy are the part of the basic rights of any individual regardless of any distinction. Every individual under article 21 of the Indian Constitution has a right to life, to live it with dignity. However, when we understand the nature of marriage in India woman have had no individual autonomy what so, ever inside the realms of marriage. Even when a woman files a divorce against his husband there are cases where the petition of restitution of conjugal rights has been filed by the husband against his wife. To understand the constitutional value of marriage one needs to analyze it through the eyes of Restitution of Conjugal Rights. The remedy of RCR originated in English law however, it no longer exists.[14] Under section 9 of the Hindu marriage Act, the court can grant a decree

[13] Chhavi Sachdev, Rape is a Crime in India-But there are Exceptions, The National Public Radio, https://www.npr.org/sections/goatsandsoda/2016/04/13/473966857/rape-is-a-crime-in-india-with-one-exception

[14] The remedy for restitution of conjugal rights was primarily granted by Ecclesiastical courts. However, in 1969, Justice Scarman recommended the abolition of this remedy. Accepting this recommendation, an amendment was made to relevant law which prevented the courts from granting this remedy.

of RCR. If a husband or wife do not live with each other without any reasonable excuse then the court can pass this decree in order to ensure that there are no unreasonable separation. This decree clearly takes away the individual choice of woman to whether or not to cohabit with her husband. Another question that arises is that whether the state can force a woman to have sexual relations with her husband in such state of the marriage.[15] There are two cases which are important in enforcing the restitution of conjugal rights.

In the case of **T sareetha v. Venkata Subbaiah[16]**, the Andhra Pradesh high court for the first time recognized the rights of a woman after marriage by questioning the constitutional validity of the marriage under article 14, 19 and 21 of the Indian Constitution. The court took a stand that that RCR is unconstitutional as it gave no right of choice to woman with regards to her sexual autonomy and clearly violates article 21 of the Indian Constitution with regards to an individual right to protect her sexual autonomy.[17] It interestingly encroached upon an area which courts are hesitant to look upon is the fact that the concept of forced sex does exist under the realms of marriage.

This decision of Andra Pradesh High Court was in complete contradiction of the Delhi high court case of Harvinder Kaur v. Harmander Singh[18] which took different stand, and stated that RCR is not coerce any partner in marriage to stay with his/her respective spouse but rather to "protect the institution of marriage".[19] The court through this case has created this notion that marital sphere is a private sphere and fundamental rights have no application in marital sphere.

However, such argument of the court that marriage is a different sphere can be contradicted through different acts such as Section 498 A of the Indian Penal code and Prevention of Women from Domestic violence Act, 2005 which provides woman both civil and criminal remedies for any form of cruelty inside the marital sphere.[20]

[15] In the case of marital rape, by not criminalizing it, state is essentially presuming that a woman has provided an irrevocable consent to her husband for sexual activity. By not providing her the option to refuse such activity, the state is offering the woman no choice but to participate in that sexual activity. Therefore, the state is compelling her to have conjugal relations with her husband

[16] T. Sareetha v. Venkata Subbaiah, AIR 1983 AP 356

[17] Id, 31-32

[18] Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66.

[19] Id, 36

[20] See, The protection if women from Domestic Violence Act, 2005; The Indian Penal Code.

THE PRIVATE SPHERE: AN EXCEPTION TO THE FUNDAMENTAL RIGHTS VIOLATION

It has been seen in the above two cases that courts have separated concept of forced sex from marriage. Traditionally it is believed that law cannot regulate the private sphere as there are certain ethical sentiments, and that any offence committed inside the marital sphere cannot be easily criminalized even when it is heinous in nature. However, this a misperceived notion.[21] When we look at the decision of both the cases the term marital privacy is interpreted differently the Case of Venkata Subbaiah interpreted marital privacy as, that the state cannot force people to resume there marital life through RCR decree. In the case of Harvinder Kaur the court interpreted marital privacy as something which a court cannot encroach upon.

There are instances where the courts have encroached upon the private sphere such as section 377 of IPC where two consenting adults were being forbidden to have sexual intercourse with each other. This shows that the state has goes into the realm of private sphere and has made changes as well. Such instances clearly show that the state can get into the private sphere depending upon its ideology as it can penetrate into the matter of same sex couples but cannot criminalize rape under the realms of marriage as it is a private sphere.

THE SHIFT FROM PRIVATE SPHERE TO INDIVIDUAL AUTONOMY: THE RELEVANCE OF THE CONSENT THEORY

Women in historical times have been treated as property of men which resulted in ignorance of their fundamental rights. When we talk about rights it violated due to the unwillingness of a woman in indulging into a sexual intercourse with her husband. Wife's consent is taken for granted as if to say her consent is of no value and she has no equal standing in the society. A noted feminist scholar Martha Nussbaum emphasized upon focusing upon women's rights on the basis of equality for self and choice. In the modern times the concept of marriage has evolved. The women have started to gain tight in terms of divorce, right to property which implies that they have become an equal partner in marriage.[22] So understanding of women as a chattel does not hold true in law anymore. Which means the law enforcement have created equality between both the spouses in terms of treating their infringement of rights. Which means consent is also the part of the equality in terms of indulging into a sexual intercourse.

[21] Margaret Thornton, The Public/Private Dichotomy: Gendered and Discriminatory, 18 Journal of Law and Society 448 (1991)

[22] See the Hindu Succession Amendment Act 2005 sec.6. The amendment gives equal property rights to women in a joint Hindu Family.

As marriage cannot presuppose consent when we talk about equality in marriage as a woman has similar right to that of man to protect her sexual autonomy from being infringed.

It is the part of a woman's right to sexual privacy. Any type of intense sex damages the right of protection of sexual security. Exclusion of rape from marital sphere would mean damaging the protection of a lady from getting into a sexual relationship without consenting to it.[23] In other cases it has been widely stated that every women is entitled to her sexual privacy and it is not open for any and every person to violate her privacy as and whenever he wished.[24]

However, the argument of the state is that they want to protect the institution of marriage for the stability of society.[25] The state's approach is clear that it wants to prevent the greater harm which to prevent the harm done to the society through broken marriages. However, this argument fails as enactment of law like Prevention of Women from Domestic Violence Act, 2005 signifies the fact that State has understood that individual autonomy of woman needs to be protected and hence that goal will override the goal of protecting the stability of the society.

Hence, it can be established that rape in the sphere of marriage can be dealt with has the precedents above have shown that state has understood women's rights and have protected them form any sort of mal treatment in the marital sphere, which makes marital rape a no exception as it is against the fundamental rights of a women and against the constitutional values, such claims persuades the argument that marital rape should be considered as a criminal offence.

THE PRESENT LEGAL POSITION OF MARITAL RAPE

Under section 375 of IPC there is an exception, when the woman who is married and is not less than 15 years of age, sexual intercourse by husband is not considered as rape.[26] Now this law tends to create two classes, rape in marriage will only be valid when the wife's age is below 15 which clearly shows that the courts have considered rape as a crime under the realms of marriage. However, Indian laws have made no effort to consider the rights of wife who is aged

[23] Neera Mathur v. LIC 1992 AIR 392, 1991 SCR Supl. (2) 146
[24] State of Maharashtra v. Madhukar Narayan AIR 1991 SC 207, 1991 (61) FLR 688, JT 1990 (4) SC 169, (1991) IILLJ 269 SC, 1990 (2) SCALE 849, (1991) 1 SCC 57, 1991 (1) UJ 109 SC
[25] See the Family Courts Act, 1984(The object of this act is to promote conciliation and speedy settlement of disputes relating to marriage and family affairs).
[26] S. 375, IPC, exception 2: reads as – Sexual Intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

between 15-18 which clearly shows unequal interpretation and lack of consideration for wives above 15 years of age.

In Haree Mohan Mythee case[27] it was stated that the husband does not have absolute right over his wife, without taking her safety into consideration. According to this case the only circumstances the law enforcements could only encroach upon husband's right when there is a danger to her health which may have grave consequences like death.[28]

This case shows that there is a danger to the overall health of a woman when she is been forced to indulge in sexual intercourse within marriage. Such incidences cannot be ignored, and are required to be taken as precedent in order to amend the existing law which fails to analyze such consequences.

The remedies under the existing law whether civil or criminal for forced sex within marriage are not enough to punish the husband for such crime. For example, under section 498 A of IPC deals with cases of cruelty against women, however there is difference between cruelty and rape and it is not apt to deal with cases of rape. In addition, rape requires separate set of evidence as well.[29] Secondly to be convicted under section 498 A the offence needs to be conducted over a long period of time and cannot be used when it is only committed on one or two occasions.[30] It is hence important the nature of recommendations made in certain law reports with regards to rape in marital sphere in order to give its recognition as a separate offence

THE LAW COMMISSION REPORT

In order to understand the nature of marital rape laws and how they can be amended and the philosophy that is required to implement such laws, it is important to understand the reports made by law commission of India with regards to it.

a. 42nd law report

   The 42nd report emphasized upon forced sex with judicially separated wife is considered as rape on a presumption that the husband de facto has no authority over his wife after divorce and hence cannot file the petition for restitution of conjugal rights. It also

[27] Queen Empress v. Haree Mohan Mythee (1890) 18 Cal. 49
[28] Id at 62. In this case, when eleven years old wife was subjected to forcible sexual intercourse by the husband, she died of vaginal ruptures and profuse bleeding.
[29] See the Indian Evidence Act, Section 114 A
[30] Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511

recommended that forced sex with a minor wife will also be termed as rape within the marital sphere. However, the report fails consider the rights of the victim above 15 years of age.

b. 84th Law Report

The 42nd law report and the 84th law report don't differ with regards to recognizing forced sex with minor as rape as well as that of judicially separated wife. However, the report suggests that rape committed by a husband upon wife and the wife is below 18 years of age would be punishable. However, this recommendation is not added in the IPC and at the same time fails to recognize the rights of major wives in marriage.

c. 172nd Law Report

In this report the law commission had recommended that the exception under section 375 shall be retained with regards to section 376 A, the punishment should be enhanced i.e. it should not be less than 2 years and may even extend to 7 years with fine. This was done with the help of the precedent of Sakshi v. Union of India[31] which stated " When a man causes hurt or any other physical injury to his own wife is liable to be punished for such offence like any other person causing such hurt or physical injury, why should a husband who sexually assaults his wife be not punished like any other person." However, such decisions have come in the light of exceptions such as judicial separation or in case of a minor wife all the reports have failed in recognizing the rights of a wife above 15 years of age in terms giving consent during the sexual intercourse.

MARITAL RAPE AND THE INTERNATIONAL LAW

More than world's half of the country does not criminalize marital rape.[32] Countries like Czech Republic and japan are included in this list. In countries such as Tunisia, Cameroon, and Bulgaria, the offenders are exempted from the crime if they marry the victim. Human rights violation of women has become evident however these countries have failed to recognised the importance of implementing the law of Marital Rape. This is a complete failure on the part of the state to exercise due diligence and to comply by International law to criminalize sexual assault in the Marital Sphere.

[31] Sakshi v. Union of India AIR 2004 SC 3566
[32] Protecting Women from Violence, World Bank Group, http://wbl.worldbank.org/data/exploretopics/protecting-women-from-violence

It has been seen that international law brings reforms in countries where such laws are not duly recognised. It has been seen that domestic violence has been regarded as a form of violence against women however the laws have failed to regard sexual component of such violence inside the Marital Sphere. This is the reason why it is important to analyze marital rape from a point of view of International Law in order to bring reforms in the domestic laws.

a. The Standard of Due Diligence

All the UN members need to comply by the due diligence standard in order to bring certain reforms in their local laws. The International Law emphasizes upon every member country to prevent any form of human rights violation through the help of International standard. Where the rights are legally guaranteed states must ensure that they must be exercise for the protection of the individuals. In 1993 DEVAW adopted by the General Assembly of UN, it gave an obligation to the member states to eliminate all sorts of violence against women.[33]

In the Due diligence report of Special Rapporteur on violence against women outlined the way in which the due diligence standard obligates the state to prevent, investigate and punish, and provide remedies for acts of violence against women as it violates their human rights.[34]

There are many compliances in International Law which require due diligence and a comprehensive approach of law making in order to address all forms of violence against women which includes the offence of marital Rape as well.

b. The International instruments on criminalization of Marital Rape

Certain International organizations and groups such as EU have expressly called for criminalization of Marital Rape in the European Parliaments Resolution on violence against women of 1986.[35] The IACHR has demanded that the states should adopt a

[33] U.N. Deceleration on the Elimination of Violence Against Women. DEVAW provides the first Internationally agreed definition of violence against women: "Violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

[34] See generally Yakin Erturk (Special Rapporteur on violence Against Women, its causes and consequences), U.N. Econ. & Soc. Council, Comm'n on Human Rights, Rep on Violence Against Women, The Due Diligence standard as a tool for the elimination of violence against women, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

[35] Resolution on Violence Against Women, EUR. PARl. DOC. A2-44/86 (1986). The European Parliament in Article 10, "calls for the legal recognition, in those countries where such is not yet the Case, of rape within the marriage, and further calls for the same treatment by the law of forced sexual acts, within and without marriage,"

comprehensive approach in terms of making laws in criminal, civil and administration and make no difference based on marital status of victim or perpetrator.[36]

The African Union adopted the protocol on the rights of women which states that "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts . . . in private or public life."[37]

These protocols and conventions are not strictly implemented in the Asian countries however there has been growing implementation of such international protocols in Asia, However the Progress has been slow due to the cultural norms that prevail in these countries.

c. <u>The requirement to criminalize sexual abuse in an intimate relationship</u>

Criminalization of spousal Rape requires more than just simply removing the exemption. According to CEDAW Committee definitions of rape, including rape in the marital sphere requires to take consent into consideration if the state fails to do so then it fails to satisfy state's obligation to protect women's rights to bodily security.[38]

In the Rule 70 of the International Criminal Court (ICC) Rules of Procedure and Evidence states following with respect to sexual violence:

(i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
(ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
(iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.[39]

In simple terms where the situation forces a married woman to give consent in order to fulfill due to the societal pressure such consent won't be considered as a genuine consent. This is the reason why marital rape needs to be criminalized to send a message across the community that

[36] Inter-Am. Comm'n On Human Rights, Access to Justice for Women Victims of sexual Violence in Mesoamerica , at xi, para 4 (2011).
[37] Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa. Art. 1 (j), July 11, 2003.
[38] CEDAW Report
[39] Assembly of state parties to the Rome statute of the International Criminal Court, 1sr sess; 1st mtg. at 44 r. 70, Doc. No. ICC-ASP/1/3 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/603/35/PDF/N0260335.pdf? Open Element.

a woman has equal rights in marriage and it remains the same for her in terms of retaining her consent for sexual activity within the sphere of marriage.

CONCLUSION AND SUGGESTION

It is important that India takes into account the laws of the foreign countries with regards to marital rape. It has been observed that the American researchers found that in estimate 10% to 14% of women face rape in marriage due to this revelation, in 1993 marital rape became a crime in fifty states in the United States. It is important to note here that the researchers examined the nature of rape in marriage then it went on to become a law in the states. In pursuance to this India needs to carry out a proper survey regarding rape in marriages so that the state can understand the importance of criminalizing such a heinous crime within the realms of marriage in order to protect the individual autonomy of married woman as we live in a constitutional era where individual rights are of utmost importance.

Further certain level headed stakeholders from both male and female side need to combine in order to spread social awareness regarding the aspects of 'Consent' and 'Individual Autonomy' in simple language as these terms are alien to the culture that prevails in the country. It is also important that these awareness groups create gender harmony rather than gender violence not terming either male or female as heinous beings rather educating them about their rights, they hold upon each other and give a clear picture in order to protect each other's rights and promote gender harmony. In order to curb such crimes, the gender perceptions are needed to be changed and that can only happen through various drives in the social strata which is backed by government in order to curb such crimes from the grass root level.

After creating awareness regarding the crime, it needs to be backed by sanction i.e. to criminalize such offence and to repeal the exception of marriage from the crime of rape as the state has to take into consideration the autonomy of both husband and wife and the concept of absolute right over wife is century old and needs to be changed, as the state in the past has shown the willingness to give woman the equal status in marriage by giving them property right, maintenance right, it is important that this trend continues so that woman can stand equally with men and ensure that gender harmony is maintained and no gender hatred is spread as we are in welfare state, and if the welfare state fails to protect each and every individual regardless of gender and historical social position that they hold then it will be a failure on the part of the state as it should not differentiate between a husband and that of an outsider as crime is a mind set and has nothing to do with social position or status.

(4)
RAPE: A BLATANT VIOLATION OF HUMAN RIGHTS - NEED OF SOCIAL TRANSFORMATION

Dr. Sharmila Ghuge[1]

INTRODUCTION

Stop recognizing woman by her gender,

Start recognizing woman as a human being!

Rape – the very expression of this word portrays the intensity of a monstrous act imposed on a woman. In this contemporary era, while the world is glorifying the technological achievements, ironically, women are struggling to be recognized as human beings. India, the second most populous country which hosts women as half of its population is not an exception to this deplorable situation. Indisputably, India has made vast strides since several glorious decades after independence in numerous disciplines. However, even in this epoch of globalization and during the phase of increasing acceptability of human rights, the crime of rape is an acute and persistent problem in India. It needs to be borne in mind that the issues of women's rights cannot be compartmentalized and segregated as secondary issues in this constant developing period. When one analyses the entire scenario prevailing in India, it demonstrates an opposite picture of women being highly progressive but yet extremely dominated and vulnerable.

The alarming increase in rape incidents in India in the last decade continues to be a contentious dilemma as its reflections incorporate grave and systematic violations of women's human rights. Despite the national and international focus on women's rights, women are still victimized largely in the Indian society. In fact, gender discrimination prevails through several forms, such as, gender inequality, female feticide, sexual harassment, violence against women, denial of education, trafficking, *etc.* However, rape is one of the most atrocious and callous act for the victim. Rape is not merely an offence, but it creates a scar in the marrows of the mind of the victim. Moreover, an act of rape is an attack on her individuality and creates a permanent dent causing irreparable loss to her life. In spite of the legislative measures adopted for protection of women, the intensity of rape offences has not been reduced in India. Numerous factors are considered to be responsible for this deplorable prevailing scenario, such as, extreme gender discrimination, poverty, widespread illiteracy, lack of awareness, extensive economic dependence and unbridled cultural male domination, etc. Over the past decades it is

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unanimously accepted that improving the status of women and making her free from the barriers of discrimination is one of the most crucial endeavor of national development. In order to protect the human rights of women and to provide protection to women, a gamut of legislations have been enacted from time to time. Unfortunately, despite these efforts, gender discrimination is experienced in all sections of the society and we are still unable to boost of a society where there is total gender equality. Today, the fact is that women's exploitation in form of gender discrimination is a reality and gender justice is a fragile myth.[2]

The moot question which ponders a thoughtful mind is, why are the rape incidents increasing at an accelerated stride despite the stringent legal provisions available in India? An attempt to answer this question leads to rethink about the role of masculinity and lack of cultural persistence in Indian society. It is significant to note that Indian culture holds a high heritage and is unique in the world. Indian culture embodies specific characteristics, such as ethical code of conduct, respect for women, morals and value, etc. During the ancient period women were placed at a towering pedestal experiencing the feminist glory in the Vedic period.[3] Later on, depressingly this elevated legacy of women's esteem was subjected to male domination due the impact of *Manusmriti* which emphasized male domination and due to several external aggressions in India.[4] Thereafter, during the British rule steps were taken to reestablish women's rights and gender equality in India.[5] In the modern era, when India stepped in the democratic setup, the *Supreme lex* of land bestowed Indian women with several rights. Presently, we have laws to protect women against crimes but still India is struggling to curb the evil of rape in the society. Hence, the unresolved question which ascends, is why India is struggling to control rapes and other forms of gender discrimination against women? Can an attempt be made to find its answer in social transformation- which includes the true essence of a rational and national reform? The answer to the first question is based on the solution which is hidden in the second question. Certainly, the society is badly in need of social transformation paving way for rational reforms.

The prerequisite of the current time is recognizing, reconciling and striking a balance between modern era and cultural values in the society. Unfortunately, today the righteousness is confined and injustice is enthroned due to dearth of ethical norms in the society. As rightly

[2] A.S. Anand, *Justice for Women*, 2nd edn.,Delhi: Universal Law Publishing Co. Pvt. Ltd, 2003, p.19.
[3] Shashi Prabha Kumar, "Indian Feminism in Vedic Perspective" *Journal of Studies of Ancient India*, Vol. 1, Nos 2-4 (1998), pp. 141-152
[4] Mamta Rao, *Laws Relating to Women and Children*, 2nd edn., Eastern Book Company, Lucknow, 2008, p. 21
[5] *Ibid* at 22.

opined by John Rawls, each generation must not only preserve the gains of culture and civilization but it must be considered as real capital accumulation.[6] Similarly, John Finnis, adheres that the principles of reasonableness are important in ordering human life and human community. Incontrovertibly, the response of human behavior in a society towards law and how law has crafted and molded itself to suit the way the society responds is intertwined. Interplay of law undoubtedly is very crucial, however, as witnessed in India only law is not able to curb the rampant incidents of rape in the country, and hence now is the time to bring about the social change by modifying the interpersonal and inter class relationships with changed approach and mindsets of people towards every woman. There is need to restructure the Indian society with appropriate cultural pattern, ethical values, sex education, liberty combined with moral restrictions, etc., to bring about the required social transformation.

RAPE – VIOLATION OF HUMAN RIGHTS

"Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society…"[7]- Dipak Mishra J.

The Indian Penal Code (hereinafter referred as IPC) defines rape as an act of a man who has sexual intercourse with a woman against her will or without her consent or with consent which is obtained by force, or consent obtained by reason of unsoundness of mind or intoxication, or consent obtained under 16 years of age.[8] Despite the distressing increase in crimes against woman and rape incidents, the IPC enacted in the year 1860 remained unchanged till the year 1983. In 1983 IPC was amended following huge protests in the wake of the controversial Supreme Court judgment in the infamous Mathura rape case.[9] Another major change in the IPC came in wake of the most iniquitous gang rape of a physiotherapy intern on 16th December 2012 who was beaten up and gang raped by four men in Delhi in a moving bus.[10]And once again as the pressure mounted from public, media, etc., legal provisions were amended for

[6] John Rawls, *A Theory of Justice*, Oxford: Clarendon Press, 1989. p. 285.
[7] *Shyam Narain V. State (NCT of Delhi)* (2013) 7 SCC 77, para 27
[8] See Section 375 and Section 376 of the Indian Penal Code, 1860. Also see, Criminal Law (Amendment) Act 2013- Sections 375, 376, 376 A, 376 B, 376 C, and 376 D.
[9] *Tukaram v. State of Maharashtra* AIR 1979 SC 185
[10] In the wake of this unrest and furor the Government of India set up a three member committee headed by the former Chief Justice of India Justice JS Verma, Justice Leila Sheth and Justice Gopal Subramanium to look into the adequacy of the legislations that afforded protection and security to the women in India. Based on the recommendations of this committee an anti-rape ordinance was signed by the President and was passed by both the Houses of the Parliament and thus the Criminal Law (Amendment) Act of 2013 came into existence

strict punishments for rape offenders.[11] The Hon'ble Supreme Court of India has been playing an active role as protector and guarantor of rights for decades in this country.[12] And the Apex court has also broadened the horizon of creative interpretation while acting as a catalyst for reform in rape laws. Nonetheless, the crime rate against women is increasing at a frightening gait instead of reducing.

The National Crime Records Bureau (NCRB) released the 'Crime in India' report for the year 2017 showed a shocking increase of 16% in crimes against women as compared to 2013.[13]According to the NCRB report, there were 3.59 lakh registered cases of crimes against women in 2017, which means a crime was committed against women every one and a half minutes during the year.[14] In 2013, the number of cases was 3.09 lakh and the rate of crimes committed against women (incidence of crime per one lakh women) in 2013 was 52.24. In 2017, this had increased to 57.9.[15]According to the figures released by NCRB, the total number of rape cases reported in India has gone up to 33,707 in 2013 from 24,923 in 2012. In 15,556 cases, the rape victims were aged between 18 and 30 years in 2013. The NCRB states that 92 women are raped every day in India.[16] In fact, a rape is reported every 15 minutes, according to a recently released official government crime data.[17] The NCRB data from 2018 has stark revelations about crime in the country.[18]

Crimes against women in India have been unceasingly escalating as reported by the NCRB. It is needless to say that the Gender-based violence has become a crucial issue as never before in this country, demanding immediate attention and solution.

[11]Indian Penal Code (IPC), 1860, the Code of Criminal Procedure (CCP), 1973, the Indian Evidence Act (IEA), 1872 and the Protection of Children from Sexual Offences Act, (PCSO), 2012.

[12]*MadhuKishwar v. State of Bihar (1996) 5 SCC 145, Maneka Gandhi v. Union of India AIR 1978 SC 597, Valsamma Paul v. Cochin University (1996) 3 SCC 545, C. B. Muthamma v. Union of India, (1979) 4 SCC 260, Air India v. Nargesh Mirza, (1981) 4SCC 335, et. al, Sttae of Maharashtra V. Madhukar N. Mardikar, (1991) 1 SCC 57, Kamalanantha V. Sttae of Tamil Nadu, (2005) 5 SCC 194: 2005 SCC (Cri) 1121: AIR 2005 SC 2132, Rafiq V, State of U. P, 1980 Cri LJ 1344 (SC) Dhananjoy Chatterjee V. State of W. B. (1994)2 SCC 220*

[13]https://www.newsclick.in/NCRB-data-shows-16-increase-crimes-women-modi-govt-terms site accessed on 10/02/2020

[14] *Ibid.*

[15] *Id.*

[16] https://www.indiatoday.in/india/story/india-rape-92-women-every-day-4-delhi-statistics-207241-2014-09-04 site accessed on 11/02/2020

[17]http://southasiajournal.net/a-rape-in-india-every-15-minutes-government-data/ site accessed on 18/01/2020

[18] https://www.asiatimes.com/2020/01/article/a-rape-in-india-every-15-minutes-government-data/ site accessed on 10/01/2020

Apart from the penal provisions for protection of women, the Constitution of India, through its Preamble, various Fundamental Rights,[19] Directive Principles[20] and Fundamental Duty[21], encompasses right to equality and provides opportunities for women. Similarly, in tune with various provisions of the Indian Constitution, the State has enacted numerous legislations to protect women against social discrimination[22]. At the international platform, The Universal Declaration on Human Rights, Convention on Political Rights of Women, Convention on the Elimination of all Forms of Discrimination against Women (hereinafter referred as CEDAW), United Nations Millennium Declaration, etc., are the landmark instruments for women's rights. India is a signatory to the CEDAW, yet elimination of gender discrimination is not even diminutively witnessed in the society. In fact, the ratification of CEDAW carries an obligation on the State[23] to provide for an adequate and effective legal framework against any form of discrimination against women. The big moral appeal of human rights has been used for a variety of purposes, from resisting torture, arbitrary incarceration and racial discrimination to demanding an end to hunger and starvation, gender inequality and to medical neglect across the globe.[24] Indeed, a stable body of rules is thus required in order to bring about the conditions for a rational human existence.[25] Nonetheless, we are encountering a phase in India which portrays diametrically opposite scenario- we have skillfully crafted laws to punish the offenders yet the crime rate in India is speeding up at a frightening pace.

Thus, once again the thought which haunts our mind is the reason for inability of the largest democracy of the world to control the crimes against women. The prevalence of gender discrimination is the corner stone of crimes against women which is the plague for the Indian society. Gender discrimination is seen as an extreme ailment which reflects as a social stigma[26] and this congruence of inequality mutilates the lives of women ruthlessly that can massively

[19]Indian Constitution, Article 14- Right to equality, Article 15- prohibition of discrimination on grounds of sex, Article 16- equality of opportunity in employment, Article 19- Fundamental freedoms, Article 21- Right to life and liberty, Article 23- Right against exploitation.

[20]Indian Constitution, Article 39(a) Equality in adequate means of livelihood, Article 39 (d) equality in remuneration, Article 39 (e) Health of women, Article 42- Right to maternity benefits.

[21]Indian Constitution, Article 51 A (e) Duty to respect dignity of women.

[22]Domestic Violence Act, 2005; Dowry Prohibition Act, 1961; Medical Termination of Pregnancy Act, 1971; The Maternity Benefit Act, 1961; The Immoral Traffic (Prevention) Act, 1986, The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex Selection) Act, 1994, The Indecent Representation of Women (Prohibition) Act, 1986, The National Commission for Women's Act, 1990, Commission of Sati(Prevention)Act, 1987, etc.,

[23]The Government of India ratified this Convention on 25th June 1993.

[24] Amartya Sen, *The Idea of Justice*, U.K, Allane Lane Penguin Books, 2009, p. 355.

[25] Sean Coyle, "The Human Face of the Rule of Law" Colm O' Cinneide, (ed.), *Current Legal Problem*, vol. 62, Oxford: Oxford University Press, 2010, p. 73.

[26] Lynn Walter, (ed.), *The Greenwood Encyclopedia of Women's Issues,* Westport: Greenwood Press, 2003, p. 155.

impoverish women.[27]At the same time the inadequate and biased investigations of crime coupled with masculinity over powering have demonstrated the plight of women crossing all known cannons of violation of their rights. It is impossible to curb the rapes and other crimes against women in India unless the structured patriarchal cob webs are broken permanently. The penal laws of the land are important to punish the accused in rape cases but death penalty should not be only for inflicting retribution. By death penalty or any other form of punishment, only the offender is penalized but there is neither deterrent nor reformative impact on the society. Unquestionably, the punishments are mandatory for the criminals for committing such heinous offences but the same is a fabricated victory for the victim. The real triumph for the society will be success in reducing such incidents and one fine day making Indian society a rape-free country. Regrettably, after any rape befalls, the entire incident is highlighted by media, there are strong retorts across the country with candle march, protests, criticism, demand of action, suspension of police officers, blaming the government, etc., all reactions but no response! Such riposte of Indian public completely exhibits vengeance with emotional turmoil whereas the country needs to encompass rational, balanced and spirited social reforms as the real and long term solution to the gender discrimination and all forms of crimes against women.

NEED OF SOCIAL TRANSFORMATION

India- one of the oldest civilization, is struggling to deracinate the gender discrimination deeply rooted in the Indian society. What needs to be changed in India? It is not enough that we have changed the laws, the clothing fashion, the geographical boundaries, taste of food, western and modern lifestyle- the answer regrettably is in negative. The entire array of changed lifestyles, behavior, present education, thought process, etc., needs to be changed. It is highly significant to silhouette the conduct of individuals in the society which in turn contours the progress of law and society.[28] The code of conduct and human behavior is deeply connected with the moral values. Ronald Dworkin, an eminent philosopher, emphasizes that moral values are required to be protected and preserved for the betterment of the society.[29] In fact, it is an established fact that morality plays a central role in the existence of the society.[30] Additionally, any desired

[27] Amartya Sen, *The Argumentative India,* London: Allen Lane, 2005, p. 207.
[28]Benjamin N. Cardozo, *The Nature of the Judicial Process,* New York: Yale University Press, 1995, p. 112.
[29]Ronald Dworkin, *Justice in Robes,* Harvard University Press, United States, 2006, p. 114.
[30] H.L.A. Hart, *Law, Liberty and Morality,* London: Oxford University Press, 1963,p. 51. *See also,* Devlin, *The Enforcement of Morals,* Oxford: Oxford University Press, 1959, pp.115-116.

social change is inseparably linked with morals and culture of the society.[31] The utmost essential change needed is the change in outlook towards the gender, the masculinity, the femininity, women's role in society, women's existence as a human being in the society. Depressingly, despite women being educated and working, it is still the societal attitude that men earn bread and butter for the family, women should cook, clean and feed. It is a great irony that our society is becoming a psycho-sick society with an uncivilized behavior.[32] Overall, the social approach towards women is still that she is inferior to men and must obey men. It is imperative to change this brain washed mindset which can be done through education and imparting ethical moral cultural values at early age so as to have good citizens in the country.

The country as a whole needs to work on its machinery and forces meant for protection of women. Rape is not a crime against an individual but a crime which destroys the basic equilibrium of the societal atmosphere.[33] Hence there is need of collective efforts by the society, in addition, there should be simplified procedure for registration of offences, effective and immediate arrests of accused, speedy trials and speedy justice, adequate policies for victims, proper legal assistance, women friendly enquiry and investigating procedures, unbiased and impartial police force, accountability of all authorities involved in the process from start to end of a case. The protective measures should be improvised at the same time the preventive measures also should be strengthened. Since early age, children should be taught and made familiar with sex education. Instead of making taboos of certain vital facts of life which the boys when grow as adult feel fascinated about the same and adopt a wrong mode by victimizing a girl. It is a matter of fact that in the Indian society people are not comfortable talking about sexuality, sex education, reproductive rights, sexual desires, menstruation, etc. Surprisingly, even in educated and middle class families these topics are banned to be uttered. Anyone who talks about these things is labeled as a pervert or a characterless person. It is indeed shocking to note that Indian people do not consider it objectionable if men buy cigar, ghutka masala[34] but people have a serious disapproval if men openly purchase condoms[35] as a preventive measure for safe sex! Additionally, a husband does not shy away to buy his liquor which is injurious to health if exceeded but is ashamed to buy a packet of sanitary napkin for his wife which is a savior for her menstrual health. This mind set needs to be changed and the

[31]Lawrence Freidman, M., *Law and Society*, Prentice Hall Inc, New Jersey: 1977, p. 168.
[32] Anand, A. S., *Justice for Women,* 2nd edn., Delhi: Universal Law Publishing Co. Pvt Ltd, 2003, p. 11.
[33] *Jogendra Singh V. State of Uttar Pradesh,* (2012) ^SCC 297, para 49.
[34]https://www.fortishealthcare.com/blog/tobacco-injurious-health/ site accessed on 06/09/2019
[35] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3307935/ site accessed on 06/09/2019. Also see, Rakhi Jain, et al., "Contraceptive Methods: Needs, Options and Utilization" *Journal ObstetGynaecol India*, 2011 Dec 61 (6): 626-634, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3307935/ site accessed on 29/07/2019

effective method to change is not only by inculcating these things in mainstream education but by actually teaching and implementing them in life. The present education system needs to be infused with the cultural and moral values deeply enshrined in the Indian civilization which once upon a time endorsed utmost respect for women. Education and empowerment are fundamental to equip women for equal participation and a dignified existence. Justice Krishna Iyer has aptly said that, "education is the *Kundalini Sakthi* of women's advance in the society"[36] Though it is said that law is the best instrument of social change and to a certain extent it indeed is, however, for the gender discrimination only law to be used as a tool in fetching homogeneity amongst the heterogeneous population which infused with patriarchal superiority is not possible and hence social transformation of Indian society is inevitable. The historical and sociological discourses have established the positive role of the community's collective approach needs to be matched by the state's facilitative response for social reforms.[37] The society needs to consider ethics and social morality as worthy factors in the mission of social transformation.[38] In fact, the moral values of the historical human spirit operating in a social context on which the social, moral and cultural ties rest should not be underestimated.[39] It is also crucial at this point of time to understand law systematically and empirically as a social phenomenon and not merely as a piece of legislation. It is indispensable that Indian society transforms itself by instilling law with cultural values just like golden threads weaving the fabric of Indian society in a masterpiece.

CONCLUSION

In conclusion it can be averred, that the first and foremost requirement in order to curb rapes in India is effective and immediate implementation of existing legislations, assistance by police personnel's, approachable attitude of authorities, speedy justice, social awakening, etc. There is a need to sensitize and educate our society towards the equal and dignified existence of women. Considering the prevailing scenario it can be averred that the solution to the crises of rape does not lie only in enacting or amending laws in the country but it is equally important for each individual to behave with a sense of responsibility being a member of the civilized society. Women who are always in a vulnerable situation should not only be educated but should be empowered as a vital strategy for overcoming this depressing scenario of alarming

[36] Krishna, Iyer. 1995. *Human Rights,* New Delhi: B. R. Publishing Corporation.
[37] Ishwara Bhatt, *Law and social Transformation,* 1st edn., Eastern Book Company, Lucknow, 2009, p. 930.
[38] *Ibid.*
[39] Alice Erh-Soon Tay, "Law, the Citizen and the State", *Law and Society*, Eugene Kamenka, et.al., ed., Edward Arnold, London, 1978, p. 3.

rape incidents. Moreover, there is need to have awakening of collective consciousness by extensive awareness campaigns launched at regular intervals to educate people at large about women's rights in urban and rural areas, slums of urban areas, outskirts of cities, etc. It is pertinent to exterminate the prejudices which transmit discrimination in the society. Importance of ethical and moral values should be inculcated since early age to have responsible citizens in the nation. The educational curriculum should be enriched with gender equality, sex education, etc. At the same time, it is pertinent to educate and employ the massive male youth of this nation who poignantly get involved in such illegal activities. If the young minds are channelized and charged with ethical values they will respect women by all means. Every individual must respect the value of social binding, social morals and social responsibility to secure gender justice.

The existing epoch is heading towards development which is grasping and is only acquisitive in nature. But such materialistic and mechanical progress has hampered the moral fabric of the society which illustrates its adverse effects in form of violation of human rights of women. Ethical and moral values have the capacity to guide human beings in the right direction. Legislative measures, education, technology, modern thoughts and progress in today's time should to be imbibed with values encouraging respect for women. Moreover, to exterminate this impediment enduringly from the society there should be collective efforts from all individuals not only men but also women, as it is the women who has a lion's share in upbringing the children in the Indian family so as to create responsible and respectable citizens in the country. The only immediate concern is the implementation of constitutional and other legal provisions and social transformation of Indian minds about masculinity and feminine dignified liberty in order to secure complete social justice upholding, guaranteeing and protecting women's rights at large in India.

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SEXUAL HARASSMENT AGAINST WOMEN AT WORKPLACE IN INDIA: LAW AND CHALLENGES

Faiz Ahmad[1]

INTRODUCTION

Over the past few decades the world has witness extraordinary increase in values and class of living across the world. India has also witness a huge boost in its economic area. However growth is not development. This is a continuing topic of debate. It is not necessary that growth and development are always interrelated. It is the economic growth which ideally bring social transformation as well as social development but this does not always happen.

As we know that development is providing opportunities to each individual to their livelihood and also develop full tendency to one each of the individual, to realize their dreams freely and achieve whatever individual feels with confidence without any barriers. Every individual enjoys equal opportunities, dignity and respect in a developed society. In such a society social, cultural, economic religious or gender bias is nonexistent.

As in a modern era crime against women is a global phenomena. Women are still victims of horrendous crime across the world. In the recent days women are even discriminated on the basis of gender, equality, race, caste which is a major issue which plays a key role in crime against women. There are different types of crime against women in the society such as domestic violence, sexual abuse, sexual assault, cruelty, rape, dowry death and even when women are sexually abused or harassed at work place is the incident happening more in a recent days. Women are not treated equally when they do work in a company, or at work place in the case of salary or any other matter related to it and have been sexually harassed.

Violence against women is violation of human rights. This is the biggest hindrance to achieve gender equality. The elimination of gender biased discrimination has been one of the fundamentals of the constitutional edifice of India. It can be a major hindrance for any society to achieve equality, development and peace. Sexual harassment is a crime which leads to the physical and psychological harm to the women.

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In India there are many challenges to attain development but one of the prominent one is the evil cultural tradition that have been instrumental in violence against women.

The WHO report on " Violence against women ''in year 2017 is " women who are less educated and have witnessed their mothers being abused, develop an attitude of accepting violence as male privilege and women's subordinate status.

EVOLUTION OF THE LAW ON WORKPLACE SEXUAL HARASSMENT

The elimination of gender – based discrimination has been one of the fundamentals of the Constitution structure of India. This principle of gender equality is also enshrine in the Constitution, in its Preamble, fundamental rights, fundamental duties and also Directive Principles of State Policy. Sexual Harassment at workplace for the very first time recognized by the Supreme Court of India in its landmark judgment of Vishaka Judgment[2], from these case Supreme Court issued certain plan and instructions to the Union of India to perform an suitable law for fighting workplace sexual harassment.

In the lack of specific law in India, the Supreme Court, in the Vishaka judgment**,** laid down certain rule making it compulsory for every company to provide a means to rectify grievances pertaining to workplace sexual harassment which were being followed by employers until the enactment of the POSH Act.

THE VISHAKA JUDGEMENT

In 1991, Bhanwari Devi, a dalit woman employed with the rural development programme of the Government of Rajasthan, was brutally gang raped on account of her efforts to curb the then prevalent practice of child marriage. [3]This incident revealed the hazards that working women were exposed to on a day basis and highlighted the urgency for safeguards to be implemented in this regard. Championing the cause of working women in the country, women's rights activists and lawyers filed a public interest litigation in the Supreme Court under the banner of Vishaka.

The Supreme Court for the first time, acknowledged the glaring legislative inadequacy and acknowledged workplace sexual harassment as a human rights violation. In framing the Vishaka rule, the Supreme Court placed reliance on the Convention on Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United

[2] 1997 6 SCC 241: AIR 1997 SC 3011
[3] Indira Jaising ,Law Relating to Sexual Harassment at the workplace (2014)

Nations, in 1979, which India has both signed and ratified. As per the Vishaka judgment, the Vishaka Guidelines issued under Article 32 of the Constitution, until such time a legislative framework on the subject has been drawn-up and enacted, would have to be mandatorily followed by organizations, both in the private and government sector.

As per the Vishaka judgment,' Sexual Harassment' includes such unwelcome sexually determined behavior as:

- Physical contact and advances
- A demand or request for sexual favors;
- Sexually colored remarks;
- Showing pornography;
- Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

POST VISHAKA –SOME OTHER JUDGMENTS

A. Apparel Export Promotion Council v. A.K Chopra

The vishaka judgement initiated a nationwide discourse on workplace sexual harassment and threw out wide open an issue that was swept under the carpet for te longest time. The first case came before the Supreme Court after vishaka in this respect was the case of Apparel Export Promotion Council v A.K Chopra[4]. In this case the supreme court reiterated the law laid down in the vishaka judgement and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexually harassing a subordinate female employee at the workplace. In this judgment, the Supreme Court enlarged the definition of sexual harassment by ruling that physical contact was not essential for it amount to an act of sexual harassment. The Supreme Court explained that "sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favors and other verbal or physical.

B. Medha Kotwal Lele & Ors.V. Union of India &Ors.

A letter written by Dr. Medha Kotwal of Aalochana (an NGO) highlighted a number of individual cases of sexual harassment stating that the Vishaka Guidelines were not being effectively implemented. Converting the letter into a written petition, the

[4] (1991) I SCC 759

Supreme Court took cognizance and undertook monitoring of implementation of the Vishaka Guidelines across the country by directing state governments to file affidavits emphasizing on the steps taken by them to implement the Vishaka Guidelines. In its judgment, the Supreme Court observed that " the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect'. Not being satisfied with the implementation of the Vishaka Guidelines, it directed states to put in place sufficient mechanisms to ensure effective implementation of the Vishaka Guidelines. Finally, the Supreme Court asserted that in case of a non-compliance or non-adherence of the Vishaka Guidelines, it would be open to the aggrieved persons to approach the respective High Courts.

What amounts to Sexual Harassment?

After the Vishaka judgment the POSH Act defines 'sexual harassment' in line up with the Supreme Court definition of 'sexual harassment'. According to the POSH Act, ' sexual harassment' includes uninvited sexually painted behavior, whether directly or by inference, such as:

1. Physical speak to and advance
2. Demand or request for sexual favors
3. Making sexually coloured remarks
4. Showing pornography
5. Any other uninvited physical, verbal or non-verbal conduct of a sexual nature.[5]

Here are some conditions that if they occur or are present in relation to or connected with any or behavior of sexual harassment may amount to sexual harassment.

- Implied or explicit guarantee of favored treatment in employment
- Implied or explicit hazard of negative treatment in employment
- Implied or explicit hazard about present or future employment class
- Interference with work or creating an intimidating or offensive or hostile work environment
- Humiliating treatment likely to affect the lady employee's health or safety.

[5] Section 2 (n) 0f the Prevention workplace sexual harassment Act

The definition of 'sexual harassment' under the POSH Act is broad enough to cover both direct or implied sexual perform which may involve physical, verbal or even written conduct. The key distinctive characteristic is that the conduct in unnecessary and unwelcome by the recipient. It includes quid pro quo sexual harassment, a form of sexual blackmail (this for that). In a representative circumstances of quid pro quo harassment, the respondent being a person in power, pressurize the woman employee for sexual favours in replace for spread in the workplace or hazard of adverse employment action. The definition also includes reference to creating an 'threaten nasty or unfriendly working environment'.

An example would be a job environment where a human being is subject to uninvited comments about her body style resultant in the woman worker feeling uncomfortable and incapable to work properly.

Whereas some forms of sexual harassment such as sexual assault are intrinsically offensive and egregious, and may need to occur only once for it to be treated as 'sexual harassment', some other forms may not be easily noticeable. While there is no fine test in decisive what would quantity to a 'hostile working environment', the trouble will lie on the domestic committee to make a decision whether the harassment suffer by a victim is satisfactorily strict to have created a hostile working environment or not. Auxiliary shaping what constitutes 'sexual harassment' depends upon the definite facts and the framework in which the accomplish has occurred.

In 2010, the High Court of Delhi endorsed the view that sexual harassment is a subjective experience and for that reason held [6]" A complete understanding of the complainant's view requires an analysis of the different perspective of men and women. Conduct that many men consider unobjectionable may offend many women…Men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object. The characteristically male view depicts sexual harassment as comparatively harmless amusement…Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."

[6] Dr. Punitha K Sodhi v. Union of India & ors. W.P. © 367/2009

KEY PROVISION OF THE POSH ACT

Applicable Jurisdiction; The POSH Act extends to the 'whole of India'.

While for every the POSH Act, an 'aggrieved woman' in next of kin to a workplace, is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment. Known that the definition does not impose the woman to be an employee, even a customer/client who may be sexually harassed at a workplace can claim protection under the POSH Act. The POSH Act further stipulates that a woman shall not be subjected to sexual harassment at her workplace. Accordingly, it may be noted that in order for a woman to claim protection under the POSH Act, the incident of sexual harassment should have taken place at the 'workplace'.

The POSH Act protects only women and is not a gender- neutral legislation and protects only women. Therefore, the safeguards under the POSH Act are not applicable to 'men victims'.

EMPLOYEE

The definition of an 'employee' under the POSH Act is fairly wide to cover regular, temporary, adhoc employees, individuals engaged on a daily wage basis, either directly or through an agent, contract labourers, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.[7]

WORKPLACE

While the Vishaka Guidelines were confined to the traditional office set-up, recognizing the fact that sexual harassment may not necessarily be limited to the primary place of employment, the POSH Act has introduced the concept of an 'extended workplace'. As per the POSH Act, 'workplace' includes any place visited by the employee, including transportation provided by the employer for the purpose of commuting to and from the place of employment.[8]

In the case of Saurabh Kumar Mallick v. Comptroller & Auditor General of India,[9] the respondent who was facing departmental inquiry for allegedly indulging in sexual harassment of his senior woman officer contended that he could not be accused of sexual harassment at workplace as the alleged misconduct took place not at the workplace but at an official mess

[7] Section 2 (f) of the Prevention of Workplace Sexual Harassment Act
[8] Section 2 (O) of Prevention of WORKPLACE Sexual Harassment Act
[9] Decided on May 9, 2008

where the woman officer was residing. It was also argued that the complaint was even senior to the respondent and therefore no 'favor' could be extracted by the respondent from the complaint and thus the alleged act would not constitute 'sexual harassment'. The Delhi Court while considering this matter held this as 'clearly misconceived'. The Delhi Court observed that 'the aim and objective of formulating the Vishaka Guidelines was obvious in order to ensure that sexual harassment of working women is prevented and any person guilty of such an act is dealt with sternly. Keeping in view the objective behind the judgment, a narrow and pedantic approach cannot be taken in defining the term 'workplace' by confining the meaning to the commonly understood expression "office". It is imperative to take into consideration the recent trend which has emerged with the advent of computer and internet technology. A person can interact or do business conference with another person while sitting in some other become a trend that the office is being run by CEOs from their residence. In a case like this, if such an officer indulges in act of sexual harassment with an employee, say, his private secretary, it would not be open for him to say that he had not committed the act at 'workplace' but at his 'residence' and get away with the same. Nothing the above, the High Court observed that the following factors would have bearing on determining whether the act has occurred in the 'workplace':

- Proximity from the place of work
- Control of the management over such a place/residence where the working woman is residing and
- Such a residence has to be an extension or contiguous part if the working place.

In conclusion, the Delhi High Court held that the official mess where the employee was alleged to have been sexually harassed definitely falls under 'workplace'.

THE ANITA SURESH'S CASE: MISUSE OF WOMEN LAWS

The fear of women filing false complaints to misuse the laws framed around them is one of the prime concerns to the existence of the law against sexual harassment. Through an analysis of a 2019 HC judgment in the case of Anita Suresh v Union of India &Ors, it is evident how courts often do not differentiate between a "malicious intent" to file the complaint and one where enough evidence was not permissible to the court by the complainant.

The High Court of Delhi in the above-mentioned case, delivered a judgment related to sexual harassment at the workplace. The news reported on the judgment that the court had imposed a

fine of Rs 50,000 on the complainant (a woman) for filing a "false" complaint of sexual harassment at her workplace. There were huge loads of comments from the readers which surfaced everywhere possible. The tone of these comments ranged from blanket declarations that false complaints are routinely lodged against employees mostly seniors, to recommendations of rigorous imprisonment to the false complainants against sexual harassment. However, that was not the first time that such measures were recommended and it would not be the last. The fear of women misusing these laws has repeatedly highlighted in discussions about sexual harassment at the workplace and would continue to be one of the principal obstructions to the existence of the law against sexual harassment.

THE BRIEF FACTS OF THE CASE WERE FOLLOWS

The petitioner, Anita Suresh, filed a complaint of sexual harassment against her employer, the Employees' State Insurance Corporation (ESIC), alleging that another employee of the corporation had indicated comments of sexual advances towards her and made sexually inappropriate remarks. This was prior to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, thus, the ESIC constituted an Internal Complaints Committee (ICC) in accordance with the guidelines set out in Vishaka &Ors v State of Rajasthan &Ors. The ICC heard the complaint, but due to a lack of evidence, the behavior of the respondent was not established. The committee recommended relocating both the parties, and did not impose any further penalty or instruction on either the parties or the ESIC. The petitioner again challenged the ICC's recommendation on grounds that there was sufficient evidence to prove her complaint and that the penalty awarded was insufficient.

REVIEW BY THE DELHI HIGH COURT

The High Court of Delhi, while hearing the petition, reviewed the ICC's proceedings and ruled that the petitioner had filed a false complaint. Its basis for the ruling was that the petitioner could not remember who may have been witness to the sexual advances when she was questioned by the ICC. The court also said that none of the people examined at the time reported witnessing any such conduct by the respondent. It also said that the petitioner had not mentioned the exact comments made by the respondent to the ICC. On these grounds, the court ruled that the complaint appeared to be false and seemed to have been filed with "some ulterior motive." The petitioner's past service record was examined and noted that she had been subject to disciplinary action on work-related issues on two occasions. It is unclear as to why her

service record was relevant to the case discussed, but the court dedicated significant attention to it.

The court concluded by stating that her writ petition was without merit and stood dismissed. A monetary penalty was imposed on the petitioner and the respondent was granted the opportunity to initiate action against her for filing a "false complaint."

WHAT DOES THE POSH ACT SAY?

There is a specific provision inserted under the POSH Act to deal with false complaints. Section 14 of the Act specifically states that if the ICC, during the course of the investigation, finds that any complaint has been falsely or maliciously filed, or that any evidence brought before the ICC is false, it can recommend a penalty to be imposed on such a person. This section was inserted amidst much concern that women are "prone" to misuse rights-based legislations. When the POSH Act was evaluated by the Parliamentary Standing Committee in 2011, they observed that this section should not deter women from filing complaints. As a result, two key provisos had been inserted into the section. First, that the inability to prove a complaint does not render it false. Second, that malicious intent has to be specifically established before disciplinary action is recommended against the complainant.

The principle behind these provisos is that no person should be penalised for bringing forward a complaint only because they are unable to prove it. As is common knowledge, a majority of instances of sexual harassment irrespective of at the workplace or not happen in places or situations where evidence is difficult to come by. In a workplace, sexual remarks and physical advances can be made behind closed doors, where there are no witnesses, no recordings, no video footage, and indeed nothing but the word of the victim against the word of the perpetrator. It is the role of the ICC to find evidence and establish whether the harassment occurred or not. However, despite the ICC's best efforts, it is likely that there will be cases where the ICC will be unable to reach a conclusion due to lack of evidence. In such cases, the complaint will not be termed "false" or "malicious," and the respondent will not be held guilty of sexual harassment. For a complaint to be considered false or malicious, the ICC needs to specifically show that the complainant intentionally and maliciously filed a complaint that she knew to be untrue. In this manner, the law does seek to establish a balance between the possibility of misuse and the preservation of an individual's right to file complaints.

LEGAL FRAMEWORK DISREGARDED BY THE HIGH COURT

The judgment, however, is in clear and gross violation of these principles. First, the court disregarded the first proviso to Section 14 and ruled that because the petitioner was unable to produce evidence to support her claim, she must have filed a false complaint. The effect of this ruling is twofold. First, it is a clear derogation from the principle set out in the POSH Act, and second, it has the potential to deter more women (or men) from coming forward with their complaints owing to the fear that a lack of evidence will eventually label them as the wrongdoer.

Furthermore, while the court made a blanket statement that the complaint was filed with an "ulterior motive," it provided no concrete evidence for this ruling in the judgment. The court did reproduce the petitioner's disciplinary record at her workplace, but in no way did it identify a tangible or convincing link between her record and the alleged "malicious intent" behind her sexual harassment complaint.

Also in the process of trying to settle the case, the court overlooked the realities of sexual harassment at the workplace. It is rarely something that will have direct witnesses or evidence, and that is what precisely makes it an insidious hindrance in women's participation in the waged workforce. The judge, in this case, seems to have gone along with the trope that women are prone to lie and misuse the law, and for good measure, cited past misconduct to discredit the petitioner.

QUESTIONS OF EQUITY

"What can men do to protect themselves against the possibility of a false complaint?" This is a common question that comes up during legally mandated anti-sexual harassment trainings. It leads one to wonder why people feel the need to assume that complainants or plaintiffs are liars or abusers of a measure only when it is intended to uplift a disadvantaged group. For instance, despite wide knowledge regarding the occurrence and possibility of insurance fraud, there is no discourse condemning the existence of insurance policies.

During discussions with employees in corporate offices, one can see a discernable wave of anger and frustration at the fact that women are given the "freedom" to talk about their experiences, not just on social media, but also through the constitution of a decentralised ICC, which look into complaints of sexual harassment at the workplace. Common points of discussion include the loss of reputation that a man faces because of a "false" complaint, the

potential of women “misusing” any rights given to them, and most jarringly, the opinion that sexual harassment is either exaggerated or non-existent. From Section 498A of the Indian Penal Code (which criminalises cruelty towards a woman by her husband or in-laws) to the POSH Act, rights-based laws that seek to safeguard women are met with intense anger, criticism, and even contempt by certain groups.

However, these laws exist because violence and discrimination against women are systemic and pervasive in India and across the world. The objective of these laws is not to place women at a higher position of power than men. Rather it is to provide them with opportunities and rights to enable them to have an equal standing. By failing to adhere to the principles of equity and subscribing to stereotypes about women’s behaviour, the courts will do a disservice not only to the women of this country, but also the laws that seek to empower them.

CONCLUSION

Preventing and effectively addressing harassment of girls in colleges and universities may be a significant challenge, but we are optimistic that academic institutions can meet that challenge, if they demonstrate the will to do so. This is because the research shows what is going to work to stop harassment and why it'll work. A system wide change to the culture and climate in our nation’s colleges and universities can stop the pattern of harassing behavior from impacting subsequent generation of girls entering science, engineering and medicine.

Changing the present culture and climate requires addressing all sorts of harassment, not just the foremost egregious cases; moving beyond legal compliance; supporting targets once they come forward; improving transparency and accountability; diffusing the facility structure between faculty and trainees; and revising organizational systems and structures to value diversity, inclusion, and respect. Leaders at every level within academia are going to be needed to initiate these changes and to determine and maintain the culture and norms. However, to achieve making these changes, all members of our nation’s college campuses—students, faculty, staff, and administrators—will got to assume responsibility for promoting a civil and respectful environment. It is everyone’s responsibility to stop sexual harassment.

In this spirit of optimism, we provide the subsequent compilation of the report’s findings, conclusions, and proposals.

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SOCIAL TRANSFORMATION AND TRANSGENDER OF CHHATTISGARH

Nimisha Mishra[1]

INTRODUCTION

Starting from Delhi High Court's 2009 Decision that decriminalized Consensual same sex relationship between adults, which had a consoling effect on the LGBTs across India but was quite momentary a relief, as soon the Supreme Court of India reversed the 2009 Delhi High Court's Judgment stating that" section 377 does not suffer from the vice of Constitutionality"

On this reactions came from all over India and from the LGBT community of Chhattisgarh as well. Calling it a "Black Day" for LGBTs they immediately demanded the concerned State Government (BJP) to adopt a resolution in Vidhan Sabha requesting to scrap sec. 377.

Mitwa Sankal Samiti is a NGO in Chhattisgarh that works for the welfare of third gender people. Raveena who also happens to be a transgender and spoke person of Mitwa Sankalp Samiti told in an interview given to Times of India that.

"We have also been demanding the government to form Transgender Welfare Board so that they do not hide their identity and join the mainstream society without hesitation."

Also a help line "Sahaay" was started for helping transgender in Chhattisgarh. People started sharing their feelings and problems over the calls and were really scared after Supreme court's Verdict that they can be now arrested on the basis of the reversed judgment.

Another transgender and a gay rights activist, Vikas Thakur, said, "The order should be reviewed. Being gay, lesbian or bi-sexual is something as natural as being a heterosexual person! They have been existing since ages, epics like Ramanyana and Mahabharata also feature homosexual characters. The statues of Khajuraho also show a number of gay figures. Ban them too!"

For Sarwat Naqvi, project officer, state Aids control society, the challenges have grown bigger after the SC verdict. "The identification of Men having sex with Men (MSM) population itself

[1] Research Scholar, Alliance University Bengaluru

was an issue and now they will resist even more to be a part of that 'hidden population'. The response was good after Delhi high court's verdict and more of them came forward to connect to the mainstream[2].

THE 'THIRD GENDER' IDENTITY

Now the transgender people could be recognized as the "third gender" all credit goes to the efforts by National legal Services authority[3]. This is not only a step towards their identification but also a starting point for recognizing all their rights that are due to them. The transgender people of Chhattisgarh are looking forward to see a beautiful future with this judgment now they can hope for a life of their interest and choice with laws in their favor. There are expectations of getting jobs under OBC quota. There are people in Chhattisgarh who being from third gender category are preparing for UPSC and PSC exams. Yasmin from Mitwaa Sankalp Samiti says that "we no more feel isolated"[4].

There are doctors, fashion designers Dancers and many more talented people among the transgender category in Chhattisgarh, but were living in alienation with their own identity. Dr.Hirock Dey runs her Clinic in Raipur (Capital Of Chhattisgarh) and she is very happy with the Supreme Court's "Third gender Tag". Shaily a fashion designer express her happiness on being tagged as "Third Gender" as a legal identity. Vikas feels proud for the same. [5]

LGBT RIGHTS ACTIVISTS IN CHHATTISGARH

In any democratic setup rights of citizens are of utmost importance. Likewise, in India from time to time many social rights activists have raised their voice against various kinds of discriminations that hampers the development of an individual, thereby hampering the development of a society as a whole.

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[2] Rashmi Drolia,The Times Of India, Scrap Sec 377 of IPC: LGBT community, Dec 14, 2013, 06:45 IST(https://timesofindia.indiatimes.com/city/raipur/Scrap-Sec-377-of-IPC-LGBT-community/articleshow/27326846.cms)

[3] National legal services authority v. Union of India, WP (Civil) No. 604 of 2013 (15th of April 2014)

[4] Rashmi Drolia,The Times Of India, Transgender in Chhattisgarh glad to be tagged as 'Third gender', Apr 15, 2014, 19:46 IST(https://timesofindia.indiatimes.com/city/raipur/Transgender-in-Chhattisgarh-glad-to-be-tagged-as-Third-gender/articleshow/33787288.cms)

[5] IBID

Well talking about the rights of LGBT's of Chhattisgarh one name requires a special mention, he is Advocate Sarwat Naqvi, advocating for the rights of marginalized communities. From videos like " Homosexuals seek an identity, to peaceful march on streets of Raipur (C.G.) he is also known for his May 2010 "India Unheard" Report. The report exposed the difficulties that sexual minorities are facing in Raipur.

It is very important to note that The Indian State police and other officials had to face severe criticisms for their treatment towards sexual minorities. As per 2006 Human Rights Watch Report, stated by Programme Director Scott Long In the concerned report, "They are able to do so because India's Government clings to the criminalization of homosexual conduct, which only prevents people from coming forward for HIV/AIDS testing, information and services"[6]

Earlier on July 2009 the Delhi High Court has however, ruled that section 377 should be amended to exclude "Consensual sexual acts of adults in Private"

According to Naqvi "During nineteenth century British rule in India, Chapter XVI, Section 377 of the Indian Penal Code was introduced, criminalizing sexual activity "against the order of nature." The legislation describes "unnatural offences" as "carnal intercourse against the order of nature with any man, woman or animal" and threatens punishment as severe as life imprisonment. But beyond a prejudiced law, Section 377 has encouraged a culture of intolerance, discrimination and harassment for sexual minorities and their communities."[7]

However, in Suresh Kumar Koushal and another v. NAZ Foundation and others**,** on December 11, 2013 the Supreme Court of India set aside the 2009 judgment of Delhi High Court and said "We hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable."

Besides these judicial pronouncements the efforts of various social activists, NGO's, government offices in making the society more inclusive towards the transgender people can be seen and felt in Chhattisgarh.

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[6] Sarwat Naqwi, Impacting the LGBT Community in Raipur, Video Volunteers, empowering community voices,(https://www.videovolunteers.org/impacting-the-lgbt-community-in-raipur)

[7] Ibid

- Focusing on an overall development of the transgender community of Chhattisgarh, the Government of Chhattisgarh has started working actively on major areas like better education, social security, health facilities, housing and skill training.
- Also, an eight member committee at a district level under the leadership of Collector and Additional Collector has been formed by the Social Welfare department, in order to identify members of transgender community and implement welfare schemes for them.
- Along with that it is also interesting to know that in Raipur's Dr. Bhim Rao Ambedkar Hospital the transgender community not only has their own OPD but also a facility for free of cost operation if required.[8]

SRS FACILITY FOR TRANSGENDER OF CHHATTISGARH

As per the piece of information published on Times of India web site The Director of State health service has stated that out of 2798 transgender 200 are interested to undergo sex change operation. Also such operations will be carried out under the expert surgeon Dr. Jayaram in Government hospital (Dr. Bhim Rao Ambedkar Hospital Raipur). Thorough medical checkup procedure people undergoing operation will be followed by the doctors before the surgery. Counselling of such people will done and every information and suggestions associated with such surgery will be given to them. Also post-surgery care will be taken.[9]

TRANSGENDER DEMAND WELFARE BOARD

The third gender community of State of Chhattisgarh seems to be very active and much aware about their rights; they do not want to leave any stone unturned when it comes to their becoming part of mainstream society. Hence there came a demand for formation of transgender well fare board by the Government.

[8] Think change India, Chhattisgarh hospital makes special arrangements for transgender people, your story, posted on 16th October 2017(https://yourstory.com/2017/10/chhattisgarh-hospital-raipur-transgender)

[9] Sex reassignment surgery at Ambedkar hospital from December 9,The Times of India, Nov 14, 2016, 07:46 IST(https://timesofindia.indiatimes.com/city/raipur/Sex-reassignment-surgery-at-Ambedkar-hospital-from-December-9/articleshow/55408374.cms)

Ravina the spokesperson of the Mitwa Mahila Sankalp Samiti shared her views and expressed her feelings being from the marginalized section of the society and said "We have been discriminated at all places",

"Even physically challenged people have special Olympics and other facilities extend to them for coming up in their lives, but when it comes to us, we have been treated very badly".

According to Ravina, transgenders despite the physical abnormality are citizen of the country and are entitled for all constitutional rights. Unfortunately, she said, they were being deprived of their constitutional rights and ill treated.

"All India Third Gender Sports Meet" was organized by the third gender community in assertion of their rights and which is highly commendable.

"Let the public see our sports talents", she said adding they were also working on evolving consensus among their community member abroad as well to mobilize their support for holding a international Olympics for transgenders. The national sports meet, first of its kind in the country she told DNA was just the beginning.[10]

WORKSHOPS ON "THIRD GENDER" SENSITIZATION AND AWARENESS

- Various workshops are being continuously organized in Chhattisgarh for spreading awareness about the transgender people in the society. Reportedly a workshop was held in Pt. Ravishankar University Raipur, in association with mitwaa sankalp samiti on 23rd February on the topic 'Third Gender Avam Samaj: Dasha Aur Disha'

  The objective of this workshop was to promote acceptance and deal with social issues linked with third gender community in education system through the means of healthy debate and discussions. Another aspect of this workshop is to connect the third gender community with the mainstream section of the society.[11]

[10]Transgenders demand welfare board, Daily Bhaskar, Aug 21, 2012, 05:34 AM IST(https://daily.bhaskar.com/news/MP-BHO-transgenders-demand-welfare-board-3676866.html)

[11] Workshop On Third Gender Today, The Pioneer, *Tuesday, 23 February 2016* | *Staff Reporter* | *Raipur* | *in Raipur*(http://www.dailypioneer.com/STATE-EDITIONS/raipur/workshop-on-third-gender-today.html)

- Also, one day workshop was organize by Durg Police under the leadership of Mrs. Suresha Chaubey Additional Superintendent of Police, on the topic" Tritiya ling Varg ke prati Police ki Samvedansheelta" on 27/12/2017.
- Likewise, on 21st February another workshop on transgender awareness was organized by the combined efforts of the police and mitwaa sankalp samitiin M.J. College Bhilai Chhattisgarh.
- In an unending effort these workshops continues to be in news and under the leadership of our brave lady officer none other than Mrs. Suresha Chaubey another workshop was held in Rungta College Bhilai on 21st of March 2018.

STEPS TOWARDS SOCIAL INCLUSION

Vidya Rajput, a trans woman and an active member of transgender welfare board says that life of a transgender has always been a struggle with almost no social life no family neither friends. As a student is school she was never accepted by the fellow mates, she was always mocked at and was considered weak. Not even that bullied and molested as well. She further says that we are not easily accepted for various jobs as the people have the habit of ignoring us, otherwise if we see at Present there are so many examples to showcase the success of transgender people despite of various odds. Madhu Kinnar is the first transgender mayor from Chhattisgarh, Dr. Hirak Runs a Prosperous saloon, Veena is a dancer, which means if given opportunities like others we can also grow n develop ourselves, she further added that through workshops and awareness programmes we can bridge this gap between us and society".[12]

Chhattisgarh Police Invites Applications for Recruitment of Transgender Persons

Being part of Indian police is something a dream comes true for those transgender persons who are aspiring for the same. In an attempt to fulfill the promises, made to the transgender people and uplifting their socio economic status the Chhattisgarh police has invited applications from transgender people as well and accordingly 40 transgender people have applied for the same.[13]

[12] Rashmi Drolial, The Times of India, Transgender striving for space in society, Feb 24, 2016, 18:54 IST(https://timesofindia.indiatimes.com/city/raipur/Transgender-striving-for-space-in-society/articleshow/51125096.cms)

[13] 40 transgenders apply to be cops in Chhattisgarh,The Times of India, Feb 26, 2018, 04:56 IST(https://timesofindia.indiatimes.com/city/raipur/40-transgenders-apply-to-be-cops-in-chhattisgarh/articleshow/63072759.cms)

APPOINTMENT OF A TRANSGENDER FROM CHHATTISGARH AS ADVOCACY OFFICER FOR THREE STATES AND A UT (UNION TERRITORY)

Again a proud moment for transgender people as well as The State of Chhattisgarh as a whole, as Amruta Alpesh Soni, a transgender from Chhattisgarh has been appointed as advocacy officer for the National AIDS Control Programme's project, Vihaan, which aims at providing care and support to HIV patients. She hails from Kolhapr but since she has been working in Chhattisgarh since 2013 for vihaan project. Also, armed with degree in MBA she has recently participated in the Annual Philadelphia Trans Health Conference at the Pennsylvania Convention Centre, USA.[14]

LAWS FOR TRANSGENDER PERSONS OF CHHATTISGARH

"One-day workshop was held today to formulate policies on the Protection of Rights of Transgenders at Mantralaya. There was a detailed discussion on how to identify the transgender, provide reservation to them, social security, scholarships, pensions and other several other important issues. Chairperson of the Parliamentary Committee on Social Justice and Empowerment Affairs and MP Mr. Ramesh Bais presided over the meeting. He called upon the gathering to give their suggestions which can be incorporated in the final draft. Women and Child Development Minister and Social Welfare Minister Mrs. Ramsheela Sahu said that efforts will be made to allow the transgenders to join the mainstream of the society. Chhattisgarh is one of the states in the entire country which constituted a separate board for transgenders. The Department was always in favour of the law to protect and safeguard the rights of third gender citizens.

Chhattisgarh State Women's Commission Chairperson Mrs. Harshita Pande, member Mrs. Padma Chandrakar, Hidayatullah National Law University Raipur representatives, Kushabau Takre Journalism University members, Pandit Ravishankar University experts, senior officers of various departments, office -bearers of various social welfare organisations, transgenders' representatives and university students were also present."[15]

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[14] Anuja Jaiswal, Chhattisgarh transgender appointed advocacy officer for three states and a UT,The Times of India, Aug 18, 2015, 18:28 IST(https://timesofindia.indiatimes.com/india/Chhattisgarh-transgender-appointed-advocacy-officer-for-three-states-and-a-UT/articleshow/48529898.cms)

[15]Raipur: Law to protect transgender's rights soon: workshop on formulation of legal Rights Held: Steps to allow transgenders join mainstream: Ramsheela Sahu Chhattisgarh Jan sampark Vibhag Raipur, 26 December2016(http://old.dprcg.gov.in/4648e-26-12-2016)

IDENTIFICATION OF TRANSGENDER A BIG CHALLENGE

The Government of Chhattisgarh is all set for a makeover of transgender persons' life. Through various workshops the ministry is aimed at formulating specific laws. But the identification of the transgender persons is the biggest challenge. By far 2798 transgender persons have been identified by a district level survey out of which 338 have been already provided with identity cards and certificates.[16]

CASES OF ARREST

A 25 year old youth named Milan from tribal District of Jashpur was arrested for trying to entrap a 17 year old boy for marriage. First, Milan received a phone call from this minor boy and after that they started talking frequently Milan use to talk in voice of a female. As soon as the minor's parents discovered the fact that Milan is not a girl they lodged a FIR with police and after that Milan was arrested for homosexuality and on the charges of cheating. According to the police this was third time he has done something like this and he is a homosexual.[17]

Such issues need special handling and the researcher thinks some special training should be given to the police personals that have to handle such issues on day to day basis.

SUPREME COURT ON SCRAPPING SEC.377

As per the article published on Times of India Titled "Scrapping Section 377 in entirety will lead to anarchy" The CJI Dipak Misra states that, "We know that if 377 goes away entirely there will be anarchy. You cannot impose your sexual orientation on others without their consent. We are only on consensual acts between adults in private. Consent is the fulcrum. Prima-facie, consensual acts between adults in private cannot be criminalized. One's sexual orientation is a part of fundamental rights. Once section 377 is decriminalized, discrimination faced by the LGBT community in employment and in a choice of vocation will vanish. This will help awaken the society and help LGBT community live life to the fullest"[18]

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[16] Alex Traub, Hindustan Times, The govt wants to help transgender people, but can it identify them?, Sep 11, 2017 10:57 IST(https://www.hindustantimes.com/india-news/govt-wants-to-help-transgender-people-but-can-it-identify-them/story-N2fuQ73hn0jzDirTgkVKyI.html)

[17] Rashmi Drolial, The times of India, Gay man tries to woo minor boy in Chhattisgarh, held, Jul 18, 2014, 21:56 IST([17] https://timesofindia.indiatimes.com/city/raipur/Gay-man-tries-to-woo-minor-boy-in-Chhattisgarh-held/articleshow/38626412.cms)

[18]https://www.indiatoday.in/mail-today/story/scrapping-section-377-entirety-lead-to-anarchy-supreme-court-1288622-2018-07-18

As soon as the sec. was struck down 377, the good news came on 30th March 2019 when 15 transgender people tied knot and promised togetherness to each other in Chhattisgarh. The researcher herself witnessed the whole ceremony and it was like any other marriage. The couples received love and affection from all over the State. There was a huge crowd at Pujari Park Lawns In Raipur the capital city of Chhattisgarh. It was a wonderful sight, couples expressing their happiness on mike holding the hands of their life partners with lots of love and confidence. It was a proud moment not only for the transgender community but also for the State of Chhattisgarh as a whole. The couples were from Chhattisgarh , Gujarat, Maharashtra, Bengal and Bihar. Out of 15 couples six (06) of them were from Chhattisgarh. Vidya Rajput, President of Mati an organization that works for the rights of LGBTs thanks to Chhattisgarh government for their support. Also the event was financially supported by Mr. Suresh Sharma who also happens to be the producer of a film on transgenders "Hansa".[19]

EMPLOYMENT AND TRANSGENDER PEOPLE OF CHHATTISGARH

It is interesting to note that the transgender people of Chhattisgarh are now showcasing their talents as well as proving that they are also as capable as others in getting employment opportunities many are working in parlors, cafe at the clinics as well as with the catering services. The Government has also started training these people under Kaushal Vikas yojana.

PARTICIPATION BY THE CHHATTISGARH TRANSGENDER PEOPLE IN TALENT SHOWS

Once again the transgender people are in news as they really rocked the stage by not only showing their dancing and singing talent but also walked the ramp with dignity and showcased their fashion statement as well in a cultural event organized by State Social welfare Department of Chhattisgarh in Raipur.[20]

SUGGESTIONS

- There is a need of understanding humanity first, it's the society that can extend hands to such people and make them feel part of this world as others.

[19]Dipankar Ghose, Each woman from transgender Community, 15 couples tie the knot in Raipur. The Indian Express,https://indianexpress.com/article/india/raipur-transgender-woman-community-marriage-chhattisgarh-5650971/

[20] Raipur, Nai Duniya, IN Aankhon Ki masti k mastano hazaro hain, "Ek shaam tritiya ling k naam "(http://www.ibc24.in/newsreader/newsdetail/index/36360/Third-Gender-Fashion-Show)

- Specific law formation is a must, regarding their marriages as recently happened in Kerala, where the trans couple tied knot n registered their marriage under special marriage act.
- Those from Third Gender community, with leadership qualities like Gauri Sawant, a transgender who has taken a girl child under her safe custody to protect her from getting exploited at the hands of cruel people, must come forward for more such acts and be an example for giving protection to the society rather than asking for protection from the society.
- Platform should be given to them to show case their talent by organizing various events.

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THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013- EXPECTATIONS AND THE REALITY

Lity Manisha[1]

Meghna Rawat[2]

INTRODUCTION

Discrimination based on gender is one of the harsh realities of this society. As per the Constitution of India removal of gender-based discrimination is one of its fundamental features. The Constitution of India depicts the gender equality clause, under thefundamental rights and duties, Preamble and DPSPs.The stigma of gender discrimination that comes with sexual harassment at workplace has affected the Constitutional Rights of women provided under the Constitution of India.Precedent to the Vishaka judgement[3] whenever a woman was sexually harassed at her workplace, she was empowered under Section 354[4] of the Indian penal Code to file a complaint against the harasser, and as well under section 509[5] which includes punishment who has intended to negatively attack the modesty of any woman. Due to error in interpreting the sections it became difficult for the victim to explain what she has experienced and thus there was a lack in providing justice to the victim.

The workplace harassment creates a stigma towards the physical as well as mental condition of them. Until 1997, sexual harassment at workplace had not gained a state as a separate defence. In India in the year 1997 it drew the attention of the Supreme Court after the Vishaka case[6] in Rajasthan where an NGO challenged the court verdict. Even then the parliament took sixteen years to frame the guidelines and enact a law i.e. POSH (Prevention of Sexual Harassment).

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[2] 5th Year Student, Alliance School of Law, Alliance University, Bengaluru

[3] *Vishaka&Ors. vs. State of Rajasthan*, AIR 1997 SC 3011
[4] The Indian Penal Code, 1860, Section 354- Assault or criminal force to woman with intent to outrage her modesty.
[5] The Indian Penal Code, 1860, Section 509- Word, gesture or act intended to insult the modesty of a woman
[6] Supra, 1

THE VISHAKA JUDGEMENT

In this case, Bhanwari Devi, a dailt woman, was under the employment of Government of Rajasthan's organised rural development programme as a social worker. She was inhumanly assaulted and gang raped by five men because she made an effort to stop a child marriage. A case was filed by her against all the five accused who were acquitted by the trial court. This incident proved the actual scenario of the working women, who were engaged in a day to day basis and thus there arose a need for implementing safeguards to these working women. Further the High court in its judgment propounded that the gang rape took place in a revengeful situation, thus the court upheld the judgement of the Trial Court. After all these efforts made by the courts several other women and NGOs, the Supreme Court of India was approached through PIL. Through this case an initiative was taken by the Supreme Court to recognizethe loopholes in the laws and apprehends sexual harassment as a gross violation of human rights. As per the judgment given in the Vishakha case, guidelines were issued and the legislature was directed enact laws accordingly. These guidelines were based on the International Convention and treatise which was based on gender equality, gender justice, gender discrimination and gender based sexual harassment. The 'Convention on the Elimination of all forms of Discrimination against Women' (CEDAW) which was signed and ratified by India is one such United Nation convention on which the guidelines by the Supreme Court were based. Thus, the Vishakha guidelines were completely valid and had the effect of law and it was mandatory to be followed by both private and the government organisations.

GUIDELINES:

- It was stated that it is the duty of the employer or any other responsible person in the workplaces to prevent the commission of any kind of act of sexual harassment and for this it is required by them to provide for the procedure of resolution, settlement or prosecution of such types of acts by taking all the necessary steps that is required.
- Definition of the term Sexual Harassment as prescribed by Supreme Court includes unwelcome sexualbehaviour (whether directly or indirectly) as:
    a) "*Physical contact and advances;*
    b) *A demand or request for sexual favours;*
    c) *Sexually coloured remarks;*
    d) *Showing pornography;*

e) *Any other unwelcome physical, verbal or non-verbal conduct of sexual nature*."[7]

- Complaint mechanism was mandated in workplaces by providing that:
  a) "*Every workplace must have an appropriate complaints mechanism which consists of a complaints committee, special counsellor or other support services;*
  b) It is required that the complaints committee must be headed by a woman and half the members of it should be women;
  c) the committee must include an NGO or an individual who is familiar with the issue of sexual harassment;
  d) further, the complaint procedure must be time bound;
  e) it is required that confidentiality must be maintained;
  f) every complainant or witnesses should not experience any kind of discrimination during the process."[8]

POST VISHAKHA JUDGEMENT

Post Vishakha Judgement, case of Medha Kotwal Lele v. Union of India and Ors[9] played a major role in case of the implementation of the guidelines given.In this case the petitioner Dr. Medha Kotwal wrote a letter highlighting a number of individual cases relating to the non-compliance with the implementation of Vishakha guidelines in a number of areas. One of the cases was that of a master student at the University of Baroda. The girl in this case was sexually harassed by her guide since 1995. The Vice Chancellor of the university upon her complaint took necessary steps and appointed a committee to investigate the charges. However, the procedure followed was not in accordance of the guidelines. On August 2000, the Supreme Court ordered a mandatory filling of affidavit by the State Governments as a proof that whether they have adhered to the guidelines given in the Vishakha judgement. However, the affidavits that came in from the side of the State Governments were incomplete, and for the name sake only they had made a few changes and a very few steps were followed to implement the guidelines. Further, in the year 2004 (April) the Supreme Court in contention to the complaint filed by the petitioners passed an order that the Complaint Committees were ineffective, the

[7]Supra, 1
[8]Supra, 1
[9]*Medha Kotwal Lele v. Union of India and Ors*, (2013) 1 SCC 311.

committees report shall be deemed to be an enquiry report based on which certain required disciplinary actions can be taken. Finally a major step was taken by the Supreme Court in the year 2006 stating that all the States need to appoint a State Level Officer who is in charge of the concerned matter of the welfare of women in each State so that they can co- ordinate with the implementation of the guidelines. The Court further ordered the Labour Commissioner to take necessary steps and to ensure the establishment of the required Committees in factories, shops and commercial establishments where mostly the guidelines were found not be taken much care of. While the orders given by the Supreme Court are on the positive side, but the response of the state governments werestill not on the right track. However, the guidelines were set many years ago still they remained unimplemented. This decision was an attempt towards the implementation of the almost forgotten guidelines.

SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

On the basis of increase in participation of the women in workplaces there was a need for the enactment of a legislation which will focus on preventing the act of sexual harassment at workplaces and also a redressal mechanism for the same.

After a long struggle of 16 years after the Vishaka judgement[10], the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came into force on 9th December 2013. The act extends to whole India. The purpose of the act is to protect working women against any act of sexual harassment at all the private or public work places and acknowledge these complaints. Further, it is also provided that workplace sexual harassment is a gross violation of the rights of women as providedunder our Constitution through Article 14[11] and 15[12], the right to livewith dignity has also been infringed in the commission of this type of act. Further the particular statue only provides protection to women and is not a gender-neutral legislation.

[10]Supra, 1.
[11] The Constitution of India, 1949, Article 14- Equality before law.
[12] The Constitution of India, 1949, Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex.

PROVISIONS UNDER THE POSH ACT, 2013

- Section 2 (a) mentions that- "*According to the act an 'aggrieved woman' in relation to a workplace is defined clearly, it states that an aggrieved woman is someone who is of any age, employed or not and alleges that an act of sexual harassment has been done to her*."[13]
- Section 2(o)& 2(p) states that: "*Further, the Act applies to both the organized as well as the unorganized sectors in India, that is, it applies to every government body, private and public sector organisations, nongovernmental organisations, organisations carrying out commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and a dwelling place or a house*."[14]
- Workplace includes places visited by the employee in the course of employment.[15]In the caseof Saurabh Kumar Mallick v. Comptroller and Auditor General of India[16] the accused argued that according to the sexual harassment allegations made by the Senior Women Officer against him. Considering the matter this cannot constitute to a sexual harassment at workplace as the misconduct did not take place in the office premises rather at an official mess where the women officer was residing.The Delhi Court considering the facts and matter held this to be clearly misconceived. Further, the Court explained that the main objective of the Vishakha guidelines was to provide a safe working space and hence the accused is liable for his actions.
- The definition of Sexual Harassment is in consonance with the definition provided under the Vishaka Judgement by the Supreme Court of India. According to the act, "*sexual harassment includes any of the below mentioned act which is unwelcomed sexual behaviour, whether it is done directly or by implication;*

  i. physical contact and advances; or
  ii. demand or request for sexual favours; or
  iii. making sexually coloured remarks; or
  iv. Showing pornography, or;
  v. *any other unwelcome physical, verbal or non-verbal conduct of a sexual nature*."[17]

[13] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, section 2(a)
[14] Ibid, section 2(o) (i-vi) & 2(p)
[15]Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, section 2(o) (v)
[16]Decided on 09 May, 2008
[17]Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013section 2 (n)

- Further, the act then extended the meaning of the word sexual harassment and thus included "*presence or occurrence of any situation which is an implied or explicit promise of where preferential treatment in employment is given; any type of threat of detrimental treatment in course of employment; further threat of present or future employment in the establishment; interference with work of female employee or creating an offensive or hostile work environment; or any type of humiliating treatment which is likely to affect the health and safety of the woman employee will also amount to sexual harassment*."[18]
- Section 2(f) describes employees covered under this Act as: "…*employee who is appointed directly or through any agent who is employed on a regular, temporary, ad hoc, or daily wage basis, and further includes contract labourers, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied*."[19]
- As per the Act, while inquiring the Internal Complaints Committee and Local Complaints Committee have the same power as a Civil Court according to the Code of Civil Procedure. It is a mandate that the victim has to submit a total of six copies of the complaint of sexual harassment while filling for it, attached with the other documents which will support the matter and name and details of the witnesses, this needs to be done within a time limit of three months from the incident and if there are couple of incidents in a series then in that case within a tenure of three months from the date of the occurrence of the last incident, also it should be noted here that if a valid reason can be stated by the aggrieved woman so as to explain the reason for the delay in filing the complaint in that case the Internal Complaints Committee or Local Complaints Committee may extend the timeline to three months and the reason need to be recorded in a written form.[20] There is also a provision which provides right to the friends, relatives, co-workers etc. to file a complaint on behalf of the aggrieved women, who is not capable of doing the same due to mental or physical incapacity or death.[21] The complaint should be concise and consists of the details of exact incident, place, time, witness etc.

[18]Ibid, section 3(2)
[19] Ibid, section 2 (f)
[20] Ibid, section 9(1)
[21] Ibid, section 9(2)

- The punishments prescribed by the Act may be imposed by the employer on the employee for getting indulged in an act of sexual harassment. The punishments need to be in accordance to the prescribed service rules of the organization, in case where the organization does not have a particular service rule as such, in that case, disciplinary action can be taken including written apology, warning, withholding promotions, withholding the increments or the salary, terminating the respondent from the service or sending him for a counselling session.[22]"*The amount of compensation payable to the aggrieved woman can be deducted from the wages of the respondent. The compensation that needs to be paid to the aggrieved woman shall be determined by the mental trauma, suffering and pain (mentally, physically and emotionally) caused to the aggrieved employee, the loss in the career opportunity that one has to bear for this incident of sexual harassment, the medical expenses, the income and status of the accused is taken into consideration, in case the accused fails to pay the aforesaid sum, the ICC may forward the order for the recovery of the prescribed sum as indebtedness of land revenue to the concerned District Officer*."[23]
- The employer has to pay penalty of INR 50,000/- in case of failingto constitute an ICC or does not comply with the requirements prescribed under the Act. In case the employer repeats the offence, it shall result in the punishment being doubled, revocation of statutory business license or de-registration of the entity.[24] It is also provided that all the offences under this Act are non-cognizable.[25]

  Even after years of formulation of the POSH Act, 2013, due to lack of effective implementation of the provisions of the act and lack of awareness regarding the law, in reality still a lot of working women are sexually harassed and are physically and mentally traumatised. This is quite evident from the most discussed #MeToo Movement which started in the late 2018s. This campaign is a clear cut demand to provide a free and safe environment for the working women.

METOO MOVEMENT

The question here is through this movement are we seeing a fundamental realignment of gender equations in the work spaces or will these be just mere complains forever?

[22]Ibid, section 13(3)
[23] Ibid, Section 15
[24] Ibid, section 26
[25] Ibid, section 27 (3)

Arguments on whether these cases are real or not and will it lead to any change, the counters are flying thick and fast. We personally feel that these kinds of movements and campaign will definitely lead to change as before getting indulged in any case of sexual harassment and using their powers to use women , the men will be more careful about their actions in this respect.The men will definitely now have a fear in mind and will think twice before sending nasty messages and getting involved in sexual harassments , the fear of getting exposed in the near future will definitely strike them so as to be in control.Secondly, there needs to be a check and balance in these kinds of cases so as to set aside the false allegations made due to any such revengeful intent.Definitely there is no doubt that this movement has worked as a silence breaker in life's of many individuals and has given them the courage to speak up for themselves.The best example here would be the experience that was shared by the lead actress of the 90's Television show 'Tara'. She waited for nineteen years to break her silence, she stated that she was raped in a party where something was mixed in her drink the saddest part here is she was raped by her best friend's husband,Mr. Alok Nath.[26]It needs real courage to stand and speak out the ruthless experiences that an individual goes through in different work space.No doubt in that as to a lot of the alleged matters cannot have a legal action to it as there are no such evidences to prove such incidents that took place ages ago but certainly a lot of women are getting involved in this movement and sharing their stories so that even if they cannot get any legal justice but they can at least help in creating a better environment for women in different work places.

Though, in certain cases it is found that the working women's are a part of this blame game where they are framing their male colleagues with a revengeful motive, as the laws are female centric and cannot provide any justice to the males, though certain provisions do speak about punishing the victims who falsely report cases of harassment. An example of this situation was of Bollywood Actress Tanushree Dutta who alleged that she was sexually harassed by renowned Bollywood Actor Nana Patekar in the year 2009 on the sets of the film Horn 'Ok' Pleassss, later, in the year 2019 Patekar got a clearance from the charges of sexual harassment against him and it was found that the complaint was malicious and out of revenge.[27]Moreover,

[26]'#MeToo: Mumbai police likely to close the rape case against Alok Nath. Here's why', (indiatoday.in, August 11, 2019)<https://www.indiatoday.in/television/top-stories/story/-metoo-mumbai-police-likely-to-close-the-rape-case-against-alok-nath-here-s-why-1579781-2019-08-11>,accessed 27th February 2020.

[27]ET Online,'#MeToo: Police files closure report after 8 months, says not enough evidence against Nana Patekar; Tanushree to challenge order', (*economictimes.indiatimes.com*, June 13, 2019) <https://economictimes.indiatimes.com/magazines/panache/tanushree-dutta-nana-patekar-case-police-files-closure-report-saying-not-enough-evidence-against-actor/articleshow/69770176.cms>,accessed 27th February 2020.

these kinds of complaints, movements and campaign are a start to a new change and a demand for a safe and carefree environment for the women in specific and there needs to be an equality in the workplace in regards to all matters as both the genders are equally involved in the work and both have equal talents so as to get on to this position.

GENDER JUSTICE ON THE BASIS OF POSH ACT, 2013

After the judgment in the case of Vishaka v. State of Rajasthan[28] there arose a need for a stringent legislation to protect working women in their respective workplaces from sexual harassment which is a form of discrimination as per Article 15 of the Constitution of India. Gender equality is the basic feature of the Indian Constitution and thus it is obligatory on the state to protect the people of the country from been discriminated on the basis of their race, sex, religion etc. POSH act was enacted by the Parliament of India 16 years after the Vishaka Judgement and protects only women employees from being sexually harassed by their employers. We all know that India is a male dominated society since ancient time that is why there arose a need to form a legislation to protect only women from the act of sexual harassment but now as India is developing not only women but at some point men employees are also been sexually harassed in their workplace. The POSH act, 2013 is a gender biased legislation. In this legislation there is a complete ignorance of men from a subject of sexual harassment at workplace which makes it more of a problem in our society. In India, even if a man is sexually harassed by a woman at his workplace there is no legal remedy for him which is the major reason behind lack of cases of sexual harassment of men at their workplace. There are instances in which men employees are also subject to sexual harassment by their female employers or male employers during the course of their employment, at workplaces sometimes the female employers humiliate them in front of their colleagues which are a normal practice in a lot firms and establishments, and also a type of sexual harassment, Gender based insults or sexist remark, sexually slanted and obscene jokes by male employers to male employees is one of the major instances of sexual harassment. But these types of cases never come in limelight due to no law regarding protection of the men against such crimes.[29] According to U.S. Equal Employment Opportunity Commission (EEOC) sexual harassment is a type of discrimination against any gender and it is gender neutral legislation. Further, on this basis there is need for a

[28]Supra, 1.
[29]Nishit Desai, "India's Law on Prevention of Sexual Harassment At Workplace", (*nishithdesai.com*, October 2018)<http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Prevention_of_Sexual_Harassment_at_Workplace.pdf>, accessed 25th February, 2020.

gender neutral law which will be in consonance with the Gender Quality principle of the Constitution of India.

RECOMMENDATIONS

- The POSH act does not provide for any second option if the Internal Complaint Committee is not constituted by the employer as per the requirements of the act.
- There should be more stringent provision which will have a harsh penalty on those women who falsely accuses any employer because of a sour relation.
- The act is gender biased and does not include men as a victim of sexual harassment at workplace; therefore there is a need for some amendment in the act.
- The act does not include educational institution in the definition of workplace therefore it is required to amend the definition of workplace and thus include educational institution in it.
- Requirement of an internal committee to keep a check on the work of ICC at the state level.
- Time limit for filing any complaint must be increased from 3 months to 6 months in the POSH Act so that the victim will have some more time to get out of the trauma of sexual harassment.
- The act only talks about the employer being the harasser but there are some cases where co-workers are also involved in harassing their co-women employees, therefore there is a need to amend the act and add them and women as harassers.
- Creating a hostile work environment, dismissing the services of the complainant and counter complaints by the accused employers are the most common feature in most of the sexual harassment cases. There is need for a provision which will restrict the employer from doing these acts.
- There is a need for same civil remedy to the domestic workers as it for other women employees.
- Need for protection of the witness so that the women employees will get support in their case against their employer accused.

CONCLUSION

Sexual harassment in the workplace is a serious issue that should be dealt efficiently. Sexual harassment is a form of gender discrimination which ultimately leads to the violation of the rights guaranteed by the Indian constitution as well as the civil rights of 1964. Sexual harassment at workplace is a crime prevailing since time immemorial but still this hasn't really drawn much attention until now. Day by day the cases regarding this crime are increasing. Moreover, sexual harassment at workplace should be taken into serious consideration and necessary steps should be taken in order to prevent it from creating a hostile workspace as it affects ones dignity creating a mental as well as physical pressure on the victim.

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THE SUBSTANTIALITY OF WOMEN REPRESENTATION IN LEGISLATIVE ASSEMBLY WITH SPECIAL REFERENCE TO KERALA

Malavika J[1]

The relationship of man and women in the society has been a topic of discussion from time immemorial. The status of women is recognized internationally by the participation of women in politics. In fact, political empowerment is given much importance since the social process is crucial to development and progress of a society. The empowerment process in equipping a women makes her economically independent, self-reliant and a positive self. It is necessary that women should be given opportunity to participate in the process of decision making. Like the case of most of the countries around the globe, the political participation of women in India is not spectacular with that of men. However, women's participation is quite encouraging compared to the past. Women have a right to engage in civil society, vote in elections, be elected to government office, serve on boards, and make their voices heard in any process that will ultimately affect them, their families, and their communities. Women's right to political participation is a necessary step to achieving global gender equality and democratic governance. Democracy is as much about citizenship rights, participation and inclusion as it is about political parties, elections, and checks and balances. The empowerment of women and the establishment of gender equality are crucial to democracy.

Democracy implies equality for all human persons, men and women. As against this basic notion of democracy, what is normally seen is that women are excluded from different walks of life, more visibly in politics. The U.N. observes that women constitute the world's largest 'excluded' category.[2] Women form nearly half the population of India and yet their voice not properly heard in the corridors of power.[3] Though our Constitution has no gender bias, women have only a symbolic presence in our political parties. Consequently, though we have had ten Lok Sabha elections, women are shockingly underrepresented in parliament, in the council of ministers and in the state assemblies. [4] Democracy belongs to the sphere of collective decision

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[2]https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures, accessed on 20 February, 2020.

[3] Women's participation in Decision-Making Source: Economic and Political Weekly, Vol. 26, No. 48 (Nov. 30, 1991), pp.736-2737

[4] Women's participation in Decision-Making Source: Economic and Political Weekly, Vol. 26, No. 48 (Nov. 30, 1991), pp. 2736-2737

making. It means every member who is affected by a decision should have equal right of participating in the decision-making process. Any assessment which lacks this feature is undemocratic. In case, it is required that democracy should reach its highest meaning, it is essential that attempts should be made to include the various sections in the decision-making process. One such way is to build up gender equality through social transformation to achieve the true essence of democracy. The process of democratization has remained confined to democratic institution building and arrangements involving the exercise of the highest executive power by the representatives elected through universal adult franchise. [5] The quality of democracy is determined not only by the form of institutions, but also by the extent that different special groups participate in these institutions.

LEGAL FRAMEWORK

The Constitution of India guarantees justice-social, economic and political liberty of thought and equality to all citizens. The Constitution of India has put women on an equal footing with men in all respects. The idea of gender equality is enshrined in the Preamble, Fundamental Rights, Fundamental Duties and Directive Principles of State Policy. Various Articles Article 14[6], 15[7], Article 16[8], 39[9], 42[10], 325 and 326 which guarantee equal rights for women. The Constitution further guarantees political equality –equal right to political activities and right to vote respectively. [11]The later, i.e. right to vote is exercised & enjoyed by a large group, but the former , right to actively take part in political activities is still a distant dream for the majority of women communities. Even the few women who are elected are sidelined and often allotted soft polios such as welfare, education etc. In both cases women lack access and control over apex bodies where decisions and policies are formulated. [12] For the promotion of welfare and

[5] Sanjib Saikia and Ankita Baruah , Deepening Democracy In India By Building Gender Equality In Politics, The Indian Journal of Political Science, Vol. 73, No. 2 (April - June 2012), pp. 273-282

[6] It guarantees equality before law and equal protection of law with in the territory of India.

[7] It prohibits discrimination on the basis of religion, race, caste, sex, place of birth. According to article 15(3), State can make special provisions for the benefit women and children.

[8] Equality of opportunity for all citizens in matter relating to employment. No citizen can be denied employment on grounds of religion, race, cast, sex, decent, place of birth residence or any of them.

[9] 39 (b) has provisions for equal pay for equal work for both men and women. Article 39 (c) has provisions for securing the health and strength of workers, men and women, and not to abuse the tender age of children.

[10] : It guarantees just and humane condition of work and maternity relief. Article 42 is in accordance with Article 23 and 25 of Universal Declaration of Human Rights.

[11] Art 325 and 326 of the Constitution of India

[12] Supra note 3, Pg 131

empowerment of women Parliament and State Legislatures have enacted several laws from intermittently.

Democracy is based on the will of life. More than a form of Government it is a way of life, an order of society, a way of social and economic relations and a belief system. The existence and implementation of these principles are termed as the pre-requisite of democracy. The pre-requisite is essential in every sphere-social, economic & political democracy. These pre-requisites are essential in every sphere - social, economic and political. The social conditions require: equality of status and opportunity, equality before law, educationally and culturally developed citizenry and absence of all kinds of discrimination. Economic conditions require absence of widespread inequalities, fulfillment of material needs for a dignified human existence, justiciable distribution of resources, equal opportunity for gainful employment, equal pay for equal work and protection against discrimination. Political conditions include rule of law, equality of citizens and equal opportunities for participation in political affairs, guaranteed and protected rights including freedom of thought, belief and expression. It also includes freedom of participation in civil and political processes, government by the people or their representatives, free and fair elections and respect for dissent and opposition. It is evident from the above discussion that equality is the core of democracy. However, democracy in practice is flawed by the very persistence of inequality in one form or the other.[13]

REPRESENTATION WITHOUT PARTICIPATION

Several scholars agree that an essential pre-requisite of for open democracy is women's political participation. It facilitates women's direct engagement in public decision-making and is a means of ensuring better accountability to women.[14] Political participation is not just taking part in political activities nor mere casting of vote. It includes wide range of other activities-like membership of political party, electoral campaigning, attending party meetings, demonstrations, communication with leaders, holding party positions, contesting elections, membership in representative bodies, influencing decision making and other related activities. [15]The participation of women in various processes of political activity is multifarious but the levels of participation and inclusiveness are quite varied, uneven and distorted. With this understanding of political participation, the evidence shows that in most of the countries

[13] Supra note 4, Pg 281
[14]https://asiapacific.unwomen.org/en/focus-areas/governance/political-participation-of-women , last accessed on 22nd February, 2020
[15] S. C. Stokes, Political Parties and Democracy, Annual Review of Political Science 1999 2:1, 243-267

participation of women is not impressive as the number of women participating in active politics is smaller compared to men. [16]Analyzed using a pyrameoidical stratified model at four levels on a quantitative basis: (1) in the top strata is female representation in the lower house of Parliament and in legislative assemblies - which is the narrowest and most constricted numerically; (2) in the second strata are women as candidates in electoral competition participating as members and functionaries of political parties where their representation in quantitative terms is more than that at the top layer; (3) in the third strata as active campaigners for political parties where female participation is much larger in numbers than that in the second strata; and (4) in the bottom strata with the widest base of women in numerical terms as single-time voters.

Women are making a little progress into politics but not yet enough to make a difference. Women members in the Lok Sabha (in terms of percentage of members in Lok Sabha) never crossed two digits, in spite women constitute nearly fifty percent of the voters. It has five decades and 17 Lok Sabhas for the percentage of women the House to move up partially from a mere 4.9 percent percent now, a figure that is far below the average of around countries which have elected legislatures.[17] The 2019 Lok Sabha witnessed the highest number of women candidates securing seats in the lower house of Parliament. Seventy eight women have been elected to the Parliament –a slight increase from 2014 polls where 62 women parliamentarians were elected.[18] Among countries in the South Asian Association for Regional Cooperation(SAARC), India has 12.6% of elected women representatives in their national parliaments, only ahead of Sri Lanka (5.3%) and Maldives(4.7%) , according to January 2019 data compiled by the Inter-Parliamentary Union(IPU), a multilateral agency.[19]

KERALA EXPERIENCE

Kerala Legislature has a unique position among other State Legislatures in India. Kerala follows a Unicameral Legislative system, i.e., there is only one house for state legislature namely the Legislative Assembly. The institution of Legislative Assembly personifies democracy and its Members carry with them not only the constitutional obligation to protect

[16] Id at 259

[17]https://prsindia.org/parliamenttrack/vital-stats/profile-newly-elected-17th-lok-sabha,last accessed on 22nd February, 2020

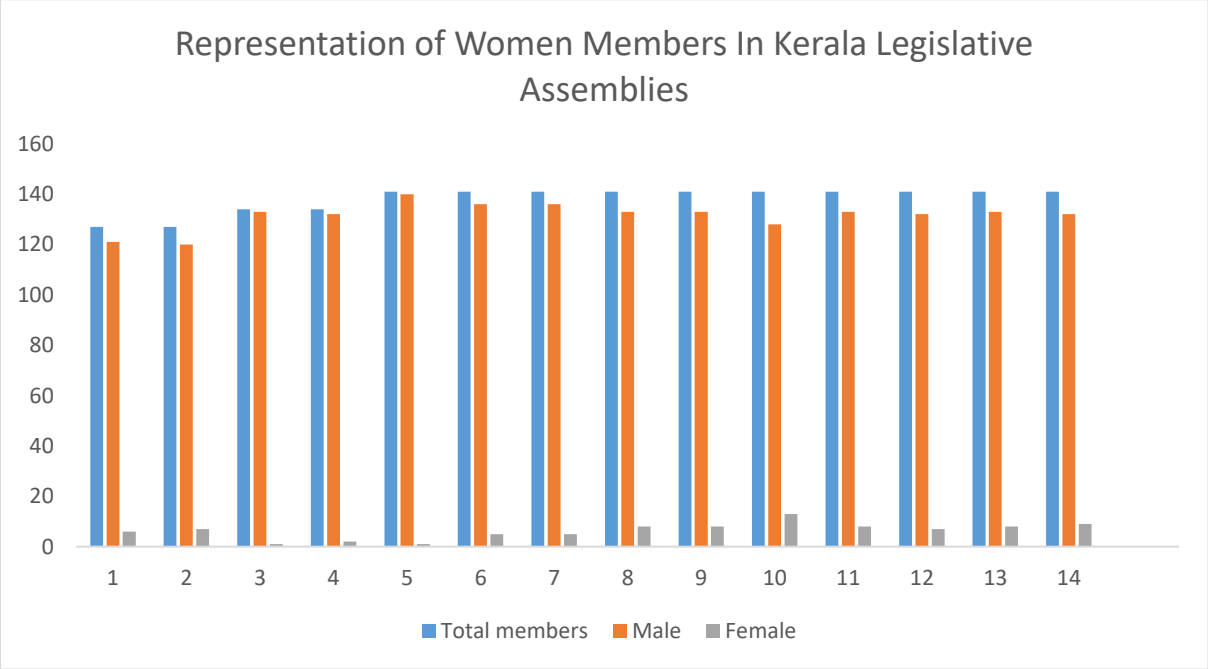
[18]https://economictimes.indiatimes.com/news/elections/lok-sabha/india/record-78-women-mps-in-new-lok-sabha/articleshow/69484777.cms?from=mdr , last accessed on 25th February, 2020

[19]https://economictimes.indiatimes.com/news/politics-and-nation/india-excludes-pakistan-from-a-saarc-initiative/articleshow/62345991.cms?from=mdr, last accessed on 22nd February, 2020

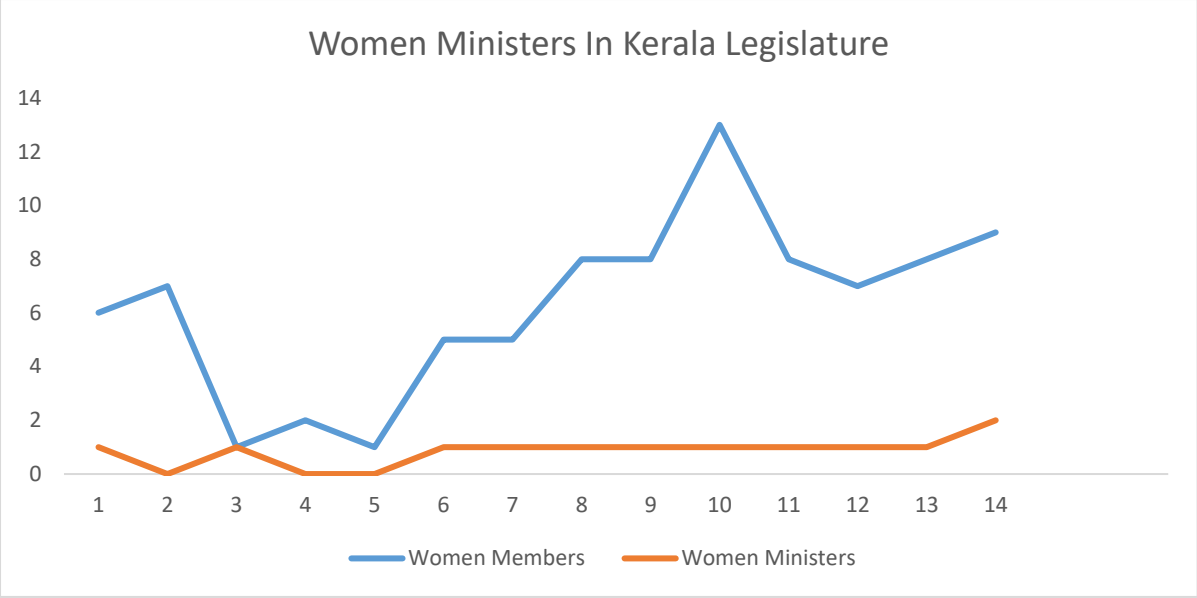
and promote democratic principles but also the hopes and aspirations of the people they represent. The total number of members in the Kerala legislative assembly is fixed as 141. Of this, 140 are elected directly by the people on the basis of adult suffrage and one member is nominated from the Latin Community, which falls under minority category. The members of the legislative assembly elect one of the members as its Speaker and Deputy Speaker. The Speaker presides over the meetings of the House and conducts the business of the government. The Deputy Speaker performs the duties of the speaker in the absence of Speaker.

In India, coalition politics came rather late, mainly because the Indian National Congress remained to rule India's central government for three decades after independence. In Kerala, however, soon after its formation in 1956, Congress lost to the Communist Party of India. At the political level, Kerala has health tradition of bipolar coalition politics in the backdrop of a multiparty system. From the political part, Kerala hosts two major political alliances: United Democratic Front and Left Democratic Front. Communist Party of India, BJP also have significant influence in the state politics. The State parties like the Indian Union Muslim League, the Kerala Congress (M), the Kerala Congress (J), and the Kerala Congress (B), Revolutionary Socialist Party (RSP) are active in Kerala politics.

The Legislature mirrors the wishes, needs and aspirations of the people and the people in general look with hopeful eyes towards the Legislature for redressal of their grievances. The success of the institution depends on the accountability of the legislature towards the constituencies.



In the first Kerala Legislative Assembly, out of 127 seats, 6 were women by women members. Out of these, one was appointed as the Minister for Land Revenue. In the Second Kerala Legislative Assembly, of the 127 seats, 7 were taken my women Members. There was no woman with the rank of a Minister. In the third Kerala Legislative Assembly, only one women , K.R. Gowri Amma, candidate was elected as the member of the Legislature. Though being the only member of the Assembly, she got the opportunity to serve as the Revenue Minister of Kerala. K.R. Gowri Amma, is considered as the most powerful women leader in Kerala and no other Member would have received the golden opportunity in serving the position none other than herself. In the fourth and fifth Kerala Legislative Assembly, only very few women members got the opportunity to be a part of the Legislative Assembly and no women was ranked with Minister position. In the Sixth Kerala Legislative Assembly, out of 141 seats, 5 members were elected women members. Of the 5, one was able to participate in the decision-making process. Similarly, in the seventh Kerala Legislative Assembly, only 5 women members were elected to the Assembly and one received the rank of Minister. In the 8th Kerala Legislative Assembly, there were 8 women members in the House of the total membership of 141. Of these, one was able to take part in the decision-making processes. The 9th Kerala Legislative Assembly also showed the same statistics. In the 10th Kerala Legislative Assembly, the number of women members showed a sharp increase from 8 to 13 in the tenth of the total seats of 141. However, this does not change the number of women ministers, even in the 10th Kerala Legislative Assembly, only one Women got the privilege to become a Minister. In the Eleventh Kerala Legislative Assembly the number of women members decreased from 13 in tenth to 8 in eleventh of the total seats of 141. Likewise, the 12th and 13th Kerala Legislative Assembly, had only 7 and 8 women members and 1 women Minister respectively. The present legislative Assembly, i.e. the 14th Kerala Legislative Assembly, stands different from the previous Assemblies with only 9 women members, the House has two women ministers for the first time in the history of Kerala.



When analyzing the different ministries held by women members, though initially women member did not receive a good ministerial position, from the 5th Kerala Legislative Assembly, subjects of importance were allotted to women members. Health being one of the most importance subject, was designed to women members in the 13th and 14th Kerala legislative assembly, both of them performed well and the present minister gives the best out of her. Notably, the present Health Minister, K.K. Shailaja received the Deepika Excellence Award (2019), Bharat Jyoti Award (2018) for her contributions to the welfare of women, children, public health and social justice in general. The quality of bills they sponsored impacted positively on the lives of the people. Besides, these bills helped in addressing some social challenges. It is therefore our contention in his paper that the legislature can only be made more vibrant, responsive and result oriented if more women are elected and appointed into various positions of authority in subsequent elections.

A qualitative study shoes that the participation of women legislators in assembly proceedings, as it appears, not so much determined by the gender factor as it is by their numbers. Both men and women legislators are governed by certain set of rules and procedures. How- ever, owing to their small numerical strength, women are in a disadvantaged position. Therefore, their participation appears to be low. Men members are given chance to speak on a variety of issues, determined by their respective parties depending upon their interest and specialization. They do raise issues apart from women-specific problems. The incidence and frequency of raising issues, moving resolutions and initiating discussions is, however, linked both to the experience of the woman member in terms of time and exposure to political activities at the grass roots levels.

CONCLUSION

Nearly 70years since the enactment of our Constitution, the solemn vow in its Preamble to secure political justice and equality of opportunity remains only partly fulfilled. Women's position in electoral politics and governances stays far below representative levels. In general, policy making, and governance is the domain of men, while other few women managing to get past a rigid glass ceiling and enter Parliament. Besides voting in the general elections, contesting elections is a very important dimension of participation. As far as political parties in India are concerned, although at election time declarations are made for granting 15-20 percent seats to women, no party has been able to achieve the target. [20] Certain laws and policies, however, have given a boost to the representation of women in Indian politics. One third reservation in the local bodies of rural and urban areas have provided extraordinary opportunity to women for their entry into politics which was otherwise not available. Beyond the district level, in matters related to Legislative Assemblies and the Lok Sabha, the challenges against women are even more pronounced.

The UN Secretary –General Banki-Moon has rightly remarked at the Round Table on Gender and Democracy in New York in 2011[21]is worth mentioning. He highlighted three key points in building up a gender equality democracy. He points out that though gender in equality in decision-making had shown important progress, there remains a great impediment to democracy to attain gender equality. Women's participation in politics not only improves the content of democracy but also stands an embodiment for gender equality. It provides for platform to raise women concerns and a public space for discussion of human rights. It makes it easier for women to realize political, civil, economic and social rights. Thirdly, gender equality must be treated as an explicit goal of democracy building, not as an *add on*. [22] Democratic ideals of inclusiveness, accountability and transparency cannot be achieved without law, policies, measure and practices that addresses inequalities. [23]He further added that we must go beyond about this issue rather than just at the time elections. The real aim should be to enshrine these ideals into social, political and economic fabric of a society. This would help the society, including girls and women to reach their potential on an equal basis with men.

[20] Rashmi Shrivastava, Minority Representation Of A Political Majority Group : Women In Indian Democratic Process, Indian Journal of Political Science, Vol. 72, No. 2 (April - June, 2011), pp. 411

[21]https://www.un.org/sg/en/content/sg/speeches/2011-05-04/remarks-roundtable-gender-equality-and-democracy-delivered , ;last accessed on 26th February, 2020

[22] Alyson Brody, Gender and Governance, Bridge-Development -gender, April(2009)

[23] Secretary-General Ban Ki-moon said in his remarks at a roundtable held at UN Headquarters on gender equality and democracy, 4th May, 2011

Decision-making processes are participatory, responsive, equitable and inclusive. Ensuring women's and men's equal participation in governance processes and the decisions that affect their lives are vital for achieving inclusive and effective governance.[24] However, despite some progress, globally women remain under-represented in all aspects of political life.[25] A range of official, unofficial, formal and informal barriers can limit women's political participation. While gender equality in political participation has intrinsic value, instrumental value also plays an very important role. [26] Along with supporting gender sensitive parliaments through induction training for MPs on gender issues, mainstreaming gender impact reviews into parliamentary committee work, gender analysis of proposed laws, the introduction of tools for gender-sensitive budgets, support for cross-party women's caucuses, and women's mentoring programmes, encouraging political parties to remove all barriers that discriminate against the participation of women, develop their capacity to analyse issues from a gender perspective and develop gender-sensitive election manifestos, and to adopt policies and/or quotas to promote the ability of women to participate fully at all levels of decision-making within those political parties are equally important.[27] Norms about women's appropriate roles and leadership capabilities also shape both aspirations and opportunities. The biggest embodiment of the resistance against great female participation in political processes is the consistent opposition to women's reservation bills which have been introduced and failed to pass in 1996, and again in 1998, 1999 and 2002. The current version of this, the Constitution (108th amendment) bill was pushed through the Rajya Sabha in 2010 with unequivocal support from the BJP and the Left. However, it did not pass the Lok Sabha and lapsed yet again. Another challenge is the expensive proposition in fighting an election. Given the low finance; a power of women in society on an average as compared to men, this becomes additional hurdle. The passage of women reservation bill would be an important step, allowing greater participation in the highest level of India's politics.

The struggle for women empowerment is a long one, it must be kept in mind that while the number of elected women members, has steadily grown 37 victors in 1991 to 62 victors in 2014, this still counts for only 11.8% of total seats in Lok Sabha, far from the 50% target

[24] https://www.undp.org/content/undp/en/home/ourwork/democratic-governance-and-peacebuilding/inclusive-political-processes/women-s-equal-political-participation/ , last accessed on 26th February, 2020
[25] Id
[26] Supra note 3, 2736
[27] UNDP, https://www.undp.org/content/undp/en/home/2030-agenda-for-sustainable-development/peace/governance/women-s-equal-political-participation.html , ;last accessed on January 21st, 2021

set by UN's Sustainable Development Goals on Gender Equality. It is true that mere participation and representation in legislative bodies may not in itself be enough to remedy the problems of discrimination faced by women in Indian society. Equality along with equity is a goal which may not easily be achieved by only high representation of women in legislatures and other public bodies but has to be backed by other supportive measures[28].

[28] Supra note 4, 280

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WHY FEMALE CRIMINALITY AND CAN IT BE SOLVED?

Sumitha.M.S[1]

'No one is a born criminal, but the circumstances make them so'. This is a famous quote while we discuss protection for persons in conflict with law. Recent trends indicate a growing rate in female criminality and necessitated to inquire into the reasons behind them and to find measures to prevent recidivism. Our society treats female criminality as an evil which deserves double hatred because in a societal point of view, such women are violating two conditions- the one imposed by law and the established gender role of femininity and passivity. Once a female somehow got connected to an offence, the punitive effect will last for her entire life. Apart from the social stigma and humiliation, a women in conflict with law is open to many exploitations during arrest, trial and in prison conditions. Her dependants are also getting victimized. The situation deserves more attention in Indian society which gives utmost importance to equality and basic human rights.

Women in conflict with law are also female who deserve constitutional guarantee of protective discrimination except for the punishment of the offence to which they are liable. They are also entitled to right to live with honour and decency under Article 21 except for the period of conviction. During the period of conviction also, a women is entitled to get human rights in general and feminine rights in particular as she remains as a female human. The mandate has also been justified by Article 10(1) of International Covenant on Civil and Political Rights 1966 that all persons deprived of their liberty should not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that respect for the dignity of such persons must be guaranteed under the same conditions as far that of free persons. Denial of these rights cannot achieve the intent behind the punishment, the expected reformation. Therefore, Art 10(3) of the covenant provides that for persons who are convicted, the prison system should not only be retributory but should focus on reformation and social rehabilitation of the prisoners.

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THEORIES ON FEMALE CRIMINALITY

Various persons at various period of time tried to explain female criminality through macro and micro analysis. Macro analysis is a general analysis of female criminal tendencies such as poverty, social insecurity, domestic violence etc., while micro analysis gives case to case overview. The theories are founded on the basic principle that a human behaviour, either it be male or female is the product of the society which he lives, since, man is only degenerating what he learns from his environment.

Historical theories on female criminality tried to connect female criminal tendencies to their biological characters. Lombroso and Ferrero in their work 'The Female Offender' (1895) detailed some physical features of female criminals such as occipital irregularities, narrow foreheads, prominent cheekbones etc. and came to a conclusion that female criminals have certain physical resemblance to their male counterparts and they have less lady like qualities such as compassion and sensitiveness to pain. Apart from this, their cognitive ability is also 'man like', with additional contributes of uncontrolled jealous and revenge. The findings were rejected for small size of sample population, lack of its heterogeneity and absence of a scientific base. Later on, Sheldon and Eleanor Glueck in 1934 tried to give a multi-disciplinary ambit in analysing female criminal tendencies considering biological, social, psychological and anthropological aspects, especially the study was based on connecting the influence of family in framing female criminals. In 1961, Otto Pollak in his work 'Criminality of women' described 'masked criminality of women'. He was of view that female criminality has most often go unreported and traditional homemaker function of women gives her a platform to offend against children and elderly people.

The historical theories of female criminality were found to be narrow, as they tried to define stereotypes about female offender as manipulative, cunning and masculine.[2] Then came the Traditional theories of crime and gender, in between 1969 and 1975. In 1961, Travis Hirschi's 'Social bond theory' tried to explain criminal tendencies in a gender neutral way. His findings were at macro level, focussing on factors such as attachment, commitment, involvement and belief as the intervening factors which can prevent criminological impulse of humans in general. He was of contention that family has much influence on framing female behaviour whereas in male character building, education can also matter. The Social bond theory has then

[2] Stacy L. Mallicoat, Women and Crime- A text/ reader, Sage Publications India Pvt. Ltd., New Delhi, 2nd edn., 2015 at p 198.

got supplemented by 'Differential association theory' proposed by Edwin Sutherland, focussing on influence of peer group in formulating one's own reasoning, knowledge and habits. Later on developed the 'Strain theory' by Robert Agnew, highlighting failure in achieving positive goals, the loss of positive influences and the arrival of negative influences as the three potential sources of strain. Girls are most often vulnerable to strain inflicted by worst family conditions and thus get involved in wrongs such as running away and substance abuse. Likewise, the attempt to suppress response to strain such as anger, developed self-destruction behaviour and depression in females.

The gender neutral traditional theory was further supplemented by the modern theories on female criminal behaviour. The first two theories of modern era were not women friendly. In 1970s, witnessing successful women movements, Freda Adler and Rita Simon highlighted liberation of women as the reason for female criminal tendencies. Further, 'power controlled theory' suggested by John Hagan (1989) also found decline of patriarchy or freedom given to women as the reason for the increase in number of female criminality. Later on, 'life course theory' developed by Robert Sampson and John Laub came to play. The theory rightly pointed out the influence of one's life experiences in the making of her criminal tendencies. The effects of early childhood abuse traumas, mental health concerns, poverty and sexual identity are some life course which can be used to understand female criminal tendencies.[3] Unlike the earlier ones, the theories gave significance to gender in explaining criminal tendencies. The approach paved way for the evolution of feminist criminology which identified a cycle for women and girls that begins with their own victimization and leads to their offending.[4]

WOMEN INVOLVED CRIMES- A GENERAL ANALYSIS

With the development of female criminology, a general analysis into women involved crimes and the driving factors of such crimes became subjects for discussion. The offences indulged mostly by women includes drug addiction, property related crimes, prostitution, gang wrongs and murders[5].

Drug addiction, not only constitute itself as an offence, is the root cause for female criminality. Women become drug addicts to cope up with the stress created by changing norms of

[3] Belknap and Holsinger (2006).
[4] Supra N 1 at p 206.
[5] Supra N1 at p 284.

femininity and to handle the mental health issues. Family environment, to say, lack of parental supervision etc. can also cultivate drug addiction upon a female.

Women involvement in property offences is relatively high in number. Women may commit such wrongs to meet needs of her own as well as family subsistence. But the number of such women is meagre. A large number of women involved in such crimes are addicted to either drugs or luxurious life.

Prostitution simply means selling body for consideration. It may take the form of escort services, massage parlours, or work in brothels, bars and truck shops.[6] But the most highlighted among them is street prostitution. It is noteworthy that there are so many driving factors behind the crime which includes drug addiction, early childhood sexual abuse by family members and consequent running away which force her to indulge in prostitution to support her basic survival, and other influences including individual, contextual and environmental.

Gang wrongs means a group consisting of both male and female members who comes from more or less similar backgrounds such as poverty or children born to those who are imprisoned punitively. They have a common hatred towards the society and thus indulge in various offences affecting society in general or unsocial activities. It may even go to the extent of terrorism.

Nowadays women are becoming murderers, especially killing her own intimate relatives such as husbands, parents and children. The motive may be property gains, to have extra marital relationships and also to hide her wrongs from publication. Sometimes child homicides may be due to the disturbed mental health of females and also because of the mad belief of benefit of children or 'altruism'.

PROBLEMS FACED BY WOMEN IN CONFLICT WITH LAW

The major problems commonly suffered by women in conflict with law include;

a) Lacuna in getting proper legal guidance

   Most of the women involved in offending are from poor social backgrounds, having no awareness on their legal rights. This will delay their prosecution, resulting a rise in number of under-trial female prisoners, and hamper their right to get access to justice. For instance, women are not properly informed of their right to keep their children

[6] Supra N1 at p 289.

below six years with them or other statutory rights availed on them during arrest and detention. Many a time, women who became panic by interrogation by male officials confess wrongs which they have not actually done and put signature upon documents given by officials without reading it.

The worst affected are those women who are non-resident foreign nations, to whom the first challenge will be language for communication[7]. They also lacks proper chain to communicate their arrest to their native place and there exists a great risk of danger including vulnerability to sexual abuse.

b) Poor mental health

Most of the women prisoners possess a history of victimization either because of domestic violence or sexual or physical abuse and also many of them may have a habit of drug use. The past history accompanied by immediate separation from their dear ones and life in over-crowded jail environment without a proper categorisation of offenders according to the crime they have committed, may inculcate deterioration of mental health among the female inmates in prison. Otherwise rather that rehabilitation, permanent mental disorder or suicides may the result.

c) Need for gender-specific health care

The background of most women prisoners reveal their vulnerability to get affected by diseases such as cancer and sexually transmitted diseases like HIV and hepatitis and also their gender-specific condition will worsen in overcrowded and unhygienic prison condition. The situation mandates periodical check-up in female prisons equipped to their gender-specific needs and the establishment of de-addiction centres in jails. The avoidance of the initiative will result rise in number of deaths in female prisons and favours recidivism, since released convicts will again seek illegal means to get finance for buying drugs.

d) Custodial tortures

Women prisoners are vulnerable to face abuse ranging from verbal abuse or humiliation to serious tortures like rape from male officials who are recruited to have supervision over women in custody. This may also take form of bad touches during pat down

[7] Handbook on Women and imprisonment- United Nations Office on Drugs and Crime at p 8 at https://www.unodc.org.

searches and peeping into bathrooms and women are often compelled to do sexual favours to get basic human rights in prison. The danger impose more threat during custodial period rather than incarceration after establishing guilt. The same threat is inflicted by fellow prisoners in jail, the only difference is the form changed to forced homosexuality rather than heterosexual activities. The complaints of the aggrieved are often neglected by authorities and may result in 'retraumatization' among female prisoners.

e) Inability to have proper family contacts

Number of female prisons will be less and hence female convicts are placed in prisons much distant from their place of residence, thereby, poses difficulty in periodical visits of family members. Some jurisdictions also impose visiting fees, adding burden to the visitors who are already trapped in a huge travel expense. The justification given by those jurisdictions is that prison visit is only a privilege and not a right.

In some cases, especially cases involving moral questions, families used to abandon the female prisoners. Whatever may be the hurdle, the long-separation from family may put women in a worst emotional condition, especially when they are mothers.

f) Challenges faced by pregnant prisoners and women prisoners with their children in jail

Pregnant women prisoners lacks adequate pre-natal and post-natal care in jails and they also suffer from problems such as malnutrition or unhealthy diet requirement, unhygienic prison condition, high risk of epidemics and poor mental condition in prison environment. The lack of health care and treatment when coupled with risk of shackling during transfer to hospital toughens smooth delivery of baby.

Mother prisoners can keep their children under six years with them. The child so maintained within four walls of a jail, in the company of females with criminal background, is not supposed to have a healthy childhood. And those children above six years, having no alternate care, are getting institutionalised. Even though children are getting basic requirements, these institutions take the form of another jail for them.

g) Post-release stigma

The released female convicts suffer neglect both from the side of the society and their family. Many a time, family will be reluctant to undertake them. The criminal

background will also prevent them from qualifying an employment or education and thus they will ultimately suffer insecurity, financial as well as social. Even if they had a proper housing during conviction, the non-occupancy for a long term may result in wrongful deprivation of its title. Most often such released women are not able to bring their children with them since no one will give them an accommodation, even for rent.

The trauma created by prison life will last for a longer period even after their release, necessitating the need for a post-release counselling and it is also mandatory to have a conjoined function of prison department with other sectors and arrange a healthy life or employment for released women convicts.

INDIAN LEGAL MECHANISM FOR PROTECTING WOMEN IN CONFLICT WITH LAW

The first central legislation intended to protect the interest of female prisoners was the Prison's Act, 1894. The Act defined duties of prison officials and made provisions to ensure interest of women prisoners by limiting search and examination of women prisoners to female staff, limited unwanted physical restraints such as handcuffs, fetters and whipping on women prisoners and also mandated separate accommodation for female prisoners[8]. Then came the Punjab Jail Manual 1996 which added measures such as classification of female prisoners based on age, health condition, legal reason etc. for their detention in separate institutions and provided protection from exploitations ensuring medical care and treatment, extra diet plan, facility of conveyance during jail transfer and also made provisions for safeguarding female prisoners sentenced to death and commutation or postponement of such sentence during pregnancy. Other legislations in the field include the Punjab Good Conduct Prisoners' (Temporary Release) Rules, 1963, Punjab Prisoner (Attendance in Courts) Rules, 1966 and Punjab Police Rules, 2011.

The major legislations such as Indian Penal Code, 1860 and Criminal Procedure Code 1973 also made provisions in this regard. IPC virtually prescribes punishment for custodial rape under section 376C and Code of Criminal Procedure provides provisions for release of women prisoners on probation of good conduct under section 360(1) and postponement of execution of death sentence in case of pregnant offenders under section 416 to maintain consonance with Article 6(5) of the International Convention on Civil and Political Rights, 1966.

[8] Chapter 2, Rights of women prisoners: A legal perspective at p 64 at www.shodhganga.inflibnet.ac.in.

The Indian judiciary widened the human rights of women prisoners, especially after 1990's, by a wide interpretation of Article 21 of the Constitution. It includes prisoners' right against handcuffing[9], right against solitary confinement[10], right to human treatment[11], right to minimum living conditions[12], right to legal aid[13], prisoners' right to be interviewed[14], right to maintain contact with the outside world[15], right to have adequate accommodation[16], right against torture and custodial violence[17], right to leave and special leave or right to have temporary release from prison on specified grounds[18], right to judicial remedy[19], right to parole and furlough[20], right to basic human needs[21], right to redressal of grievances[22], right to evoke the writ of Habeas Corpus against prison authorities for excesses[23], right to have information about rights[24], right to work in prison[25], right to reformative programmes[26], right against fellow prisoners[27]and finally right to security and safety[28]. Further, in R.D. Upadhyay v. State of Andhra Pradesh[29], the Supreme Court issued guidelines to provide pre-natal and post-natal care for pregnant prisoners and also for the maintenance of children kept along with female prisoners.

WHAT YET TO BE DONE?

- Avail proper legal access to female prisoners irrespective of their financial and educational status by properly informing their rights during arrest, detention etc. and avail them a speedy trial with strict compliance of unbiased interrogation and fairness in trial procedure. If any malicious prosecution was found to be done against any

[9] Citizen for Democracy through its President V. State of Assam, AIR 1996 SC 2193.
[10] Sunil Batra V. Delhi Administration, AIR 1997 SC 1739.
[11] Sanjay Suri V. Delhi Administration, 1988 Cr.L.J. 705 (SC).
[12] Vikram Deo Singh Tamar V. State of Bihar, AIR 1988 SC 1782.
[13] M.H. Hoskot V. State of Maharashtra, AIR 1978 SC 1548
[14] Sunil Batra V. Delhi Administration, AIR 1997 SC 1739.
[15] Francis Coralie Mullin V. The Administrators, Union Territory of Delhi, AIR 1981 SC 746.
[16] S.P. Anand V. State of M.P, AIR 2007 MP 167.
[17] D.K. Basu V. State of West Bengal, AIR 1997 SC 610.
[18] Krishna Pal Malik, Penology, Victimology and Correctional Administration in India, Allahabad Law Agency, Allahabad, 2011, pp. 334-360.
[19] Charles Sobraj V. Superintendent Central Jail, AIR 1978 SC 1594.
[20] Sharad Keshav Mehta V. State of Maharashtra & others, AIR 1978 SC 1594.
[21] A Convict Prisoner in the Central Prison V. State of Kerala, 1993 Cr.L.J. 3242.
[22] Madhukar & Jambhale V. State of Maharashtra and Others, 1987 MahLJ 68; Ram Murthy V. State of Karnataka, AIR 1997 SC 1739.
[23] Sunil Batra V. Delhi Administration, AIR 1997 SC 1739.
[24] Id, 109.
[25]Hiralal Mallick V. The state of Bihar, 1977 SC (Cr) 538.
[26] Ashutosh, Rights of Accused, Universal Law Publishing Co. Pvt. Ltd., Delhi, 2009, p.110.
[27]Kewal Pati V. State of U.P, 1995 3 SCC 660.
[28] Sheela Barse V. State of Maharashtra, AIR 1983 SC 378.
[29] AIR 2006 SC 1946.

female, resulting in her imprisonment, award strict punishment. And also ensure proper support to those non-resident foreign females who are in conflict with Indian law and give a special consideration to pre-trial prisoners, since their guilt has not established yet.

- Provide periodic counselling and proper mental health care to female inmates to sustain their healthy mental condition and take all measures to avoid suicides and self-harms in prison. Efforts must be made to categorise prisoners based on their age, reformation tendencies etc. and maintain them in separate divisions.
- In order to ensure better health condition of female prisoners, provide them with gender-specific health care and measures such as medical screening on entry must be done to avoid the spread of epidemics and provide treatment to affected persons. They must be given preventive health care services and take adequate steps in prevention, treatment, care and support of HIV and other deadly diseases. In every jail, there must be a de-addiction centre and provide treatment for substance dependence.
- Effective complaint cell need to be established in every prison and provide adequate mechanism to ensure the safety of prisoners. Ensure periodic staff training regarding management of prison condition in a healthy and hygienic manner with strict consideration of safety of inmates. Due regard must also be given to appoint women as supervising officers to the maximum possible extent and ensure monitoring system over prison conditions.
- To effect a proper reformation, conduct various activities and programmes ensuring participation of inmates and give them proper education and training programs. Periodic assessment regarding the extent of reformation made in each and every prisoner must also be done. Prison officers must act like doctors who cure ill-affected behavioural patterns of the prisoners. Resort can also be made to adopt procedure followed in restorative justice.
- To maintain a family link of women prisoners, give them periodic parole and maximum efforts must be made to place them in a jail having less distance to their place of residence and allow visitors, at periodic intervals, free of cost and allow them open visit to their minor children.
- Ensure pre-natal and post-natal care of pregnant inmates and provide early childhood care to children kept with women prisoners. Follow practices done in Bulgaria in

establishing kindergarten or establish a family cell unit as has been done in Spain to ensure intimacy between child and mother[30]. It is also advisable to find alternatives in imprisoning pregnant ladies and ladies with immature children. If the female is punished for less serious offences, attracting not more than five years imprisonment, alternatives such as home arrest as has been done in Argentina[31] or suspension of the sentence during such term can be done, following measures taken in countries like Russia[32] and Kazakhstan[33].

- Extend post-release support to released female convicts in collaboration with various departments or NGOs and ensure their societal reintegration by providing employment or other means of livelihood. Also adopt mechanism to provide them with post-counselling schemes to face the trauma created by prison and social stigma suffered during post-release period.

[30] Supra N6 at p 86 and 87.
[31] Law no. 26. 472 of 2009.
[32] Crl Code of the Russian Federation, Art. 82.
[33] Crl Code of the Republic of Kazakhstan, Art. 72.

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THE DOWRY PROHIBITION ACT, 1961 AND THE WAY AHEAD

Dr. Heena Ghanshyam Patoli[1]

INTRODUCTION

In spite of modernization and women's increasing role in the market economy, the fashion of taking expensive gifts from the bride's side is becoming more common in India, and the value of dowries is rising day by day.[2]Dowry in its ordinary meaning is a transfer of parental property, gifts, or money at the time of giving their daughter in marriage. . Dowry is a kind of dakshina which, originally was conceived as a happy gift given at a happy moment of marriage to the daughter to make their subsequent life happy it was just a celebration of a happy movement[3] .It is different from bride price and dower under the Muslim law. This is a customary practice in India where it started by bride's father giving presents to the groom and his family and also as the bride was permanently leaving her maternal family her parents gave her and her husband a lot of gifts and presents out of love and affection. This practice took to roots and today dowry is one wide ranging social evil.

This paper endeavours to examine the dowry system in India, critically analyse the Act, check the effectiveness, the implementation and impact of legislative measures, and give suggestions/ recommendations to cover the loopholes in the Act and further, to make suggestions for effective implementing the Act.

When the practice was limited to the good wishes of parents, towards their daughters by way of presents, it was fine and did not constitute any evil. But the practice of giving presents to daughters has degenerated over time and now it has become a matter of prestige and social status. Now, it has almost become a sort of necessity, a binding on the part of girls' parents to give jewellery, clothing, household articles and also some cash. Gradually it has degenerated to such an extent that unless and until the girls' parents give stipulated amount in cash and also costly jewellery not only to their daughters but also to their in-laws, the marriage of their daughters is not possible at all. Thus, the simple desire on the

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[2] Padma Srinivasan and Gary R. Lee, 'The Dowry System in Northern India: Women's Attitudes and Social Change'; Journal of Marriage and Family, Vol. 66, No. 5, Special Issue: International Perspectives on Families and Social Change (Dec., 2004), pp. 1108-1117

[3] https://shodhganga.inflibnet.ac.in

part of the bride's parents to see their daughter well established and settled , after marriage, has assumed alarming proportion and turned into a 'great social evil'.[4]

The modem Indian dowry system has its roots in the traditional upper-caste practices of 'kanyadhan' of women which literally means gift of the virgin bride, 'varadakshina' meaning honorary handouts or presents given by the bride's side which could be either father, uncle, elder brother or grandfather to the groom.[5] In the age old custom of India, there was no indication or any kind of reference about the existence of dowry system. In fact, during those days it was the boy who paid the bride price to the father of the girl for taking her services to the family, and also it was felt disgraceful for the bride's family to give her in marriage for nothing. In the Epic period it was said that 'Kaikeyi', 'Gandhari' and 'Madri' were paid heavy bride-price.[6] There was a mention of 'Stridhana' (separate wealth for the women in times of need) which was given as a token of attachment and sentiment without any demand from the boy's side. "Dowry, according to the Act[7], means any property or valuable security given or agreed to be given either directly or indirectly by the bride's family in the marriage to the groom's family in the marriage; or by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; which can be at or before any time after the marriage in connection with the marriage of the said parties. But this does not include dower or mahr under Mummedian Law".

Dowry which started as a customary practice as a gift to the groom and his family in due course of time it became a compulsion for the father. Dowry is an age old custom of exchanging hand-outs or gifts to the Groom and his relatives. But in due course of time, this became more compelling and the room's side started looking forward for more and more gifts, cash and other household items and it became almost a demand as a condition to accept a marriage proposal. This practice is rampant in India and other parts of Asian Countries. Dowry has become so violent that it is now the cause of bride burning, murders and acute domestic violence. One thing good about dowry is that because the daughters are not given property rights, dowry received by her from her parents became her own property

[4] https://shodhganga.inflibnet.ac.in
[5] Infra 1
[6] B. Pramila, 'A critique on Dowry Prohibition act, 1961', Proceedings of the Indian History Congress, Vol. 76 (2015), pp. 844-850

[7] Sec 2 of Dowry Prohibition Act , act of 28 of 1961 ,

which provides some sort of financial security in times when women face hardships in her life be it widowhood or if the husband is not providing for her or is irresponsible towards her. The same reserve can eventually be used to provide for her depends. It is also said that dowry in bygone days of India was insignificant, and daughters had equal inheritance rights. This right to property was in the form of gifts at the time of marriage to the daughter. Astonishingly, this culture changed and no one knows or its ambiguous when, why and how quickly the culture of dowry came in and it almost became a demand by groom's side.

In India, we have seen the practice of giving dowry, puts a lot of burden on the bride's family. Dowry has become a menace to the society, looking at the situation the parliament enacted the Dowry Prohibition Act, 1961.Sections 304B and 498-A of the Indian Penal Code (IPC) also deals with crimes related to dowry. i.e. dowry death, and the offence of cruelty, both mental and physical, towards a married woman by her husband or relatives. Section 1 13-A of the Evident Act, 1872 provides that courts may presume the guilt of the husband or relative who had subjected the woman to cruelty in connection with dowry. In spite of anti-dowry laws in India, it is still very much in practice in India. Dowry is a criminal offence by virtue of section 498-A, which was inserted by the Amendment Act and by this Section, "whoever, the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable for fine"[8] but surprisingly no one in India takes it seriously. Apart from these legal measures taken by the government, there are other programs happening to bring about awareness of the Act. The existence of legislations has made little or no effect and not much change can be seen even after the efforts of social activists. It is not comforting to note that even today this custom is in vogue and the cases recorded have increased among the educated class. In fact education is become more of a weapon to attract more dowry for the bride. Even the parents want to allure good proposal for their daughter and so they are ready to give out handsome dowry.

The custom of dowry has invited other crimes against women. Dowry deaths happen several times or the woman commits suicide because of the cruelty by husband and his relatives and bride burning is so very common.[9] There are a good number of crimes which are committed by the parents and relatives of the girl out of the fear of dowry demand. The

[8] Sec 498-A IPC

[9] B. Pramila, 'A critique on Dowry Prohibition act, 1961', Proceedings of the Indian History Congress, Vol. 76 (2015), pp. 844-850

Killing of the female child, not educating her are the offences committed by her parents. The cost incurred or huge dowry demands at the time of marriage of their girl is a scary situation for the parents and so they commit offences against girls. The inability of the parents of the bride to meet out or fulfil the dowry demands of the bride groom and his relatives at the time of marriage and in the later years is a very big reason for them to commit such crimes. Many times the demands of the groom and his family are endless and they are in a way to earn money through marriage. Every society and every community has his/her own way of looking at dowry and in some or the other way it is a tradition or a fashion among higher class.

The Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985 is made to document gifts and provide complainants so that there is a strong evidence for the crime by the groom and his family and the Dowry Prohibition (Amendment) Act, 1984, has the list of presents which are given at the time of the marriage to the bridegroom. This list should be maintained by the bridegroom with the signatures or the thumb impressions of both the bride and the groom. This should have the brief description of the gifts/ presents, value of the gifts given, the place and name of the person who has given the gifts. There is also the *Dowry and Bridal Gifts Restrictions Rules, 1976*. Which is making an effort to deal with the problem of dowry. The legislature has done its part and the laws against dowry has been enacted, but unfortunately this effort is fruitless and unproductive because there has been no change in the mind-set of the people.[10]

Suicides due to torture for dowry, deaths and murders are unending and never cease to exist in India and the enacting of the law is of no use.[11] The greed for dowry has increased so much that the wife/ bride is killed for not bringing sufficient dowry to the marriage. Also, torture of dowry starts with domestic abuses by the husband and in laws and it takes a bad shape in the end which is the death of the girl many times. [12]

The practice of dowry in India has been theoretically linked to a number of factors including the nature of residence and inheritance system, women's role in production, kinship

[10] *Manchandia, Purna (2005). "Practical Steps towards Eliminating Dowry and Bride-Burning in India". Tul. J. Int'l & Comp. L. 13: 305–319.*
[11] *Spatz, Melissa (1991). "A 'Lesser' Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives". Colum. J. L. & Soc. Probs.* ***24****: 597, 612.*
[12] Jane Rudd, "Dowry-murder: An example of violence against women." *Women's Studies International Forum* 24#5 (2001). pp. 513–522. doi:10.1016/S0277-5395(01)00196-0

organizations, relative availability of potential spouses, and social layering in society [13] Thus, ‘dowry’ is presumed to be a "price" or ‘consideration’ paid for a "appropriate match" in the marriage market. It can be called an exhibition where the best one is chosen with highest price offered. The woman who joins the husband’s family after marriage which is taken as a burden by the groom’s family and because of which she is made to make her own arrangements in some or the other way. In many traditional societies, some transfer of money, goods and services accompany when the marriage takes place or at times even before the marriage, i.e. when the marriage is fixed or decided. When these transfers are made from brides and their families to grooms and their families, they are broadly classified as dowries. [14] It is really surprising and funny that the groom’s family expects the amount spent on groom's education from the bride. The net dowry as expected is more for educated grooms and their worth is more in the marriage market in India. The parents don’t realise that the education given to the boy is for him and not a way to earn money at the time of marriage. A good match may be defined as a groom with higher education, greater family wealth etc. for which the bride ‘s family is also willing to pay any amount to the groom and it is more of a prestige issue for the bride to pay good amount of dowry and meet the expected requirements of the boy’s family[15].

The Dowry Prohibition Act, 1961 was enacted to forbid the practice of custom of dowry. It is with a noble purpose of eradicating this social evil. However, the loopholes of the Act are one of the major reasons for the failure of achieving the goal. In this Act, “dowry is defined as any property or valuable security given or agreed to be given by any way and it could be either directly or indirectly and this dowry or exchange of money or other material should be at the time of marriage or before or any time after the marriage is performed. The definition of dowry under the Act does not include dower or mahr in the Muslim Personal Law (Shariat)”[16] .The definition of dowry also includes the expression “valuable security”.[17] The Act has defined dowry including all gifts or any exchange of money at the

[13] Sonia Dalmia Grand Valley State University, USA Pareena G Lawrence University of Minnesota, USA; The institution of dowry in India: why it continues to prevail’ The Journal of Developing Areas Volume 38 Number 2 Spring 2005,
[14] Infra 4

[15] Infra 4
[16] Definition of Dowry under Section 2 of the Dowry Prohibition Act 1961
[17] Dowry Prohibition Act 1961(introduction) , act of 28, 1961

time of marriage but the section is miserably defeated when the provisions of Sec.3 of the Act come into picture.

Sec. 3 of the Act discusses about penalty for giving or taking dowry, it goes like this, "If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more."[18] The main provision seems appropriate and it shows that the person who is giving or taking dowry will be punished, it also provides that "the Court may impose a sentence of imprisonment for a term of less than five years". The exception to the main provision in many ways seems very amusing; it says the above provisions shall not apply to the presents which are given at the time of a marriage to the groom when the dowry or any present is not demanded from their side, i.e. if dowry, presents, gifts, money and other household items is given with wish and desire or its own, it does not fall under the definition of dowry under the Act. This very section defeats the objectives of the Act entirely.

This makes it easy for the families, community, societies to give and take dowry under one pretext or the other. Neither side is ever willing to reveal that the dowry was demanded and the demand was fulfilled. The provision in many ways defeats the main provision of penalty and gifts continue to be given and taken. It is in fact a complete set back to the entire Act. In traditional families the giving of dowry is a prestige issue and also a way to catch a good groom by paying a good price. The bride's family also believes that girls who take along with them good money and presents are kept happy by their in-laws and husband. Further, the groom's side are under the impression that they are respected if they get good dowry or gifts and their son's worth is decided in that way. To add it further, parents of girls with average looks and dark colour are willing to give any amount of dowry as they are aware without it, the marriage of the girl is not possible. So the Act become fruitless and worthless as the practice of giving and collecting dowry continues.

Also further, it adds that such gifts/ presents are entered in a list maintained in accordance with the rules made under this Act[19] ; the researcher is just wondering at the time of marriage who on earth makes list of presents and how does it come to anyone's mind to

[18] Sec 3, Dowry Prohibition Act 1961 , act of 28, 1961
[19] Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985.

maintain a list. In India it is said marriage is between two families which means it is coming together of two families, which is expected to be out of love affection trust and bond, in this kind of situation how anyone can think of making list of presents and keep an account of who gave what etc. Further, why would any of the families want to document anything where everyone knows that taking and giving of dowry is prohibited under the Act? Neither the bride's family nor the groom's family would document anything or create any evidence against themselves or others. Moreover the giver, being the parents and relatives of the bride would not file a complaint, looking at the situation and for the fear of losing the trust of the daughter's in-laws family, which would be against the interest of the girl, and it is impossible to prove that the presents made as consideration for the marriage. It can always be proved by the other side that the presents were not demanded at all. To further complicate the matter, the Act [20]"provides that the court cannot take cognizance of any offence unless a complaint is made within one year". The bride's parents would be reluctant to make any complaints against the family members of the boy's side because of the fear that it would affect her life.

The proviso further adds "that where such presents can be made by or on behalf of the bride or any person related to the bride and if such presents are of a customary nature or as a tradition to be followed and the value thereof is not excessive having regard to the financial status of the bride side then such presents can be given."[21] This provision further defeats the purpose of the Act as anything can be given on pretext of tradition.

Sec 4 of the Act[22] talks about penalty for demanding dowry "which fixes a punishment with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees if any person directly or indirectly makes a demand for dowry from the parents or other relatives or guardian of a bride or bridegroom and in special cases the Court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months". The amount of the fine is very small and negligible amount for many families and not to mention the quantum of punishment, six months does not seem like a punishment at all.

[20] Dowry Prohibition Act amendment of 1984
[21] Infra 8
[22] Sec 4, Dowry Prohibition Act 1961 , act of 28, 1961

Another very significant provision in this Act is Sec 4A "which puts a ban on advertisement of his son or daughter for the marriage or any other relative who offers through any advertisement in any newspaper, periodical, journal or through any other media, any share in his property or of any money or both as a share in any business or other interest as consideration for the marriage". The Act makes "it punishable with imprisonment for a term which shall not be less than six months, but which may extend to five years, or with fine which may extend to fifteen thousand rupees, also the Court can impose a sentence of imprisonment for a term of less than six month" and the immediate next Sec 5 of the Act[23] is about an Agreement for giving or taking dowry to be void.

Another key provision is the appointment of Dowry Prohibition Officers by the State government. The officers have been given specific areas and distinct function in respect of which they shall exercise their jurisdiction and powers under this Act. Every Dowry Prohibition Officer exercises and performs the function as to see that the provisions of this Act are complied with and to prevent, as far as possible, the taking or abetting the taking of, or the demanding of, dowry and to collect such evidence as may be necessary for the prosecution of persons committing offences under the Act. "The State Government may confer such powers of a police officer as may be specified in the notification on the Dowry Prohibition Officer who shall exercise such powers subject to such limitations and conditions. The State Government may, for the purpose of advising and assisting Dowry Prohibition Officers in the efficient performance of their functions under this Act, appoint an advisory board consisting of not more than five social welfare workers (out of whom at least two shall be women) from the area". When we look at this provision it seems very sound and complete but divulging it bit further does the question not ponder in our minds where are these Dowry Prohibition Officers , have we even seen them functioning in our areas, do we ever see them during any marriages, leave about they performing the above functions. So we go back to the basic challenges of the Dowry Act not being functional.

Sections 7 and 8 of the Act[24] are related to take cognizance of offences and they make it clear that it should be non-bailable and non-compoundable. In the pretext of dowry many other crimes are committed against women which is a crime against the society. In this kind of crimes anticipatory bail is given. The case for dowry will spoil the relations with the husband and wife and families on both sides and it will lead to breaking of the marriage,

[23] Sec 5, Dowry Prohibition Act 1961 , act of 28, 1961
[24] Sec 7 & 8 of Dowry Prohibition Act (act 28 of 1961)

and the victim has to accept defeat. It has also been recognised that in consequence or connection with dowry demands, many women are harassed, brutalized, murdered or induced to commit suicide.

All the above provisions of the Dowry Prohibition Act makes the Act not functional, ineffective, fruitless and pointless to have such an Act.

CONCLUSION

Dowry has emerged as a by- product of the socio- economic forces over a period of time. It is really surprising that the tradition of dowry year after year has not changed. The enacting of the Act has made little difference in the tradition of giving and taking dowry. The culture to receive dowry from the bride and her family is more prevalent in upper and middle caste households as compared to grooms from the lowest caste households.[25] It is generally believed that spread of education may change the situation. But, the fact seems to be in the opposite way.[26] Dowry is one of the ways in which the in-laws and the husband can abuse and torture the daughter in law/wife. The greed of the in laws is satisfied by asking for more and more dowry.[27] In the end, the researcher would state that in this era of equality and women liberation it is even painful and perhaps disgusting that women continue to be the victim of harassment, ill-treatment which ultimately brings unbelievable cruelty and untimely death in many cases.

The custom of dowry is a socio-legal problem, it cannot be tackled by law alone unless members of the society come forward and actively cooperate with the law to abate this menace. There is an ardent need for a change of mind-set of the people, to think out of the box, to fight for the right cause wherever required and stand for it. There is also need to create social awareness and make efforts to bring about a change in public opinion against dowry. This can be achieved to some extent through an in-depth and rigorous educational programme at all levels, particularly in the rural pockets. There have been a large number of voluntary non governmental agencies and social organisations/ NGOs which are doing a commendable work in helping the dowry victims and exposing the perpetrators of dowry crimes with the help of community assistance and guidance. There is a need for the legal aid workers to take up the cause and promote it. The law Faculty and students should also

[25] Infra 4
[26] Infra
[27] Sodhganga, Kishwar,M.(1988),"Rethinking dowry boycott. "In: No. 48(Sep.-Oct.1988),Manushi p. 10-13.

take initiative in dowry eradication campaign through an all-embracing legal literacy programme not only in urban cities and towns but in remote village areas as well.[28] Law students have done remarkable work in this area and definitely can contribute more to this.

"The Cohesive Role of Sanskritization,"Marriages involve the spending of unconscionable gifts of money by the parents of bride and this is particularly true of the urban middle classes, the traders and the richer peasantry. Dowry adds greatly to their burden, especially as the sums demanded have been steadily increasing; and the gadgets, vessels and furniture demand as 'gifts' also cost much more than before (Beginning with the upper levels of the society, dowry has now spread even to slowly a group as sweepers in Calcutta) the passing of the prohibition of Dowry Act in 1961 has had no effect whatever in combating this evil".(P.92).[29]

Following are the Recommendations / suggestions to cover the loopholes in the Act and effective implementation for the amendment in the Act.

- The Dowry Prohibition Act intended to prevent giving and taking of dowry, but Sec 3 of the Act says that dowry is dowry only if demanded and not otherwise so this Section has to be amended because it is very difficult to prove if dowry is demanded or voluntarily given.
- The Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985 which was enacted along with the Act is to document gifts/presents and provide for a mechanism for complainants. This list serves as an evidence for the crime by the groom and his family and the Dowry Prohibition (Amendment) Act, 1984, the list of presents which are given at the time of the marriage to the bridegroom shall be maintained by the bridegroom with the signatures or the thumb impressions of both the bride and the groom. It is not practical and feasible to maintain such list as it has negative repercussions. [30]
- The penal provision of the Act prove to be virtually ineffective. The punishments are too less and fruitless. The penal provisions should be made stricter with a further enhancement in the period of imprisonment, by the 1986 amendment Act it was further enhanced up to five years and a fine not less than Rs. 15,000/-. The enhanced

[28] Supra 28
[29] Dr. M.N. Srinivas (1989) has stated in his book titled.
[30] The Dowry Prohibition Rules 1985

punishment would act as an effective deterrent in committing a dowry offence. Dowry continues to be given and taken. This is evidenced by the absence of any kind of impact of the Act on the people. The Act seems to be a dead letter. Despite various State amendments and several other attempts by the Central and State Governments to curb the system.

- The Judicial Custody of the husband and other family members makes reconciliation very difficult. Therefore, except in cases of actual physical injury, offence under Section 498-A, I.P.C. should be made bailable.[31]
- The police department consists of mostly dominated by men; women are side lined to occupy subsidiary positions. Appointing an advisor, who is a woman, to the police department to handle women's issues is necessary.
- There is a need to prescribe stringent punishment for the brokers who fix marriages with dowry as consideration and who give false information to the parties.
- The researcher suggests that the Section 198-A of Cr.P.C. is to be amended to the extent that the definition of the term ‘relative’ must be clearly prescribed as to whom are the person who ultimately be benefited by such demand of dowry and who are the relations included in the definition of the ‘relative’ for the demand of dowry.
- The lacunae regarding the definition of cruelty is that though all legal systems provided the matrimonial relief based on 'Cruelty' yet all of them failed to define the legal concept of 'Cruelty' which creates a lot of confusion in interpreting the legal concept of cruelty. Therefore it has been suggested that some criteria or some standard of norms should be imposed upon the word 'Cruelty' for providing the remedy of divorce on the basis of it. The definition of ‘cruelty’ under Protection of Women from Domestic Violence Act can be adopted.
- Local NGO's along with the help of the government can participate with the Protection Officers to keep track of marriages happening in the area and dowry given and taken. Many NGOs in the country can work in this area particularly for counselling the female victims.
- At all levels there has to be Gender-sensitization training programmes. The awareness regarding the Dowry Prohibition Act is found to be incomplete, though not fully

[31] Committee on Reforms of Criminal Justice System; Government of India, Ministry of Home Affairs. Report Vol. I. India, March 2003, para 16.4.3.

absent. During one of the studies it was revealed that the respondents are aware of the Act, but only partially. They think that the Act prevents only the bridegroom from receiving money or gifts from the bride. However they are not aware of the fact that the Act prevents the payment of bride price existing where as not a single person admitted either practising or supporting bride price[32]

- 'Community policing' is a new word coined and the involvement of local NGOs is very important in initial stage which could reduce crime against women.[33]
- Special 'Mahila police inspector should be appointed as Protection Officers, after appropriate training, under the directives from the Home Ministry of the Government.[34]
- The provisions of the Dowry Prohibition Act should be strictly implemented and the police should be directed to immediately act on dowry complaints and conduct search and recovery of dowry. Preventive steps like appointing Dowry Prohibition Officer in a particular area should be immediately undertaken by all the State Government. The duty of the officer should also include creating awareness against the practice of dowry among the public by conducting awareness programs, road skits along with law students, seminars, etc.
- In one of the studies it reveals that the more educated the bridegroom is, the more marketable commodity he becomes in the marriage market. There is a likelihood of his already having a job with monthly salary or likelihood of getting such a job because of his education. In such cases the dowry demand from the groom's side is naturally more and the preparedness to the demanded dowry by the bride's side also is more.[35]
- Another study shows that the economic status based on the income of the family makes the family to expect more dowry in son's marriage and to offer more dowry in the daughter's marriage. The data regarding the articles given or taken in marriages linked to income level reveals this fact.[36]
- Studies reveals that all the respondents are aware of the Dowry Prohibition Act and also of the fact that it is a crime to demand and offer the dowry.

[32] https://shodhganga.inflibnet.ac.in
[33] Infra 27
[34] Infra 27
[35] Infra 28
[36] Infra 28

- It is required to have a three-tier system for dealing with women's issues. The tier can consist of teachers and professors as watchdogs to ensure effective implementation of character-building, education; the tier must include counsellors, especially, elderly persons and the tier should comprise setting up separate cells in all police stations, "manned" by sensitized persons to deal with women's issues.
- Besides resolving to the sensitization of police, judiciary and other provisions for the damages and legal amendments a change in mentality of people at large is also essential because the dowry is not an individual problem, it is a social evil. Law alone cannot help to eradicate this evil. The society at large especially the women will have to be educated and informed about the evil of dowry system and its various implications with regard to the matrimonial disputes within the society by legal awareness programmes, seminars etc.
- Adequate publicity campaign should be launched to build up an attitude against the dowry practice by influencing the mind of elders against the undesirable traditional practices like dowry.
- The State Executive Personnel entrusted with the task of implementing the anti-dowry laws should be alerted to keep an open eye in executing the law to discourage the dowry practice as a preventive measures and to punish those involved in it.[37]
- The volunteers, non-governmental organisations and specific purpose organisations like National Commission on Women, should be given sufficient teeth in the form of judicial powers to tackle the problem of dowry.[38]
- Rich parents give huge dowries to their daughters and this increases the greed of other parties. They know that the girl's parents can afford it so their demands keep on increasing. This is vicious circle and at some point of time, problems begin. Thus, those who give dowry are the ones who perpetrate and perpetuate the evil. Instead of giving dowry in a bid to buy happiness for the girl, they should educate their daughters and make them financially secure.
- Today Dowry has lost its cultural values and is, therefore, now a new and mounting menace and social malignancy and responsible for turning many matrimonial homes into a hell house. As a matter of fact, society itself has been primarily responsible for giving air to this evil. All this has taken place because of stereo type thinking about

[37] Infra 27
[38] Infra 31

> the status of women in our society and consequently, there have been prejudice against the women by one and all thus making her status unequal. It is suggested that there is need to change the mind set of the society towards this evil.[39]

The difficulty is that even after the payment of heavy dowry there is no guarantee that the bride will enjoy a comfortable life in her new family. There is always pestering for additional demands made and if they are not met by the parents of the bride, she is abused and there is physical and mental torture by her in-law. Here it is the women who is supposed to take a stand and not adhere to the demands of the in laws on the pretext of saving her marriage. The deep rooted social evil depicts the inability of the society to control the dowry system. The mind set of the society requires a change. The most important thing is that in the society the outlook of the people have to change. The problem has to be looked from divergent ways and controlled accordingly and cope this menace of giving dowry. [40]

It can be stated that for some time in the future, dowry is likely to continue in spite of various legislation's prohibiting the same and their seems to be no change in the situation. In the post independence time India passed several laws and much legislation's have been brought into force and women organisations have been pressing for status equality for women. These legislation, notwithstanding, the changes, are not likely to come automatically with regard to dowry, because the legislative reality is external to the social reality, in which the Indian women lead their life. If a change must be brought it is not through the legislation, but through a radical socio-cultural revolution. But such revolution is not within our site, though it can be made possible if our men and women together launch a crusade against the dowry.[41]

The youth of marriageable age should be encouraged in making their independent choices regarding the issue like marriage since it is their own life and their future is involved there. The interference of elders should be brought to the minimum level in marriage decisions so that the tradition is honoured simultaneously, along with the independence in selection of mates without involving issues like dowry. This is, all the more necessary among the scheduled castes where tradition is still a powerful factor[42]

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[39] Infra 28
[40] Infra 28
[41] Infra 28
[42] Infra 28

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DECRIMINALISATION OF HOMOSEXUALITY IN INDIA

S. Hameeda Begum[1]

INTRODUCTION

The LGBT community is normally called a gay community, the full form of LGBT means a group of lesbian, gay, bisexual, and transgender. The word homosexual referred to both same-sex connect with male and female, the word 'Gay' referred to a male homosexual, 'Lesbian' referred to female homosexual and a bisexual person attracted to both male and female

The LGBT community has faced various obstacles and challenges. Homosexuals are harassed by society, police and family. They verbally assaulted, denied jobs, fired from jobs and prevented from living in a neighbourhood even family also not supported to them. As a result, they develop an internalized stigma.

They have always discriminated, humiliated and marginalized. Even our legislations also not supported and suppressed their freedom. Indian criminal law (IPC, 1860) punished homosexuality according to S. 377 and constricts down freedom, equality and dignity of the LGBT community.

The year 2018 was a golden year for the LGBT community. Their dream fulfilled after many years struggled from the case of Navtej Johar v. Union o India. The petition challenged the anti-sodomy law of the Indian Penal Code, 1860, based on article14, 15 and 21 of Indian Constitutional law. The supreme court of India has given the Judgement and stated S. 377 no longer criminalization and also stated to protect their rights. In this case, for protecting their rights the Supreme court of India has given an extensive meaning of sex within the constitution and also include gender identity and sexual locating.

HISTORY AND LEGAL FRAMEWORK

Homosexuality originated all over the world from the ancient period. It was perceived that same-sex relationship has been practised by many kings. Homosexuality did not consider a crime in the ancient period. Lord Shiva Known as Arthanarishwara worshipped as a multi-gender composed of Shiva and his wife Parvati. In Kama Sutra also mentioned a character of

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Swairini. In Manusmrti homosexuality has been punished but it does not consider as a heinous crime.[2]In Islam, few maulanas discussed quranic version "Allah shapes you in the mother's womb as he pleases". In Ahmadabad at Shiva temple which was constructed in 1060 CE depicts the interest between two women together for sexual activities.[3]

The history of the legal movement for the rights of LGBTI persons in India largely started with the legal challenge to Section 377 of the Indian Penal Code. Section 377 is an anti-sodomy provision derived from the Indian Penal Code of 1860. The Section. 377 obstructed gay, lesbian, queer and transgender persons,

Transgender persons are persons whose gender identity or gender expression does not conform to their biological sex. This includes persons who intend to or have undergone Sex Reassignment Surgery (SRS) to align their biological sex with their gender identity to become male or female.

In India, "Transgender" is often used as an umbrella term to include intersex persons and also several identities including Hijras, Kothis, Aravanis, Jogappas, ShivShakthis etc.[4]

Despite all these legislations that criminalized transgender persons, there was no mass transgender rights movement in the country that challenged these laws or fought against them. Although from the nineties, transgender activists were very vocal on the streets and had been the backbone of street protests around LGBTI issues in cities like Bengaluru,[5] they were not at that time organized into a strong transgender rights movement nor were they too actively thinking of legally challenging any of these legislations including Section 377.

The real legal battle for LGBTI rights started in 2001 with a petition filed by Lawyers Collective on behalf of *Naz Foundation* challenged the Sec. 377 based on article 14, 15, and 21 of Indian Constitution in the Delhi High Court. This was not the first time that Section 377 was being challenged. It was first challenged in 1994 by a group called AIDS Bhedbhav Virodhi Andolan, which was working on HIV/AIDS, but their petition, however, was not actively pursued. Thereafter, in 2001 a public interest litigation (PIL) was filed by the *Naz*

[2] Das, R. (1982). Crime and Punishment in Ancient India. Kanchan Publication. pp 89- 100. Retrieved Jan 04, 2020 from books.google.co.in

[3] Mathew, B. (2013). Pilgrimage to Temple Heritage. Published in Prashant Kumar V.T on behalf of info. Kerela communication ltd. pp 478 å 489. ISBN: 8192128443. Retrieved on Feb 03, 2020 from books.google.co.in

[4] *NALSA v. Union of India (2014) 5 SCC 438.*

[5] Narrain, Siddharth (2009). "Crystallizing Queer Politics: The NAZ Foundation Case and its Implications for India's Transgender Communities" NUJS Law Review 2(3): 455.

Foundation,[6] which was working actively with the gay community. This was prompted after a police raid in Lucknow where the police arrested many persons on the grounds of suspected homosexuality while they were distributing condoms and other materials, as part of their HIV health rights work.[7]

Section 377 of the Indian Penal Code, 1860 makes certain acts illegal. It was an ancient colonial law that was brought by the British framed by Macaulay. The section seems neutral in that it criminalizes certain sexual acts and not people and their identities. However, it has never been used against consenting heterosexual persons and has been misused against homosexual persons.

The Delhi High court gave its judgment in *Naz Foundation* v *NCT of Delhi*[8] wherein section 377 of the IPC was read down to not apply to consenting adult consensual acts in private. The Delhi High Court held that section 377 is against constitutional values embedded in Article 14 (Right to Equality), Article 15 (Non-Discrimination) and Article 21 (Right to Life).

According to the Supreme Court, the law can be implemented without misuse. It was also argued before the Supreme Court that because S.377 applies to certain sexual conduct, it essentially means that all forms of sexual expression by LGBT people would be unnatural. This would mean that any sexual conduct by such people would be illegal. Therefore, S.377 prohibits all sexual expression of LGBT persons. The Supreme Court disagreed with this argument and held that S.377 speaks only of sexual acts and does not speak about sexual orientation or gender identity. This would mean that even heterosexuals indulging in acts covered under S.377 would be punished. Therefore, the section does not target LGBT persons as a class.

History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognize that homosexuality is a completely natural condition, part of a range of human sexuality.[9]

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[6] Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.)
[7] Krishnan, Vidya (2018). "How the LGBTQ Rights Movement in India Gained Momentum", The Hindu, 14 July. Available at: https://www.thehindu.com/society/its-been-a-long-long-time-forthelgbtq-rights-movement-in-india/article24408262.ece
[8] *Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.)*
[9] Justice Malhotra

INTERNATIONAL PERSPECTIVE ON 377 IPC

Institutionalized homophobia, the legal sanction and penalties criminalizing same-sex behaviour between consenting adults, remains the law in more than 70 countries. While the modern movements for sexual and gender minority rights, the rights of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) persons, have led to widespread protections in many countries, including marriage equality and parental rights, the gains have been markedly uneven. In Russia, harsh new penalties were imposed in 2013, and have led to brutal attacks against LGBTQ persons, most horrifically in the Russian region of Chechnya.[10]

European colonialism left enormously broad and complex legacies under British colonial rule, Section 377, the colonial statute criminalizing sex between men, and "unnatural" sex between men and women, has remained a challenging social crisis, a legal battlefield, and an important domain in the struggle to address HIV and AIDS, particularly among gay, bisexual and other men who have sex with men.[11]

In 2015, Ireland became the first country to legalize gay marriage. In 2015, the US Supreme Court held that same-sex marriages are legal. Germany, France, UK, Canada, Australia and Brazil have decriminalized homosexuality. Michelle Bachelet, the new UN High Commissioner for Human Rights, applauded the Supreme Court's decision to decriminalize homosexuality.

United Nation Human Rights also raised voice against the protection of LGBT rights in case of *Toonen v. Australia*[12] where the United Nation Human Rights Committee held that criminalization of homosexuality in states in violation of Article 2 and 26 of International Convention on Civil and Political Rights.[13] 172nd Law Commission Report recommended the deletion of Section 377. In 2016, a UN report had urged to decriminalize consensual homosexual relations.

[10] Amnesty International. Chechnya, stop abducting and killing gay men. [cited 2019 Mar 19]. Available from: https://www.amnesty.org/en/get-involved/take-action/chechnya-stop-abducting-and-killing-gay-men/

[11] Thomas M, Steger I. In over 40 countries, laws against homosexuality are a lasting legacy of British rule. 2018 [cited 2019 Feb 26]. Available from: https://qz.com/india/1380947/section-377-the-former-british-colonies-with-laws-againstgay-people

[12] Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Human Rights Library. University of Minnesota. Retrieved on June 01,2014 from www1.umn.edu/humanrts/undocs/html/vws488.htm

[13] Ibid.

The case of the U.S. may be instructive here. Sodomy statutes were common across the country, particularly in the conservative south, until the landmark 2003 Supreme Court ruling in Lawrence versus Texas, which declared them unconstitutional.[14]

In the recent criminal law Sec. 377 of Indian Penal Code also term same-sex relationship illegal and against nature. But finally, this section removed and decriminalized of homosexuality based on Constitutional Rights and Human Rights.

CONSTITUTIONALITY AND JUDICIARY ON IPC 377

SC's judgment may go down in history as one of India's landmark rulings. Section 377 of the Indian Penal Code, 1860 was partially struck down by the SC as it was seen to violate the fundamental rights of equality, the prohibition of discrimination, freedom of speech and expression, and more importantly, the right to life. As a result, being gay sex no longer illegal or to be afraid of. This judgment became proud of India and gey society.

The Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* (2009)[15] held that 'criminalizing sexual activities with consent in private not only impairs the dignity of those persons, but it is also discriminatory and impacts the health of those people. The Delhi High Court decriminalized homosexuality because Section 377 is a violation of Article 14, 15 and 21'.

The Supreme Court, in *Suresh Kumar Koushal v. Naz Foundation* (2013)[16] case held that set aside of the Delhi High Court judgment and said that homosexuality under Section 377 of IPC is illegal and will continue to be an offence. The court said that Section 377 did not suffer from any "constitutional infirmity". The court also added the responsibility of amending or removing Section 377 lay with the Parliament.

In the *Puttuswamy vs. Union of India*[17] case, 'the Supreme Court held the right to privacy as a fundamental right. The court stated that privacy included the preservation of personal intimacies and that sexual orientation was an essential attribute of privacy. The Court argued that the right to privacy and the protection of sexual orientation lay at the core of fundamental rights guaranteed under Article 14, 15 and 21 of Indian Constitution. In the year 2017 Supreme

[14] Carpenter D. Flagrant conduct: the story of Lawrence vs Texas. New York: W.W. Norton & Co; 2012.
[15] Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.)
[16] Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. 2016 7 SCC 485
[17] Justice K.S. *Puttaswamy v. Union of India*) (2017) 10 SCC 1

Court of India verdict based on the right to privacy highlights that the choice of one's sexual orientation is an important part of his/her privacy.

The principles of individual autonomy and liberty, equality connect to all, Recognition of identity with dignity and privacy of individual constitute the cardinal four corners of our Constitution. Right to Privacy enshrined under Article 21 upholds that if a person cannot enjoy his privacy then it obstructs his right to a dignified life. It violates the provision of equality before the law (Article 14). Article 15 provides for a prohibition of discrimination. Decriminalizing Section 377 does not ensure a halt in discrimination against the LGBT community. The other challenge for LGBT members will be concerning acceptance in jobs and family gatherings.

CONCLUSION

The LGBTQ community in India fought almost 158 years for their freedom. All these years the LGBT community have been treated like convicted criminals and treated them differentially. Section 377 of Indian Penal Code, 1860 violated Article 14, and 21 of the Indian constitution, which states that every citizen has equal opportunity, life and equal before the law. In addition to that, they were denied their basic human rights by the government. People treated them as aliens and called chakkas. Parents also feel ashamed and thrown out of their houses. In India, the problem of social acceptance of homosexuality is more than that of legal acceptance. All these problems have come into existence because of section 377.

Finally, in 2018 the five-judge constitutional bench of the Supreme Court started hearing the challenge to the constitutionality of Section 377. On 6th September 2018, the court released its final verdict that reversed the 2013 verdict by legalizing homosexuality and by providing the LGBT community with the rights they deserve. Homosexuality is not a crime in India anymore. This was a huge victory for the LGBTQ community and a very important day for the history of India. The Supreme Court stated that Sexual orientation is natural, discrimination based on sexual orientation is a violation of freedom of speech and expression. The step taken by the Indian government shows support by stating that all entitled to live freely and equally.

CHAPTER 3

CRIMINAL LAW, DEMOCRACY AND NATIONAL SECURITY LAW

(1)

A SOCIO-LEGAL ANALYSIS OF ACID ATTACKS IN INDIA

Sonam Pradhan[1]

Hiranmayee Rajeev[2]

INTRODUCTION

Acid attacks are one of the most dreadful crimes in India. The acid not only give scars to their faces but also a life-long disappointment. It is evident that the men who throw acid on their faces, certainly do not intend to kill the victim. Their main intention is to leave her in such a pathetic condition that would make her life a living hell. We live in such an interesting society or precisely a terrible and insensitive society. The person who throws acid on the girl attacks her only once, but society is someone who pours acid uncountably and endlessly. The excruciating pain experienced by her during the attack multiplies after the attack. In India, 85% of the acid attack victims are women, and rest 15% of the victims are men, mostly due to property disputes[3]. Since, we have no strict rules and regulations, it is even easier for people to commit crimes of this nature. After an attack, the girl suffers her entire life but the attacker, even after committing such crimes, roams about freely. There are several cases of acid attacks, where the attacker, soon after the attack, gets married and freely enjoys his life with his family. The attacker is released on bail after few years of imprisonment and sometimes, after few months of imprisonment. It is the victim who has to undergo a number of painful surgeries, face the cold-hearted society, see her family suffer both financially and psychologically, go through the mental agony and ultimately become a different person.

It was only in 2013, changes were made in the IPC to take strict measures regarding acid violence. There are strict rules and regulations on the sale of acid due to the PIL filed by the acid attack survivor Laxmi Agarwal. However, it is quite evident that not much has been done to implement such laws and regulations. In fact, the year 2017 witnessed the highest number of acid attacks. There were in total 596 cases reported both in year 2017 and 2018[4]. Acid attack is one of the worst inflictions of one human on another. However, courage has brought these women to the frontline and thus victims turned into survivors.

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[1] B.A.LLB(HONS.), Batch 2019-2024, Alliance School of Law, Alliance University, Bengaluru
[2] B.A.LLB(HONS.), Batch 2019-2024, Alliance School of Law, Alliance University, Bengaluru
[3] 'Huffpost Is Now A Part Of Verizon Media' (*Huffpost.com*, 2020) <https://www.huffpost.com/entry/acid-attack-in-india-wher_b_9559790> accessed 28 February 2020.
[4] Roy, 'India Saw Almost 1,500 Acid Attacks In Five Years' (*India Today*, 2020) <https://www.indiatoday.in/diu/story/india-saw-almost-1-500-acid-attacks-in-five-years-1636109-2020-01-12> accessed 24 February 2020.

RESEARCH PROBLEM

Even after six years of ban on regulation of acid sale, acid bottles worth forty- rupees are sold openly in almost every state in the country. The vitriolic substance which has been the weapon for many assaults against women continues to be sold like any other commodity in the market. There are certain guidelines given by the Supreme Court of India which regulate the sale of acid, so that no random person can buy acid without specifying the purpose or the use. However, the implementation is extremely poor.

Acid attack is one of those crimes which does not deserve any kind of mercy. In fact, the crime of this nature was so unknown that there was not any law regarding punishment for the accused in acid attacks. However, in 2013, it was ruled that the punishment in such cases will be 10 years of imprisonment and compensation to the victim. In an incident where consequences are irreparable, mere amount of compensation and few years of imprisonment are certainly not enough.

These issues raise following questions:

(i) Why is the sale of acid rampant in spite of the strict regulation of acid sale?

(ii) Why is the judicial system so lenient towards the accused in acid attack cases in spite of the severity of the consequences of the crime?

OBJECTIVES

The objectives of the research is to analyse and understand the reason behind these attacks, the difficulties faced by the victims financially, psychologically and socially, reasons behind the easy availability of acids in the market despite the ban on acid sale and understanding the laws created and implementation of the laws for the prevention of these attacks. The study also aims to suggest certain measures to

ACID ATTACK- A NEW FACE OF GENDER-BASED VIOLENCE: REASONS

The 226th Report of the Law Commission of India and the Report of the Justice Verma Committee agree that there is a clear gender component to the brutal crime of acid attacks in India.[5]

[5] Minakshi Goswami (*Mssv.co.in*, 2020) <https://www.mssv.co.in/Journal/vol1no2/MSSVJHSS010201.pdf> accessed 24 February 2020.

Acid attack is a reflection of gender inequality and social discrimination. Generally, when a girl rejects a love proposal or a marriage proposal, an acid attack happens. Acid attacks are often inflicted on women when they contradict the so-called conventional norms that relegate women to inferior roles. The people known to the victims perform most acid attacks.

The most prominent motives for violent attacks on women and girls are rejection of marriage, refusal of physical proximity as well as the sexual rejection of men and boys. It represents an expression of control over the bodies of women and girls.

There have been thousands of acid attacks in Bangladesh, where Action Aid operates, over the last few years. These include young women who try to escape forced marriage. In most instances, individuals deliberately target for the face because a woman's face is considered holy. Then their disfigurement becomes a public shame symbol, making it impossible for her to get married or get a career.

By destroying the face of the survivor, the perpetrator reduces his opportunity to participate in public life and damages his chances of marrying and having children. Acid attacks on women therefore have numerous consequences due to the attitude of society to the victim. It looks like something the perpetrator surely knows about before the attack. [6]

The worsening economic conditions, high unemployment rates among male bread-winners, the growing number of landless households and the shortage of agricultural labour for male labourers are the key reasons for their discontent. Disputes regarding property are yet another cause for women's acid attacks. Other attackers use acid to disfigure the victim's body, in an effort to debase it, as an act of conscious rage. Others cultivate their deep-seated feelings of incapacity and insecurity in an attempt to exhibit their everlasting power over the woman's destiny by demonstrating their dominance and authority by throwing acid at them.

Alternatively, and in conclusion, it can be said that people use acid attacks as a means of maintaining their dominance and power over them and often holding them in a state of terror.

CONSEQUENCES OF ACID ATTACKS

(i) Physical: Acid cuts through two layers of tissue, i.e. the fat and muscle surrounding it, and also not only eats up to the bone, but also dissolves the bone. The depth of the damage is solely based on the intensity of the acid and the length of its interaction with the surface.

[6] 'Acid Attacks' (*ActionAid UK*, 2020) <https://www.actionaid.org.uk/about-us/what-we-do/violence-against-women-and-girls/acid-attacks> accessed 24 February 2020.

Breathing issues can be caused by acid vapour inhalation in two ways, i.e. by creating a toxic reaction in the lungs and swelling the throat and narrowing the airway and strangling the victim. They form deep wounds that draw very closely onto the skin and can cause disfigurement until the burns recover from an acid attack.[7]

(ii) Psychological: Survivors of an acid assault face many mental health problems upon recovery. Survivors of acid violence developed higher levels of anxiety and depression, due to their appearances. The females, both in general and in the social sphere, registered lower self-esteem and increased self-consciousness, according to the Rosenberg Scale.

(iii) Social and Economic: Acid attacks normally leave survivors with an impairment in some form, leaving them dependent for everyday tasks, such as feeding and doing chores, on their partner or relatives. They face social injustice for life and they feel isolated. These dependencies are exacerbated by the reason that due to impaired vision and physically disabled many acid survivors are unable to find suitable work. Consequently divorce, husband abandonment is common in society.[8]

LEGAL PROVISIONS RELATING TO ACID ATTACK CASES

As a matter of fact, there were no laws which recognized acid attack as a separate offence. Bu The Indian Penal Code not only recognized acid attack as a separate offence but also separate provisions regarding punishment of acid violence and its attempt were introduced in 2013. The term "Acid" is defined in Section 326A of Indian Penal Code as "*Acid includes any substance which has acidic or corrosive character or burning nature that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability*".[9] Section 326A of Indian Penal Code states that the minimum punishment in cases of acid attack is ten years which may be extended to ten years and compensation is to be given to the victim. Section 326B of Indian Penal Code states that the minimum punishment for attempted acid attack is five years of imprisonment which may extent to seven years of imprisonment. The offence of acid attack is registered under Sections 320, 322,325, 326 and 307 of Indian Penal Code[10]. The

[7] 226th Report, Law Commission of India, Proposal for the Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime 7 (July 2009).
[8] Ibid
[9] Amartya Bag, 'Acid Attack and the Law in India - Ipleaders' (*iPleaders*, 2020) <https://blog.ipleaders.in/acid-attack-and-the-law-in-india/> accessed 24 February 2020.
[10] 'The Most Grievous Assault Acid Attack Is Common In India Why' (*Legalserviceindia.com*, 2020) <http://www.legalserviceindia.com/legal/article-196-the-most-grievous-assault-acid-attack-is-common-in-india-why.html> accessed 24 February 2020.

compensation was provided for the very first time in the case of *Laxmi Agarwal v. Union of India*[11], Section 357A of Code of Criminal Procedure states the Victim Compensation Scheme. It was only after Laxmi Agarwal v. Union of India and others that the Supreme Court directed the State Governments to frame and implement stringent guidelines regarding acid sale. The States were also directed to treat acid as a poison under the Poison's Act, 1919. Licenses must be issued by the shops retailing acid. A purchaser must give valid identity proof and the purpose of purchase must be recorded in writing by the shopkeeper. The record of the sale of acid must be submitted to the police. A minor cannot purchase acid and violation of any of these guidelines will amount to punishment in the form imprisonment or fines up to fifty-thousand rupees.

However, as the statistics suggest, there has been no reduction in the number of attacks, instead the numbers have been increasing rampantly. The number went up to 309 in 2014, which is four times more than that the preceding years. A total of 185 cases are reported from Uttar Pradesh, 53 cases from Madhya Pradesh, and Delhi with 27 cases. The ratio of number of cases and the persons getting arrested is matter of concern. Out of 309 acid attack cases, only 208 people got arrested and in at least 66 cases from Uttar Pradesh, none of the attackers were arrested.[12]

BAN ON SALE OF ACID

In our country, the acids which can char the skin and burn the flesh, are easily available in the market worth rupees 20 per liter. The Public Interest Litigation filed by advocate Anuja Kapur on behalf of Laxmi Agarwal was a small step towards preventing future attacks. However, in a country of more than 134 crore people, much has to be done to prevent crimes of this nature. Despite several legislations and judicial provisions, acid continues to sell freely in the market. This is because, mere enactment of law is of no use. Proper implementation along with timely strict action against defaulters is important.

One of the major reasons being, acid is used in household work. Majority of people, especially in villages and small towns use acid as toilet cleaners. Numerous industries make use of acids

[11] 2014 SCC 4 427

[12] Sugandha Singh and Meghna Bajpai (*Galgotiasuniversity.edu.in*, 2015) <https://www.galgotiasuniversity.edu.in/pdfs/Acid-Attack-A-Burning-Issue-in-India_Meghna-Bajpai-Sugandha-Singh.pdf> accessed 25 February 2020.

for trade purposes. Acid looks exactly like water due to which it is not possible to differentiate, and thus no chance of suspicion can arise. It can easily be carried in a jar, beaker or a bottle.

Previously, acid purchases may only be controlled for commercial uses under the Laws of Manufacturing, Storage and Import of Toxic Chemicals, 1989. Consequently, acids could be easily brought from medical stores and street vendors. The Model Poisons Possession and Sale Rules were framed under the Poison's Act, 1919 to regulate sale of acid and other corrosive substances. Any person found to be selling acids in breach of the protocol specified in the 2013 Model Rules on the Possession and Sale of Acids shall be liable for a fine or a one-month imprisonment that may be extended to six months.[13]

However, there is no such committee which ensures that no acid is being sold. There is no such organization which ensures that the defaulters who violate the legislation made, gets punished. There is no strict implementation of laws. In a social experiment conducted by actress Deepika Padukone, she bought 24 bottles of acid from various shops in Mumbai. The experiment was conducted by a team of people dressed as a plumber, a businessman, a housewife, a street goon, a drunkard and a student. Some of them asked for the reason of the purchase but did not bother to record the details. Only one out of these several shops asked for an identity card while the other shopkeepers sold bottles of acid without any kind of fear and hesitation.

The Delhi Commission for women conducted a 13-day long march and issued a notice to the Divisional Commissioner of Revenue for seeking a complete ban on the sale of acid in Delhi since it has become a major concern. Other countries facing similar incidences of acid attacks have imposed a complete ban on sale of acid. In 2011, and pursuant to Articles 5 and 8 of the Acid Control Legislation, Cambodia adopted an Acid Control Law, unless an individual has a licence or letter provided by a competent authority, they shall not be permitted to obtain, sell, store, export or import acid.[14] In 2002, Bangladesh enacted an Acid Crime Prevention Act to restrict the selling of acid throughout its country.[15].

[13] Vageshwari Deswal, 'Acid Attacks –Need To Regulate Acid Sales' (*Times of India Blog*, 2020) <https://timesofindia.indiatimes.com/blogs/legally-speaking/acid-attacks-need-to-regulate-acid-sales/> accessed 25 February 2020.

[14] Vageshwari Deswal, 'Acid Attacks –Need To Regulate Acid Sales' (*Times of India Blog*, 2020) <https://timesofindia.indiatimes.com/blogs/legally-speaking/acid-attacks-need-to-regulate-acid-sales/> accessed 25 February 2020.

[15] Vageshwari Deswal, 'Acid Attacks –Need To Regulate Acid Sales' (*Times of India Blog*, 2020) <https://timesofindia.indiatimes.com/blogs/legally-speaking/acid-attacks-need-to-regulate-acid-sales/> accessed 25 February 2020.

It is important to provide help to the victims after the commission of the crime, but it is even more important to ensure certain precautions which would prevent such crimes in the future. Acid attacks can be prevented by cutting down the sale of acids and it indeed is possible.

JUDICIAL APPROACH

Before introduction of Section 326A in IPC

(i) *Marepally Venkata Sree Nagesh v, State of Andhra Pradesh*[16]

The accused suspected his wife's character and inserted mercuric chloride into her vagina and died of kidney failure.

The accused has been charged and convicted pursuant under the section 302 and IPC 307.

(ii) *Devanand* versus *The State*[17]

Since the wife chose not to live with him, a man poured acid on her. The wife was disfigured permanently and lost one eye. Under Section 307, the perpetrator was arrested and held in jail for 7 years.

(iii) *State of Karnataka by Jalahalli Police Station* vs. *Jospeh Rodrigues*[18]

It is one of the most well-known instances of acid attacks. The defendant poured acid at a woman, Hasina, for declining his job offer. This severely scarred her physical appearance, altered the colour and appearance of her face and left her blind. The perpetrator was arrested and sentenced to life imprisonment under IPC Section 307. A sum of 2 lakh rupees was to be paid to the parents of Hasina by the convicted in addition to the Trial Court fine of 3 lakh rupees.

LANDMARK JUDGEMENTS

Laxmi v. *Union of India*[19] is a landmark case, the Laxmi (Acid Victim) petition filed in that case. In this case, Apex Court gave state and UT the direction for regulating acid. The court also tackled the compensation problem. The Supreme Court holds that this provision of Section 357A provides for the preparation of a scheme for the provision of recovery funds to victims or their dependents who have sustained a crime-related loss or disability and who are in need

[16] Marepally Venkata Sree Nagesh Vs. State of A.P, *2002 CriLJ 3625*
[17] Devanand Vs. The State 1987 (1) Crimes 314
[18] State of Karnataka by Jalahalli Police Station vs. Jospeh Rodrigues Decided in the Hon'ble High Court of Kerala on 22/8/2006
[19] Laxmi v. Union of India 2014 4 SCC 427

of rehabilitation. The Apex Court directs that the victims of the acid attacks shall receive compensation of at least Rs. 3 Lakh as the cost of aftercare and rehabilitation by the State Government / UT concerned.

In fact, though, no state has set up a victim compensation scheme and the payout varies from 25,000 to 3Lakh depend on the state to state which is not adequate for the victim because the acid attack survivor will have to endure multiple plastic injuries throughout a lifetime.

Parivartan Kendra Vs. *Union of India*,[20] In this case, a petition under Survivor Compensation Systems was filed for the plight of victims of acid attacks such as free medical treatment, recovery facilities or fair compensation. The plight of two Dalit girls who were victims of acid attack was highlighted. The Court also considered that acid is still readily available to the majority of the Indian population, even after the orders and directives of the same court in the Laxmi case.

In that landmark judgement, the Supreme Court held that all private hospitals in their respective States should be discussed and taken seriously by the State Governments to the effect that private hospitals should not deny service to victims of acid attacks and that full care, including medicines, food, bedding and reconstructive surgery, should be provided to those victims. The Apex Court stated that it is not necessary to establish a separate Criminal Injuries Compensation Board and also more compensation than Rs. 3Lakh can be given by the State Government / UT concerned.

The Court also held that the State Government / UT should take stern action against all erring people who supply acid without proper authorisation and that the authority concerned should also be held accountable for failure to control the delivery of acid.

State of Maharashtra v. *Ankrur Panwar:* It was first in this case that an order to sentence the convict in an acid attack case. It was hence held in the Maharashtra special women's Court to sentence Ankur Panwar to death. The accused was found guilty of throwing acid at Bandra Station's Preeti Rathi in 2013 after she chose to pursue her nursing career, declining his marriage proposal.

[20] Parivartan Kendra Vs. Union of India 2015 (13) SCALE 325

ANALYSIS OF THE CASES

According to a survey, at least three acid attack cases are being reported every week in India. It is true that many of the cases go unreported. The misery among women continues to rise every year. Several Non- Governmental organisations have been working towards rehabilitating the victims and raising funds for their medical treatment. One such NGO which has been constantly making efforts towards rebuilding the lives of acid attack victims is "MAKE LOVE NOT SCARS" founded by a Ria Sharma. The misery suffered by acid attack victims made her start this journey and hence, she has come a long way.

Some of the stories of these brave hearts who have been rehabilitated and the ones who have been volunteering in the organisation are as follows.

1. RIA SHARMA, THE FOUNDER OF MAKE LOVE NOT SCARS

A 21- year old girl studying in England in a fashion school could have enjoyed the rest of her life chilling in abroad, chose to come back to India, and started working for the acid attack victims. Like every other Indian, the Nirbhaya gang rape case, shook her conscience, but the thing which hit her more was the picture of an acid attack victim. This motivated her to come back to India and work for the cause. She runs the only rehabilitation centre for acid attack victims. In her rehabilitation centre, she helps raising funds for the treatment, paying for their education, providing psychological aid, safe accommodation , training programmes in dance, yoga, spoken English, candle- making and finding jobs for the survivors. She runs a campaign called #SkillsNotScars which is a first job portal for acid attack survivors in India. Other two campaigns include #EndAcidSale and "Beauty Tips By Reshma". Reshma is an acid attack Survivor who walked for the New York Fashion Week and is continuing walking ramps in fashion events across India. She is a blogger who writes about her experiences, ideologies on acid attack laws fearlessly. She believes that courage is the biggest lesson she has learnt while working with these survivors and believes in utilising the privileges to make the world a better place.[21]

[21] Apeksha Bagchi, 'Ria Sharma Of 'Make Love Not Scars' Talks Why The Acid Sale Ban Failed Despite The SC Order' (*Indian Women Blog - Stories of Indian Women*, 2017) <http://www.indianwomenblog.org/ria-sharma-of-make-love-not-scars-talks-why-the-acid-sale-ban-failed-despite-the-sc-order/> accessed 25 February 2020.

2. SAPNA

Sapna is an acid attack survivor and the manager of the Rehabilitation Centre of Make Love Not Scars. She takes care of the victims, their hospital appointments, organizes workshops and classes for the survivors and ensures the smooth running of the Rehab Centre. She was attacked with acid by her husband and In-laws since she could not give them enough dowry. She was constantly abused by her in-laws but she had never expressed her agony in front of her parents. Much reluctantly, she was accepted by a Government hospital where all her surgeries were done. She was not provided any kind of compensation by the Government, due to which she had to face financial problems. After her recovery, she started looking for jobs. However, she was rejected and abused on the basis of her appearance although she was more qualified than the other applicants. Hence indirectly, she was punished for the crime which she never committed. However, destiny had her role to play and she approached Make Love Not Scars where her strength and the desire to survive was revived in a way that she has been helping other survivors in the organisation.

3. MAMTA

Mamta is an acid attack survivor who is known to have the most infectious smile. She was being abused in her marriage. She was constantly being threatened by her husband who had already sold his previous two wives in a sex trade. She was forced to carry her unborn child because her husband wanted a son. Finally, she decided to go back to her parent's house. However, the night of August 21, 2010 turned to be the darkest night of her life when she was attacked by her husband while sleeping. She was two months pregnant when she was attacked, still her treatment was disregarded as 'low priority'. She begged for poison as she did not want to face the world. Her husband was arrested but was released on bail after two and a half months. Her husband took her son away and till today she does not know where her is. Five months after the attack, mamta gave birth to a baby girl who could not survive for long. Perhaps, it may be due to the mental trauma which affected her pregnancy. She had been abandoned by her family and today, she continues to stay in isolation. One could not possibly imagine the physical pain, she went through on the night of the attack, but it is even difficult to comprehend the emotional pain she experiences every single day.

4. REKHA

Rekha is an acid attack survivor who was attacked by her husband in October 2013. Her condition was so terrible that even her two-year old daughter could not recognize her. Her parents died and her siblings denied to support her. She was shifted from a Government hospital to a private hospital by Make Love Not Scars where she underwent her surgeries. She received no compensation from the Government for the medical treatment. This shows that none of the schemes made by law are put into implementation. She was forced to withdraw the case by her family so that her husband could be released. Rekha refused to back out. She is determined to live her life normally and provide the best possible care to her daughter. The attack has given her immense pain but has not killed her spirit and hope.

Several conclusions can be drawn from the stories of these brave hearts who in spite of all odds have rebuilt their lives. It is clear that though there is a Government Compensation scheme, yet many of the victims have not received any kind of monetary help or compensation from the Government. They are not even able to incur the expenses of their surgeries. The second thing which is quite evident from these cases is that the accused has suffered no punishment after committing this kind of cruelty. New Sections stating punishments for the accused are inserted in the Indian Penal Code. But what we see is, these attackers do not even suffer imprisonment for months. Either they are not caught or if caught, are released on bail in spite of the severity of the crime. Sale of acid is rampant. None of the laws or campaigns have been able to stop the sale of acid. When the survivors after going through all of this trauma wish to restart their life, society denies acceptance. In spite of the skills and the talent, survivors are denied credit or do not get jobs. Due to all these reasons, Government is not able to curtail acid attacks in India. When the attacker thinks, that he can easily get away even after committing this kind of a crime, he do not hesitate to do it.

Hence, mere law- making is not enough. It will only work with effective implementation.

SUGGESTIONS

It is important that the Government imposes complete ban on sale of acid. It is possible in India since many countries have been successful in achieving this. In India, people mostly use acid for cleaning purposes. The Government needs to find an alternative to it. Only then, there can be no contention on behalf of people opposing ban on sale of acid. In every state, an

organization must be formed whose sole aim will be to check that acid is not being sold in the market. Regular checks must be done. The defaulters must be given strict punishment for violating the law.

Secondly, the entire medical expenses must be incurred by the accused along with compensation. It must be ensured by the Government that the victim suffers no financial crisis because of the attack. It must be ensured by the Government that the compensation amount has been given to the victim because in majority in cases, not even a single rupee has been provided to the victims.

Thirdly, the only punishment which is justified in the case of acid attack is life imprisonment. The accused must suffer his entire life since the victim suffers the entire life because of the act of the accused.

The Government must ensure that jobs are provided to the survivors on the basis of her skills and talent so that the victim might be self- reliant. There must be more and more rehabilitation centers for the victims which would help them come out of the trauma and depression and lead a normal life.

Last but not the least, we as a society must be respectful and caring towards the victims so that they do not blame themselves or their conditions. Our support will make them a strong and independent person and every other victim will be capable of standing for themselves.

CONCLUSION

We live in a judgemental society. We exist in a society where we are judged for every other action. People judge each other on the basis of appearance or even dressing style. Ours is an interesting society. Ours is a society where if the girl gets raped, it is her fault. If a girl wants divorce, she is considered to be characterless. If a boy wants divorce, then also the girl is considered characterless. If boy throws acid on a girl, society believes that the girl must have compelled him to take this step. At least, this is the ideology of a so-called ideal society. The story starts with the women suffering and ends with the suffering of the woman. It is extremely important to acknowledge this fact that society plays a huge role when a victim wishes to start her life afresh. It is the members of the society and her surrounding people who can give back her confidence, strength and hope. This is because, she deserves dignity, justice and all kinds of happiness in the world.

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RATIONAL SENTENCING REPOSING THE FAITH IN THE ADMINISTRATION OF CRIMINAL JUSTICE SYSTEM

Tarakeshwari D. Bulusu[1]

INTRODUCTION

"Justice is conscience, not a personal conscience but the conscience of the whole of humanity".[2]This conscience of the humanity is reflected in the laws which govern men, societies and nations. Laws are the means to achieve justice; the judiciary holds these reins of laws as a charioteer to guide humanity towards achieving justice and thus, plays the role of the conscience-keeper of the humanity.

In its tryst to deliver justice, the judiciary has to balance the scales between the offender, the victim and the society. In the process, the judiciary has to render punishment to the guilty and uphold the rights of the victim. It has to determine the kind of punishment that has to be inflicted, the quantum of punishment that has to be imposed and at the same time balance the interests of the society, the victim and that of the offender. All these aspects are reflected in the sentence that is pronounced by the judge after adjudication of a matter. The sentence itself and the sentencing process should echo the criminal jurisprudence which is nothing but the conscience of the society. If the judiciary fails in this task, it will lead to injustice, people will lose faith in the judiciary and in the administration of criminal justice system as a whole leading to vigilantism.

Thus, the pivotal function of the judiciary being sentencing, a rational and thoughtful approach to sentencing needs to be adopted. Lack of sentencing guidelines lead to uncertainty in the application of law and contradictory judgements by the courts. To instil the confidence of the society in justice and administration of justice, law and its application need to be certain. The present paper seeks to highlight the need for a coherent sentencing policy, examine the

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[2] Alexander Solzhenitsyn (October 1967), *Solzhenitsyn: A Documentary Record* (1970)

feasibility of formulating a sentencing policy and suggest measures to bring about the same so as to repose the faith of the people in the administration of criminal justice system.

SENTENCING AND PUNISHMENT

Before, a deliberation on the process of sentencing ensues, it is imperative to define the term 'Sentencing'. Some of the definitions are analyzed as, sentencing is appropriate allocation of criminal sanctions, which is mostly given by the judicial branch.[3] Sentencing is a socio-legal process, wherein a judge finds an appropriate punishment for the accused considering the factual circumstances and equities.[4] Sentencing is the post–conviction stage of the criminal justice process, in which the defendant is brought before the court for the imposition of a penalty. If a defendant is convicted in a criminal prosecution, the event that follows the verdict is sentencing.[5]Thus, sentencing is a process wherein the judge after determining the guilt of the accused, lays down the kind of punishment that the accused has to suffer and the quantum of punishment that is to be imposed. It is the final act marking the end of a trial.

The principle of just punishment is the bedrock of sentencing in respect of a criminal offence.[6] Punishment should neither be disproportionately excessive and nor be grossly inadequate. Thus, the punishment imposed has to be just and appropriate. The punishment imposed should meet its objectives, namely, retribution, deterrence, prevention and reformation. These objectives are determined primarily by factors like the nature of crime, harm caused, manner in which the crime is committed and alarm caused to the members of the society. Nature of punishment and its objectives are reflective of the attitude of the society towards crime and criminals. Thus, it is imperative that the sentence imposed by a judge reflects the ethos of the society while balancing the rights of the victim and the offender, failing which the faith of the society in the justice dispensing system will wane. Such a situation would only lead to anarchy and lawlessness.

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[3] Nicola Padfield, Rod Morgan and Mike Maguire, "Out of Court, Out of Sight? Criminal Sanctions and No Judicial Decision-making", The Oxford Handbook of Criminology (5th Edn.).

[4] Accused 'X' v/s. State of Maharashtra, para 47, page 30-21, https://www.sci.gov.in visited on 06/12/2019 accessed at 00:35 hrs.

[5] *West's Encyclopedia of American Law, edition 2. S.v.* "sentencing." Retrieved March 1 2020 from https://legal-dictionary.thefreedictionary.com/sentencing

[6] A. Laxminath , Komanduri S. Murty, *Sentencing Jurisprudence-An Indian Perspective*, Thomson Reuters, 5, (1st Edition 2018)

SENTENCING AND ITS PROCESS

Once the offender is found guilty, the court has to decide the kind of punishment that should be meted out. The limits of punishment are laid down in the substantive laws either in the form of minimum or maximum sentences or in the case of heinous crimes; both the minimum and maximum sentences are laid down. The punishment laid down in the substantive laws is based on factors like gravity of the offence, manner in which the crime has been committed, i.e., wickedness or gruesomeness employed in committing the crime, the alarm that it causes to the society and social abhorrence of the act. Between the maximum and minimum limits laid down by the substantive law, the Judge can exercise his discretion. This discretion is based on the mitigating and aggravating factors or circumstances of the case.

AGGRAVATING FACTORS

Factors or circumstances of the case which warrant the imposition of a grave punishment are termed as aggravating factors. The court considers these factors before imposing a sentence.

EXAMPLES

Motive, cruelty employed in committing the crime, mental depravity of the offender, pre-planning, consequences to the public and to the individual victims.

MITIGATING FACTORS

Factors or circumstances of the case which lessen the severity of the offence are termed as mitigating factors.

EXAMPLES

Absence or lack of intention to commit the offence, provocation, no previous conviction, the offence is committed under a combination of circumstances and influences which are not likely to recur, social and economic conditions of the offender, the state of health and gender of the offender.

The above-mentioned examples of aggravating and mitigating factors are not exhaustive. These will depend on the facts and circumstances of the case and will vary accordingly. The court in each case should endeavour to find them so as to impose an appropriate sentence.

The process of sentencing involves the following two decisions which the court has to consider:

1) Primary Decisions
2) Secondary Decisions

1) PRIMARY DECISIONS

The determination of the approach to be adopted by the court in sentencing the offender is termed as "Primary Decision". The "Approach" is based on the objectives of punishment. The present penological thought aims at reformative and individualistic approach, wherein the principle of "punishment should fit the offender and not the offence" is adopted. Based on the nature of crime, antecedents of the offender and objectives of punishment, etc. the court makes the primary decisions

It involves the court in making the following reflections:

Whether a "punitive approach" or "individualistic measure" should be adopted?

i) PUNITIVE APPROACH

This approach is victim-centric. The offender is punished by the various modes prescribed by the substantive laws. This approach fulfils the retributive and deterrent objectives of punishment.

ii) INDIVIDUALISTIC APPROACH

This approach is offender-friendly. The "reformative and rehabilitative" measures are dictated based on the nature of the offence, antecedents of the offender, etc. This approach finds consonance with the contemporary philosophy of treating an offender as a victim of social deprivation.

2) SECONDARY DECISIONS

After deciding the approach to be adopted, the Judge has to decide the alternatives available under the each kind and which mode would be most suitable. This decision made by the judge is called the secondary decision which is based on the fundamental principles laid down in the substantive and procedural laws.

EXAMPLE

In respect of punitive approach, whether a fine, imprisonment or death sentence should be awarded forms the secondary decisions.

Likewise, with respect to individualization, deciding between probation, suspension of sentence, etc. constitute the secondary decisions.

CASE ILLUSTRATIONS

GANGARAM RAGHUNATH V/S. STATE OF M.P[7]

Facts: The accused was a 14 year old who murdered a boy (victim) who propositioned the former to have an unnatural intercourse. The accused in retaliation hit the victim with an axe which led to the latter's death. The accused was charged under section 302 of the Indian Penal Code, 1860 and was found guilty.

Decision: The accused was not sent to a reformatory school as the Reformatory Schools Act did not operate in murder cases. The Madhya Pradesh High Court held that a youthful offender convicted of murder should not be sent to a reformatory school, especially where he has demonstrated cruelty and depravity of mind. A punitive approach was adopted by the court and the offender was deprived the benefit of being sent to a reformatory school.

BISIKESAN SUNA V/S. THE STATE[8]

Facts: The accused had stolen a bicycle and a few clothes and was found guilty for theft.

Decision: The court instead of punishing under S.380 of the Indian Penal Code, merely admonished him by applying the section 3 of the Probation of Offenders Act, 1958.

The various factors considered by the court in the case were:

i) There was no previous conviction of the accused.

ii) The theft was committed without any prior planning on part of the accused.

iii) He had committed the theft on the spur of the moment.

[7] Gangaram Raghunath v/s State of MP, AIR 1965 MP 122

[8] Bisikesan Suna v/s The State, AIR 1967 Ori 4

STATE OF U. P V/S. M. K. ANTHONY[9]

Facts: The accused due to dire poverty had killed his ailing wife and two children.

Decision: The court awarded him life imprisonment instead of death penalty on the following grounds:

i) The accused was an educated man and was in an impoverished state.

ii) His wife was ailing and he could not afford the expenses of her surgery.

iii) He was helplessness.

iv) He had no record of previous conviction.

PRE-SENTENCING INQUIRY

To arrive at a rational sentence and in determining the Primary and Secondary decisions, the information as to the socio-economic background and various personal factors of the accused play a very pivotal role. The Pre-Sentence Reports are now a regular feature of the English and American Criminal Law Systems.[10]

The Pre-Sentencing Inquiry or Investigation involves preparation of report of the accused as to his character, socio-economic back ground, personality, etc. This enables the court to assess the accused and determine a rational sentence based on the personality of the accused. The courts, where required seek the opinion of a Psychiatrist or Psychologist regarding the desirability of a particular sentence keeping in view its likely impact on the accused. These reports are referred to before a sentence is pronounced.

The importance of the pre-sentence report has been spelt out by Sheldon Glueck as under:[11]
"A pre-sentence investigation is helpful even if one clings to the conviction that the chief aim of the criminal law is painful punishment with a view to general and specific deterrence; all the more necessary it is if one believes its main objective to be the reform or rehabilitation of the offender. Not only is the pre-sentence report valuable as a basis for sentence and treatment in the individual case but the accumulation and study of many pre-sentence reports can lead to a realistic, rather than a merely theoretical, re-examination of the entire philosophy of punishment."

[9] The State of UP v/s MK Anthony, AIR 1985 SC 48

[10] S. M. Afzal Qadri, Ahmad Siddique, *Criminology, Penology and Victimology*, Eastern Book Company, Lucknow, (7th Edition, 2016)
[11] 41 Journal of Criminal Law and Crime 717

PRE-SENTENCING REPORT VIS-À-VIS THE INDIAN CONTEXT

In the Indian context, The Probation of Offenders Act, 1958 and Juvenile Justice (Care and Protection) Act, 2015 provides for pre-sentencing report. But application of the two laws is limited to offenders of specific offences in case of the Probation of Offenders Act, 1958 and juveniles in case of Juvenile Justice (Care and Protection) Act, 2015. For the rest of the offences, the Code of Criminal Procedure, 1973 is followed which does not provide for pre-sentencing report.

Though the code does not lay down that a pre-sentence report has to be compiled by an officer designated by the court, it incorporates the principle by providing for post-conviction hearing under Sections 235(2) and 248(2).

Section 235(2) mandates the judge to hear the accused if convicted, on the question of sentence and then pass the sentence according to the law. The reasons given by the convict may not be pertaining to the crime nor be legally sound but it will enable the judge to understand the social and personal details of the convict and determine if these will affect the sentence.

ILLUSTRATION

If it is brought to the notice of the court that he is the bread winner of the family, the punishment meted out would enable him to earn a living and send the same to his family.

Section 248(2) gives opportunity to both the parties to bring to the notice of the court facts and circumstances which will help individualize the sentence from a reformative angle.

However, it has been found in some cases that this provision has not been given effect to by the trial courts. The very object of the salutary provisions being defeated, the apex court on appeal has stepped in to undo the miscarriage of justice to the convict.

The Supreme Court explained the importance of pre-sentencing hearing in the following case:

Santa Singh vs. State of Punjab[12] The Supreme Court held that, “The provision stipulated in S.235 (2) is mandatory and failure to give a hearing to the accused before the sentence is pronounced vitiates the sentence and it is not an irregularity curable by S.465 of the Criminal Procedure Code. The hearing implies opportunity to place full and adequate material before the court and, if necessary, to lead evidence.”

[12] Santa Singh v/s State of Punjab SCC (1976) , 4, 190

Provision for pre-sentence investigation and report has been incorporated under the Juvenile Justice Act (Care and Protection Act of Children) Act, 2015 and Probation of Offenders Act, 1958.

JUDICIAL DISCRETION AND DISPARITIES IN SENTENCING

After considering the facts brought before the court, the evidence tendered to it, and the aggravating and mitigating circumstances, the judge has to determine the nature and quantum of punishment. The substantive laws lay down the punishment. As stated earlier, generally the substantive law either lays down the maximum punishment or the minimum. In heinous cases the minimum and maximum punishment too is laid down. Subject to the upper and lower limits, the judge has the discretion to award the punishment. This liberty that a judge has in imposing a sentence is termed as judicial discretion. Judicial discretion is a liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable, and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law.[13] According to Chief Justice Marshall, it is a legal discretion to be exercised not to give effect to the will of the Judge, but to that of the law.[14] Judicial discretion is discretion in discerning the course prescribed by the law; a perceiving by, through or according to the law of what would be just.[15]

Thus, judicial discretion is the freedom given to the judge to find the right course of action or punishment within the confines of law. It can be aptly summarized in the words of Lord Mansfield, "Discretion, when applied to court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular."[16]

Judicial discretion even when confined by the limits of the law can result into contradictory outcomes or sentences. It leads to disparities in sentencing. This problem occurs because the discretion is based on the judge who decides a particular case. Discretion, though not desirable, is sometimes influenced by the socio-economic background of the judge and the prejudices

[13] Black's Law Dictionary, 2nd Edition, "discretion", Retrieved December 21, 2019 from https://dictionary.thelaw.com/discretion/
[14] Osborn v. The Bank of United States, 22 U.S. (9 Wheat .) 738 (1824).
[15] P Ramanatha Aiyer, *The Law Lexicon*, 1014 (Justice Y. V. Chandrachud ed., 2006)
[16] Rex v. Wilkes, 4 Burr.2527,2539

held by him. This is reflected in how he perceives a set of facts brought before him. What constitutes as mitigating factor to one judge may be held to be an aggravating factor by another judge. This can be illustrated by the following cases:

CASE ILLUSTRATIONS

GURDEV SINGH V/S. STATE OF PUNJAB[17]

Facts: The appellants, due to a family feud with the victims entered the house with the knowledge that a marriage was taking place and killed thirteen and seriously injured eight. They later killed the father and brother at another place. Considering these aggravating circumstances, a death penalty was awarded by the trial court and confirmed by the High Court against which an appeal was made in the Supreme Court.

Decision: The Supreme Court confirmed the death sentence based on the aggravating circumstances of the case like the number of victims and the brutal manner of committing the crime.

M. S. SHESHAPPA V/S. STATE OF KARNATAKA[18]

Facts: The accused being dissatisfied with family partition killed four members of the family.

The trial court awarded a death sentence against which an appeal was made.

Decision: The death sentence was commuted to life imprisonment as the crime committed was not pre-planned. He was under the influence of extreme mental and emotional disturbance which impaired his capacity to appreciate the criminality of his conduct. The aggravating factors like number of victims, brutal killing of the family members were outweighed by the mitigating factors.

SHER SINGH'S CASE [19]

It was held that two years delay in executing the death sentence is by itself not enough to commute the sentence to life imprisonment.

[17] Gurdev Singh v/s State of Punjab, AIR 2003 SC 4187

[18] MS Sheshappa v/s State of Karnataka, Cr LJ 1994 (Kant) 3372

[19] 1983 Cr LJ 803: AIR 1983 SC 465

VATHEESWARAN'S CASE[20]

It was held that two years delay in executing the death sentence is a sufficient ground to commute the death sentence to life imprisonment. Sher Singh's case and Vatheeswaran's case only highlight the problem of contrary decisions given by the judges in face of same set of facts. In Sher Singh's case, two years delay was not held to be a mitigating factor but in Vatheeswaran's case, the delay for the same period was held to be a mitigating factor by the court.

Though this dilemma was settled by the Supreme Court in Smt. Triveniben v. The State of Gujarat[21], till then uncertainty reigned.

A. DEVENDRAN V. STATE OF TAMIL NADU[22]

Facts: The accused murdered three persons. However, the main object was to commit robbery. The trial court awarded a death sentence against which an appeal was filed.

Decision: The Supreme Court held that the trial court was not justified in awarding death sentence as the accused had no pre-meditated plan to kill any person and the main object was to commit robbery.

GENTELA VIJAYAVARDHAN RAO V. STATE OF ANDHRA PRADESH[23]

Facts: The accused set a bus on fire with the intention of committing a robbery. This act killed 23 passengers in the bus. The main accused was sentenced to death. An appeal was filed.

Decision: The Supreme Court upheld the sentence. The motive in both the above-discussed cases was to rob the victims. However, in one case it has been used as an aggravating factor and the other it is used as a mitigating factor.

IMPACT OF DISPARITIES IN SENTENCING VIS-À-VIS VIGILANTISM

One of the prime objectives of criminal law is imposition of adequate, just and proportionate punishment.[24] Disparities in sentencing lead to disproportionate punishment and these defeat the very object of criminal law. If some criminals are given harsh punishment while others receive grossly inadequate sentence for an essentially, similar offence and a shockingly large

[20] 1983 Cr LJ 481: AIR 1983 SC 361(2).
[21] AIR 1989 SC 142
[22] A Devendran v/s State of Tamil Nadu, AIR 1998 SC 2791.
[23] Gentela Vijayavardhan Rao v. State of Andhra Pradesh, AIR 1996 SC 2791
[24] A. Laxminath , Komanduri S. Murty, Supra, 4

number are not punished at all, it would encourage the criminal and make justice suffer by weakening the system's credibility.[25] The justice dispensing system would be adversely affected and the public confidence in the efficacy of law would be undermined. People would then take law into their own hands leading to a rise in vigilante acts. This would strike at the very foundations of a civilized society and lead to anarchy. Mob lynching due to rumours of child-lifting, suspicion of theft and cow slaughter are an outcome of loss of faith in the administration of criminal justice system due to easy acquittals or inadequate punishment. The incidents of Mob Lynching rocked the length and breadth of India. From February 2018 to May 2018, forty two incidents of Mob Lynching occurred on suspicions of child-lifting which led to the death of twenty seven persons.[26]

SENTENCING POLICY AND ITS FEASIBILITY

This segment of the paper will assess the feasibility of formulating a sentencing policy to reduce disparities in sentencing. Inadequate punishment, irrational sentencing, easy acquittals permeate a feeling of injustice. To satisfy the society's cry for justice, a need for a sentencing policy has been felt. The Madhava Menon Committee and the Malimath Committee have recommended the introduction of sentencing guidelines. Likewise, the committee on Reforms of the Criminal Justice System, 2003 recommended the appointment of a statutory committee to lay down the sentencing guidelines to minimize uncertainty in awarding sentences.

However, formulating a standardized sentencing policy is beset with a few problems and the same are discussed as under:

SENTENCING CANNOT BE REDUCED TO MATHEMATICAL FORMULAE

The quantum of punishment cannot be calculated with mathematical precision as the subjects are individuals. The offence, its nature, the mode, the circumstances differ in every new case. Though, two offences committed may be the same but the offenders are two different individuals, the manner of committing the crime, the motive, etc., all differ. There can countless permutations and combination, which are beyond the anticipatory capacity of the human

[25] Ibid. at 5

[26] Rashmi Rajput, Abhishek Saha, Sweety Kumari, Sreenivas Janyala, Johnson TA, Arun Janradhan & Dipankar Ghose, *9 States, 27 Killings, one year: And a pattern to the lynchings,* THE INDIAN EXPRESS, July 6, 2018

calculus.[27] Legislators cannot anticipate all the possible permutations and combinations and fix a punishment. Laying down exhaustive standards would be impossible.

Awarding same punishment to two different offenders for the same offence may not be just.

Thus, reducing sentencing to mathematical formulae would not aid the cause of just sentencing.

STANDARDIZATION LIMITS THE DISCRETION OF A JUDGE

It is pertinent to note that sentencing very much depends upon the objective it is sought to achieve by imposing a particular punishment. To a judge the objective of punishment may be deterrence, retribution, prevention or reformation. This object is based on the facts and circumstances of the case, the nature of offence, the background of the offender, the impact on the victim and the society. Therefore, a judge needs discretion to award a sentence balancing the various conflicting interests. In the illustration cited below, the judge in case of offender 'A' would probably hold the view that a maximum punishment of three years imprisonment should be awarded to serve the twin objectives of deterrence and prevention. In the case of offender 'B', the judge may award him three months imprisonment under section 379 of the Indian Penal Code, 1860 or admonish him or put him on probation under the Probation of Offenders Act, 1958 to achieve the object of reformation. According both 'A' and 'B' the same punishment would not serve the interests of justice. If sentencing is standardized, a judge would not be able to deliver a just sentence.

ILLUSTRATION

'A' has committed theft of a piece of jewelry from store 'X'. 'A' is a habitual offender.

'B' too has committed theft of a piece of jewelry from store 'Y'. 'B' is a first time offender and he steals so as to secure money for his mother's surgery.

'A' and 'B' both are awarded a maximum punishment of three years imprisonment. This would not be just in case of 'B' as his motive differed from that of 'A'. The mitigating circumstances in case of 'B', namely, his being a first time offender and his motive would definitely warrant a lesser sentence.

[27] Ibid. at 59

DIFFERING PENAL PHILOSOPHIES OF JUDGES & SENTENCING

Judges may adhere to different penal philosophies. This would not only affect the sentence but also the factors that are considered relevant in awarding punishment, leading to disparities in sentencing. For instance, if a judge bases a sentence on retributive philosophy of punishment, the sentence would be linked to the severity of the offence and the culpability of the offender. On the other hand, a judge adopting a reformative theory of punishment would look to impose a punishment which helps in reforming him. Various factors like, socio-economic conditions of the offender, the circumstances under which the crime was committed, past criminal record, the prospect of reforming and rehabilitating the offender would be considered by the court. Differing penal philosophies lead to differing sentences. This again poses a challenge to bring about standardization in sentencing.

TUSSLE BETWEEN PENOLOGISTS AND SOCIOLOGISTS

In determining the quantum of punishment, information relevant and irrelevant to the crime and criminal plays an important role. A judge has to weed out what is relevant and what is not relevant. But there is no consensus amongst the penologists and sociologists as to what aspects of crime and criminal are relevant and what are not relevant. According to Cesare Beccaria, the proponent of fixed sentence movement, "crimes are only to be measured by the injury done to society". However, Von Hirsch, an eminent sociologist is of the opinion that "seriousness of a crime depends upon the harm done (or risked) by the act and degree of the actor's culpability". And it is not possible to measure the degree of culpability. This makes standardization of sentencing a difficult proposition.

SENTENCING GUIDELINES – A POSSIBILITY

The Supreme Court of India in Bachan Singh v. State of Punjab held that "Standardization is well-nigh impossible". The legislature cannot anticipate all the permutations and combinations of crime and patterns of criminal behaviour and lay down a sentencing policy reduced to mathematical formulae. However, it can definitely take steps to bring about uniform guidelines and principles to reduce disparities in sentencing and the same are discussed hereunder:

(i) DEFINING CONSISTENT PATTERN OF SENTENCING AIMS AND SENTENCING COUNCILS

It has been discussed earlier that differing penal philosophies lead to different sentences for similar crimes. This can be reduced by defining the aims or objectives of sentencing

for a particular crime. Guidance on which aims of sentencing would be more appropriate for various crimes or offenders would bring about uniformity in sentencing and reduce disparities. For example, in rape cases, the object of deterrence and prevention can be set. Likewise, in case of a first time offender, reformation and rehabilitation can be the object of sentencing. These guidelines as to sentencing objectives when laid by the legislature would contribute towards uniformity in sentencing. The task of laying down these guidelines should be entrusted to Sentencing Councils or Committees comprising of Judges, Criminologists, Penologists and Sociologists.

(ii) PUBLIC VERSUS EXPERTS IN FRAMING A SENTENCING POLICY

The penal policy of a society depends on the attitude of the society towards crime and criminals. It is generally the public view which influences the legislature to impose a particular punishment for a particular crime. However, it has been observed that penal policies based on public opinion have not yielded any success in the form of reduction in crimes.

ILLUSTRATION

Post Nirbhaya rape case, a call for stringent punishment was made from all quarters of the society. Sections 375 and 376 of the Indian Penal Code, 1860 were recast and reframed, punishment was enhanced. Life imprisonment or death penalty was laid down in cases of rape which resulted into the death of the victim or left the victim in a persistent vegetative state and where the offender is a repeat offender. The object of the enhanced punishment was to deter the offenders. However, the deterrent object of punishment has not been achieved as the number of rape cases post the amendment to the criminal law in 2013 have been on the rise.

A penal policy should be framed by the legislature after consulting experts like criminologists, penologists, sociologists and moral philosophers. Once this is done, the public should be educated about the objectives that are sought to be achieved and not vice-versa.

(iii) REASONED SENTENCING TO BE MANDATORY IN TRIAL COURTS

Giving reasoned judgments is one of the principles of natural justice. This is evidenced in the practice adopted by the High Courts and the Supreme Court. However, the trial courts hardly state any reasons while passing a sentence where there is no statutory

obligation to do so. Giving reasoned judgments in all cases should be made mandatory. This will help in not only giving a rational sentence but will also assist the appellate courts and revisional courts in assessing the adequacy of a sentence.[28] A rational sentence would be more acceptable by the offender, victim and the society, thus, reiterating the faith of the society in the judiciary.

(iv) TRIAL COURTS AND PRE-SENTENCE INVESTIGATION

A just sentence is one wherein the judge considers the antecedents of the offender which includes his socio-economic background, the nature of the offence, the impact on the victim and the society. A trial court judge should be activist enough to collect facts having a bearing on punishment.[29] The same can be done by appointing officers to prepare a pre-sentencing report and also ensuring that the prosecution as well as defence lead evidence on the antecedents of the offender. Pre-sentence investigation should be made mandatory in all criminal matters.

(v) REFRESHER TRAINING FOR JUDGES AND SENTENCING CIRCLES

At the time of induction into the judiciary, training is imparted to the newly recruited judges. The judges need to keep abreast of the developments in penology and criminology which are central to formulating a sentencing policy. This will aid them in awarding an appropriate and a just sentence. To keep the judges apprised of newer developments in sentencing jurisprudence, refresher training should be given at regular intervals. Besides this, sentencing circles should be formed wherein the judges meet at regular intervals to discuss and deliberate on the problems in sentencing and the peculiar cases that they had decided. These deliberations would contribute a wealth of knowledge towards drafting a sentencing policy.

(vi) VICTIM IMPACT STATEMENTS

Sentencing, more often than not, has become offender-centric. The victim's perspective is lost. It is important that the statement of the victims is taken to assess the impact of the crime on them and/or their family members. This will help the court in determining the quantum of punishment as well as how reparation to the victim can be brought about. In the Criminal Justice System, it is imperative that a victim of crime feels that justice has

[28] A. Laxminath , Komanduri S. Murty, Supra, 230
[29] Ibid

been done. If this aspect is overlooked, it will permeate feelings of injustice and foment vigilante acts in the society. Just as a Pre-sentence report collects information of the offender, Victim Impact Statements should gather information from the victim and/or relatives of victims to assess the effect of crime on the latter. Justice is not merely about punishing the offender but is also about balancing the rights of the victim, society and the offender.

(vii) ADVISE OF EXPERTS IN SENTENCING

A punishment that fits the offender and that which can transform an offender into a law abiding citizen should be the goal of any criminal justice system. Retributive sentencing as a knee jerk reaction to a crime based on public opinion has failed to strike at the root cause of offending. To determine a suitable sentence and informed decisions, advice of psychologists should be taken by the courts. This will help the court in formulating an appropriate sentence which would bring about reformation in the offender. Likewise, recidivism can be assessed by an experienced psychologist. This information will help the court in deciding whether the offender should be imprisoned for a longer duration or should be let out under the supervision of a probation officer. Courts in Sweden consult Forensic or Clinical Psychologists to inform them on sentencing aspects. The effectiveness of such a practice is evident from the fact that rate of reoffending in Sweden is forty percent (40%) less than that of the United Kingdom[30] and the number of prisoners dropped from 5722 to 4500 and four prisons have been closed.[31] Rehabilitation and individualization goals of sentencing can to a larger extent be achieved with the advice of psychology on sentencing. These positive outcomes should pave way for consulting a psychologist on aspects of sentencing.

CONCLUSION

Certainty and uniformity of law and in its application are the hallmarks of a competent justice dispensing administration. The judiciary is charged with an onerous duty to balance the thin line between certainties in application of law and meet the goals of punishment vis-à-vis individualization. While it is accepted that sentencing cannot be reduced to a mathematical calculus as offenders differ in their personality, motives and manner in which the crime is

[30]Erwin James, Prison is not for punishment in Sweden, The Guardian, 26th November 2014
[31]Zeeshan Aleem, Sweden's remarkable Prison System has done what the U.S won't even consider, The Mic, 27th January 2015

committed but common goals and principles of punishment can be set. This can be laid down in the form of sentencing guidelines by the legislature in consultation with the criminologists, penologists and psychologists. Likewise, refresher training and sentencing circles will enable the judiciary to reflect upon the sentencing jurisprudence and help it devise coherent sentencing principles. Disparities in sentencing and inadequate punishment will only foment discontent and distrust amongst the masses of the administration of criminal justice system. To repose the faith of the society in the administration of criminal justice system, coherent and sound sentencing policies need to be formulated and applied.

Lest, notions of a civilized society and state will be destroyed as private citizens will take law into their own hands and become vigilantes!

(3)

SPORTS VIOLENCE AND CRIMINAL LIABILITY

Nikhil G[1]

INTRODUCTION

The term "sport" encompasses concepts of play, gamesmanship and competitiveness. Presumably, mankind has always engaged in some activity for the sake of frivolity. The type of activity has been shaped by many factors, including climatic, topographic and cultural influences. Individual play, organized games and team sports evolved in rough chronological order. Individual play and gamesmanship naturally centred on man's mastery of his physical capabilities. Walking, running, jumping and throwing, though subject to equipment supplementation and organized rules, have not changed much since man learned to stand upright. Globally, these "original" sports have maintained much of their popularity with little change in their particulars. Now collectively known as track and field, these activities are referred to by most of the world as "athletics."[2] These sports maintain universal appeal because they are familiar to everyone. The Greek Olympics illustrate the international proportions of these activities and mark the historical point of official recognition of these activities as sports.[3] Although civilizations predating the Greeks engaged in sports, no other society raised organized competition to such a widespread level.[4]

For many years, the Olympics consisted of only foot races. Gradually, other common sports were added to the festivities. The Olympics were the largest of a number of ongoing athletic festivals in the Greek world. Initially, athletes received wreaths and laurels. Soon, however, the prizes grew to include monuments and cash. The ancient world saw victors boast of success without distinction between the cash competitions and the sacred contests. Athletes were sponsored and there is even evidence of corporate chariots in some of the racing events. Although the Greek Olympics ended in the fourth century, this did not signal the demise of competitive sports. Variations of competitive sport generally reflected the polity of the times. In the Roman Empire, the view of sport as a matter of gaining great recognition gave way to concerns of mere survival. Medieval jousting and similar "sports" involving activity akin to

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[2] Darryl C. Wilson *supra* note 2.
[3] JOHN KIERMAN & ARTHUR DALEY, THE STORY OF THE OLYMPIC GAMES, 776 B.C. TO 1968 (1973).
[4] *Id*. at 11.

training for battle left many fatally wounded. While these sports of killing for the entertainment of the plutocracy seemed especially ghastly, mortality became an integral part of gamesmanship.

The modern era of sport span is approximately less than two hundred years. Expert theories on the proper starting point of the modem era of sports are diverse. They generally agree, however, upon a starting point somewhere near the end of the nineteenth century. At that time, the world was basically resolved geographically, with governments focusing on issues of inner strength as nations and outer strength as recognized global economic powers. In the west, there was industrialization and capitalism. In the east, there was communism. Throughout the rest of the world, there were variations along the spectrum. A constant among societies was the growth of population, which was uniformly welcomed as providing a strong basis for the chosen governmental form. A second constant was the need to provide this expanding populace with enough comforts to dispel the likelihood of an uprising and therefore, to make the people willingly serve their greater societal purpose.

To fulfil the needs of the expanding populace, a more highly organized form of sport developed. Sport, once prized for its value as exercise or spontaneous frivolity, now became a tool of governmental control that offered citizens a way to creatively release energy. Official associations arose to give structure to national and international competition. Hence, men were no longer isolated but connected now through sports. The nature of the activities provided the most viable explanation of how sports, law and society were to coexist. Society required acquiescence to laws in order to function, whereas sport provided even though not permanent or extensive, citizens to operate within a sphere where, for at least a moment, they felt as masters of their own destiny.

VIOLENCE

Violence is a main nerve in criminal law. Fear of crime to an extent is the fear of violence.[5] Violence is an aspect which is often determined as a result of events or circumstances that cause a conflict to escalate. It describes both the overwhelming of the human body and the disobedience of social and cultural norms.[6]The fear of violence is something which is nearly universal and it cannot be dismissed. To a great extent, this fear is the fear of death and pain.

[5] Gerald. E. Frug, City Services, 73 NYUL Rev 23, 71 (1998)
[6] RENE GIRARD, VIOLENCE AND THE SACRED (1977)

But it sometimes extends beyond bodily injury. It remains as a notion which lays the source for all we find repulsive, or a violation of social or moral boundaries, or simply sufficiently annoying.

Violence could be defined as any act, event or condition resulting from a human behavior which cause death, injury or damage to the physical or psychological well-being of an individual.[7] According to Oxford English Dictionary, violence is something related to the use of great physical forces. Violence involves excessive, unrestrained or unjustifiable force, outrage, profanation, injury or rape.[8] The U.S National Commission on violence defined it as, the threat or use of force that results, or is intended to result, in the injury or forcible restraint or intimation of persons or the destruction or forcible seizure of property. Violence has a silent and unseen presence in popular sports such as soccer, hockey, rugby, boxing etc which appear without a warning. Along with crimes in general, crimes in sports are also on the rise. The 1984 Comprehensive Crime Control Act added to federal law a new definition of a crime of violence: one that involves the use, attempted use, or threatened use of physical force against the person or property of another, or any felony that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[9]The federal Armed Career Criminal Act (ACCA) defines a violent felony as one that has as an element the use, attempted use, or threatened use of physical force against the person of another or is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[10] Alice Ristroph[11] has classified violence as Murder, Mayhem, and Manly Sport. Murder or manslaughter, involves an unlawful killing of one human being by another. Mayhem[12] is the act of maliciously injuring or maiming someone, originally so as to render them defenseless. Manly sport which extends to the various sports ranging from the boxing ring to the soccer pitch physical contests

[7] Steve E Brown, The reconceptualization of violence in criminal justice education programs, Crim just. Rev. 34,42(1986)
[8] Kirkpatrick, E. M., & Schwarz, C. M. (1983). *Chambers 20th century dictionary*. Cambridge [Cambridgeshire: Cambridge University Press. Chicago
[9] 160 18 U.S.C. § 16 (2006) adopted as part of the Comprehensive Crime Control
Act of 1984, Pub. L. 98-473.]
[10] 162 18 U.S.C. § 924(e)(2)(B) (2006)
[11] Alice Ristroph, Criminal Law in the Shadow of Violence, 62 Ala. L. Rev. 571, 622 (2011)
[12] the violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems : See BLACKSTONE, supra note 16, at 205-06.

have produced physical injuries, criminal prosecutions, and claims of consent. A few patterns emerge from those charges if his harmful acts broke the accepted rules of the sport.[13]

SPORTS VIOLENCE

A safe working environment is essential in the arena of sports for the wellbeing of the participants. It is essential to keep the integrity of sports. A safe working environment is not aimed towards eliminating the physical vigor from sports. In fact this physical vigor is an essential element of sports. Violence in sports is not a new phenomenon, but violence acts and injuries are increasing in wide ambit within the sports arena.[14] In sports like basketball and baseball where the rules don't permit much body contact, violent acts and injuries takes place frequently. Sports violence not only affect the participants of a game, but the whole society especially children for whom the players are role models. Hence the aim is to control the violent acts that takes place in the sports field which is against the rules of play and spirit of sports. The issue here is when and where law is expected to regulate the violent and unexpected acts in sports without affecting the competitive nature of sports especially, in contact sports. From the late 19th century participants who used intentional and reckless force beyond a sport which is likely to cause bodily injury to another was considered acting illegally and was mostly condemned.[15] Michael Smith[16] divides sports violence into four types;

i) Brutal body contact which occurs as part of sports participation,
ii) Borderline violence which involves assaults which even though prohibited by formal rules, takes place in the province of referees, umpires etc.
iii) Quasi criminal violence which violates not only the rules of a sport but also the informal playing culture of the game
iv) Criminal violence which seriously and obviously is outside the boundaries of sport.

According to Sean Hamil[17], Sports violence is an act which causes physical harm to an opponent, which is against the competitive spirit, fair play and the rules of sport. The competition among sports persons for their financial carrier and sports value guide them to win the match by any means. This end of the players cause potential antisocial behavior like yelling,

[13] Jack Anderson, Citius, Altius, Fortius? A Study of Criminal Violence in Sport, 11 MARQ.SPORTS L. REv. 87, 94-97 (2000)
[14] Mathew P. Barry; Richard L. Fox; Clark Jones, Judicial Opinion on the Criminality of Sports Violence in the United States, 15 Seton Hall J. Sports & Ent. L. 1, 26 (2005)
[15] R v Bradshaw (1878) 14 Cox CrimeCases 83 ; R v Moore (1898) 14 TLR 229.
[16] Smith M D, VIOLENCE & SPORTS (1983)
[17] Seal Hamil, MANAGING SPORT : SOCIAL AND CULTURAL PERSPECTIVES (2012)

pushing, passing derogatory remarks etc. But if the players play according to the rules and practices and not beyond it, the normal inference is that they are not attracted by malicious motive or intentions.[18] Terry and Jackson define sports violence as behavior which causes harm, occurs outside of the rules of the sport, and is unrelated to the competitive objectives of sport.[19] Coakley defines it as "the use of excessive physical force, which causes or has the potential to cause harm or destruction.[20]

One of the oldest incident in sports violence was witnessed in a Federal Amateur Hockey game between Cornwall and Ottawa Canada.[21] Towards the end of the game a fight outburst between Cornwall's Owen McCourt and Ottawa's Charles Masion. Owen McCourt, was struck over the head by a hockey stick wielded by Ottawa's Charles Masson, who was attempting to defend one of his teammates. The victim was taken into hospital as the injury was serious. He latter succumbed to his injury and died after several hours. Masson was originally charged with murder, but prosecutors latter changed it to manslaughter. In a game between Vancauver Canucks and Colarado Avalanche in the National Hockey League (NHL) which is a professional ice hockey league in North America, Todd Burtuzzi of Vancauver had assaulted Steave Mores of the opposite team.[22] The incident took place during the final minutes of the match when Steave was moving away from the point of play, Todd skated near him and gave a blow to his head side. Earlier on an interview Todd threatened to avenge Steve Mores on the game. Todd was then suspended for next seven games of the season and was filed with civil and criminal charges. But subsequently he was only sentenced to community service and probation.[23]

The legislators, law commentators and the sports leagues have tried to apply their own mechanisms for controlling sports violence.[24] In 1980 in the United States of America congress proposed a legislation that would amend Title 18 of the United States code which would have provided criminal sanction for excessive violence during professional sports events.[25] But the

[18] R v Bradshaw (1878) 14 Cox CC 83 at 85.
[19] Terry PC, Jackson J. The determinants and control of violence in sport. Quest. 1985; 37(1):176–185
[20] Coakley J. *Sports in Society: Issues and Controversies*. 8th ed. New York, NY: McGraw-Hill; 2004
[21]Masson Faces Murder Charges, OTTAWA, J. Mar 8, 1907, available at http://www.collectionscanada.ca/hockey/024002-119.01-e.php?&hockey-id-nbr=20&&PHPSESSID=CC126, sbtkai5mh75olejgf6qn4.
[22] Tarik-El-Bashir, Canucks Bertuzzi charged for punch, WASH POST, June 25, 2004, at D1.
[23] Associated press, Moore Seeking $ 15 M in Lost Wages, More in Dameges, Feb: 15, 2006, available at http//sports.espn.go.com/nhl/nesa/story?id=2331878.
[24] Karen Melnik, *Giving Violence a Sporting Chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports*, 17 J. LEGIS. 123 (1990)
[25] The Sports Violence Act of 1980, H.R. 7903, 96th Cong. (2d Sess. 1980).

professional sports representatives opposed the bill calling it vague and inconsistent.[26] They opposed the bill arguing that it was the Professional Leagues that would control the violent acts in sports and not the government.[27] Again in 1983 in the United States House Representatives Thomas Daschle introduced Sports Violence Arbitration Act which failed on uncertainty as to how and when the bill or arbitration would apply.[28]

CAUSES OF SPORTS VIOLENCE

There could be various minute causes for violence in sports. But if we analyse in detail, it could be said that there could be two principle causes of sports violence. One is competitive spirit of a sport, and the other is the level of pressure a game puts on its participants[29]. Competitive spirit is the primary causes of violence in a sport event. A player wants to win a match at any cost and it means a lot to the players or the team to do so. The advantages of winning a game or sport are much more that of refraining from violence in a game or maintaining fair play throughout the game[30]. Winning a game, adds to the economic, professional and emotional advantages to the players. Likewise the array of pressure developed upon the participants also tent to cause violent acts in sports[31]. Sometimes a whole nations hope or expectations of the supporters and fans could put the players or participants in immense pressure which ultimately result in acts of violence committed by them and loss of temper and calm. Competitive edge and pressure of participants together have developed an atmosphere, which could easily heat up for a violent act during sports. The remedies like fine and suspension now days are very ineffective and is often seen just as inconveniences rather than deterrents. Also in the two sides is as a players who commits violence and the one who receives it are actually willingly participating in the game foreseeing these violent acts resulting in injuries. This willingness is something developed not only through competitive edge to win a game but also through agreement and support of team owners[32]. As a result players often share costs with team owners when they are fined or suspended. This cost sharing nullifies the effect of fines and suspensions

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[26] Melnik, *supra* note 21, at 131

[27] Diane V. White, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts,* 1986 DUKE L.J. 1030, 1054 n.9 (1986)

[28] Bradley Nielsen, *Controlling Sports Violence: Too Late for Carrots - Bring on the Big Stick,* 74 IOWA L. REv. 681, 686 (1989). 11, at 693.

[29] Ronald.A.Dinicola scott Mendeloff, Controlling violence in professional sports : Rule reform and the Federal professional sports violence commission ,21 Dep.L.Rev 843,916(1983)

[30] Sluskee, Soprts : A philosophical perspective, 38 L.& CONTEMP. PROB 129, 130(1973)

[31] Horrow Sports note at 30-38

[32] H .MANNE, THE ECONOMIC OF LEGAL RELATIONSHIPS : READING IN THE THEORY OF PROPERTY RIGHTS 572 (1975

upon the players and reduces any kind of loss to players which has resulted from any payment for committing violence during the game[33]. Since most of the professional sports are packed with high remunerations the other remedy of civil liabilities also are very ineffective to deal with violence is sports. The players are paid high to play effectively on any brutal environment to win a competition. Hence if violence in sports is to be controlled, much more effective remedies should be brought so that players refrain to do so, and it is evident that the disadvantages of violence in sports is more than an advantage caused through it while winning a competition.

THE RULES OF THE GAME

Rules of a game are one primary matter in determining criminal liability in sports. Even though it has been settled that an act prohibited by law cannot be made legal by any rule of sport, these rules are considered primarily to determine whether an act is a sport or crime. Rules of a game are the yardstick to determine the scope of legitimate sport. It helps to determine the intend of player in determining whether he committed a crime in the course of the game.[34] In R V Bradshaw[35] it was held that if someone is playing according to the rules and practice of the game and not going beyond it may be reasonable to infer a lack of the requisite mens rea for an assault. So when an act is well within the rules of play of a sport, it is unlikely to be booked for criminal liability. A behaviour which is sanctioned by a sport is normally treated as part of the fabric of law. Another standard to determine the extent of a person's consent during the course of a game is coined by Simon Gardiner as playing culture[36]. The concept takes into concern all relevant circumstances of an act which caused the injury or violation to determine at what point the act dissociated from the sport to be part of a crime. Even though the concept is close to the existing standards set up by courts, it also is considered as an efficient one in determining criminal liability.

As harm including behaviour bearing no direct relationship to the competitive goals of sport, relates to incidents of uncontrolled aggression outside the rules of sport, rather than highly competitive behaviour within the rule boundaries.[37] The primary concern of determining what violence in sport is permitted is lawfulness of a foul play committed by of player on his

[33] Lehn, property rights, risk sharing and players disability in major league baseball, 25 J.L& Eco.343 (1982)
[34] supra note 2 at 498
[35] (1878) 14 cox cc 83
[36] S.Gardines et al.. sports law 3rd edu (Cavendish London, 2006) 606-12.
[37] Peter C. Terry & John J Jackson, The determinate and control of violence in sport. Quest : Vol 37, No 1 (1985)

opponent[38]. The simple way of demarcating a lawful and unlawful violence is to determine whether it is beyond the ruler of the game. If this way is accepted as the norm to determine lawfulness of an act in sports it could paw way to certain deformities. Firstly it is for the law to determine as to what could possibly account to a crime when committed within a sports event, and not the sports authorities or organisers to determine. Secondly if this way of demarcating is accepted, it could end up in certain trivial acts to be counted out as unlawful if outside the rules, and certain grave force counted in as lawful when with rules. And finally it undermines the concept of consent. The participants of the game have the knowledge the risk of considerable degree of force to be accepted during the progress of a match.[39] If not it will disturb the spirit of a game. Hence its rightly determined through R v Billingburst[40] in which it provided that if provided that if the act of foul committed is commonly experienced in the sport, it would not be considered as a crime. Also the propositions in R v Bradshaw[41],R v Coney[42] and R v Moore,[43] suggests that if the act is not a commonly experienced one then could be punished under law.

It was Canadian courts which got a chance to deal with several of these kinds of occasions, especially because of Ice Hockey, which was an important sport practiced there, which also involved violent and rigorous acts and contacts[44]. One such famous incident took place at a game between Boston Bruins and St Louis Blues, wherein a brutal act of violence took place between Ted Green and his opponent Wayne Maki. The incident took after a collision between the two players which triggered a fight between two, which ultimately resulted in a blow on lead of Green giving him serious injuries on head. After the incident both the players were charged and tried separately. Hence there were two cases trying a determine the same issue is R v Maki[45] and R v Green [46]. In R v Maki while acquitting Maki on doubts raised about intuitions of use of force, Carter P.C J Said even though the players is acquitted there is no question of self-defence in the incident and that the amount of given in a sports event is limited

[38] J.Paul Mc Cutcheon, Sports violence, consent and criminal law , 45 N.Ir.Legal Q.267,284(1994)
[39] Id .at 273
[40] (1976) Crim LR 553
[41] (1878) 14 Cox CC 83
[42] (1882) 8 QBD 534
[43] (1898) 14 TLR 229
[44] Section 265(1)(a) of the Canadian criminal code provides that a person commits an assault when " without the consent of another person" he intentionally applies force to that other, directly or indirectly, although absence of consent is an ingredient of the actus reus it is now established that the low inposes limits on a person capacity to consent, and the position is broadly similar to that which oblains a common law see R V Jobidon (1991) 66ccc(3d) 454.
[45] [1970] 14 DLR (3d.) 164
[46] [1970] 16 DLR (3d.) 137

and does not include all the acts committed on the field. It was further added that a players is expected to accept a level of risk or hazard which comes under normal defence of consent, but he is not expected to consent to an act which is malicious unprovoked and overtly violent. Also in R v Green the players was acquitted and opined that self protection is an important defence in sport violence Fitzpatrick PCJ found that ice hockey which is a game of speed, force, vigour and competitions which cannot be played in a customary way without a drat degree of forceful body contact. He found the incident was an immediate response of the players which amounted nothing more than an instinctive self protection.

The lawfulness in sports varied with the nature of sports and a clear division of line between an act which amounted to a crime or unlawful violence and acceptable violence was not made clear. Systems found it difficult as to what could be primary concern to demarcate activities of violence that is against the spirit of game and well within criminal prosecution. Canadian courts formulated a number of decisions to determine what act was beyond the accepted acts of behaviours in the field. In R v Leyte,[47] it was settled that a players is deemed to consent to an act which is instinctive reaction closely related to a play or nature of a game. Normally there may be of negative intent as well. But in R v Watson[48] it was held that consent was limited to routine body contact and nothing more than that. Later in R v Maloney,[49] the court opined that a player is deemed to give consent to an assault which is inherent and is reasonably related to the normal play of the game. If there is an intent for serious injury then the player is deemed to be guilty even if the final act or result was not as he intended. In R v St. Croix[50] the accused struck the opponent after the play has stopped and was found guilty as the act was beyond foreseeable consent and not instinctive or for self-defence.

A much more recent decision in R v Cey[51] made a better clarity to the scenario. In R v Cey the accused in order to cross check an opponent from his rear, punished him on his face in to the board surrounding the ice-rink which resulted in facial injuries and concussion to the player. Initially the accused was acquitted as the court observed that he didn't have an intuition to injure the player or to use force exceeding to which was customary for the game. But the court of appeal overturned the acquittal and ordered for re-trial. The question before the court was whether the force used was inherently dangerous to the ambit of implied consent by the player.

[47] (1973) 13ccc (2d) 458
[48] (1975) 26 ccc (2d) 150
[49] (1976) 28 ccc (2d) 323
[50] (1979) 47 ccc (2d) 122
[51] (1989) 45 ccc (3d) 480

In order to evaluate this ambit, the court set a framework while checking what the condition of game was played and the nature of the act and the degree risk of injury involved. The court also suggested in any rule change in a sport is need to avoid such instance of violence it is to be made. The decision made two significant contribution in deciding the matter concerning sport violence. One is that it spelt out the factors which were vague in determining the issue. And second that the decision made the system less tolerant towards sport violence. There was a considerable shift in the attitude of court towards sports violence. It established that violent and dangerous conduct within sports was beyond the ambit of implied consent. Thus in sports, if a conduct carries high risk of injury, the act itself would be unlawful regardless of consent or the frequency at which it occurs in sport.

Normally permitted force in a game varied from game to game, based on the circumstances under which it is played. A conduct permissible at one level was not permissible on another. For instance a conduct permissible on a professional level of sport was not permissible on an amateur setting[52] or the conduct on a senior level is not permissible at junior level[53]. The proposition in R v Cey was considered as appropriate in R v Ciccarelli[54] to understand an act expected to happen during a game. Letter in R v Leclerc[55] the Ontario court of appeal applied the same test but added to seek whether the rules of the game played contemplate contact. However even though the sport in the can did not allow body contact, the court approved the acquittal as it spotted that the act was not inherently violent in nature. The application of the Cey rule in sports has been confirmed by the supreme court of Canada in R v Jobidon[56] where the court adopted the test in Attorney General reference (No 6 of 1980)[57]as applicable in Canada and ruled out the fair fight defence available to the accused. The court declared that unlike fights sports have a significant social value among people.

SYSTEMS EXISTING CONTROL OVER SPORTS VIOLENCE

Misconduct of players is a frequent and quite common factor in professional sports. It is not a problem to the extend acceptable and not harmful to the players and society in general. Any act beyond this level of acceptance of a sport would attract legal action. Violent conduct in a

[52] R V St.Croix (1979) 47ccc (2d)122.
[53] Re Lenfield (1993) Aust Tort Reporter 81-222
[54] (1989) 54 ccc(3d) 121
[55] (1991) 67 ccc (3d) 563
[56] (1991) 66 ccc (3d) 454
[57] (1981) QB 715, violence when in anger was intented and likly to cause bodily injury was unlawful regardless of consent.

sport could be categorized into four types. First, is conduct which is prohibited by rules of the game. Such conduct involves minor and less harmful violations which occur frequently in a game. Penalties for such acts are given in immediate context mostly by the referee or officials during the game itself. Such actions are managed by local control only and need very rare or minimal legal sanction. Second category of conduct involves violations which extend to the league imposed penalties. These acts are a little more serious than the previous category and mostly involve league deliberations, match suspensions etc. The third category involves games which are basically brutal in nature and are to be carried out in state intrinsic control. State has the responsibility over the game and when it goes beyond such control it can initiate criminal proceedings. The final category contains acts which are completely outside the game even if it occurs in a field. Like a player bringing a weapon to field in a fight may directly attract criminal law.

All professional leagues have internal systems to look into conduct of players. Normally it is the primary step in controlling conduct of a player, which decides as to what is permitted conduct and what acts beyond it could be violence against the sport.[58] The system provides mechanisms to investigate, and to penalize players amounting to excessive violence with respect to the sports they are involved in. [59] The intension of maintaining such a system was to develop an internal mechanism among the sports authorities itself to control violent acts apart from the players resorting to the civil and criminal remedies. The advantage of such a system is that the leagues which are well acquainted with a sport get to take decisions with regard to conduct of a player[60]. It could decide the extend of tolerable conduct of a player and give penalties in accordance to its deviation, giving simple penalty for minor or common violation and fines and suspensions for severe sports violence. There has been two main advantages of assigning the leagues with the power to control conduct of the players or in particular control violence within a sport. First advantage is the in-depth knowledge of the leagues over the respective sport against any other regulatory body.[61] Leagues are more familiar with the rules and regulations of the sport and could more accurately determine when an act of player has gone beyond the expected conduct in the game. Also it could determine the extent of risk a player is willing to take and level of consent he gives in during a game. The second advantage of the internal mechanism is that it can be more certain, quicker and uniform

[58] R.Harrow, Sports Violance: The interaction between private lawmaking and the criminal law 64-73 (1980)
[59] Berry & Glenn M. Wong, LAW AND THE BUSINESS OF THE SPORTS INDUSTRY 680 (1993)
[60] HERB APPEZELLER, SPORTS AND LAW : CONTEMPORARY ISSUES 55 (1985)
[61] *Id* at 55

compared to any other mechanism[62]. Since its capable of being uniform, its punishments and remedies are more predictable and have a set format.

Internal mechanisms concentrated more on financial motivations, by giving fines and suspensions without pay against the players committing unacceptable violence during the game. But these mechanisms have not acted as a proper deterrent of violent acts, since these fines and suspensions cost minimal compared to payment of professional players.[63] Another major issue with the leagues being the authority regulating conduct is that in order to promote the sport, they sometimes tolerate violence.[64] In a sport, media attention will be more for violent games which in turn increase the revenue for the league bought by commercial value and ticket sale for the league.[65] Also more often the players committing violence get a heroic image in public.

CRIMINAL PROSECUTION

It cannot be suggested that athletes simply on the ground that they are on the field cannot be allowed to commit the violence which is prohibited to a civil citizen on his normal life. Rare reporting of sports crimes and the difficulty of the present courts in dealing with the violence in sports may be the main reason before the system in dealing with the issue. But it cannot be accepted as an exception to the violence taking place in sports arena. It is mandatory for every system that they protect their subjects from any sort of serious violence taking place in society without excluding any action which takes place in the sports field as well which is very essential for the protection of the players. In fact, R. v. Billinghurst was the first of this kind where the English Court expressly sort its intent to evaluate the role of criminal law in sports arena. The case made a successful prosection of a rugby footballer for assault causing actual bodyharm for an incident taking place in sports field in which during the course of a rugged encounter the accused brock the opponents leg. Later in R. v. Gingell , where a conviction for inflicting grievous bodily harm was successful, led to a sentence of six months imprisonment.Furthermore, in 1986, in R. v. Johnson , the accused bit the ear off of an opponent in a police rugby union match and was charged with the infliction of grievous bodily

[62] Karen Melnik, Giving Violence A Sporting Chance : A Review of Measures used to cast excessive violence in professional sports 17 J. of LEG. 13 (1990).
[63] For example Charles Barkley, Philadelphia 76's forward in American professional basketball when penalized for a game suspension which cost him 31,700 said that he don't care if he gets fine because he make $3 million a year and fine was just couple thousand dollars : Jack McCallum, Fight Night at the palace, Sports Illustrated, April 30, 1990, at 25
[64] *Supra* note 2
[65] W.M.LEONARD II, A SOCIOLOGICAL PERSPECTIVE OF SPORT 169, 176 (1988).

harm. In soccer cases too cases where filed and prosecutions succeeded in punishing players accused of criminal acts during play. In R. v. Kamara , Mr. Kamara pleaded guilty to inflicting grievous bodily harm and was fined a total of £1500, including compensation and costs. In the case of R. v.Birkin the accused had run after and struck an opponent who had late tackled him. The accused duly pleaded guilty to assault occasioning actual bodily harm and was sentenced to eight months imprisonment, reduced on appeal to six months. Similar prosecutions was also made in R. v. Davies . R. v. Brown where the law on consent was fully reviewed, the House of Lords confirmed that the existing law on the area indicated that, whereas consent negatives liability for minor harm, the victim's consent does not provide a defence where actual bodily harm is intentionally or recklessly caused, unless the case falls within a range of socially acceptable categories.

CONCLUSION

Sports maintain a deviation from the general rule of violence and the criminal liability which occurs from it. But that does not completely make criminal law inapplicable to sports violence. This aspect of sports lies in the fact that the players consent to the inherent risks prevalent in the particular sport and this degree of risk depends on the nature of sport a player is participating. Therefore it becomes imperative to ensure that in any sport, the rules of the particular sport are followed strictly and the players conduct themselves according to the rules and regulations of the particular sport.

Study of criminal law and its relationship to sports is essential to establish a solid outline as to when an act during sports amount to crime. Even though there is no separate branch of crimes dealing with sports, criminal offences like assault, hurt, grievous hurt, homicide etc could be applied to conduct that occurs on the sporting field of play. There are periodic incidents that question the complex nature of the involvement of the criminal law in the context of sports. Hence, it is necessary to have a detailed study of how criminal law applies to sports activity.

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WOMEN AND APPLICATION OF CRIMINAL LAW – A WAY TO LIBERTY

Arpita Mitra [66]

Suraj Deb[67]

INTRODUCTION

Our Indian culture is satisfied with different issues like superstitions, lack of education, station framework and the malevolent share framework, and so on. Regardless of different shows and endeavours set forward by the Government, the young lady kid are exposed to kid relationships and savagery in various types of Children were dealt and constrained in the process of childbirth and sex subjection .They was would not finish their training; they were not permitted to any social, political cooperation by their significant other, family and society; until they get their rank. As it is a male dominated society, some women's were trapped in conflicts where rape is used as a weapon to dominate over female society. According to Susan Brownmiller, in her book "Against Our Will" tells "It (rape) is nothing more or less a conscious process of intimidation by which all men keeps all women in a state of fear..."

From ancient time in India many people think that the birth of a girl child is a disgrace for their families, so they should be kept aside from education, decision making for their families (family planning), they were insulted, killed, they were not allowed to shout against any men in their society, family. If they shout against their husband, they were bitten up by their families including their husband. A few people thought "the pace of populace expanded, is equivalent to the pace of wrongdoing against women. Women have been disregarded through hundreds of years everywhere throughout the world. Undoubtedly, even in India, the present marriage trade is settled in the lights of offer as share. The forlorn gatekeepers or guards or the vulnerable young lady or sisters are continually made the setbacks of enrichment. Requests of share don't lessen considerably after marriage. The in-laws of the bride are very much ready in Indian homes to inflict harassment, insults and tortures both mentally as well as physically. The husband on his part either remains passive like a very docile son of the family, or he also himself starts torturing their wife for the full payment of the promised dowry where the poor guardians of the bridge could not meet their commitments at the time of wedding, or even for

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some new demands[68]. And ultimately the poor bride does not find any other alternative way to get rid of their devil dowry system, than to kill itself to get rid of these horrible sufferings. This is the way how cases of suicide which are in fact cases of cunningly motivated masterly planned murders, burning, jumped from certain height that caused death, etc .This take place in respectable and wealthy families also. But The Domestic Violence Act. (2005), the Dowry Prohibited Act.(1961), the Immoral Traffic (Prevention) Act.(1956), Protection against Domestic Violence Act (1997), the Sexual Harassment Act(1989) control the increasing level of this situation. In this way as long as the lady remains as manikin or pawn in the hands of her male family members, she will consistently be controlled, overwhelmed and utilized." In India, this is unequivocally acknowledged (proclamation) that by women has strangely been lighted by the Supreme Court's first judgment in the Mathura Rape Case. Perhaps this was the celebrated match stick which set ablaze the fire. Starting late barely any years back December sixteenth, 2012 an attack have been done on an open vehicle by youths (Mukesh Singh, Vinay Sharma, Pawan Gupt, Akshay Thakur) who were Indians. According to India Government the number of rape case is increasing day by day, nearly 12 or 30 rape cases are committed in our country every day. Everyday nearly two to three rape cases were in every newspaper, sometimes. In our country within three to four years nearly 25% to30% rape case increased yearly in 2001 the number of rape cases were hundreds or thousands or less then that but at the end of 2014 its value increased near to a million.

There are thousands of sexual harassment cases those have been lodged which cannot be explained. After 2012 Nirbhaya incident, On December 10, 2014, an interviewer asked our first female IPS officer and former Inspector General of Prisons KIRAN BEDI that “what are the steps are needed for greater women’s safety” she answered “we need to energise and sensitise all segment of society and governance at all level. I've been talking about six Ps – people or patients, principals and NGOs, police in balance, area and advancement, government authorities for revived laws, arraignment for practical primers, confinement offices for change and press foreseeing women with obligation. All of the six Ps need a middle point to cause them to collaborate constantly which could be the CMs specifically states. As indicated by the law, assault against ladies conveys discipline of prison, in addition to a fine of substantial sum in as per article 375(c). The Bill seeks to amend sections of the Indian Penal Code and the code of criminal procedure and the Indian Evidence Act. On December eighteenth in a report on

[68] Feminist consciousness in women centred Hindi films, Dasgupta SD. (1996).The Journal of Popular Culture, 30(1), 173-89.

"THE TIMES OF INDIA" "More than 31,000 assault cases pending in HCs (High Court) alone" their stated "New Delhi: Crimes against ladies are on the ascent, as is the pendency of such cases in the subordinate and high courts the nation over .

STAGES OF DEVELOPMENTS OF WOMEN - ROLE OF LAW IN WOMEN EMPOWERMENT

The best way to deal with fathom the spirit, if human progression adds to recognize and comprehend its significance and obstructions is to ponder the recorded setting of the womenfolk-improvement and change in the status of ladies once in a while. A start was made by the Seneca Falls Declaration's in 1848[69] the world over the battle for the rights of ladies. The developments of women in Britain can be isolated in four phases. During the main stage from 1840-1870 women's associations worked away at different level of issues. The second stage from 1871-1905 was ruled by protected women suffrage associations, which centred totally on picking up the rights to cast a ballot. The third time of the development from 1905 to 1918 concentrated on the rights of vote yet embraced aggressor and military strategies, which drove in 1918 to the liberation of ladies more than thirty years old. The overwhelm highlight of the fourth stage from 1919-1930 was the expansion of the women establishment to incorporate all women more than twenty-one. After 1930 the battle was against biased practices, laws, and choices and furthermore for individual freedom and rights outside ordinary legislative issues[70].

International Women Day has been seen since mid-1900s in the midst of mesh choppiness in the industrialized world that saw blast in populace and an ascent of radical philosophies as well as ideologies. In 1908 ladies' mistreatment and imbalance prodded them to turn out to be progressively vocal in crusading and campaigning for charge. In 1908, 15000 women walked through New York City requesting shorter hours, better compensation and casting voting rights. In 1911 International Women's Day (IWD) was regarded the first run through in Austria, Denmark, Germany and Switzerland on Nineteenth March. More than one million individuals went to IWD rallies crusading for ladies' privileges to work, vote, be prepared, to hold open office and end separation. Anyway, seven days after the fact on March 25, the grievous

[69] Seneca Falls Convention
http:// faculty.uml.edu/sgallagher/SenecaFalls.htm
[70] Social profiling: the root causes of racial discrimination against women, Chandra M. (2012).
Paper presented at a UGC Sponsored National Seminar on Gender and Racial Discrimination: the Paradigm of Women's Vulnerability. Imphal, Manipur.
Retrieved from: http://nehelpline.net/?p=702

—Triangle Fire' in New York City ended the lives of in excess of 140 working ladies, the vast majority of them Italian and Jewish outsiders. This occasion caused critical to notice working condition and work enactment in the US that turned into a focal point of resulting International Women's Day occasions.

OFFENCES AGAINST WOMEN RECOGNISED UNDER LAW

1. **ASSAULT AND RAPE:** Rape is characterized under Section 375 of Indian Penal Code and its discipline is characterized under this area. Assault is considered as the most successive and most grim wrongdoing against the ladies. It is generally rough and considered to be a boorish act. An individual who submits assault or commits rape will be rebuffed and thoroughly punished with detainment of either portrayal for a term which will not be less than a period of seven years, yet which may reach out to detainment forever and will likewise be at risk to be subjected to a fine. The offense of an assault is "ravishment of a woman" without her assent or without wanting to forcibly, dread or extortion and furthermore incorporates the fornication with of a woman[71].
2. **KIDNAPPING AND ABDUCTION FOR VARIOUS PURPOSES:** The arrangement relating to identifying with kidnapping and abduction are encapsulated from section 361 to 373 of IPC. Any individual, who is snatching a minor for reason for asking or capturing minor/woman for prostitution or unlawful intercourse, will be rebuffed with detainment of either depiction for a term which may reach out to ten years and will likewise be obligated to fine. Therefore this is also considered to be one of the most prevalent crimes against the weaker section of the society at present.
3. **CRIME FOR DOWRY AND DOWRY DEATH:** The arrangement identifying with dowry death of ladies is under section 302/304B/306 of IPC. Where the demise of the women is caused by any consumes or real injury or happens in any case than under ordinary conditions within seven years of her marriage and it is indicated that soon before her she was exposed to mercilessness or provocation by her parents in law or spouse, for or regarding, any interest of settlement, for any kind of such connection is considered to be the death by dowry and such passing of the person will be called endowment demise. Whoever commits dowry death out of depression or frustration

[71] Bhupendra Sharma v. state of Himanchal Pradesh (2003)8 SCC 551

will be rebuffed with detainment of with either depiction for a term which will not be under seven years, yet which may reach out to detainment forever.

4. **CRUELTY AGAINST WOMEN:** Pitilessness Domestic savagery is without a doubt is a genuine human right issue. The arrangement with respect to the mercilessness is typified under segment 498A of IPC[72]. Whoever, being the spouse or the relative of the husband or the relative of the husband of a lady, subjects such lady to pitilessness cruelty will be rebuffed with detainment for a term which may stretch out to three years and will likewise is obligated to fine as per law.

5. **MOLESTATION AND SEXUAL HARASSMENT:** Attack and molestation is typified under segment 354 of IPC. Whoever attacks or uses criminal power to any women, expecting to shock or realizing that it generally will be likely that he will in this manner shock her humility, will be rebuffed with detainment of either a depiction for a term which will not be short of what one year yet which may stretch out to three years, and will likewise be subject for fine. Whoever proposed to affront the unobtrusiveness of women will be liable of the offense of lewd behaviour and will be rebuffed with detainment for a term which may reach out to three years and furthermore with fine[73].

The above section additionally shows that most predominant wrongdoing against ladies is the assault and sexual misuse. Most likely corrosive tossing and different kinds of wrongdoing against ladies other than assault are additionally common violations. However, in the vast majority of the cases the corrosive tossing and activities is important of inappropriate behaviour. Aside from it, practically all ladies in India have confronted the desolation of human rights infringement in family and society; however the predominant wrongdoing against the women is the assault and other sexual bad conduct. In Ram Dev Singh's case[74], His Lordship Hon'ble Justice Arijit Pasayat in para no. 1 of the judgment has held as under: "Sexual brutality separated from being a dehumanizing demonstration is an unlawful interruption on the privilege of security and sacredness of a female. It is a genuine hit to her incomparable respect and irritates her confidence and poise. It corrupts and embarrasses the person in question and

[72] Mahajan A. Instigators of wife beating. In: Sood S, editor. Violence Against women. Jaipur (India): Arihant Publication; 1990. Google Scholar
[73] Azikiwe N, Wright J, Cheng T & D'Angelo LJ. (2005). Management of rape victims (regarding STD treatment and pregnancy prevention): do academic emergency departments practice what they preach? Journal of Adolescent Health, 36(5), 446-8.
[74] State of Punjab v. Ram Dev Singh (2004) 1 SCC 241

where the unfortunate casualty is a vulnerable blameless youngster or a minor, it abandons an awful encounter. An attacker cause's physical wounds as well as more permanently leaves a scar on the most loved ownership of a lady for example her nobility, respect, notoriety and not the least her celibacy. Assault isn't just a wrongdoing against the individual of a lady; it is a wrongdoing against the whole society. It devastates the whole brain research of a lady and drives her into profound enthusiastic emergency. It is a wrongdoing against essential human rights, and is likewise violate of the injured individual's generally treasured of crucial rights, in particular, the privilege to life contained in Article 21.

JUDICIARY AND CRIMES AGAINST WOMEN

The Indian Judiciary is the vigorous legal executive all through the world. The legal executive in India is autonomous and forms the official and the law-making body by Indian Constitution. The Indian Judiciary has assumed a noteworthy job in the ladies strengthening. The Hon'ble Supreme Court by its legal declaration ensures the privileges of the ladies and gives the privilege to women to live with pride.

1. **CHANDRA PRAKASH KEWAL CHAND JAIN V. PROVINCE OF MAHARASHTRA**[75]

   In this case the Hon‟ble Supreme Court communicated that the regard of ladies in our nation is on the decrease. So the goodness and profound quality in the open life can be advanced and ensured just if the Courts manage the individuals who damage the social standards.

2. **VISHAKA AND ORS. V. PROVINCE OF RAJASTHAN AND ORS.**[76]

   In this the Hon‟ble Supreme Court gave the rules to forestall and prevent inappropriate behaviours against ladies in work place, that adds up to infringement of the privilege to sex correspondence and furthermore the privilege to life and freedom the two most valuable crucial rights ensured under article 14, 19 and 21 of the Constitution of India.

3. **DANIEL LATIFI V. ASSOCIATION OF INDIA**[77]

   An established seat of the Hon‟ble Supreme Court held that it is the risk of Muslim spouse to his separated from wife to pay upkeep. The Court additionally said that it is

[75] AIR 1990 SC 658
[76] (1997) 6 SCC 241
[77] 2001(7) SCC 740

the obligation of a Muslim spouse to make sensible support for the fate of the separated from wife or except if she gets hitched for second time.

4. **LAKSHMI V. ASSOCIATION OF INDIA**[78]

   The Hon‟ble Supreme Court carefully restricted the offer of the corrosive chemicals and further decided that a purchaser can buy the corrosive substance from the vendor just if purchaser gives the substantial character evidence and the requirement for the buy and made it compulsory for the vendor to present the deal report inside three days of the offer of the corrosive to the closest police headquarters and denies the seller to offer the corrosive to minor.

5. **MARY ROY V. PROVINCE OF KERALA**[79]

   Right now Hon'ble Apex Court conveyed the milestone judgment by granting the women an option to look for equivalent offer in their father's property.

6. **SHAMIMA FAROOQUI V. SHAHID KHAN**[80]

   The Hon‟ble Supreme Court said that the ladies cannot be treated as homeless people and they have option to guarantee upkeep after separation even the spouse has resigned from his administration.

7. **AIR INDIA V. NARGESH MEERZA**[81]

   This case is about the status of ladies and it was held that women will not be denied to work only on the ground that she was a lady as it adds up to the infringement of the Article 14 of the Constitution and the Court struck down the provision of the retirement of the airhostess, from the Air India Employees Service Regulation, 1963, on accomplishing the age of 35 years or on marriage inside multiyear of the administration or on first pregnancy as it is infringement of the Article 14 of the Constitution of India.

8. **SARLA MUGDAL V. ASSOCIATION OF INDIA**[82]

   The Hon‟ble Supreme Court said that the second marriage of a Hindu spouse or wife after change to other religion for example Islam which licenses polygamy is a void marriage. In the other word, change of a religion doesn't offer permit to submit bigamy[83].

[78] WP(Crl) No. 129 of 2006
[79] 1986 AIR 1011, 1986 SCR (1) 371
[80] CRIMINAL APPEAL NOS.564-565 OF 2015
[81] (1981) 4 SCC 355
[82] AIR 1531,1995 SCC (3) 635
[83] K.D. Gaur, Offence relating to marriage, section 494, Page-1047

9. MS. GITHA HARIHARAN V. HOLD BANK OF INDIA[84]

For this situation the Hon‟ble Supreme Court said that the father alone cannot guarantee that he is the main regular watchman of the minor kid and spouse has no authority over the minor. The court saw that a mother can likewise go about as a characteristic gatekeeper of the minor during the lifetime of his brother.

10. LILY THOMAS V. ASSOCIATION OF INDIA[85] **-**

The Hon‟ble Apex Court said that a second marriage during the lifetime of the mate is an offense culpable under Penal Code and marriage would be void under segment 11[86] and 17[87]of the Hindu Marriage Act, 1995.

11. JOSEPH SHINE V. ASSOCIATION OF INDIA[88]

Three judges bench of the Hon‟ble Supreme Court held that Section 497[89] is a denial of equality which abuses the Article 14[90], section 497 depends on sex generalizations about the job of women and disregards the non-discrimination guidelines typified in Article 15[91], Section 497 is a refusal of the established certifications of dignity, freedom, security and sexual independence which are natural for Article 21[92]. Consequently, Section 497 is illegal.

12. SHAYARA BANO V. ASSOCIATION OF INDIA[93]

The Hon‟ble Supreme Court set somewhere around 3:2 majority holding the act of Triple Talaq as illegal.

13. INDIAN YOUNG LAWYERS ASSOCIATION AND ORS. V. THE STATE OF KERALA AND ORS.[94]

The Hon‟ble Supreme Court held that the social avoidance of women, in view of menstrual status, is an infringement of Preamble and their major rights. Accordingly, the Hon‟ble Court permitted the section of ladies into the sanctuary Sabarimala.

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[84] W.P.(C) N0.000489/1995
[85] AIR 2000 SC 1650
[86] HMA,1955, Sec. 11: Void Marriage
[87] HMA,1955, Sec17: Punishment for Bigamy
[88] W.P.(C) No. 194 of 2017
[89] Section 497, Indian Penal Code 1872, Adultery
[90] Article 14, Equality before law, Constitution of India
[91] Article 15, Prohibition of discrimination on grounds of religion, race caste, sex or place of birth, Constitution of India
[92] Article 21, protection of life and personal liberty, Constitution of India
[93] W.P.(C) No. 118 Of 2016
[94] Civil Original Jurisdiction
Writ Petition (Civil) No. 373 Of 2006

In this manner, apparently Judiciary plays an essential and significant job in strengthening of women. Legal executive ensured status of ladies as well as gave their entitlement to live with poise and distinction. The Hon‟ble Supreme Court through its number of milestone decisions secures and protects the women structure from the evil effects of the society. It is judiciary which assumes crucial job in the translation of the Constitutional Rights through its judgment and considered the women not as generalizations and more fragile than men, it gave ladies uniformity and equivalent rights as men in the general public.

INSTANCES OF CRIMES AGAINST WOMEN IN INDIA

1. A girl aged 23 years old studied in pre medical college in Delhi. Rapist and threw her on road-side at injured manner and she died within 2 month. The ages of the victims were 35, 33, 29 and 16. They were all sentenced to death at High Court on 2014, March 5.
2. On November 30, 2014 at Howrah a class II student was allegedly raped by a relative in Howrah. When her mother approached the panchayat, she was told not to inform police. Their ordeal continued even when a doctor allegedly refused to treat the minor and kept them waiting for hours. The 7-year-old studied in an English medium school and used to live in Domjur's Ankurhati area.
3. Again, a rape case happens at Mainpuri in U.P. a rapist Shiv Kumar Yadav (32) raped a girl aged 25, after investigating DCP (North) Mr. Madhur Verma said that he was arrested for more than one cases , for molestation in 2003 , under Goonda Act Armed Act in 2006 and rape and robbery in 2013 in his hometown.
4. Another rape case happened at West Bengal at Malda District on December 18th 2014, Thursday. The naked and mutilated body of a class –IV girl was found in a banana orchard, about 12 km away from her home in Kaligram under Chanchal police station. The 12-year old was allegedly raped and killed. Apart from injuries to her private parts, she had one of her ear chopped off.
5. A rickshaw-puller's daughter, girl went missing on Tuesday evening. She took the family's goats to the field as usual, but never returned home. Her father then lodged a missing dairy at Chanchal police station. Harishchandrapur police station IC Babin Mukherjee said that they had got information of a child's body lying in an orchard near NH-81. Police suspected that the girl was first abducted and then raped. Finally she was killed with a sharp weapon. The brutal murder has created tension in the neighbour

areas. Apart from IC, a sub-divisional police officer too reached the spot to probe the matter.

In the last three years, number of cases relating to sexual harassment, kidnapping and abduction, including rape, has gone up from 2.28lakh to 3.096lakh. Over 31,000 rape cases are pending in high courts alone. Concerned at increasing pendency of cases of crime against women and children, the law ministry has written to the state government and the chief justices of High Courts to continue fast track courts. The conviction rate in these cases came down from 27% to22% between 2011 and 2013. After the Nirbhaya case, the centre had asked states to allocate additional funds for setting up of fast track courts for trials related to crime against women and children. Along with the cases of suicides due to dowry system, Eve teasing and molestation, murder of women have risen abnormally. It has become a great social problem. The negative social attitude towards the victims of such cases creates serious psychological problems. Unfortunately, people look down upon a victim of rape, whereas a women who has gone through an extreme painful situation, needs social and emotional support. This is double victimisation – one by the rapist and the other by their social circle. So rape is not only a sexual and physical attack upon a woman, but also on the last vestige of honour of her family. Indian women belonging to any class suffer from an inferiority complex. The male dominated society makes them feel that they are in competent in adequate and worthless. It is from the time of their birth, their brain washing begins. From childhood a girl is groomed for a way of life that is accepted by other. This passive acceptance of her lot makes her an easy prey in male dominated societies. So the violence against women and girl can be tackled at two levels – socially and legally. In case of the former, the women's will have to have to be confident in her had spread those confident to women's on their society. From the legal side, she will have to be treated as a living, thinking sensitive human being having her own identity; she should not be treated as the property of her husband and parents[95].

Under the ancient law codes, crimes against women were not a violation of the property rights of her father, brother or husband. A woman was considered to be the property of the parents or husband. A woman was considered to be the property of the parents or husband. The punishment was that the damaged property be bought by paying compensation and marrying her. Punishment for rape should be quite stringent. But simply by imposing deterrent punishment we cannot do away with the evil of rape. We cannot or should not look at rape in

[95] Thara R. A Study of Disabled Women. Chennai (India): SCARF; 1997-1998.
A study of mentally ill disabled women who have been separated/divorced. Google Scholar

purely sexual terms. It is a cultural offence. Man should not be allowed to consider women as his property; she is a companion who must enjoy all the rights of being equal. Society must atone for her suffering instead of condemning her. Nowadays in many fields where women get opportunity had proved themselves that they are not less talented then men. Women are showing talent in business, sport, decision making in the field of social, economic and political field. Some of the successful women are also holding higher posts in office and institutions. Women are also motivated by giving awards.

ISSUES AND CHALLENGES

1. USAGE OF 498A – A MYTH

498A is misused for the maximum time period. The interest for changes to Section 498A stems from a general myth that Sec 498A is abused. Men involved in working with women confronting abusive behaviour at home unmistakably shows that as opposed to Section 498A being abused, it is a Section that is 'not really utilized' by women. Our social setting, the degree of aggressive behaviour at home and the real utilization of 498A unmistakably prove this reality. As referred previously, in every one of these long periods of work, it has been discovered that a dominant part of women confronting aggressive behaviour at home request assistance to stop the savagery and to accommodate with their better half[96]. They don't take plan of action to law until they have depleted every single other alternative to spare their marriage. Much after this a vast greater part wouldn't like to move toward the police. Therefore there should be a higher rate of approach towards the police that would lead to winding up documenting a case under Section 498A.

2. GENDER ORIENTATION

Indeed, even today, women in India are considered as inconsistent in each circle - reliant on men and their families for their reality; confronted with expanding conjugal brutality and social weights to keep up family regardless of the viciousness; lose their lives day by day because of conjugal savagery; are ignorant of laws to secure them; need assets and backing to seek after the law; and don't have the ability to arrange or impact. Men then again have presentation, information and assets to get to the law, and

[96] Kishor S & Gupta K. (2009).Gender equality and women's empowerment in India. National Family Health Survey (NFHS-3),
India, 2005-06. Mumbai: International Institute for Population Sciences.

utilize their capacity to impact the framework and pull off it with their own influence. Making the law sexually unbiased under these conditions will make women totally powerless and bring about men mishandling women and documenting as well as filing cases before women can gather the boldness and backing to do as such, and the motivation behind the law will be completely vanquished[97].

3. COGNIZABLE OFFENCES

A non-cognizable offense keeps the police away from enlisting a FIR, researching, or requesting a capture without the express consent or headings from the court. The way that the law is cognizable permits the police to make quick move on the objection of a woman and the issue can be tended to approach without the leave of the court. All things considered, women think that it is hard to arrive at the Police Station and record a complaint as the police are hesitant to make a move under Sec 498A. Making the offense non-cognizable will put an immense weight on ladies who should experience the legal procedure to file an initial complain along these lines making it troublesome if certainly feasible for ladies for whose advantage this law was sanctioned to utilize the law. On the off chance if the law becomes non-cognizable, then no move made will be taken by the police and the law will turn out to be absolutely toothless and stay on paper.

4. NON - COMPOUNDABLE

Law sets a standard for society to follow anytime. Conjugal savagery is a wrongdoing and compounding it will convey a message that the gravity of wrongdoing is not as much as that of other comparative crimes. Further, women will be feeling the squeeze to pull back protests and bargain by family, the other party, legal counsellors and courts and will wind up being undeniably vulnerable against brutality and savagery. A system for suppressing Section 498A cases as of now already exists in the High Court and we can use it where women choose to pull back the case. The law must remain non-compoundable to guarantee that social weight doesn't bring about ladies being compelled to pull back cases.

[97] Khanna R. (2008).Communal violence in Gujarat, India: impact of sexual violence and responsibilities of the health care system. Reproductive Health Matters, 16(31), 142-52.

SUGGESTIONS

1. PSYCHOLOGICAL ILLNESS

Mental disease ought to be distinguished and treated speedily. Patients with dynamic side effects ought to be kept in a secured situation till considerable improvement happens. Numerous patients may require long lasting assurance for example those experiencing mental impediment or constant schizophrenia. Ladies with extreme psychological maladjustment need extraordinary consideration. Women need security however those with psychological maladjustment need more consideration and insurance.

2. LIMITATION ON UTILIZATION OF LIQUOR

There ought to be denial of liquor use in mass social affairs in establishments, open spots like trains and transports. The quantity of liquor outlets ought to be diminished. The age for buying liquor might be raised to 30 years. Special consideration should be given on merry events for reduction of sell of alcoholic and toxic substances. Automatic treatment of people with liquor reliance ought to be completed.

3. CONTROL ON MEDIA

Sexual material ought to be controlled in media. Great topics, which censure viciousness and praise recovery of the person in question, ought to be anticipated. Prohibition on erotic entertainment ought to be carefully executed. The destinations must be blocked.

4. RELATIONSHIPS

Marriage of young men and young ladies ought to ideally be in mid 20s, when possible, with the goal that sexual needs could be fulfilled in a socially proper way.

5. FORTIFYING THE ESTABLISHMENT OF MARRIAGE

Solid conjugal bond would go about as an obstacle. The "Shiv-Parvati" model ought to be advanced for Hindus.

6. REQUIREMENT OF LAWS

Effective and responsible law implementation hardware at all levels (organization, government, police and legal executive) is required.

7. ENACTMENT AND CHANGE IN OUTLOOK OF THE LEGAL EXECUTIVE

This is the need of the day. Indira Jaising, Additional Solicitor General of India, suitably expressed "It's the ideal opportunity for India's courts to look internal and toss out profoundly installed man centric thoughts that prevent decisions from being reasonable for

women. Sexism inside the framework needs to go before it accomplishes more harm in the country.[98]"

8. GOOD AND RELIGIOUS QUALITIES

Guardians and instructors ought to endeavour to implant great good and strict qualities in kids and fill in as good examples.

9. POPULACE CONTROL

Last, yet not the least, If we are genuine we will get the outcomes. Let all of us state "No" to savagery against ladies.

CONCLUSION

Therefore, last but not the least this paper discusses the main issues regarding the violence and crimes that takes place against women in India. Thus, this research further shows about the legal assistance that must be provided to women facing domestic violence or sexual harassment. Public Interest Litigations can also further enhance the human rights standards as well as alternative disputes mechanisms thereby conducting Lok Adalats in collaboration with the other statutory authoritative sources. The courts are, thus, expected to manage instances of sexual wrongdoing against women with most extreme affectability. Such cases should be managed harshly and harshly. A socially sharpened appointed authority is better statutory protection in instances of wrongdoing against ladies than long conditions of correctional arrangements, containing complex exemptions and stipulations[99]." Assault is the predominant wrongdoing against ladies in India and overall Regarding nature, way of submitting the offense like assault and the results of assault on ladies, the perspective on Brown Miller Susan in his Article 'Without wanting to', 1986, detailed and depended in Sakshi's. Therefore it is generally asserted that the existence of criminal laws tends to be gender biased but most of the times law does not attain its target as it aims to. Thereby at present amendments are done on a regular basis to Indian Penal Code 1860 and Criminal Procedure Code 1973 in order to render those legislations to be more efficient in an effective manner[100].

[98] Jaising I. Blind to what, your honour. Times of India. 2013 Jan 6; Google Scholar
[99] Women and Law, Prof (Dr.) Samiya Tabasum, First Edition-2018, Central Law Publications.
[100] Dr Upendra Baxi, Dr Lotika Sarkar, Dr. Vasudha Dhagamvar and Professor R.V. Kelkar.

(5)

FAILURE OF EMPATIC JUSTICE TO THE VICTIM OF TERRORISM BY DEMOCRATIC GOVERNMENTS

B.G.Shobha[1]

Democracy is by the people for the people and of the people

-Abraham Lincon

INTRODUCTION

As the above meaning Democracy means rule by the people and ensure them protecting the people by providing basic rights along with social, political, Economic, Cultural Rights[2].

But the Terrorism is present and threat all round the world it is well known as illegal violence by non state actions immediately threaten the people and its Governments Politically, Socially, Economically go down day by day.

The Terrorism emotionally charged that frequently used to politically and socially denigrate. It is really confused why so many men, women, children were driven to violence by the terrorist groups. Terrorism is a product of poverty it leads to poor development in Economic of a country. Due to this there will be frequent attack on citizens and casualties and deaths in the global level. The citizen are attacked by terrorist without any reasons. Both developed and developing countries in the world witnessed the suffering of terrorist attacks. The countries like U.S.A, USSR, France, Germany, Afghanistan, U.K, India Syria Somalia, Pakistan Nigeria, Iraq Yemen, Egypt suffering with frequent attacks.

After 9/11 attack entire world's eyes turned to counter the terrorism. The war established on Islamic, Caliphate in Middle East and also global level threat from, ISIS, Al Queda, etc. these frequent attacks changed the picture of democracy. If same attack continue made leads to total destroy of Democracy the political, Social Economical powers may go in hands of terrorists in global level[3].

As it is well known terrorist goal and intention are not known it is an illegal violence in the way of killing people and damaging the properties of citizen without no fault. They believe

1. Principal, Kempegowda Law College, Near SJCIT Engineering College,

[2] The new era of Terrorism selected reading by editor California State University 2007 International Human rights in context by J.Stenier Henery 2007. By Henry J. sterier,

[3] Philps Alston, Ryan Goodman

that they are fighting for freedom in the name of religion. It may be psychological basis. The several attacking ending with several casualitra and moralities. Ex:- People live in Pok line, Balcoat, Pulwama attacks made the citizen's failure in Economical level. It become sever problems to every Democratic Government to take care attacks of citizen's. the government need strong political social power to get rid of terrorism the government provides victim assistance programmers in protecting victims rights are: -

- The rights of every citizens must treated with sensitivity, fairly and dignified respect to victims.
- The victims got rights to attend criminal justice.
- The victims rights to know about proceedings like arrest of accused parole and other proceeding 313 statement, punishments etc.
- The right to be informed every processes of legal events[4].
- Protection of witness
- Right to speedy trial
- Right to privacy.

The right to enforcement of these rights and access to avoidable remedies in addition to victim rights nearly two-third of states have adopted amendments to their state constitutions guaranteed rights of victims of crime. The state constitutions to increase the strength performance and enforcement of victim rights. The citizens are attacked by several terrorist groups with their own name there are more than 274 group are there in global level[5].

EUROPEAN COUNCILS SAYS HOW THE VICTIMS TO BE PROTECTED

1. The fundamental rights of all humans are going to suffer physically, psychologically who are all attacked by terrorist.
2. The victims and families kith and kins must identified and helping hands must reached to them.
3. Emergency assistance to victims must provided immediately like medical social, spiritual assistance to all victims and their families, survivals.

[4] Contempory Trends in world terrorism edited by Anat Kurz Dimensions of terrorism edited by Alan O' Day

[5] Article Terrorism & Insurgency in India , Mahendra P. Lama V.C Sikkim University

4. The continuous assistance must extend to victims like law and justice must provided to victims by filing case in approached court for compensation.
5. The victims and their families must protected by further attack on the victims and their families. It the witness and their personal life must be protected.
6. The compensation in the form of reeauniary must reach to victims, dependents survivals, In juried, loss of life also to kith an kins.
7. The victim includes the family dependents who suffered injuries partially or permanently.
8. The Article 1 says that the state must recognized the harms due to terrorist attacks the state must responsibility to pay the compensation to victims of terrorism.
9. The Article 2 says the compensation scheme victims says not only paying compensation must protect the life and properties of citizen.
10. Protection of victims before and after attack
11. Emergency assistance
12. Continuing Assistance
13. Investigation Assistance and helps to victims
14. Providing law and justice.
15. Protection of private and family lives of victim,
16. Compensation to victims
17. Protection of dignity and security
18. Training for persons who crates awareness to people.

Before 9/11 attack USA had different approach on compensation for victims. U.S Government civil tort law and insurance laws operated in paying compensation victims[6].

The frequent attacks on mankind made the democracy to lose their economic stability as number of attacks more the number compensation also rising day by day. Government leads state budget scrumbled. Every time the state must goon attiring the compensation amounts to victims and in juried, kith and kin of person who lost their lines.

Terrorist attacks between 1989 to 2018.

- Victims who are in service received allowance , Bonus who are not taxed
- Compensation paid in form of high salaries bring down to pay the compensation

[6] Dobson, Christopher. *Black September: Its Short, Violent History*. London: Robert Hale, 1975.

- Rehasilation packaged like paying insurance amount
- Medical treatment transportation costs
- Monthly person
- Long term care
- Compensation extended to victims of abroad attacked by terrorist.

COMPENSATION TO VICTIMS TO TERRORISM BY DIFFERENCT COUNTRIES

USA COMPENSATION SCHEME

After 9/11 terrorist attacks on world trade centers and pentagon special funds are established. The disability medical expenses, nature of injuries, survivals, lose of properties the state must bear the payments to the victims. The government will bear the indemnities on civil responsibility and agreements.

The bush Administration created new compensions programme for victims of terrorism financed by state departments funds and proposals were rejected by US Congress. 9/11 attack made the losses to victims approximately 15 billion dollars. The damages includes economic and non economic losses associated the death as physical injuries. Appropriate funds must be crated for compensation.

The US Government fund was not to be replacement of tort system. The source was funding scheme of 10 billion dollars.[7]

- Statutory centers are established to provide financias Assistance.
- Legal assistance
- Compensation extended to victims who are all attacked terrorism in aboard.
- The victims get the compensation if they succeeded legally.
- In case of death beneficiaries passed to successor
- Loss of service period medical treatment period treated as economic loss to victims.
- Loss of education
- Assistance by third parts
- Loss professional and prosal life.
- Injuries are calculated on endure and sufferings.

[7] Freedman. Lawrence Zelic. "Terrorism: Problems of the Polistaraxic." Pages 3-18 in Yonah Alexander and L.Z. Freedman, eds., *Perspectives on Terrorism*. Wilmington, Delaware: Scholarly Resources, 1983.

- Created permanent funds
- Psychological efforts to bring them to main stream
- U.S Government sets side money for victims until they are normal
- Education assistance for future is calculated
- No fixation of compensation amount
- In dist of Colombia $ 5,00000 each victims
- North America $ 2,00000 distributed on based of population[8].

UNITED KINGDOM COMPENSATION SCHEME

- Compensation to injured physically, mentally
- Witness in terrorism case
- Medical assistance and moral assistance
- Amount to partners and close relative
- Funeral expensive
- Legal assistance
- Long term care
- Extended to victim of aboard 2009 bill.
- Future maintance calculated on basis of injuries

GERMANY COMPENSATION SHCEME

- The compensation for physical injuries, no legal entitlement
- Soldier or citizen financial assistance extended
- Material damages not included in compensation scheme.
- One-off capital payment to victims
- Medical, other assistance pensions paid victims

COMPENSATION SCHEM AT USSR

- Medical expenses for physically or psychologically attacked victims
- Legal assistance
- Compensation injuries kith and kin of deceased
- Compensation is depends on the nature and injuries

[8] Cubert, Harold M. *The PFLP's Changing Role in the Middle East*. London and Portland, Oregon: Frank Cass, 1997.

- Amount fixed on nature and time[9]

The countries like Sudam Afganistan, Iraq, Egypt Lodin, established permanent pension scheme to victim of terrorist attacked.

Federal government programs

- Provide assistance to victim on statutes
- The pocket expenses funeral expenses loss of life loss of enjoyment, loss of wages, loss of consortium, are not consider under compensation schemes.
- The Re embursement 1 lakhs is going to pay as immediate assistance.

COMPENSATION SCHEME IN INDIA

- Medical expenses
- Education to children of victims
- Cash for femoral
- Hospital expansion
- Treatment cost
- Spot aid to victim
- Jobs to survivals

Ex:- Pulwamma attacked 2019 CRPF persons paid 1 crore 40 CR. yet to receive the compensation.

Jobs offered by different state government

Total amount 2.16, 3.24 crores. Financial assistance residential flats given to 21 cases are progress 19 cases of kith and kin of survival awaiting financial assistance. Still they are waiting for justice.

According to bill 2017 says, Rs. 2,000 for funeral 5 lakhs to person with rehabilitation in form of employment, vocational training cost of construction of houses loss of business must pay appropriate compensation they must paid till they get back to their normal life.

After comparing the compensation scheme of various countries question arise is their uniformity in payment compensation in all developed and developing countries. We can says no uniformly in victims compensation scheme. The threat for the world peace we believe

[9] P.R Gandhi International law And Human Rights

psychological processes described to domestic terrorism. The study or social, political, economical level can't build the grounds for terrorist act .9

The fixation of compensation is not their global level the amount varies from victim to victim, there is lot of difference in paying compensation when there was attacks the government announces the compensation amounts to victims and family members. But reaching of compensation takes long processes. The victim and kith and kins suffers with economical instability. As there is no proper and strong startles it is very difficult to establish uniformity in compensation.

The frequent attacks on government effect the economics smaller. It is to be noted majority state amended the constitution guaranteed rights by giving same additional rights. The rights which are guaranteed must create stronger. It is very difficulties to change the constitutions. The amendments to be done with 2/3 majority of votes in both the house can pass time to time in fixing compensation which leads to failure of emphatic justice to victims of the terrorism.[10]

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(6)

HUMAN RIGHTS OF SEAFARERS

Nivya Valsan*

Emil Stanley**

INTRODUCTION

Maritime history dates back thousands of years in which maritime trade lasts almost two Millennia. During early years vessels were used for fishing and travel. 17th century marked a drastic change in the maritime history because Europeans started to build seaworthy vessels which is fit for travel and trade. Every vessel needs manpower for its function. The persons who employ in seafaring activities are known as Seafarers. The life of early seafarers can be traced in the chronicles of Edward Barlow who went to the sea in 1659 and return from a voyage after 20 months. He sailed on a British ship, Queen Charlotte. Seafarers' life was considered tedious and tiring.

SEAFARERS

"A seafarer[1] is a person who assists a crew member in navigation and maintenance of waterborne vessel"[2]. The legal definition of a seamen, in its statutory form states as, ―includes every person (except masters and pilots) employed or engaged in the capacity on any ship.[3] A ship includes every description of a vessel used in navigation not propelled by oars.[4] The Merchant Shipping Act (MSA) sometimes includes masters even though they are excluded from its ambit. The sections 62 to 66 of the MSA say that, seamen include master of the ship. Seamen means people employed or engaged in shipping activities do not require going at sea[5].

"Seafarer are persons who engage in seafaring activities. It is not necessary that they should be onboard, they can be in the coast also engaging in the vessel operation."

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[1] SEAMAN is the first called to a person working SEABASED, this usually are MALE. But as time goes by WOMEN are now also performing the duties of a SEAMAN that's why SEAMAN was changed to SEAFARER to make it more universal.

[2] *https://wiki2.org/en/Sailor*

[3] Merchant shipping act 1894, Sec.742 (as amended by MSA 1970, Sec 100 (1) and schedule3, para.4). Jonathan kitchen. Employment of seamen. Croom helm London.

[4] Section 742 of MSA,1894

[5] Thomson v hart, (1890)28 Sc.L.R.28

The persons who are engaged in adventures work are onboard seafarers. They should be given more care. Seafarers are like other human beings who possess rights that are inherent, universal and unalienable. The essence of rights is that violation of a person's right gives an injured person a legal right to redress such wrong doing before a court of justice and an entitlement to claim for compensation for damages.

WOMEN SEAFARERS

Women started entering the profession making a social transformation to the industry. Women seafarers may carry different images of women at sea depending on what kinds of sailing crafts are concerned. Earlier they work onboard without revealing their identity. They even dress up like men. But now they reveal their gender but makes no difference in case of their work. Women were considered weak and given less importance. Women's talent are mostly underutilized.

HUMAN RIGHTS OF SEAFARERS

Human rights are availed by States to all individuals within their jurisdiction and also to groups of individuals. "Human rights are universal and should be enjoyed by everyone, regardless of nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. Human rights are enshrined in international law, international treaties, and regional treaties and national constitutions.[6]Human rights are the ―basic rights and freedoms to which all human are entitled. The Universal Declaration of Human Rights adopted by the United Nations in 1948 recognizes the inherent dignity and inalienable rights of all members of the human family and they are to be treated equal." They includes the right to life and liberty and equality before the law.

- Right to Life – Article 3 of the United Nations Universal Declaration of Human Rights (UNDHR)[7] and in article 6.1 of the International Covenant on Civil and Political Rights (ICCPR)[8]:

  "Every human being has the inherent and inalienable right to life. These right shall be protected by law. No one shall be arbitrarily deprived of his life."

[6] *http://seafarersrights.org/seafarers-subjects/human-rights/*
[7] United Nations Declaration on Human Rights or UNDHR is a declaration adopted by the United Nations General Assembly by Resolution 217 A (III) on 10 December 1948 at the Palais de Chaillot, Paris, France.
[8] The International Covenant on Civil and Political Rights or ICCPR was created in 1966. It entered into force on 23 March 1976.

This right is unalienable right. There are two elements, they are

a) Inherence of the right to life and

b) Legal protection of such right

Human beings are born free and have equal dignity. They must be treated without any discrimination of any type as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Moreover, no human being shall be held in slavery or servitude or be subject to torture or to cruel, inhuman, or degrading treatment or punishment. Seafarers are also human beings, they also have the inherent right to live dignifiedly.

- Right to Equal Protection of Laws – Seafarers are considered as a special category of workers because they work in water more and in multimodal jurisdiction. They have the right to be afforded with necessary legal protection and have to be treated equally before any law.

  "UNDHR is explicit on this: ―All are equal before the law and are entitled without any discrimination. They have to be provided with equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". This means that the equality of all persons before the law. According to this, people are not treated differently because of who he is or what he possesses.

  Article 25 of UDHR[9]

  "(1) everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
  (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection".

[9] *Supra* n.6

CHALLENGES FACED BY SEAFARERS

Seafaring job is adventurous and each day they are undergoing different challenges. Hammond, a former barrister, says he was working on a legal case back in 2013, he discovered, only find academic narratives relating to human rights at sea. "Of course, we had labour rights which look after the fundamental workers' rights at sea, but remarkably no human rights at sea"[10]. Every seafarers are human beings and have equal rights compared to other individuals. Whether they are acquiring such rights is a matter to be thought about. The challenges they face as regards to human rights can be characterised into legal issues and practical issues.

LEGAL ISSUES

United Nations Convention on Law of the Sea, 1982 was adopted and became the legal framework of maritime industry. UNCLOS-III deals with territorial sea, contiguous zone, continental shelf, marine scientific research etc…. but didn't explicitly deal with the human rights of the seafarers. Human rights of seafarers are dealt by UDHR[11]. International human rights law is applicable to Flag State jurisdiction and it's the state's responsibility to protect and fulfil individual against human right abuses. They have to ensure the human rights of individuals.

It is well aware that states jurisdiction are made limited by the maritime zones. In Territorial sea (which is of 12 NM form the baseline) and contiguous zone (24 NM form baseline), states have port state jurisdiction. Other zones such, Exclusive economic zone (200NM from baseline) and High Sea (beyond 200NM) states exercise Flag state jurisdiction. This flag state jurisdiction can be made applicable to registered ships. Pirates, which is a major cause of human rights violation, who came to attack never register their ships. There is no convention yet put forward specifically for protecting the human rights of seafarers.

PRACTICAL ISSUES

Health:

Poor food

For seafarers the issue of food is very significant. It is not that they get food but they need right nutritious food. This is for improving the health and well-being of the seafarers. Right to food

[10] *https://www.ship-technology.com/features/human-rights-at-sea/*

[11] United Nations Declaration on Human Rights or UNDHR is a declaration adopted by the United Nations General Assembly by Resolution 217 A (III) on 10 December 1948 at the Palais de Chaillot, Paris, France.

and right to health are important factors of human rights. The general concept of adequate food can be broken down into several elements: the food supply should be adequate, which means that the types of foodstuffs commonly available (nationally, in local markets and, ultimately, at the household level) should be culturally acceptable (fit in with the prevailing food or dietary culture); the available supply should cover overall nutritional needs in terms of quantity (energy) and quality (it should provide all the essential nutrients, including micronutrients such as vitamins and iodine); and, last but not least, food should be safe (free of toxic elements and contaminants) and of good quality (in terms of, for example, taste and texture)[12].

Unhygienic living conditions

Another challenge faced by the seafarers are unhygienic living condition. Poor hygiene can put forward health issues. Maintenance of hygiene is an essential thing for the well-being of the seafarers. Usually hygiene cannot maintained on board because of their hectic works.

Communication blocked off with the outside world

Seafarers, while they are on board. They cannot communicate with their persons offshore. This will lead to isolation and depression. That means their mental health is been effected.

Right to life

Abuse

Life at sea for many seafarers involves much abuse. Physical abuses include beatings and sexual assault, inadequate medical treatment, sub-standard accommodation, and inadequate food. Mental abuse arises from isolation, cultural insensitivity and a lack of amenities for social interaction[13].

Torture and death.

Seafarers are prone to torture and death. Their hectic life and over work load is a form of torture. Every seafarers need rest hours but in fact they are nor receiving it. Even they will not be provided with adequate food. During emergency situations seafarers have to sacrifice their lives in order to protect the vessel, cargo or passengers.

[12] *http://www.fao.org/3/w9990e/w9990e03.htm*
[13] *http://seafarersrights.org/wp-content/uploads/2018/03/INTERNATIONAL_REPORT_SHIPS-SLAVES-AND-COMPETITION_2000_ENG.pdf*

Piracy

It is one of the major factor that constitutes human rights violation. Piracy is an act of robbery or criminal violence by ship or boat-borne attackers upon another ship or a coastal area, typically with the goal of stealing cargo and other valuable items or properties. Those who engage in acts of piracy are called pirates[14].

Human trafficking

Forced labour is an essential factor. Article 4 of the UDHR[15]: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." Today slavery still exists, but it has a different name, it's called human trafficking.

Lack of monitoring and reporting of human rights abuses

Monitoring and reporting mechanisms dealing specifically with violations at sea were lacking or absent, and the study called for public and accessible reporting procedures to ensure that seafarers are not being exploited. There is no specific monitoring mechanism to ensure the seafarers abuse. No reporting mechanism are also there to protect the rights of seafarers.

Lack of payment

Seafarers are entitled to wages and other basic allowances. Denying this is also a human right violation because they live with these wages. Wages are necessary for the better life of the seafarers. This is an essential for increasing the working of the seafarers.

Abandonment of seafarers

Seafarers may face abandonment for many months, sometimes years, without pay, and little hope of repatriation. The crew are unexpectedly deserted by their employer who has become incapable of generating required funds to continue with daily marine operations. The abandoned seafarers often also find themselves stranded in a country where they do not speak the language, and where they face the difficulties of financial constraints due to unpaid wages. When combined with the dangers of the elements of the sea, and the possible abuse by bad owners, this puts an unacceptable pressure on the seafarers[16].

[14] *https://en.wikipedia.org/wiki/Piracy*
[15] *Supra n. 10*
[16] *https://www.humanrightsatsea.org/wp-content/uploads/2019/04/20190404-Paper_WMU_Womens_Empowerment-Conference_Hajar-Hejazi_Seafarer_Abandonment_Final.pdf*

Equal protection of laws

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Women seafarers

They are special class of seafarers who have violation under this category. Women talents are underutilized and they are not getting the same wage as of male seafarers. They undergo sexual harassment, gender discrimination, not being promoted, bulling, isolation etc…….

SUGGESTIONS TO ERADICATE THESE PROBLEMS

Need of more stringent laws: Even though there are many conventions relating to maritime field and rights of seafarers they are not adequate. More stringent, special and specific law are needed to help the seafarers in order to ensure their human rights.

Ship owners should give more care and caution to the seafarers: it is the responsibility of the ship owner to protect its employees. They have to provide them with proper food, wage, sanitation, repatriation etc… Ship owner should never torture its employees. Strict action should be taken against the ship owners who violates rights of seafarers.

Avail them with better medical access: every seafarer should be provided with proper medical treatment both physical and mental treatment. They should be given regular checkups because they are mostly prone to epidemics.

Provide them nutritious food: simply providing with food is not enough. They have to be provided with proper nutritious food because nutritious food are necessary for the good health condition of the seafarers.

Put forward proper mechanism to monitor onboard abuse: Monitoring each and every activities of the vessel on board by the flag state is necessary inorder to ensure the seafarers well-being and eradicating any sort of human rights violations.

Report every seafarer abuse: seafarers should be instructed that any sort of abuse onboard the vessel should be reported offshore, to the authorities concerned.

Provide them with proper rest hours: Rest hours are essential inorder to strengthen the working condition of the seafarers. Provide adequate rest hours so that the seafarers can get healthy working condition and secure their health.

A campaign to seafarers regarding gender equality: there are many campaigns which were put forward to secure the human rights at sea and protection of women seafarers' rights. But still these campaigns are conducted offshore which is not so fruitful because onboard seafarers are still not aware of these campaigns and its essence. Provide campaign on board inorder to be effective.

Orientation to the seafarers: Seafarers before starting their sailing should be given an orientation regarding their rights, their duties, their responsibilities etc…

Make every human right violation a criminal liability: Criminal action should be taken against the ship owners and other personnel who violates the human rights of the seafarers. More stringent laws are necessary to protect the rights of seafarers.

States should provide proper security to seafarers against abuse, trafficking and piracy: State have the authority to protect its citizens. They have to provide security to its people against all sort of piracy, trafficking etc……

FIRST GENEVA DECLARATION ON HUMAN RIGHTS AT SEA

A new convention is under drafting process in order to build an adequate legislation for protecting the human rights at sea. The first version of the opening '**Geneva Declaration on Human Rights at Sea**' is published by Human Rights at Sea after the initial drafting session was held in Switzerland on 20-21 March 2019 at the Graduate Institute of International and Development Studies, Geneva. The principal goal of the Declaration is to advance global awareness of the abuse of human rights at sea and to mobilise an intensive international effort to put an end to it. It identifies established International Human Rights Law and International Maritime Law, highlights the applicable legal assumptions, and reflects the developing progress and customary use of the increased cross-over of the two bodies of law. The concept of human rights at sea rests on four fundamental principles:

1. Human rights apply at sea to exactly the same degree and extent that they do on land.
2. All persons at sea, without any distinction, enjoy human rights at sea.
3. There are no maritime specific rules allowing derogation from human rights standards.

4. All human rights established under treaty and customary international law must be respected at sea.

The first drafting round was supported with input and observers from multiple UN agencies, leading human rights lawyers, international and civil society organisations. The second drafting session will be held in Geneva in May[17].

The declaration is essential for the protection of seafarers' human rights.

CONCLUSION

Maritime trade is the most essential field which contribute more to the world economy. This seafaring trade is possible only by the personnel who work in the vessel known as seafarers. The seafarers lead an unusual social life-One on board the vessels and the other on land. They undergo very serious issues with regard to their rights. Violation of human rights take place on-board. Their rights have to protect because they are also human beings who have inalienable and inherent rights. There are many conventions with regard to the rights of seafarers but they are not adequate. Even though there are much more conventions for protecting the rights of seafarers, they cannot met the still prevailed human right violations. Geneva Convention for human rights at sea is under drafting process and it viewed that these convention may put forward better results. More stringent laws and its enforcement can only bring these violations to an end. Thus, it can be concluded that seafarers are an isolated class of workers, for whom effective or adequate legislations are to be enacted.

[17] *https://www.humanrightsatsea.org/2019/04/05/first-geneva-declaration-on-human-rights-at-sea-published/*

CHAPTER 4

INTELLECTUAL PROPERTY RIGHTS

(1)

AN ANALYSIS OF THE ISSUES AND CHANLLAGES IN COMMERCIAL SPORTS BROADCASTING

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INTRODUCTION

Intellectual property right (IPR) has been among the most discussed arena dealing with diverse area of techno legal as well as socio legal prospective in today's scenario. Starting with the protection regime towards recognition of the rights of the author towards new dynamisms in current scenario such as AI, block-chain etc. these dynamism has endured us to think more on the aspects of creativity and leading us the road towards the inventiveness and innovativeness in the society at large. Progress in the technological arena trust for a new thought and diversification and thus agrees the diversification enabling it to be dynamic in character.

The IPR regime prevalent in India has been refurbished several times to accommodate the change in Indian society. Such is in the case of wide arena of copyright, which covers a wide regime of works. Starting with literary and artistic work encompassing books, poems, stories, paintings, sculptures, dance and musical works including tunes and sound recording. Furthermore a new dimension has been brought into the traditional thought of the copyright where by the inclusion of broadcaster's right, moral rights, performer's right and so on has been clubbed into the regime of the copyright.

Broadcaster's right in a wider form is towards a wider public preview where by massage or a work is being broadly casted among the public at large. As it is viewed by as wide group of people it creates a mass impact in the society which is the reason why the broadcasting has been put in a higher footing while dealing with other neighboring scopes. Broadcasting has been influencing our society in various aspects let it be education to that of entertainment. The persuasion of broadcast is so instrumental that it becomes a trend in the modern developing society. In modern days most of the information is passed on through satellites and various other broadcasting mechanisms prevalent which has been an eternal gift of science and technology. India being the most emerging country in information technology which is also known to be a hub of scientists and engineers has been focused more on day to day information

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through this medium. It being utilized by a major chunk of population making it the most popular arena of neighboring rights. Looking at its diverse prospects the broadcaster's right has been a matter of debate and deliberation, whereby various cases has been filed relating to the rights of both the sender and the receiver. The cases such as ZeeTV case, Crickbuzz and StarTV case has been pioneering some untold issues which has been heard and judiciously implemented.

DEVELOPMENT OF COPYRIGHT

It says in a part of it as:

'…[T]he Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years,... and no longer; and that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Fourteen Years, to Commence from the Day of the First Publishing the same, and no longer;...'[3]

Infringement of copyrighted works was used to be taken into consideration whenever there is any unauthorized printing used to take place for selling, hiring or exporting to sale or hiring. The suit for infringement was to be filed before the highest local Court exercising original civil jurisdiction.[4]

Subsequently after a gap of decade some changes are introduced through and amendment in 1994. These included:

- The increase of the term of copyright from fifty years post mortem to sixty years;[5]
- The extension of copyright to new types of works including computer programmes and performances;[6]

[3]Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).
[4]Ibid
[5]Ibid
[6] Ibid

- The redefinition of "communication to the public" so that a work is communicated "regardless of whether any member of the public actually sees, hears or otherwise enjoys the work".[7]
- An overhaul of the vocabulary employed in the Act, for instance – substituting 'broadcast' for 'radio diffusion', 'work of architecture' in the place of 'architectural work', 'sound recording' in the place of 'record'.[8]
- Clarification of the ownership of copyrights over public speeches and works by public undertakings.[9]

Halsbury's Laws of England has made the following observations

"Only original works are protected under part I of the Copyright Act, 1956. But it is not required that the work should be the expression of original or inventive thought, for Copyright Act is not concerned with the originality of ideas, but with the expression of thought, and, in the case of a literary work, with the expression of thought in print or writing… There is copyright in original dramatic works and adaptations thereof, and such copyright subsists not only in the actual words of the work but in the dramatic incidents created, so that if these are taken there may be an infringement although no words are actually copies. There cannot be copyright in mere science effects or stage situations which and not reduced into some permanent form."[10]

'Nature gives us ideas of animals in their natural surroundings: an Eagle with talons extended to snatch a mouse; a grizzly bear clutching a salmon between its teeth; a butterfly emerging from its cocoon; a wolf howling at the full moon; a jellyfish swimming through tropical waters. These ideas, first expressed by nature, are the common heritage of humankind and no artist may use copyright law to prevent others from depicting them.'[11]

Indian Copyright Act, 1957 speaks about certain works which has copyright protection. They are literary, dramatic, musical, artistic works, cinematograph films and sound recording.[12] With

[7] Ibid
[8] Ibid
[9] Ibid
[10] Halsbury's Laws of England (4th Edn.)
[11] *Satava v. Lowry*, 323 F 3d 805 (9th Cir 2003)
[12] The Copyright Act 1957, s 13(1) reads as:
(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-
(a) original literary, dramatic, musical and artistic works;
(b) cinematograph films; and
(c) sound recordings;

the advancement in the communication technologies there has been introduced some new rights to be protected under the Act. They are broadcasting rights, performer's rights and moral rights.

In modern days copyright has been enabled in all the fields, as everywhere people are claiming rights for their creation and sports is one of the major fields of creation for copyrighted works.

INTELLECTUAL PROPERTY IN RELATION TO SPORTS

The basic fundamental question regarding this topic is 'what is a sport?' Defining the term 'sport' is difficult as there is no particular expression to sport. There are various types of sports and so there are various kinds of definitions for each of them. Collectively a sport can be said as physical human activity that exist somewhere along the continuum from work to play.[13] Sport includes certain elements, as below:

- Physical activity
- Skill
- Individual or team
- Competition
- Rules
- Entertainment

Physical activity is the foremost element to be in any sport. Physical activity now can be questioned on the basis about kind of physical activity, because every physical activity cannot be termed as a part of sport. So to find it out about the kind of physical activity that is necessary to be in any sport, it is necessary to know about the rules and the system of the sport which will be played, because each kind of sport has its own kind of physical activity. E.g. in football running and kicking the ball, in cricket hitting a ball with a bat and running, chess needs mind activity only. So, the examples made it clear that it is necessary to have various kinds of physical and mental activity to be in any sport according to the requirements.

Skill is another element that is needed in any kind of sport. Skill here means to be the way, the sport to be carried out by any person according to his best process limiting within the rules of the sport. It is a personal intellect of achieving the aim in any sport, because every person has

[13] Simon Gardiner, *Sports Law* (3rd edn, Cavendish Publishing Ltd 2006) 14

their own intellect to achieve the aim in any sport. So, skill needs to be there to achieve the aim of any sport.

Individual or team is another important element to be called as sport, because the activity needs to be carried out by any person individually or with the team. In any sport without any person it is impossible to have an activity.

Competition is the way to achieve success and the basic objective of any sport is to win the game. So, there is a presence of competition between the individuals or the teams to win in any sport. Without any competition there will be no winning in any game, and if there is no winning in any game, the basic objective of the game shall not be fulfilled.

Rules are present everywhere, even in the sports also. Because without rules any sport can become a war between the teams. So to maintain a limit in the sport there is need of rules to strict the sport up to a certain limit. In absence of rules in sport there can be any illegal activity in the name of sport and to restrict those activities rules are included in sports. Also the process of playing is included in the rule of sport.

Entertainment is the final element of sport which can also be said as the primary motive for the invention of any game. Playing any sport includes self-entertainment. When any sport catches the eyes of the audience it becomes public entertainment. So, there will always be presence of entertainment in any sport.

With the above elements collectively, the definition of the sport can be carried out as, ‘a sport is a physical activity which is carried out through skills individually or with teammates having a competition with the opponent within the rules, for the entertainment.’

There are various fields of intellectual property that are included in the sport. As per the examples discussed in the earlier paragraph describes the fields of intellectual property that are included in sport, among them the most important is the broadcasting rights because through broadcasting only all the sports are getting circulated worldwide and though there are protections for broadcasting as intellectual property, it seems to be not enough against the current revolutionary technologies.

Protections for broadcasting rights are limitedly spoken by intellectual property and some international conventions like Berne Convention and Rome Convention. The Berne Convention has provided certain limitations and exceptions on economic rights, which includes the use of protected works without the authorisation of the owner, and also without any

payment of compensation. These limitations are mostly 'free use' of the protected works which are expressed in Articles 9(2) which says about reproduction in certain special cases, Article 10 which is about quotations and use of works by way of illustration for teaching purposes, Article 10*bis* about reproduction of newspaper or similar articles and use of works for the purpose of reporting current events and lastly 11*bis* (3) about ephemeral recordings for broadcasting purposes.[14]

According to Rome Convention, producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.[15] It also says that if a phonogram is published for commercial purposes, reproduction of such phonogram, is used directly for broadcasting on any communication to public, remuneration should be paid, which shall be made according to the conditions laid down by domestic law in absence of any contract between the parties, to the performers or to the producers of the phonograms.[16]

In relation to the broadcasting organisation, this Convention provides some rights which includes, to authorise or prohibit the rebroadcasting, fixation or reproduction of any broadcasted work. Broadcasting organisations has also the authority to fix and charge any fees for the broadcast if it is communicated to the public, and all these matters shall be exercised under the domestic law of the contacting state.[17]

The direct relation of copyright and sport prevails only in single platform, i.e. media. Media is the source of broadcasting and advertisement of the sports, which is the matter of copyright. Broadcasting and advertisement is the only source to make the sport communicable to the mass

[14] Berne Convention, 1886; art. 9(2), 10*bis*, 11*bis* (3)

[15] Ibid. art 10 reads as:
Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

[16] Ibid. art 12 reads as:
If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

[17] Ibid. art 13 reads as:
Broadcasting organisations shall enjoy the right to authorize or prohibit:
(a) the rebroadcasting of their broadcasts;
(b) the fixation of their broadcasts;
(c) the reproduction:
(i) of fixations, made without their consent, of their broadcasts;
(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

public and media is the only source for it. Therefore copyright is the most important intellectual property of sports as because it is related to that part of the sport which fulfils the main objective of the sport, i.e. entertainment.

This kind of right is known in various names in different jurisdictions, like right to publicity in United States, right to privacy in United Kingdom, right of personality in Italy. Image rights' protection has two aspects. There are those who wish to control the use made of the image as a form of privacy and, others like sports person, who has high reputation and, who wish to control the use made of the image as it affects the income.[18]

There are specific arrangements with particular players, with whom it is dealt with by the way of an addendum to the standard contract, negotiated on a case-by-case basis. Thus the club becomes the sole holder of the image rights of the players.[19]

Football clubs do not always manage to keep up the image rights of their players, especially of the outstanding ones, as it is often more convenient to manage these rights personally, or give them to third party. In some cases, players by themselves give the rights to the club to exploit their image rights through printed media or commercial exploitation but retain the rights of exploitation through internet for self only.[20]

From all the above discussions it made clear that the sports clubs protect their players' image rights with the help of the copyright only as in all the nations worldwide image right is always an intellectual property for revenue generation and which needs to be protected, or else they will suffer loss.

CURRENT ISSUES ON BROADCASTING IN RELATION TO SPORTS

Advancement of technology has given rise to many flaws in the traditional broadcasting laws, because they are made to curve the known issues, whereas technology is always future oriented. So, with that modernisation gave birth to certain major issues as listed below:

- Public videography during live matches
- Self- publicity with the use of memorable moments in sports
- Public streaming/broadcasting of live matches in commercial places with an intention of indirect commercial benefit.

[18] Ibid.
[19] Ibid.
[20] Ibid.

With the evolution of mobile phones from a basic phone to a smartphone has to some extant touch the society, flooded with information from world-wide. Now people not just own a phone to converse telephonically but the use has extended to be called as a computer. Whereby people stay connected not only through traditional voice calls but also through different mediums. Among such is through video calls, internet calls, social media such as Facebook, Snapchat, Twitter, WhatsApp and so on. This has been instrumentally helping the human kind to a great extent through its connectivity among the masses[21].

This evolution has been a Gemini, and with its greater good looking, we are overlooking its other dimension. Though it is not that damaging yet, looking into a wider perspective one can view a differential rights infringement from the same.[22]

In present scenario, the videography has been posing a major threat towards the rights of the broadcasters. Wherein videography of live matches by the spectators has been seen flooded in social medias after any major matches. The thing to note here is that, broadcasters pay a handsome amount of revenue towards broadcast of a certain match. On the other hand private videographers try to shoot some interesting moments of the matches and upload on those medias and to gain audience resulting to a profit gaining source privately. There also incidents whereby match clippings and pictures are being broadcasted in private websites enabling them to draw audience and directly or indirectly commercial benefits out of it. Now as our copyright policy towards broadcasters right restricts utilisation of those materials without authorisation for commercial gains. But the above incidents will definitely hamper the rights if not fully but to a certain extent. The question posed here is that 'Can this situation be called infringement and can this act be justified?'

Public broadcasting is very popular in every place now days. During any major sports event, it is evident that the commercial places display live matches to attract public towards commercial gain. It is evident that the public display of matches in televisions in shops is bringing huge crowds resulting to increase in sale. There are also some social gathering places like restaurants

[21] Indibrain,' Social Media: Impact on human behavior and society, Indibrain', https://www.indibrain.com/article/547/social-media-impact-on-human-behavior-and-society accessed 22nd February, 2020

[22] Warren Phelops, 'Is sharing sports clips on social media an infringement of copyright under UK, European, Australian & US law?', LawInSport Ltd. https://www.lawinsport.com/topics/sports/item/does-sharing-sports-clips-on-social-media-amount-to-an-infringement-of-copyright-under-uk-european-australian-and-us-law accessed 22nd February, 2020

pubs, malls regularly broadcast live matches and promote offers based on such events. The question attracts here is that, 'whether it is ethical to broadcast publically with a private licensed broadcasting medium?'

These are some of the unanswered questions and a matter of protection of rights of the broadcaster and being overlooked by us for a subsistent period of time. The enforcement authorities are seen negligent in these above issues while finding out if the public display of those live matches infringe the right of the broadcasters or may be this custom is so prevalent that the authority generalise the scenario and overlook such an act.

CONCLUSION AND SUGGESTIONS

Revolution in science and technology since 20th century has contributed intense developments in advancement of human life from hardship to easy being, from bigger size to more compressed shape. But it attached some complications attached to it, even posing ethical and legal hitches. Such complications are addressed herein, by looking at the wider perspective to the prevalent customs in the technologically developed society. Among such is of protecting the rights of the broadcasters in the sports event. Since long the sports have been a major attraction and had been an institution of excitement to relive the stress of the busy world. Whereby diehard fans of sports look at it in entertainment perspective and various organisations such as Clubs, sponsors, etc. look at it with the economic aspects. Here comes the ethical and moral aspect of rights relating the same. The incidents like public videography during live matches, self- publicity with the use of memorable moments in sports, public streaming/broadcasting of live matches in commercial places by and for fans with an intention of indirect commercial benefit interrogates that, 'can this commercial utilization be justified in any manner?' The provisions of broadcaster's right under the copyright domain, provides rights to the rightful broadcasters towards attaining commercial gain by the broadcast, yet infringement could be seen in prevalence today. It's a concern now, although the provisions, there have been infringements in day to day basis goes unaddressed. If one looks at the wider prospective it clearly stands to be an infringement.

The enforcement mechanism prevalent is silent towards this extent. Addressing back to the question of ethics and fair use of those resources, it is therefore the need of the hour to regulate the use of such works. Hereby, the suggestions:

The first suggestion towards the fair use of the broadcast in public is that to mandate the organisations towards duly receive appropriate permission for the use. Such in the case of public broadcast in restaurants, pubs, malls etc. shall be strictly scrutinised by the enforcement officers towards the broadcast. There is also a need of empowerment in this regard educating the fans relating to rights and fair use of such resources or works.

Secondly, although the diehard fans videographing and photographing the events for personal use may at some point of time becomes infringement when they knowingly or unknowingly upload it in internet domains. It may be the structure of social media which has to look into this matter and educate the users to refrain from such acts. The provisions relating to infringement of broadcaster's right should also be interpreted in consonance towards addressing and restricting the acts of commercial gain using social media as a medium to broadcast any sports event without prior approval from appropriate authorities.

Finally, every sports event shall have a caution statement either in the ticket or at the public display contenting the non-use of any recording device or technology aiding in broadcast and gaining any commercial gain out of any such events.

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(2)

DEVELOPING TRENDS OF CYBERCRIMES IN SOCIETY AND THE NEED FOR A DYNAMIC LEGAL APPROACH

Dipak Cherian Abraham*

CYBERCRIMES: AN INTRODUCTION

The world that we live in is constantly evolving and at the forefront of this evolution is the development of computers and the internet. Today technology is integrated into every aspect of our daily living and everything around us is undergoing digitization. Virtually all modern services depend on the use of information and communication technologies (ICT). While these advancements have made life more simple and productive, it has also created a space that is a hotspot for criminal activity. With the majority of society largely unaware of the extent of cybercrimes, Cybercriminals can be considered as one of the most dangerous criminals in the modern world.

Cybercrime cannot be described as a single definition and is best considered as a collection of acts or conduct based on the material offence object and modus operandi that affect computer data or systems. [1] We can broadly define cybercrimes as any criminal activity that involves a computer, networked device or a network. The computer in cybercrimes is used as a tool or a target and in some cases both.[2] There are several interpretations of cybercrime that have been made by organisations around the world. The Council of Europe Convention on Cybercrime defines cybercrime as a wide range of malicious activities, including the illegal interception of data, system interferences that compromise network integrity and availability, and copyright infringements[3].

Cybercrimes are an increasing threat around the world. A study conducted by the University of Maryland concluded that a hacker attack occurs every 39 seconds.[4] In India as well, according to statistics released by the National Crime Record Bureau, Cybercrimes in India

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[1] United Nations Office on Drugs and Crime - UNODC (2013). ―Comprehensive study on Cybercrime‖. Vienna, Austria

[2] P. Parthasarathi, Cybercrime,5.

[3] Clough, J. The Council of Europe Convention on Cybercrime: Defining `Crime' in a Digital World. *Crim Law Forum* 23**,** 363–391 (2012).

[4]Study: Hackers Attack Computers Every 39 Seconds (2007, February 8)

have almost doubled in 2017. A reason for the same can also be credited to the widespread use and easy and access to the internet over the past two decades.

From a criminal's point of view, there are several advantages in indulging in cybercrimes. The computer is a system where large information can be stored in a small place and it is fairly simple to remove it either by physical or virtual means. Unauthorised access is possible by bypassing the security system. It is said to be easy for cybercriminals to destroy evidence after committing the crime as information stored in the computer can be destroyed easily. Since these criminals perpetrate the crime behind computer screens, the victim and offender may never even come into direct contact with each other.

Earliest instances of cybercrime can be traced back to the US in the 1970s with the misuse of early computerised phone systems. These criminals discovered the correct codes and tones that would result in free long-distance services and impersonated operators and obtained secret information of customers. Cybercrime since then has seen different levels of evolution and have now become increasingly sophisticated.

The classification of cybercrimes can be made based on who the victim is. In that regard, we can classify cybercrimes as follows.

Crimes against individuals are those that target a particular person. There are several ways cybercriminals target individuals. Email spoofing is the act of forgery of an email header. This means that the message appears to have received from someone or somewhere other than the genuine or actual source. This method is usually used to deceive the user who thinks that they are from a legitimate source. Spamming is the unwanted mass messages that are often sent to the user's email and may contain viruses. Cyber defamation is one of the most commonly committed crimes in the cyberspace. With the widespread popularity of social media sites, It is easier than ever before to defame someone's reputation with just the click of a button. IRC (Internet Relay Chat) are servers that allow people around the world to come together and communicate. These chat rooms are misused by cybercriminals to stage ransoms through these forums and paedophiles resort to this forum to allure children. Phishing is a very prominent type of crime or fraud where the attackers try to gain information such as login information or account's information by masquerading as a reputable individual or entity. Some of the other crimes against individuals include Net extortion, Hacking, Trafficking, Credit Card fraud, Malicious code etc.

Cyber Crimes against property are those crimes which include vandalism of computers, Intellectual Property Crimes, online threatening and other crimes such as software piracy which copies software without authorisation and trademark infringement which is the using of a service mark or trademark without permission.

Cyber Crimes against organization include unauthorized changing or deleting of data, Reading or copying of confidential information unauthorizedly, DOS attack which are types of attacks where the attacker floods the servers, systems or networks with traffic in order to overwhelm the victim resources and make it infeasible or difficult for the users to use them, Salami attack is a form of breach where the attackers use an online database in order to seize the customer's information like bank details, credit card details and deduces very little amounts from every account over a period of time without the customer even realising. Some other cybercrimes against organization include- Logical bomb, Trojan horse, Data diddling etc

Cyber Crimes against society are those that affect society as a whole. For example financial crimes against public organizations, selling illegal products, trafficking, online gambling, forgery, etc.

Cybercrime against the government is a type of crime that can have grave consequences. It's a form of terrorism and includes such activities as breaking into government systems and networks, defacing and shutting down military websites, and spreading propaganda.

CYBERCRIMES AROUND THE WORLD

How different countries tackle cybercrimes vary immensely. While some countries are at the forefront in terms of legislation, tribunals and international conventions, other countries are yet to consider cyber laws as a priority.

The United Nations has acknowledged the complex nature of cybercrimes and its threat. The United Nation's efforts to combat this global menace can be observed in past resolutions that have been passed. For instance, According to General Assembly resolution, 65/230 [5]and Commission on Crime Prevention and Criminal Justice resolutions 22/7 [6]and 22/8[7], the Global Programme on Cybercrime is mandated to assist the Member States in their struggle against cyber-related crimes through capacity building and technical assistance. This includes the

[5] A/RES/65/230 ,Resolution adopted by the General Assembly on 21 December 2010
[6] Resolution 22/7, Strengthening international cooperation to combat cybercrime
[7] Resolution 22/8 Promoting technical assistance and capacity-building to strengthen national measures and international cooperation against cybercrime

exchange of information on national legislation, best practice, technical assistance and international cooperation. The objective of the global programme highlights the need to mount a dynamic and international response to cybercrimes and is designed to not only serve the developed countries but also the developing countries to prevent and combat cybercrimes holistically.

The United Nations Global Cybersecurity Index (*herein referred as GCI*) is a reference analysis compiled by the United Nations Telecommunication Union which gauges the commitment to cybersecurity different countries have. This analysis is made by evaluating 5 categories namely, Legal Measures, Technical Measures, Organizational Measures, Capacity Building and Cooperation. According to the GCI of 2018, United Kingdom ranked first in top countries for cybersecurity while the United States of America ranked 2nd. The other countries that were placed in the top 10 include France, Lithuania, Estonia, Singapore, Spain, Malaysia, Norway, Canada.

The GCI also includes cluster divisions of countries with high, medium and low commitment towards cybersecurity. 2018's index included 194 countries who were member states of the United Nations International Telecommunication Union. Countries which were under the high range of commitment included India, Australia, Japan, China etc. Countries with a medium level of cybersecurity commitment include countries such as Brazil, Jordan, Ukraine, Iran etc. While countries with low cybersecurity include countries such as Fiji, Sudan, Nepal etc. According to the report, 142 out of the total countries analysed fell into the category of either medium or low commitment. This shows that even as late as the year 2018, Cybersecurity wasn't considered to be a major priority in most countries. Emerging cyber threats could precipitate massive economic and societal damage, and international efforts need to be agreed and acted upon in response to this new trend. The frontrunners such as the United Kingdom and the United States of America have established legal and organisational pillars to compact the threats of cyberspace. The United Kingdom has several legislations including the Computer Misuse Act. The National Crime Agency, which is the national law enforcement agency of the United Kingdom work closely with UK police, regional organised crime units, and other partners in international law enforcement such as Europol, the FBI and US secret service to share intelligence and coordinate action. The United States of America is one among the world leaders in terms of cybercrimes. As one of the top affected country in the world in terms of Cybercrimes, It is one of their imperative objectives to ensure the strictest of cyberlaws. Legislations such as The computer fraud and abuse act,1984, The National Information

Infrastructure Protection Act are among several laws which compact a wide array of themes such as espionage, hacking etc. The United States has also been among the initial countries to establish strict definitions and punishments for cybercrimes. From penalties like expulsion to a criminal misdemeanour to felony in cyberbullying. To penalty of 15 years imprisonment and fines for identity theft. To penalty of six to twenty years prison time for hacking and damage to computer properties. The USA has quite a stronghold on cyber laws.

China is another country which has a prominent approach when it comes to the whole concept of cybersecurity. Their laws which appear dictatorial are essential to the Chinese government. The recognition and penalizing of cybercrimes began early on in the timeline in 1997 with the 'Computer Information Network and Internet Security, Protection and Management Regulations' codified by the State Council. As per the criminal law, acts like hacking, sabotaging data or creating and propagating digital viruses lead to a minimum of three years imprisonment. The sentence is increased phenomenally in graver cases, involving sensitive data. At the outset of the previous decade, they also formulated laws which regulated the role of internet within the country. Within Chinese territory, the internet is under the sovereignty of China. Which means that the government has utter and complete control over the internet within their borders. As such, many of the world's most popular websites are banned in China. The latest in China's law is the Cybersecurity Law that came into effect last year. The law requires all foreign companies to store their essential data of use within the country itself. As well as allow the government to conduct check's on the company network's and data.

LAWS RELATING TO CYBERCRIMES IN INDIA

India is the largest market for internet users after China. The 370 million Indian internet users constitute about 30% of India's population. India's rapid digitization in the past decade added with a young digital population and an insufficient response mechanism make cyber-attacks easy to carry out.

Both businesses and private entities are increasingly dependent on cyberspace and are thus vulnerable to cybercrimes. With the advent of social media, harassment and bullying have become easier than ever before. According to a study conducted by the market research company Ipsos, parents indicated a 63% awareness of online bullying among Indians[8]. There

[8] Mallory Newall, Cyberbullying: A Global Advisory Survey,2-9 (2018)

is still a lack of awareness among the society regarding such incidents. According to a joint study conducted by ASSOCHAM-NEC, India witnessed a 457% rise in cybercrime incidents under the Information Technology (IT) Act, 2000 from the year 2011 to 2016[9].

Laws pertaining to cyberlaws in India are not considered just a separate and independent legal framework but rather a combination of legislation that deal with contracts, intellectual property, data protection, Information technology and privacy laws. In India, the primary legislation that connects the other related legislations is the Information Technology Act, 2000 (herein referred as 'IT ACT'). This act which came into force on 17th October 2000 applies throughout India and its provisions also apply to any offence committed even outside the territorial jurisdiction of Republic of India, by any person irrespective of his nationality. Under this act, offences should involve a computer, computer system, or computer network located in India. Considering the date at which it was adopted, it is natural that *the Indian Penal Code 1860* does not cover cybercrimes and thereby arose a need to have its own designated legislation. Therefore, the Indian Penal Code was amended overtime and the IT Act,2000 was also introduced.

The IT Act,2000 embodies the initial legal response to the emerging challenges of cybercrime. The IT Act constitutes of 13 chapters and 94 sections with the last four sections namely sections 91 to 94 in the IT Act 2000 which deals with the amendments to the four Acts namely the Indian Penal Code 1860, The Indian Evidence Act 1872, The Bankers' Books Evidence Act 1891 and the Reserve Bank of India Act 1934. The Act begins with preliminary and definitions and from subsequently the chapters that follow deal with authentication of electronic records, digital signatures, electronic signatures etc. The Act goes on to define and describe some of the well-known cybercrimes and lays down the punishments as well. the concept of due diligence, the role of intermediaries and some miscellaneous provisions have also been described.

Chapter XI of the IT Act [10]which covers section 65 all the way till 78 deals with cybercrimes and the related investigative powers. This chapter details certain specific kind of acts that have been designated as cybercrimes. These acts have been declared penal offences, which are made punishable with imprisonment and fines. We can analyse the legislation based on its substantive and procedural nature with respect to cybercrimes. The chapter covers unauthorized access, hacking and causing damage to a computer source code etc. This offence

[9] ASSOCHAM BULLETIN,INDIA SAW 457% RISE IN CYBERCRIME IN FIVE YEARS: ASSOCHAM-NEC, Vol No.44 Issue No.02, 32-33 (2019)
[10] Information Technology Act, 2000, Chapter XI, Acts of Parliament, 2000 (India)

is made punishable with imprisonment for up to three years or with a fine up to two lakh rupees or with both. Hacking is criminalised under section 66 of the IT Act[11]. Any person who breaches a protected system is open to criminal liability under section 70 IT Act. [12]Anyone who accesses or attempts to access a protected system commits an offence and can be punished with imprisonment for a term of up to ten years and a hefty fine. Section 67[13] covers online obscenity and deals with the offence of publishing or transmitting obscene content via electronic means. The punishment for this offence on the first conviction is imprisonment for a term and a fine up to one lakh rupees. In the event of a second or subsequent conviction, the quantum of imprisonment and fine both doubled. Section 68 of the IT Act [14]criminalises a failure to comply with the order of Controller of certifying authorities which relates to digital signature certificates. Section 71 of the IT Act [15]deals with misrepresenting or suppressing a material fact from the Controller of Certifying Authorities in order to obtain any license or Digital Signature Certificate. Section 73 [16]criminalizes the publication of a Digital Signature certificate that is false concerning certain particulars. Section 74 [17]deals with the offence of publication of a Digital Signature Certificate for fraudulent or unlawful purposes. The punishment for a period of up to two years, a fine up to one lakh rupees or both. Section 77 [18]elaborates on the non-interference of penalties with other punishments. Which means that no penalty imposed or confiscation made under the Act shall prevent the imposition of any other punishment to which the person affected is thereby liable under any other law currently in force.

Section 78 of the IT act[19] gives the power to investigate offences under the cyberlaw. Section 69[20] of the IT Act gives the power to intercept communications to the controller of certifying authorities in India if deemed necessary. The subscriber or agency, when called upon on order, must extend all facilities and extend technical assistance to decrypt said information in question. The section also states that if the subscriber or any person fails to assist the agency referred to under this section, he shall be punished with imprisonment for a term of up to seven

[11] Information Technology Act, 2000, Chapter XI, Section 66, Acts of Parliament, 2000,(India).
[12] Information Technology Act, 2000, Chapter XI, Section 70, Acts of Parliament, 2000,(India).
[13] Information Technology Act, 2000, Chapter XI, Section 67, Acts of Parliament, 2000,(India).
[14] Information Technology Act, 2000, Chapter XI, Section 68, Acts of Parliament, 2000,(India).
[15] Information Technology Act, 2000, Chapter XI, Section 71, Acts of Parliament, 2000,(India).
[16] Information Technology Act, 2000, Chapter XI, Section 73, Acts of Parliament, 2000,(India).
[17] Information Technology Act, 2000, Chapter XI, Section 74, Acts of Parliament, 2000,(India).
[18] Information Technology Act, 2000, Chapter XI, Section 77, Acts of Parliament, 2000,(India).
[19] Information Technology Act, 2000, Chapter XI, Section 78, Acts of Parliament, 2000,(India).
[20] Information Technology Act, 2000, Chapter XI, Section 69, Acts of Parliament, 2000,(India).

years. Section 76[21] IT Act provides for the power of confiscation. It lays down the conditions under which any computer, computer system, floppies, compact disks, tape drives, or any other accessories related thereto that have been used to contravene any provision of the IT Act or any rules, orders or regulations made thereunder can be confiscated. The above-described articles can be confiscated if it is established to the satisfaction of the court adjudicating confiscation that the person in whose possession, power, or control any such article is found, has committed one of the violations described above. Procedurally, section 80 [22]of the IT Act is a much-debated section wherein powers are given to high ranking police officials for the investigation of cybercrimes. This controversial aspect is the extent of powers given to the Deputy Superintendent of Police who more or less has the power to search anywhere in India. This power is notwithstanding anything contained in the Code of Criminal Procedure, 1973 and therefore while Cr.P.C gives the power of entry, search, and arrest to an investigating officer, that power can only be exercised after the investigating officer has followed the prescribed process. However, there are no such specified processes, restriction, or parameters binding the DSP for exercising discretion under section 80(1). Also, the DSP is not mandated to record reasons in writing, prior to the exercise of such powers.

The IT Act,2000 after its implementation was hugely scrutinised and largely criticised for being outdated and diluted. There was also criticism that there was still more reliance on the IPC rather than IT Act. This criticism facilitated the need to reassess the legislation and make necessary changes. Major industry bodies were consulted and advisory groups were formed to suggest recommendations. These recommendations were analysed and subsequently taken up as a comprehensive Amendment Act and after considerable administrative procedures, the consolidated amendment called the IT Amendment Act 2008 was placed in the parliament and passed without much debate, towards the end of 2008. The Amendment Act got the president assent on 5 Feb 2009 and was effective from 27 October 2009. The amendment addressed several topics such as data privacy, updated definitions, making digital signature technology-neutral, the role of intermediaries, updating cybercrimes authorising an inspector to investigate cyber offences etc.

[21] Information Technology Act, 2000, Chapter XI, Section 76, Acts of Parliament, 2000,(India).
[22] Information Technology Act, 2000, Chapter XII, Section 80, Acts of Parliament, 2000,(India).

Although India is still developing with regards to compacting cybercrimes, there are some notable cases that can shed light on the functioning of the IT Act 2000. Let us briefly look at a few Indian cases related to Cybercrimes.

Syed Asifuddin And Ors. vs The State Of Andhra Pradesh [2005 CriLJ 4314][23] is a case where *Reliance model handsets were to be exclusively used by Reliance India Mobile Limited but the TATA Indicom staff members who were figured as an accused tampered with pre-programmed CDMA digital handsets belonging to Reliance Infocomm and activated with TATA Indicom network with all dubious means. The offence was held to be made out under Section 65 of the IT Act. Poona Auto Ancillaries Pvt. Ltd., Pune Versus Punjab National Bank, HO New Delhi & Others*[24] is a case from *2013 and one of the largest compensation awarded in legal adjudication of a cybercrime dispute. Maharashtra's IT secretary Rajesh Aggarwal had ordered PNB to pay Rs 45 lakh to the Complainant Manmohan Singh Matharu, MD of Pune-based firm Poona Auto Ancillaries. A fraudster had transferred Rs 80.10 lakh from Matharu's account in PNB, Pune after Matharu responded to a phishing email. The complainant was asked to share the liability since he responded to the phishing mail but the Bank was found negligent due to lack of proper security checks against fraud accounts opened to defraud the Complainant under section 43 of the IT Act 2000.*

An important advancement in Indian cybersecurity is the National Cyber Security Policy. This policy is a framework constituted by the Department of Electronics and Information Technology, Ministry of Communication and Information Technology and Government of India. The goal of this framework is to ensure the protection of private and public entities from cyberattacks. It also prioritises on safeguarding critical information and personal data. The Cyber Security Policy 2013 aims at improving the critical infrastructure and build resilient cyberspace for citizens, business, and government. The policy also aims to stabilise any resultant economic instability as a consequence of cyberattacks. There are several proactive steps taken via this policy that takes a step towards a holistic approach to combat cybercrimes. They include the Setup of a 24×7 research centre for obtaining strategic information regarding threats to ICT infrastructure, Creation of a task force consisting of 5,00,000 cybersecurity professionals, Provision for incentives to encourage entities to upgrade information infrastructure with respect to cybersecurity, encourage organizations to designate and allocate

[23] Syed Asifuddin And Ors. vs The State Of Andhra Pradesh [2005 CriLJ 4314]
[24] *Poona Auto Anillaries Pvt. Ltd., Pune Versus Punjab National Bank, HO New Delhi & Others*

cybersecurity budget, Development of a dynamic legal framework to address cybersecurity challenges etc.

Another recent development of cybersecurity in India is the Personal Data Protection Bill 2019 which was tabled in the Indian parliament on 11 December 2019. The bill covers provisions to protect the personal data and proposes the setting up of a Data Protection Authority of India. The bill aims to provide protection of individual's privacy with respect to personal data. This bill has also received criticism for the exclusive power the government has in accessing private data with fears of the ability to turn India into an "Orwellian state". Currently, this bill is being analysed and consulted by a joint Parliamentary committee and other industry experts.

PROBLEM OF JURISDICTION IN CYBERCRIME

Each legal case has a relevant jurisdiction where the corresponding courts will hear and finally adjudicate the case. Laws pertaining to constitution, civil and criminal code and statutes on various other matters clearly provide and demarcate jurisdiction of the courts. Three prominent forms of jurisdiction are subject matter, pecuniary and territorial. Territorial jurisdiction is the territorial limit in which the law is applicable and the corresponding court has the power to decide upon it. Pecuniary jurisdiction refers to the power of the court to hear the matter on the monetary value of the case which differs from state to state.

We have previously established that technology and in particular the internet has been widely accepted into the daily life of society. But with the Internet and cyberspace connecting each and every parts of the world, a pressing problem regarding the jurisdiction in cyberspace arises. The main concern is the lack of physical territory as most cybercrimes occur in the virtual world. The criminal could be at any corner of the world and commit crimes to people some of whom are even unsuspicious of the said crime being committed.

In the traditional legal system, any incident between the parties situated in two specific geographical locations is under the jurisdiction of the laws of the country which parties agree beforehand or by the laws of the country where the incident occurs. But that is not the case in cyberspace. The absence of geographic limitations may lead many to believe that only the laws of their home state apply to their actions, when in fact they may be violations of the laws of another State as well. In these circumstances, the courts may assume jurisdiction over the

offence and try the offender within their own jurisdiction, resulting in situations where persons located in a completely different jurisdiction may be tried in a court of a different jurisdiction[25]

The problem of geographical uncertainty leads to a confusion of where a complainant can sue. It is of general understanding that users of the Internet remain in the physical jurisdictions of their location and are subject to laws independent of their presence on the Internet. This means that any form of misuse on the internet may expose the person to the risk of being sued not only in their country but also in foreign countries where another internet user may establish a claim. Thus the jurisdiction in each case may vary in accordance with the laws pertaining to the geographical location of the user, the laws relating to the nation where the server is hosted from or even the laws of the nation which applies to the person with whom the transaction takes place. There also may be an extraterritorial impact with regards to the jurisdiction of that nation. Since there is no uniform, international jurisdictional law which can be applied universally, this may lead to several conflicts. But this conflict of laws geographically leads us to question of whether to consider the internet as a physical space and subject it to a given jurisdiction's laws consider the internet a world of its self and allow the internet community to self-regulate. In the current scenario, the internet user is subject to laws of the location within which they use the internet service.

Cyber cases with respect to jurisdiction in India are still limited but the approach followed can be similar to the 'minimum contacts' approach practised in the United States. This is a test to determine whether the party has sufficient contact for the court to exercise jurisdiction over it.

Cybercrimes may occur at an international level and it is necessary for a nexus between the regulating nation and the crime in order for national courts to adjudicate criminals and sanctions internationally. The concept of territorial nexus plays a huge role here and determines the jurisdiction. Sufficient reasonability can also be determined by understanding factors like the character, extent and link of the criminal activity with those accused, the violation of the legislative regulations etc.

The IT ACT, 2000 in India covers the jurisdiction to act on different cybercrimes. Section 46 in The IT Act, 2000 [26]talks about adjudicating officers who hear and resolve violations of any rules and also determines the geographical location where jurisdiction may be exercised. The officer will take into account the wrongdoer's "gain of unfair advantage", the amount of loss

[25] Amita Verma, Cyber Crimes and Law, Central Law Publications, Allahabad, 2009, p.318.
[26] Information Technology Act, 2000, Chapter IX, Section 46, Acts of Parliament, 2000,(India).

caused by the wrongful acts and the number of times the wrongdoer committed the acts. Penalties will be imposed or awards will be made on a case-by-case basis. Adjudicating officers will have both technology and judicial experience. The officer's authority will be both civil and criminal in nature. Cyber regulations appellate tribunals are established under the authority of the Indian government to specify the "matters and place" pertinent to their jurisdiction. This is mentioned under section 48 of the IT Act, 2000 [27]and functions as the first appellate level of the decisions of the Control Board or adjudicating officers established under the same legislation. An appeal to the Tribunal must be filed within 45 days from the date on which the aggrieved party received a copy of the order of the Controller or the adjudicating officer. The Tribunal will make every effort to dispose of each appeal within six months from the date it is received. The Tribunal will hear all parties to the controversy and may affirm the previous order, modify it or set it aside. The decisions that are made by the appellate tribunal may be also appealed to the High court. This appeal must be filed within 60 days after the decision has been reviewed and can be further extended for sufficient justification shown. Extraterritorial jurisdiction in case of cyberspace is also covered under the IT Act,2000 but has shown to be difficult to execute since geographical intricacies involving punishments of foreign criminals still emerge. Section 75 deals with extraterritorial application of the law and states that the provisions of the Act will apply to any person irrespective of nationality and any cyber offence or contravention committed outside India. The Act has, therefore, adopted the principle of universal jurisdiction to cover both cyber contraventions and cyber offences. Thus jurisdiction plays an integral role in cybercrimes and is instrumental in ensuring justice is served promptly.

OUTDATED LEGISLATIONS IN CYBERCRIMES

In every aspect of technology, each update that comes to any application that you use makes its predecessor obsolete. Thus It is practically impossible for laws to keep up with these frequent changes. The laws when not frequently updated and amended become redundant. Since there is a multi-layered procedure in converting a bill to a practised law, This delay becomes a problem in the fast-paced environment of technology. By the time any sort of regulatory process is finalised and passed by the government, the product or technology has seen several stages of evolution. Since Laws and regulations are outdated, organizations find it hard to modernize security practices and usage thereby increasing chances of cyberattacks. A very common example of this scenario is cybersecurity legislation established in America. The Computer Fraud and Abuse Act (CFAA)[28] was enacted in 1986. CFAA

[27] Information Technology Act, 2000, Chapter X, Section 48, Acts of Parliament, 2000,(India).
[28] The Computer Fraud and Abuse Act (1986)

has not achieved in reducing cybercrime mainly as the legislation has been slow to make amendments as the last one was over a decade ago. Factors such as socio-political issues, economy and adherence to international agreements often lead to delay in the enactment and implementation of laws. For example, by 2016, almost half of the countries that had ratified their participation in the Budapest Convention on cybercrimes had taken a decade or more to complete the ratification, due to reasons like the delay in the development of their laws. Moreover, the Convention just focuses on certain legal aspects within the range of possibilities related to the scope of cybersecurity. Just as organizations continuously update their standards in response to evolving risks and new technologies, the law must be at the forefront when it comes to responding to present and emergent issues which may need to be regulated. Legal and technical disparities make it difficult to respond to, investigate, and rule on cybersecurity incidents, and inhibit international collaboration. There arises a need to have legal measures available at various levels and must cover a wide variety of fields. Existing Laws relating to cyberspace must be periodically amended to keep up with the changing demands and if required separate legislation must also be considered. It is also important that the judges who hear cases related to cybercrimes must be aware of the technical aspect of technology and cyberspace. Their judicial acumen must be complimented with technical knowledge in order to ensure speedy and accurate judgements.

SENSITISING THE SOCIETY ON CYBERCRIMES

The society is still largely oblivious to the cybercrimes happening around them and It is the need of the hour for the community to be made aware of the different ways to protect themselves and their personal data from such crimes.

There are several precautions internet users must take. The first and arguably the easiest step that can be taken by an individual is being careful about your passwords. The passwords that you choose for each of your accounts must be strong and complex. That means using a combination of at least 10 letters, numbers, and symbols. Don't repeat your passwords on different sites, and change your passwords regularly. Ensure that every system that you use is protected with a full-service internet security suite. This ensures real-time protection against existing and emerging malware including ransomware and viruses and helps protect your private and financial information when you go online. Ensure that your operating systems and internet security software are periodically updated. Old and obsolete software is unprotected and make it easy for cybercriminals to access your system. Constant updates can make it less likely that you'll become a cybercrime target. Be careful about the information you share on social media. Cybercriminals can get your personal information with just a few data points, so the less you share publicly, the better. For instance, if you post your pet's name or reveal your mother's maiden name, you might expose the answers to two common security questions which

may lead to the compromise of your other accounts as well. A VPN will encrypt all traffic leaving your devices until it arrives at its destination. If cybercriminals do manage to hack your communication line, they won't intercept anything but encrypted data. It's a good idea to use a VPN whenever you access a public Wi-Fi network, whether it's in a library, café, hotel, or airport. VPNs and a strongly encrypted password can also be used to strengthen your home network. Identity theft is a common act for cybercriminals. Identity theft occurs when someone wrongfully obtains your personal data in a way that involves fraud or deception, typically for economic gain. You might be tricked into giving personal information over the internet, for instance, or a thief might steal your mail to access account information. it's important to guard your personal data. A VPN — short for the virtual private network as we had discussed previously help to protect the data you send and receive online, especially when accessing the internet on public Wi-Fi. In a study conducted by the Kaiser Family Foundation in 2009,[29] young people 8-18 years in the US spent an average of 7 ½ hours per day online, The dependence of the internet and technology amongst the coming generations are only going to get bigger and is important that the youngsters who consume the internet the most are taught about safe use of the internet. The internet can be a toxic channel for children if they are not aware of the predators lurking behind anonymous aliases. Teach the kids about the acceptable and safe use of the internet. Schools, colleges, offices and other such institutions should have workshops and courses on cybersecurity to ensure maxim sensitising of the issue at hand.

It should be a collective effort to ensure that society is protected from this new age of crime. When a person or a business entity is victim to a cybercrime it is important to know what has to be done next. The first step that is taken to report cybercrime in India is to file a complaint at the cybercrime cell in a police station of the city where the crime has taken place, or where the device is located which was affected. The next step would be knowing where to **report cybercrime in India**, which can be done online and offline by registering your complaint against the committed cybercrime. India has two sources that mainly attend to your complaint i.e. cyber cell or a police station. You can go to the police station of your region or send a mail to the Police as they will forward your complaint to the Cyber Cell or you can directly mail the complaint to the cyber cell. the first step includes filing a complaint as per **cybercrime laws in India**. This complaint letter will include certain prerequisites depending on the incident.

[29] Kaiser Family Foundation, Generation M2: Media in the Lives of 8- to 18- Year-Olds, Program for the Study of Media and Health Publications 2010.

CONCLUSION

Society is transforming overtime and along with it is technology. Cybercrimes will continue to develop. The laws that deal with Cybercrimes must achieve what it is intended to do and that can only be done with constant restructuring of relevant legislations. It will take a multi-layered approach with cooperation from the global community in order to curb cybercrimes. The society at large ought to be sensitised on the various ways they can be victim to cybercrimes and must be taught how to protect themselves from this constantly evolving crisis. Technology is a boon to us in many ways but if the law is not constantly one step ahead, it may cause irreversible damage.

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LAW AND SOCIAL TRANSFORMATION: LAW, SCIENCE AND TECHNOLOGY

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INTRODUCTION

Law plays a growing critical role within the regulation of science and technology, including the moral consequences of research project and new technologies. The relatively new field of law, science, and technology seeks to review systematically the various ways law interacts with science and technology. One of the important areas of law related partially to the present is consumer protection.

Technology enables us to avoid brick and mortar stores and do our shopping on the web, but it also makes it easier for scammers to sell dangerous products, knock off designs, or steal customers' identities. Since much of the new technology involves communication devices, communications, media, free speech, and privacy law are all a part of science and technology law.

LAW AND TECHNOLOGY

Almost everything we do is governed by some set of rules. There are rules for games, for social clubs, for sports and for adults within the workplace. There are also rules imposed by morality and custom that play a crucial role in telling us what we should always and will not do. Laws resemble morality because they're designed to regulate or alter our behavior.[3] But unlike rules of morality, laws are enforced by the courts; if you break a law whether you wish that law or not you'll be forced to pay a fine, pay damages, or attend prison.

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[3] Law, Science, and Technology, https://hls.harvard.edu/dept/academics/programs-of-study/law-science-and-technology/, Accessed on 15/02/2020

ROLE OF ADVERTISEMENTS IN TECHNOLOGY

Today the foremost efficient ads are search ads. They're small, they don't contain large and fancy images, they're cheap and one can track their efficiency right down to the last cent. But it wasn't always that way; let's return through the main achievements in advertising that have brought us ads nearly as good as these. In the end of the 1800s, during the economic revolution, products became more and more commoditized and makers now had to advertise to thousands so as to sell the inventory that they had produced. That's when larger scale advertising as we all know it today began. At the time ads were often in black and white, line-art and text. At the time printing technology was not evolved enough to print real pictures and in most cases color printing wasn't affordable for newspapers. Fast forward to the 1920s, color printing of magazines had progressed. Advertising had already evolved tons. Large illustrations, art-deco style, were capturing readers' attention everywhere the planet. Though varying in quality and emotional impact it had been already an extended way from the black and white, line-art ads we had before. In earlier times the advertisements are only through newspaper radio magazines and some posters.[4] Through this only the advertisements are shown to everyone. Now technology has improved in advertisements that are projected in social media. The social media has many disadvantages also like women are portrayed during a wrong way.

CYBER LAW

Cyber Crime isn't defined in Information Technology Act 2000 or within the National Cyber Security Policy 2013 or in the other regulation in India. Hence, to define cyber-crime, one can say, it's just a mixture of crime and computer. Even a petty offence like stealing or pick pocket are often brought within the broader purview of cybercrime if the essential data or aid to such an offence may be a computer or information stored during a computer used by the fraudster. Cyber Law also called IT Law is that the law regarding Information-technology including computers and internet. It associated with legal informatics and supervises the digital circulation of data, software, information security and e-commerce. IT law doesn't consists of a separate area of law rather it encloses aspects of contract, property, privacy and data protection laws. Property may be a key element of IT law. Cyber law also can be described as that branch of law that deals with legal

[4] The role of technology in advertising, http://www.theequitykicker.com/2008/06/23/the-role-of-technology-in-advertising/, Accessed on 15/02/2020

issues associated with use of inter-networked information technology. In short, cyber law is that the law governing computers and therefore the internet. The growth of Electronic Commerce has propelled the necessity for vibrant and effective regulatory mechanisms which might further strengthen the legal infrastructure, so crucial to the success of Electronic Commerce.[5] Cyber law is Vital because it touches most aspects of transactions and activities and on involving the web, World Wide Web and cyberspace. It covers all transaction over internet and it keeps eyes on all activities over internet. The law relating to this are

- Cyber crimes
- Electronic and digital signatures
- Data protection and privacy

Cyber space includes computers, networks, software, data storage devices (such as hard disks, USB disks etc), the web, websites, emails and even electronic devices like cell phones, ATM machines etc.

1. Cybercrimes against persons
2. Cybercrimes against property
3. Cybercrimes against government

Such as, Cyber stalking ,Loss of Privacy, Harassment with the utilization of computer, Hacking of state websites, Cyber Extortion, Cyber Terrorism, Computer Viruses (i.e.)Spamming, computer virus, E-Mail Bombing.

In today's environment, the planet is becoming more and more digitally sophisticated and so are the crimes. All legal issues associated with internet crime are addressed through cyber laws. Because the number of internet users is on the increase, the necessity for cyber laws and their application has also gathered great momentum. In today's highly digitalized world, almost most are suffering from cyber law. For example:

1. Most companies extensively depend on their computer networks and keep their valuable data in electronic form.
2. Government forms including tax returns, company law forms etc. are now filled in electronic form.

[5] Importance of Cyber Law In India, http://www.legalserviceindia.com/legal/article-1019-importance-of-cyber-law-in-india.html, Accessed on 15/02/2020

3. Consumers are increasingly using credit/debit cards for shopping.
4. Digital signatures and e-contracts are fast replacing conventional method of transacting business.[6]

In India, cyber laws are contained within the Information Technology Act, 2000 ("IT Act") which came into force on October 17, 2000. The most purpose of the Act is to supply legal recognition to electronic commerce and to facilitate filing of electronic records with the govt. None of the prevailing laws gave any legal validity or sanction to the activities in Cyberspace. For instance, internet is employed by an outsized majority of users for email. Cyber laws contain differing types of purposes. Some laws create rules for way individuals and corporations may use computers and therefore the internet while some laws protect people from becoming the victims of crime through unscrupulous activities on the web.

The main areas of cyber law includes:

COPYRIGHT

The internet has made copyright violations easier. In youth of online communication, copyright violations were too easy. Both companies and individuals need lawyers to bring actions to impose copyright protections. Copyright violation is a neighborhood of cyber law that protects the rights of people and corporations to take advantage of their own creative works.

FRAUD

Consumers depend upon cyber laws to guard them from online fraud. Laws are made to stop fraud, master card theft and other financial crimes that happen online. An individual who commits fraud may face confederate or state criminal charges. They could also encounter a legal action brought by a victim. Cyber lawyers work to both defend and prosecute against allegations of fraud using the web.

HARASSEMENT AND STALKING

Sometimes online statements can violate criminal laws that forbid harassment and stalking. When an individual makes threatening statements again and again about somebody

[6] Need for Cyber Laws, https://www.legalbites.in/need-cyber-laws/, Accessed on 16/02/2020

else online, there's violation of both civil and criminal laws. Cyber lawyers both prosecute and defend people when stalking occurs using the web and other sorts of transmission.

THE COPYRIGHT ACT

Copyright Law within the country was governed by the Copyright Act[7] of 1914; all copyright-related laws are governed by the Copyright Act, 1957. The Copyright Act today is compliant with most international conventions and treaties in the field of copyrights. Various crimes have started occurring especially within the field of computer, which has been categorized as cyber-crimes.

THE CINEMATOGRAPH ACT

The Cinematograph Act[8] of 1952 has been passed to form provisions for a certification of cinematographed films for exhibitions by means of Cinematograph. Under this Act, a Board of Film Censors (now renamed Central Board of Film Certification) with advisory panels at regional centres is empowered to look at every film and sanction it whether for unrestricted exhibition or for exhibition restricted to adults. The Board is additionally empowered to refuse to sanction a movie for public exhibition. In **K.A. ABBAS V. UNION OF INDIA**[9] the petitioner for the primary time challenged the validity of censorship as volatile of his fundamental right of speech and expression. The Supreme Court however observed that, pre-censorship of films under the Cinematograph Act was justified under Article 19(2) on the bottom that films need to be treated separately from other sorts of art and expression because a movie was ready to fire up emotion more deeply and thus, classification of films between two categories 'A' (for adults only) and 'U' (for all) was brought about.

Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981 This legislation affords a measure of protection to those employed within the industry by imposing certain obligations on movie producers and theatre owners concerning the former's condition of service.

[7] Copyright Act of 1914

[8] Cinematograph Act of 1952

[9] AIR 1971 481, 1971 SCR (2) 446

Cine Workers Welfare Cess Act, 1981 and therefore the Cine Workers Welfare Fund Act 1981 - They seek to make means of monetary support to cine employees.

ANALYSIS

WOMEN IN ADVERTISEMENTS

Women in India have had a really categorically defined role since time out of mind. Most ads which featured women showed typical Indian housewives. Brands like Nirma, Dabur, etc made women endorse house hold products. you'd either see saree clad women performing some household chore or buying some grocery items. a search showed that Indian ads reflected stereotypical roles like women's place is within the home and that they don't take important decisions and that they aren't considered significant. Traditional gender roles, despite certain revisions, are still standard and stereotypical within the large segment. Sexuality within the media has been on a continuing rise thanks to that.[10] Cadbury introduced a replacement image of a lady when it re-positioned itself as a product which will be consumed by people of any age bracket especially youngsters and not only children. In trying to expand the audience, Cadbury portrayed a lady during a way that was never seen in Indian Ads before. Currently, Indian ads are a mixture of traditional, sexual and progressive. Sexual ads objectify women with a sexual focus. Initially such ads were restricted to categories like perfumes and undergarments. The Maaza ad starring Katrina Kaif is example of unwanted sexual appeal within the advertisement. The manufacturers thought that the visual wasn't a disaster enough, in order that they added the punch line "Aamsutra – Pure Mango Pleasure". The words like 'Pleasure' are an indirect comparison to sex. But only women as objects to be obtained by men for his or her own sake, isn't really appreciated by the Indian mentality. The most important advantage of advertising is that it helps the corporate in creating awareness about the merchandise or service which the corporate is offering because how will people know what product or service you're selling unless you advertised about it. Without crying even mothers don't feed their little babies, within the same way companies got to make some noise so as to make awareness about the merchandise within the minds of the purchasers and advertising does exactly that. Advertising helps the corporate in creating brand image which is extremely important as far as future outlook of business cares and

[10] Women, And Their Importance in Advertisements, https://www.youthkiawaaz.com/2011/09/women-and-their-importance-in-advertisements/, Accessed on 17/02/2020

that we all know that brands aren't created overnight and advertising is one among the key pillars on which brand image is made thus advertising helps the corporate in creating long lasting image of the corporate. Advertisement are often misleading and not all products or services which are advertised are good and hence during a way advertisement gives wrong impression within the minds of consumers leading them to get the advertised product or service which are of inferior quality. Another limitation of advertisement is that big companies have undue advantage with them of getting higher allow advertisements whereas local manufacturers or small companies don't have any budget which ends up in bigger companies advertising and selling those products which are of lower quality than local manufacturers products.[11] In **TATA PRESS Ltd. V. MAHANAGAR TELEPHONE NIGAM Ltd**[12] a 3 judge bench of the Supreme Court differed from the view expressed within the Dawakhana case and held that 'commercial advertisement' was definitely a neighborhood of Article 19(1)(a) because it aimed toward the dissemination of data regarding the merchandise. The Court, however, made it clear that the government could regulate commercial advertisements, which are deceptive, unfair, misleading and untruthful.

MEDICAL FIELD

In medical field the sooner times the primitive practices during pregnancy time it had been only within the house delivery. In olden days there were no any machines within the medical field. And there's no any vaccines associated with leprosy tb and little pox vaccines. In times there are many types of equipment within the medical field. Like surrogacy tube Medical technology may be a broad field where innovation plays an important role in sustaining health. Areas like biotechnology, pharmaceuticals, information technology, the event of medical devices and equipment, and more have all made significant contributions to improving the health of individuals all round the world. From "small" innovations like adhesive bandages and ankle braces, to larger, more complex technologies like MRI machines, artificial organs, and robotic prosthetic limbs, technology has undoubtedly made a fantastic impact on medicine. Now a day's abortion is legal. In times the essential care is at the varsity level.

[11] Advantages and Disadvantages of Advertising, https://www.letslearnfinance.com/advantages-and-disadvantages-of-advertising.html, Accessed on 17/02/2020

[12] AIR 2438, 1995 SCC(5) 139

MEDICAL EQUIPMENT TECHNOLOGY

The improving quality of life is one among the most benefits of integrating new innovations into medicine. Medical technologies like minimally-invasive surgeries, better monitoring systems, and easier scanning equipment are allowing patients to spend less time in recovery and longer enjoying a healthy life. The integration of medical equipment technology and telehealth has also created robotic surgeries, where in some cases; physicians don't even have to be within the OR with a patient when the surgery is performed. Instead, surgeons can operate out of their "home base", and patients can have the procedure wiped out a hospital or clinic closes their own hometown, eliminating the hassles and stress of health-related travel. With other robotic surgeries, the surgeon remains within the room, operating the robotic devices, but the technology allows for a minimally-invasive procedure that leaves patients with less scarring and significantly less recovery time. In law and biology, it is to supply a legal framework for medically assisted procreation or for cloning we've to affect the technologies which permit obtaining gametes, stem cells, crossbreds, chimeras. As technology within the world of healthcare continues to evolve, rules and regulations concerning its use must be established and adjusted to adapt to the new methods of administering care. Regulations like HIPAA and its Privacy and Security Act target the concerns about the confidentiality of patient information and therefore the steps that has got to be taken to take care of privacy in our digital world. Medical providers and healthcare administration must take care when choosing to implement new products and technologies into their services, and will make sure that all technologies are "HIPAA compliant" before investing in their implementation. Other initiatives, just like the 2010 Health Care Reform bill, state the steps that have got to be taken by hospitals and other care providers to integrate medical technology into their practices. Through technology's integration with areas like disease prevention, surgical procedures, better access to information, and medical telecommunications, the medical industry and patients round the world still benefit.[13]

ABORTION LAW IN INDIA

Abortion in India is legal in certain circumstances. It are often performed on various grounds until 24 weeks of pregnancy. In exceptional cases, a court may allow a termination

[13] How Technological Advances Are Transforming the Medical Field, https://datafloq.com/read/technological-advances-transforming-medical/4173, Accessed on 17/02/2020

after 24 weeks. When a lady gets a pregnancy terminated voluntarily from a service provider is known as abortion. The Medical Termination of Pregnancy Act, 1971, is liable for the legalization of abortion. However, legally, it can only be performed up to twenty weeks of conception.

Abortion is often performed only fewer than four conditions, the idea of terminating your pregnancy cannot originate by choice and is only circumstantial. There are four situations under which a legal abortion is performed:

- If continuation of the pregnancy poses any risks to the lifetime of the mother or to her physical or psychological state
- If the fetus has any severe abnormalities
- If pregnancy occurred as a results of failure of contraception (but this is often only applicable to married women)
- If pregnancy may be a results of sexual abuse or rape[14]

MEDICAL NEGLIGENCES

In some cases of medical negligence, the compensation to the victim has given looking on the moral values associated with humanitarian basis as we will infer with the case of Pravat Kumar Mukherjee Vs. Ruby General Hospital and ors 2005 CPJ 35 (NC). during this case National Commission of India delivered a land mark judgment for treating of accident victim, what happened during this case the complainant were the oldsters of deceased boy named Samanate Mukherjee a 2nd year B.tech boy who studied in Netaji Subhas Chandra Bose Engineering College , the complaint was filed in National Commission of India. The boy was hit by a Calcutta transport bus and rushed to the hospital which was 1 km from the accident spot. The boy was conscious when he was taken to hospital and he showed his medical insurance card, which clearly says that the boy are going to be given Rs.65,000 by the insurance firm just in case of accident, counting on it hospital started treating boy but after giving some initial treatment hospital demanded Rs15, 000 and on the non- payment of the demanded money, the hospital discontinued treatment of the boy and therefore the boy was rushed to a different hospital, in the way the boy died. This was the case and during this case the National Commission

[14] Human Rights – Abortion, A Woman's Right, https://www.lawteacher.net/free-law-essays/medical-law/human-rights-abortion-a-womans-right-law-essays.php, Accessed on 17/02/2020

held Ruby hospital liable and provided Rs. 10 lakhs as compensation to the oldsters. So, during this case the court looked on humanitarian basis and compensation was awarded to the complainant.

ECOURT POLICY

The e-courts project is that the most up-to-date, and arguably, the foremost ambitious, plan to introduce ICT within the Indian judiciary. It seeks greater standardization in judicial processing, progressive service delivery and process reform of judicial functioning supported empirical data. The eCourts project may be a Mission Mode Project (MMP), being implemented by the National Informatics Centre (NIC) under the National e-Governance Plan. At the stage of designing the eCourts policy, it had been acknowledged that the core problem of the judiciary was its failure to supply speedy and affordable justice. The eCourts system was clearly designed with the intent to deal with this problem and its effectiveness must be measured on these parameters. Disaggregating "speedy justice" may be a complex exercise, and is admittedly a contextual assessment. Some intermediate effects of the policy like the computerization and automation of services like filing of cases, issue of check slips, caveat checking, scrutiny check of plaints, preparation of summons, updating of daily orders, preparation of cause list, preparation of court diaries, transcription of evidence, warrants and see generation, preparation and delivery of decree and issue of copy of judgement and order have already been observed. The impact of context on effectiveness of the project, the policy's success in addressing all targeted problem/s and therefore the distribution of effects over time, however, can only be accurately assessed after the whole project is completed.[15]

Technology plays a crucial role now a day. This technology has improved altogether the aspects. Now this technology has involved within the judiciary also. This technology is to reinforce the standard of justice, reduce congestion in courts and ensure timely disposal of cases. In several countries including Australia, Canada and Singapore are successful in implementing the technology in judiciary. And now the Indian Judiciary system has planned the e-court project to modernize the justice through computerization. The e-court service is that the new app because it gives all the small print of the cases. In olden days there's no technology like this. In olden days there'll be no clear is that the cases like

[15] Ecourts in India From Policy Formulation to Implementation, https://vidhilegalpolicy.in/wp-content/uploads/2019/05/eCourtsinIndia_Vidhi.pdf, Accessed on 17/02/2020

when the people should come for subsequent appeal and also the hearing date. And there are many pending cases also are going to be there. After the technology has evolved within the judiciary and within the courtroom also it's grown. There are various equipment courtroom like video displays, witness monitor, evidence camera, laptop connections and other digital input locations and courtroom printing and electronic storage of exhibits. Within the courtroom also the technology has grown. The advanced equipment within the courtroom it should be utilized properly and nobody can escape. And there's a app is also there that is e-court service app where we will see all the small print of the cases like who is that the petitioner, respondent, advocate and when is that the next appeal and hearing date. It is useful for the citizens, lawyers police and government agencies. Therein app by searching the CNR number we came to understand the case status.

The e-courts portal is operational online and provides details of case registration, cause lists, case status, daily orders and final judgments. At the stage of designing the e-courts policy, it had been acknowledged that the core problem of the judiciary was its failure to supply speedy and affordable justice. The e-courts system was clearly designed with the intent to deal with this problem and its effectiveness must be measured on these parameters.

RELATIONSHIP BETWEEN LAW, SCIENCE AND TECHNOLOGY

Most popular social media in India are Facebook, WhatsApp and Twitter. When the users of the digital media use the social medium during a negative way, it's a Cyber Crime. One among major cybercrimes happening round the world through social media currently is that the deadly 'Blue whale game'. 'Blue whale challenge' itself is a thought of mass hypnotism invented by Philipp Budeikin who was a Russian psychology student within the year 2013. The blue whale challenge is an online suicide game where the player is given various tasks by an administrator over a 50-day period, starting from isolation to self-harm and ultimately suicide. The infamous blue Whale challenge has been in news for over two months now for creating vulnerable teenagers enjoys self-harming acts and ultimately taking their own lives.

Vignesh, a 19-year-old second year B. Com student in Mannar Thirumalai Naicker College from Thirumangalam, Madurai committed suicide by hanging himself on Wednesday. The student's father Jayamani who returned home after work around 4:30 pm, found his son hanging using a saree. Police confirmed that the image of a whale was carved on Vignesh's

left forearm with the words "Blue Whale" written beneath it. A note was also recovered from the spot which said, “Blue Whale - this is often not a game but danger. Once you enter, you'll never exit". Vignesh's friends told the police that they saw him attempting the blue whale Challenge on his phone. The victim's grandmother Anthonyammal said that he was glued to his phone and neglected everything around him. According to his brother SathyaMoothy, Vignesh was playing some game in his phone on the terrace late nights and early mornings. The night before he committed suicide, he went missing for a brief while within the night. His brother went call at search of him but couldn't find him. When he returned later, Vignesh was found sleeping. He was found distressed for the past two days but didn't say why. P Amarnath, a young man from the village, said that his friend's circle knew that he was playing blue whale game and particularly that he was within the end. They were connected on a Whats-App game and lots of were also playing it. That they had warned him to not take up the suicide challenge. However, he told them that he would survive the challenge and meet them as a winner." Police have confiscated the phone and are analyzing if his friends may need taken the challenge too. This is often the primary death reported within the state thanks to the sport which has claimed many young lives within the country and round the world.[16] Madurai SP Mr.Manivannan said that a special technical team under Inspector Parameswari had been formed to research suicide. Also, a counselling cell headed by ADSP Kalavathi would probe any complaints on such games. a fanatical WhatsApp number 7708 806 111 has also been activated to register complaints about the blue whale challenge. Similarly, Madurai collector K. Veera Raghava Rao said that the parents got to keep an in-depth watches on the activities of their children. Meanwhile the police have sought the assistance of the computer emergency response team of ministry of communication and knowledge technology in deciphering the messages. The police also are trying to trace a team of Sri Lankan youth with whom the teenager was in-tuned. Only after examining the phone, details like how long the boy was playing the sport might be ascertained through the IP addresses. The police have created a separate WhatsApp group for folks to complain about children playing Blue Whale game and that they will directly attend the child's home

[16] Evils of Social Media : Case Study of the Blue Whale Challenge, https://www.semanticscholar.org/paper/Evils-of-Social-Media-%3A-Case-Study-of-the-Blue-Chopra-Khattar/903d989d9981b4e2b131f1ac1aa4b9cc07ff34de, Accessed on 17/02/2020

with councilors to analyse things Police have once more requested the parents to be more vigil.

The104 helpline are receiving a couple of calls from parents seeking advice on the way to identify if their child is into the deadly game and are constantly educating the callers under risk involving and how parents, teachers and friends can help identify the signs. the assistance line got call from a couple of children who said that that they had been playing the sport but uninstalled it who were appreciated for doing so also requested their parents to keep an in depth watch on them. A 23-year-old student committed suicide on Aug 31 late night in Puducherry, Kalapet police said this could be the second death associated with the damaging blue whale Challenge online game in two days in south India. Sasikumar Bora a first-year MBA student hailing from Assam, hanged himself from a tree near his hostel room. Bora, who was chatting together with his friends last night, left for his room and was found hanging Friday morning. His friends informed the police that Bora used to play the blue whale game. The body of Bora was sent to Indira Gandhi Medical College and Research Institute for an autopsy, and cops are expecting a report. BuluDeyBori, mother of Sasikumar Bora said the teenager had seemed disturbed for the past few days. She didn't know what he was exactly affected by , but surely something was affecting him that he would call her up late in the dark and wept. He didn't tell her what was troubling him. A message on the teenager's Facebook page, posted at 2:21 am on August 29, read: "Maybe I wasn't made for anyone". Shashikant Borha's classmates said he had downloaded the sport on his mobile and his laptop and had sent messages that he was the admin of the blue whale group .Superintendent of Police (East) S Venkatasamy said that they need begun investigations to see whether the death was thanks to his playing the BlueWhale game. Kalapet police who checked his telephone also confirmed that the youth was playing the sport. His phone has been seized and sent to the cyber cell for further investigation. Pondicherry Chief Minister V. Narayanaswamy warns youth against playing blue whale game and asks cyber-crime branch and police to watch students. He called upon the scholar community and youths to prevent playing the Bluewhale game. Addressing to the media he stated that severe action would be taken against those playing this game and requested those playing the games to right away begin of it. There had been several demands to ban this game. He said if possible, the govt would usher in legislation to ban the sport and requested the central government to require measures to prevent this game. Puducherry unit BJP President V. Ramanathan MLA urged the government to

require steps to save lots of children from the clutches of the sport. He called upon social activists, educational institutions to save lots of children from this game which can ultimately instigate them to kill. He demanded that computers, telephone and tablets shouldn't be allowed in schools and reception parents should monitor use of those by their wards. He said that the sport programmed by foreign countries should be treated as a cyber-attack on our culture and heritage. [17]

CONCLUSION

Science and technology benefit society during a sort of ways. Science generates ideas which are the guiding principles for technology. New technology allows increased productivity, like the wheelbarrow for agriculture and folding money for commercial success. Technology also increases transportation, allowing exploration, increased communication, and eventually globalization The impact of science and technology on modern society is broad and wide-ranging, influencing such areas as politics, diplomacy, defense, the economy, medicine, transportation, agriculture, social capital improvement, and lots of more. Science and technology have thus far brought humanity immeasurable benefits. This can be seen within the development of latest bridges and nautical improvements. Paper and printing are samples of technology that change the planet and benefit society in countless ways. Books and their production allow ideas to spread to large groups of people who may learn then create new ideas. Technology results in new trade items which one country wants from another, resulting in trade alliances and eventual commercial success. Technology may benefit one society and not another by resulting in advanced weaponry and large warfare.

SUGGESTIONS

Technology is the main cause for the survival in our society. Science and technology are the major parts which plays an important role in the minds of the people. The growth of these elements cannot be stopped but we can try to reduce their side effects and negativities by implementing certain laws and rules. So that there shall be some reduction in crimes. Every individuals have the right to handle the technology but in a good way without causing trouble to the society and people. Now a day increase in technology also increases the

[17] Blue Whale: What is the truth behind an online 'suicide challenge'?, https://www.bbc.com/news/blogs-trending-46505722, Accessed on 17/02/2020

crimes. The usage of these elements must be secured in a good manner for the growth of the society.

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(4)

LEGAL ISSUES ARISING THROUGH USE OF ARTIFICIAL INTELLIGENCE IN MEDICAL PRACTICE

Sivarama Krishna Prakash[1]

INTRODUCTION

Technology has become an integral part of our daily life and our needs and demands for it is rising exponentially. It has become one of the primary driving factors in all of society's progress. The society has a cyclical co-dependence on technology. Humans use technology to travel, to communicate, to learn, to do business and to live in comfort. Technology has made our lives easy. Technology is now also competing with humans through the medium of Artificial Intelligence ("AI"), wherein technology has depicted its capability to perform same/similar actions as humans with better precision, accuracy and speed. Technology has now in the form of Artificial Intelligence infused mechanism also invaded the domain of medical surgery, through a method which is popularly known as Robotic Assisted Surgery ("Robotic Surgery" or "RAS"). Many health firms/hospitals are advertising that they have Robotic Surgery, which is less invasive and has more precision as compared to surgeries performed by humans. Law is always behind Technology in the race. Technology is surpassing all developments and has reached to such an extent that it is dictating everything for humans and the bigger challenge is availability of law or regulations to control adverse issues arising on humans while adopting new technologies. Robotic Surgery is a blend of technology, machine and artificial intelligence with a doctor or team of doctors working at the backend and it will bring in new legal and ethical challenges in areas of medical practice.

POTENTIAL ISSUES IN USING AI ROBOTS FOR SURGERY

Before dwelling into the details of Robotic Surgery it would be good to list out the potential issues (legal and non-legal) that can arise while using AI infused Robots for Surgery. Some of these issues are:

[1] Sivarama Krishna Prakash, Ph.D Scholar, Alliance School of Law, Alliance University, Bengaluru

(a) MEDICAL NEGLIGENCE: For medical negligence caused by Doctors there are well laid down civil laws in areas of Consumer Protection, Medical Negligence and various Criminal Laws to file civil claims and criminal cases against the Doctors**.** Surgical Robots can make errors which could possibly cause injury to patients. The injured patient has a right to sue for damages. The law of torts has evolved to regulate the actions of natural persons and the main issue in Robot related accidents/incidents is that the AI Robots are not natural persons. Hence a patient seeking redress cannot rely on the existing laws relating to medical negligence or malpractice to recover damages from AI Robots. It is therefore the need of the hour that this gap be bridged by passing appropriate laws so as to enable a patient to claim damages on account of improper actions of an AI Robot.[2]

(b) CONTRIBUTORY NEGLIGENCE: Contributory negligence is an important aspect that would be investigated or looked into in a personal injury case. Every individual is expected to act in a reasonable manner and when he or she does not do so or refrains from doing so and sustains injuries, then such person can be held responsible for those injuries under the ambit of contributory negligence and such affected individuals will not be able to successfully contest and obtain damages from another party, even though the said another party also negligently caused the accident to occur.[3] In the case of injuries sustained due to an AI Robot the obvious solution would be to move to true strict liability – for any damage caused by a product (subject to the contributory negligence defense). However, the larger problem in such cases would be proving and assigning proportionate share of contributory negligence.

(c) CONSENT: Procedure for obtaining consent from a patient for a doctor performed surgery is well defined for patients who have attained majority of age and of sound mind. In addition, adequate procedures have been laid down to obtain consent with respect to patients who are of minority age, of unsound mind and Traumatic patients. As on date same process is followed for Robotic Assisted Surgeries, but at a later date

[2] "Take a Look at the Recent Articles" (*Some ethical and legal consequences of the application of artificial intelligence in the field of medicine* July 9, 2018) <https://www.oatext.com/some-ethical-and-legal-consequences-of-the-application-of-artificial-intelligence-in-the-field-of-medicine.php> accessed February 7, 2020

[3] Simeone and Miller, "Contributory Negligence: What It Is & How It Could Influence Your Case" (*Simeone & Miller, LLP* October 11, 2019) <https://www.simeonemiller.com/blog/2018/february/contributory-negligence-what-it-is-how-it-could-/> accessed February 7, 2020

should these Robots be granted human status then these processes will need to be defined specifically for Robotic and Non-Robotic Assisted Surgeries as Robots are akin to computers and their decision would be based on inputs by the patient and it may not be very difficult for a patient to trick the robot with respect to his/her age, mental status etc.

(d) VICARIOUS LIABILITY: For any normal accident apart from the user of the machine, the owner could also be sued under Vicarious Liability. In the case of accidents by AI Robots during surgery the user would be the doctor and the owner would be the hospital, but theoretically Vicarious Liability could also extend to the manufacturer if any defect in the AI Robot caused the accident. Some countries in the world like France, Belgium etc. have well carved out Vicarious Liability principles. There is a need to have clarity and uniformity on vicarious liability principles across the world if we have to effectively move to Robotic Surgeries.

(e) BIAS: AI systems knowingly or unknowingly imbibe the bias it's programmer or coder has. Bad data used to train AI can contain implicit racial, gender, or ideological biases. Bias in AI systems could erode trust between humans and machines that learn. Machine learning bias, also known as algorithm bias or AI bias, is a phenomenon that occurs when an algorithm produces results that are systematically prejudiced due to erroneous assumptions in the machine learning process. Bias can damage research, if the researcher chooses to allow his bias to distort the measurements and observations or their interpretation. The only way to avoid bias from creeping into an AI system is international standardization.

(f) PATIENT POSITION AND SAFETY: All Robotic Surgeries are performed with patient in a different posture/position as against conventional doctor led surgery. This is to facilitate the insertion of Robotic probes and arms at the right place. The only issue here is when it is a doctor led surgery the doctor can intermittently during surgery adjust the position of the patient, if the doctor apprehends that the patient is likely to slip or fall from the operation bed. However, in case of surgeries performed by Robots that's not possible as any interference can cause other side effects with the Robot either crushing the patient or moving probes elsewhere in the body and causing injuries.

ADVANTAGES OF ROBOTIC SURGERY

Through their superhuman ability Robots can repeat exact motions. In a hair transplant surgery, integrated force sensing mechanism in the robot ensures that the robot maintains the desired force during harvesting and implantation. Most of the abdominal surgical robots can be controlled using an eye-tracking camera control. The robotic machine also provides haptic feedback, which enables the surgeons to feel the forces that the robotics arms encounter.

Robotic Surgery is an advanced form of minimally invasive or laparoscopic (small incision) surgery where surgeons use Artificial Intelligence infused robots to assist them in surgical procedures. The robot's "hands" have a high degree of dexterity, allowing surgeons the ability to operate in very tight spaces in the body that would otherwise only be accessible through open (long incision) surgery. Compared to open surgery (traditional surgery with incisions), robotic and minimally invasive surgery results in smaller incisions resulting in less pain and scarring. Time taken for a robotic assisted surgery is very less as compared to human assisted surgery and patients can get discharged from the hospital much quickly.

REMOTE TREATMENT

Defense Advanced Research Projects Agency ("DARPA") in the 1990s mooted the first idea to use a remote robot to treat battlefield patients. But the then communication networks did not have the capacity or bandwidth to offer necessary technical support to treat soldiers on the battlefield. As on date with 4G in place and the possibility of 5G coming up soon the capacity and bandwidth issue is a problem of the past. As on date DARPA is funding efforts to treat soldiers remotely in the battlefield. Despite the advancement in technology the robotic surgery of present day in the battlefield cannot be performed without assistance of humans behind the machine, thereby making things more complicated and cost prohibitive. A research funded by US defense Department is underway to create an autonomous robotic trauma care system for treating soldiers injured in remote locations.[4]

ZERO FATIGUE

Surgeons require extremely steady hands when operating in the eyes and in similar delicate areas. In the operating room (OR), surgeons must always be mindful of being precise.

[4] "6 Ways AI and Robotics Are Improving Healthcare" (*Robotics Business Review* May 29, 2019) <https://www.roboticsbusinessreview.com/health-medical/6-ways-ai-and-robotics-are-improving-healthcare/> accessed February 24, 2020

Performing repetitive tasks are challenging as they are mundane. AI and collaborative robots are now used in the OR to assist surgeons and reduce fatigue. Surgical robots being machines can control their motion with great precision and that too with zero fatigue and hence they are well-suited for procedures that require the same, repetitive movements. Robots can go inside a human body to areas where traditional tools cannot. It is a well-known fact that experience is invaluable in the OR. The greater the number of surgeries a surgeon performs, the better skilled they become. But surgical procedures can be physically demanding and can drain the energy and loose the focus of a surgeon. On one hand Surgeons amass a great amount of skill and knowledge over their careers and on the other hand they can also be handicapped due to loss of motor skills. Collaborative robots have the capacity to support the surgeons to help them avoid tremors or unintended/accidental movements. In many cases, Robotic Assisted Surgery has proved to be more effective than doing the procedures manually.

DEEP LEARNING BY SURGICAL ROBOTS

Manufacturers see the necessity to use deep learning data to automate instead of the behavior of the AI programmed by an engineer who is unaware of all the situations. This deep machine learning data is collected by making the AI watch the surgeons in the OR. AI is additionally also being trained to investigate scans and detect cancerous cases. Laparoscopic video analysis of surgeries helps to spot missing or unexpected steps in real time and that's how AI's are trained to become surgical robots.[5]

AREAS WHERE ROBOTIC SURGERY IS PRACTICED

Robotic Surgery is used presently to treat a number of different procedures, including:[6]

a. Bypass of the artery
b. Removal of cancerous tissue
c. Removal of Gallbladder
d. Replacement of Hip/Knee
e. Removal of Uterus

[5] Robotics Online Marketing Team, "Robotic Surgery: The Role of AI and Collaborative Robots" (*Robotics Online*) <https://www.robotics.org/blog-article.cfm/Robotic-Surgery-The-Role-of-AI-and-Collaborative-Robots/181> accessed February 2, 2020

[6] "Robotic Surgery: MedlinePlus Medical Encyclopedia" (*MedlinePlus* January 6, 2020) <https://medlineplus.gov/ency/article/007339.htm> accessed February 6, 2020

f. Removal of kidney
g. Transplantation of Kidney
h. Repair of Mitral
i. Transplantation of Hair

SURGICAL FAILURES

Errors do happen in a human assisted surgery and there are laid down rules and regulations to attribute culpability, liability and sentencing. While it is said that there is very miniscule scope for error in Robotic Surgery, errors can also occur in a Robotic Surgery. Some of the common failures/injuries that one can think of in a Robotic Surgery are:

a. bleeding or the need of transfusion,
b. risk of infections,
c. temporary nerve or intra-abdominal organ injuries,
d. breathing problems,
e. stroke, heart attack,
f. compression injuries,
g. eye injuries, and
h. blood clots in the legs or reactions to medications, etc.

CRIMINAL LIABILITY FOR ACTS COMMITTED BY AI INFUSED ROBOTS

Litigation for accidents or incidents causes during Robotic Surgeries will definitely be complicated even though the legal basis for professional liability would more or less be the same as in the case of non-Robotic surgeries. As regards AI persons conducting Robotic Surgery, there are no predefined AI specific legal frameworks to affix culpability & liability and determine valid and effective sentence. For accidents or incidents caused during Robot assisted surgeries, in addition to physician and hospital, the manufacturer of the robotic system and third-party individual (in cases of hacking) may be sued. The process is to fall back on existing laws for both civil and criminal liability and prove the blameworthiness/guilt of each of the actor and then assess the culpability, liability and punishment.

Criminal Act is one of the basic requirements to sustain criminal liability and imposing a punishment. Criminal Act is something which can only be done by humans or attributed to humans. To fix culpability for a crime done by an AI, we should be able to pin point human(s) who can be made liable for criminal liability, i.e they should have done the criminal act or

actus reus[7] and should have a guilty mind or mens-rea[8], to whom the crime can be attributed. In order to fix attributability to a person for having done a criminal act there would be a necessity to identify the persons involved in the AI and its decision making.[9] Some of the actors are:

a. The first person who can be identified is the user.[10] The user is normally a person who uses and controls the AI in its operations and provides instructions to the AI about the various tasks that it has to do. The user in all probabilities would be the first beneficiary of the work done by the AI. Going by past precedence, it can be clearly concluded that the general tendency is that the user and supervisor have mostly been the persons who have been involved in criminal investigations looking into the behaviour of an AI.
b. The second person in the chain would be the supervisor, who has the responsibility to supervise the AI and has the right controls or opportunity to intervene in the decision-making of the AI, if necessary.
c. The third person in the chain would be the producer or manufacture of the AI as they are generally responsible for anything and everything that concerns the production of the AI, including but not limited to hardware, software and other utility related features. The producer has in-depth knowledge of the backend technology or platform under which the decision-making process in the AI runs. The producer also has the capacity and wherewithal to rise or fall to the expectation levels of the other actors especially with respect to the capability of the AI.[11]
d. In most of the cases the producer may not necessarily be the software coder and this task would have been outsourced to a third party. Such third-party software coders or developers would also generally fall in the category of producer, despite the fact that the software coder would actually be a third party to whom the producer would have outsourced the coding work.

[7] A Dictionary of Law (8th edn, 2015) 15.

[8] Ibid 395-96.

[9] Simester AP and others, *Criminal Law: Theory and Doctrine* (Hart Publishing 2016) 72.

[10] Weaver JF, *Robots Are People Too: How Siri, Google Car, and Artificial Intelligence Will Force Us to Change Our Laws* (Praeger 2014) 3.

[11] Daniel C Vladeck, *'Machines Without Principals: Liability Rules and Artificial Intelligence'* (2014) 89

e. Before the sale of the AI or machine the owner would generally be the producer. After the sale, the owner likely would be either the user or the supervisor. However, indicating the ownership of the AI is very important as that role will be important for any future analysis especially if there is a change in law from the time of manufacture to the time of offence (de lege ferenda).
f. The last actor possibly is a third party who is an outsider and has no relationship with the AI. However, this third party has the ability and capacity to interact with the AI and affect or alter its behaviour. Such a third party could possibly be a human who could possibly be a hacker or someone performing similar tasks, or in case of non-humans, a malware or virus.

Impact and ability are generally the main factors to determine criminal liability as well as responsibility with respect to matters leading to the factors causing the consequences of the crime. As one of the subject matter of discussion in this paper is regarding liability for crimes committed by AI, we need to trace an AI's criminal act and behaviour to the human(s) behind the AI as it is fairly clear that under the existing legal regime an AI is not legally accountable for its conduct. The human on whom such culpability is intended to be fixed must have the position and capability to influence the AI and its conduct in some way. Consideration of factors in this analysis will vary from case to case. Notwithstanding the above, one cannot overlook the fact that the responsibilities of the supervisor and user would also have a direct connection with the use of the AI. The various actors as described above may have a role to play in controlling the AI either remotely through their instructions or by omitting to provide requisite instructions to override the AI where required. AI users can remotely control AI performing surgery and intentionally cause harm to a patient through the AI Robot.

To solve this example and attribute liability is not a difficult proposition so long as one considers the Robot as a tool used to injure a human being. However, the question of liability becomes complicated as soon as the Robot ignores the instructions given to it by the user and acts autonomously causing serious damage. One of the primary question that would arise is if if there is a duty cast on the user or supervisor to abrogate such behaviour by the Robot and do they have the capacity and control to override the Robot's actions? When it comes to the producer's responsibility or liability, most of it can generally be linked to the AI software and/or hardware with associated algorithms, mechanical parts and movements of the AI and

also the AI's education and training.[12] It is also evident that the producer has a vast scope to influence the AI in any area. The software code in an AI can also be called the AI's brain and that is the core factor and the key to an AI's capability.[13] Any malfunction pointing to a production issue will in all probabilities be traced back to the producer and its sub-contractors. However, there could be situations where the AI causes wrongs which were not foreseen by the producers while manufacturing or by the coder when they wrote the software code. In such cases there are two things that will come to the forefront during investigation. One is if the producer provided overriding controls to the AI user. The next is if the AI user or supervisor are responsible in the scheme of things to abrogate such wrong actions by the AI. In any investigation regarding a wrong act committed by an AI, the owner will definitely be one of the key indispensable actors who would be questioned in depth to determine and affix the liability.

As mentioned above there will also be outsiders who can or would have influenced the AI in its decision-making, who would be more or less self-evident in criminal liability case. Such outsiders could be a remote-control hacker or a third party who controls the intelligence of an AI by presenting an idea. There could also be outsiders who can fool the AI to misunderstand its environment in such a way, resulting in wrongdoing by the AI.

ETHICAL ISSUES WHEN PERFORMING ROBOTIC ASSISTED SURGERY OR RAS

Ethical issues in Robotic Surgery are also of paramount importance and one must be mindful of equipment safety and reliability, provision of adequate information, and maintenance of confidentiality. There is no doubt that the future of surgical practice is highly dependent on surgical robots and this dependency is will have a significant impact on surgical practice on account of the umpteen challenges that it is likely to pose in the realm of law and ethics in areas of medicine and healthcare.

[12] Cindy M Grimm, William D Smart and Woodrow Hartzog, *An Education Theory of Fault for Autonomous Systems,* (WeRobot 2017 conference, New Haven, Mars 2017) <www.werobot2017.com/wp-content/uploads/2017/03/Smart-Grimm-Hartzog-Education-We-Robot.pdf> accessed 02 Feb 2020.

[13] Nick Bostrom, *Superintelligence: Paths, Dangers, Strategies* (OUP 2014) 23

The following are some key ethical and societal issues that are of concern when subjecting a patient to RAS:[14]

a. **SECURITY AND PRIVACY.** Data security is a primary concern for a connected system. Historic information and any additional current relevant information of the patient and the surrounding world is a mandatory requirement for an assistive robot to help it adapt to the user's changing needs and circumstances. The above information can be clearly categorised as sensitive information, which if shared inappropriately could compromise the individual's dignity and right to privacy.

b. **TRANSPARENCY.** The users must clearly know what a RAS system does and what it cannot do. The users must understand why a RAS system is performing a task at a specific location/time, what kind of data is being collected by the RAS system and if such collected data is being shared. The RAS system must be able to give an account of what it is doing and thereby enable users to understand and speedily respond to situations on as required basis.

c. **SOCIAL ATTACHMENT.** Humans already have emotional bonds their mobile phones, tablets and cars. Over a period of time they would develop similar bonding with RAS technologies including companion robots. Hence the AI designer must definitely give careful consideration while designing to ensure that machines and humans don't entangle their relationships.

d. **AUTONOMY OF DECISION MAKING.** As the RAS systems become more complex, the expectations will increase. Matured machines will be expected to make more demanding decisions in course of their work. The Intelligent RAS machines as they mature will at times have to reason internally and arrive at their own best conclusions. The RAS manufacturers have to ensure that these machines do not operate outside the laid down parameters and if they do so either the machine must automatically stop or if user operated then the user must be able to take control.

e. **IMPACT ON CARETAKERS.** RAS is something which is there to stay and will definitely impact on future social care delivery. However, RAS may not end up

[14] Consequential Robotics, "8 Ethical and Societal Issues Relevant to the Future Use of Robots in Social Care" (*Consequential Robotics*, March 12, 2018) <http://consequentialrobotics.com/blog/2018/3/12/8-ethical-and-societal-issues-relevant-to-the-use-of-robotics-autonomous-systems-in-social-care> accessed February 2, 2020

substituting humans in the care sector. RAS can be developed to supplement human care activities, but they are not likely to match or replace the ability of humans in the near future as humans have empathy and can provide an engaging relationship which cannot be replaced by the synthetic companionship provided by RAS.

f. **GOVERNANCE.** Great amount of efforts is underway to develop governance frameworks for AI and robotics. United Kingdom is considering governance of data, and hence have set up a Commission on the moral and societal impacts of AI. Governance and regulatory policies and mechanisms must be internationally standard and recognised by most nations of the world for it to be effective.

SENTENCING FOR CRIMINAL ACTS COMMITTED BY ROBOTS/AI PERSONS

Robots are slowly becoming a part and parcel of our lives and we are slowly trusting them. However, it has been seen that in some cases the results have been catastrophic:

a. Robots that are used for medical practices have been injuring and killing its patients.
b. In 1979 a robot killed a human in a Ford Motor Company plant. The next death was in 2015 in a German factory and in 2017 another human died due to a robot in Michigan.
c. The famous Tesla autonomous car accident occurred in May 2016 wherein the car collided with a tractor-trailer and killed the Tesla driver.
d. In March 2018, an Uber self-driving car in Arizona hit and killed a pedestrian.

In the United States a study was carried out regarding the safety of surgical robots. It surfaced that Robots had caused 144 deaths and more than 1,000 injuries over a 14-year period. Some of these accidents included injuries to patients' bodies through broken instruments. The other major injury was tissue burns through electrical sparks. Long delays in surgery due system errors was also a contributory factor for the deaths. The bottom line of the study was very clear about the need for fresh safety measures. The study also highlighted that a number of technical difficulties and complications are still being experienced during robot assisted medical procedures.[15]

[15] "Robotic Surgery Linked to 144 Deaths in the US" (*BBC News*, July 22, 2015) <https://www.bbc.com/news/technology-33609495> accessed February 2, 2020

It is quite evident that we definitely lack clarity. When it comes to robots, in the absence of clear-cut laws and regulations, what obligations and consequences apply are unknown. It is not clear if the software programmer who negligently or recklessly coded the same "smart" car can be found guilty of manslaughter? In the absence of a proper separate legal framework for crimes/offences committed by various actors in an AI operated environment, courts apply legacy rules to affix culpability on a case-by-case basis.

CONCLUSION

Blaming machines for any accidents incidents is the easiest but not the right thing to do. Present day robots which are packed in metal and plastic are not naturally intelligent to make independent decisions. They run on flow charts and algorithms. Most of the present-day AI systems are heavy on the artificial and light on the intelligence. Some of the questions that always need an answer when using an AI are:

a. How to affix responsibility when an accident or incident happens when using AI systems which causes harms to humans or damages property.
b. If culpability cannot be fixed on robots, then who can be made responsible and culpable for the act is the second question.
c. How to solve cases where Operator Error leads to an accident/incident/ injury/death?

The most important and controversial question concerning the employment of intelligent robots is that the usage of intelligent robots is fraught with the danger of malpractice. In the case of non-intelligent AI's they would be merely considered as a facilitating tool being used by the doctor and any mishap through usage of the tool would be attributed to the doctor. However, the question of affixing responsibility enters a large canvas once we have intelligent AI's which can take their own decisions, without any kind of human intervention. If the decision of an intelligent AI has led to a failure of the treatment, fixing responsibility is not going to be a simple task. The fault could be attributed to the doctor for not taking control of the machine at the right moment or to the programmer who did not foresee a situation requiring the doctor to take over control and accordingly did not program the AI system.. While there are no clear answers to pin point attributably in the correct manner and to the right person(s), it is expected that as AI systems and their understanding matures, better healthcare regulations will be in place to help resolve these issues.

SUGGESTIONS

One can clearly say that that any AI related accident or incident will have the involvement of multiple human actors, albeit each with a different responsibility depending on the specifics of the case. Hence it would be necessary to examine the responsibility of each of these individuals in criminal law. The main focus during such examination has to be on mens rea, actus reus (including negligence). There is definitely a need to amend existing laws to handle accidents or incidents caused due to criminal actions of AI infused persons. Men behind the AI machines face an uncertain, exposure. The sad part is we have adopted technology without updating our laws. The need of the hour therefore is to have clear "robot rules" and the law, which clearly lay down the roles and responsibilities of each actor and the consequences if they don't.

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THE NEED FOR EVOLUTION OF COPYRIGHT LAW: ARTIFICIAL INTELLIGENCE

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INTRODUCTION

Technology is advancing at a rapid rate, there is a need for copyright law to keep up with such advancement. Various issues such as who should be given the authorship and ownership in case of a copyrightable work created by AI and whether such works can actually be termed as original is yet to be determined. The works created by AI using machine learning without any human intervention are not recognized by many states, such provisions have not been provided for under copyright law. In such cases who should be given the authorship and ownership is yet to be determined. This article aims at addressing the issue of granting copyrights to creations generated by computers through machine learning. It determines the consequences arising out of granting copyrights to the computer itself and also looks into who should be given the ownership rights, whether the programmer or the one who uses such machines to create copyrightable works and also aims at determining whether such creations pose a challenge to the justification of granting copyright as a reward for creativity. The article justifies the classification of works created by Artificial intelligence as an 'original work'. It also justifies the need for the evolution of copyright law to provide provisions which include the works created by AI. As of now, the copyright law is lagging behind technological development. It has failed to provide provisions regarding AI. Copyright law deals with works created by human beings. It rewards their creativity, labour, capital and skill. Many states such as the USA, Australia, etc., have disregarded works created by AI as being copyrightable. Other states like India, recognize the programmer as the owner of such copyright. Recognizing AI as the author/owner of the work created on its own is not yet accepted.

The rate of technological advancement is such that in a few decades a machine will be indistinguishable from a human being. From writing movie scripts, composing music, to

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painting a portrait, machines are now capable of creating works of art on their own. Although the programmer sets parameters within which the machine can function, the work is still created by the computer itself via a process which is similar to the thought process of the human mind. Artificial intelligence is the simulation of human intelligence in machines that are programmed to think like humans. It is based on the principle that human intelligence can be defined in a manner that a machine can easily imitate[3]. Alan Turing, one of the individuals who were given the task of decoding the Enigma (Nazi encryption machine), a decade after the World War II started looking for an answer to the question "can machines think?". In 1935 he had described an abstract computing machine consisting of a limitless memory and a scanner that moves back and forth through the memory, reading and writing symbols. This conception is now known as the universal Turing machine and all modern computers are in essence universal Turing machines. In 1950, he published a report titled "Computing Machinery and Intelligence" and later revealed a test which is now known as the "Turing Test"[4]. In 1951, Christopher Strachey, created the first ever successful AI program, which can play checkers. Starchey would later go on to become the director of the Programming Research Group at the Oxford University. The AI was able to play a game of checkers at reasonable speed by 1952. The first AI program in the United States was also a checkers program created by Arthur Samuel in 1952 and by 1955 he added a feature that allowed the program to learn from experience. The program also won a game against a former Connecticut checkers champion in 1962. Artificial Intelligence can be categorized as "Narrow AI" and "Artificial General Intelligence (AGI)"[5]. Narrow AI is also known as "Weak AI" as it operates within a limited context and is a simulation of human intelligence and they cannot think for themselves. It is a form of AI which is focused on performing a single task the best way it possibly can. They can attend to a task in real time but they pull information from a specific data set, which is required at the time of performing the task and they do not perform outside of the task they are asked to perform. Narrow AI is not a conscious, sentient or emotional being, it operates within the predetermined range and not outside it. Narrow AI is the most commonly present AI in the

[3] B.J. Copeland, "Artificial intelligence", (Britannica 2019) <https://www.britannica.com/technology/artificial-intelligence> accessed 24 February 2020.

[4] Prof Noel Sharkey, "Alan Turing: The experiment that shaped artificial intelligence", (BBC 2012), <https://www.bbc.com/news/technology-18475646> accessed 24 February 2020.

[5] BuiltIn, "Artificial Intelligence" , (2016) <https://builtin.com/artificial-intelligence> accessed 24 February 2020.

current world, such as Virtual home assistants like 'Google Assistant', 'Alexa' and 'Siri'[6]. These AI's are programmed to act as assistants that can take voice commands and use their limited data set to even have conversations with the user. Another area where narrow AI's have been prominent over the past few years is driving. These AI's are generally known as "Autopilots" which use radars placed around the vehicle to read the environment around and take control over the driving. They are programmed to perform tasks such as lane keep assist, variable cruise control, auto emergency braking etc. Artificial General Intelligence (AGI) is also known as "Strong AI" as it can exhibit human intelligence[7]. It is a machine with general intelligence and much like a human they can make their own decisions and also express emotions. These are the forms of AI that are portrayed in movies such as "Terminator" and "I Robot". AGI has the ability to reason, solve problems, learn and also be creative and innovative. Unlike Narrow AI, AGI has only been a part of fiction not reality, although the quest is ongoing and relentless. Machine learning is an application of artificial intelligence which allows the system to automatically learn and improve from experience. The computer program can access data and interpret it to learn for themselves. The primary aim is to allow the program to learn automatically without human intervention or assistance[8]. The process begins with feeding the program the necessary data and then building a machine learning model using the data and different algorithms. Machine learning algorithms may be characterized as 'supervised', 'unsupervised', 'semi-supervised' and 'reinforcement machine learning'[9].

Copyright is the bundle of legal rights of the owner of intellectual property. As the name suggests copyright is the right to copy, it means the owner of the copyright has the right to duplicate or reproduce his intellectual property. The right is exhaustive, as it is provided for a limited amount of time, after which the property goes to public domain. The right was created to protect a creator's original work from unauthorized use. In India, the copyright laws are governed under the Indian Copyright Act 1957. After the exhaustion of the term of protection (lifetime + 60 years), the copyright is transferred to the public domain, where it is free to use.

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[6] Ibid 3

[7] Lake Frankenfield, "Artificial Intelligence (AI)" (Investopedia January 2020) <https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp> accessed 24 February 2020.

[8] Expert system team, "What is Machine Learning? A definition" (Expert System 2017) <https://expertsystem.com/machine-learning-definition/> accessed 25 February 2020.

[9] Geeksforgeeks, "Machine learning", (Geeksforgeeks 2020) <https://www.geeksforgeeks.org/machine-learning/>, accessed on 26 February 2020.

It is to be noted that the economic rights of the owner is exhaustive in nature whereas, the moral rights of the author are inexhaustible.

ARTIFICIAL INTELLIGENCE AND THE THREAT TO TRADITIONAL COPYRIGHT LAW

When a work has been created with sufficient amount of skill, labour, capital and judgement, the copyright comes into existence on such work without the need for it to be registered. Such work need not make any literary sense, the quality of the work is not taken into account while granting copyright protection.[10] Copyright is defined under section 14 of the Indian Copyright act 1957. [11]

Copyright is given for works created by human beings using labour, capital, skill and judgement. The purpose of granting copyright to such works is to encourage others to create more copyrightable works which will be beneficial for the development of the society. Economic and moral rights are granted when a work is protected under copyright. These rights will be of no value when it comes to AI as it will have no use for such rights. AI doesn't require motivation, all it needs is programming and data input. Copyright rewards labour put in by the person, in case of AI no such labour is required to be rewarded. It only uses the database which is available and creates new work. Traditional copyright law which is applicable to humans will be of no use for works created by AI. There is a need for the copyright law to include certain provisions related to works created by AI. Using machine learning, deep learning and neural networks, AI is able to create new copyrightable works, as technological advancements keep growing at a rapid rate, copyright law has to evolve with such advancements to provide for issues which will arise out of use of such technologies.

The law of copyright protects others from appropriating the work which has been produced by labour, skill and capital of the author/owner. It's only given for an original work. Original work means the author must have created the work using his own skill, labour and judgement. It must not be copied from other works. It maintains balance between the interest of the owner in protecting his works and the interest of the public to have access to the works. Copyright

[10] T.R. Srinivasa Iyengar, Commentary on The Copyright Act (first edition 1959, LexisNexis 2016)

[11] According to section 14 of the Indian Copyright act 1957, Copyright means the exclusive right to do or authorise others to do certain acts in relation to literary, dramatic, or musical work, computer programme, artistic work, cinematographic film and sound recording. Since the section begins with the words 'copyright means', the definition is exhaustive and copyright extends only to the subject matter mentioned in section 14 of the Act. the right also extends to any adaptation or translation of such work as well.

promotes the creation of more copyrightable works by providing economic benefits and protection to the author's work. It's an exclusive right granted for a limited period of time after which it will go into the public domain. This is done by taking into account the interest and right of the public to use such work for their development.

The most important aspect of copyright is that it rewards labour, skill and creativity of the author. Works created by Artificial intelligence using machine learning on the other hand is based on large amounts of data, probability, learning from experience. These works are however created by autonomous systems which can learn and make independent decisions without being specifically programmed to do so. Even though the parameters are set by the programmer, the work is generated by the computer itself, by a process which is akin to the thought process of a human. [12] Traditionally, such computer generated works were not a question under copyright law as they acted merely as a tool for the human to create a copyrightable work, but now they are capable of generating new works on their own. They don't act as only a tool anymore, they make decisions involved in the creation of such work without human intervention. Whether such computer generated work can be given protection under copyright law is something yet to be determined. In many states like the USA, Spain, European Union and Germany, only works created by a human can be copyrighted. In countries like India, Hong Kong, New Zealand and UK, giving authorship to the programmer is recognized, but not giving copyright to the Artificial intelligence which created it[13]. In the case of Feist Publications v Rural Telephone Service Company, Inc.[14] In this case, the US court has specified that copyright law only protects "the fruits of intellectual labor that are founded in the creative powers of the mind." The US copyright office also stated that it will only register an original work of authorship as long as such work was created by a human being.[15] In India unfortunately there has been no specific decision of the court wherein the protection of works created by AI is allowed. Computer programmes can however be copyrighted under the India copyright Act which provides protection to the author of such programme.[16] The intellectual

[12] Andres Guadamuz, 'Artificial intelligence and copyright' (WIPO Magazine, October 2017) <https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html> accessed 17 February 2020

[13] Ibid

[14] 499 U.S. 340 (1991)

[15] Andres Guadamuz, 'Artificial intelligence and copyright' (WIPO Magazine, October 2017) <https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html> accessed 17 February 2020

[16] Archi Bhatia, 'Ways in which Artificial Intelligence is Transforming Copyright Law'

property as a whole has not provided for any rules or regulations as to the protection of works created by AI which mimics human intelligence and are not recognized as entities having rights of their own. With the massive development of machine learning, there is a need for copyright laws to address this issue of recognizing works created by AI as the purpose of AI is to enable innovation, reduce human labour.[17] It acts as an extension of a human being.

CLASSIFICATION OF WORK CREATED BY AI AS 'ORIGINAL WORK'

Copyright can only subsist in an original work. An original work need not necessarily be a new or inventive idea, as long as the expression of such an idea is original and unique, such work shall be protected under copyright. For a work to be protected, 'originality' is an essential element. Neither literary quality, artistic merit nor inventive thought is necessary to constitute originality[18]. Section 13 of the Indian Copyright Act 1957 speaks about the works in which copyright shall subsist.[19] An AI relies on large amounts of data and the use of machine learning to create works of their own. Whether such work can be called as original or not will be determined by using the following concepts.

IDEA EXPRESSION DICHOTOMY

Idea when coupled with expression can only be a subject matter under copyright. If such an idea is in a written form only then the idea itself is protected, otherwise it's not. In the case of Camlin Private limited v. National Pencil Industries[20], it was laid down that the work must originate from the author himself, it must not be copied. It's the expression of the thought which is protected, not the thought itself. In the case of Nicholas v. Universal Pictures Corporation[21], it was observed that copyright protection for an original work of authorship does not extend to the idea. In the case of R.G. Anand v Delux Films[22], the Supreme court of India held that the movie made by the defendant cannot be said to be an infringement of the script of the play

(Legal service India) <http://www.legalserviceindia.com/legal/article-157-ways-in-which-artificial-intelligence-is-transforming-copyright-law.html> accessed 25 February 2020

[17] Ibid

[18] T.R. Srinivasa Iyengar, Commentary on The Copyright Act (first edition 1959, LexisNexis 2016) 112

[19] Section 13 provides that copyright shall subsist in original literary, dramatic, musical and artistic work. It shall also subsist in cinematographic films and record only if a substantial part of a film or record does not amount to infringement of copyright in any other work.

[20] (2002) 24 PTC 349 (Del)

[21] 45 F.2d 119 (2d Cir. 1930)

[22] AIR 1978 SC 1613: (1979) 4 SCC 118

made by the plaintiff as even though the idea behind both the stories were the same it differed in the manner of expression of such an idea. Hence the courts have made it very clear that mere idea is not protected but the expression is[23], the ratio behind not protecting the idea is to avoid creation of a monopoly over such an idea which would in turn restrict different expressions.

This concept can be utilized in justifying the need for protection of works created by an AI. The large amount of data put into the AI acts as different ideas for the creation of a new work. Such new work will be a different and unique expression of the already existing ideas. By applying idea expression dichotomy, works of AI can be considered as different expressions of same ideas and hence be protected under copyright law. Taking the example of Shimon, a robot invented by researchers from the Georgia Institute of Technology, which can write and play musical compositions using AI and deep learning without human intervention. The robot has been fed with almost 5000 songs in order to teach how music is played by humans.[24] The new music composition from Shimon can be considered as its original work. The idea is taken from those pre fed songs and the expression is something unique and different without human intervention, hence it can be considered as an original work of Shimon. Being a unique expression, such an expression can be considered as an original work, thus making it possible to obtain copyright protection.

COMPILATION UNDER COPYRIGHT LAW

Another argument in justifying the need for protection of work created by AI under copyright law as an original work is by using the doctrine of Sweat of Brow. In the case of Eastern Book Company & Ors. v D.B. Modak & Anr[25], the Supreme court of India held that all literary works have to be original, however, derivative or secondary work would also qualify for claiming such protection as long as skill, judgement, labour and capital is involved in its creation. The term "original work" is not defined in the Act, however, while deciding the originality the Court usually checks the following parameters:

1. Whether the idea and expression are intrinsically connected. (Doctrine of Merger)

[23] Senthil Kumar, 'Idea-Expression Dichotomy Under Copyright Law' (mondaq, 19 October 2016) <www.mondaq.com/india/Intellectual-Property/536650/Idea-Expression-Dichotomy-Under-Copyright-Law> accessed 26 February 2020

[24] Jessica Miley, 'This AI-Powered Robot Can Compose and Play Its Own Music' (Interesting Engineering, June 28, 2017) <interestingengineering.com/ai-powered-robot-can-compose-and-play-its-own-music> accessed 26 February 2020

[25] 2008 (1) SCC 1

2. Whether the work was created with skill and labour by the author. (Sweat of the Brow Doctrine)
3. Whether the work possesses a minimum degree of creativity. (Modicum of Creativity Doctrine)
4. Whether the work is created with mere skill and labour or whether the work possess skill and judgment. (Sweat of the brow/ Skill and Judgment Test)[26]

AI through machine learning makes decisions on its own through a process which is much similar to the human thought process known as neural network and produces new works[27]. The work of AI can be considered to be a compilation as well, it uses massive amounts of data, selects and compiles various data inputs to create something new.[28] The work done by selecting and thus compiling such data can be said to be a representation of compilation done by human beings using skill, judgement and labour. As compilation is considered to be an original work, so can the compilation done by an AI be considered as an original work as it uses its skill and judgement in selecting and compiling data without human intervention.

COMPARING AI TO THE HUMAN BRAIN

The work created by an AI can be compared to the works created by human beings using inspiration. Human brain accumulates vast amounts of memory much like data inputted in an AI. This memory (much like already existing data) is then utilized in the creation of new works which can be copyrighted when proved to be unique and not a mere copy of an existing work. Similarly, works of AI can also be considered as unique creations generated from the already existing data (much like memory in humans) which can be considered as original and hence copyrightable. AI evolves and learns from experience much like human beings who create subsequent new works which can be copyrighted.

[26] Lucy Rana, Meril Mathew Joy 'Artificial Intelligence And Copyright – The Authorship' (mondaq, 18 december 2019)<https://www.mondaq.com/india/Intellectual-Property/876800/Artificial-Intelligence-And-Copyright-The-Authorship> accessed 25 February 2020

[27] Andres Guadamuz, 'Artificial intelligence and copyright' (WIPO Magazine, October 2017) <https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html> accessed 17 February 2020

[28] Lucy Rana, Meril Mathew Joy 'Artificial Intelligence And Copyright – The Authorship' (mondaq, 18 december 2019)<https://www.mondaq.com/india/Intellectual-Property/876800/Artificial-Intelligence-And-Copyright-The-Authorship> accessed 25 February 2020

GRANTING OWNERSHIP: PROGRAMMER OR THE USER OF SUCH AI

The term author is defined in section 2(d) of the Indian Copyright Act, 1957[29], however it does not make any reference to the legal personality of the author. Section 17[30] of the abovementioned act provides for ownership in cases of contract of service for artificial persons such as international organization and government, but not an artificial person.[31] Issues of authorship, ownership, economic benefits and most importantly liability in cases of infringement arises when a work is protected under copyright. If an AI is given a legal status and thus rights and liabilities, as of now it cannot respond or react in such situations. AI technology is not so advanced yet but there is a high probability of such an occurrence. As of now, the AI can only work with the parameters set by its programmer, it cannot think about any other aspects or consequences. It can only create something unique from data that's been fed into it. In such cases, the AI creates new work through machine learning from already existing data and there is no human intervention in the process of creating such work. The programmer cannot be called as both an author as well as an owner where he is not actually involved in the process of creation. Thus the authorship in such cases should be given to the AI itself. Since AI does not have a legal status yet, the ownership should be given to the programmer where he can utilize the economic benefits arising from work created by AI once it's granted protection under copyright law. The relationship between the programmer and the AI can be looked into from the perspective of the relationship between an employer and an employee, where the employee is the author and the employer is the owner. However, there is no remuneration involved between the AI and the programmer, instead of remuneration he can award the AI by providing it with the basic amenities which it requires to be kept functional and well. If the programmer is given the status of the owner of works created by AI, being a natural person, he can be held liable for the works created by the AI in case of infringement.

[29] Section 2(d) "author" means, — (i) in relation to a literary or dramatic work, the author of the work; (ii)in relation to a musical work, the composer; (iii)in relation to an artistic work other than a photograph, the artist; (iv)in relation to a photograph, the person taking the photograph; (v)in relation to a cinematograph film or sound recording, the producer; and (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;

[30] Section 17 of the Indian Copyright Act, 1957 speaks about the first owner of copyright.

Section 17 (d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein

Section 17 (e) in the case of a work to which the provisions of section 41 apply, the international organization concerned shall be the first owner of the copyright therein.

[31] Ritvik M Kulkarni, 'Of Artificial Intelligence and Authorship' (SpicyIP, 11 December 2016) <https://spicyip.com/2016/12/of-artificial-intelligence-and-authorship.html> accessed on 28 February 2020

Section 51 of the Indian Copyright Act 1957, starts with the words 'when any person'[32]. By reading the section it can be understood that infringement of copyright mentioned in copyright Act speaks about infringement done by a human being. Thus the programmer being a natural person, can be held liable for any infringement caused by AI if he is given the ownership of such work created by the AI.

There might arise a scenario in which AI created by the programmer is sold to different customers who will further use that AI for creating copyrightable works. Taking the example of Shimon (robot which can compose and create music) if such a robot becomes a commercial product in the music industry, different music composers will use Shimon to create music for them. Benjamin, an AI which can write bizarre movie scripts also has the potential of becoming a commercial product in the movie making industry.[33] In such cases, a dilemma regarding the granting of ownership either to the programmer or the purchaser (user) of the AI will arise. This dilemma can be solved in two ways:

1) The programmer/creator of such AI can license it to various licensees who will in turn use the AI to create and use the works so created for their own benefit. The licensee should pay a certain amount of royalty to the licensor upon every such work.

2) The programmer can sell the AI to various customers.

In the first case, the licensee and licensor both benefit from such works created by AI. in the second case however, only the customer (user) will continue to benefit from such works, the programmer will be barred by Doctrine of exhaustion of rights from seeking royalty over the creations of the AI which he already sold to the licensor.

[32] Section 51, When copyright infringed.— Copyright in a work shall be deemed to be infringed— (a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act— (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or (b) when any person— (i)makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or (ii)distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or (iii) by way of trade exhibits in public, or (iv) imports into India, any infringing copies of the work: Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

[33] 'This is what happens when an AI-written screenplay is made into a film' (The Guardian, 10 June 2016) <https://www.theguardian.com/technology/2016/jun/10/artificial-intelligence-screenplay-sunspring-silicon-valley-thomas-middleditch-ai> accessed 27 February 2020

WORKS CREATED BY INTELLIGENT ALGORITHMS WITH LITTLE OR NO HUMAN INTERVENTION

AI programs can operate with or without human intervention. Although they are created by humans, more often than not, an AI can come to a conclusion which cannot be explained or understood by the programmers themselves. It all depends upon the form of AI being dealt with. In the case of Narrow AI, human intervention reduces when machine learning algorithms are applied. An AI operated by a supervised machine learning algorithm will only produce results that are based on the parameters in the dataset, whereas an AI operated by unsupervised machine learning algorithm can produce questionable results while it is trying to understand the unlabeled dataset fed to it. This is what is considered as "little" human intervention, where the task is performed by the AI, but it needs certain inputs to be able to perform the given task.

Case Study: The Next Rembrandt: In 2016, J Walter Thompson (JWT) collaborated with a Dutch multinational bank called ING and Microsoft to create an AI 3D Printer that shocked many. The AI was fed data derived from 346 known paintings by Rembrandt. Rembrandt van Rijn (1606-1669) was a Dutch painter, considered to be one of the greatest painters and an important figure in Dutch history. The AI 3D printer created an original painting by itself, which was later dubbed "The Next Rembrandt "[34].

The AI used facial recognition software to read all the 346 known paintings to analyse Rembrandt's technique. Pixel data allowed the AI to understand and imitate his brush strokes. An 18 month analysis of work resulted in the creation of "The Next Rembrandt". The 3D printer used 13 layers of ink to produce the painting. According to JWT the portrait consists of 168,263 fragments from Rembrandt's portfolio.[35]

Unlike a language, an original work of art is under the purview of copyright law. But now the question arises whether this piece of art created by a machine can be protected under copyright law. Even though it was made by recognizing and imitating the brush strokes and technique of a well-known artist, the work is still unique in nature. The bigger issue lies in the fact that The Next Rembrandt is not a human creation. In most countries giving copyright to a machine is not strictly prohibited, but there are others which expressly declare that copyright is a right

[34] Microsoft reporter, "The Next Rembrandt" <https://news.microsoft.com/europe/features/next-rembrandt/> (April 2016) accessed 26 February 2020.

[35] J. Walter Thompson, "The Next Rembrandt/ ING" (JWT 2016) <https://www.jwt.com/en/work/thenextrembrandt> accessed 25 February 2020.

only given to humans.[36]The United States copyright office declared that it will register an original work of authorship, provided that the work was created by a human being.[37]

Even if a machine is given copyright, it does not have the means to utilize the rights. It neither has use for money nor can it file a suit in case of infringement of copyright. Considering these factors, the ideal scenario would be where the AI is given the 'authorship' while the programmer is given the 'ownership' title. After all, the programmer is the creator of the AI and the AI itself being a program can be protected under copyright, where the programmer is the author and owner.

In case of Artificial General Intelligence (AGI), in theory it is capable of matching the human intellect, but no programmer has been able to create a strong AI till date. An AGI is a sentient being, it can feel emotions and make decisions without human intervention. In the future, if and when AGI's are common in the world, they might also demand for their own rights, both economic and moral. In theory, since the AGI has the same mental capacity of humans and can also make decisions based on morals and emotion, it would also have the ability to exercise rights, if given any. In a situation where an AGI has applied its creative mind and labour to create an original 'work', should that work be protected under copyright?

This is far more complicated because of the absence of human intervention. In the case of Narrow AI there is input of data from a human and a command for a desired output, whereas in case of AGI the decision to do the work is made by the AI itself and no human has control over the outcome. In this case it is ideal to give works created by AGI protection under the law of copyright as they have the capability to satisfy all the requirements under copyright law. It has the ability to act on its own and create an original 'work'. Therefore, it should be given both authorship and ownership rights or it should be put into the public domain where nobody owns such creation.[38]

[36]Ibid 2

[37] Lake Frankenfield, "Artificial Intelligence (AI)" (Investopedia January 2020) <https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp> accessed 24 February 2020.

[38] Lake Frankenfield, "Artificial Intelligence (AI)" (Investopedia January 2020) <https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp> accessed 24 February 2020.

CONCLUSION AND SUGGESTIONS

The world of AI has transformed massively throughout the years, it will continue to do so in the future as well. Inventions of AI which are so closely related to human capabilities will soon demand the same rights/legal status as human beings. If not for the economic benefits, at least the recognition of being the author is to be granted to works created by AI without human intervention in the process of creating such work. The Programmer or user depending upon whether such AI software has been licensed or sold should be given the ownership rights as AI lacks legal status and hence cannot be held for any infringement caused. By using the concept of Idea Expression Dichotomy as well as Doctrine of Sweat of Brow, an AI's work can be considered as original. Thus in case of Narrow AI where a legal status has not been provided to AI, authorship is to be given and in case of an AGI, either it should be given a legal status in order to obtain ownership of the work created, or it should go to the public domain where nobody owns it. There is a need for copyright law to address the issue of granting copyright protection to works created by AI. Although it poses a threat to the traditional copyright law which is only applicable to works of humans, it is up to the law to evolve and adopt various technological, social advancements otherwise it will soon become irrelevant. Humans are already dependent on AI much more than ever, this is inevitable, there is a need for copyright law to protect works created by AI.

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CHAPTER 5

MASS MEDIA AS WATCHDOG OF DEMOCRACY, LEGAL EDUCATION AND RESEARCH, LAW, SOCIETY AND RELIGION LAW, MEDICINE AND ETHICS

(1)

NEWS COVERAGE BY ONLINE MEDIA AND BROADCASTING TV CHANNELS

Umme Ayman*

Shamal Sangam**

INTRODUCTION

Article 19(1) (a) of the Indian Constitution guarantees Freedom of Speech and Expression to Indian Citizens. Reasonable restrictions for the same are provided under Article 19 (2) of the constitution, wherein the rights may be curtailed to uphold "*interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence*". The American Constitution in its 14th Amendment Rights expressly provides for freedom of press but in the Indian Constitution it is implied by the wordings of Article 19 that freedom of speech and expression is granted to media too. Thus, while the media forms one of the four pillars of democracy, it is crucial for the media to disseminate information responsibly without bias. Yet, in practical terms there are factors which influence the media houses exponentially and jeopardize the independence and integrity of media. The Cobrapost Operation 136 is one such sting operation conducted by Cobrapost detectives to expose the corrupt practices of media houses wherein the media houses charge a huge amount of money to spread propaganda. Thus, this paper studies the findings of the operation and methods of dissemination of information by these houses to support the findings of the investigation.[1]

Article 19(1) (a) of the Constitution of India provides for freedom of speech and expression. Even though freedom of press is not expressly provided under the Constitution, various cases support the view of B.R. Ambedkar (as voiced in the Constituent Assembly Debates) that Freedom of press and Indian citizens is synonymous. Article 19(2) lays down reasonable restrictions wherein the freedom of speech and expression may be curtailed to uphold 'sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or

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incitement to an offence'. Thus, this right is considered as a limiting right which may be curtailed for maintenance of law and order.

The concept of reasonable restriction is expressly provided in the constitution so as to provide for Governmental control over exercise of the freedoms provided under Article 19(1). These restrictions imposed by the Government may be subject to judicial review and the burden to prove the reasonableness of the restriction lies on the authority imposing such restrictions.[2]

Media houses are described as large corporations owned by wealthy persons employing young individuals from 'liberal culture'. Yet the control over media and their freedom of speech and regulation can be curbed by reasonable restrictions, which provides the power to control what the general population sees, hears and thinks about a certain event thus managing public opinion.[3] As described by Walter Lippmann, propaganda is generated by "manufacture of consent" used by popular governments to establish control over public opinion. Thus, the forces controlling the news that is reported is called "guided market system".[4]

COBRAPOST OPERATION 136

Similarly, in Indian context, it has been observed that media houses are run as business corporations as 'fourth estate'. This has been exposed by the Cobrapost Investigation Operation 136 on March 26, 2018 on their official website.

Cobrapost is a non-profit venture at online independent investigative journalism which has conducted various investigations since 2003 to expose corruption within the government and big corporations. One such investigation was Operation 136 that was used to expose big corporations and their "propensity to influence India's electoral process through undesirable means.". The question that was posed to media houses when approached in disguise (as undercover investigation by senior journalist Pushp Sharma) to sell propaganda was 'If I reward you handsomely, would you peddle Hindutva in the garb of spiritualism to polarize the electorate and allow the party in power to harvest electoral dividends in coming elections?'. The shocking truth was for a definite sum of money the media houses (print, electronic or digital) agreed to sell propaganda in a structured manner.

[2] M P Jain, "*Indian Constitutional Law*", (7th edition, LexisNexis 2016), 1043.

[3] Edward S. Herman & Noam Chomsky "*Manufacturing Consent*", (Vintage 1994), 332.

[4] Daniel Chandler and Rod Munday, "*Dictionary of Media and Communication*", (1st edition, Oxford University Press, 2011).

The agenda being sold by the undercover investigator was published as under and somewhere between Rs. 6 crores to Rs. 50 crores were being offered to more than a dozen media houses:

"*In the initial phase, the first three months, promote Hindutva through customized religious programmes to create a congenial atmosphere. Then, the campaign will be geared up to mobilize the electorate on communal lines by promoting speeches of Hindutva hardliners, the likes of Vinay Katiyar, Uma Bharti, Mohan Bhagwat and others. As elections approach, the campaign will target opposition leaders, namely, Rahul Gandhi, Mayawati and Akhilesh Yadav, caricaturing them using less than dignified language like Pappu, Bua and Babua, respectively, for them, in order to show them in poor light before the electorate. They will have to run this campaign on all platforms – print, electronic or digital including, e-news portals, web sites and social media such as Facebook and Twitter.*" [5]

The agreement to publish content on communal nature violated various provisions of Indian Penal Code 1860, Representation of the People Act 1951, the Conduct of Election Rules 1961, Companies Act 1956, the Income Tax Act 1961, and Consumer Protection Act 1986, Cable Television Network Rules 1994 and guidelines of Press Council of India.

Following is a study of a prominent media house violating the principle of neutrality by studying the methods and structures in which the news for election campaigning of 2019 are reported mainly the Modi wave, Times Article "India's Divider in Chief", Ban on certain leaders for communal remarks by Election Commission of India and trolling of prominent political leaders. The reason for studying these topics specifically arises due to the fact that they have attracted mass-media coverage reaching out to huge populace which ultimately would impact the perception of different political ideologies which may make or break an election campaign and ultimately impact the election result.

ZEE NEWS EXPOSE

Zee news has been running many tv channels under its banner and is viewed by 190 million individuals. It is owned by Zee Group Chairman Subhash Chandra, who is also a Member of Parliament in Rajya Sabha representing Hisar constituency from Haryana State. In the sting operation conducted by Cobrapost Zee news has been accused of Selling hindutva propaganda and willingly accepting bribes to air certain advertisements for the same. As stated below, some

[5] Cobrapost , 'Operation 136 ' (*Cobrapost.com* , 26 March 2018) <https://www.cobrapost.com/blog/Operation-136:-Part-1/1009> accessed 22 February 2020.

excerpts are sited from the published content:

- Rajiv Sharma, Sr. Vice President- 9x Tashan (Owned by Zee Group): Promised the covert operation client from Cobrapost, Pushp Sharma, that the channel would run theme songs according to the ' agenda'.
- Santosh, Sales and Marketing Team- Zee Kalinga (Owned by Zee Group): Agreed to not only publish content according to agenda on Zee Kalinga which airs in Bhubaneswar, but also gave his word to spread the information to the 'top level of Zee News' to be aired nationally.
- Gauri Mahapatra, Head Sales and Marketing Team- Zee Kalinga (Owned by Zee Group): Agreed to accept cash payments of around Rs. 10 Crores through an agency/ashram to sell propaganda. He developed a plan to do so by providing a weekly schedule of Fixed Point Chart (FPC) and a wide-reach to grasp the audience's attention.
- Sanjoy Chatterjee, Business Head-Zee Regional East (for Zee Group): Agreed with the sting journalist to spread hindutva citing his Brahmin background and his personal support for hindutva ideology. He even confirmed that he had received directions from top to help in spreading this propoganda by airing almost 2-hours a day in favour of the ideology. He even mentions that keeping the sting journalists and 'the channels' objective in mind, finances shall be handled covertly in cash net worth of Rs. 10 Crores. Further, since the agenda was to be aired in states wherein elections are around that corner i.e. Rajasthan, Madhya Pradesh, Odisha and Chattisgarh, the total price negotiated was Rs. 25 Crores with Rs. 12.5 Crores in cash and the balance in cheque with a signed contract. Plans to receive money from overseas are laid and strong aggressive messages in the form of advertisements and covert operations are determined.
- Sagar Arora, Senior Sales Manager, Zee regional channel- Chandigarh office (Punjab, Haryana and Himachal): This journalist showed support in polarising electorates, propogation of speeches of hindutva leaders, assassination of politcal rivals (Pappu, Behanji etc) and thrashing of Akali leaders to convert voters in support of parties propogating hinduva ideology.

Similarly, various heads from various branches were approached and similar plans of actions, monetary negotiations and contractual details were discussed and almost everywhere support for the spread of propaganda was shown. The site also mentions that three contract proposals

were also forwarded by the respective Senior journalists in pursuance of the same. The videos of conversations of each journalist and the sting journalist representing Cobrapost have been published on the Cobrapost website.[6]

1. COVERAGE OF ELECTION CAMPAIGN 2019

ELECTION CAMPAIGN OF 2019

BROADCASTING TV CHANNELS (ZEE NEWS)

Zee News releases clippings of its broadcasted videos on its youtube channel which has 10.4 million followers. On observation of Zee News coverage in Election Campaign 2019, the following pointers have been noted:

- Comment on Modi Wave[7]: In this article, the journalist states that this election result was not only a result of "Modi Wave" but also a leadership wave that demanded strong political leaders who are "decisiveness, empathy and concern for issues". It supports leaders who have followed the same trend such as the "***Odisha Chief Minister Biju Patnaik, Andhra Pradesh's YSR Congress leader Jagan Reddy and DMK's MK Stalin"***. He criticises Mamta Banerjee, CM of West Bengal for playing the victim card rather than portraying herself as the master. He further holds that "***Kejriwal and Mamata Banerjee showed themselves to be more like protesters than governance executives***". It states that even though Modi's speeches might have targeted Congress leadership, he showed tremendous strength in Balakot strike and BJP's machinery advertising the parties schemes worked in his benefit. It further states "***The ones who managed to check Modi were precisely those who, like him, knew how to blend politics with governance with a confident, methodical approach***".

[6] Cobrapost, 'ZEE News: We are Pro-BJP, We are Pro-Hindutva ' (*Cobrapost.com* , 25 May 2018) <http://cobrapost.com/blog/Zee-News/1042> accessed on 28th February 2020.

[7] Madhavan Narayanan, "Not just a Modi wave, it was a leadership wave that dominated Lok Sabha elections 2019 results", (*Zeenews.india.com*, 28 May 2019) <https://zeenews.india.com/blogs/not-just-a-modi-wave-it-was-a-leadership-wave-that-dominated-lok-sabha-elections-2019-results-2207272.html>, accessed on 28th February 2020.

- Comment on Times Magazine "India's Divider-in-Chief"[8]: In his popular show DNA (Daily News and Analysis) aired by ZeeNews in which Sudhir Chaudry is the anchor, the article published by Times has been analysed. In this article, the anchor discredits the article by stating the "***agenda of international conspiracy***". He further states that the author of the article is biased and mentally incapable of grasping the good in any other human. He supports the 'triple talaq law' brought about by PM Modi which the author does not find credible. Various interviews and statements by prominent persons have been filmed to discredit the image of Modi portrayed by the Times Article.

- Election Commission ban on Yogi, Maneka, Mayawati and Azam Khan[9]: In this Article, it is highlighted that communal remarks on lines of "Ali" and "Bajrang Bali" are communal in nature and thus Election Commission imposed a ban of 48-72 hours on Yogi Adityanath and Mayawati. Azam Khan was banned for a sexist comment against his rival candidate Jayapradha for "khaki underpants". Maneka Gandhi had issued a statement saying that the BJP will come to power either with or without the support of Muslims and they'd have to deal with it, thus attracting a ban from EC. This article further states that this ban shall be taken as a lesson by other leaders to restrict their speech and not engage in communal politics.

- Trolling: Various articles were published by Zee News calling out Rahul Gandhi and his trolls when he made the "Coca-Cola and Shikanji"[10] comment, making a word "Modilie"[11] to call out false statistics stated by Modi in his speeches and BJP trolling Rahul Gandhi over sleeping in Parliament[12].

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[8] Sudhir Chaudry, "DNA analysis of article 'India's divider in chief' published in 'TIME' magazine", (*zeenews.india.com*, May 10 2019), <https://zeenews.india.com/video/india/dna-analysis-of-article-indias-divider-in-chief-published-in-time-magazine-2202499.html> accessed on 28th February 2020.

[9] Zee Media Bureau, "EC acts tough, bans campaigns by Azam Khan, Adityanath, Maneka and Mayawati for MCC violation", (*zeenews.india.com*, 15 April 2019), <https://zeenews.india.com/lok-sabha-general-elections-2019/ec-acts-tough-bans-campaigns-by-azam-khan-adityanath-maneka-and-mayawati-for-mcc-violation-2195894.html> accessed on 28th February 2020.

[10] Zee Media Bureau, "Rahul Gandhi trolled on Twitter for 'Coca Cola owner sold Shikanji' comment", (*zeenews.india.com*, 12 June 2018), <https://zeenews.india.com/india/rahul-gandhi-trolled-on-twitter-for-coca-cola-owner-sold-shikanji-comment-2115617.html> accessed on 28th February 2020.

[11] Zee Media Bureau, "Oxford dictionaries calls out Rahul Gandhi's 'Modilie' claim, says 'no such word exists", (*zeenews.india.com*, 16 May 2019), <https://zeenews.india.com/lok-sabha-general-elections-2019/oxford-dictionaries-call-out-rahul-gandhis-modilie-claim-says-no-such-word-exists-2203847.html> accessed on 28th February 2020.

[12] Kamna Arora, "#SleepingBeautyRahul: This is how Twitter trolled Rahul Gandhi when he was caught 'napping' in Lok Sabha", (*zeenews.india.in*, 20 June 2016),

ONLINE INDEPENDENT MEDIA (THE PRINT)

The Print is an online independent news channel that produces videos on YouTube and posts on other social media. IT is supported by Printline Media Pvt. Ltd. in 2016. The methods and ways of covering events that happened in Lok Sabha Election Campaign of 2019 are as follows:

- Comment on Modi Wave[13]: In this article, the journalist states that "***there is no wave for the ruling party as in 2014***". It's stated that as per analysis the election campaign is designed around "***some intangible idea of nationalism***" and not on seeking re-election based on its performance in its previous term. The article highlights the panic politics of the PM wherein instead of rational numbers and data of performance, the PM in his speeches during campaign has relied upon "***threatening to use the nuclear button to claiming that the opposition parties dream of his death to mocking the death of former Prime Minister Rajiv Gandhi who was assassinated brutally***". The journalist further states that exit polls calculated since 2014 have been proved wrong almost 85% of the time and delves upon the subject of a "silent voter" problem.
- Comment on Times Magazine "India's Divider-in-Chief"[14]: In this Article states that the Times Article may not affect his credibility in re-election but may affect his "***personal standing among his global peers***", especially foreign investors. The journo supports the argument that the article might have been one-sided as it does not acknowledge the initiatives taken by the NDA-Government towards development of India. Yet, the impact of silence of the PM during mob lynching and lynching in cases of cow smuggling/ selling of beef, might have had a negative impact. Many other journalists criticise the western media for being biased when it comes to criticism of Modi's model as its viewed in light of failed engaging

<https://zeenews.india.com/news/india/sleepingbeautyrahul-this-is-how-twitter-trolled-rahul-gandhi-when-he-was-caught-napping-in-lok-sabha_1909630.html> accessed on 28th February 2020.

[13] Praveen Chakravarty, "Rajiv Gandhi to Nuclear Button: PM Modi has made it amply clear he's panicking this election", (*theprint.in*, 6 May 2019), <https://theprint.in/opinion/rajiv-gandhi-to-nuclear-button-pm-modi-has-made-it-amply-clear-hes-panicking-this-election/231516/> accessed on 28th February 2020.

[14] Moushmi Das Gupta, "What message does it send when international media calls PM Modi "divider in chief"?", (*theprint.in*, 12 May 2019), <https://theprint.in/talk-point/what-message-does-it-send-when-international-media-calls-pm-modi-divider-in-chief/234360/> accessed on 28th February 2020.

economic environment leading to disappointment by global investors. It's also debated that even if Modi delivers in economic reforms there's hardly any trust due to the social degradation of India's secular fabric.

- Election Commission ban on Yogi, Maneka, Mayawati and Azam Khan[15]: This article states that the ban was imposed on the mentioned politicians for communal remarks. IT further states that during ban the three other politicians stayed under radar but Yogi continued visited temples and interacting with "***dalit family seers, a group of differently-abled school girls in Lucknow, triple talaq victims, and Varanasi's mayor, who is undergoing treatment at a local hospital***".

- Trolling[16]: In this article, the journo recognises various trolls that were issued during Lok Sabha election campaign of 2019. It states PM Modi giving a speech at a rally defaming the late former PM Rajiv Gandhi by "***Your father was termed 'Mr Clean' by his courtiers, but his life ended as 'Bhrashtachari number 1***" to troll Rahul Gandhi. Mayawati trolled PM Modi by "***asking how a man who had abandoned his "innocent wife" could be expected to speak for women. She also claimed married women in the Bharatiya Janata Party (BJP) were scared of letting their husbands meet Modi, as they feared he might separate them like he abandoned his wife***". PM Modi has coined the term "***speedbreaker didi***" for West Bengal CM Mamta Banerjee. In return Mamta Banerjee commented "***When Narendra Modi came to Bengal and accused my party of being tolabaaj (extortionist), I wanted to give him a tight slap of democracy***". Congress Leader Mani Shankar Aiyar commented "***acquaintance with higher education has gone no further than lying about degrees from Delhi and Gujarat universities that he never got and who can obviously not tell a scientific proposition from a dhokla***". Pragya Singh Thakur who was contesting for the Bhopal seat stated "***Hemant Karkare falsely implicated me and treated me very badly. I told him your entire dynasty will be wiped out. He died of his karma***", justifying his death during the

[15] Aditi Vatsa, "Temple run, books, meetings: What Yogi, Mayawati, Maneka & Azam Khan did during EC ban", (*theprint.in,* 19 April 2019) <https://theprint.in/politics/temple-run-books-meetings-what-yogi-mayawati-maneka-azam-khan-did-during-ec-ban/223629/> accessed on 28th February 2020.

[16] Ruhi Tewari, "Trolling the dead, women's underpants & 'Pappu's Pappi': Here's worst of the 2019 campaign", (*theprint.in,* 15 May 2019), <https://theprint.in/politics/trolling-the-dead-womens-underpants-pappus-pappi-heres-worst-of-the-2019-campaign/235605/> accessed on 28 February 2020.

terror attacks of 26/11 Mumbai. Amit Shah on the Kerala campaign of Rahul Gandhi stated "***When a procession is taken out there, it is difficult to make out whether it is India or Pakistan***". The article goes on to mention various other party leaders from all parties and their below the belt trolling tactics to win elections.

COMPARATIVE ANALYSIS

In the above mentioned paragraphs, the role of TV broadcasting channels and online independent journals has been elucidated. On factors of their comment on Modi wave, Modi's feature on Times as "India's Divider-in-Chief", ban by Election Commission on Yogi Adityanath, Mayawati, Maneka Gandhi and Azam Khan for communal remarks in campaigning and trolling as a tool used by oppositions to discredit each other the following conclusion can be drawn from each head:

- Reporting Modi wave

  While Zee News featured an article comparing the "strong, decisive, empathetic and concerned" leaders such as Odisha Chief Minister Biju Patnaik, Andhra Pradesh's YSR Congress leader Jagan Reddy and DMK's MK Stalin with that of PM Modi's style of leadership, it discredited Arvind Kejriwal and Mamta Banerjee for playing the weak victim to contest elections. On the other hand, ThePrint describes that the Modi wave is nothing but a facade and elections are being won by selling a romantic idea of nationalism rather than on grounds of performance from 2014-2019 by BJP. Clearly, one may draw a conclusion that Zee News was selling a "hero and savior" idea of PM Modi by stating his "strong" personality and "decisive" politics (communally inclined) on a high-road which evidently is a propaganda to sell the face of the BJP party i.e. Modi to increase his credibility but not on any valid quantitative grounds.

- Reporting Modi's feature on Times as "India's Divider-in-Chief":

  When Zee News's Sudhir Chaudry in his program DNA, analyses the Times Magazines article, he uses two-fold arguments to discredit it. Firstly, he states that the negative article has been printing on the cover page in bold but the article highlighting the reforms NDA government under Modi brought about has been written in a small font, which is harder to read. Secondly, he states that the Article is written by Aatish Taseer who is the son of Indian Journalist and a Pakistani politician now settled in New York working for the Times Group. He highlights that the author is biased and mentally incapable of grasping anything good

done by any person. Various interviews of BJP party members are attached to the program to discredit the validity of the article itself. On the other hand, the Article published by ThePrint highlights that the international media does not fully research before putting it down as it does not acknowledge the good schemes and laws brought about by the NDA government. Yet, it rather studies why the fear leaps in the global perspective by supporting it by two-fold argument. Firstly, the fall in economic growth has failed in attracting foreign investment which India requires. Secondly, that the degradation of the secular fabric of the country and the impending riots, protests and violence i.e. an area of conflict, will always be a questionable criteria for investors. Comparing these two methods of reporting, it is clear that the arguments presented by ThePrint are rational and all-encompassing whereas the arguments used to defend PM Modi's image are weak, irrational and childish.

- Reporting ban by Election Commission on Yogi Adityanath, Mayawati, Maneka Gandhi and Azam Khan:

  Zee News reported the news of the ban with a very neutral stance by stating the ban lasts for 48-72 hours and laying it down as a lesson for every candidate to not engage in communal politics. Similarly, ThePrint reported the news on a factual basis. In this aspect, which is quite important because the ban by the Election Commission was issued due to communal and sexist remarks by the candidates, both the news outlets reported the news on factual basis.

- Reporting trolling:

  When Zee News had to report trolls its main focus was opposition leader Rahul Gandhi. Whereas, when ThePrint reported the news of trolling, it covered almost every leader of every political party which made national news over their trolling remarks.

CONCLUSION

The revelation of corruption of Zee News as reported by Cobrapost Operation 136 may hold true in nature as this study found that Zee News inclined towards supporting, promoting and selling the "hero" image of Modi thus impacting the way BJP is perceived. On the other hand, online independent pages proved more credible in terms of delivery of information without bias. This was observed by comparing the way Zee News and ThePrint report four important events that occurred during Lok Sabha Election Campaign 2019 which definitely impacted the views of the voters.

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(2)

EDUCATION AND SOCIAL CHANGE: A CRITICAL ANALYSIS

Parineeta Goswami[1]

INTRODUCTION

The term social change is utilized to show the changes that occur in human connections and interrelations. Society is a snare of social connections and subsequently social change implies change in the arrangement of social connections. These are comprehended as far as social procedures and social collaborations and social association. August Comte the dad of Sociology has suggested two issues the conversation starter of social statics and the topic of social elements, what is and how it changes. The sociologists diagram the structure of the general public as well as look to know its causes moreover. As indicated by Morris Ginsberg social change is a change in the social structure. The International Encyclopedia of the Social Science sees social change as the change in the social structure, or in the example of activity and connection in social orders. Adjustments may happen in standards, values, social items and images in a general public. Modification may happen in standards, values, social items and images in the public arena. Different meanings of change additionally call attention to that change suggests, over every single other thing, adjustment in the structure and elements of a social framework. Establishments, examples of association, work, recreation exercises, jobs, standards, and different parts of society[2] can be adjusted after some time because of the procedure of social change. While characterizing the social change we can say that social change is basically a procedure of modification with no reference to the nature of change. Changes in the public arena are connected/connected to changes in culture, with the goal that it would be now and then helpful to discuss 'socio-social change'. Social change can differ in its degree and in speed. We can discuss little or huge scope changes. Change can take a recurrent example, e.g., when there is the repeat of centralization and decentralization in authoritative association. It can likewise be progressive. Progressive change can be seen when there is an oust of government in a specific country. Change can likewise incorporate transient changes (e.g., in relocation rates) just as long haul changes (in monetary structures).

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[2] Kellner Douglas, (2013), Towards a Critical Theory of Education, Critical Quest, NewDelhi, p. 7.

EDUCATION AND SOCIAL CHANGE

Education[3] is an instrument on social change and advancement which comprises a fundamental contribution to the improvement procedure itself.[4] The job of education in the advancement of HR specifically, requires scarcely and accentuation. Education raises individuals' profitability and imagination and advances business enterprise and mechanical advances. What's more it assumes an exceptionally vital job in making sure about financial and social advancement and improving salary conveyance. Education assumes a significant job in destroying destitution by conceding access to various business openings. Education framework should be overhauled time to time to fuse wanted changes so as to adapt to the present changes in the general public. Education framework ought to be made more pragmatic as opposed to giving minor hypothetical information. As opposed to learning just the hypothetical angles commonsense information ought to be given.[5]

The utilization of data and correspondence innovation (ICT) achieves an incredible learning condition and it changes the learning and training process where understudies manage information in a functioning, self-coordinated and helpful way.

Education and social change are interrelated. Both are similarly significant for the development and improvement of a general public. Education and social change is a two-way process.[6] While education is liable for protection, transmission and scattering of the entire culture, social change is the instrument and precondition of educational idea. Education starts the social change and provides them guidance and reason. Education readies the person for social changes.

Education as an instrument is utilized as a methods for achieving wanted changes in the general public and in the last case changes in the educational structure follows as a result of changes which have just occurred in the general public.

[3] Rabindranath Tagore, Education Quotes and Sayings, NMML, New Delhi, p.1.
[4] Krishnamurthy Sulochana, (2014), Modern Education and its Impact on Society in Bombay (1854-1905), Himalaya Publishing House, Mumbai, p. Introduction (x.)
[5] Dewey John, (2014), Moral Principles in Education, Critical Quest, New Delhi, p. 3
[6] Ambedkar B. R. in Narake Hari et. al. (ed.), (2003), Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 17,Part II, (Dr. B. R. Ambedkar and his Egalitarian Revolution), Dr. Babasaheb Ambedkar, Source Material Publication Committee, Government of Maharashtra, Mumbai, p. 128.

There are three sorts of connection among education and social change which are as per the following:

- **EDUCATION AS A NECESSARY CONDITION OF SOCIAL CHANGE**

  Historical experience of advanced countries has shown that for any social revolution education is the pre-condition. Uneducated people stay happy with their current conditions and feel that they are bound to be what they are. They never trouble to apply to get change their present social and monetary conditions. They are guided by universality, customs and destiny as opposed to by objectivity in their activities. Education causes individuals to make them levelheaded in their reasoning and approach.

- **EDUCATION AS AN OUTCOME OF SOCIAL CHANGE**

  There is between subordinate connection among education and social change. From one perspective it acquires change social conditions. Then again it is affected by social change, which implies social change helps spreading education. Education follows social change. It has its place when social change first come social changes and afterward encouraging procedure is changed by those social changes. Education framework changes as indicated by the requirements of society.

- **EDUCATION AS AN OUTCOME OF SOCIAL CHANGE**

  Education as an instrument of social change implies how education encourages individuals to bring social change. Education changes the standpoint and the convention approach towards social and monetary issues. It hones the aptitudes and information on the youngsters. Specialized education helps during the time-spent industrialization which brings about huge changes in the public eye. Educations not just jelly the social conventions i.e., customs, customs and qualities and so forth of the general public yet in addition transmit them to the people to come. It likewise inspires the kids to embrace new example so as to stay dynamic and forward looking. Education satisfies the requirements of the general public and engenders such thoughts that advance social changes in all fields of life.[7]

[7] Rege Sharmila, (Introduction and Selection), (2013), Against the Madness of Manu: B. R.Ambedkar's Writings on Brahmanical Patriarchy, Navayana Publications, New Delhi, p.72.

The job of education as an operator or instrument of a social change and social advancement is broadly perceived these days. Social change may occur when human needs change, when the current social framework or system of social foundations neglects to meet the current human needs and new materials propose better methods for addressing human needs.[8]

Education can start social changes by achieving a change in standpoint and demeanor of man. It can realize a change in the example of social connections and establishments and along these lines it might cause social change. Sometime in the past educational organizations and instructors were occupied with transmitting a lifestyle to the understudies. During those days, education was more a methods for social control than an instrument of social change. Current schools, universities and colleges don't put a lot of accentuation after transmitting a lifestyle to the understudies. The conventional education was intended for a constant, static culture, not set apart by fast changes. In any case, today, education targets bestowing exact information that is information about science, innovation and other kind of specializations. Education was related with religion. It has, nonetheless, become common today. It is an autonomous foundation now. Education today has been primarily instrumental in setting up the route for the advancement of science and innovation.[9]

EDUCATION & CULTURAL CHANGE

All societies are intrinsically inclined to change and, simultaneously, to oppose change. There are dynamic procedures working in a general public that energizes the acknowledgment of new thoughts and changes. At the point when changes occur for progress the general public for its prosperity promptly acknowledges them. Inside a general public social change occur because of dispersion that is the development of things and thoughts starting with one culture then onto the next. Education can chop down the thick underlying foundations of conventions, superstitions, obliviousness and backwardness and so forth. At the point when dispersion happens the type of a characteristic may move starting with one society then onto the next yet not its unique social significance. Inside a general public, forms prompting change incorporate development and culture misfortune. Developments might be either innovative or ideological which incorporate creations of new apparatuses, logical instruments or transportation strategies and so forth or development of new scientific hypotheses.

[8] Rege Sharmila, (Introduction and Selection), (2013), Against the Madness of Manu: B. R.Ambedkar's Writings on Brahmanical Patriarchy, Navayana Publications, New Delhi, p.73.
[9] Bagade Umesh, (2006), Maharashtatil Prabodhan ani Vargjatiprabhutwa, Sugava Prakashan, Pune, p. 331.

SOCIAL AND CULTURAL CHANGE

Some sociologists, however, differentiate social change with cultural change. Social change is defined as alterations in the social structure, or in a particular social institution, or in the relationship between institutions.[10]

They feel that social change refers mainly to actual human behaviour. Cultural change on the other hand, refers to variations in cultural phenomenon such as knowledge and ideas, art, religion, moral doctrine, values, beliefs, symbol systems and so on.

The distinction is abstract, because in many situations it is difficult, or nearly impossible to decide which type of change is occurring. For instance, growth of modern technology as part of the culture has been closely associated with alterations in the economic structures, one important part of the society.

ROLE OF EDUCATION FOR SOCIAL CHANGE

The relationship of education with social change is definitely not a straightforward, one-sided one, as maybe many might want to accept, for education isn't just instrumental in achieving social change, it is additionally strikingly instrumental in keeping up the state of affairs. At the end of the day, education plays with a 'moderate' and radical job, i.e., it helps both in 'keeping up' and changing various parts of the social framework. Society wishing to change or modernize itself needs to utilize various methods, instruments, foundations, operators or offices to accomplish its ideal objectives. Among such methods, education is maybe the most significant. Education gives essential preparing in abilities and occupations and in this way, delivers the required capable staff for keeping up the distinctive particular employments in present day mechanical, business, educational and look into foundations. Not just this, education is relied upon to change the qualities and mentalities of individuals.

The job of education in achieving social change or modernization has driven pioneers and organizers in creating countries to make enormous scope arrangements of educational offices for their separate individuals. We in India, have likewise observed the incredible endeavors of our educational organizers during the most recent fifty years of national intending to grow differing educational offices at all levels, and in all areas of the nation.

[10] Srinivas M. N., (2014), Social Change in Modern India, Orient Blackswan, Hyderabad, p. 6.

Likewise India is empowering exchange of work force and thoughts with created nations to get and use speculations; practices and systems of education to accomplish a modernized society.

Indian instructors must have a dynamic vision of innovation. Instructors can set up their understudies for assuming their correct position in such a future society. So instructors need to include themselves entire heartedly in producing the procedure of social change in India. We are aware of the way that educators alone can't do this.

The different reference gatherings, the educational organizers, educational heads, political and social pioneers and guardians likewise should approach to help the educators by modernizing their working in their own circle of social activity. Be that as it may, a definitive duty of actuating all these reference gatherings and enrolling this practical help for change and modernizing our general public through education would in the long run fall on the educators of contemporary India. This is extraordinary obligation and challenge.[11]

SOCIAL DEMAND FOR EDUCATION

There is each motivation to accept that the social interest for a more drawn out education will keep on expanding. We have seen the pattern of the present youth to remain in full-time education until the periods of seventh or eighteen, and consequently become potential possibility for advanced education, and there are confirmations to show that we are as yet losing young men and young ladies of good capacity in their battle through our complex and class stratified educational framework. A more noteworthy energy about the estimation of a more drawn out education is spreading all through all degrees of society. This is particularly observable among regular workers guardians who are more than that even before willing and even restless to let their youngsters remain on past the statutory leaving age. The weight on our framework to react and adjust to the interest is being felt in three significant ways which are recorded underneath:

ADVANCED EDUCATION

The cutting edge college not just proceeds with its conventional elements of making a network of understudies and researchers and habitats for the progression of information and research, yet has likewise become a wellspring of the main places of intensity and impact in the public arena. With the proceeding and huge increment in proficient and administrative classes, the

[11] Parimala Rao, (ed.), 2014, New Perspectives in the History of Indian Education, Orient Black Swan, New Delhi, p. 7.

colleges have come to procure increasingly more sociological importance. They are getting themselves all the more firmly connected with specific occupations, interests, and are called upon to look at their place and change the heading of their impact in a world with which they are getting increasingly outfitted to material creation. Truth be told, alongside the more up to date organizations of higher learning, they are currently turning into a critical factor in the improvement of our national economy. We should confront the chance of a lot more willing and capable understudies approaching than the limit of our higher educational establishments are at present fit for managing.

OPTIONAL EDUCATION

There is requirement for a more drawn out school life for youngsters with the goal that they are better adjusted to society. There is as of now a raising of the school-leaving age to 15 in the whole nation and thus the expansion of broadened courses. Increment in the school leaving age is basic for giving progressively develop residents to the nation. For this reason, the schools must be set up for their elements of giving a defensive, good and even helpful condition for the young people. It is in this way a matter of outrageous significance that the school should turn into a network which is amiable, useful and helpful in creating youngsters, no longer kids who are going through a troublesome time of development.

SPECIALIZED EDUCATION

The interest for specialized education is expanding quickly. We allude here to the preparation of short and center evaluation professionals beneath the degree of the technologists. They have, previously, generally been instructed by low maintenance courses in which there has been a deficiency of time, an overwhelming disappointment rate and absence of profundity. There has likewise been a requirement for a closer reconciliation among schools and the arrangement of further education. The low maintenance base of all courses has consistently been a question mark and plans are currently being made to give more opportunity to understudies for classes, handy and conversation.

At last, the advancement of extension courses for the 16 to 18 age gathering will be an agreeable technique. These courses structure a base soon after school and before understudies enter the specialized establishment. Giving a closer connection between the schools and specialized education is the most significant part of these changes, which come

straightforwardly because of the disappointment of the framework to keep pace with the changing needs of industry.

WAYS BY WHICH EDUCATION BRINGS ABOUT SOCIAL CHANGE IN INDIA

- **CHANGING THE ATTITUDE OF PEOPLE**

  The chief medium of education for effecting social change is mind, the sixth sense of man. Mind is the creator of the new and explainer of the old and the present. Education assists in altering the attitude of people in the right direction by which people can fight superstitions, traditional beliefs, prejudices etc.

- **CREATING A DESIRE FOR CHANGE**

  Education not only assists in molding the attitudes of people but also in creating desire for change by providing right knowledge and sharpening their thinking. It makes people aware of the social evils and stigmas helps in preparing the mind to fight for them in order to accelerate the pace of progress of the society. Besides, education helps to the down-trodden and under-privileged groups by creating awareness of their plights which provides a fillip to them to improve their conditions. Moreover, it helps in identifying plus points in our social structure, social gaps and in gaining required knowledge and skills which are pre-requisites for achieving spectacular progress in the society.

- **PROMOTING CAPACITY TO WELCOME AND ADOPT SOCIAL CHANGE**

  Education creates sound conditions for the people to welcome and adopt social change by bringing good things, utilities and desirability's of it home to the people. Education promotes capacity of the individuals to accept and adopt change in a meaningful way. So, building up capacities among individuals is one of the important functions of education towards social change. Education does it by providing right knowledge, information and skill to the people through its formal, non-formal and informal agencies.

- **EVALUATION OF SOCIAL CHANGE**

  Evaluation of social change is done by education in the form of sharpening the intellect and establishing certain standards which act as criteria for analysis of social change. Therefore, through the searchlight of critical analysis, undesirable elements of social change are

decried and discarded and desirable elements of social changes are accepted and propagated.

- **ASSIST IN SURMOUNTING RESISTANCE TO CHANGE**

  Education assists people to realize the necessities of overcoming resistance to social change for harnessing progress of the society. People are convinced of merits of reinforcing change in the society. Thus, dissemination of right kind of knowledge and information is sine-qua-non for encountering any forms of resistance to change and education serves the purpose.

- **AIDS THE EMERGENCE OF NEW SOCIAL CHANGES**

  Education strives to banish social evils such as untouchability, child marriage, mal-treatment to women,[12] sati, infanticide, superstitions, blind beliefs, fatalism, social injustice, derogatory practices, dogmatism, etc. by creating a sound and enlightened public opinion which is sine-qua-non for emergence of new social change. In the past, socio-religious reform movements in India and abroad were initiated and guided by education to ameliorate the conditions of people in general. In other words, progress of the society solely depends on the education. Education in today is used as a sure and chief instrument to bring about a scheme of change in every spheres of human life.

- **PROMOTES UNITY AND INTEGRATION AMONG PEOPLE**

  Education promotes unity and integration among people by broadening the visions of people, helping in shedding parochial attitude, stimulating cosmopolitan thinking and cultivating fellow-felineness and nationalism in the minds of people. Education helps people in realizing the necessities of unity and integration among people. Unity binds all people in one rope and education brings unity in them to fight for a common cause of making society advanced and modernized.

- **LEADERSHIP ROLE IN SOCIAL CHANGE**

  Education takes the leadership role in developing capacity to challenge various social ills and maladies infecting our society. Education prepares people for assuming leadership

[12] Omvedt Gail, (2003), Buddhism in India Challenging Brahminism and Caste, Sage Publication, New Delhi, p. 81.

roles as social reformers and nation builders. Therefore, education is considered as a creator of condition to transform the society from old to modern and advanced.

- **ADVANCES THE AREAS OF KNOWLEDGE**

  Today, explosion of knowledge has been an accepted fact. The area and scope of knowledge have been widened due to the contribution of researches and investigations undertaken by educated individuals. Research findings help in increasing the spheres of knowledge. Knowledge contributes to the progress of society and as such becomes the basis of social change.

- **PERPETUALIZING ETERNAL VALUES**

  Eternal values are part and parcel of any culture, which stabilize the society. In such times of crisis, education protects and guards these eternal values, insulates them from the pernicious effects of change and instills adequate knowledge and skills to have faith in these values. Education should protect, preserve and promote these values, for they are the blood-veins of a society.

- **TRANSMISSION OF CULTURE**

  Education lends stability and continuity to the society by transmitting worthwhile culture of a society from generation to generation. Besides, it prepares the society to adopt desirable and adequate social reforms. Therefore, education is labeled as a creator, generator and director of all social changes.[13]

- **STABILIZING DEMOCRATIC VALUES**

  As a stabilizing force, education helps in fostering democratic spirit and values for leading a better life. Democratic values such as liberty, equality, fraternity, justice, fair-play, tolerance, mutual respect, respect to dignity of individuals, feeling of brotherhood and inherent faith in peaceful methods are nurtured by the vibrant force of education.

- **REDUCING CULTURAL OR SOCIAL LAG**

  It occurs when different aspects of the society fail to adjust themselves to changes affected in some of its parts. According to Ogburn, "when there is change in material aspect of the

[13] Omvedt Gail, (2003), Buddhism in India Challenging Brahminism and Caste, Sage Publication, New Delhi, p.81.

culture, non-material aspect of culture does not keep pace with that of the former, there emerges a gap or lag between the two parts of culture: material and non-material".

- **ECONOMIC DEVELOPMENT**

  An emergent social order is needed for fair play of freedom, equality, social justice and equal opportunity. Education helps in the emergence of new social order. Economic development is essential for sustenance of new social order and education plays very vital rob in the economic development of the nation by injecting knowledge and skill in the minds of people for the growth of economy the pre-requisite for the national progress and prosperity.

- **NATIONAL DEVELOPMENT**

  Education opens the vista of national development. National development includes every aspects of nation to be developed to its fullest political, economic, cultural, scientific, social, and development of human resources the key to national development. So, the all round development of the individuals is essential for unlocking the treasure of national development. Sound knowledge base is required for speeding up the pace of national development.

CONCLUSION AND SUGGESTIONS

To conclude, by whatever means and media the change may be brought about, education always plays an important part in the process of change. Education through its aims, curricula, methods and multifarious functions brings about changes in the society. Mind is the chief instrument of social change and education helps in evolution of free and creative mind, which accepts and propagates social change in its true perspectives. Education provides practical knowledge and stimulates thinking for development of mind, which contributes to the progress, and modernisation of the society. It is the role of the teacher that cannot be overlooked. It is the teacher whose duty is not to teach but to act in such a manner that he/she can accelerate the changes in the society. So, he/she can manipulate and direct the multitude minds to create something and help in the evolution of adaptable mind key to national progress and reconstruction of the society.

Therefore, it is admitted on all hands that education develops the mind and transforms people towards art enlightened and advanced society.

For facile understanding the relationship between education and social change, it is felt necessary to summaries the contributory role of education in social change in the following manner:

(a) Education prepares the individual for social changes.

(b) It determines the values which act as criteria/measures for the analysis of social change before its acceptance.

(c) It initiates, directs and guides social change and helps in abolition of a host of social ills and malaise.

(d) It produces social reformers and leaders who make concerted efforts to bring about changes in the society.

(e) It helps in evolution and development of mind—the gateway of knowledge for generating changes.

(f) It helps in disseminating knowledge and skill in the growing minds to work for the progress of the society.

(g) It determines the nature of social changes that ought to be brought about slow or fast, violent or peaceful.

(h) It helps in preservation of worthwhile cultural heritage, transmission and promotion of cultural patterns by assisting in assimilation of good cultural traits of other cultures of the world. Therefore, it heralds an open-ended society which is receptive to any types of incoming cultural contents which are assimilated after proper analysis and evaluation.

Therefore, education is recognized as a powerful instrument of social change. An analysis of the role of education in different societies and nations reveal the glaring note that effectiveness of educational system determines the pace of social change. It is rightly said that education prepares the ground for changes to be brought about in the society.

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(3)

JUDICIAL PROCESS IN REALIZATION OF RIGHT TO EDUCATION IN INDIA - AN ANALYSIS

Avinash Bhagwan Awaghade[1]

INTRODUCTION

Education is the process of instruction aimed at the all-round development of boys and girls. Education dispels ignorance. It is the only wealth that cannot be robbed. Learning includes the moral values, improvement of character and the strength of mind.

Education plays an essential role in the overall personality development of individual. Education is part and parcel of Human Being and consider as fundamental need which require giving the dignified life to Human Being. Hence it has been realized that education is necessary for all without any discrimination on the basis of caste and creed.

In history of education *Non-Brahmins* were discouraged to gain education. Religion revolved around rituals and was preached in a language not understood by the masses. It gave birth to conflict between marginalized and privileged group of society. *Gurukulas* system of education was open to upper class and royal family members only. There were some *Budhistic* institutions, schools and monasteries open for all without any discrimination on the basis of caste and creed.

During British rule the missionaries openly started their educational activities and gradually Indian education came under the influence of British. It gives more importance to the western traditions, culture and civilization. The western education model has incriminating the eastern thoughts, beliefs and educational moral ethics.

Education is one of the most important factor in human development and educational development is called as mirror to see the nation's progress. The right of the children to education is not only substantial human right by itself but it is also the mechanism for realization of all other relative human rights. It provides platform to learn, earn and develop humanly. It facilitates and cheers for involvement of the social, moral, economic and political

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life of the society. Through the generalization of education enhance the standard of life, health and transform the individual in to law abider citizen.

> In Brown v. Board of Education[2] Warren C.J. cogently observed "that education is perhaps the most important function of state and local Government, compulsory education laws and the great expenditures for education demonstrate our recognition of the importance of education in our society. It is required in the performance of our most basic responsibilities, even service in the armed forces. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms"

It is the constitutional mandate upon the state especially on the judiciary to protect and safeguard the basic liberties of individual particularly the marginalized segment of the society.

THE OBJECTIVES OF RESEARCH PAPER

The theme of paper is to analyse the various judicial precedents and the approach of judiciary regarding right to education the through methodical inquiry, systematic critical and analytical way in propositions. The objective of this paper to discover the judicial process which has unseen and not yet been exposed. Therefore, for present research paper theme it has been identifiable definite aims and objectives are as follow.

- To analyze the judicial process and challenges ahead in realization of right to education
- To find out the various dimensions of judicial response in changing phases in realization of right to education.

The accessible research work displays that through various issues of education have been considered and studied in various research work i.e. quality issues, access to education, gender issues and poverty. The motivational factor behind this paper, is proactive role of Indian judiciary in protection of right to education.

[2] (1953) 347 US 483 at p. 494

RESEARCH PROBLEM

The era of liberalization, privatization and globalization i.e. (LPG) almost ruined Indian traditional education system due to that most of the socio-welfare educational policies were compromised. However, it has not been debated for quite some time and settled that establishing and administering of education institution for imparting knowledge to students is an occupation within meaning of constitutional text. Indian judiciary has played positive and proactive role towards privatization and commercialization of education. This is key problem in the interpretation of constitutional vision and attainment of certain goals and prescribed doctrinaire means for fulfillment of this vision through preamble.

The important problem regarding access to education, trade and commercialization in education system which is threatening the rights to equality and restricting fundamental rights of students i.e. equality, justice and fairness in educational matters.

The next key issues regarding accountability of education institution toward government, public at large and understanding the philosophical idea behind right to education in liberalised approach. This has lead in growth of concept like autonomous and self-financed institution, unaided private institution.

RESEARCH QUESTIONS

- Is the Judiciary is only the mechanism for the promotion of equality, justice and fairness in matter of right to education?
- To what extent the judicial process in realization of right to education has fulfilled the objectives of preamble of Indian constitution.

Rationale of Judicial process and Right to education

The judiciary in India has really shown a proactive and realistic approach in enforcement of fundamental rights of citizen. The final court of appeal in India has embarked and argued on many educational developmental issues.

In process of realization of right to education in India, The judiciary has come up with new approach toward universalization of education and access to education on the basis of equality. The judicial legislation, judicial activism and public interest litigation cases drove attention of

government to recognize right to education as fundamental right expressly under constitutional law and statutory manner.[3]

FIRST PHASE OF REALIZATION OF RIGHT TO EDUCATION BY JUDICIAL PROCESS

Indian Judiciary considered as guardian and caretaker of all fundamental rights and constitutional rights. It has rolled actively in ensuring the constitutional goals as set by preamble of the constitution. The justice i.e. social, economic and political is assured to the all sections of society. In unequal society there are instances of struggle between stronger and weaker section of society. In the matter of education interest the judiciary has played role of protector, sometime it has been acted radical, liberal to the extent. Through it has been creatively enhanced boundaries of educational interest. The Supreme Court in the phase of realization of right to education has embarked and professed that the right to take the primary education is an integral part of Article 21.[4] These judicial declaration deliberately projected that Right to Education is fundamentally necessary for the transformation of human being and society as well. Hence Right to Education is unique feature of right to life and personal liberty.

In historic phase of realization of right to education by judicial process the landmark decision of the Supreme Court of India in *Mohini Jain v Karnataka*,[5] declared and extended the scope of right to life. On the line of this declaration parliament has come with the constitutional amendment was passed in 2002.The said judicial precedent enlighten the right to education as a founding stone of constitutional right listed in Article 21-A.[6] At the same time it has extended and altered the scope of Article 45 of constitution[7]

The amendment has complex dimension positive and negative side of education. The right to education has been diluted by exclusion of early childhood care and education i.e. child younger than six year. It was not insight of judicial approach toward right to education but parliament has shifted the burden of responsibility successfully over parent themself to take

[3] Mamta Viswanath, 'Judicial Intervention in Policymaking: The Uniqueness of Right to Education in India', The International Journal Of Humanities & Social Studies (ISSN 2321 - 9203) available at www.theijhss.com accesses on 15 January 2020
[4] Unni Krishnan v State of Andhra Pradesh AIR 1993 SWC 863
[5] 1992 AIR 1858
[6]Article- 21 A of Constitution of India,1950 "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."
[7] The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

care and education of child below age of six year. The state has in salient mode in relation to the constitutional mandate of providing early care and education.

In perception of said judicial approach have darken side because it is difficult to hide the importance of early education at the age of below six year. The structural adjustment made by shifting responsibility on the shoulder of parent is deviation of constitutional mandate. In other side judiciary and law maker approach are said to be narrow-minded by limiting the scope of right to education only to the extent of primary education.

Another substantial judicial precedent established historic proposition which could be called as transformation phase of right to education. *In Unni Krishnan v State of Andhra Pradesh*[8] historic judgment in 1993 radically realized the right to education and authoritatively turned in three sixty degree the ambit of the Article 45.[9] In its Judgment, the Supreme Court embarked that Article 45 in Part IV has substantial nexus with Article 21 of the constitution which has been listed in Part III of the constitution. We can't judicially divorce the Article 45 and Article 21. It is the duty of this court to harmonious construction while interpreting both the article judiciously. The apex court further pointed out the correlation of part III and IV of constitution and said that both are supplementary and complementary to each other. In other way round we can say that it is the two sided coin with same value. However court has took the restricted version of right to education and disagreed the proposition of the *Mohini Jain* case[10] i.e. that the right to education at all levels is guaranteed by the Constitution. The Court rejected the contention that the fundamental rights guaranteed in the provisions of Part III are superior to the constitutional moral claims and objectives reflected in the Part IV. The one side of judgment of apex court has adopted proposition based on Irish model of constitutional infringement but proactively stand to assert the constitutional goal.[11]

[8] AIR 1993 SWC 863
[9] Article 45, Constitution of India, 1950 "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."
[10] Supra F.N. 4
[11] T.D. v. Minister for Education, [2001] 4 I.R. 545

SECOND PHASE OF REALIZATION OF RIGHT TO EDUCATION BY JUDICIAL PROCESS

Right to education after The Eighty Sixth Constitutional Amendment Act[12]

The Judicial transformation of the directive principle of state policy regarding right to education toward the realization of fundamental right is realistic approach to the educational interest. It is said to be socio-liberal phase of the Indian Constitution. In the process of transformation judiciary has played proactive and realistic role in educational development. It is great role that can be called even though directive principles are not enforceable by judicial process. The 86th amendment of the Constitution of India inserted new fundamental right expressly, From that movement right to education is now legal statutory right provided under Right to education Act,2009 and constitutional fundamental base lies in Article 21- A, In addition to its new clause has been incorporated under fundamental duties of citizen i.e. Article 51 A(K)[13] . It has imposed duty upon the parent to give education to child until he or she completed the age of fourteen year of age.

In the *Modern School v Union of India*[14]the Supreme Court has predominantly dealt with the changing approach toward education in imparting education. The education was considered as trade and imparting education was considered as occupation. The profit making as commercial approach in offering education by private institution was key issue in this phase. The sky hike of the fee structure adopted by private educational institution was challenged in this case. The judicial precedent in this case was bold step in realization of right to education in the era of liberalization, privatization and globalization i.e. (LPG). The Supreme Court emphases on equality of opportunity to get education and positively assert that education shall be equally accessible by common people in private schools. It is the duty of state to promote the interest of weaker section and marginalized group of society. The state shall take effort to check commercialization of education and promote socialistic approach by ensuring educational reservation policy in private school and unaided school. The effect of this judicial approach, state has introduced mechanism to control and regulate fee structure of education course offered by private institution. The implication of this judgment has changed the law maker approach toward commercialization of education.

[12] Constitution (Eighty-Sixth Amendment) Act, 2002
[13] Article 45 of the Constitution of India, 1950, The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.
[14] (2004) 5SCC 583

Proactive judicial process in recognition of privatization and trade in education sector

In the scenario of the private-public partnership (PPP) in imparting education in society has forced to advance the approach of judiciary. The education policy of Indian government has been smoothly allowed private sector under the shared responsibility of state and private sector. It is the phase of changing socialist to the capitalist approach. The advanced approach of educationalist and policy maker invented concept of The Public Private Partnership (PPP). Because free and compulsory primary education has one of the constitutional obligation upon the state. This obligation cannot be satisfied by only by state-funded schools/institutions alone. Due to various financial issues and absence of strong political will, the government had been to bounded to accept the privatization, commercialization of charitable and welfare policy of education. The huge demand of education and increasing population of India bound us to welcome WTOs policies in education in form of PPP. That is the reason new category of private schools; self-funding institutions, aided or non-aided institutions are registered and incredible growth after adopting the new education and economic policy.

If we analyse the judicial response toward the elaboration of the right to education in context of LPG policy, the ratio-decidendi and dictum provided in *TMA Pai*[15] and *Inamdar*[16] case drastically change approach of constitutional policy and education as well. The offering educational was considered as welfare and a charitable activity in Indian society, but this noble objective was construed in other way round in the *TMA Pai* and *Inamdar* decisions. In the both the judicial precedent it was construed education as charitable activity but this version of educational policy could not allow state to shift burden of constitution mandate , upon the shoulder of private educational institution. State has to perform its obligation under the head of charitable and welfare activity by it could not anticipate from the private institution to accept reservation policy in matter of admission. The judicial approach in *TMA Pai* is much not clear about the nature of education as occupation. As per se education considered as charitable activity and not occupation to earn the profit by business. The Hon'ble Supreme Court has held that right to admit student is the important right in realm of right to administration of educational institution as envisaged by Article -30 of Indian constitution. The State Government or executive authority may not enjoy regulatory authority over the administration. The private institution may regulate there admission process on the fair and merit basis for ensuring educational standard. The right to administer, not being absolute, hence there could

[15] TMA Pai Foundation v. State of Karnataka AIR 2003, SC 355
[16] P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537

be regulatory measures admissible to maintain equality and access to education on fair basis. In the *Inamdar* case Supreme Court emphatically held that Private unaided educational institution would enjoy free hand control and autonomy to decide there parameters and standard of professional education courses. Even then they would enjoy great autonomy in deciding there fees and other educational fees.

JUDICIAL APPROACH AFTER 93RD CONSTITUTIONAL AMENDMENT ACT, 2005[17]

The constitutionality of 93rd constitutional amendment act, 2005 and Central Educational Institutions (Reservation in Admission) Act, 2006 was challenged on the groud of violation of basic structure doctrine In *Ashoka Kumar Thakur v Union of India and others*[18]the major issue were adjudge in this public interest litigation i.e. non exclusion of creamy layer from the ambit of reservation, ambit of definition of backward class, identification of backward class on the basis of caste ,applicability of principle of creamy layer to SC and ST people.

> The Supreme Court authoritatively ruled that "*creamy layer must compulsorily be exclude from the category of backward classes. If the Creamy layer principle is not applied, it could easily be said that all that castes that have been included exclusively amongst the socially and educationally backward classes have been included exclusively on the basis of caste".*[19]

While deciding the issue of constitutionality of the Central Educational Institutions (Reservation in Admission) Act, 2006 and violation of basic structure doctrine aplex court has refereed judicial approach taken in *Indra Sawhney v Union of India*[20] was socialist approach of court and held that creamy layer principle could not be suitable to find out backwardness of any kind. The very purpose of Article 15(4) & 15(5) are to set up mechanism to give access to education and endow the educational interest of backward community. The legislation enacted thereunder supposed to serve the purpose of Article 15(4) & 15(5).The Supreme Court upheld

[17] In Article 15 (5) of the Constitution, Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational Institutions referred to in clause (1) of Article 30.
[18] (2008) 6 SCC1
[19] Ibid
[20] 1992 Suppe(3) SCC 217

the constitutional validity of the Constitution (Ninety – Third Amendment) Act and declare that it does not violate the "basic structure" of the Constitution.

CONCLUSION

In brief conclusion of this article exposes various approaches and dimension of judicial process in fundamental issue or concern about right to education. This article has tried to expand the scope and ambit of right to education with the help of judicial insight. The Indian judiciary has radically protected the rights of child and successfully paled role of activist and guardian of constitution and fundamental right of citizens. Although the entry of LPG policy in Indian education system cant not questioned but in realization of right to education our Hon'ble Supreme Court has done remarkable and appreciable work by creditable judicial precedent and in form of directions and suggestions. In process of realization and recognition of right to education from the first phase till date in many cases supreme court ensure the protection of basic rights of child and marginalized group of society. In this regards Indian judiciary has fixed standard in implementation of right to education policy to achieve socialist goal of preamble. In the context of *In Society of Unaided Private Schools v Union of India*[21] The apex court discovered the prime objective of Right to education and further stated that approach of education institution while imparting education shall be child centric and not institution centric.

In education system whatever we understood we should keep in mind the priority and prime interest of all children regardless whether they are admitted or not admitted in school. It shall be absolute motto of promotion and realization of right to education. The burden of achieving the objective of right to education is on shoulder of education institution irrespective of the fact that it has category of private school or government school. The importance of Article 21-A, in human life is not less than food, cloth and shelter The judiciary in India has taken a realistic approach in process of realization of the right to education to children.

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CASTE, FACTION AND POLITICS IN RAYALASEEMA REGION

Sai Srinivas Reddy. B*

The study of factions and the violence associated with it, attempts to analyse the nature of politics in the specific context of a region in Andhra Pradesh, one of the four southern states of lndia.[22] The intended objective of this thesis is to understand, sociologically, the twin problematic of 'faction' and violence within a region. A particular aspect of the politics of the region, namely violent factionalism, is taken as the starting point for analysing the political practices that inform local and 'macro' politics and their interrelationship. The study is diachronic in nature, and covers roughly a period of 40 years, starting from the year of formation of the state of Andhra Pradesh, 1956 to the year 2000. It is primarily a study of a region or a sub region (if we take Andhra Pradesh itself as a region in South India) within the state. Rayalaseema, etymologically 'the land of kings', consisting of four districts -Anantapur, Kurnool, Cuddapah and Chittoor- is the southernmost part of the state having boundaries with Tamil Nadu in the south and Karnataka in the West. A few preliminary remarks are necessary in order to situate this study in relation to the extant literature on factions and violence, both in the social sciences generally and studies on India particularly.

To locate the conflicts and the conflicting groups in this region was only part of the problem. A more significant aspect was to understand the pervasiveness of the violence that usually accompanies such conflicts. My concern in looking at 'factional' violence is to stretch the "political imagination" about violence from an exclusive pre-occupation with violence among 'nation-states'; among different 'ethnic' communities; or racial violence, to that of violence

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[22] The state of Andhra Pradesh, formed on 1 November 1956 comprises of three geographical regions known as the Circars or coastal Andhra, Rayalaseema and Telangana. The first two regions were formerly a part of the Madras Presidency until I 51 October 1953 when they were detached from it to form a separate Andhra state. The Andhra state, at that point, included the eleven Telugu districts of the Circars and Rayalaseema of the undivided Madras state and the three Telugu taluks- A doni, Alur and Rayadurg- of Bellary district (now a part of the present state of Karnataka). Subsequently, on the basis of the linguistic reorganization of the states, nine Telugu speaking districts of the old Hyderabad state, known as Telangana, was merged with Andhra state to carve out the bigger state of Andhra Pradesh in 1956, with Hyderabad city as the state capital. The present state of Andhra Pradesh comprises of 22 districts- 10 districts of Telangana, 8 districts of the Circars and the 4 Rayalaseema districts of Anantapur, Cuddapah, Kurnool and Chittoor.

among 'culturally similar' peoples, violence generated by the political process itself. Any study of violence necessarily means a conceptual selection from an array of violent activities witnessed within a society. This means that while trying to explain one set of violent events, other kinds of violence in the same society is lost sight of. This study is no exception to that predicament.

RAYALASEEMA – AN ERA

Rayalaseema derives its etymology from the illustrious Vijayanagara King, Shri Krishna Deva Raya and literally means the "Land of Rayalu." According to historians, the territory did not exactly match with the empire of Sri Krishna Deva Raya as he ruled considerable areas of Karnataka, Goa and Tamil Nadu but the boundaries matched more or less with the territory of Araveeti Dynasty which ruled the place after fall of Vijayanagara Empire. The term "Rayalaseema" was coined during freedom movement out of aversion to being referred as "ceded districts" in the British administrative terminology. In the year 1800, British referred to the districts as 'Ceded'. The term 'Ceded' was derogatory and amounted to slavery.[23] Nizam of Hyderabad Ali Khan ceded the places to the empire as part of subsidiary alliance. After Mysore wars, the Nizam got the Rayalaseema districts to its share which he did not want to administer immediately but create a buffer with the help of the British. The British agreed to the proposal to meet the cost of the subsidiary force out of the revenue from the territory. The change of name from the Ceded districts to that of Rayalaseema was effected during a number of conferences in Andhra Mahasabha and Andhra Provincial Conference or Ceded Districts Conference was held at Nandyal on November 17 and 18 of 1928.[24]

RAYALASEEMA MURDEROUS FAMILIES

The word Rayalaseema will probably run a chill down the spines of individuals from Andhra Pradesh. Government authorities and educators have feared postings in inside towns of the district. Rayalaseema is a law unto itself, a locale of brutal groups and possess whose words rule. As per police records, over the most recent 35 years, almost 8,465 regular citizens, including 970 Congress and 560 TDP labourers have been executed due to factional savagery in this area.[25]

[23] https://www.thehindu.com/news/national/andhra-pradesh/the-birth-of-rayalaseema/article5948111.ece Accessed: 7th February, 2020.

[25] https://thewire.in/politics/rayalaseema-politics-andhra-pradesh

"*Once you bloody your hands, there will always be more blood; only death washes it off*."[26] That's an old saying told with chilling simplicity in Rayalaseema.

ORIGIN OF CONFLICTS

The processes that interlink the village to the district shape the political culture of the region, and identified the essential component of such interlinkages as 'factions' at different levels of the social and political structure. A general characteristic of factional formations in all the cases of their occurrence is their origin in conflicts-whether of material interest, of honour, or of political expediency. The basis of conflict is always the competition over access to or control over scarce resources, which is sometimes expressed in an honorific idiom. This in turn means that such competition for resources took place between economically and socially powerful persons. Conflicts arise over positions of authority, such as village headman ship, the Mandal and· district level political leadership, and legislative positions at the state level. Although these are primarily political contestations, economic and symbolic aspects of such conflicts cannot be underestimated. Thus, rather than conceptualizing 'factions' as quasi-groups (a structural feature of society) or conflict groups (a form of political organization), our case of factional formations in the Rayalaseema region of Andhra Pradesh has shown that factions are generated by the political process itself, the sine qua non of which is the competition over scarce material or symbolic resources. This means that the idiom of factional politics may permeate a political system or has the potential to define a political process in a specific context. In our case, the relationships of patronage and client ship have been identified as the political principle that defines factional politics in the regional political culture of Rayalaseema.

RAYALASEEMA AND THE FORMATION OF STATE

The region formerly known as the Ceded districts, part of Madras Presidency.[27] This Presidency comprised of heterogeneous in terms of language, culture, social structure and geography. The Five major linguistics areas in Madras Presidency are – Tamil, Telugu, Malayalam, Canarese and Oriya, they were reorganised according to linguistics division and the corresponded districts are Tamil Nadu, Andhra Pradesh, Kerala, Karnataka, and Orissa.

The Telugu speaking two districts in Madras Presidency;

[26] http://archive.indianexpress.com/news/revenge-in-rayalaseema/738026/

[27] This region are called ceded districts because they were ceded by then Nizam of the Princely State of Hyderabad to the British in 1800.

1. Coastal districts are known as Circars
2. Interior districts are known as Ceded

The Ceded districts comprises of Anantapur, Bellary, Cuddapah and Kurnool, "were thinly populated and were roughly half in area and population of the Circars districts. With a slight rainfall, mostly infertile soil and few large irrigation works, the Ceded Districts had suffered more consistently than the other districts of the Madras Presidency from famines and scarcities.[28] This region population was dominated by reddy landlords, non-Brahmin peasant proprietors, who owned the majority of the village lands and they monopolized the positions of village headman.[29] For the Madras Presidency, the administrative centre was in Madras. John G. Leonard has argued. "Cultural pride and nationalistic feelings remained a part of the Andhra movement, but the emotional response to the cry of 'one language, one state, one language' formed only part of the support for an Andhra State for the chief source of support came from dissatisfaction with the current state of Madras Politics."

The Telugu Brahmins who led the movement faced a intimidating task in hoarding the support of the Telugu speaking districts of Rayalaseema, which took on the character of regional and caste. Within the congress, the question for separate state led to division of Madras Presidency. The congressmen in Circars districts and Rayalaseema agreed to demand for separate linguistic state for the Andhra Pradesh. Thus, in conference between 1913 and 1937, excogitate on the separate state question which concluded in Sri Bagh Pact providing "guarantees and safeguards that may be sought by Rayalaseema prior working with other Telugus towards the immediate formation of Andhra province."[30] The pact agreed "weightage in the legislature by distributing seats on an equal district basis, gave priority to the irrigation needs of the region, and a university centre in one of the districts of the region, which would improve the educational qualification of the people. The principle of linguistic province accepted by the congress party in its Nagpur session in 1920. " The demand for a Separate state gained momentum after the congress ministry sworn in Madras in 1937."[31] There are myriad tussles between the Rayalaseema leaders and the Circars leaders for equal representation of people from

[28] K.V. Narayana Rao writes, "The movement for a separate Andhra Province had its origin in the prosperous coastal delta districts where the spread of Western education engendered a spirit of social reform and accelerated the growth of political consciousness.
[29] Leonard, 1967,
[30] Narayana Rao op.cit.
[31] Ibib,

Rayalaseema in government jobs and for favourable and efficient execution of the Tungabhadra project that would benefit Rayalaseema people economically.

The struggled for separate Andhra Province was all along tied with the movement for Independence of India. The Congress party provided the leadership in this movement because all the regional level organizations were populated by congressmen. Personal antagonism among the leaders within the congress resulted in the delay of the formation of the separate Andhra state. There are tussle between the circars and the Rayalaseema leaders. This tussle look place because of the Andhra Pradesh Congress Committee (APCC) post.

After the Independence, there was a cessation between the National leaders and State leaders regarding the separate Andhra state. Jawaharlal Nehru refused to grant separate Andhra state, referring to contradicting voices among the leaders for insertion and non- inclusion of Madras city in the new Andhra state and the location of the capital city, the High Court and the state university in the accordance with the Sri Bagh Pact.[32] However, such a situation was disturbed by the fast-unto-death of Potti Sriramulu, an ex-Congressman and social worker, who died on the 58th day of his fast, triggering widespread protests and demonstrations against the government at the centre and against Nehru in particular. Subsequently, an Andhra state consisting of 7 Circars districts, 4 Rayalaseema districts and 3 tehsils from Bellary district was formed in October 1953, with Kurnool in the ceded region as the ephemeral capital. There was a conflict between the ceded and circars congress leaders with Telangana leaders for including the Telangana region with Andhra Region. Reason behind the integration of the Telangana region is which will deprive the due share in the administration of the state. The safeguards provided to the Telangana region came to be known as the Gentleman's Agreement.

In this way the development for discrete Telugu linguistic state saw the ascent of non-Brahmin caste to political leadership in the recently formed state of Andhra Pradesh. With the social and political hegemony of the Reddy's and Kammas, regardless of whether they belong to the Congress party or the Communist party, it presented a political procedure of amalgamation of the bases of these non-Brahmin positions both inside the party and in the general public.

[32] Following his defeat and eventual exit from the Congress, T. Prakasam had opposed the formation of the separate Andhra province when the Dar Commission had visited Andhra districts in 1948. As K.V. Narayana Rao has speculated, " ... it is possible that, in 1950 Prakasam feared that the formation of an Andhra Province would increase the strength and prestige of the already dominant legislature group of Pattabhi (Sitaramayya) and, to prevent such an eventuality, he may have put up his dissent hoping that the government of India would not be anxious to create a new province in the absence of unanimity on vital issues like the status of Madras City, the capital ofthe Andhra Province and the apportionment of assets and liabilities"

"Legislative issues then, has added a modern acreage to the idea of secular power and its accomplishment."

Inside Andhra Pradesh political history, local contrasts are supplemented by the more prominent or lesser predominance of one specific caste or the other. In Andhra at the time of its beginning, there were two most significant castes, which overwhelmed the political situation –the Reddy's and the Kammas. While the Reddy's were prevailing in the Rayalaseema and the Telangana areas, the Kammas overwhelmed the Coastal/Circars areas. The former were generally related to the Congress while the last with the Communists, in spite of the fact that the Reddy's were represented fairly in the Communist party also. The ascent of these "local dominant caste" was the result of the non-Brahmin mobilization to redress social and economic disparities between the traditional authority of the Brahmins and other castes in all spheres of public life.

Caste as a definite sub-continental phenomenon and its significance in the political lifetime of the varied national territories has been amply studied, within the subcontinent as an entire and within the Indian case in particular.[33] Caste has been a notable currency within the political history of Andhra Pradesh, right from the inception of the state when the Brahmin/ non-Brahmin strife had taken centre-stage during the arbitration for a separate state. Factional groupings within castes, which were in turn manipulated by political parties to consolidate themselves. In what follows, an attempt is made to chart the various ways in which castes, factions within and between castes and political parties came together at specific junctures in characterizing the political landscape of the state of Andhra Pradesh in general and Rayalaseema in particular.

RAYALASEEMA WITHIN THE POLITICAL HISTORY OF ANDHRA PRADESH

The economic and social structure of the region of Rayalaseema has been documented to point out how certain castes and certain political formations commanded the general public at various junctures of its political history. This has been done to underline the very fact that the political

[33] Caste, as an ascriptive status of a majority of the population of the subcontinent, has been seen as constituting the basis of society. As a social-structural phenomenon, it is the most significant criteria of identity based associations and mobilizations. Studies, which have dealt with caste and its articulation with other categories such as, class, politics, religion etc. are too numerous to be mentioned here individually. However, for our purposes, let us suffice by defining castes as enduring endogamous groups that are hierarchically ranked with recognized systems of ritual and ceremonial principles and, with significant regional and cultural variations within the Indian society.

trajectory of Rayalaseema are largely determined by complex processes in which castes, factions and political parties have combined to characterize regional politics.

The region of Rayalaseema which belonged to the erstwhile Madras Presidency[34] has been a perennially drought prone area. Land is the primary source of livelihood for a majority of the population and agricultural produce· was mostly determined by the amount of rainfall in a particular year, especially because these regions were devoid of the natural advantages of a river or any other water source.[35] At the time of the arrival of British rule out Madras region, land was possessed by a few local landed families and "in general, the agrarian society of the 'dry' zone was as stratified in 1900 because it had been in 1800; and, in some ways, the stratification was even more clearly defined". This was mostly brought about by the economic dependence of huge sections of the agricultural population on the handful of rich peasants who controlled the agrarian economy. Their dependence was however undue to their landlessness alone, as that they had to depend upon the rich peasant for services such as water and capital for loan for a range of needs not related to subsistence. Thus, a rich peasant could build a network of dependents around himself who were indebted to him for more reasons than one. This in tum gave the rich peasant a large measure of control over the economy and society of their localities.

CUDDAPAH

This district lies at the guts of the tract of land that forms the Southern Deccan Plateau, the geographical territory commonly mentioned as Rayalaseema. Cuddapah spreads northwards beneath the slopes of the Eastern Ghats, bounded by Kurnool district on the north, by Nellore district on the east, by Chittoor district on the south and by Anantapur district on the west. The

[34] Dhanna Kumar describes the region covering the Madras Presidency thus: "After it had been rounded off by conquest and cession, and excluding North Canara, the Madras Presidency covered about 140,000 square miles of southern India, between 8° and 16° N., with an outlying spur (the districts of Godavari, Kistna, Vizagapatam and Ganjam) stretching to the north-east. The bulk of the Presidency fell into three physical groups: the strip of land between the Indian Ocean and the Western Ghats (the districts of South Canara and Malabar); the strip between the Bay of Bengal and the Eastern Ghats (the districts of Tinnevelly, Tanjore, South Arcot, Madura, Chingleput and Nellore); and the territory between these two coastal belts (the districts of Coimbatore, the Nilgiris, Salem, North Arcot, Trichinopoly, Cuddapah, Kurnool, Anantapur and Bellary). Between these twenty-one districts there were important differences. On the West Coast the monsoon rainfall is so lavish that double and treble cropping are common in Malabar and the low lands of South Canara. But on the East coast, only Tanjore has abundant rain, while in the centre it is both scanty and capricious. Far and away the most abundant crops grown in the Presidency were cereals (rice, cho/am, cambu, and ragi) although there were vegetable gardens everywhere, and during the course of the nineteenth century there were to be experiments with such cash crops as cotton, indigo and cinchona ..."

[35] The description of the social and economic structure of the region of Rayalaseema draws mostly from David Washbrook's The Emergence of Provincial Politics. The Madras Presidency 1870-1920; and his 'Country Politics: Madras 1880 to 1930.

district has its share of hill ranges and rivers. The Cuddapah hill ranges from the central portion of the Eastern Ghats with mountains such as the Nallamalais, Vellikondas and Palakondas. The river Penneru runs from the west to the east, with the northern and southern slopes of the district draining into it. Black cotton soils are predominant in this district as elsewhere in the Rayalaseema region.

There are three distinctly discernible natural divisions. The "western plains" lying contiguous with similar black cotton plains of Kurnool and Anantapur districts, comprises of Jammalamadugu, Proddatur, Kamalapuram, Pulivendula and Cuddapah (District Census Handbook, Cuddapah District, 1991). This part of the district is richer compared to the other two parts. The tract called the "eastern valley" is that the stretch of land forming the valley between two hill ranges and comprises the Rajampet, Badvel.[36]This area comes next in agricultural resources to the western plains and is noted for its forest wealth. The third natural division of the district, the "southern plateau" may be area on the edge of the Mysore Plateau and is that the endemic famine zone of the district. This tract has poor red sandy soil unsuitable for cultivation accounting for the low crop yields[37]. Agricultural practices are similar to Anantapur and Kumool districts, the principal crops being grown are varieties of gram, groundnut and other oilseeds, and cotton, which needs little water and are suited to the dry conditions that characterize this region of Andhra Pradesh. The district is noted, especially in the eastern valleys and the southern plateau for its horticulture plantations of citrus fruits, mangoes and melons. The Kumool-Cuddapah canal (KC canal) is one of the principal sources of irrigation in this district. There was no uniform land revenue system in this region before the advent of British rule until under Munro's regime, when Ryotwari system of tenure was introduced, whereby each ryot held his land immediately from the government under a patta, and therefore the land revenue was involved on a scale of rates for the various classes under which the fields were classified. This district has a rich mineral resource with the country's largest share of Barytes coming from this district.

The political history of the district as a part of the region of Rayalaseema is similar to that of the other two districts. Of all the dynasties that ruled over this region, the Vijayanagara kingdom was the most notable for its attempt at centralization of power. After the fall of this dynasty of rulers, the region had come under the authority of petty rulers, called 'palegars'. Of the 80 'palegars' enumerated by Munro, were from this part of the region of Rayalaseema. In

[36] District Census Handbook, Cuddapah District, 1991.
[37] Ibid.

the 18th century, the southern plateau area of the district was under the rule of 'palegars'. In this district, powerful 'palegar' families were prevalent in the old Rayachoti taluk. Under Munro's regime, these 'palegars' were either executed or given pensions for the upkeep of their domains. The local administrative system within the district is analogous to other parts of the state and the district is divided into 50 Mandal's.

FACTIONS IN CUDDAPAH

Cuddapah, alongside Kumool are the hotbeds of factional conflicts and violence for a extended time than that witnessed in Anantapur. While in Cuddapah, factions as a part of the everyday social life far surpasses that noticed within the case of Anantapur and Kumool, an environment of fear and threat of violence permeates certain parts of Kumool. In Cuddapah, the faction mode of doing politics is all-pervasive, with all sorts of associational life being polarized into two faction groups.

In Cuddapah traditional factions arose due to disputes over village supremacy between village headmen and those who chose to oppose the hereditary authority of the headman. In most cases, the opposition to the village headman would come from fellow caste members, who are usually from the Reddy caste. Authority and power in the matters of the village, representation of the village to the administration or Sarkar, family disputes and illicit relationships are a number of the explanations for conflicts to arise and continue. These factions, as long as they were constrained to the village limits were not influential within the political lifetime of the district and therefore the state. It was in the 1980s that these village groups began getting the support of locale leaders and state level pioneers leaders for their political gains. Especially after the 1989 Assembly elections, several leaders who had their own groups or who disparaged groups came to involve important positions in state level politics. Three Reddy leaders from Kurnool, Cuddapah, and Anantapur respectively came to influence state politics significantly after these elections. In present day Cuddapah, the domination of factions is found in the black cotton soils of the Penna valley. The most pervasive and intense factional conflicts are noticed in the areas that are situated in this valley- Jammalamadugu, Proddatur, and Pulivendula. This area is the epicentre of factional domination of the three most important leaders from Cuddapah after 1978- all belonging to the dominant Reddy caste.

In Cuddapah too, the method whereby village factions entered district politics started with elections to village panchayats. The system of decentralization of democracy was utilized by the normal factions to settle scores. In due course, panchayat elections became stage for

factions to originate, which later climbed further to the Mandal and Taluka level. Political rivalries intensified the already existing disputes during a village between either two families or between incumbents of positions of authority in the village. With patronage of district level leaders, the village factions could gain the legitimacy that comes with proximity to positions of power, which also enabled to strengthen their control over the village.

With the influence of political parties on village factions, the character of the factions changed. When group rivalries were confined to the village, earning wealth and gaining political power were not the immediate ends. It was for the most part a tussle over village mastery and a contention circumstance was encouraged as it were when a replacement contender staked claim for village leadership. With the polarization of the village along party lines, every dispute was centred on the principal conflict between the two opposing parties. Any dispute over property or inter-caste disputes would immediately be affiliated with the two rival political leaders and in this process a conflict between two individuals precipitate during a rift within the social fabric of the village itself.

Something else also changed with the factions turning into groups with primarily political manifestations. Political factions had to necessarily provide patronage to their followers at the village, Mandal and the district level, which meant that a substantial financial resource had to be accumulated for that purpose. This necessitated exploiting the various public and private economic resources. Thus, with the increased activity of political leaders in the factional politics of the district, unlawful arrack business, illicit agreements for open roads and extensions, bootlegging, and other illegal trade prospered. In contrast to the normal factions, modern factions by virtue of their proximity to officialdom and ministers could approximate the public and private contracts for their own political and economic gains. Thus, political conflicts became buttressed by economic conflicts with a rise in violence as factionists and their followers resorted to physical force against those who opposed them. Village factions were also transformed to an extent with the advent of the new avenues for economic gains. Disputes regarding arrack contracts, fair price shops and government contracts now lead to the formation of factions at the village level. In this process, not only were the old faction villages transformed but a lot of other villages got sucked into the vortex of factional politics as illegal means of economic gains were appropriated by most influential people in these villages.

In Cuddapah, factional politics at the district and therefore the state level has been synonymous with three places and three persons. The three adjacent mandalas (and erstwhile taluks) of

Proddatur, Pulivendula and Jammalamadugu situated within the north-western a part of the district has been noted for intense factional conflicts. In Proddatur, village factions were a prominent feature since the nineteenth century. A particular village, Tanguturu, had factions since pre-independence days, which continue even to this day. The conflict started during gram panchayat elections when a candidate supported by the TDP was pitted against the sarpanch of the village who had held that post for 30 years. The opponent was propped up by the then MLA from Proddatur. However, Proddatur factions had started with political ambitions of a particular Reddy leader. This leader has a communist background whose political career began with organizing trade unions in the early '70s. He entered mainstream politics in 1978 and have become an MLA in 1983 on TDP ticket. He became a liquor contractor once he won the election and amassed incredible riches. As his clout in the district was perceived as a threat to a different Reddy leader from the Congress (1), the latter encouraged another Reddy and an ex- MLA against his rival Reddy within the district. What followed was a rivalry between the two Reddy leaders and their supporters at the district and state level. Although the latter belonged to the Congress (1), he urged his protégé to join TDP and fight his rival Reddy in the elections. It has been often remarked that this opponent would hoist Congress flag on his car replacing the TDP's as soon as he was out of his constituency during election campaigns. Thus, factional loyalties seem to be the primary allegiance in the political culture of the area and for sure of the district, making all other, making all other affiliations subservient to it.

One of the explanations for the conflict between the Reddy leader from TDP and his rival propped up by his adversary Reddy pioneer from the Congress (I) was the clash of interest over liquor contracts. They held liquor contracts among themselves working under a trust that the TDP pioneer had established for the sale of government liquor contracts. He put his own men on the trust in order that he can get the auctions year after year in his favour, which led to a lot of violence between the two Reddy’s. They also inflicted losses on each other whenever the auction went in one party's favour than the other. This happened in 1986 when the contract went to his opponent and he inflicted a loss of 30 lakh rupees on him. For the next four years, they reached a compromise and took the contract alternately. This illustrates that for the reasons for financial addition, group pioneers ordinarily met up and partitioned the spoils among themselves. In the case of Kurnool we've noticed that faction leader’s structure syndicates and these syndicates in tum partition the spoils from government contracts among its members.

The present age of faction pioneer's Cuddapah has accordingly surpassed the sooner generation of leaders by its articulation with other spheres outside the village society for economic

resources and personnel for violence. This new generation leaders, who came up in the 1970s, used them effectively to bypass the old leaders. Subsequently, the competition between the new leaders became intense and factions in the district got an impetus with these leaders actively supporting second rung leaders in the district who were themselves contesting each other economically and politically at the Mandal or the village level. With the nature of groups turning essentially political, their monetary character likewise experienced a substantial change with newer avenues of economic gain being opened. While this is not true of all the factions, most of the prominent factions related to big leaders at the district and therefore the state level have seen a rise in their economic fortunes, making factional activity within the district a lucrative economic opportunity in the face of general economic backwardness of the district. This has seen the induction of a class of people who are branded as criminals and 'rowdies' in common parlance into the factional network in a significant way. These men graduated into small town factionists themselves under these circumstances. Extortion, land grabbing, real estate panchayats, and intimidation of official machinery became routine. All the key positions of public office too started becoming an arena for political contestation by these small leaders. By the end of the 1980s, politics, government machinery and social life were taken over by factional activities and its echoes could be heard in the state capital, Hyderabad While the TDP pioneer from Proddatur has been viewed as a progressive leader with sympathies with the dis privileged and therefore the Congress (I) leader from Pulivendula has been seen as a mass leader concerned with people's welfare, another Reddy leader from Jammalamadugu doesn't have such pretensions. In his constituency, faction rivalries at the village level are present since British times. A number of villages in this constituency have been noted for rural factions under the control of Reddy patriarchs. The Reddy from Jammalamadugu emerged as a leader when he contested as Samithi president against another Reddy patriarch in 1975. After he won as the samithi president, he used the prevalent faction culture to dominate and bring under his control several villages adjoining his native village. His main opponent was the family of another Reddy who was the sarpanch of Devagudi village. This family had once helped him but that they had turned against him at the point when he had joined TDP in 1983 and had been chosen as a MLA from Jammalamadugu. The Congress (I) pioneer from Pulivendula likewise attempted to assemble each one of the individuals who contradicted the Reddy leader from Jammalamadugu after 1983 and supported all those who were opposed to the latter's followers in various villages. In the decade following Reddy's election as MLA, Jammalamadugu witnessed several instances of violence. With the direct opposition to his domination coming from his erstwhile supporters, the Reddy family in Devagudi, after 1990 the factional tussles

between these two families took an overt form until the Reddy MLA from Jammalamadugu himself was murdered in Hyderabad in 1994.

The factional rivalry between the Reddy leader from Jammalamadugu and therefore the Devagudi Reddy's had started in 1983 and had intensified subsequently with one party patronizing a specific leader of a village under the other party's control. This rivalry was later extended to regulate of liquor business in Jammalamadugu during a similar fashion there to notice within the case of Proddatur. There was both conflict and compromise on the question of liquor contract between the two Reddy's. While the conflict was mainly on the amount of financial gain or loss that either party suffered, there was always a compromise on the question of sharing the liquor contracts between them, until his opponents killed the MLA.

While the Reddy leaders from Proddatur and Jammalamadugu were primarily faction leaders in their own constituencies, the Congress (I) leader from Pulivendula who is additionally a prominent leader in state politics can't be seen as merely a constituency level leader. The political space that he commands spans the whole district and consequently his choice is vital in numerous voting demographic level group tussles where he commands a lot prestige and power. His local spot Pulivendula had seen political tussles between his father and another Reddy over matchless quality in the erstwhile taluk of Pulivendula. In their tussle for supremacy, the communists bolstered the previous while the last had the help of the Erukalas who are from the SCs. The former had monopoly on the illegal mining of minerals called birates since the 1960s, which resulted in the family amassing a huge quantity of wealth, which helped his son launch his political career. His economic dominance enabled him to buy votes, set up factions against his rivals, which ended the supremacy that his Reddy opponent enjoyed in Pulivendula.

The tussle between the prominent Congress (I) leader from Pulivendula and his rivals within the district took factional form when the previous tried to establish his supremacy in several villages within the Mandal. In a particular village in Lingala Mandal of past Pulivendula taluk, a Reddy family owing faithfulness to their rival was confronted by the Congress leader's faction and most of them were eliminated in order to establish the latter's supremacy. In the ensuing violence, the rival family was silenced within the face of attacks by factionists backed by the Congress leader. The political vocation of the Congress (I) leader had taken off in 1978 and subsequently he had come to command authority and prestige as a state level Congress leader more than a factionist. Although he is known more as a state level leader, his political career

had taken off with the help of setting up of rival factions in his constituency, Pulivendula. After the decline of his rival's influence in Pulivendula, the said Congress leader had set about effecting compromises between rival faction leaders of faction villages. This was done not in order to in still democratic ethos among them, but so as to win both the parties to his side in order that his support within the villages were strengthened, whilst they remained as separate groups in the village itself. According to the terms of this settlement, the Congress leader is given the proper to confiscate the property of the party who violates the norms of peaceful conduct as laid out by the leader's diktats. This establishes a provisional harmony in the towns while giving the political bit of leeway to the leaders and his political fortunes. While he foreclosed the possibility of village level conflicts in his own constituency for his political compulsions, in the other parts of the district he indulged in putting up rival factions to counter the rise of a particular leader who posed a threat to his power and political ambitions within the district and the state.

This was the situation in Jammalamadugu where he upheld one Reddy family against another, and in Proddatur where he set up a Reddy against his rival Reddy leaders from the TDP. In all of these cases, he set up a candidate who could challenge their rivals with the assistance of the gatherings, which were supported by him in the public. For accomplishing his goal, he not just offered successor to the previously existing groups but also set up new factions where there were none. In cases where he effected compromises between two rival village factions, it ensured that he continued to have the support of both the factions, as each faction tried to prove their loyalty to him. Ambakapalli village in Pulivendula are two such villages where the entire village owes its allegiance to him as their leader even though there are rivalries within the village.

Thus, it might be argued that although this Congress leader and his family didn't have direct factional rivalries with anyone within the district, they utilized the prevailing faction culture for political gains at the district and therefore the state level. To the extent that he encouraged factions in villages to emerge and therefore the illegal enterprises that he indulged in, he's no different from a typical faction leader. However, what sets him beside the leaders in Proddatur and Jammalamadugu is his strategy for utilizing the idiom of an existing political culture to further his political career within the party and in state politics. Moreover, by this process he came to hold sway over the entire district and even influenced the political fortunes of a few leaders in the neighbouring district of Anantapur.

FACTION AND POLITICAL PROCESS

From the discussion on factions within the Rayalaseema districts of Cuddapah, we depicted how the procedures that interlink the village to the district shape the political culture of the locale, and recognized the essential component of such interlinkages as 'factions' at different levels of the social and political structure.

A general characteristic of factional formations altogether the cases of their occurrence is their origin in conflicts-whether of material interest, of honour, or of political expediency.[38] The basis of conflict is always the competition over access to or control over scarce resources, which is sometimes expressed in an honorific idiom. This in turn means that such competition for resources took place between economically and socially powerful persons. As we have noted above, in most cases, conflicts arise over positions of authority, such as village headman ship, the Mandal and· regional level political leadership, and legislative positions at the state level. In spite of the fact that these are political contestations, financial and emblematic perspectives of such conflicts cannot be underestimated. Thus, rather than conceptualizing 'factions' as quasi-groups (a structural feature of society) or conflict groups (a form of political organization), our case of factional formations in the Rayalaseema region of Andhra Pradesh has indicated that factions are created by the political procedure itself, the sine qua non of which is that the competition over scarce material or symbolic resources. This means that the idiom of factional politics may permeate a political system or has the potential to define a political process in a specific context. In our case, the relationships of patronage and client ship have been identified as the political principle that defines factional politics in the regional political culture of Rayalaseema.

However, this generality is influenced by specific conditions, which determine the ways during which factional formations are manifested within a society. This may incorporate ecological factors, the social, political and economic context, and the symbolic context of conflicts. The context is critical insofar because it delineates the processes whereby a phenomenon is known historically and also to work out the conditions of occurrence of the phenomenon. Thus, it's important to think about why solidarities aside from the patron-client bond is ineffective as a

[38] Anthropology, "conflict" is a broadly defined concept and is widely interpreted, depending on the perspectives and interests of particular research interests. The structural approach to the study of conflict views conflict as an inherent component of the social structure, traces the sources of conflict to the social structure and holds that the specific form that conflict takes is determined by the social structure. Another way of studying conflict focuses on the social dynamics or processes of conflict. In this approach, the emphasis is on dynamic political phenomena- "such as competition, factionalism, struggle, conflict resolution, conflicts of interest and values, the pursuit of public goals, and the struggle for power"--rather than on structure and function

political idiom during this region of Andhra Pradesh , while other forms of solidarities supported caste, religion, or political ideology, are smaller it's been argued that patron-client networks are largely confined to the Mediterranean and Latin American countries; however, comparable relationships are found in less developed areas within a national state and therefore the region of Rayalaseema might be seen as an instance of underdevelopment vis-a-vis a comparatively prosperous capital.[39] Thus, patronage relationships succeed in "poor, in reverse and disengaged regions" where the patron intervenes between the area and "the central state contraption".

Patronage takes different forms counting on the structure and culture of the society during which it's found. Factional politics supported the patronage networks are determined by several factors in Rayalaseema. These are-- the caste composition of the populace, the prevailing caste of the region, the political role by the predominant caste leaders in state governmental issues, the economy of the area, and the cultural codes determining the meanings of honour, shame, prestige, and authority. Needless to mention, any transformation within the above may cause a transformation within the patronage relationship and hence the character of factional politics in the region. In fact, altogether the three districts, patterns of factional transformations could be mapped along three distinct periods. These are (a) Factions in pre-independence days to about 1970s; (b) Factions in 1970s to 1980s; and (c) Factions post l983 i.e. after the approaching into power of the Telugu Desam party within the state.

Factions before 1970s were primarily village level factions, prevailing caste proprietors being the leaders of such factions. These factions came into existence thanks to the search for power and authority of village level leaders who wanted to increase their spheres of influence within the rural society through control of several villages. Village factions originated mainly between two powerful people, the village headman and therefore the village accountant or karnam being the usual protagonists during a village factional tussle. Traditional village factions were primarily family-based. These tussles normally started round the time of village panchayat elections over the post of the village headman, but had other covert reasons relating to family disputes, land and property disputes and disputes regarding women. Thus, altogether the normal factional struggles, disputes often happened for family honour and prestige and for settling long-standing property questions, which had a for the most part local flavours and were

[39] This could be read in the context of regional disparities within the state of Andhra Pradesh, which has been discussed in Chapter One while delineating the regional political history of Rayalaseema vis- a-vis the other regions of the state.

limited inside the few villages that the factionist controlled. When clienteles bases solidified around these basically family quarrels, rival bunches became set up which was then used by each gathering to promote their interests, as "obligation in feuds, might reach clients". These family feuds came to be manipulated and utilized by political parties, which reinforced the quarrels and took on overt political motives. The Congress and therefore the Communist party were the political parties, which vied for political power at that time. While the dominant caste Reddy's supported Congress, the communists were mainly drawn from both the dominant castes like the Kammas also as backward castes. Thusly, factional tussles at the village level was predominantly between two prevailing standing landowners belonging to the same party or between leaders having a place with rival ideological parties yet having comparable socio-economic foundation in terms of caste and economic status.

During the last decade 1970s to 1980s, the Congress party consolidated its hold within the state. This was when economic and social philanthropy changed to political philanthropy. Most leaders at the village level owed allegiance to different leaders from an equivalent party who were rivals at the taluk or the district level. This saw the intensification of factional struggles within the villages because the bigger leaders encouraged and supported factions for garnering support for themselves in district or state level elections. Factional struggles at the district level between district leaders were the highlight of this era when it took the colour of mainly party factionalism within the Congress (I). Thus, party leaders acted as new patrons who were often from outside the area people, and hence the ties between patrons and clients started becoming more instrumental and fewer comprehensive. This also meant that "since those that controlled the new resources were generally office-holders subject to transfers or political changes at the middle, the new patrons were less secure than older patrons and doubtless more inclined to maximise their gains over the short run"

After the rise of the regional TDP, the leaders who couldn't make well within the Congress party shifted their allegiance to the new TDP. With this, factional struggles from village to the taluk/ Mandal and therefore the district became a tussle between the leaders of two parties, the Congress (I) and therefore the TDP.

This implied that factional battles took a clear party dimensions with the leaders of the two parties empowering groups on partisan divisions. Prior, groups between locale leaders having a place with the Congress (I) were transformed into party factions with interlinkages between same party leaders across the district. Thus, at present, even village factions have become

synonymous with political party factions owing allegiance to a particular district or state level political leader, while the disputes at the village level is subsumed under the political antagonism of the Congress (I) and the TDP. However, one important variation in the connection between party and patron-client structures noticed in the case of the Congress (I) and the TDP respectively is that while the previous has created its own network of patron-client linkages from the centre, the last has for the most part depended on previous patron-client bonds and have only used such systems for political objectives.

Thus, traditional village factions, centred on a strong village leader changed into basically political factions with, first, the inside tussles in the Congress and later as political competition between two factions competing for power at the state level. Within the region of Rayalaseema, district level leaders have facilitated their win at the state level by networking with leaders of the same hue, as that noticed in the case of particular Congress (I) leaders in Cuddapah and Kumool patronizing leaders in Anantapur. In this process, earlier partners have come to become stalwart rivals with the shifting of allegiances from one leader to a different and this in tum has. Intensified the factional struggles within a district. Moreover, the factional rivalries among the territorial level leaders have intermittently decided the character of state politics as it happened after the 1989 Assembly elections when several Congress (I) leaders from the region became famous for his or her factional struggles within the region also, brought such places as Allagadda, Tadpatri and Pulivendula to the political standard of the entire state.

The dynamics of electoral competition, thus transformed patronage networks in the region in several significant ways. First, votes improved the client's position with a patron by adding to his assets. however, this limit of the client might be seriously constrained in situations where the debts of the client far exceed his bargaining power with the vote; second, elections provided the context for the vertical integration of patron-client structures from the hamlet level to the centre; third, it led to the creation of latest patron-client structures and therefore the politicization of old ones; and it couched antagonisms at the local level within the garb of overtly political antagonisms.

The structure of a faction remains, quintessentially comparative whether it is a village faction or a neighbourhood faction. While the basic patron-client relationship is integral to any factional network, modem day factions have networks that transcend ties of loyalty or economic dependence of the follower. Traditional faction leaders also fulfilled the function of arbitrator in disputes in the village and could thus rally round him a mass of followers who are

indebted to him in some way or the other. This increased his reputation within the villages under his control and helped in building a loyal group of followers who were prepared to sacrifice anything for him. With the enlistment of hired fighters inside a faction network, customary ideas of loyalty and subordination has given thanks to purely instrumental reasons for rallying around a leader. This has necessitated the illegal exploitation of economic resources on the part of the faction leaders, as they cannot now merely rely on their followers' faith and loyalty towards them, and thus need a considerable amount of wealth to finance their followers' needs. Along these lines, the move has been from symbolic rewards to expectations of material benefits, and "the trend in recent times has been to dissociate political competence from traditional status distinctions and to identify it with the ability to manipulate technical and political · resources effectively". While traditional factions usually had dominant caste leaders, factions in the present day have leaders coming from Backward and Scheduled Castes also. However, most of these leaders still depend on the patronage of a dominant caste leader or a MLA to be powerful in their individual mandals and villages. In spite of the fact that multi-caste factions turned into a reality now, the fundamental character of political coalitions in these three districts is recognized by a system of political elites from various caste tied in an interrelationship of regional squabble to gain economic and political power. Factional allegiance is the grammar of political participation during this region, and therefore the use of violence is that the significant feature of this mode of political participation.

The pervasiveness of savagery as a significant component of the factional mode of politics in this region would be discussed. In doing this, the attention would shift from the structural understanding of factions to why violence becomes a significant action in articulating conflicting interests.

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ETHICAL AND LEGAL PERSPECTIVES OF EUTHANASIA: AN ANALYSIS

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INTRODUCTION

Every person exercises the right to live and enjoy their life to the fullest possible way. It is termed as an abnormality when a human unnaturally ends their own life and it is termed as suicide. Like how every person has a right to enjoy their life to the fullest possible extent, in some rare and adverse situations a person may encounter a situation where they meet a terminal or deadly illness and in such instances ending their life would seem like an appropriate choice rather than existing.

The term 'Euthanasia' is not exactly verbatim; there are different classifications of euthanasia that exist. Namely;

1. Active / positive euthanasia**:** It is the process by which the death of a person is brought about by overdosing the patient with a high number of painkillers.
2. Passive / negative euthanasia: It is also known as "letting - die". It is basically a process of withdrawing the medical assistance for a patient with an intention to hasten their death.
3. Voluntary euthanasia: It is the process by which the decision of killing the patient is given by the patient themselves and the choice made serves the best interest of the patient.
4. Involuntary euthanasia**:** It is the method by which the life of a terminally ill patient is ended against the consent of the patient. This process will amount to murder.
5. Non - voluntary euthanasia: It is the action by which the family members of the ill patient will have to make cumulative decision of terminating the life of the patient as

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the patient has left no living will nor has the patient given any mandate in advance. This occurs when the patient is not mentally competent to make such a judgment. [42]

From the types of euthanasia that has been listed above, in India, only passive / negative euthanasia has been made legal by the Hon'ble Supreme Court. The process of legalizing euthanasia occurred in March 2018.

General reasons behind the demand of legalized euthanasia:

1. Seeking compassionate relief from pain and suffering.
2. Providing protection to the doctors who behave compassionately.
3. Showing respect for human rights.

GROUNDS FOR EUTHANASIA

Consent of the patient must be obtained and failure of all medical treatments or when the patient who is suffering from a terminal disease, is in an irremediable condition and has no chance to recover or survive or the patient has been in coma for 20/30 years. It is also vital that the intention of the doctor must not be to cause harm. At last, proper safeguarding must be taken to avoid abuse of it by doctors. [43]

JUDICIAL RESPONSE

There was a perpetual debate over the legalization of euthanasia in India because people are of the view that life is sacred and no one has got the right to end it whereas on the other hand some say that life belongs to oneself and thus each person has got the right to decide what they want to do with their life even if it amounts to dying. In our day to day life we often come across terminally ill patients that are bedridden and are totally dependent on others. While encountering such circumstances we would say that death would be a better option for them rather than living such a painful life; physically as well as psychologically.

LEGISLATION

In the issue, one main misconception that arises in the minds of a lot of individuals is that "right to die" is not the same as "right to die with dignity". In India there is no difference between active and passive euthanasia and no penal law yet introduced in I.P.C, which specifically deals

[42] https://www.researchgate.net/publication/259485727_POSITION_OF_EUTHANASIA_IN_INDIA_-_AN_ANALYTICAL_STUDY
[43] http://www.legalservicesindia.com/article/787/Euthanasia-in-India.html

with euthanasia. Thus every act of aiding and abetting the commission of suicide are punishable under the section 306 of the I.P.C.

EUTHANASIA AND SUICIDE

The two acts are both factually and legally distinct from one another. Justice Lodha in *Naresh Maratra Sakhee vs. Union of India*, observed that, "suicide by its nature is an act of self-killing or self-destruction, an act of terminating one's own act and without the aid or assistance of any other human agency. Euthanasia or Mercy killing on the other hand means implies the intervention of other human agency to end the life. Mercy killing is thus not suicide and the provision of section 309 does not cover an attempt at mercy killing. . Euthanasia or Mercy killing is nothing but homicide whatever the circumstances in which it is affected."

The act of physician can fall under section 88 and 92 of IPC as there is an intention to cause death of a patient for the benefit of the patient. . The other relatives who are aware of such intention of the physician can be charged under section 202 of IPC .

According to the supporters of euthanasia the decision of the patients should be accepted. If on the other hand we weigh the social values with the individual interest then we will clearly see that here the interest of the individual will outweigh the interest of the society. The essence of human life is to live a dignified life and to force the person to live in an undignified way is against the person's choice. Thus it expresses the choice of a person which is a fundamental principle.

Article 21 of the Indian Constitution clearly provides for living with dignity. A person has a right to live a life with at least minimum dignity and if the condition of the patient is falling below the minimum level then a person should be given a right to end their life. We mutually feel that, every individual should be given an option of being able to end their life at their will and consent if they encounter any such terminal or deadly and dependant illnesses. We can say that when a person voluntarily opts to end their life it is evident that the patient is suffering from extreme pain and difficulty. From a third person's perspective, one can only sympathize but cannot physically experience their suffering. Thus it is safe to say that, when a patient opts for euthanasia they would choose it as their last resort after knowing that there is no cure for the suffering they are experiencing. [44]

[44] http://www.legalservicesindia.com/article/787/Euthanasia-in-India.html

OBJECTIONS TO JUDICIAL RESPONSE AND LEGISLATION

ETHICAL AND MORAL ASPECT

In a civilized society, the people who support euthanasia justify that they must allow people to die in dignity and without pain. They must also allow others to help them do so. Every individual has the first and foremost right over their body and it's their right to make decisions in favor of their own comfort. Atheist or not, every religion has got their own perspective over killing of another living being. Thus, religion also plays a subtle role in establishing people's opinion over whether euthanasia is ethically justified or not.

SANCTITY OF LIFE

The phrase 'sanctity of life' refers to the idea that human life is sacred, holy, and precious. While taking this phrase into consideration, a whole new issue of contradiction arises where if a human beings life is considered to be holy and sacred, it is not morally or ethically acceptable to end a life.

EUTHANASIA AS MURDER

While considering the entire process of passive euthanasia, we see that medical dose given to the patient is deliberately withdrawn with an intention to hasten the process of death so while taking into consideration the person who withdraws the medicine, it is natural for a certain sect of people to assume or perceive the physician as a murderer since the physician carries out the process of ending the life of the patient. When taking medical practitioners into consideration, it can be said that there may be an intention to cause the death of a patient, hence the practitioners can be charged under clause (1) of section 300 of I.P.C but where there is valid consent of the deceased, exception 5 of section 300 is attracted and thus the act of the physician is considered as culpable homicide not amounting to murder under Part I of section 304.[45]

HUMAN RIGHTS AND EUTHANASIA

Human rights, in simple terms, means the rights that can be exercised by every human. Human rights are also considered as the fundamental rights, basic rights or natural rights as well. Over the past two decades euthanasia has shifted from the political to the legal and judicial arena and it continues to draw much attention and debate. The main question of issue here is whether the issue of euthanasia is in accordance with the United Nations Universal Declaration of

[45] http://www.legalservicesindia.com/article/787/Euthanasia-in-India.html

Human Rights, where the most fundamental Human Right is declared to be the right of every innocent person to the integrity of his/her life, a right that should be protected by law. Another issue here is questioning the principle of sanctity of life which is considered to supersede all other human rights which is in contrast with the right to die with dignity or right to euthanasia and assisted suicide. A doctor or any other person for that matter cannot do any positive act to cause the death of any patient, the discontinuance of life support may be lawful when such treatment is in accordance with responsible public opinion and after fulfilling all the requirements of legal as well as judicial guidelines. Universal Declaration of Human Rights, 1948 under Article 3 proclaims that "Everyone has the right to life, liberty and security of person." International Covenant on Civil and Political Rights", under Article 6(1) provides: "Every human being has inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life" We can say that not all cases of killing a person intentionally is arbitrary (without any reason) . Some instances are homicide in relation to self defense, coercion etc. Even though such acts are evidently intentional, they are justified or excused under certain laws. [46]

RELIGION AND EUTHANASIA

Most religions disapprove of euthanasia. Some of the religions are absolutely against it. All religions state that those who become susceptible through an illness or any disability require special care and protection.

a) HINDUISM

Many of the Hindus have learnt that a doctor must not accept a patient's request for euthanasia since this will cause the soul and body to be separated at an unaccepted and bizarre time. The result will damage the karma (reincarnation of the soul) of both doctor and patient. Other Hindus are superstitious over the fact that euthanasia cannot be allowed because it breaches the teaching of ahimsa (doing no harm). However, some Hindus say that by helping to end a painful life a person is performing a good deed and so fulfilling their moral obligations (Dharma).

b) CHRISTIANITY

Many of the Christians are not supportive of euthanasia. The arguments are usually based on the beliefs that life is given by God, and that human beings are made in God's

[46] https://shodhganga.inflibnet.ac.in/bitstream/10603/172264/9/09_chapter%203.pdf

image. Some churches also emphasize the importance of not interfering with the natural process of death.

The process of dying is spiritually important, and should not be disrupted- Many churches believe that the period just before death is a profoundly spiritual time and they think it is wrong to interfere with the process of dying, as this would interrupt the process of the spirit moving towards God.

c) ISLAM

Muslims are against euthanasia. They believe that all human life is sacred because it is given by Allah, and that Allah chooses how long each person will live (When their time comes they cannot delay it for a single hour nor can they bring it forward by a single hour). Human beings should not interfere in this. Muslims cannot kill, or be complicit in the killing of another, except in the interests of justice. According to the Islamic Medical Association of America (IMANA) "When death becomes inevitable, as determined by physicians taking care of terminally ill patients, the patient should be allowed to die without unnecessary procedures." IMANA says that turning off life support for patients deemed to be in a persistent vegetative state is permissible. This is because they consider all mechanical life support procedures as temporary measures. While turning off a life-support is allowed, hastening death with the use of certain pain-killing drugs is not allowed as this would equate to euthanasia. [47]

EMPIRICAL STUDY

In order to gain a wider perspective over the issue of legalizing euthanasia, we conducted a survey where we took a sample of 90 people. Amongst the 90 samples; 30 samples were of layman, 30 samples were lawman (lawyers and law students) and the remaining 30 samples included people pursuing a career in the medical field (doctors, nurses, medical students). We found it necessary to segment the sample into different groups of people because we felt that since our study is based on establishing a relationship between law and ethics using medicine as a platform, the main professions that are involved with euthanasia are lawyers and doctors. We wanted to gain awareness over whether the opinions of lawyers and doctors are similar or contradictory. Similarly we wanted to understand the views of a person who is not associated

[47]http://www.bbc.co.uk/ethics/euthanasia/religion/religion.shtml

with the legal or the medical field. Some of the observations we made out of this study are given below.

General questions related to euthanasia were asked. Initially questions were asked regarding the awareness people had over euthanasia to which we recorded that 88.5% of the respondents stated that they were aware of the existence of the word euthanasia, 5.7% of the respondents replied that they were aware of the term but did not really have an idea over what it actually meant. Thus leaving us with 7% of the respondents who did not know anything about the term and its meaning. Next we moved on to defining what euthanasia meant and after stating the definition we asked the respondents if ending an individual's life was considered as an ethical act or not. To this question we gained result showing us that 55% of the respondents agreed to the question by stating that it is ethical leaving us with the remaining 45% of the people expressing that the act is considered unethical. We explained the process of how euthanasia is carried out - "Euthanasia is carried out by providing a fatal dose of a suitable drug to the patient by the physician causing the patient to die from natural cause". We asked the respondents if the doctors can be granted an authority to perform this procedure based on the request of the patient. Out of the sample which included doctors as the group of respondents, we recorded that 82.6% of the sample agreed that doctors can be granted an authority to perform this procedure based on the request of the patient leaving the remaining 17.4% stating that doctors cannot be given such an authority. One of the respondents who is a doctor with a legal background as well stated that "We have to be compassionate. Unfortunately, other passions take over compassion and people lose their way. That is the problem in opening the floodgates". We posed a situation to our respondents - similar to how animals are put to sleep to save them from a great deal of suffering, can human beings be permitted to do the same? To this question, 78.2% of our respondents agreed to the fact that putting humans to sleep can be kept as an option during a suffering and the remaining 21.8% of the sample stated that such an option should not be considered. Similar to the previous question, we posed our respondents with another situation where we asked them if they would consider euthanasia as an option for a loved one of theirs or for themselves to terminate the suffering. To this situation, 72.4% of the respondents voted positively towards using euthanasia as an option whereas, the remaining 27.6% of the respondents voted against using euthanasia as a choice. For this question we found it necessary to separately assess the responses received from a person with a medical background and a person with a law background. We found the necessity to make this division because we felt that from both the professions, people will look at the situation from a different

perspective. Upon the assessment we recorded that a majority of the respondents with a legal background voted positively over keeping euthanasia as a choice for themselves as well as a loved one. Similarly while assessing the response given by people with a medical background we recorded that a lesser majority in comparison with people having a legal background voted positively towards keeping euthanasia as a choice for themselves as well as their loved ones.

The next question we posed to our respondents was related to what their opinion would be over convicting a person as an accomplice if they were found to assist another terminally ill person to end their life. To this question, 32.2% of the respondents replied positively about convicting a person as an accomplice if they were to assist over the mercy killing of another. We were left with the remaining 67.8% of the people who voted against the prosecution of the accomplice. To this question, we found it necessary to bring into light the opinion of what a lawman would have over this issue since they would have a wider knowledge over the legal perspective and specifications. We recorded that a sweeping majority of the respondents voted against prosecuting the abettor of the mercy killing.

We posed a question to our respondents where we highlighted a situation stating “The Supreme Court upheld the right of a person to die with dignity by stating that right to live with dignity also includes right to die with dignity”. After stating this, we asked the respondents if they think that the practice of euthanasia justifies the statement. On the whole by taking all the samples into consideration, we recorded that 77% of the respondents agreed to the fact that mercy killing does justify the statement. The remaining 23% voted against the question by expressing the fact that mercy killing does not justify the statement. For this question, we found it necessary to make a division between the samples and do an assessment individually. While doing so, we recorded that among the sample, from the sector of people who come from a legal background a big majority of the respondents agreed to the question. From the sample of people who come from a medical background, we recorded that similar to the previous sector of the sample, majority of the people voted positively proving that euthanasia justifies the statement. Among both the divisions, we observe that there were also a certain amount of respondents who voted against the question. We feel that this occurred due to differences in religion and due to a certain age bar. One of our respondents who is a doctor expressed an opinion regarding the question where he stated that “The court will take the 'best interest' approach, which may be in favor of the patient (to end the misery and certainty that there is no chance for recovery) and of the caretakers (relatives, medical personnel).”

The entire issue over legalizing euthanasia in India came into light after the landmark case - *Aruna Ramchandra Shanbaug v. Union of India.* Aruna Shanbaug, who was working as a nurse at KEM Hospital, was assaulted by a ward boy in the workplace. Upon realization that she was menstruating, he sodomised Aruna after strangling her with a dog chain. The strangulation resulted in severe damage to her brain. The attack left Aruna blind, paralyzed and speechless and she went into a coma from which she has never come out. She is cared for by KEM hospital nurses and doctors. The victim did not want to live any more. The doctors told her that there was no chance of any improvement in her state. Thirty six years had lapsed since the incident. She had been surviving on mashed food, could not move her hands or legs and she could not perform the basic functions of a human being. The Hon'ble Division Bench of the Supreme Court of India, opined that based on the doctors' report and the definition of brain death under the Transplantation of Human Organs Act, 1994, Aruna was not brain dead. However, Aruna Shanbaug was denied euthanasia as the court opined that the matter was not fit for mercy killing. Later, on May 18th, 2015 her body succumbed to her incident and she passed away. We cited the example of this case to our respondents and asked them if they think that euthanasia must have been served for the patient to ease her suffering. Overall, we observed that 72.4% of the respondents replied positively thus indicating that euthanasia must have been served for the patient. The remaining 27.6% of the respondents voted against the idea of granting euthanasia to the patient. We wanted to study the perspective each sector would have over euthanasia so we divided the sample and made an assessment. We wanted to study the perspective which a lawman would have over the issue given that a lawman's knowledge over the legal area would be wider than a layman or a doctor in this case. Similarly, doctors would have a wider understanding over the medical aspect behind mercy killing so they may have a different perspective over the issue. As such, a layman would have a different perspective where issues like religion, ethics, beliefs and emotions would play a bigger role in establishing their opinion. Keeping in mind all these aspect, we recorded that 70.5% of the people who come from a legal background voted positively towards providing death sentence for the victim leaving the remaining 29.5% of the people who voted against it. Next we studied that among the layman, 72.4% of the people voted positively towards providing death sentence for the victim leaving the remaining 27.6% of the people who voted against it. Finally when we moved on to studying the opinions of the people who come from a medical background, we studied that 75.8% of the people voted in favor of the fact that euthanasia must have been granted to the patient leaving the remaining 24.2% of the respondents who voted against it. From our respondents, one of them expressed their view "It appears that in the Shanbaug case she did

have some emotional responses - showing her pleasure at favorite foods - fish. She was breathing for herself. The court could not allow her to die by withdrawing food. That would essentially mean killing by starvation. She would not just die in a day after stopping nutrition." In many cases that come to courts (in the UK as well, where it is common with children and young babies where the hospital will want to withdraw but parents refuse) the patient usually dies very soon after withdrawal of treatment.

From the survey we inferred that some factors like - age, religious beliefs and ethics play a huge role in establishing a person's opinions over a sensitive issue like euthanasia. We feel this way because from the respondents, a lot of the people were between the age of 20-60 and had conflicting opinions from one and other and this occurred between people who had a wider age gap

CONCLUSION

The main aim behind the research was to gain perspective and knowledge over euthanasia, its specifications and the justification behind the process. Another major deduction behind doing the paper was to gain insight over the opinions of people belonging to three separate categories. Namely – lawman, layman and medical practitioners. We also did a research to establish an alliance between law and ethics by using medicine as a middle ground. We were able to gain awareness on how people perceive mercy killing from unique perspectives. We also learnt about a lot of unpredictable factors which play a role in affecting euthanasia. As aspiring law graduates, we were given a great opportunity to learn about many legislations and judicial precedents pertaining this issue, landmark judgments which have played a major role in altering the judicial system in India. It's a common mistake for people to develop confusion between suicide and euthanasia and this research helped in making an analysis and bringing in clarity to remove this misunderstanding. Since the legalization of passive euthanasia in India, there have also been a sector of people who have criticized the process and we were able to understand both sides of the issue and peoples reaction towards mercy killing. One major objection which was used by the people to oppose euthanasia was the human rights. We were able to gain knowledge over the international rules regarding human rights which were formulated by the United Nations and draw out an understanding on whether it contradicted the process of euthanasia. Another major obstacle is the religion and the beliefs of the people, how it differs from person to person and how it clouds judgment and dictates over people's thinking. This gave us an opportunity to learn about different religions and their laws. Since

religion and societal thinking are interrelated, we were able to draw out a parallel understanding between both the thoughts and beliefs. An empirical study was conducted which gave us the opportunity to personally interact with people and understand their thoughts. This opportunity paved way to provide us with clarity on a lot of unanswered questions which came up during the process of our research. Thus, we conclude this research by drawing out the relationship between Law, Medicine and Ethics.

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LAWS ON MEDICAL NEGLIGENCE IN INDIA AND USA: A COMPARATIVE ANALYSIS

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Ramya S.R.[2]

INTRODUCTION

The vulnerability of people with respect to health care issues is on the rise in India nowadays. Medicine is a field that completely works based on a relationship made of trust and belief amongst the doctors, patients and the hospital administration. As per the medical ethics, Medical negligence can be considered as an offence. Moreover, negligence on the part of the involved parties with respect to emerging cases is notable to the study. A patient allows his doctor to treat him only because of the trust he has on his doctor's duty of care and the belief that he possesses a certain standard of knowledge pertaining to the ailment and skills to treat him. Patients should disclose their personal medical history so as to help doctors diagnose the ailment and prescribe treatment appropriately. However, the patient's negligence in acquiring this basic knowledge of disclosing this is mainly due to the fear of being exploited. The doctors' negligence in not abiding by, to the duty of care and standard of care towards a patient who is to be treated as per the medical ethics is surely detrimental to the field of medicine which runs on the underlying principle of trust between the involved parties. Here lies the intercept of hospital administration's negligence wherein poor infrastructure, lack of hygiene and tumultuous treatment processes pave way to such acts in the hospitals. The above mentioned characteristics add to the differential treatments in Government and private hospitals. This difference is observed due to the non-availability of contemporary medical equipments in Government hospitals when compared to private hospitals. Patients are put to risk when they are advised to visit the Government doctors' private clinics for more guidance regarding advanced treatment. The element of access to such facilities lures the patients to bribe doctors, to be treated for their ailments in a more sophisticated manner. These facilities, though available in private hospitals, are highly expensive. Nowadays, the Indian society's knowledge

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on rights and claims of a patient with certain ailment to be treated with utmost care has been growing consistently. However, the society is said to have progressed completely only when it fends off unsafe medical practices and compensates negligent cases. This shall be fulfilled by laws made to curb medical negligence besides malpractices.

NEGLIGENCE

Winfield defined it as "breach of a legal duty to care, which results in damage undesired by the plaintiff". Baron Alderson defined it as "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do". The Supreme Court observed, "Negligence has many manifestations – it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active negligence, wilful or reckless negligence, or negligence per se"[3] .

Medical Negligence is the failure to act reasonably or to discharge obligations required from a professional. It is the obligation to conduct investigation into the condition of the patient and make a report of the same. Moreover, except in the cases of emergency, the requirement to take the patient's consent before a major procedure, surgery or operation is essential. The failure to discharge such obligations gives rise to tortious liability and the court can interfere to award damages as it is a right in rem.[4] Medical negligence is also the improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, a health care professional or the hospital management. Medical negligence occurs when a health-care provider strays from the recognized "standard of care" and "duty of care" in the treatment of a patient.

CONSTITUENTS OF NEGLIGENCE

There are three essential components that attribute to negligence which are recognised by the jurists. They are awareness about duty, breach and damage.

- There exists a duty to take care, which is owed by the defendant to the complainant.
- The failure to attain that standard of care prescribed by law and thereby committing a breach of duty.
- Damage which is caused by such breach of duty and recognized by law.

[3] Poonam verma v. Ashwin patel & ors., air 1996 sc 2111
[4] Prerana, "what is the medical negligence law and USA?", Socio-legal Research Journal

1. **DUTY OF CARE**

   A duty of care is a legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. This is the main element which establishes the case of negligence, if there is no duty of care towards the plaintiff, the defendant is not liable.

2. **REASONABLE FORESEEABILITY**

   Foreseeability of an act is to be considered by the court not only for imposition of duty of care but also for limiting the liability of the persons to whom the duty is owed.

3. **STANDARD OF CARE**

   A certain standard `of must be given to a person if the other owes the duty of care. If the standard does not meet up to the level fixed then it amounts to breach of duty.

NEGLIGENCE AS CRIME AND TORT – LIABILITY TO BE BORNE

The negligence can be civil as well as criminal. It depends upon the duty and the breach of duty of care and standard of care. It carries the following liability while analysing the requisite act of negligence committed by the medical practitioners:

There can be both civil as well as criminal liability.

CIVIL LIABILITY: Civil liability generally includes the claim for damages suffered in the form of compensation. If there is a breach of the duty of care during the operation or while the patient is under the supervision of the hospital or the medical professional, he is held indirectly responsible for such error. And they are required to pay damages in the form of compensation. Sometimes, even senior doctors are held vicariously responsible for mistakes made by junior doctors.

If someone is a hospital employee, the hospital is responsible if that employee hurts a patient by acting incompetently. In other words, if the employee is negligent (not reasonably cautious when treating or treating a patient), the hospital is aware of any resulting injury to the patient, the hospital will be held liable.

CRIMINAL LIABILITY: There may be an occasion when the patient has died after treatment and a criminal case is filed for allegedly causing death by a reckless or negligent act. Hospitals can also be accused of negligence for the transmission of an infection, including HIV, HBsAg, etc., if a patient develops such an infection during the course of treatment in the hospital and it

is demonstrated that the same thing has happened due to a lapse in part of the hospital. The hospital may be held responsible for the lack of a reasonable duty of care.

LAWS ON MEDICAL NEGLIGENCE IN INDIA

Duties of the doctor towards his patients under the medical advice of India (professional conduct, rules of etiquette and ethics of 2002 framed in the law of the medical advice of India of 1956:[5]

The regulations of the Indian Medical Council of 2002 prescribe the following:

1. **MAXIMUM QUALITY ASSURANCE IN PATIENT CARE**

   Every doctor should help safeguard the professions against the admission of those with deficiencies in moral character or education. The doctor will not use any attempt that is not registered or included in the current medical lists in relation to his professional practice and will not allow said person to attend, treat or perform operations on patients where professional discretion or skill is required. "

2. **OBLIGATIONS TO THE SICK**

   Through a doctor you are not obliged to treat each and every one of those who request their services, except in emergencies for the good of humanity and the noble traditions of the profession, you should only be ready to answer the calls of the sick and injured, but you must take into account the high nature of your mission and the responsibility that you incur in the performance of your care depends on your ability and attention. A doctor should strive to increase the comfort of the sick by visiting the patients promptly."

3. **THE PATIENT SHOULD NOT BE NEGLECTED**

   A doctor is free to choose whom to serve. However, he should respond to any request for assistance in an emergency or when moderate public opinion awaits his service. Once a case is undertaken, the doctor should neither neglect the patient, nor should withdraw from the case without notifying the patient, his relatives or his responsible friends well in advance of his retirement to allow them to secure another medical assistant. No registered medical professional provisionally or completely shall commit

[5] rules of etiquette and ethics of 2002 framed in the law of the medical advice of India of 1956

an act of negligence that may deprive his patient or patients of the necessary medical care. "

There are several cases where the courts have held the doctors to be negligent in performing their duty.

DUTIES / CONDITIONS FOR MEDICAL MALPRACTICE

The duties specifically mentioned by the Supreme Court of India in cases such as *Dr. Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr* and *A.S.Mittal v. U.P. Status* [6]They are:

(a) duty of care when deciding whether to take the case,
(b) duty of care when deciding what treatment to give, and
(c) duty of care in the administration of that treatment.

In case of not fulfilling these duties, there may be negligence in action. However, if a doctor has adopted a practice that the experts in the field consider "appropriate," he will not be held responsible for the act committed.

The Superior Court of Delhi in *Smt. Madhubala vs. The NCT Government of Delhi* [7]divides negligence into three grades. They are:

• can fault, gross negligence
• Levis guilt, ordinary negligence, and
• Levissima culpa, slight negligence

A doctor is not responsible in case of slight negligence and ordinary negligence. But, when the two are united, there is a certain degree of uncertainty and that is when the courts turn to *Bolam Case* and *Jacob Mathew Case*[8]. Although, Bolam's case was decided in an English court, it is considered one of the historical trials and is also applicable in India.

In the Bolam case, the patient suffering from depression received treatment without relaxing because he suffered fractures and filed a complaint against the hospital. The Court examined that there were two ways of carrying out the treatment, either with or without the relaxant.

[6] Ibid pp.3
[7] Smt. Madhubala vs. The NCT Government of Delhi 2005
[8] Jacob Mathew vs State of Punjab 2005

Regarding the warning too, there were two ways, to give a warning or to give a warning only when the patient asks about the risk.

Bolam's test is 'the doctor does not need to possess the greatest expert killing, it is sufficient if he exercised the ordinary skill of an ordinary competent man who exercises that art, he is not guilty of negligence if he has acted in accordance with accepted practice as appropriate by a body responsible for medical experts in the particular act.

This means that in deciding whether a doctor's act was negligent or not, his actions must be compared with the act of another doctor in similar circumstances and facilities. However, the Bolam test is applied when it is acceptable to omit the information of each risk to the patient, but with the advancement of the patient's safety and human rights, it is believed that all the facts have to be disclosed to the patient regardless of how insignificant it is.

Similarly, in the case of Jacob Mathew, the patient had difficulty breathing and the doctors arrived after 20-25 minutes with a cylinder. Surprisingly, his condition deteriorated and doctors realized that the cylinder had no oxygen. They asked for another cylinder, but by then, the patient had died. The court decided that there was no criminal negligence. The Supreme Court also established guidelines in case of medical malpractice in this historical case. They are:

- A private complaint will not be considered unless the plaintiff has prima facie evidence in the form of an opinion of a competent physician in the same field regarding a reckless or negligent act or omission.
- A police officer, before proceeding against the doctor, must obtain an impartial opinion from a government doctor who is an expert in the same field.
- A doctor accused of recklessness or recklessness will not be routinely arrested unless it is necessary to continue the investigation.

Therefore, this decision gives some relief to the medical profession.

Burden of proof in case of medical malpractice in India

The burden of proof when proving a medical malpractice case rests with the plaintiff, who was retained by the court at the Medical Research Institute of *Calcutta v. Bimalesh Chatterjee*.[9] He / she can use 'res ipsa loquitor' or 'things speak for themselves', that is, no evidence is needed

[9] Medical Research Institute of Calcutta v. Bimalesh Chatterjee 1998

to prove the case beyond the accident itself, which was applied by the National Commission for Reparation of Disputes in *Janak Kantimathi Nathan v. Murlidhar Eknath Masane.*[10]

CIVIL MALPRACTICE:

According to the Civil Law, the victim can be punished either under the Consumer Protection Act of 1986 or the Tort Law. It has been explored for years if "Medical Services" are included in the definition of "Services" in Section 2 (1) (or) of the Consumer Protection Act.

This question arose before the Supreme Court in the *Indian Medical Association v. Shantha & Ors.*, in which the court felt that professional men should be competent and exercise reasonable care in the performance of their duties. Medical professionals enter into a service contract and can be sued under the Consumer Protection Law.

In addition, if the Consumer Protection Law cannot be applied, the victim can use the civil liability law, which is available even if the victim has free treatment. If the patient can prove that the doctor was negligent.

CRIMINAL NEGLIGENCE:

In normal cases of medical malpractice, the doctor is responsible according to civil law. Only when the negligence was so serious and his act was so reckless as to endanger the patient's life, will the criminal law for crime under section 304A of the Indian Criminal Code, 1860 are applied. This was carried out in the Dr. Suresh Gupta vs. Government of N.C.T. from Delhi

The section is as follows:

304A - Causing death through negligence - Anyone who causes the death of any person when committing a reckless or negligent act that does not amount to wrongful death will be punished with imprisonment of any description for a period that may extend to two years, or with a fine, or with both.

The Court explicitly mentions the circumstances in which physicians may be held criminally liable in the case of Jacob Mathew. He said:

> "To prosecute a medical professional for negligence under criminal law, it must be demonstrated that the defendant did something or did not do something that, in the

[10] Janak Kantimathi Nathan v. Murlidhar Eknath Masane 2002

given facts and circumstances, no medical professional in his or her ordinary senses and prudence would have done or could not The risk assumed by the accused physician must be of such a nature that the resulting injury is likely to be imminent."

Therefore, the threat of being criminally responsible still persists in the medical profession even though there is protection against accidents caused during legal acts or acts that are not intended to cause death.

The main difference between a civil liability and a criminal liability for medical malpractice is that, under civil liability, the court considers the amount of damages incurred but in criminal negligence, the court considers the amount and degree of negligence.

SUPREME COURT ON MEDICAL ETHICS

In *Spring Meadows Hospital and other v. Harjol Ahlu-Walia*[11] *Case,* The Supreme Court observed in this case that "it is a problem that focuses on medical ethics and it may be appropriate to note the responsibilities of the board of such organizations, who in the attempt to serve humanity have continued their commercial activities". And they have been mercilessly extracting money from the helpless patients and their families; however, they do not provide the necessary services. The influence exhorted by a doctor is unique. The relationships between the doctor and the patient are not always equally balanced. The attitude of a patient is based on the confidence in the learning of another and the general anguish of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and, therefore, is the function of ethics Medical ensure that the superiority of the doctor is abused in any way. It is a great mistake to think that doctors and hospitals are easy targets for dissatisfied patients. In fact, it is very difficult to raise an action of negligence. Not only are there practical difficulties in linking the injury suffered with medical treatment, but it is also even more difficult to establish the standard of care in case of medical negligence for which a complaint can be filed. All these factors, together with the simple expense of bringing legal action denied legal assistance to all but the poorest, operate to limit medical litigation in this country."

DOCTOR'S DUTIES TO THE PATIENTS

Halsbury's Law of England states – "Duties to the patients: - a person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. such a person, whether he is registered medical practitioner or

[11] Spring Meadows Hospital and other v. Harjol Ahlu-Walia 1997

not, who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give; and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient".

LAWS ON MEDICAL NEGLIGENCE IN USA

Medical malpractice lawsuits began in 1800. It accelerated in the 1960s and now claims filed for medical malpractice by patients are quite common in the United States. To obtain damage, the patient must demonstrate that poor attention caused the injury. Doctors in the United States have medical malpractice insurance to protect themselves from medical malpractice cases and unintentional injuries. Such lawsuits in the United States are initiated by filing a subpoena, claim or complaint form; these legal documents are called allegations. The allegations set forth the alleged errors made by the doctor accused with a demand for reparation. In some jurisdictions, legal action is initiated through the service of the legal process by the physical delivery of documents to the accused by a process server; These documents are then presented to the court with an affidavit that verifies that they have been delivered to the accused physician in accordance with certain rules of legal procedure. The plaintiff can sue for both economic as well as non-economic damages like medical bills, loss on income, lost earning capacity, mental agony, pain and suffering. There is a statute of limitation to file such a suit ranging from 6 months to 2 years.

DUTIES/CONDITIONS FOR MEDICAL NEGLIGENCE

In general, four elements must be met, although all states in the United States have separate laws on medical malpractice. These elements include:

(1) The existence of a legal obligation on the part of the doctor to provide care or treatment to the patient;

(2) A violation of this duty due to a failure of the attending physician in adhering to the standards of the profession;

(3) A causal relationship between said breach of duty and injuries to the patient;

(4) The existence of damages arising from the injury in such a way that the legal system can provide reparation.

1. BURDEN OF PROOF OF MEDICAL MALPRACTICE IN THE US

The burden of proof to prove medical malpractice rests with the plaintiff. The plaintiff must demonstrate that there was a legal duty towards him / her, and said professional / legal duty has been breached, invoking the concept of standard of care. The standard of care differs in each jurisdiction. In general, the concept of "standard of care" refers to the care that a similarly located similar professional would have provided to the patient.

After the statement mentioned above, the plaintiff's defender has to prove that it was the doctor's negligence that caused the injury using the evidence collected in the pre-trial discovery. The principle that is followed in the United States with respect to the evidence is the "preponderance of the evidence", which means that if there is more than a 50% probability of negligence based on the evidence presented, then the benefit of the Doubt is granted in favour of the plaintiff. It is less than the principle "beyond any reasonable doubt" followed in most cases.

2. CIVIL MALPRACTICE

Under civil negligence, plaintiffs are entitled to economic and non-economic damages. Economic damages allow plaintiffs to recover monetary losses, such as lost wages and medical expenses. Non-economic damages allow them to recover non-monetary losses, such as losses due to pain and suffering. In addition, each state has a nursing board or a state medical board that keeps records of all those instances, conducts investigations and has its own methods of punishment, such as reprimands, suspensions, license revocation or probation.

3. CRIMINAL MALPRACTICE

Before 1981, there were no cases of criminal negligence in the United States. Between 1981 and 2005, there were 30 reported cases of criminal negligence. One of the most known and most recent criminal malpractice cases is against the doctor of Michael Jackson, accused of involuntary manslaughter.

United States law does not clarify when the negligence of a health care provider amounts to criminal fault. However, to cross the line, there must be a "serious or flagrant deviation from the standard of care." In addition, the health care provider must also have a guilty mental state. However, it is true that a health care provider accused of criminal negligence does not really cause the damage intentionally.

Consequently, experts such as Dr. Filkins argued that the application of criminal negligence would make the jury give more importance to the mood than to the standard of care, which would lead to an arbitrary decision. Professor Hoffman also opined that the placement of criminal negligence does not have a deterrent effect, since most of these cases occur involuntarily. Therefore, the majority opinion is that medical malpractice must remain strictly a matter of civil liability.

4. THE ACTUAL PROCESS OF TRIAL

Medical malpractice cases are rarely tried, which is generally true in civil litigation in the United States. The reason is that the legal system is based on the adversarial defence of the respective lawyers, designed to encourage and promote effective self-resolution of civil disputes. To this end, a series of legal tools have been developed, the most important of which is the discovery process. Between the filing of the application and the trial, there is a long and long period of discovery, or exchange of information and understanding of the facts between the parties. The discovery process is facilitated by requests for documents, interrogations and statements. All of these are part of a large out-of-court pre-trial litigation process between the parties that the legal system is supposed to encourage. The documents consist of medical records; a medical record request is usually the first step that a claimant's lawyer takes to review the case. Other documents may include hospital billing information, clinical notes and related documents. Once the file is filed, an interrogation is a form submitted by the lawyers to the opposing party. The goal is to collect preliminary and demographic information about the party. Depositions are formal procedures in which a litigant or a litigant is questioned by a lawyer, under oath, and a report is drawn up for later use in court. The reason for this is that by asking the parties to the dispute to exchange underlying facts and information, such as the testimony of respective experts, the parties can reach a mutual understanding and resolve the matter. In the absence of an agreement, the information obtained during the discovery is presented during the trial Contrary to popular belief on trials; neither party can surprise the other party by introducing new and undiscovered facts.

For many physicians, affidavits are the most vivid encounter with the legal system during a medical malpractice trial. By law, a statement is the testimony of a witness who is sworn in and registered for use by a court at a later date. In the United States, a testimony is part of the discovery process by which litigants collect information for trial. Federal rules of

civil procedure and their corresponding state counterparts govern the taking of testimony by testimony. Usually, the patient's lawyer will present a notice to the lawyer defending the doctor that a statement is required. All parties agree on a suitable time and place. In many cases, the location is the doctor's office, preferred by defence lawyers, because doctors feel comfortable in their office and have books and other reference materials, if necessary. A deposition begins with a court reporter who takes the same oath or statement as the deposed party would take if the testimony went to court, before a judge and a jury. Then a literal shorthand recording of everything said during the testimony is taken, as well as a court recording. A written recording of the testimony, or a video recording, is available to all parties to the dispute.

Typically, counsel for both parties attends the depositions and a representative from the insurance company who has issued negligence coverage on behalf of the doctor. Sometimes the patient may choose to attend the deposition, although he does not ask the reporter questions. Direct examination is the examination of the declarant by the lawyer who ordered the testimony, that is, the patient's lawyer. After the direct examination, the other lawyers present may question the doctor who testifies. The examination may be followed by other questions from the first lawyer; this process is called redirection, which can be followed by regrowth, until all parties have exhausted their questions.

During depositions, lawyers can raise two types of objections; these apply both to the assertion of a privilege and to the form of the question asked. Objections relating to the admissibility of evidence and the applicability of the rules of evidence are generally accepted for trial. Objections to the form are usually a signal that the registrant should be careful when answering the question. The importance of testimony by testimony is that it can be used to accuse or contradict the doctor's subsequent testimony at a public hearing. Therefore, careful preparation for deposition is necessitated.

5. TORT REFORM

In response to concerns that there is a crisis in medical malpractice litigation, many states have adopted a variety of administrative and legislative actions, collectively referred to as "tort reform" measures. These measures include actions such as the termination of lawsuits in which a defendant may be responsible for paying all damages if other defendants lack the resources to pay (joint and several liability); reduce compensation for damages in the amount available to an injured party from collateral sources (such as workers'

compensation and health insurance); limit contingency fees that a lawyer can claim to cover fees and expenses; limit the period of time after an injury that a trial can be brought to trial, allowing the award of future damages such as lost wages and health care costs to be paid in instalments instead of a lump sum; and limit the damages granted in negligence claims. Similar reform efforts have also been introduced at the federal government level.

Other proposals have included the introduction of a contractual model for medical malpractice liability and instituting a system of medical negligence liability without fault similar to worker's compensation, or car insurance without fault. Although the state legislatures have generally rejected these two models, several other proposals have been approved in order to reduce the frequency, probability and severity of the bad practice. One study examined 44,913 claims reported to the National Practitioner Data Bank from 1999 to 2001, using logistic regression to study the associations between payments, doctors' premiums and ten legal liability reforms established by the state. The authors found that, despite large variations in negligence payments between states, legal reforms that limited total and non-economic damages were associated with lower payments and premiums. While other studies report mixed results, significant reductions in negligence payments may be made if the total or non-economic damage ceilings were operating nationwide.

Alternatives to the strict extra-contractual liability system have also been offered. Such alternatives include replacing the trial and jury system with a less formal process that involves professional decision makers. The objective of this alternative dispute resolution scheme is to reduce costs, expedite the handling of negligence claims, eliminate excessively generous juries and discard non-meritorious claims. Arbitration is a form of alternative dispute resolution that has been adopted by many states in the United States, but not to resolve medical malpractice claims. Binding voluntary arbitration is an alternative to litigation, conducted privately by the parties before an impartial third party with experience in the area. The arbitrator's decision is generally final, although dissatisfied parties may seek subsequent judicial resolution of the dispute. The American Medical Association has proposed establishing a state medical board to discipline doctors and resolve medical malpractice claims. Under this proposal, which has not been adopted in any state so far, the board would have the authority to change some legal rules related to medical malpractice, limit attorney fees and use guidelines to promote consistency in damages for damages. Others have proposed to eliminate the responsibility of the doctor altogether and replace it with the responsibility of the company in which the health care organization where the care

is provided is responsible for negligence. The objective of corporate responsibility is to control the quality of care while reducing costs and accelerating the resolution of negligence. Some health organizations that employ doctors already apply some of these concepts when taking legal responsibility for their medical employees.

Different states have different regulations for the actual filing of a claim related to medical malpractice; Some of these regulations are the result of incremental tort reform efforts. Therefore, state regulations may limit the choice of place, that is, limit the court in which a plaintiff can file the lawsuit instead of seeking an alternative place with a history of generous awards for the plaintiffs.

CONCLUSION

A balance between the medical needs of the public and the attention and care provided by the doctors is the need of the hour. Law and medicine ought not to be fighting with each other, but should be complementary to one another.

We are aware of the fact of callous negligence on the part of doctors towards their patients in India. But not many go to court to prosecute either the doctor or the hospital where he is working.

Few doctors are negligent due to various reasons. Some of them are the use of poor judgment in rendering care to a patient, lack of the requisite skill necessary to provide adequate care, wrong diagnosis conditions. Thus, this paper analyses the above mentioned issues and suggests on the standardisation of procedures and their expeditable nature. There are number of laws in India and other countries like USA that governs medical malpractice and the liability of the medical practitioners. The idea of suing the hospital, the authority running it for the negligence of its professional staff is two- fold, i.e., first , it would make the hospital more alert and responsible for its staff, and second , the patient would be able to get more compensation from it than from an individual doctor. As mentioned above, we have hardly any cases in India where a hospital has been made a party to the suit.

But we strongly suggest that a patient who has been the victim of a doctor’s negligence should sue not only the doctor, but also the institution he is working for. This would apply equally to government hospitals, private hospitals and nursing.

Certain points stand out conclusively from the cases. Imagine the plight if the case was to go to the Supreme Court, for then it might take another 15 to 20 years for a final decision. This inordinate delay in deciding cases of medical negligence is one of the main factors in people shying away from prosecuting hospitals and doctors for negligence. We suggest that such cases should be accorded some priority over other cases.

The standard of care required is enormously different in India and USA which makes it difficult to compare it but still both have same constituents of negligence. In USA the treatment expected is that the cause and remedy for the problem should be in one step or fewer steps but in India it is through deducting method, it will be done through many steps. It is strongly suggestible that there should be a raising of bars for the standard of care in India among the medical professionals and the cases must be adjudicated considering the standard of care. There is also a need for determining the adequacy of compensations to the aggrieved patients in case the mistake is on the doctor's side and on the institution. Thus, the need for such vital reformations as early as possible in this field is suggested.

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CHAPTER 6

PERSONAL LAWS IN CHANGING TIMES AND SUSTAINABLE DEVELOPMENT

(1)

CHANGING CONCEPT OF MARRIAGE AND THE NEED TO REFORM FAMILY LAWS IN INDIA

Ajitha John[1]

INTRODUCTION

India is a country of cultural values and marriage in India has always been considered a sacrament. The couples are considered as one before the law. The legal consequences of marriage follow the sanctity of this relationship. Marriage legally entitles both the persons to cohabit and children born out of wedlock are considered as legitimate children. The benefit of marriage gives certain rights and imposes certain obligations too. The Indian State recognizes religious laws to the matrimonial laws for the matrimonial relief.

The influence of the western culture, growing economy, education and the changes due to the globalization has made changes in the concept of marriage and the concept of live in relation has come into the picture. This concept of live in relationships is not new to the Indian society; the only difference is that earlier people were hesitant in declaring their status as living together. It was due to the fear of the society but now the people are openly in this kind of relationship. So the institution of marriage in India is witnessing tremendous changes in the concept of changes.

CONCEPT OF MARRIAGE

Marriage is considered as the basic foundation of the civilized society. It is the basis of social organization which makes mutual rights and obligations between the parties. By natural law it is a contract and with the passage of time it has got the sanction of religion. Different regions have different customs, rules and laws regarding marriage.

GLOBAL SCENARIO

Research in western sphere about the marriage demonstrates that it provides social benefits through the permanent union of one man and woman[2]. Despite these benefits, it creates certain obligations too. To avoid these obligations, currently more couples are choosing the non

[1] Research Scholar, Government Law College, Trivandrum
[2] John Sirjamaki, the Amereican Family in the Twentieth Century, 4 (1953).

marital, alternative sexual relationships than marital relationship. It includes relationships in the form such as living together and homosexual relationships.

In USA family is one of the private institutions which are based on marriage[3]. It is a legal, social and religious institution and federal states are making laws with respect to marriage. Common law marriage and obtaining a license are there. Marriage is the civil union of two people with certain rights and obligations[4] and one before law, in which registration and recognition is by states. The birth rate in USA, Canada, United Kingdom and Ireland shows that the births outside marriage are increasing. One out of six births is from outside marriage relationship[5]. Marriage is no longer the universal setting for being family and for child-bearing that it was a century ago.

Cohabitation is becoming more institutionalized in USA, states and municipalities are granting some of the rights and responsibilities that the married couples are have[6], Canada[7], and France[8]. Several other countries have instituted registered partnership instead of marriage.

The meaning of marriage got drastically transformed during the 20th century, due to the long term cultural, moral and social changes. It includes the changes in the working conditions, education, developments in the society, child bearing outside the marriage, and cohabitation. These developments made changes in the concept of marriage in the 20th century.

The first transition in the concept of marriage is termed as "from an institution to a companionship"[9]. In describing the companionship of marriage, he was referring that it is a change from the single earner, bread winner and home maker to the sharing of earning and sharing of responsibilities. It extends the traditional concept of compassionate marriage to the individualized system of cohabitation. It was started in 1950's and accelerated in the seventies[10]. The result was the change of institutionalized marriage to individualization of marriage.

[3] S JAFFER HUSSAIN, MARRIAGE BREKDOWN AND DIVORCEE LAW REFORM IN CONTEMPORARY SOCIETY, 27(2010).
[4] *Supra* note 1 at 27.
[5] *The National Marriage Project, the State of Our Unions, Marriage in America, 2010.*
[6] *Nova Scottia v. Walsh*, 2002 SCC 83.
[7] Modernization of Benefits and Obligations Act of 2000.
[8] Civil Solidarity Pacts, 2002.
[9] EARNEST W BURGESS & LOCKE H J, THE FAMILY: FROM INSTITUTION TO COMPANIONSHIP, 2(1945).
[10] CANCIAN F M, LOVE IN AMERICA: GENDER AND SSELF DEVELOPMENT (1987).

The cohabitation can be considered as the intimate partnership and logical extension of the increasing individualism. It is also a desire for of the deinstitutionalization of marriage in the 20th century. Thus the changes in the concept of marriage made it into free floating and free of obligations and some rights too.

CHANGES IN THE CONCEPT OF MARRIAGE IN THE ASIAN SPHERES

Like that the change in the Western sphere, Asia is also undergoing tremendous changes in the concept of marriage. Young people are waiting later to marry, couples are having fewer children, more married women are working outside home, gay marriages and cohabitation are increasing[11]. Within the region the changing trends were firstly observed in Japan and after that in Korea, Taiwan and Singapore[12]. Similar patterns emerged in other Asian countries also.

Half a century ago, universal and early marriage was characteristic feature of marriage almost Asia, but child marriage was very common in South Asia[13]. Asia's three sub regions have distinct traditional family structures. The traditional families are strongly male dominated. A woman leaves her parents at marriage and lives with the husband and his parents after the marriage. With economic development and modernization, women in most Asian countries are now enjoying autonomy than they had in the past[14].

Due to economic development, the scenario of the society changed. The girl children started schooling which made them self empowered. Thus they started paid employment which provided a measure of financial independence which reduced the pressure of early marriage. Education and employment opened the horizons of opportunity to women. So the concept of marriage changed, and young people find less importance to marriage. And the increase in the divorce rates reduced the attractiveness of marriage. But comparatively divorce rates are less in Asia than the Western Countries such as USA, UK and Canada.

But patriarchal system prevailed in many parts of Asia which prevented women from getting education and independence. The sediments of the patriarchal system lowered the position of women. Even though, the women are getting education, employment and independence. It

[11] Jones, Gravin W, *The Flight From Marriage in East And South East Asia*, 36, JOURNAL OF COMPRATIVE FAMILY STIDIES, 455 (2007).
[12] *Id.*
[13] Smith Peter C, Marriage Patterns in Transition, 5 JOURNAL OF FAMILY HISTORY, 6(1980).
[14] *Id.*

made them thinking about the sharing of responsibilities and thus they cop up with the changes in the concept of marriage too.

MARRIAGE CONCEPT IN INDIA

Marriage is treated as a part of the personal law in India. Personal laws mainly depend upon the religion. Marriage had assumed the sacred character of a sacrament. The sanction of religion had heightened the character and importance of the institution of marriage[15].

Hindus conceived marriage as a sacrament[16]. It is considered as one of the ten sacraments under Hindu religion. Ancient Hindu Law scriptures considered marriage as one of the Samskaras[17] or sacrament. It is te last of the ten sacraments. Religious and spiritual duties are connected with this sacrament. So marriage was obligatory in nature and certain rituals and ceremonies are also connected with the marriage. It is a permanent union which cannot be dissolved. It is n eternal union which extends to the life after death. Moreover the widow remarriages were not recognised by Hindu law. The ideal behind this was that the woman who remained unmarried after the death of the husband gets heaven even though she had no son to save her from the hell[18]. A Hindu marriage was a sacrament in the sense that wife could never ask for divorce at any ground.

Originally, the Hindu Law recognised eight forms of marriage[19] such as brahma, daiva, arsha, prajapatya, asura, gandharva, rakshasa and pisachika. These forms are uniformly referred in al Dharmasastras. The first four forms were considered as the best form of marriage during the Sutra and Smriti period.

The supreme object of marriage was the procreation of a son to save the soul of the father from the hell. In reality Hindus did not consider their marriage as a contract; instead they considered it as a sacrament. And it has three characteristics such as permanent and dissoluble union, eternal union and holy union. These elements made it a permanent in nature.

[15] Rig Veda, IX, 85.
[16] Manu Smriti, IX,45,48,64-68,9,96;
[17] MULLA PRINCIPLES OF HINDU LAW, 1&2(2007).
[18] *Id* at V, 151.
[19] According to Manusmriti.

Under Muslim law, marriage is considered as a contract. It is established for the sexual relationship in the beginning. And Prophet Mohammed made sea changes in the concept of marriage and placed women almost equal to the position of men[20].

Present scenario of Muslim law depicts marriage as a civil contract for the purpose of legalizing the sexual intercourse and procreation of children. The major aspects of Muslim marriage can be broadly divided into legal, social and religious aspect. However the resemblance of contract makes the Muslim marriage a civil contract.

The pre-Christian Roman law, marriage and divorce were private acts and they enjoyed freedom in entering and dissolving them[21]. No formalities included. But the advent of Christianity made it s an indissoluble sacrament having judicial recognition[22]. Christian marriage being a sacrament was considered as indissoluble. Parties have to live together till the end of life as per Canon laws. The reformations in the marriage divided the entire Christian community and it paved way for revolutionary changes and made it dissoluble. The Catholics and Protestants are having different opinion and laws regarding the dissolution of marriage among Christians. Catholics continued with the indissolubility while Protestants go with the jurisdiction of civil courts.

The influence of British law during the colonization made the Indian Christian law under the purview of British laws. Thus even the Indian Christian marriage is adhering to the sacraments; it is subject to dissolution under Indian law[23].

The Parsi community in India considers marriage as a social requirement with suitable law[24]. A Parsi husband or wife cannot remarry even if the marriage dissolved by law. It shows the monogamy and indissolubility nature of Parsi marriage[25].

Jews in India solely depending upon their religious usages which is not affected legislation. He laws regarding Jews are not codified in India. They are governed by their own religious laws. They regard marriage as a relation between two persons involving very sacred duties[26]. It is a respected and sacred institution which is viewed as an outward sign of inward and divine

[20] CHARLES HIMILTON, THE HEDAYA: COMMENTARY ON THE ISLMC LAWS, 25(1932).
[21] DR JOHN WARWICK MONTGOMERY, HISTORY, LAW AND CHRISTIANITY, 4(2015).
[22] Hyde v. Hyde, (1866) 1 P&D 130.
[23] Indian Divorce Act, 1869.
[24] The Parsi Marriage and Divorce Act,1936.a Parsi husband or wife cannot remarry even if the
[25] SHIV SAHAI SINGH, UNIFICATION OF DIVORCE LAWS IN INDIA, 33(1993).
[26] Benjamin v. Benjamin, 39 P.D (1) 215.

grace[27]. According to Jew's man is owed with duty to God and family. Thus the highest values of purity, sanctity and stability are vested in Jewish family[28].

UNMARRIED PARTNERSHIP

The benefits of marriage come with a lot of responsibilities. The marital obligations towards the spouse, towards the family, towards the children and towards the marital house are an inseparable part of the Indian marriage. To avoid the obligations of a traditional marriage and on the other hand to enjoy the benefit of cohabiting together, the concept of live in relation has come into picture[29]. Live in relationships provide for a life free from responsibility and commitment which is an essential element of marriage. The concept of live in relationships is not new to the Indian society, the only difference is that earlier people were hesitant in declaring their status may be due to the fear of the society but now the people are openly in this kind of relationship.

Live in relation i.e. Cohabitation is an arrangement whereby two people decide to live together on a long term or permanent basis in an emotionally and or sexually intimate relationship[30]. The term is most frequently applied to couples who are not married. It is an arrangement of living together to conduct a long-going relationship similarly as in marriage. In living together unmarried couple lives together under the same roof in a long term relationship that resembles a marriage without getting married. This form of relationship has become an alternate to marriage in metropolitan cities in which individual freedom is the top priority amongst the youth and nobody wants to get entangled into the typical responsibilities of a married life.

Despite the fact that there are scores of couples who are opting for live-in relationships, the society still attaches a taboo to such relationships. The majority looks at live-in relationship as a dilution of morals and more importantly tradition. The Supreme Court held that we have to consider various factors including social norms and constitutional values while considering the nature of live in relationships, and it may be immoral to society but not illegal to law[31]. So we have to admit he reality of unmarried partnership or living together. Marriage on the other is still venerated by most despite the alarming rise in the number of divorces and problems in

[27] KRISHNAMURTHY AIYAR, MARRIAGE, MAINTENANCE, SEPERATION AND DIVORCE, 503(2010).
[28] *Id*.
[29] Antony W Dnes, *Cohabitation and Marriage*,118, The Law And Economics Of Marriage And Divorce, CUP2002.
[30] ROBERT ROWTHORN, THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE, 117(2002).

[31] *Ramasiddappa v. Mallikarjun*, (2011) 11 SCC 1.

relationship. Therefore, the primary difference between live-in relationships and marriage is that marriage has received the societal stamp of approval and live-in relationships are yet to do so.

Marriage is governed by a separate set of laws in all countries which safeguards the interests of both parties who enter into the union. Live-in relationships on the other hand have received due recognition in a few countries such as France and Philippines. In India, presently there is no law defining the maxims of a live-in relationship. The Supreme Court however, has observed in a current ruling that a woman who has lived in a live-in relationship for a long period of time should enjoy same rights that a married woman is entitled to[32].

So the Supreme Court of India has accepted the live-in relationship. The Supreme Court is of the view that a continued long relationship as living together is the presumption of valid marriage in India[33]. Different countries have different stand on live-in relationship. But the laws in India are not adequately equipped to fulfill the needs of the time. There is a need to formulate a law that clarifies the concept.

Marriage is governed by a separate set of laws in all countries which safeguards the interests of both parties who enter into the union. Live-in relationships on the other hand have received due recognition in a few countries such as USA, UK, Canada, France and Philippines. In India, presently there is no law defining the maxims of a live-in relationship. The Supreme Court however, has observed in a current ruling that a woman who has lived in a live-in relationship for a long period of time should enjoy same rights that a married woman is entitled to[34].

LEGAL AND JUDICIAL APPROACH

Living together or unmarried partners is considered as domestic relationship in the nature of marriage[35]. As it is considered as marriage and the woman under such relation for a long term before the society is entitled to get maintenance[36]. The partners living together as husband and wife are under presumption as husband and wife[37]. The common presumption of fact is that assumption of marriages in such unmarried partnership[38]. Living together comes under right to life under Article 21 of the Constitution of India, it is permissible and cannot be considered as

[32] Veluswami v. Pachai Ammal, AIR 2011 SC 479.
[33] *Payal Sharma v. Nari Niketan*, (2001) 8 SCC 726.
[34] *Id.*
[35] Sec. 2(f) Protection of Women from domestic Violences Act, 2005.
[36] Sec.125 CrPC , *see also Ajay bhardwaj v. Jyotsna*, 2016 SCC 9707.
[37] *Chamuniya v. Virendra Singgh Kushwala*.
[38] Sec. 114 Evidence Act.

illegal or unlawful was held by the Supreme Court in Khushboo v. Kanniammal[39]. So that the Supreme Court allowed maintenance like legally wedded wife under PWDA[40] sec. 26 and under Sec.125 CrPC in Chanmuniya v. Chanmuniya Kumar Singh Khushwa, which over ruled the decision of the High Court[41].

The Privy Council was of the opinion that where a man and woman lived together as husband and wife, the law will presume it as a valid marriage, unless a contrary is proved[42]. Again the Supreme Court validated a fifty year of live in relationship as in the form of marriage[43].

The Supreme Court upheld the live in relation [44] and held that two people living together without formal marriage are not criminal offenders[45]. Moreover a long term live in relationship cannot be termed as walk in and walk out relation as there exists the presumption of marriage[46]. Such relation creates a legal bond which cannot break by either party at will and the parties in living together cannot complain infidelity or immorality[47]. In Indra Sarma v. V K V Sarma[48], the Supreme Court held that denial of any protection would amount to great injustice to the victim and emphasized the need to extend Sec. 2(f) of PWDA of domestic relationship to include such relations also and requested the Parliament to enact a new legislation to protect the victims in such relation based on the following guidelines: duration of period of relationship, shared household, pooling of resources and financial arrangements, domestic arrangements, sexual relationship and companionship, children born out of such relationship, socialization in public, intention and conduct of the parties. Again the Supreme Court in Dhanulal v. Ganeshram[49] reiterated that the couples living together will be presumed to be legally married and woman in such relationship is eligible to inherit the property after the death of the partner. Even now no legislations or no amendments in the existing law have been made by the Parliament.

[39] (2010) 5 SCC 600.
[40] Protection of Women from Domestic Violences Act, 2005.
[41] (2011)1 SCC 141.
[42] *Dinohamy v. W L Balhamy*(1928) M.L.J 388(PC).
[43] *Badri Prasad v. Director of Consolidation*, AIR 97 SC 1557.
[44] *Payal Sharma v. Nari Niketan*, (2001) 8 SCC 726.
[45] (2010) 9 SCC 209.
[46] *Madan Mohan Singh v. Rajni Kant*, (2010) 9 SCC 209.
[47] *Alok Kumar v. State*, 2010 SCC Online Delhi 2645.
[48](2013) 15 SCC 755.
[49] (2015) 12 SCC 301.

CONCLUSION

The changes are going on not only in society but also in law too. It is due to the changes in environmental conditions, human behaviour and social progress. All branches of law are also changing as per the needs of the time, especially the family law. A progressive development is the urge of the time and it is better for the social engineering in the area of family law the institution of marriage is undergoing rapid changes from the concept of sacrament to co habitation. The theories in marriage and family laws are also undergoing sea changes. The judiciary is also attempting to modify the laws and trying to give guidelines through the judicial pronouncements.

The instances of unmarried partners are increasing nowadays due to education, influence of western culture and changing scenario and it has made drastic changes in the conventional pattern of family and marriage. It is termed as living together which provides a life free from obligations of a traditional marriage and at the same time gives the benefits of cohabiting together. Living together or live in relation or unmarried partners is an arrangement whereby two people decide to live together on a long term or permanent basis in an emotionally and sexually intimate relationship. The term living together is most frequently applied to couples who are not married. The couple in living together leads a life similar to that of marital relationship. It is a concept arose in western society and spread all over the world. Unmarried couples who live together have some special legal issues also. Cohabitation or living together declined the stability in the marriage relationship and sometimes questions the morality.

The definition of live in relationships is not clear and so is the status of the couples in a live in relationship. There is no specific law on the subject of live in relationships in India. There is no legislation to define the rights and obligations of the parties to a live in relationships, the status of children born to such couples. Since there is no specific law that recognizes the status of the couples in live in relationship, the status of children born to couples in live in relationship is also not very clear.

At present there is no specific legislation that deals with concept of live in relationship and the rights of the parties and the children of the live in partners. In the present scenario there is a need to formulate a law that would clarify the concept. There should be clear provisions with regard to the time span required to give status to the relationship, registration and rights of parties and children born out of it. The utmost need of the hour is to secure the future of the children born to live in couples. The steps taken by the judiciary are indeed welcoming and

pragmatic in approach. Though the live in relations provide the individuals individual freedom but due to the insecurity it carries it with, there needs to be a law to curtail its disadvantages.

It is the need of the hour to point out the legal recognition to living together as that of marriage and to clarify the concept. For that we need new rules and regulations.

(2)

INFLUENCE OF MODERNISATION AND WESTERNISATION ON PERSONAL LAWS

Malavika M[1]
Kiruthika Devi S[2]

INTRODUCTION

India is diverse with various religions, cultures languages and beliefs. It is the land of unity in diversity. Considering the velocity of the dynamic forum of personal laws over time, it includes religion, culture, faith and belief not closed by the boundaries of religion but freedom of self-expression and oneness. Personal laws can be defined as a law that is personalised and framed according to the will and way of a certain class of people based on the factors, it shapes the overview of people about their antecedents and roots. Over time personal laws have developed and changed, the main roots for the transformation of the law began when the British colonised India. Before colonisation, religion controlled every aspect of the law, both public and personal. Religion controlled how criminal law was controlled and executed. Same went for laws related to contracts, commerce and trade, court proceedings, punishments etc. Now due to westernisation, modernisation and colonisation, personal laws are confined to laws relating to marriage, adoption, succession, inheritance, guardianship etc. It can be viewed as laws that affect everyone personally on their belief systems and their lifestyle. During the medieval period, the King did not interfere in the personal laws of the citizens, there were strict regimes for the Muslims and the Hindus were free to execute their religion according to their will and wish. Later during the British Era, they also did not interfere much or influence the citizens until they attempted to codify personal law during the 18th century. They changed opinions on the right and wrongs of some biased personal beliefs such as untouchablility, sati etc. and tried enforcing laws against such practices. In today's world (i,e) the 21st century, modernisation and westernisation affect the personal laws. In this paper we are going to understand how modernisation and westernisation have affected the Indian personal laws with the help of an empirical study.

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MODERNISATION

Modernisation can also be termed as self westernisation that is initiated with the aim of achieving internal goals, which is required to bridge the gap between technological advancements and western civilisation's modernity. Modernisation is present as transformation of national sociocultural systems, carried out with the direct/ indirect participation of the state belonging to western civilisation of modernity. Attempting to transform societies and achieving a hybrid design of foreign cultural innovation, where there are residual elements of the imported foreign culture and local sociocultural traditions. . Modernisation can be factored in as the positive impact of westernisation on society. Indian culture is one of the oldest cultures in the world as urbanisation had taken place even during the bronze age (Indus Valley Civilisation). Hence modernisation can be considered as the benefactor for unfolding a contemporary era in a divergent country like India. Modernisation refers to the model of a progressive transition from a pre-modern or traditional to modern society. Modernisation can be viewed in India through the development of certain laws and right over recent times, such as family structure, property law, women's right and many more.

FAMILY STRUCTURE

Family is considered as a primary social unit of human society. In India, the traditional system has survived without any radical change in the system. With the advent of British rule along with industrialization and modernization, many structural features along with family structures have started to change. Joint family, constituting the grandfather, grandmother, father, mother, their children and sometimes the siblings of the parents along with their children are considered as a full-fledged form and basic unit of a family. Nuclear family, on the other hand, constitutes father, mother and their children. In the traditional system, the breakdown of this unit is possible due to death, migration of any family member**.** We can classify the nuclear family into two kinds. First, Husband and wife without children, sub-nuclear unit, are called conjugal family or a spousal family. This is the kind of family where there a possibility of it developing into a basic structure, i.e. from sub-nuclear family to nuclear family. The second kind is when a nuclear family breaks down, a larger unit getting shrunk into a smaller unit, getting separated from their children who might have moved out and started their family unit. They are referred to as a residual conjugal family. The structure of a family is considered to be patriarchal. India has a marginal decline in average household size from 5.5 to 5.4 persons during the 1980s and 1990s. Some of the major changes due to modernization are marriage dissolution, women's

economic participation, urbanisation, globalisation and many others. Before the enforcement of the Hindu Marriage Act, 1955, the concept of divorce didn't exist. Hindu marriage is considered to be sacred, unlike Muslim marriage which a contract. Since Muslim marriage is a contract, dissolution of marriage was possible, however, it was the opposite under Hindu law. The most positive aspect of modernization is women empowerment. The working class of women have increased over the last three decades. Women have entered the labour market and are free from household chores. Globalisation gives access to the free flow of trade and labour across countries. It has created employment opportunities for migration which has an impact on the family structure.

WOMEN AND PROPERTY RIGHTS

Women in India have been denied the right to ancestral property and discriminated for many years. One of the main reasons behind this could be due to non-uniformity in inheritance laws because religious communities are governed by their laws. Most of these laws discouraged the inheritance of property to women merely because they would lose the property once the woman gets married. In northern and western states women gave up on their ancestral property. The justification given by the family members is that they spend on dowry and finance the daughter's wedding, so the son gets the family property. According to a survey, awarding inherited property to women between 1970 to 1990 lead to an increase in female foeticide and higher infant mortality rate. It was believed that the inherited property will fall into the hands of her in-laws, so the woman was considered to be a liability. It was only after the enforcement of the Hindu Succession Act, 2005, women got equal rights in their father's ancestral property. A wife is entitled to get an equal share in her deceased husband's property. According to the Hindu Succession Act, 2005, the distribution of property takes place among all heirs and widowed wife. However, they are always problems, in the case of inter-religious marriage, assuming a Hindu woman marries a Muslim man without converting into Islam, the marriage isn't regular or valid in the existing laws. According to Muslim laws, Meher (dower) is received by the bride from the groom. The Hindu woman, in this case, is entitled to the dower but she can't inherit her husband's property. If a Hindu woman marries a Christian, the wife's religion doesn't prevent her from inheriting the property. In this case, a widowed woman will get one-third of the property if they had lineal decedents who will get two-third of the property. To end discrimination against daughters, amendment of Section 6 of the Hindu Succession Act, 2005 was made. This gave equal rights to daughters as they have the right of the property by birth itself. The father can't deny the daughter's share in the property. Before the enactment of the

Hindu Succession Act, 2005, the daughters weren't considered to be coparceners in Hindu Undivided Family. They were ceased to be a family member once they get married. After the amendment, they became coparceners and their marital status did not affect her right. The living daughters of the living or dead coparceners are entitled to claim a share in the ancestral property. [3] On the other hand in case of self-acquired property, the father has the right to do anything he wants with the property, the daughter has no right to make any objection. In case of Muslims, both male and female heirs have a right over the property. However**,** the share of the female heir is less than half of the male heir. A wife without children receives one-fourth of the property and with children are entitled to one-eighth of the husband's property. A son gets double the share of a daughter in the property. Even if the deceased father has no male heirs, only half the property goes to the daughter. If they are two daughters then they receive two-third of the property collectively. In the case of Christians, the heirs inherit equally, irrespective of their gender.

MODERNISATION AND RELIGION

Modernization affects the lifestyle of people with time. People who adopt themselves to modernity have become more rational and pragmatic about their lifestyle. Modernization resulted in a decline in religious practices. It has been identified that modernization creates sects in Islam which results in conflicts among Muslims, and creates a bad image about Muslims before Non-Muslims. Modernization has resulted in women becoming a major part of the earning sector. The freedom given to them isn't completely acceptable by all religious practices. In the recent case of Indian Young Lawyers Association & Ors. v. The State of Kerala, it was held by a five bench judge of the Supreme Court that women of all ages were allowed to enter the Sabarimala temple.

WESTERNISATION

Westernisation is when society adopts western culture into their day to day routine. Westernisation also known as occidentalisation, is a process whereby societies come under or adopt western concepts. Westernisation has been factored into society when rights were provided and certain laws were scrapped e.g., Adultery, Triple Talaq and nikkah Halala, etc. In simpler terms, modernization can be considered to be influence of ther people and westernization is influence of ideologies.

[3] Mangamal @ Thulasi And Anr. vs T.B.Raju And Ors.

TRIPLE TALAQ AND NIKAH HALALA

Triple talaq is a practice in the Islamic culture whereby the Muslim man could divorce his wife by pronouncing the Arabic term "talaq" three times. An argument was presented before the Supreme Court in a case for Bigamy by a Hindu man. He argued that his fundamental right to equality was violated as he was prohibited the practice of polygamy however Muslim men were not.[2] Personal laws weren't considered to be "Laws in force" as defined by Article 13 of the Indian Constitution. Personal laws were held to be immune from constitutional challenges. The argument made by the respondent was rational, but some cases overturned this argument by stating that personal laws would be void if they violated fundamental rights. Over recent times talaq are declared via email, text a phone call or any other source of communication that can be delivered. There are three ways under this, talaq-e-Biddat is when talaq is pronounced three times immediately and the divorce is finalised in one sitting. Talaq-e-Ahsan, in this talaq, is pronounced once and then there has to be a three month iddat period to factor in three menstrual cycles of the wife, this time is meant for reconciliation for the man and if they have sexual intercourse during that time, the talaq is said to be revoked. Talaq-e-Hasan, the word talaq must be pronounced after every successive menstrual cycle. There is no mention of triple talaq in Sharia law or the Quran. Since triple talaq violates the rights of a woman, it has been banned in India and 23 other countries. Campaigning for abolishing this practice took place in the landmark case- the Shayara Bano, 35-year-old mother. Shayara Bano had filed a petition to ban Triple Talaq and also to outlaw Nikkah Halala and polygamy. She said that she was in her parents' home in Uttarakhand when she received a talaqnama- a letter from her husband mentioning that he was divorcing her. She had made several attempts to contact her husband in Allahabad, but all attempts failed. She was also denied access to her children. If a woman wants to remarry her husband after talaq has been pronounced, she must perform Nikkah Halala. She must marry another Muslim man and consummate that marriage with him and then he must divorce her, after that she can go back to her husband. This practice exploits women and they are put under very vulnerable circumstances. There are many cases where during the performance of Nikkah Halala, the Muslim man might refuse to divorce the wife unless the husband pays a certain sum for him to pronounce talaq. A Muslim couple in the UK once had a heated discussion and the husband pronounced triple talaq to his wife and they got divorced. When the wife told about this to her father he said that she was divorced. However, the husband regretted his action and wanted her back but since talaq had already been pronounced and the divorce was finalized, so she had to perform Nikkah Halala to get back with her husband. They

found an institution where men were available for the very purpose of Nikkah Halala, They charged her 500-1,000 Euros to get a Muslim man to marry her, consummate the marriage and then divorce her from that institute that been set up for that very purpose. There are several sites like these where they make a profitable action out of Nikkah Halala. Several debates have risen, accusing this practice to fall under rape or religion. The Muslim Women (Protection of rights on marriage) Bill 2019, was passed on 26th July 2019 finally got the verdict. It makes instant triple talaq (Talaq-e-biddah) in any form i,e spoken, written or by any electronic means such as emails or SMS, illegal and void with 3 years in jail for the husband. Triple Talaq cases are most common in families that have low income or semi-educated families/ illiterate. If the main bread earner of the family gets jail time, the woman of the same family cannot lead life herself. The question remains that whether declaring the practice of Triple Talaq unconstitutional would serve to improve the social status of Muslim women at all. It would only serve as a pit that Muslim women against her immediate family and society. The subjectivity of Muslim women has to be understood to be constructed within norms that she must supposedly exist in. We cannot separate her religious belief, it is a part of her personality and she cannot be alienated from them.

LGBTQ COMMUNITY

The LGBTQ (also referred to as lesbians, gays, bisexuals, transgender and queer community) is an acronym used to define a person's sexual orientation. During the late 19th century, there was great difficulty in accepting the same. The homophobic era began when various religions had forbidden the act of having sexual intercourse with the same sex. Christianity considered it a "sinful act" if the sexual activity was not related to procreation, homosexual acts were considered grave unforgivable sins. Hinduism never openly admitted into being a homophobic religion. The Gods of Hindu religion and the Mahabaratha series contribute to many tales on transgenders, sexual intercourse by the same-sex etc. In a majoritarian-Hindu driven society, sexuality is very rarely discussed in the open. In India, Sec-377 was imposed by the British in 1861 during the colonisation period. Section 377 comes into play for bestiality, minor and non-consensual sexual acts. The punishment for "unnatural sex" was imprisonment which may extend. Up to 10 years and shall also be liable to a fine. During the war, homophobia was at its peak. The British have very low tolerance towards homosexuals. Alan turning, who cracked the German code during the war helped saved millions of lives by formulating his cryptanalysis of the enigma was a homosexual. Despite his grave contributions during the war, because he was homosexual, most of his work was buried by the Official secrets act in Britain. He later

was sent to a camp where they attempted to “cure” his homosexuality. There are several hidden cases of camps that held that the intent to “purify” the soul of the unnatural habit of having sexual desires towards the same sex, where they would be brutally tortured, physically and mentally. They would be injected with serums that would change the hormonal balance and stability of the persons. These weren’t tested and they would sometimes lead to catastrophic casualties and worst case, death. These “concentration camps”. For the gay were/are present all over the world. Alan turning passed away due to self-inflicted cyanide poisoning. There are several cases similar to these that light hasn’t been shunned on. In India, society plays a big role in the acceptance of the LGBTQ community. Orthodox families still till this day have difficulties in accepting same-sex marriage. Most orthodox adults believe it lies with the influence of westernisation. Heavy debates have been reoccurring on whether to classify this personal law influence as under westernisation or modernisation. Facts remain that westernisation has not influenced the ideology behind decriminalising gay marriage, better yet it is modernisation as sexuality is not determined by region but by within. Society as a whole has adopted themselves into accepting the LGBTQ community more these days. Over 92% of the LGBTQ community have found that over the past 10 years people have been more accepting of them, but religion still plays a major factor in their acceptance. A study shows that 45% of American still believe it to be a sin to be attracted to the same sex. A survey conducted by Pew Research centre has found that only 55% of gay men are accepted in society and 58% of lesbians. It is believed by the people of the LGBTQ community that major religious constitutions are unwelcoming of them. To be precise, 84% of muslim 75% of Christians. But the rate of Hindu’s against Gays and Lesbians are at a low 40%.

ADULTERY

Adultery means voluntary sexual intercourse between a married person and someone who is not their spouse. As per the Jewish law, if adultery was practised both women and men would be punished for it. The penalty for adultery was stoning. This penalty would only come in the act if the independent’s witness had been warned them before the crime being committed. Today, Jewish law has taken action to forbid a man to continue living with a wife who has committed adultery. He is obligated to give her a divorce. There were stringent laws made up in the Roman world against adultery and it was only applied to those who were involved in coitus with another married woman. Under Christianity, old testament had forbidden adultery and the punishment provided was the death penalty. In the new testament, adultery was preached as a sin and only considered to be social wrong. In Judaism only the married women

were guilty of the offence if she has committed Adultery, Punishment provided for Adultery are as follows:-

- Pennsylvania - two years imprisonment / 18 months treatment for insanity.
- Michigan - Potential for a life sentence
- Mary land - Fine of 10 Dollars
- Pakistan - Death sentence
- India - husband and wife can use it as a ground for divorce

Section 497 of the IPC stated that "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of **a**dulter**y**." The act says "without the consent or convince of the man". Section 497 of IPC compromises the dignity and rights of the wife of the individual. This provision of the Indian Penal Code was criticized by many as it was a criminal offence and believed that the provision is to be amended keeping in mind the dignity and rights of the women.

This section was challenged and struck down recently, hence referring to women as the husband's property. It challenged, stating that if the woman had gotten permission would it not amount to adultery. The Supreme Court scrapped the 150-year-old law. "Adultery cannot and should not be a crime, it can be a ground for divorce" a five bench led by outgoing Chief Justice of India. They mentioned that adultery law against the right to life and equality. It violated article 14 guaranteeing equality before law to all individuals, article 15 ensuring that no person is discriminated on the basis of caste creed, sex etc. and article 21 ensuring right to life and liberty to all citizens of the country and gay sex was decriminalised. The petition challenged this law stating that it is discriminatory against men by only holding them liable for extra-marital relationships while treating women like objects.[4] Adultery is an effect of modernisation as feminism and equality are emerging out into the world and seeping into the mind of the people who favour equality. Adultery now can be used as a ground for divorce unless and otherwise other elements are added that constitute a crime. Many were not even aware of the existence of the law until it got struck down and was supported by the majority.

[4] Joseph Shine v Union of India

OBJECTIVE

- To study the awareness level of people on personal law in India
- They understand the influence of modernization and westernization on personal laws in India
- To analyze how society responds to the changes made in personal laws.

METHODOLOGY

The study has been conducted through purposive sampling technique. A structured questionnaire has been prepared and the data has been collected from people in Chennai and the sample size is 90. The questions asked are related to personal laws in changing time and the responses are used to meet the objective of the present study.

FINDINGS

- According to the empirical study, 91% agreed that westernization and modernization has affected the Indian society. Reasons stating there has been a drastic change in a generation because of the evolution of technology etc, media has developed the mindset of a budding generation and has made the already existing generation to change their mindsets too. Because it is a human tendency to adapt and change. But some people don't adapt to change because they hold on culture and values.
- 57% are not aware of the personal laws made in India. Majority of the background of the people who attended the survey has a link to the law. The rest of the category could fall under the technical side or other reasons.
- On being questioned about the awareness of any recent amendmants with regard to personal laws, 44.4% of the respondents were aware of Adultery being decriminalised, 76.6% on Scrapping of section 377, 71.1% on Triple talaq becoming a punishable offence, 83.3% on Entry of women into the Sabarimala. Media plays a big role in Indian society. Most Indians follow up regularly on the news channels and paper. Issues and controversy driven up will have an opinion on the Indiana people. Since these laws have been followed for over many years and when there's a sudden change it gives the public a shock.
- 89% have disagreed and have stated that the practice of Triple Talaq and Nikah Halala is not justified. Women are subject many to many violations in Muslim law while analysing the factor of Muslim law in divorce and marriage, women have not been

given equal rights. The rights provided in the constitution are meant for both Genders, but here it is contradictory.

- 57% have agreed that legalizing same sex marriage has affected the Indian culture. Hinduism has always been subtle in the talks of LGBTQ community, when it has been publicly stated about the scrapping of section 377, matters were put out into society, such matters are generally kept within 4 walls of an Indian home.
- 51% of the respondents believe that entry of women into the sabarimala temple is violation of their fundamental right to practice religion. 49% have disagreed to the same. Women have fought for many rights that they were denied. This being one of them. Many also disagree and have mentioned that women must not be allowed in the temple as it is a belief and Holy/Sacred place of a value that has been followed for several years and mustn't be broken.
- 63% have agreed that the overturning of the SC ruling was unfair in Shah Bano case, where the alimony was granted only for three months after divorce. 37% have disagreed. Considering that it was very discriminatory to Muslim as they do not get maintenance after divorce, many have agreed to the overturning of the SC ruling.
- 77% have agreed to the enforcement of a Uniform Civil Code in a diverse country like India, 23% have disagreed. Since there are many laws under various religions that provide specific rights for a particular religion and not the other, it violates the rights of people from other religions, hence having a uniform civil code would provide equality to all people despite the difference of religion.

RECOMMENDATION

- From the empirical survey conducted, it is well established that not many people are aware of the laws laid down in this country. Hence it is essential that society is educated in the laws of this country and everyone is aware of their legal rights and duties provided to them. Legal awareness can be provided by educating people more and helping them understand the provisions. Rural areas might not be as well aware as urban areas and Legal-Aid camps must be set up to help spread the word of their rights and duties. Schools must teach children their basic fundamental rights and institutions must be set up to help spread awareness of law from grass-root level to help curb the lack of attention brought to the education of the law to a layman.

- Since Islam is the only religion to permit polygamy for the man, certain restrictions must be provided to help the man and the women in the marriage, e.g. the man must not be allowed the right to polygamy unless he can maintain all 4 wives, he must be able to provide for all their needs. With the changing time it becomes a necessity to make amendments, the laws must be in such a way that adopting to the changes must be easy.
- Acceptance of the LGBTQ community has reduced suicidal behaviour, depression and substance abuse, especially people of adolescent age. Young people belonging to an accepting family are reported to be more confident and have higher self-esteem and also live a more healthy life. It is important to support them and make them feel okay about themselves and accepting who they are. Families must stand up for them, and making them feel less insecure by finding a more supportive place of worship.

CONCLUSION

Over the years, how westernisation and modernisation have transformed and is transforming India into a new platform for people to diversify into other cultures and attempt to curb their own. Introduction to new laws implies that the country might not be supported well, the law must be amended according to time and not passing new ones. With a rapidly evolving era, the law must be able to adapt to the ideology and the mindset of the people. If the law does not advance at the rate the people advance, it would be very difficult for the people to adapt.

(3)

CLIMATE CHANGE AND ITS IMPACT ON THE ENVIRONMENT: A SOCIO - LEGAL PERSPECTIVE

Shreya Saxena[1]

Gunjan Maji[2]

INTRODUCTION

The apparent disparity in solar radiance, the fluctuations in Earth's orbital parameters and volcanic activity cause climate change. The solar energy received by the Earth is partly transmitted back to space. Nevertheless, the remaining of such outgoing energy is trapped by atmospheric gases. These gases are called the Greenhouse Gases. The gasses such as water vapour, carbon dioxide (CO2), methane, nitrous oxides, and chlorofluorocarbons (CFCs) also absorb the infrared radiation emitted from the surface of the Earth. An increase in these gases in the Earth's atmosphere has caused the Earth to have warm temperatures by trapping more of that heat. These gases are holding back the heat from the sun that would otherwise have been radiated back into space. The surge in heat has culminated generating the greenhouse effect which has contributed to climate change.

The effects of climate change have lead to the warming of the atmosphere around us and which in returned warmed our oceans, melted our polar ice caps, and thus, lead to the rise in the sea level.[3] In the last 1400 years, the cycle between the years 983 to 2012 has presented itself to be the warmest 30-years for the Northern Hemisphere.[4] Making the Earth's past three decades steadily and increasingly colder since 1850.[5] When measured, there has been a recorded rise of 0.85 ° C throughout the oceans and lands of the earth between 1880-2012 century alone.[6] The number of people who have come into contact with the heat wave has increased by around 125 million people at an alarming rate.[7] Agriculture sector vulnerability to such changes in the atmosphere has plagued the planet with malnutrition. In 2017 due to severe droughts correlated with El Niño rose displacement to 821 million.[8] Out of the 17.7 million internally displaced

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[3] 'Climate Change 2014 Synthesis Report 2014' Edited by The Core Writing Team, Chairman Pachauri Rajendra K., Meyer Leo Head, Published by Intergovernmental Panel on Climate Change (2015), < https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf > accessed on 20th February, 2020
[4] Ibid
[5] Ibid
[6] Ibid
[7] < https://www.who.int/globalchange/publications/heat-and-health/en/ > accessed on 23rd February, 2020
[8] Ibid

persons (IDPs) over 2 million in September 2018, the International Organisation for Migration (IOM) tracked the adverse climatic conditions they faced in natives there.[9]

THE INFLUENTIAL INTERNATIONAL CONVENTIONS ON CLIMATE CHANGE

(A) VIENNA CONVENTION FOR THE PROTECTION OF THE OZONE LAYER

The ozone layer has been protecting people and other living organisms from harmful UV rays coming from the Sun but there has been a man-made creation called the Ozone Holes which has been preventing them to do their jobs. The rays escaped due to the broken ozone molecules in the upper atmosphere and these have a freezing effect on the stratosphere more than they warm the troposphere. However, scientists have recently uncovered is that the ozone hole in the Southern Hemisphere has affected climate.[10] The cooler stratosphere has contributed to higher winds at the centre, which can affect the equator, tropical activity and rainfall at lower latitudes. Thus, causing unforeseen changes in the climate.

The Vienna Convention was introduced for the Protection of the Ozone Layer came into play in year 1985. The conference was initially developed out of appreciation of the international concern about the depletion of the stratosphere's ozone. The convention states that all parties should take 'appropriate measures' to keep in the midst of the conventions and related protocols to "protect human health and environment from adverse effects" caused to human life and environment.[11] The agreement does not aim at all the changes, in general, any alteration of the ozone layer which has a positive effect on human health and the environment would be preferable.[12] The term 'adverse effects'[13] under the convention refers to changes in the physical environment or biota, including climate change.

[9]< https://www.unhcr.org/ceu/80-enwho-we-helpinternally-displaced-people-html.htm > accessed 22nd February, 2020

[10] <https://climate.nasa.gov/faq/15/is-the-ozone-hole-causing-climate-change/> accessed on 23rd February, 2020

[11] 'The Vienna Convention for the Protection of the Ozone Layer' by United Nations Environment Programme, Article 2 (1) < http://mountainlex.alpconv.org/images/documents/international/convention_ozone_layer.pdf > accessed on 16th February, 2020.

[12] Ibid, Article 1 (2)

[13] Ibid

(B) MONTREAL PROTOCOL ON SUBSTANCE DEPLEMENTING THE OZONE LAYER

The Protocol was adopted on 15 September 1987 in Montreal, Canada. The Protocol is to date the only UN treaty that has been ratified by every country on Earth - all 197 UN Member States. The Montreal Protocol is a groundbreaking tool for ensuring that the substances depleting the ozone layer is regulated. It is multilateral environmental which has identified various products, the numbers leading up to 100 compounds, as ozone-depleting substances. The Earth's defensive barrier is being crippled, due to the release of these compounds into the air. The treaty provides specific responsibilities to phase out different groups of Ozone-depleting Substances by providing provision related to control measures (Article 2), control of trade with non parties, annual reporting of data (Article 7), national licensing systems to control Ozone-depleting Substances imports and exports, Special situation of developing countries (Article 5) and various other matters. The countries parties to the treaty do have similar yet separate obligations, but most significantly, all nations have promises that are legal, effective and tangible.[14] The Montreal Protocol has contributed to a substantial decline in total global production and consumption of ozone depleting substances which has also brought climate benefits, as some of these substances are also greenhouse gasses[15] and has evolved over time in the light of new scientific, technical and economic developments.

(C) UNITED NATION FRAMEWORK CONVENTION ON CLIMATE CHANGE

Untied Nations General Assembly establish a committee to develop legal measures for protection of environment from climate change in 1990. The committee put forth the United Nations Framework Convention on Climate Change[16] in 1992. It has 165 signatories and 197 parties. The main aim is clearly stated as to established a balanced concentration of the Green House Gases and maintain it "at a level that would prevent dangerous anthropogenic interference with the climate system" and thus will be done over a stretched period of time "to allow eco-systems to adapt naturally to climate change, to ensure that food production is not threatened" as well the economic development of the states continue in a sustainable manner.[17] The Common but Differentiated Responsibility

[14] <https://www.unenvironment.org/ozonaction/who-we-are/about-montreal-protocol/> accessed on 20 February, 2020.
[15]<https://www.worldbank.org/en/topic/climatechange/brief/montreal-protocol/> accessed on 20 February, 2020.
[16] Ibid, Part 7
[17] Ibid, Article 2

approach takes into consideration the difference between developed countries[18] and developing countries and says that the developed nation parties are required to adopt national policies to control and reduce the effects of climate change and these polices are to "demonstrate that developed countries are taking the lead in modifying longer term trends in anthropogenic emissions consistent with the objective of the Convention"[19]. This convention also directs the developed countries[20] to provide monetary relief by stating them to assist country Parties who are in the process of development because they "are particularly vulnerable to the adverse effects of climate change" and that implementing the environmental friendly methods would have severe effect on their economy.[21] The convention also mention monetary support by stating them to "promote, facilitate and finance," the developing parties.[22] The convention lays more burden on the developed countries[23] by quoting that shall be an 'effectively implement' and the extent of such implementation will depend on the developed countries through the guarantee of providing the developing nation with "financial resources and transfer of technology".[24] These commitments act as a protective blanket for the developing nations. It states that it shall grant consideration while the developing nations are implementing the commitments and directs parties to provide "funding, insurance and the transfer of technology" so as to meet concerns and particular needs. It states that the parties who are suffering due to "climate change and/or the impact of the implementation of response measures"[25] shall be financially compensated by the developed parties.[26]

(D) THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

The United Nations Conference on Environment and Development (UNCED), is referred to by different names. They are: Rio Summit, the Rio Conference, Rio de Janeiro and the Earth Summit. It acted as a major gathering of world leaders as of 1992. Furthermore, there were representatives of 178 nations and 117 heads of state present in Rio de Janeiro

[18] United Nation Framework Convention on Climate Change (Registration No.:30822), 21 March 1994, Chapter XXVII, Part 7, Annex I
[19] Ibid, Article 4 (2) (a)
[20] Ibid, Annex II
[21]Ibid, Article 4 (4)
[22]Ibid, Article 4 (5)
[23]Ibid, Annex I
[24] Ibid, Article 4 (7)
[25] Ibid, Article 4 (8)
[26] Ibid, Article 4 (9)

for the reconciled worldwide economic development and protection of the environment from 3 to 14 June in 1992. The Rio Declaration stipulated 27 specific, non-binding criteria for sound environmental sustainability. Agenda 21 focused on global environmental clean-up policies and promoted environmentally sound growth. Other arrangements made and signed at the Conference, many world nations have nominally agreed to encourage economic development in ways that would conserve the planet's atmosphere and non-renewable resources. The Statement of Principles on Forests, which seeks to conserve the tropical rainforests in the world, is a non-binding statement which takes steps to limit the damage done to them.[27]

(E) THE UNDERSTANDING OF THE KYOTO PROTOCOL

In the 3rd session of the Conference of Parties (COP3), the negotiations of the Kyoto Protocol[28]. The protocol has 83 signatories and 192 parties. It laid down strict rules for controlling and reducing the emotion of the Green House Gases by developed countries[29] under the agreed period from 2008-2012[30] and each of these Parties shall communicate, within six months of the entry into force of the Convention for it.[31] The Kyoto Protocol lays down that "individually or jointly" the parties[32] are to make sure that the anthropogenic compounds which are relished to the environment do not exceed the amount that is prescribed.[33] The required reduction rate is 5% of 1990 rates and should be done in 2008 to 2012.[34] The percentage amount for limiting and reducing the emission for each party was also prescribed under the protocol.[35] Thus, no new commitments are made but there is reaffirmation of existing commitments.[36] The 1997 Kyoto Protocol establishes 3 flexible mechanisms: (1) Joint Implementation (JI), (2) the Clean Development Mechanism (CDM) and (3) Emissions Trading (ET).[37]

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[27] The Editors of Encyclopaedia Britannica, United Nations Conference on Environment and Development, published on: 21 January, 2020, Encyclopaedia Britannica.inc, URL<https://www.britannica.com/event/United-Nations-Conference-on-Environment-and-Development>/accessed on: 17 February, 2020.
[28] Kyoto Protocol to the United Nations Framework Convention on Climate Change, (Registration No.30822) 16th February 2005, Chapter XXVII, Part 7.a.
[29] Supra note 23
[30] Kyoto Protocol to the United Nations Framework Convention on Climate Change, (Registration No.30822) 16th February 2005, Chapter XXVII, Part 7.a., < https://unfccc.int/resource/docs/convkp/kpeng.pdf > accessed on 28 February, 2020.
[31] Ibid, Article 4 (2) (a) (b),(5),(7)
[32] Supra note 29
[33] Ibid, Article 3 (1)
[34] Ibid
[35] Ibid, Annex B
[36] Supra note 29
[37] Ibid., Article 6, Article 12, Article 17

JOINT IMPLEMENTATION (JI)

The idea of Joint Implementation[38] is back up by the idea laid down under Article 4 (2) (b)[39] which compels the countries mentioned in Annex I to act collectively by transferring resources or acquiring them from other parties to meet their objective to reduce emissions. They resourced can be called as Emission Reduction Units (ERUs).

CLEAN DEVELOPMENT MECHANISM (CDM)

The main goal of the clean development mechanism[40] is to provide support to the parties not mentioned in Annex I to ways to achieve development without causing detrimental effects to the environment and that can be done by controlling emission releases by parties included in Annex II.[41] The Clean Development Mechanism allows a reduction in emissions through projects which are taken up in developing countries to earn certified emission reduction (CER) credits. Each of the credits is equivalent to one ton of CO2. These credits can be sold or traded and even used by the industrially centred nations.

EMISSIONS TRADING (ET)

The parties under the Kyoto Protocol have the power to acquire emission units from other parties under the Protocol and put them to use for achieving their targets laid under the convention. "An international transaction log, a software-based accounting system, ensures secure transfer of emission reduction units between countries."[42]

(H) THE UNDERSTANDING OF PARIS AGREEMENT

The Paris Agreement was adopted at the 21st session of the Conference on Climate change which was held on 12th December 2015 in Paris. 4th November 2016 was the day the convention came to force. Its preamble does not create rights and obligations between Parties. The main goal of the convention is Article 2 as above mentioned through limiting the dangerous anthropogenic interference with the climate system by bringing down the temperature "below 2 °C above pre-industrial levels" and the temperatures can only exceed 1.5 °C above pre-

[38] Ibid., Article 6
[39] Supra note 29
[40] Ibid., Article 12
[41] Ibid., Article 12 (2)
[42] Ibid.

industrial levels.[43] This convention keeps in mind the developing countries as they understand it will require them a longer period of time to implement the policies which creates a balance between the anthropogenic emissions and the carbon-sinks of greenhouse gases. The developed countries are required to take leading role in economic "wide absolute emission reduction targets"[44]. They should find methods to "enhance their mitigating efforts" and provide for "enhance support for developing party"[45] members which allow them to reach higher ambition to their action. The convention also lays down advices like "developing strategies, plans and actions for low green house gas ambitions" while keeping in mind the 'special circumstances'[46] of least developed countries. 'Mitigation co-benefits'[47] developing countries as not only the develop countries provide them with financial resources but also provides them with technologies at a far more affordable price and start ventures and projects with nations whose majority of populations is underdeveloped, unemployed or socially backward. Paris Agreement under its Article 5.1[48] can call on Parties to take action to conserve and enhance biomass, forest, oceanic and other greenhouse gas sinks and reservoirs.

CRITICAL ANALYSIS OF THE VARIOUS CONVENTIONS ON CLIMATE CHANGE

(A) VIENNA CONVENTION

The Montreal Protocol, which plays a key role in preserving the ozone layer, was a primary consequence of the Vienna Convention. The ozone layer is expected to recover as the Protocol persists phase-out of ozone-depleting compounds over most of the globe.[49] Such recovery is expected to occur before mid-century in mid-latitudes and the Arctic, and for the Antarctic ozone hole somewhat later. At present, ozone layer thickness is about 2 percent below global benchmark levels of 1980 and about 3.5 percent below global benchmark levels over northern mid-latitudes including most of Canada.[50]

[43] Paris Agreement to the United Nations Framework Convention on Climate Change, (Registration No. 54113) 4 November 2016, Chapter XXVII, Part 7.d., Article 2 (a) <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf > accessed on 28 February, 2020
[44] Ibid, Article 4 (4)
[45] Ibid, Article 4 (5)
[46] Ibid, Article 4 (6)
[47] Ibid, Article 4 (7)
[48] Ibid, Article 5 (1)
[49] < https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/ozone-layer-protection-vienna-convention.html > accessed on 27 February, 2020
[50] Ibid

(B) MONTREAL PROTOCOL

The ozone layer of the Planet would have dissolved without the Montreal Protocol by 2050 with catastrophic consequences, reports have shown. Without the Protocol, our global climate would be at least 25% hotter today.[51] The extra heat energy would have provided 'fuel' for the extreme weather events of today. The planet would have been 2.5 degrees Celsius colder and this point is disastrously extreme for most scientists.[52] The ozone layer is expected to recover by 2050 but there are big unfinished business pieces in the Protocol. The developing nations have yet to phase out ozone-damaging contaminants which are being used in many refrigeration and air-conditioning systems such as R-22 (hydrochlorofluorocarbon). Such developing nations may require financial assistance, as given under the Multilateral Fund of the Protocol.[53]

(C) UNCED

In December 1992, The Commission on Sustainable Development (CSD) was organised to guarantee UNCED follow-up, track and comment on state, national, regional and international enforcement of the agreements. It was decided that a five-year analysis of the results of the Earth Summit would be carried out in a special session of the United Nations General Assembly in 1997[54]. The World Summit on Sustainable Development (WSSD) was held in Johannesburg, South Africa from 26 August to 4 September 2002, in which the full implementation of Agenda 21 and the Commitments to the Rio Principles were firmly reaffirmed.[55]

(D) UNFCCC

The work program and its areas were adopted by the COP at its 17th session, as set out in Decision 2/CP.17 on the basis of the Climate Change Convention of the United Nations: a) sharing of information and expertise, including reporting and understanding of the positive and negative impacts of response measures; b) cooperation on response strategies; c) impact assessment and analysis; d) exchange of information and expertise; e) Economic forecasting and socio-economic trends; (f) related issues pertaining to the application of

[51] < https://www.nationalgeographic.com/news/2017/09/montreal-protocol-ozone-treaty-30-climate-change-hcfs-hfcs/ > accessed on 28 February, 2020
[52] Ibid
[53] Ibid
[54] < https://enb.iisd.org/process/climate_atm-fcccintro.html > accessed on: 11 February, 2020.
[55] Ibid

decisions 1/CP.10, 1/CP.13 and 1/CP.16 and Article 2(3) and Article 3 (14) of the Kyoto Protocol; (g) fair transformation of the population and the development of decent work and quality jobs; and (h) collective and individual preparation towards a shift to a low greenhouse emitting to the society.[56]

(E) KYOTO PROTOCOL

The Kyoto Protocol of 1997 is an arrangement within the context of the United Nations Convention on Climate Change (UNFCCC). Reducing greenhouse emissions is the only legally binding Treaty in the world. Many big emitters are not part of Kyoto and they represent about 18% of global emissions.[57] Participating countries are committed to reducing their emissions of such gases by an average of 5 percent below 1990 levels in the first period of the Protocol (2008-12). The EU and its member countries–15 at the moment the bill was implemented (the 'EU-15') –reached beyond this and pledged themselves to a cut of 8% for the union as a whole.[58] The Kyoto Protocol has also exempted the at least 100 developing countries like China and India from the binding nature of the agreement. The United States of America were initially a part of it but took back there ratification in 2001. The Kyoto Protocol cannot hold the major emitters of Greenhouse gases. Thus, only covering 18 percent of the global emissions.[59]

(F) PARIS AGREEMENT

As per The Paris Agreement, every member nation that has ratified it under the United Nations Framework Convention on Climate Change, should submit a report called as "National Communication". Countries that are listed in Annex I of the agreement (mostly industrialised countries) are obliged to submit frequent National Communications[60] and Non-Annex I countries do so less frequently.[61] Most of the smaller non-Annex I countries have not submitted National Communications in the past 5–15 year[62] and leaving their contributions to climate change mitigation unclear in spite of their ratification of the Paris Agreement.

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[56] < https://unfccc.int/topics/mitigation/workstreams/response-measures/forum-on-the-impact-of-the-implementation-of-response-measures > accessed on 10 February, 2020

[57] < https://ec.europa.eu/clima/policies/strategies/progress/kyoto_1_en > accessed on 12 February, 2020

[58] Ibid

[59] European Union Official Website, < https://ec.europa.eu/clima/policies/strategies/progress/kyoto_1_en > accessed 1 February, 2020

[60] < https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/submitted-national-communications-from-annex-i-parties > accessed 14 February, 2020

[61] Ibid

[62] Ibid

CONCLUSION AND RECOMMENDATIONS

Climate change is taking place and is mainly caused by human activity. Its impacts are starting to be felt and will escalate in the coming decades unless we act. The increasing levels of global warming courtesy of carbon dioxide and other human-based greenhouse gas emissions have culminated in climate change and environmental degradation, resulting in major disease and human health problems. Some viruses that were previously unknown in certain climatic regions are now finding their way to these areas, due to weather climate adjustments. In fact, certain viruses that were believed to be extinct reappear in places with altered climatic conditions that support their comeback. Therefore, it is necessary for commercial, governmental and international policy actors and decision-makers to come up with rigorous and workable means of reducing greenhouse gas emissions to counter the spread of global warming effects and the subsequent climate change, which has created disastrous impacts, especially among poorer nations. Furthermore, sufficient support should be given for adaptation and coping services and initiatives in affected areas to reduce effects on human health and curb disease transmission.[63] The main drawback of United Nations Framework Conference on Climate Change was that it does not give any initial point which acts as modal for 'earlier' levels. The Kyoto Protocols' main fault was that the parties were to make a reduction in greenhouse gases emission which could be demonstrated by 2005. However, the 1997 Kyoto Protocol laid down a bund of vague and range of indicative measures such as promote energy efficiency, promote renewable energy protect and enhance carbon sinks, etc. Thus, there has been a requirement in the international laws to provide for various specific ventures and methods to achieve the goal of greenhouse gases reduction and not only they should keep looking at a periodic progress of each country but also they should ensure there are penalties that each country would require to pay for the inability to achieve the set target without any valid reason or regression from their set goal. They should also provide for stricter measures for even the developing countries as China is said to have the highest Carbon emission and penalties for countries who leave the agreement.

[63] Adedeji, O. et al. (2014). "Global Climate Change. Journal of Geoscience and Environment Protection", 2 122-144, <http://dx.doi.org/10.4236/gep.2014.22016/> accessed on: 22 February, 2020

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(4)

SIGNIFICANCE OF PRECAUTIONARY PRINCIPLE TOWARDS SUSTAINABLE DEVELOPMENT IN INDIA

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INTRODUCTION

The precautionary principle is a "better safe than sorry" approach. According to this principle, one cannot quote risk of severe damage to humans and/or the environment, absence of incontrovertible, conclusive, or definite scientific proof as a reason for inaction. The principle is very much different from usual "wait and see" method where we do not react until something happens to environment. The precautionary principle is a new approach towards an environmental problem where one is expected to anticipate and avoid environmental damage when the impacts of an act are uncertain. United Nations Framework Convention on Climate Change adopted on 9 May 1992 also dealt with this concept under Article 3 making it well liked among the international community.[3] Dalai Lama, who is a spiritual leader of Tibetan people, also believed in the concept of precaution. In one of his speeches, he said that the ignorance of Tibetan people towards environmental protection is directly responsible for many of the problems that they face. Every individual has a responsibility in guiding the Tibet towards the right direction. Mere good wishes are not enough. Everyone should be more responsible. Individual human initiatives are the beginning of large movements.[4] The Theravada Scriptures of Buddhism also recognizes the concept of precautionary principle indirectly. It teaches not to commit harm. Buddha also urged his followers to refrain from 'unwholesome action'. Monks cannot injure or damage plants and seeds.[5]The precautionary principle is recognized both nationally and internationally. However, there is no uniform understanding when it comes to interpretation of the principle. There is also confusion in implementation of the principle. It is important to solve the issues of interpretation and

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[3] Rabbi Elamparo Deloso, *The Precautionary Principle: Relevance in International Law and Climate Change, LUMES (Mar. 25, 2018,10:30 AM)* http://www.lumes.lu.se/database/alumni/04.05/theses/rabbi_deloso.pdf
[4] Dalai Lama, *Universal Responsibility and the Global Environment –Address at the Rio Earth Summit*, HIS HOLINESS THE XIV DALAI LAMA (Mar. 25, 2018, 11:00 AM) https://www.dalailama.com/messages/environment/global-environment
[5] Rabbi, *Supra* note 1

implementation of this principle in order to achieve sustainable development. We all know the importance and relevance of sustainable development in today's world. With many environmental problems like climate change, global warming, ozone depletion, over population etc are rising up, it is necessary to know the principle and start applying it in all possible and feasible ways.

DEFINITIONS

The German word Vorsorgeprinzip is the basis on which the term precautionary principle was derived. It is also sometimes referred to as foresight principle as it involves anticipation.[6] Generally, when the result of a particular act is unclear, the general belief is to let the activities proceed until the uncertainty is resolved. The precautionary principle is against such belief and it demands anticipation and prevention of environmental harm. It supports checking, preventing and mitigating unsure potential harms. The Rio Declaration and Wingspread Statement are the most commonly referred instruments when it comes to the definition of precautionary principle.

Principle 15 of The Rio Declaration (or Agenda 21) of 1992, says "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[7] According to the 1998 Wingspread Statement on the Precautionary Principle when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action. In this context the proponent of an activity, rather than the public, should bear the burden of proof.[8] The Rio Declaration says 'serious or irreversible damage', whereas the Wingspread statement talks only about 'harm' in general. However, it is clear from above definitions that lack of full scientific certainty is not an acceptable reason for postponing. The adoption of the

[6] Dr. M.P.Chandrika, *Legal and Precautionary Principles on Conservation on Biodiversity with Reference to Climate Change in India – An Analysis,* INT. J. LAW LEG. JURISPRUD. STUD. 3 (2015)
[7] The Rio Declaration on Environment and Development 1992 (Mar. 25, 2018, 3:00 PM) http://www.unesco.org/education/pdf/RIO_E.PDF
[8] Wingspread Statement on the Precautionary Principle 1998 (Mar. 25, 2018 3:10 PM) https://www.iatp.org/sites/default/files/Wingspread_Statement_on_the_Precautionary_Prin.htm

precautionary principle will ultimately depend upon the economic capacity and technological development of the countries. Usually, when an action is apparent to cause harm to the environment or humans, the challengers of the action has to establish the damaging effects caused by the action. In case of precautionary principle, the burden of proof lies with proponents of the activity and not with the people who oppose it.

INTERNATIONAL INSTRUMENTS ON PRECAUTIONARY PRINCIPLE

The International Community acknowledged the precautionary principle for the first time in the Preamble of the 1985 Vienna Convention for the Protection of the Ozone Layer.[9] The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer demanded precautionary measures to control global emissions of ozone depleting substances and chlorofluorocarbons.[10] This precaution concept was also mentioned in the Second North Sea Conference Ministerial Declaration (the London Declaration) in 1987[11] and Third North Sea Conference in 1990.[12] In 1990, the Bergen Ministerial Declaration on Sustainable Development in the Economic Commission for Europe Region linked precautionary principle to sustainable development for the first time.[13]

According to Article 3(3) of the Framework Convention on Climate Change, the contracting parties should take precautionary actions to foresee, prevent or curtail the causes of climate change and lessen its bad effects. It stressed on threats of serious or irreversible damage where lack of full scientific certainty cannot be used as a reason for postponement of action. Policies and measures to deal with climate change should be cost-effective.[14]Agenda 21 emphasizes on threats of irreversible environmental damage where lack of full scientific understanding should not be an excuse for postponing actions.[15] The preambles of the Convention on Biological Diversity and the 1997 Kyoto Protocol also recognize the precautionary principle.

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[9] The Vienna Convention for the Protection of the Ozone Layer 2001 (Mar. 25, 2018 3:22 PM) https://unep.ch/Ozone/pdfs/viennaconvention2002.pdf

[10] The Montreal Protocol on Substances that Deplete the Ozone Layer 2000 (Mar. 25, 2018 3:26 PM) https://unep.ch/ozone/pdf/Montreal-Protocol2000.pdf

[11]Second North Sea Ministerial Declaration 1987 (Mar. 25, 2018 3:29 PM) https://iea.uoregon.edu/treaty-text/1987-secondnorthseadeclarationentxt

[12] Ministerial Declaration of the Third International Conference on the Protection of the North Sea 1990 (Mar. 25, 2018 3:45 PM) https://www.eea.europa.eu/policy-documents/ministerial-declaration-of-the-third

[13] P Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, p. 269 (2003)

[14] United Nations Framework Convention on Climate Change 1992 (Mar. 25, 2018 3:50 PM) https://unfccc.int/resource/docs/convkp/conveng.pdf

[15]United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992 AGENDA 21 (Mar. 25, 2018 4:20 PM) https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf

INDIAN JUDICIARY ON PRECAUTIONARY PRINCIPLE

The precautionary principle is not explicitly mentioned anywhere in environmental laws of India. Indian judiciary has added this principle to Indian laws while passing various judgments. Precautionary principle first found its place in the judgment of Indian Council for Enviro legal Action vs. Union of India.[16] In Vellore Citizens Welfare Forum case, the Supreme Court of India highlighted the importance and priority of healthy environment over industrial growth. It said that even though the leather industry generates foreign exchange and provides employment avenues it cannot destroy the ecology, degrade the environment and pose as a health hazard. The court refused to accept the old outdated concept that development and ecology are opposed to each other. It felt that sustainable development is the answer to all problems. It also stated that salient principles of 'Sustainable Development' as understood from the Brundtland Report and other international documents include the Precautionary Principle. The precautionary principle is one of the essential features of sustainable development. In the municipal level, it means that Government must take environmental measures. Government and authorities should also anticipate, prevent and attack the sources of environmental degradation. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. The burden of proof is on the actor or the developer/industrialist to show that his action is environmentally safe. The Hon'ble Court felt that there should be a balance between the economy and the environment.[17] Similar view was held in M.C Mehta v. Kamal Nath case.[18]

In AP Pollution Control Board v. Prof. M V Nayudu case, the Hon'ble Supreme Court of India observed that the precautionary principle involves the anticipation of environmental harm and taking steps to avoid it, or to select the options that are least harmful to the environment. This principle is based on scientific uncertainty. Precautionary duties are triggered by the suspicion of concrete danger as well as risk potential. Where there is a risk of serious or irreversible harm like extinction of species, widespread toxic pollution or major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person proposing the activity that is potentially unsafe to the environment.[19] In Narmada Bachao Andolan v. Union of India, the Hon'ble Court held that the 'precautionary principle' and the corresponding burden of proof on the person who wants to change the status quo will normally apply in a case

[16] Indian Council for Enviro legal Action vs. Union of India AIR 1996 SC 1446
[17] Vellore Citizens Welfare Forum v. Union of India AIR 1996 SC 2715.
[18] M.C Mehta v. Kamal Nath (1997) 1 SCC 388
[19] AP Pollution Control Board v. Prof. M V Nayudu AIR 1999 SC 812

of polluting or other project or industry where the level of damage expected to be caused is unknown. When there is vagueness due to lack of information about the level of harm or pollution likely to be caused then, in order to preserve the ecology balance, the onus of proof that the said balance will be maintained must essentially be on the industry or person who is expected to cause pollution. On the other hand where the effect on ecology of environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what measures can be taken to tackle the same. Merely because there will be a change is no grounds to believe that there will be ecological tragedy. It is when the outcome of the project is known then the principle of sustainable development would come into picture.[20] In Taj Mahal pollution case, the Hon'ble Supreme Court of India dealt with the protection of Taj Mahal from pollution. The court applied the Precautionary principle and observed that emissions from the industries are the main reason for pollution in Taj Trapezium zone. The court ordered either to relocate the polluting industries or to use natural gas as fuel instead of coal. It was observed that development of industry is important for economy but environment should also be protected.[21]

ISSUES IN INTERPRETATION

There are many definitions for the precautionary principle as discussed in the previous sections of the paper. Not all decisions are similar to one another. Even though all definitions have something in common, they are still contradictory to each other in many aspects. The precautionary principle as the name suggests is a principle encouraging precautionary measures. However, whether precaution includes or is equal to prevention is a question not yet answered. Prevention and precaution are two different words with different meanings. Wearing a mask to save ourselves from viruses would be precaution whereas vaccinating ourselves with injections to prevent a particular disease is prevention. Prevention completely negates the possibility of danger or eliminates it. On the other hand, precaution is merely a protection against the danger. Not all precautionary measures are preventive in nature. Wearing a bulletproof jacket is precaution taken against death by guns whereas not at all going to the battlefield is prevention against death. In the former, the person is protected to face the risk whereas in the latter, the possibility of risk itself is eliminated. Precaution is doing something to avoid something else. Prevention is not letting something happen. Both are interrelated. The next confusion is relating to cost. Some definitions of the principle require the nations to be

[20] Narmada Bachao Andolan v. Union of India AIR 2000 SC 3751
[21] MC Mehta v. Union of India **(1997) 2 SCC 353**

cost effective while implementation whereas some definitions do not. Apart from this, there are few other unanswered issues with respect to the word “harm”. Some definitions use “serious and irreversible harm” whereas other ones simply states, “harm”. This leads to confusion whether the principle applies to all type of harms or only to serious and irreversible harms. The flexible definition of the precautionary principle may be its strength, but also one of its greatest weaknesses. Therefore, the lack of uniformity in the interpretation of the principle has led to the environmentalist to see it as moral principle rather than a decision-making principle.

ISSUES IN IMPLEMENTATION

Precautionary principle says no new thing can happen if there is a possibility of harm to environment. This might discourage innovation or testing of newly invented technology. It is impossible to foresee all possible bad reactions that a new product/ process might cause without actually testing it on humans. The principle can be used to oppose the idea of having a nuclear plant, using mobile phones, or genetically modified food etc. In this way, the principle is pessimistic in nature. There are no fixed or uniform guidelines followed by all nations in implementing the principle. This paves way for different theories and confusion surrounding the principle. In India, there is no legislation explaining the principle or laying down guidelines or procedure relating to the same. This might give enormous power to judiciary. Different judgments might give different definitions or guidelines for the principle. The legislative framework is missing. There is no clear specific remedy apart from constitutional remedies for non-compliance of the principle. The cost of implementing the precautionary principle is very high. Checking the compliance is also difficult and sometimes impossible for the government in the absence of legislation or regulatory body.

IMPORTANCE OF PRECAUTIONARY PRINCIPLE

Tolerance may be good in general but it is dangerous when it comes to environment. We cannot ignore or adjust to changing weather patterns, rise in sea levels reduced food production, flood etc. We cannot ignore global temperature rise and melting of ice either. If this continues to happen then the earth will no longer be livable. Most of the damage caused to environment is because of humans. However, we still have time to rectify our mistakes and fix everything. Science and technology can be used to solve climate change crisis. It is necessary to reduce carbon emission. Mere reduction in emission level is not enough. We should also remove carbon dioxide by planting trees. Precautionary principle is the most relevant principle in this

world now. Even though we have enough resources in earth, we have to apply precautionary principle to save the resources for future generation. We owe a better environment to our future generation. By ignoring the precautionary principle, we are stepping a little closer to the fate that none of us want.

CONCLUSION

The precautionary principle is a part of sustainable development, which is the very important for the humanity. The sustainable development concept is now receiving appreciation and acceptance at local, national, regional, and international levels. The precautionary principle is one of the fundamental elements of sustainable development discussed and promulgated in national as well as international level. Interpretation and implementation of this principle is the current issue the world is facing. The Indian judiciary has played a major role in interpreting and assisting the governments in the process of implementation of this principle. This principle is step in changing the mindset of the society from wait and see approach to better safe than sorry approach. It is more relevant in today's world as we are facing numerous crisis like climate change, extinction of species, global warming, ozone depletion, etc which might be irreversible if not addressed. It is important to save our environment for our future generation. We cannot be selfish and reckless in our actions. We should be responsible enough to take the necessary precaution against all risks that our children or great grand children might face in their future. We see many protests against environmental harm. Even young people are actively involved and interested in environmental law. They all know the importance of having a healthy environment. No one is ready to lose the environment in the name of development. The sustainable development principles depict the change in mindset of the society. Law changes according to the change in society. It is now time to change the national laws of our country before it is too late to do so.

SUGGESTIONS

- Incorporate the Precautionary Principle explicitly into a existing legislation by way of a amendment. This should also include penalties and remedies for the violation for principle.
- Form a regulatory body to check compliance and to make risk assessment

- There should be a common definition agreed upon by all countries and should be followed in their national laws too. This common definition should repeal all previous definitions stated so far.
- Cost effective implementation is not practically possible so such requirement should not be a barrier to implement the principle. Therefore, the common definition as suggested by us should not include such a requirement. Government can consider social and economic costs and benefits while implementation. It should be a choice and not a mandatory requirement. If the implementation has negative impacts on the poor , Government should prevent such impacts and try to implement the principle in environment friendly way.
- We suggest precautionary principle should apply only to irreversible harm and not to all environmental harms.
- We suggest that regulatory body should characterize the threat and assess the uncertainties surrounding the ecological, social and economic changes. Spot the available actions to deal with impending threats, and assess the likely result of those actions and omissions.
- They should also specify the precautionary measures taken and be transparent about the uncertainty to which the precautionary measures are responding. Stringency of precautionary measures should be proportional to the threat for which it is used.
- The compliance cost should be borne by the parties who have the capacity to do it eg. Corporate. No tax should be collected from poor or middle class people for the purpose of implementation or regulation of the principle.

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Narmada Bachao Andolan v. Union of India AIR 2000 SC 3751

MC Mehta v. Union of India (1997) 2 SCC 353

(5)

SUSTAINABLE COASTS: PROS AND CONS OF CRZ NOTIFICATIONS IN INDIA

Asha J.[1]

INTRODUCTION

India has got a rich and diverse shoreline which shelters more than 7500 kms. Two third of India is encircled by sea and a big coastal zone. These coastal zones facilitated in expansion of natural coastal habitat and privileged our environment. Coastal areas of our country are ecologically sensitive so human or commercial activities in coastal area generates imbalances in environment. Emergence of housing colonies, selection of coasts for industrial activities, conversion of land for non-coastal purposes, railways, roads are destructively influencing Indian coasts. Coastal zones are always on the forefront of civilization and has been by far the most exploited geographical unit of earth. Its easy access and resourcefulness have always fascinated human activities, but its complexity in understanding has led to misuse and abuse. This required urgent attention for better management of coastal zones. A legal and human right perspective directly influences environmental impacts on life, health, private life and property of individual human being rather than on other states or environment in general. Natural resources and eco systems in the India are currently tainted because of meager supervision of environment. Dredging and dumping at sea is another important challenge faced by our coasts. Coastlines of our country faces high risks of damages from certain types of natural disasters. A major concern is death and property loss and flooding by cyclones. Along many densely populated coastlines, risks of natural disasters are being increased by population growth and unmanaged development projects including residential urban development. Therefore, a holistic approach is needed in this regard.

Issues related to coastal protection in India

1. High rate of human population
2. Development of various industries
3. Fishing
4. Mining

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5. Discharge of municipal sewage
6. Industrial waste effluents
7. Marine trade
8. Over exploitation of resources
9. Climate change and global warming

On land coastal development

HISTORY OF COASTAL MANAGEMENT IN INDIA

In India, foreshore development was primarily structured by building rules under local town and country planning laws or land revenue code. The first federal initiatives came on 27 th November 1981 by our former Prime Minister Indira Gandhi and she wrote letter to all coastal state chief ministers. She was concerned about the degradation and mis utilization of beaches in our coastal states by their developmental activities. Consequently, Government of India came up with some regulatory measures for the prevention of environmental degradation in coastal zones. For better management of coastal zones, Government of India has issued Coastal Regulation Zone Notification in India conferred by sec.3 of Environmental (protection) Act,1986[2]. The CRZ is there to provide limits and prohibitions required in coastal areas. It provides permitted activities and classifies zones into several categories for the purpose of regulation. Coastal nations have an interest in safeguarding their coastline. For the protection of coastal area, India has various notifications. But it has amended various times

CRZ is the buffer zone between marine and territorial zones which includes sensitive eco systems like shore, wet land, man groves, mud flat, sea grass, salt marshes and seaweed eco systems.[3] The CRZ Notification describes High Tide Line (HTL) and Low Tide Line (LTL). The line up to which highest water flow reaches the land during springtime is known as HTL. CRZ consists of coastal land up to 500 meters from HTL and a stage of 100 meters along the bank of creeks, estuaries, back water and rivers where tidal fluctuations occur.

CRZ Notification calls upon coastal states and union territories to prepare Coastal Zone Management Plans (CZMP). It helps to identify and classify CRZ areas within respective territory. Central Government will guide states, union territories and local authorities to work in these areas

[2] Environmental protection Act,1986, sec.3.
[3] S. Nayak, "Coastal zone management in India- present status and future needs" , (2008), http://wwwtandfontline.com accessed on oct.2019.

For eco protection and specific regulation of each zone, the law makes a classification of coastal areas in to four categories. The CRZ I include ecologically sensitive areas like national parks, sanctuaries, reserve forests, wildlife habitats, mangroves, corals, historical heritage etc. Natural gas exploration and salt extractions are permitted in this area.

The areas up to shoreline of coasts are notified under CRZ II. CRZ II is sufficiently developed urban area with facilities of drainage, approach roads, water supply, sewage etc. In this zone, buildings are not permitted. Rural and urban areas which fall outside CRZ I and CRZ II is classified as CRZ III. CRZ III is relatively undisturbed and those which do not belong to CRZ I and CRZ II. CRZ I area is classified again as CRZ I A and CRZ I B as per 2011 Notifications. CRZ IV comprises coastal stretches in Andaman and Nicobar, Lakshadweep and small islands except those designated as CRZ I, CRZ II, CRZ III. CRZ IV is notified for Andaman Nicobar and Lakshadweep islands.

CRZ Notification was first issued in 1991. After this an expert committee was appointed and it was chaired by eminent scientist M.S. Swaminathan. He examined the working of CRZ regime. The committee suggested a paradigm shift from coastal regulation to sustainable and integrated management is necessary. Later it amended so many times. The Tsunami in 2004, killed 10000 people along eastern coasts. Due to it, in 2011 again the CRZ was amended. CRZ Notification in 2011, revamped the CRZ regime with considerable changes in definition, extend and classification of zones. The reform intended conspicuous aims, livelihood security to the fisherman and other local communities, conservation and protection of coastal structure and its marine area and the development of the area through sustainable manner. The CRZ Notification in 2011 is criticized because it laid down certain exceptions to prohibition which already present in 1991 Notification. Grounding of coastal zone Management Plans (CZMP) were also introduced in 2011 Notification, but it is not implemented till now. Till 2019, the amendment is continuing but it is criticized that CRZ has been violated than protected. Now development works are allowed beyond 50 meters from High Tide Line. The Coastal Regulation Zone Notification ,2019 has relaxed restrictions imposed for the construction activities along coastal areas. The benefits of new amendment are that it will lead to enhance the activities along coastal areas and thereby promoting the economic growth. The amendment is based on report of Dr. Shailesh Naik Committee in 2014[4]. It was appointed for the purpose of examining the issues and concern of central states and UTIs and other stakeholders. The

[4] Vinay.N. Paranjappe, *Environmental Law, (*second edition 2017, Commercial Law Publishers).

Notification come at time when the State of Kerala has been alerting by continuing natural disasters in every year. It is scrutinized that Notification of 2019[5] is beneficial to the fisherman community. But there is also criticism from their side that it is more beneficial to the tourism and land mafia tycoons. But the amendment in real sense intended to create additional opportunities for the local communities and their housing purposes and for growth of tourism. It aims to meet the aspirations of coastal communities and ensure the welfare of poor and vulnerable populations in coastal regions. By CRZ 2019, CRZ clearances are streamlined and a No development zone(NDZ) of 20 meters has been stipulated for all islands. More than this all ecological sensitive areas have been accorded with special importance and pollution abatement has been accorded with special focus. But still there are various criticisms levelled against the present notification.

MAIN CRITICISMS AGAINST CRZ 2019 NOTIFICATIONS

1. It enhances coastal vulnerabilities
2. It facilitates flagship projects
3. It enhances risks to local inhabitants
4. It increases coastal erosion
5. It disregards to fragile coastal ecology
6. It ignores increased pollution in coastal areas
7. It is an unscientific and non-empirical approach
8. Local communities are again distanced from coastal management.
9. The objectives of sustainable conservation and livelihood protection is compromised.

JUDICIAL APPROACH TOWARDS COASTAL MANAGEMENT

Judiciary has intruded in Coastal Zone Management in various cases. Jagannath v. Union of India[6] is a landmark decision of Supreme Court on environmental protection of coastal zone and it acknowledged the adverse impacts of coastal pollution caused by non-traditional and unregulated industries and constructions. The issue was related to prawn farming in ecologically fragile coastal zone and for prohibiting the use of wet land for prawn farming. Court ordered for demolition of shrimp factories and directed to recover compensation from shrimp farmers for damaging the ecology and environment. Indian Council for Enviro Legal

[5] P.B. Sahasra Raman, *The Law Related to Protection of Coastal Areas*, (Tenth Edition 2019, Swamy Law House)215.
[6] AIR 1997 SC 811.

Action v. Union of India[7], court said no justification is there in reduction of CRZ Notification. In Union Territory of Lakshadweep and Others v. Seashells Beach Resort and Others, court recognized the importance of Lakshadweep Island which is known for its beauty and fragile ecological and environmental balances. Tourism resorts need to be encouraged, but not in violation of coastal Regulation Zone (CRZ). In a very recent decision, The Kerala State Coastal Management Authority v. The State of Kerala, Maradu Municipality[8], Supreme Court of India ordered for demolition of five flats in CRZ III Region Supreme court ordered that illegal structures cannot be allowed in CRZ region because in Kerala thousands of people died due to floods and devastation caused to the environment. In this decision, court opinioned that it is a colossal loss to the environment. In this decision Court quoted the earlier decision in Pidade Filomina Gonsalves v. State of Goa[9]. Based on above decisions, it affirmed constructions raised in violation of CRZ cannot be lightly condoned. So, from the above decisions we can understand that Supreme Court's involvement is strict and crucial in protection and conservation of coastal environment. More than this court want to guide government's action on environment generally and on coasts specifically. These judgments not only exhibit its deep concern about India's coastal environment but provides emphasis on the urgent need to protect it. It can also be understood that Supreme Court is scrutinizing the various amendments to the notification and it highlights the importance of coastal management and focuses the major issues in implementing physical, social and human right aspects of coastal environment.[10]

CRZ NOTIFICATIONS -ENVIRONMENTAL VIS A VIS HUMAN RIGHT ISSUES

The 1991 Notifications had many limitations. It was extremely restrictive and unsuccessful to account the concerns of coastal communities. The 1991 rules created hurdles for so many industrial and infrastructure projects such as POSCO Steel Plant in Odisha and proposed Navi Mumbai project. It did not reflect of hydrodynamic conditions, demographic patterns and geo morphological and geological features of Indian coastline highly diverse in terms of biodiversity. The deficiency of clear procedure, timeline and format for CRZ Clearance, want of post clearance monitoring mechanism and absence of transparency in procedure were its

[7] (2012) 6 SCC 136.
[8] (2019)7 SCC 284-B.
[9] (2004) 3 SCC 445.
[10] P. Leela Krishnan, *Environmental law in India,* (first published in Jan 2010, Lexis Nexis, edition 2019).

short comings. No concrete regulations were there in dealing with pollution coming from this land-based activity[11]

India's coastal environment is interrupted by on land coastal developments. Efforts should be there to regulate land use in ecologically sensitive coast lines. The issue in management of coastal area is that despite their ecological richness and contribution to the national economy, these areas are not received adequate protection and are under stress[12]. Climate change, population explosion and developmental activities created too much disturbances in coastal zones in India. The Coastal Zone Management Notifications are not successful in better management of coasts. Too much restriction caused hardships to traditional inhabitants in the coast. It is claimed that 2011 notification addressed the issues more realistically, it ensures livelihood security, conservation and protection, renders more concern to the natural hazards and attempt to promote development in a sustainable manner. The state specific provisions are there to protect fisherman community, slumdwellers and other coast settlers. To meet the increasing demands of housing for fishing communities and other traditional coastal communities Non development zones (NDZ) from HTL was reduced from 200 to 50 meters. It is criticized that Ministry of Environment, Forests and Climate change (MoEF) made so many amendments to CRZ Notifications. These amendments threaten coastal eco system and degrades environment to the point of no return. The difference between the policies in USA and India is evident in managing coastal zones. In USA, there is a federal grant to the coastal states to take up coastal area management.

In India, no tangible steps were so far made despite certain suggestions of Swaminathan Committee in 2005 and Dr, Shailesh Naik Committee in 2014. The main aspect is that economic growth is related with eco system destruction and degradation if no due care is given to the safety of environment. So, a sustainable management of Coastal area is compulsory for future generations. But it is complained that when CRZ is implemented strictly the rights of people in coastal areas are compromised. Along with that the strict adherence to CRZ notifications are negatively influencing the growth of tourism and other developmental activities.

[11] Manju Menon, Sudarshan Rodreguize and Arathy Sridhar, "Coastal zone Management – Better or Bitter Fare?(2007), EPW Vol. 42, sep.22-28.
[12] J. Jefray Immanuel, Ansul Singh, N.C. Narayan "Coastal Regulation Zone,2018 -In to sea with regulations" EPW vol.42, Sep 22-28 (2007) pp. 3838-3840.

Extreme natural hazards are now becoming more frequent and their destruction potentials are also increasing. State of Kerala and Goa are the examples of improper management of coastal eco system and biodiversity. The concept of coastal management is not limited to protecting coastal states and their zones only. It should be read as having wider dimensions of protecting the whole nation, its biodiversity and its people. The concept of coastal management is not limited to protecting coastal states and their zones only. It should be read as having wider dimensions of protecting the whole nation, its bio - diversity and its people. Instead of relaxing of CRZ notification, especially in case of tourism, it is essential to strictly implement the restrictions in its totality. The coastal management policy needs to be necessarily redesigned to check intrusion of ecological malignant projects into coasts and to give more weightage to the security of local communities on the coast[13]. The deficiency of clear procedures and enforcement mechanism and lack of transparency in procedures are the main issues identified in CRZ notifications[14]. if the regulations listed in CRZ notifications are implemented properly, the coastal zones can be safeguarded against illegal encroachments. However, India lacks a central legislation. We have only a notification without any punitive measures and it cannot be implemented strictly. Special needs of people in certain ecological sensitive areas should be identified as critical vulnerable areas and they are to be managed and solved by the involvement of local communities. A suitable mechanism is still to be evolved at this level. Coastal areas of Greater Mumbai, States like Kerala and Goa which have substantial coastal regions compared to their total area are reasonably classified as areas requiring special consideration. More than this to development along with management of coastal zones in a sustainable manner are not highlighted till this recent notification of 2019. [15]

DEVELOPMENT ACCORDING TO CRZ NORMS: LACK OF APPLICATION OF SUSTAINABLE DEVELOPMENT PRINCIPLES

The integrity of coastal zones is maintained in India through CRZ mechanisms. Undoubtedly need of development must be harmonized with the values of ecology. Sustainable management of the coastal and marine areas in India should be properly maintained for the benefit and

[13] Senthil Arumugham, "coastal zone regulations and the implementations of coastal zone management plans in India" vol. 4 United Nations, Newyork, 1999, pp109.
[14] J. Jefray Immanuel, Ansul singh, N.C. Narayan "Coastal Regulation Zone ,2018- Into sea with Regulations". vol.54, issue 10,09 March 2019.
[15] V. SunderRaj, "why we need a Coastal Protection Act?" (2019) Down to Earth, Jan 18, http://wwwdowntoearth.org.in accessed on oct .2019.

wellbeing of coastal and island communities.[16] Developmental initiatives bring prosperity to a region but bring miseries to coastal region. Economic activities and recreational facilities in and around these zones have given rise to the idea of "coastal zone sustainability"[17]. National Environmental Policy, 2006 also declared that "comprehensive approach to integrate coastal management by addressing linkage between coastal areas ,wet lands, and river system in relevant policies ,regulations and programmes is necessary," In Vamika Island case[18] there was serious question regarding coastal ecology and use of wetlands. But in India, a centrally structured financial strategy is still to be tailored into the legal system to back up a sound coastal management policy. Indian Council for Enviro Legal Action case[19] court ordered that CRZ notifications and development activities should go hand in hand. The organization should be achieved in coastal zones within the parameters of CRZ[20]. But the government should come up with a comprehensive Act for the coastal areas and facilitates the greater role of local bodies and enhanced community participation in the governance of coastal areas so as to ensure sustained utilization of coastal zones[21]. CRZ Notification 2019 will lead to enhanced activities in coastal regions thereby promoting economic growth while also respecting the conservation principles of coastal regions. Pollution abatement has been accorded special focus. But under latest notification densely populated areas have been given greater opportunity for development.[22]

CONCLUSION

The scope of this paper is to discuss the issues of coastal management in India as it become the need of the hour. It deals with current environmental encroachments in India and its negative impact on environment. We can conclude that despite their ecological richness and contribution to national economy, these resources have not received adequate protection and are under stress. It is necessary to balance the diverse needs of development with protection of vulnerable eco systems. There is alarming necessity in managing coastal areas, its environment and human rights of local people in coastal regions. Equal emphasis should be there on conservation of

[16] Bibliana Cian, "Sustainable Development and Integrated Coastal Management", Ocean and coastal management vol.21, issue 1-3,(1993), http://doi.org/10.1016/0964-5691(93)90019-u. accessed on 6 Jan. 2020.
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[18] (2013),8 SCC 388.
[19] Ibid.
[20] Preetha Dhar," Contested contests", vol.53 issue 33 Aug.(2018).
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coastal areas and human rights of people residing in coastal regions. India's coastal environments are threatened by lack of integrated development and planning. This paper aims at expanding a multi sectoral and integrated approach to paradigm shift from traditional coastal management to a proper institutional, legal, economic and planning framework. As in USA, the scheme of coastal zone management in India should reflect a cooperative venture among the Union and Coastal states. Protection of coasts should be a national commitment rather than the responsibility of coastal states. More than this a centrally structured financial strategy is still to be tailored into the legal system to back up a sound coastal management policy.[23]

India is facing a puzzling paradox from general public as well as entrepreneurs about the actual working of CRZ Notification of 2019.Environmental sustainability for coasts became necessary to create a global forum for formulation of sustainable development targets supported by coastal policies. Coastal Zones are attractive environments to settle and live or pursue economic activities, but this has led to a growing human footprint on coastal eco systems. The development of and commitment to a focused sustainable development goal for ocean and coasts can trigger greater international cooperation towards achieving good environment status of coasts.[24] Instead of watering down of CRZ notification, especially in case of tourism, it is essential to strictly implement the restriction in its totality. We need to ensure robust health of coastal eco systems through sustainable management, so that they continue to provide various goods and services for future generations. The measures to preserve coastal areas and natural resources to protect our Mother Earth in a sustainable manner need to be highlighted and along with that right to life of coastal people also should be recognized. Equal access to basic resources is an ingredient of right to development. So, the right of common people should be enlightened and participation of coastal people in the process and strategy of proper management of coast is necessary in realizing the desired goals in coastal management. So, we must protect our blue and green wealth and equitable access to coastal resources and have to support the development of resilient coastal communities.

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LEGISLATIVE OUTLOOK ON SUSTAINABLE DEVELOPMENT IN INDIA

Francy Victor [25]

Srinidhi Raja [26]

INTRODUCTION

Sustainable development fulfills the necessities of the present without endangering the resources for the people in the future and simultaneously ensuring the harmony between caring for nature and social prosperity. With the current scenario of excessive exploitation of available resources, sustainable development becomes vital as without the necessary goals, the resources would be reduced to zilch. With globalization opening the entryways of economic advancement for such a large number of nations, there is a genuine concern in regards to how far we are having the option to spare nature and not hamper its constituents. In this respect, India's support is a crucial factor in achieving sustainable development goals throughout the world as this nation represents approximately one seventh of the world's population. Thereby an initiation or implementation of sustainable goals would result in a mass undertaking that would achieve a promising outcome on the environment. In basic terms it centers around various methods for getting things done without having to affect the quality of our lives. It ranges from the simple task of switching to environmentally friendly substitutes to using renewable energy on a global or a national scale down to a family or an individual. The term involves three aspects namely the sociological, economic and environmental view and this paper primarily targets the environmental aspect of sustainability.

JUDICIAL REVIEW

The idea of economical utilization of earth's assets is an old one. Without the principles of viability as a way of life, individuals would not have made its due in the twentieth century. The rule of practical advancement got driving force with the appropriation of Stockholm Declaration in 1972, World Conservation Strategy arranged in 1980 by the World Conservation

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Union with the exhortation and help of the United Nations Environment Program , World Charter for Nature of 1982, Report of the World Commission on Environment and Development under the chairmanship of Geo Harlem Brundtland Report, Our Common Future of 1987, the archive Caring for the Earth; A Strategy for the Sustainable Living created constantly world protection venture included the delegates of the IUCN, UNEP and the Worldwide Fund for the Nature. The idea of manageable advancement is the establishment stone of the Montreal Protocol for the Protection of Ozone Layer of 1987 and the instruments received at the UN Conference on Environment and Development World Summit held at Rio in 1992.

India being a developing economy has seen widespread industrialization and improvement in the late past, which brought about unfavorable effect on nature. The Supreme Court of India in an offer to secure nature, assumed a huge job in molding and embracing the teaching of Sustainable Development. This campaign for shielding the earth was driven by Justice Kuldip Singh, who broadly came to be known as the 'Green Judge'. The regulation of Sustainable Development was executed by the Supreme Court on account of **Vellore Citizen Welfare Forum vs The union of India**. The Petitioners in that had documented an appeal in broad daylight enthusiasm under Article 32 of the Constitution of India against the contamination brought about by release of untreated emanating by the tanneries and different ventures in the waterway Palar in the State of Tamil Nadu. In the moment case, the Supreme Court held that the preparatory rule and polluter pays guideline are a piece of the natural law of India. The court likewise held that: "Remediation of the harmed condition is a piece of the procedure of 'Practical Development' and all things considered polluter is obligated to pay the expense to the individual sufferers just as the expense of switching the harmed nature."

From that point in various decisions, the Supreme Court clarified and executed the convention of Sustainable Development. The Hon'ble Supreme Court of India in **Narmada Bachao Andolan vs Union of India** saw that "Practical Development implies what type or degree of improvement can happen, which can be supported ordinarily or nature with or without moderation". In **T.N. Godavaraman Thirumulpad vs the Union of India**, the Hon'ble Supreme Court said "as an issue of introduction, we may express that adherence to the standard of Sustainable Development is presently a sacred necessity. What amount of harm to the earth and nature must be chosen the realities of each case" In Indian Council of **Environ-Legal Action vs the Union of India**, the supreme Court held: "while monetary advancement ought not be permitted to happen at the expense of biology or by causing boundless condition

demolition and infringement; simultaneously, the need to safeguard nature and condition ought not hamper financial and different improvements". Subsequently, significance has been offered both to improvement and condition and the mission is to keep up a fine harmony among condition and monetary advancement. The Supreme Court of India accentuated on the need to set up particular condition courts for the powerful and speedy removal of cases including natural issues, since the privilege to sound condition has been interpreted as a piece of right to life under Article 21 of the Constitution

INTERNATIONAL PROVISIONS ON SUSTAINABILITY-AGENDA 2030

“Transforming our World: the 2030 Agenda for Sustainable Development" the agenda enlists 17 sustainable development goals and 169 targets that was adopted by the countries on 25 September 2015 at a special un summit. The primary goal of the agenda is to eradicate poverty and achieve sustainable development worldwide at the same time, guaranteeing that no individual or country is left behind. Though the 17 SDGs are interrelated in nature this paper mainly targets about a dominant five which are affordable and clean energy, sustainable cities and communities, responsible consumption and production, climate action and clean water and sanitation.

This one of a kind agenda is global and universally applicable therefore this agenda towards a sustainable future can be interpreted differently to various countries taking into account their challenges and their level of development. The countries involved have a responsibility towards achieving these goals locally, nationally and internationally.

The Government of India is part of the UN member states and as India has no exclusive provision created for sustainable development, India is strongly committed to the 2030 Agenda, including the goals, as confirmed by the statements of the Prime Minister of India and other Ministers at national and international meetings. These goals in other words eliminate the absence of having particular set of laws that have been constructed in India to target development in the sustainable field.

NATIONAL PROVISIONS ON SUSTAINABILITY

Despite India not having any exclusive provision in terms of sustainable development, there have been several provisions, schemes and initiatives that are interrelated in conserving the environment. The provisions mentioned below are a selected few that are corelated with safeguarding the environment.

Environment protection act 1986

The Bhopal calamity, was a gas release occurrence in India, considered one of the world's most noticeably awful mechanical fiascos. It happened on the night somewhere in the range of second and third December, 1984 at the Union Carbide India Limited UCIL pesticide plant in Bhopal, Madhya Pradesh. More than 500,000 individuals were presented to methyl isocyanate gas and different synthetic compounds. The poisonous substance advanced in and around the shanty-towns situated close to the plant. The authority prompt loss of life was 2,259. The administration of Madhya Pradesh affirmed an aggregate of 3,787 passing's identified with the gas discharge. As indicated by different assessments, around 8,000 passed on inside about fourteen days and another at least 8,000 have since kicked the bucket from gas-related illnesses. A government sworn statement in 2006 expressed the break caused 558,125 wounds counting 38,478 incomplete debilitating wounds and around 3,900 serious and perpetual impairing wounds. This tragedy required the Government of India to institute a far-reaching natural enactment, including rules identifying with putting away, dealing with and utilization of unsafe waste. Based on these principles, the Indian Parliament instituted the Environment Protection Act, 1986. They identify with the insurance and improvement of the human condition and to avoid dangers to individuals, other living animals, plants and property. The Act is one of the most far reaching enactments with affection to security and improvement of condition. This is an umbrella enactment that united the arrangements of the Water (Prevention furthermore, Control of Pollution Act of 1974 and the Air Prevention and Control of Contamination) Act of 1981.

Plastic Waste Management Rules 2016

The plastic convey packs are the greatest patrons of littered waste and consistently, a huge number of plastic sacks end up in to the earth opposite soil, water bodies, water courses, and so on and it takes a normal of one thousand years to break down totally. The Plastic Waste Management Rules, 2016 intend to: Increase least thickness of plastic convey sacks from 40 to 50 microns and stipulate least thickness of 50 micron for plastic sheets additionally to encourage assortment and reuse of plastic waste. Few aims include an eco-accommodating item, which is a finished substitute of the plastic, expanding the jurisdiction of applicability from the municipal area to rural areas, as plastic has reached rural areas also, for the advance utilization of plastic waste for street development according to Indian Road Congress rules or vitality recuperation, or waste to oil and so forth for beneficial use of waste and furthermore address the waste removal issue.

Plastic Waste Management (Amendment) Rules 2018

The Ministry of Environment, Forest and Climate Change has informed the Plastic Waste Management (Amendment) Rules 2018 on March 27, 2018. The revised Rules likewise recommend a focal enrollment framework for the enlistment of the maker/shipper/brand proprietor. The Rules likewise set out that any system for the enlistment ought to be mechanized and should consider working together for makers, recyclers and makers. The enlistment framework will be advanced by Central Pollution Control Board (CPCB) for the enrollment of the maker/merchant/brand proprietor.

National green tribunal act 2010

National Green Tribunal Act, 2010 is an Act of the Parliament of India which enables creation of a special tribunal to handle the quick disposal of the cases related to environmental issues. In 2010, the legislature sanctioned the National Green Tribunal (NGT) Act which empowered the making of an uncommon green council that would deal with the cases concerning natural issues. The motivation for this originated from Article 21 of the Constitution of India which ensures the residents of India a privilege to a perfect and sound condition. The objectives of the National Green Tribunal include the rapid and viable removal of the considerable number of cases identified with ecological assurance and other characteristic assets.

Swachh Bharat Abhiyan

This mission was implemented on 2nd Oct 2014, to honor Mahatma Gandhi's vision of having a cleaner country which is an initiative for both rural and urban India. The objectives of Swachh Bharat was to initiate awareness of a clean surrounding and how important was to have a sustainable living. The highlight of the mission is to provide toilets, waste disposal systems, clean village and adequate drinking water made available to every individual. The above-mentioned objectives and goals of the mission can only be accomplished with the combined effort of every citizen. The Swachh Bharat Abhiyan mission being a recent initiative that has been regularly followed since the implementation has had the greatest impact in bringing the communities of India closer with the purpose of a cleaner environment.

ROLE OF MEDIA

Media being the watchdog of the economy plays a crucial role in spreading awareness on the impending dangers of the economy one being endangering lives due to the absence of sustainable practices. From time to time one can confirm that only through media, be it through televised content, social media, newspapers or even posters and pamphlets one can be aware of the ongoing situations in the economy. Judicial decisions that layman is aware of owe their knowledge to media for which can be taken in both positive and negative sense. The failure of media to educate the public completely on an issue due to political involvement will lead to public unrest which has been proved in the past. In perspective of sustainable living, the implicit laws and schemes that have been implemented for the environment

SUGGESTIONS

- Environmental related laws and schemes should be made more specific and the implementation and punishment should be made more stringent.
- Encourage use of non-conventional sources of energy, especially solar power.
- Formulate more policies in order to use more renewable resources than nonrenewable resources
- As much as possible, creation of condition for disposable products should be promoted and maximum utilization of organic composts and biotechnology should be supported.
- Ensuring environmental related education such as ways to preserve the resources, better utilization of environment, laws that govern and schemes that government implement should be taught in schools and college.
- Promote green construction, biodegradable blocks rather than concrete

- Previously development was mainly focused on economic growth which was centered exclusively around financial development. Presently there is developing acknowledgment that nature fills in as the establishment for improvement over the long haul since normal frameworks bolster our nourishment creation, clean our water, manage our atmosphere, and protect the Earth's biodiversity. The Sustainable Development Gs work superbly of incorporating the financial, social and natural elements of advancement. Thus there should be an advance connection between environment and sustainable development,
- Promote technological advancements and explicit innovation
- The government should give more importance to forest conservation acts and create more awareness
- All schemes that have been implemented should be followed through in such a manner that it is not a mere memory in the future.

CONCLUSION

The pursuit of environmental sustainability is the process of ensuring that the current relationship with the environment is unpolluted and pristine in nature which refers to the activities of humans in a manner where resources can be replenished regularly and naturally. Invariably with this current lifestyle of not paying heed to the surroundings concern, it will ultimately lead to environment degradation which in other words is the inability to support any form of life. The term “sustainable development” has been used often more recently due to the need of the hour that has been realized by the layman due to his own understanding of the consequences of reckless living. The primary goal of the paper was to understand the ways of living of the participants, to create awareness and lastly to suggest ways where India could take a step forward in terms of sustainability. To quote Paul McCartney, “There must be a better way to make the things we want, a way that doesn’t spoil the sky, or the rain or the land”.

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SAFEGUARDING OUR COMMON FUTURE: RETHINKING SUSTAINABLE DEVELOPMENT

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Yashwanth A S[2]

INTRODUCTION

Sustainable Development is the organizing principle for meeting human development goals while simultaneously sustaining the ability of natural systems to provide the natural resources and ecosystem services based upon which the economy and society depend. The desired result is a state of society where living conditions and resources are used to continue to meet human needs without undermining the integrity and stability of the natural system. Sustainable development can be defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

While the modern concept of sustainable development is derived mostly from the 1987 Brundtland Report, it is also rooted in earlier ideas about sustainable forest management and twentieth-century environmental concerns. As the concept developed, it has shifted towards focus more on economic development, social development and environmental protection for future generations. It has been suggested that "the term 'sustainability' should be viewed as humanity's target goal of human-ecosystem equilibrium, while 'sustainable development' refers to the holistic approach and temporal processes that lead us to the end point of sustainability.

Modern economies are endeavouring to reconcile ambitious economic development and obligations of preserving natural resources and ecosystems, as the two are usually seen as of conflicting nature. Instead of holding climate change commitments and other sustainability measures as a remedy to economic development, turning and leveraging them into market opportunities will do greater good. The economic development brought by such organized principles and practices in an economy is called Managed Sustainable Development (MSD)

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The United Nations Conference on Sustainable Development (UNCSD), which will gather UN member states and other stakeholders in Brazil in 2012, is a key occasion to take stock of 20 years of action at all levels to promote sustainable development, and to provide a clear vision and way forward for the international community, national governments, partnerships and other stakeholders in implementing the sustainable development agenda in an integrated manner.

The SD21 project is built around a series of studies that will inform a synthesis report, "Sustainable development in the 21st century" (SD21). The SD21 body of studies is expected to become an important analytical and political contribution in its own right. Studies under the SD21 project will cover the following topics: assessment of progress since the Earth Summit; emerging issues ; long-term sustainable development scenarios; tools for managing sustainable economies; national and international institutions for sustainable development; and sector assessments.

The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030. The 17 SDGs are integrated—that is, they recognize that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability. Everyone is needed to reach these ambitious targets. The creativity, knowhow, technology and financial resources from all of society is necessary to achieve the SDGs in every context.

REASONS FOR LACK OF FUNDER INTEREST IN THE NORTHEAST

- **Most Funders are Unfamiliar with the Region and Territory:**

  Twenty years ago, when there was any development report in India and there was data being collected and analysed, there would be data on all the states and then there would be a category called ‘other states’ – which basically comprised Jammu and Kashmir, Sikkim and the seven North-eastern states.

  Everyone knows (or ought to know) that Manipur is not the same as Assam, which is not the same as Arunachal Pradesh, and it’s definitely not the same as J&K. But they were still all lumped together as other states. While today there is state-and district-wise data

available, there is still little interest in understanding the region and the issues there. Funders and practitioners find it easier to stay away.

- **There is Limited Knowledge Regarding the Issues Facing the States in the Northeast:**

  Take the criteria of economic development or per capita income of the population. Contrary to popular opinion, it's not the districts in the north-central states of India like Jharkhand, Bihar, Chhattisgarh, that are the lowest performing in terms of economic development and per capita income, but those in the Northeast.

  If you see the different Human Development Reports published by the UN agencies and Government of India, in a survey where they mapped all the districts in India on multiple parameters, the north-eastern states fared well on health and education but did poorly on economic development.

  However since the index was a composite comprising multiple indicators–health, education, employability, per capita income, and so on–in the 25 lowest performing districts, there are only one or two from the Northeast. Most of the 'poor performing' districts were from Bihar, Jharkhand, Odisha and Chhattisgarh. As a result, the development rupees and investment went to these regions.

  Therefore an index like this was unable to tell the whole story of just how much the northeastern states lagged on the economic development front; this meant that little or no attention was paid to these districts.

ON DIFFERENT ISSUES

On the Technical Level, for example, it will involve the sustainable technologies based upon the use of non-renewable, fossil fuels for technologies that take advantage of renewable energies like the sun, wind and biomass, the adoption of conservation and recycling practices on a wider scale, and the transfer of f cleaner and more energy efficient technologies to countries in the developing world.

On the Political and Economic Levels, it will involve, among other things, the overhauling of development and trade practices which tend to destroy the environment, and the improvement of indigenous peoples, a fairer distribution of wealth and resources within and between nations, the charging of true cost for products which exploit or pollute the environment, and the encouragement of sustainable practices through fiscal and legal controls and incentives.

On the Social Plane, it will involve a renewed thrust towards universal primary education and health care, with particular emphasis on the education and social liberation of women. On the environmental level, we are talking about massive afforestation projects, renewed research into and assistance for organic farming practices and biopsy control, and the vigorous protection of biodiversity. On the informational level, the need is for data that will allow the development of accurate social and environmental accountancy systems.

INDIA CAN FOCUS ATTENTION ON THE FOLLOWING MEASURES

1. Ensure clean and hygienic living and working conditions for the people;
2. Sponsor research on environmental issues pertaining to the region;
3. Ensure safety against known and proven industrial hazards;
4. Find economical methods for salvaging hazardous industrial wastes;
5. Encourage afforestation;
6. Find out substitutes for proven hazardous materials based on local resources and needs instead of blindly depending on advanced nations to find solutions;
7. Ensuring environmental education as a part of school and college curriculum;
8. Encourage use of non-conventional sources of energy, especially solar energy;
9. As far as possible, production of environment-friendly products should be encouraged;
10. Use of organic fertilisers and other bio techniques should be popularised;
11. Environmental management is the key for sustainable development, and it should include monitoring and accountability; and
12. Need for socialisation and also humanisation of all environmental issues.

Generally speaking, no one from the rest of India will want to move there. Therefore, it is important to develop local talent and put time, energy and resources on human resources there. We knew that nobody from Maharashtra or Gujarat would be interested in coming to the Northeast to work on a long-term basis.In many places each village is populated with only one tribe and each one is very different from the other in customs, language, practices. It is therefore important to have diversity in the team that supports the northeastern work.

THE OBJECTIVES ARE

(i) To provide an incentive for manufactures and to reduce adverse environmental impact of their products,

(ii) To reward genuine initiatives by companies to reduce adverse environmental impact of their products,

(iii) To assist consumers to become responsible in their daily lives by providing them information to take account of environmental factors in their purchase decisions,

(iv) To encourage citizens to purchase products which have less harmful environmental impact, and

(v) To improve the quality of the environment and to encourage the sustainable management of resources.

Not only in consumer goods production but in the field of energy production also, environment-friendly techniques of power generation can be used. For example, in power production from coal, PFBC (Pressurised Fluidised Bed Combined Cycle) technique is useful in which coal is burnt efficiently and cleanly in combined cycle plants.

To cope with increased demand of the basic requirement of life and the limited supply of the natural resources, along with consideration of environmental degradation and ecological balance, we need to emphasise on optimal management of land, water, minerals and other natural resources. There is also need to utilize the native wisdom of those people, who live close to nature and earth, for eco-restoration along with development.

There are three pillars of sustainable development namely community development (which includes providing basic needs like food, shelter, clothes, health, education etc.), economic development (which include industrialization creating job opportunity) and environmental protection (which includes providing clean air, safe water, quality environment).

Since development activities are always associated with environmental degradation, sustainability in development has to enter in all our planning processes as an important parameter.

The sudden interest in sustainable development is, of course, a response to warnings that the world is facing an environmental and, therefore, social catastrophe in the near future unless mankind radically modifies certain practices and perspectives which have created the present crisis.

THE SUSTAINABILITY IN ENVIRONMENTAL RESTORATION PROGRAMME CONSIDERS THE FOLLOWING KEY ISSUES

(i) Stabilisation of population growth

(ii) Conservation and rational exploitation of forest resources.

(iii) Afforestation in waste lands and deforested areas.

(iv) Control of pollution (Air, water, land etc.)

(v) Maintenance of sustainability in agriculture

(vi) Recycling of waste and residue

(vii) Conservation of biodiversity

(viii) Development of non-polluting renewable energy stems.

(ix) Updating environmental laws and its strict imposition.

(x) Assessment of ecological security.

FOR THE SUSTAINABLE DEVELOPMENT, THE FOLLOWING POINTS SHOULD BE CONSIDERED

(i) The input of matter and energy should be reduced up to their limiting values.

(ii) The exhaustible and polluting fossil fuels should be replaced by less harmful renewable energy.

(iii) Technology should be developed which provides essential goods with minimum waste in a non-polluted manner.

(iv) The population growth should be slow down which will reduce stress on global life support. There should be strict implementation of environmental laws.

(vi) Steps should be taken for the conservation of forest, conservation of biodiversity, recycling of wastes, control of pollution etc.

(vii) There should be integrated land use planning.

(viii) Environmental education should be made compulsory to create awareness about the basic environmental issues.

CONCLUSION

In order to apply the principle of sustainable management in reality, a highly complex way of looking at the problem is required, involving various disciplines. Sustainability is first and foremost a mental question. Without a grasp of the need or the will to change awareness, we will not succeed in realising the principle of sustainability in agriculture.

It is upon the decision-makers in politics to create the right framework and the pre-conditions for a sustainable development in agriculture. Global involvement, on the other hand, must not be left out of account. Sustainability reflects our understanding of necessity and responsibility on the question for whom, for what and how production can be guided into the future in a way that is efficient, environmentally sound and sparing on resources.

Global change is an ecological phenomenon, whereas globalisation is concerned with economic change. A recent analysis of sustainable agriculture in the context of trade liberalisation and globalisation raises equally significant concern for a more informed decision-making process at local, regional and international levels.

Despite its simplicity, the phrase ‘sustainable development’ is capable of carrying a wide range of meanings, sometimes allowing quite different ideas about what should be done to exist side by side without the conflict between them being clear. Both radical environmentalists and conventional development policy pragmatists have seized the phrase and used it to express and explain their ideas about development and environment.

The environmental degradation and associated problems, like desertification, soil erosion, tropical forest depletion, etc., in the Third World, are the consequences of present development policies. Therefore, there is need for positive mutual adjustment between development and natural environment. The pursuit of sustainability demands choices about the distribution of costs and benefits in space and time.

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CHAPTER 7

CONSTITUTION AND THE COMMON MAN

(1)

GENDER PARITY IN THE SUPREME COURT OF INDIA: A ROAD TO TRANSFORMATIVE CONSTITUTION?

Ms. Sharmila H S[1]

INTRODUCTION

The judiciary specially the apex court in India is always looked up to, in terms of acting as a key agent for social transformation. It is a very well-known fact that the Supreme Court of India has demonstrated democratic governance, believed in transformative constitution and upheld the rule of law, over time. It is also a model court in the world that has contributed to the jurisprudence in terms of adjudicating vibrant cases[2] public interest litigations and constantly striving towards the substantial growth of weaker section and vulnerable segment of the Indian society expanding the scope of Art.14, 21 and Part IV of Constitution of India. The Supreme Court has endeavoured to lessen the visible disparity between men and women in socio-economic and family matters harmonising the various facets of gender justice. In contrast, the gender parity and adequate representation of women judges to the Supreme Court of India has still taken a back seat. Time and again, it was discussed about under representation of women judges in the higher judiciary. It was argued by various scholars that a greater number of women judges are necessary not only, to espouse their experiences, worldviews to the bench but for advancing access to justice for women. In this backdrop, the researcher makes an attempt to analyse the reasons as to why there should be a greater number of women judges specially in the Supreme Court? do they make difference in the bench? Does it symbolise progressives or travels towards the road to transformative constitution? The author tries to answer these by dividing the paper into 2 segments.

In the **phase I** it is argued that Supreme Court has ensured gender justice and it is reflective through its own decisions. The Supreme Court is considered as the most powerful socio-economic institution which shares connection with people of India. It is world famous for its vibrant experiment such as public interest litigation, enhancing the independence of judiciary by protecting and sustaining democratic governance.[3] The Supreme Court has been called as the most powerful court in the world. This is because of its wide jurisdiction and also for

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[2] Shah Bano Begum Case, Nargesh Meerza Triple Talaq case, Sabarimala Temple entry case, decriminalisation of adultery, constitutionality of S.377 of Indian Penal Code and many other cases which are dealt in subsequent paragraphs.

[3] Burt Neuborne " The Supreme Court of India" accessed through HEINONLINE

enforcing the world's lengthiest constitution.[4] The Supreme Court of India being the highest court of the nation has made several attempts to uphold the gender equality which is manifested though certain progressive judgements. The gender justice is reflective on the judgements of the Supreme Court; the judgements chosen are not intuitive but purposive. In the recent past i.e., last 3 decades judgements are discussed as under. They are chosen on the basis of head notes of the cases either under Art.14 or under Art. 21 or specifically relating to men or women or even third gender.

Indian Young Lawyers Association & others v. State of Kerala[5]

The Supreme Court lifted the ban on upon the certain age[6] of women devotees and allowed women of all age group to enter the Sabarimala temple. Thereby it establishes the constitutional values equality, gender justice.

Rama Pandey v. Union of India and Others[7]

The Delhi High Court held that women cannot be discriminated with respect to her maternity rights on the ground that she has obtained the baby through Surrogacy. This decision was referred again in Hema Vijaya Menon v. State of Maharashtra[8] on the ground that motherhood just doesn't end with delivery of a baby; child rearing is also important and denial of the same right amounts violation of her fundamental right.

Shayara Banu v. Union of India[9]

Yet another decision of the Supreme Court relating to one of the forms of divorces namely Talaq-e-biddat or Triple talaq declaring it to be unconstitutional by invoking the provisions of Art. 14 and Art. 25 of Constitution of India, also brought justice for many unheard voices of India.

Mohadmmed Ahmed Khan v Shah Bano Begum[10]

Granting maintenance after unilateral triple talaq invoking the provisions of Sec.125 of Code of Criminal Procedure,1973

[4] Aparna Chandra & others "The Supreme Court of India: An empirical overview of the Institution" accessed through http://ssrn.com/abstract=3154597
[5] W.P.Np.(Civil) No.373/2006 decided by the Supreme Court on 28th September 2018 decided by the 5 judges.
[6] Associated with menstruation age
[7] W.P.884/2014 decided by the Delhi High Court on 17th July 2015
[8] 2015 SCC online Bombay 6127
[9] (2017)9 SCC 1
[10] AIR 1985 SC 945

Air India v Nargeesh Mirza[11]

Age of retirement of the air hostesses[12] as 30 years or when she gets married whichever is earlier was held discriminatory by the Supreme Court.

Navtej Singh Johar v. Union of India and Akkai Padmashali v Union of India[13]

Recognition of constitutional rights, freedom and protection extended to LGBT community. The concept of transformative constitutionalism refers to the ability of the document to adapt and transform to the changing needs of the society by giving pragmatic interpretation to the provisions of the Indian constitution[14].

These are the only few landmark instances of the judgement of the Supreme Court wherein it has shown a serious concern in effectuating a transformation in the medieval hierarchical into more progressive, egalitarian, modern and fairer society. There are many more cases adjudicated by the Supreme Court of India ensuring gender justice. Mr. Goutham Bhatia[15] DPHIL candidate Oxford University London argues that vision of the Indian Constitution being a transformative document. It operates within the confines of textual and structural constraints in complete restructuring the society focal point being the relationship existed between State and individuals and between individuals[16]. It is an attempt to adopt the constitution itself.

In the **II phase** the author argues that there is exclusion of women judges in the higher judiciary. The procedure for appointment of judges to the Supreme Court of India under Art.124 is by the President in consultation with Chief Justice of India and other Supreme Court judges. In the process how far the women candidates (prosperous judges) were prioritised in appointment? This is because, the concept of law or legal institution is considered as a man's world[17] and a woman attempting to enter his world would be regarded as sanctum sanctorum of men[18]. It is believed that the god designated the sexes to occupy different spheres of action and that it belonged to men to make, apply, and execute the laws which was the axiomatic

[11] AIR (1981)4 SCC 335
[12] In case of General Managers age of retirement id determined as 40 years
[13] AIR 2018 SC 4322
[14] Para 110 of the judgment passed in LBGT case
[15] Author of the book "The Transformative Constitution- a radical biography of nine acts" Harpercollins India 2019
[16]https://www.law.ox.ac.uk/current-students/graduate-discussion-groups/south-asian-law-discussion-group/blog/2019/01/gautam-0 accessed on 27.2.2020 at 11.30 P.M
[17] In Man's World- Essays on Women in Male -Dominated Professions, A. Spencers & D. Podmore(Eds)
[18] Bradwell v. State of Illinois,83 US 132, 1873

truth.[19] The profession has masculine values such as reasonableness, objectivity, rights, adversarial tactics, victory, predictability, aggressiveness, objectivity, deductive reasoning, universalism[20] and abstract rights override the female values such as mediation, caring, empathy, less concerned to abstract rights, non-adversarial way of settling the disputes, preservation of relationship.[21]In India among the 238 judges appointed to the Supreme Court till date since 1950[22], when It was established, only eight[23] have been women. Though the High Courts had a woman judge as early as 1959; it took the court 39 years to get its first woman judge, Fathima Beevi, who was appointed in 1989.

According to the European Institute for Gender Equality (EIGE)[24] gender parity refers to relative equality in terms of numbers and proportions of women and men, girls and boys, or also called sex ratio of male and female value. It can also be referred to the equal contribution of women and men to every dimension of life, including private or public. The empirical research shows the gender parity in judiciary at the law school level[25] is proportionate, reaching to subordinate judiciary is considerable[26]. Women judges in lower judiciary have less salary, less judicial power and less social power as compared to the High Courts and the Supreme Courts.

There are dichotomous view regarding whether women judges make a difference in the bench? One view is that judges go by law, evidence and arguments and there are no influencing factors. Justice Jeanne Coyne[27] argue every wise old man and wise woman reach at same decision. The judicial neutrality and impartiality are the essential decision-making qualities which helps the public to repose, retain confidence in judiciary.

On the contrary, Feminists argue that women judges bring in their experiences, worldviews, different perspective than men to the bench. Further it is advocated[28] bench with more women

[19] A case from USA filed by Myra Bradwell against the State questioning the discrimination to obtain the license to practise before the court. Sandra Day O'Connor was the first female judge of the Supreme Court of USA,1981-2006

[20] Dr. Sharyn Roach Anleu: Women in the legal profession

[21] Carol Gilligan In a Different Voice 1982, Anleu, Sharyn R. "Women in law: Theory, research and practice.

[22] https://www.sci.gov.in/chief-justice-judges,(as on 27.6.2019) 238 judges include 44 former Chief Justices of India till date, 163 former Supreme Court Judges, 1 Chief Justice of India(present) along with 30 other sitting Supreme Court Judges.

[23] 1,Justice Fatima Beevi , 2. Justice Sujatha V Manohar, 3.Justice Banumati, 4. Justice Ranjana Prakash Desai, 5. Justice Ruma Pal 6.Justice Gyan Sudha Mishra, 7. Justice Indu Malhotra 8. Justice Indira Banerjee

[24] https://eige.europa.eu/thesaurus/terms/1195 , Accessed on 27.2.2020 at 11.45 PM

[25] Feenan Dermot "Women Judges: Gendering Judging, Justifying Diversity, 2008

[26] Electronic copy available at: http://ssrn.com/abstract=1866024

[27] Judge of Minnesota Supreme Court

[28] Kenny Sally J "Gender & Justice- Why women in the Judiciary really matter?"

judges reflect the total fabric of society in bringing the people together. They help to settle the disputes amicably and with more through non-adversarial way because they have vibrant experiences of life which they bring it to the bench. Starting from Carol Gilligan[29] s empirical research which argues that women bring an ethic of care to issues of justice in contrast to the rights-based relief on men. The increased number of women judges is necessary as they espouse their experiences, worldviews to the bench thereby ensuring advancement of access to justice for women. Gender parity is also conceptual requirement of a democratic state. One side we are ensuring gender justice connecting it to rule of law and transformative constitution. But it is a paradox that the highest court of India lacks to maintain gender parity.

CONCLUSION

Though there are enough judgements relating to women and law, empowerment of women, equal opportunity for them wherein, the Supreme Court considered gender parity and justice as a mandatory requirement of progressive, transformative constitution in the Indian Society. yet the implementation of the same in the Supreme Court of India is still taken a back seat. When National Judicial Appointment Commission Act,2014 was struck down by the five judges bench the need for a woman judge being part of the quorum was neither thought nor considered the fair chance to women judges regarding their judicial opinion about NJAC Act. The women advocates[30] opined that the different perspective and diverse views and opinions were left unheard specially from the women judges. Exclusion of elevation of few High Court judges[31] to the Supreme Court in list of recommendation to collegium is still incapable of being explained by the Hon'ble Supreme Court of India. Art. 14 mandates equality before law and equal protection of laws to all persons and permits classification and not class legislation. Following this mandate read with women empowerment equal opportunity as enshrined as equality, Convention of Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993, the principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles are still need to be diligently applied with utmost care and caution removing all the socio-economic cultural, official barriers against them so as to ensure the transformation of

[29] C. Gilligan, In a Different Voice 1982

[30] Shalu Nigam's "Hail Patriarchy! Of Supreme Judges and Elite Law" Practising Lawyer and an activist at the Supreme Court of India"

[31] https://www.indialegallive.com/cover-story-articles/focus/women-judges-cracking-glass-ceiling-23572 accessed on 28.2.2020 at 08:50 P.M

constitutional provisions into reality by extending the access to justice to all the women across India.

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(2)

LAW AND SOCIAL TRANSFORMATION ON EVOLUTION OF THE CONCEPT OF LEGAL AID IN KARNATAKA

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ON EVOLUTION OF THE CONCEPT OF LEGAL AID IN KARNATAKA

INTRODUCTION

Legal aid services a modern phenomenon aims to provide legal assistance to the poor and vulnerable sections of the society to look after themselves about the exercise and enforcement of their legal right. Legal aid is considered as an instrument to achieve equality before law a provided in our constitutional mandate, the Karnataka state have created their own infrastructure at different levels of administration to make legal aid available to the poor people under sec.29-A,[3] the state of Karnataka enacted their own Rules and Regulations to provide legal assistance to the poor people. This paper contains constitutional, as well as legislative development of aspect of legal aid services in the State of Karnataka with a view to achieve the object of Legal Service Authorities Act of 1987.[4]

MEANING OF LEGAL AID

Under Sec.2(1)(c)[5] "Legal services includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other Authority or tribunal and the giving of advice on any legal matter.[6]

CONSTITUTIONAL PROVISIONS OF LEGAL AID

Article 14[7] and 22 (1) of the constitution of India obligates the states to provide equality before law and equal protection before law to the citizens of India and provide equal justice and equal opportunity in all the matters connected with legal aid.

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[3] The Legal services authorities Act, 1987 edited by Satpal puliani Managing director KLJ, 2019 2nd edition, page 51
[4] The Legal Services Authorities Act 1987, (Central Act 39 of 1987), amended Act, 1994
[5]The Legal services authorities Act, 1987 edited by Satpal puliani Managing director KLJ, 2019 2nd edition, page 6
[6].Ibid 5
[7] The Constitution of India 1950 , Bare Act and Short comments.Commercial Law Publisheres (India) pvt.Ltd.(2017)

Article 21[8] provides, every person have right to life and personal liberty without interference of anyone. In the Hussainara khatoon v. Home secretary Bihar[9] the Supreme Court referred that right to free legal aid in is integral part of Art.21.

Article 22 provides rights of arrested person. Right to legal aid cannot be denied to him on the ground that he failed to apply for it.

Article 39-A[10] promotes equal justice and equal oppotunitities in the matter of free legal aid. It imposes an imperative duty upon the state to provide free legal aid to the poor. The parliament of India while discharge of its obligation under the above mentioned Article enacted the Legal Services Authorities Act, 1987 that provided free legal aid to the concerned category of people. The 42nd amendment, which inserted Art.39-A by the Parliament of India also made some changes in Schedule 7 of the constitution of India. It removed the entry 3 that is administration of justice form state list and added it under concureent list, as entry 11-A.[11] The object behind such change was to enable both union and state to make laws free legal aid and access to justice to the poor and needy people.

THE LEGAL SERVICES AUTHORITIES ACT 1987

With the reference of Art.39-A and the suggestions of the Government's Committess, the Central Government of India enacted the Legal Services Authorities Act, 1987, on 11 October 1987. The Act was finally coming into force on 9 November 1995 after certain amendments took place and introduced therein by the Amendment Act of 1994. The Act also amended in the year 2002 and major provisions added in the amendment Act of 2002.

Preamble of the Act

"An Act to constitute Legal Services Authorities to provide free and competent legal services to the weaker sections of the society to ensure the opportunities for securing justice, are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to ensure that the operation of the legal system promotes justice on a basis of equal opportunity[12]."

[8] The Constitution of India 1950, Bare Act and short comments commercial law publishers (india) pvt.Ltd. (2017)
[9] AIR 1979 SC 1360
[10] The Constitution of India 1950, Commercial Law Publishers 2017 Bare Act, (p-13).Inseted by the Constitution (Forty-fourth Amendment) Act, 1978,w.e.f.20-6-1979
[11] M PJain, Indian Constitutional Law (8th edn, Lexis Nexis 2018), Manoharan v Shivarajan [2014]4 SCC163
[12] The legal services Authorities Act,of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-5

Jurisdiction and Scheme of the Act[13]

The Act extends whole of India except Jammu and Kashmir. The Act[14]consist 30 sections, and 7 divided into 7 chapters. The Chapters involve preliminary part and explains the composition and powers of of National and state Legal Services Authority, manner in which legal services provide under the Act, and structure of Lok Adalat and Permanent Lok Adalat and the work of the authorities and Financial aspects of these authorities.

Objects of the Act

The Legal Services Authorities Act 1987[15] enacted for the purpose of following objectives.

1. To composition of National and State Legal Services Authorities.
2. To provide Free Legal Service to needy people and weaker sections of the society.
3. To constitute Lok Adalat and permanent Lok Adalat for the speedy disposal of cases pending before the court of law.

Criteria for legal aid services under the Act of 1987

Section 12[16] of the Legal services Authority Act 1987 provides: "Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-

- a member of a Scheduled Caste or Scheduled Tribe,
- a victim of trafficking in human beings or beggar as referred to in Article 23of the Constitution a Women or a Child,
- A person with disability,
- A person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake, or industrial disaster,
- An industrial workman,
- In custody, including custody in a protective home within the meaning of section 2(g)of the Immoral Traffic (prevention) Act, 1956, or in a juvenile home within the meaning of section 2(j) of the juvenile Justice Act, 1986, or in a psychiatric hospital or

[13] The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-5
[14] Ibid 12.
[15] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004)p-28-29
[16] The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-18

psychiatric nursing home within the meaning of clause section 2 (g) of the Mental Health act, 1987 or

- In receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the state Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case before the Supreme Court.

Entitlement to Legal Services [17]

According to section 13 of the Act explains any person satisfy the requirements of section 12 of the Act, file an affidavit before the concerned legal service authority. The authority examine the affidavit based on the income of the applicant and it found the applicant is eligible for provide legal assistace it can grant assistance that no reason for disbelieve the affidavit.

Authorities under the Act:

There are four Authorities as contemplated by the Act, they are as follows:

1. **National Legal Service Authority:[18]**

   a) Composition:
      - Patron-in-chief – Presided by The chief Justice of India
      - Executive Chairman – Presided by a serving or retire supreme court judge and president will nominate him
      - Member Secretary – appointed by central Government with the consultation of Chief Justice of India
      - And other members nominated by Central Government.

   b) Term: The Act cannot specified the specific terms of the members but it describes the members can hold office with the procedure prescribed by the central Government.

   c) Salaries and allowances: Prescribed by the central government with the consultation of the Chief Justice of India.

   Supreme Court Legal Service Committee:

   - Constituted by Central Legal Services Authority

[17] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004),p-86 The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-19

[18] Chapter – II The Legal Service Authorities Act of 1987 The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-5

- The powers and functions of the committee performed on the basis of Central authority
- Composition:

  Chairman - A serving judge of the Supreme court,

  Member Secretary and other officers and officials appointed by Chief Justice of India. The members possessing such qualification and experience as prescribed by the Central Government.

State Legal Service Authority[19]

All the State Government have the power to constitute State Legal Service Authority in their territory to provide Legal Aid Services:

- Composition[20]
  - Patron-in-chief – Presided by Chief Justice of High Court
  - Executive Chairman – serving or retired Judge of High Court
  - Member Secretary – will be the rank of District Judge and above.(term- 5years)
- Term: As specified by the State Government by time to time.
- The State authority have the power to Constitute a Committee called High court Legal Service Committee to function prescribed by the authority.
- It consist of serving High Court judge such other officers to perform functions prescribed by the State Authority.

Functions of the National and State Legal Service Authorities:

The National and State Legal Services Authorities carry these following functions:U/Sec.4 and 5 of the Act

1. Frame policies and principles with respect to Legal services.
2. Frame the most effective and social and economical Schemes.
3. Arrange training programmes to needy people
4. Provide Social Justice by taking litigation in the matter provided consumer protection, environment protection or any other matter.

[19] Chapter- III of The Legal Services Authorities Act of 1987
[20] <https://nalsa.gov.in acts-rules>accessed on 25 Februrary 2020

5. Provide special status and concern to weaker sections of the society and provide them legal awareness and educate them in all matters.
6. To achieve the goal of legal aid service the authorities conduct Legal literacy camps in village, grama, rural areas, colonies, slums and labour colonies and such other places as it thinks fit.
7. Spread information regarding Lok Adalat to the every people to settle their disputes through Lok Adalat by using ADR methods such as arbitration, Negotiation, Mediation and Conciliation
8. Encourage and promote interested students and others to conduct research in the field of legal services available to the concerned sections.
9. Give assistance, Guidelines and monitor the Voluntary Organizations and others organization which are working to provide legal assistance to the people.
10. With Co-ordination of Bar Councils, Legal Aid institutions, Law Colleges, Universities and other Institution conduct and develop clinical legal education to the students as well as people in the society.
11. To achieve above functions and such other functions prescribed by the concerned Governments the authorities will form such other committees and utilise funds as such.[21]
12. By performing these functions authorities fullfill the aim of the Act.

District and Taluk Legal Services Committees:

Sec.9 and 11A of the Legal Service Act of 1987 provides for the composition and powers of these committees.

- **Composition:**
  - Chairman - Presided by serving District Judge
  - Senior civil judge is ex-officio chairman of taluk committee.
  - The state Authority have the power to appoint Chairman to district and taluk committees who possess the qualification and rank of subordinate judge or civil judge

[21] Chapter – II & IIIThe Legal Service Authorities Act of 1987 The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-7 to 14

- The state authority with the consultation of the Chairman of the both the committess have the power to appoint such other members to perform required function specified by the State Governemnt.

- **Functions:**
  - According to sections 11 A and 11B District and Taluk legal aid Committess with co-ordinate with each other perform such of the functions delegated by the State Authorities.
  - Functions such as Conduct legal aid Programmes, organise Lok Adalat, provide legal assistance to the people arranging seminars, workshops and other things. And such other functions as prescribed by the state authority.

Organization of Lok Adalats:[22]

All Legal Service Authorities and committees specified under the Act have to Constitute Lok Adalat in their territorial limits. While organizing Lok Adalat it shall consist of following members such as---

- A serving or retired judicial officers, and
- Other persons – appointed by the State Government with the consultation of the Chief Justice of High Court.
- Cognizance of the Case and Procedure to settle dispute through Lok Adalat:-
  - The dispute or case must be pending Before the court of Law, and both the parties of such case agreed to settle their dispute through Lok Adalat after one of the party file applictin before the court for refer the case to the Lok Adalat. If court satisfied the applicant fulfilled all the requirements specified by the Act and consider the matter is appropriate to settle dispute through Lok Adalat then it pass the such case to the Lok Adalat.
- If dispute is not settled through Lok Adalat[23] then the case returned to the concerned court for disposal in accordance with law.

[22] Section 19 of LSA Act 1987 Chapter – VI The Legal Service Authorities Act of 1987 The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-22-25

[23] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004),p-93-94 Chapter – II The Legal Service Authorities Act of 1987 The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-26

- If dispute settle through Lok Adalat it have power to pass an award. It treated as decree of Civil court, and decision is binding both the parties and There is no appeal lie on this award.[24]
- Lok Adalats excersise powers vested in a civil court under the code of Civil Procedure 1908, for the purpose of summons, discovery documents, reception of evidences, requisitioning of public records[25].
- Advantages of Lok Adalats is free and speedy justice of the case.

Permanent Lok Adalats

With the amendment Act of 2002 of Legal services Authorities Act of 1987 inserted section 22-B and provided constitution of Permanent Lok Adalats with view to resolve disputes relating to public utility services.

Finance, Accounts and Audit

The Sec.14 to 18 of the said Act[26] made provisions containing to utilization of funds granted by the authorities and same is audited every year and keep it record.

Miscellaneous

Chapter VII of the Legal Services Authorities Act [27] section-23 describes members and staff of authorities, committees and Lok Adalats to be treated as Public Servants.

Further provisions contained the power of the Central Government and State Government to made appropriate rules and regulations with respect to provide legal aid services.

EVOLUTION AND IMPLEMENTATION OF LEGAL AID SERVICES IN STATE OF KARNATAKA

Brief Introduction of State of Karnataka [28]

Karnataka is a state in the south western region of India. It was formed on 1 November 1956, with the passage of the States Reorganization Act. Originally Known as the State of Mysore.

[24] Section 21 of Legal Services Authorities Act 1987
[25] Section 23 of Legal Services Autorities Act 1987
[26] Ibid 22. Section 14 to 18
[27] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004),p-137 to 145
[28] < https://en.m.wikipedia.org .wiki>access on 27/2/2020

It was renamed Karnataka in 1973. The State Corresponds to the Carnatic region. The capital and largest city is Bengaluru. It is the sixth Largest Indian State by area, with 61,130,704 inhabitants at the 2011 census. The state covers an area of 191,976 square kilometres (74,122sq mi), comprising 30 districts. Kannada is the most widely spoken and official language of the state. The Kaveri , Krishna, Tungabhadra, Ghataprabha, Hemavati, Kabini …are the rivers flow out of Karnataka and it comprised 238 taluks, 745 hoblies /Revenue circles for administrative purposes.[29]

Development of Legal aid services in State of Karnataka[30]

The Legal aid was introduced by the State of Karnataka, as early as in 1981 by enacting the Karnataka State Legal aid Board Act 1981, with view to provide legal aid services. Subsequently in the year 1983, The Karnataka Legal Aid Board Rules 1983 enacted to provide free legal aid services to the poor and economically backward people. A rule contains the allowances of office bearers. And it also consists of the procedure for Board meetings , minutes, and powers and functions of the Board members with respect to provide free legal aid services.[31] The board with view to provide legal services in entire state, adopted The Karnataka Legal Aid (District and Taluka Committees) Scheme 1983 to constitute the District and Taluk Legal Aid Committees to provide initial stage of legal services to the needy people. The Karnataka Government enacted a scheme of The Karnataka Legal Aid (Motor Vehicle Accident Compensation Claims) Scheme, 1983 with view to provide relief to the accident cases via legal aid committees.

The above bodies worked well prior to enacting The Karnataka State Legal Services Authority Regulations 1997. After these regulation above laws are repealed and the now State Authority working under the provisions of Central Legislation of Legal Services Authorities Act of 1987.

[29] Ibid.25
[30] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004), p 405 to 500
[31] Ibid,27

The Karnataka State Legal Services Authority Regulations 1997[32]

29 A of Legal Services Authorities Act, 1987 (Central Act 39 of 1987), amended Act, 1994 (No.59 of 1994) Karnataka State Legal Services Authority framed following Regulations. The regulations consist of XV chapters and II schedules.

Chapter I Preliminary

Explained title of the Regulation it called as Karnataka State Legal services Authority Regulations, 1997 **[33]** and concerned provision also specified these regulation shall come into force at once.

Chapter II "Powers and functions of the Patron-in-chief: (section 3)

- Supervision the state, High court, District and Taluk Legal services Authorities and committees.
- To give instructions to the member Secretary and Chairman of the Authorities and committees to implement the Scheme of the Act.
- To undertake such tour throughout the state for promoting the Legal Services Programmes and the Schemes of the Act and to implement in the Perspective Manner.[34]

Chapter III Meetings of the State Legal Services Authority :(section 4&5)

- State Authority meets once in 3 months
- Time and accomadation fix by the patron-in- chief or Executive chairman[35].
- Quorum of meeting constitute nine members.
- The decision taken on the basis of majority vote. The person presiding shall have casting vote.
- Any 10 members of the committee prior give written requisition to Secretary to conduct meetings. Member secretary prepare agenda of the meeting same as to be noticed to other members to present the meeting.
- Members present in the meeting must be sign in the register.

[32] 1987 The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-151
[33] Chapter – II The Legal Service Authorities Act of 1987 The legal services Authorities Act, of 1987, edited by Satpal Puliani Managing director KLJ, 2019, KLJ publication 2nd edition page-151

[34] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004), p-487-488, Ibid-31
[35] Ibid, 30 p-488-489

Chapter IV, V, VI explains the High Court Legal Service Committees, District Legal Service Committees, and Taluk Legal Service Committees

Composition of High Court Legal Services Committee:[36]

- A serving judge of the High Court - Chairman
- Member-Secretary – defined under rule 6
- addtional Law secretary (in the cadre of District Judge)
- Commissioner of Police, Bengaluru City
- State Public prosecutor or State Additional public prosecutor or Advocate General
- One member of the State Bar council
- An office bearer of Advocates associatsion, Bengaluru
- A woman Advocate
- Three members who have experience in the field of law, social service, weaker sections of the society including scheduled Caste and Scheduled tribes, women and Children.[37]

Composition of DLSA[38]

- Headed by Member Secretary is the Chairman and he only draft a minutes of meeting and meets once in a 2 months

Composition of TLSC:[39]

Committee headed by chairman, and meeting held once in a 2 months. Quorum is 5 members

- In absence of secretary and chairman members chosen any member among themselves as a chair and conduct the meeting.

Term of office bearers and others with the specified with the pleasure of patron- in chief. Any vacancy created filled in by the way of original nominated members.

Meetings to be held once in 3 months. With the approval of chairman, quorum is 4in HLSC 5 in TLSC. The meeting should contain minutes prepared by head and present member must be signed in the register.

[36] Ibid, 30 p-489-490
[37] Ibid 32 page 153-154
[38] Sec.9 of Legal Services Authorities Act 1987(Ibid,30)
[39] Section 11 of Legal services Authorities Act 1987

Functions and Powers of the Committees:

- To provide free legal services
- Implement Legal Service Schemes and Programmes
- To look after all the administration and other works of the committees.
- To organize various Legal Aid Programmes, seminars, workshops time to time
- To maintain proper accounts and income, and audit it.
- To work directions given by the State Authority
- Conduct Lok Adalats for their jurisdiction
- Assist the parties to the dispute settle their disputes through negotiations, arbitrations and conciliations
- The committee function such other activities prescribed by state authority.[40]

Panel of Advocates

Each Committee appoints panel of advocates to conduct cases referred by the committees. On certain conditions that if he failure to do such duties the committee have the authority to send him notice and disquality by the panel list.

Funds, Accounts and Audit of the Committees:

The funds of these committees will provide by the state government. Every authorities should maintain accounts for it and same as to aduit and submit the report to the State authority, the State Authority made consolidated audit and submit report to government and NALSA.

Legal Literacy Programmes:[41]

The Authorities and Committees constitute Legal advice centres at one or more places depending on the need and public response.

Arrange Legal Literacy Programmes in various rural areas, Educational institutions, universities, Voluntary organizations etc..[42]

Chapter XII contains the pension and death cum retirement Gratuity of employees of KSLSA

[40] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004), p-493-496
[41] Chapter XI Section 33
[42] Ibid, 30 (p-497-499)

Chapter XIII and Chapter XIV contains Miscellaneous provisions with respect to appointment, promotion, removal, discharge and such other disciplinary action as per the provision mentioned in Rule 10.

The above discussion gives the idea of how the Legal Aid Services provided in various ways in Karnataka State.[43]

AN OVER VIEW OF FUNCTIONS AND SCHEMES OF KARNATAKA STATE LEGAL SERVICE AUTHORITY

Aims and Objectives[44]

Karnataka State Legal Services Authority is a statutory body constituted under a Central Legislation Legal Services Authorities Act 1987.

Composition:

Patron- in Chief – become Chief Justice of High Court

Executive Chairman – Sr. Judge of High Court of Karnataka of the Authority.

There are 30 District legal services authorities and 150 Taluka Legal Services Committees are working under state of Karnataka.

Victim Compensation Schemes

Under code of Criminal Procedure 1973 and with the guidelines of NALSA[45] Karnataka State Legal Service Authority constituted victim compensation scheme for Women victims/ survivors of Sexual Assault/ other Crimes in these cases court can award compensation and direct the state Government to give Interim compensation for the victims. Who filed a case under 357-B of Crpc in any authorities in State.

Jail reforms[46]

With the view to fulfil the object of Common Health Human Rights Institute the State Authorities constituted Legal Aid Clinics in Jail and Police station. 20 districts already

[43] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004)p-498 to 505
[44]< https://kslsa.kar.nic.in > Aims & objective , Para 1, accessed on 25 february 2020
[45]<https://nalsa.gov.in acts-rules>accessed on 25 Februrary 2020

[46] < https://kslsa.kar.nic.in > downloads schemes and acts, accessed on 25 february 2020

established front offices with view to provide service consisting of one advocate and PLVs are regular sitting and give assistance and same to maintain in register.

Nyaya Sam yoga appointed in the Karnataka Legal Service Authority with view to establish the Legal Aid Clinics in offices and Thashildar Offices.[47]

Permanent Lok Adalats: here in after referred PLA[48]

PLA is established under 22-B (1) of Legal Service Authorities Act of 1987.

PLA have the jurisdiction to settle disputes relating to Public Utility Services, which means - Transport, postal, telegraph, power supply, sanitation, hospital and insurance services etc..and any other services specified by the central and state Governments.[49]

- The Permanent Lok Adalats in Karnataka function in following cities such as Bengaluru, Mangalore, Gulbarga, Dharwad, Mysore and Belgaum districts established Permanent Lok Adalats in their jurisdiction.
- It composed a chairman and 2 members.
- Chairman must be hold qualification of District Judge and he must be retired when he acquired the position of chairman.
- The other 2 members well aware of public utility services.
- Any party to a dispute can approach PLA in their PLA has no jurisdiction to entertain the petition where the value of the property in disputes exceeds Rs. 1 Crore.
- The award of PLA is final and binding.

Legal Literacy programmes:

With view to provide legal literacy programmes Karnataka State Legal Service Authorities have 5 saksharatha buses to conduct legal awareness in villages. And time to time conduct these programmes in various places to with the co-ordination with the other Authorities and committees[50].

[47] Ibid 41
[48] < https://kslsa.kar.nic.in > PLA rules and PLA in home page entire para, accessed on 25 february 2020

[49] Ibid 43
[50] < https://kslsa.kar.nic.in > homepage under downloads, accessed on 25 february 2020

The Authority also published various books namely jana samanyarigagi kanoon mahiti, Kanoonu samkshipth mahiti, Mahile mathuu Kanoonu, etc…both in kannada and English languages. It will provide with nominal amount of 20 rupees and free in workshops.

Lok Adalats:

As per the rules Karnataka State Legal Service Authority conduct yearly 5 Lok Adalat in the month of January 86,000 cases disposed among 80,000 pending cases and 6,000 pre litigation cases.[51]

Implementing Defence Council System:

The Karnataka State Legal Service Authority with view to dispose criminal case practically implemented pilot system in Belagav. Still it is under process to implement all the districts.

CONCLUSION

Legal Aid Service aims at access to justice at root level. To achieve this judicial mechanism which applied is traditional, conventional as well as contemporary. Judicial Activism can be traced through following citations and case laws.

Hussainara Kathoon v. Home Secretary, state of Bihar[52]

Supreme Court has observed that " we hope and trust that every State Government will take prompt steps to carry out its constitutional obligationto provide free legal services to every accused persons who is in peil of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require. If free legal services are not provided to such an accused the trial itself may run the risk of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality".[53] had called upon Government to frame appropriate scheme for providing legal aid to the poor.

[51] . < https://kslsa.kar.nic.in > homepage, statistics, accessed on 25 february 2020
[52] AIR [1979] SC 1369

[53] S K Sarkar, Law Relating to Lok Adalat and Legal Aid (1st edn, orient publishing company 2004)p-44,para5

Rajoo v. State of MP[54]

Article 39A puts stress upon legal justice. Put simply, the directives requires the state to provide free legal aid to deserving people so that justice is not denied to any one merely because of economic disability.

Ranjan Dwivedi V. UOI[55]

The Supreme Court has ruled that it cannot issure a writ of mandamus to enforce Article 39A. Article 39Amakes it clear tht the social objective of equal justice and free legal aid has to be implemented by suitable legislation or by formulating schemes for free legal aid.

Babubhi v. UOI

The Supreme Court has emphasised that under Article 39A, the State Government undoubtedly has an obligation to set up a comprehensive and effective legal aid programme in ordr to ensure that the operation of the legal system promotes justice on the basis of equality.[56]

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[54] M PJain, Indian Constitutional Law (8th edn, Lexis Nexis 2018), p-1485AIR [2012] SC 3034
[55] M PJain, Indian Constitutional Law (8th edn, Lexis Nexis 2018),p-1486, AIR [1983]SC 224
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(3)

IMPACT OF GLOBALISATION AND MODERNISATION UNDER LAW, RELIGION AND SOCIETY (WITH RESPECT TO WOMEN) AND ITS TRANSFORMATION OVER THE YEARS

Poorvaja J[57]

INTRODUCTION

In the 18th centuries where modernization and globalization had not hit the nation hard, India was in a completely different shape and ball game with respect to who and where India is today. India and its perspective towards women were completely different back then than it is now. It took several people to educate them on the manner in which they should be treated and educate them on the rights and privileges[58] they behold. These were mainly rights that were taken away by men and other dominating force of the society who think high of themselves and just don't treat women the way they are supposed to be treated. The present society today has indeed been completely rebuilt in a manner for which the peoples mind is open to changes. Changes which are influenced by factors which evolve from cultures, traditions, and practices from all over the globe which are now widely accepted in our country. People do appreciate and welcome these changes in the society but there is a particular part of the society which still denounce that these are contradictory[59] to the culture and are exploiting them. Opinions differ in nature, but the changes are still revolving, and it has a great impact on the living.

OBJECTIVES

- To understand the mindset of the people in the society
- How globalisation and modernization has affected the society
- What are unhumanitarian practices that are abolished
- Understanding the mindset of the people in the society

[57] Second Year, BBA LLB, VIT Law School, Vellore Institute of Technology University, Chennai
[58] Privileges- < https://www.thehindu.com/opinion/op-ed/bring-the-house-up-to-date/article19253239.ece>
[59] Contradictory- Social Change in society <https://www.britannica.com/topic/social-change>

RESEARCH METHODOLOGY

Information collected to substantiate the stance of this paper were collected from books and websites. Since the paper is mostly based on the opinions of individuals rather than numerical data, multiple texts and articles of authors concerning this topic were referred to.

However, in order to understand the implications of Globalzation, Mordernization, with respect to how it has changed the mindset[60] of people living in India. Along with this, the study with respect to women will also be analysed on how they are treated in a better manner than in the past.

GLIMPSE INTO THE PAST

Law and order present today aren't the same as it was ages ago. It was completely influenced by morals and heritage values which were embedded strongly in the hearts of every individual back then. Although, today law has been taken into a completely different account due to the change in lifestyle of people, which is mainly influenced by factors like globalization and modernization. Law in India is governed by religion vastly due to the cultural influence. Getting specific, women back then were not treated in the same manner as men. Inequality was a prominent[61] feature back then. Lack of exposure towards the world and the mindset of people was a reason for this. For example, Draupadi, wife of five Pandavas was, used by them on the dice like goods. Woman were also used for dance to please the kings and other male members of kingship, woman was also not having right to speak loudly in home or public places, these are some instances which shows that in ancient period also woman was not being treated equally with men. The privilege they received was always lower than men, be it in terms of monetary value, humanitarian respect or even the freedom a basic human should have was absent in their lifes.

PRESENT SCENARIO

Today, in India, it is believed that the situation isn't the same as how it was in the past. This is acceptable to an extent. Although the situation of women has not been completely been evacuated, it has reduced in number to a remarkable number. The reduced number is mainly because of women activist who believed that women are no way in lower towards men. Another contributing factor to this is the regulations that were added to the constitution which

[60] Mindset- Roland Robertson, <https://journals.sagepub.com/doi/10.1177/026327648500200300 9>
[61] Prominent- Inequality in india < https://www.wider.unu.edu/publication/inequality-india-rise>

binded in nature with the concept of equality amongst both genders. This can be a major add on factor in the case of social transformation in India. A prominent example would be the abolishment of Sati in India. Today, India's *Prevention of Sati Act* (1987) makes it illegal [62]to coerce or encourage anyone to commit sati. Forcing someone to commit sati can be punished by death. Nonetheless, a small number of widows still choose to join their husbands in death; at least four instances have been recorded between the year 2000 and 2015. Apart from women related social transformations, there are several prominent transformations over the years which has not only altered the thinking aspect of people in the society rather it has transformed the believes and practices of fellow citizens of the nation. For example, Coming from different parts of the country with diverse religion, age, sex and other backgrounds, the petitioners said that section 377 legitimises the stigma associated with sexual orientation and its expression something which is essential, fundamental. The Supreme Court has scrapped Section 377 of the IPC, decriminalising the 158-year-old colonial law which criminalises consensual gay sex. The decriminalisation was accepted majorly throughout the nation, but of course it was opposed in certain parts. It was believed that it was contradictory with the culture of the nation and it was diluting the heritage which India is holding. Their oppostition was of course expressed in means of protest and other forms. But on a whole, it was majorly accepted as a country as a whole and its extensively due to the reason of foreign exposure and interaction.

PRESENT IDEOLOGY OF PEOPLE

Currently people in the society believe that they are living in a westernized[63] world due to the influence they have obtained from sources all over the globe. This includes the way they dress, the food they consume, their attitude towards acceptance and change in the environment. The views towards this is variable in nature and differs from different set of people in the society. The people who receive education or the ones who belong to the working sector tend to have an open mind for this and accepted change that is recurring. On the other hand, the people living in the rural areas who did not have much exposure found it hard to accept what was happening in the society, and yet stood by their rituals and cultural practices which they have been practicing for ages. According to the people belonging in those sector, they are not prepared to change according to the trend because they have a feeling it is exploiting their culture and traditions and it is their responsibility to withhold the ever green traditions.

[62] Illegal – Bare Act, < http://www.bareactslive.com/ACA/ACT105.HTM>
[63] Westernised- Social Change in Society < https://www.britannica.com/topic/social-change>

HOW HAS CHANGE CONTRIBUTED TO THE CHANGE IN ECONOMY

Abolishment[64] of certain of the many unfair practices has definitely contributed to the economy, especially with respect to women. Women these days are given equal and deserving rights in the society and at workplace as well. Be it in terms of receiving opportunities or in the terms of remuneration, women are being treated just the way they are supposed to be and it has indeed been a contribution towards the Indian Economy. Through such social transformation women have now become an active contributor to the country's GDP(Gross Domestic Product). Not only this, women are now being expected as an active employee in several organisations and there are organisations that exist where in 50% of the employees are supposed to be women and norms are set accordingly. Also, under the developing law and order system in India, women are also benefited in the area of harassment where by special provisions are created for them, only on sole reason which is to protect their mental and physical status. Sexual harassment at a workplace is considered violation of women's right to equality, life and liberty. It creates an insecure and hostile work environment, which discourage women's participation in work, thereby adversely affecting their social and economic empowerment and the goal of inclusive growth[1]. With this idea the legislature formulated the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

The need for such legislation was observed first time by the Supreme Court, in Vishaka v State of Rajasthan. In the absence of any law at that time providing measures to check the evil of sexual harassment of working women, the Supreme Court, in exercise of power available under Article 32 of the Constitution, framed guidelines to be followed at all workplaces or institutions, until a legislation is enacted for the purpose. The Supreme Court incorporated basic principles of human rights enshrined in Constitution of India under Article 14, 15, 19(1)(g) and 21, and provisions of Convention on Elimination of All Forms of Discrimination against Women (CEDAW), which has been ratified in 1993 by the Government of India. The guidelines laid down by the Supreme Court were to be treated as the law declared under Article 141 of the Constitution.

ICELAND ANALYSIS

Firstly, the success can be linked to women taking power and creating alternatives to the male dominant "truths" and making the invisible realities of women visible, most importantly

[64] Abolishment- Laws For Women < http://ncw.nic.in/important-links/List-of-Laws-Related-to-Women>

discriminatory practices including sexual harassment and abuse. Also, Iceland's progress can be attributed to women and men sharing power with each other as decision-makers and gradually having more men supporting the give and take of gender equality.

As such, the Iceland[65] case is nothing exceptional. It has been impacted by cultural, political, religious, social, academic and economic currents that have washed ashore and been embedded within the country.

In India, as per the tradition , there exists a belief of "strong women". Despite being mythical, it has it roots in reality, as women enjoyed certain privileges and had cultural and religious authority during the commonwealth period that lingered on throughout the ages. On the religious front, diversity was embraced in the "pre-modern", society. There were gods and goddesses, as well as women and men serving as cultural and religious authorities.

Cultural institutions in India, particularly those of patrilineality and patrilocality, play a central role in perpetuating gender inequality and ideas about gender

A culturally ingrained parental preference for sons emanating from their importance as caregivers for parents in old age is linked to poorer consequences for daughters.

The dowry system, involving a cash payment from the bride's family to the groom's at the time of marriage, is another situation that disempowers women. The incidence of dowry payment, which is often a substantial part of a household's income, has been steadily rising over time across all regions and socioeconomic classes.

This often results in dowry-related violence against women by their husbands and in-laws if the dowry is considered insufficient or as a way to demand more payments.

These practices create incentives for parents not to have girl children or to invest less in girls' health and education. Such parental preferences are reflected in increasingly masculine sex ratios in India. In 2011, there were 919 girls under age six per 1000 boys, despite sex determination being outlawed in India.

[65] Iceland - <https://www.weforum.org/agenda/2017/11/why-iceland-ranks-first-gender-equality/>

This reinforces the inferior status of Indian women and puts them at risk of violence in their marital households. According to the National Family and Health Survey of 2005-06, 37% of married women have been victims of physical or sexual violence perpetrated by their spouse.

HINDUISM AND SOCIAL TRANSFORMATION

Hinduism has witnessed variety of changes from the dress code to shrinking down of worshipping deities and also number of people following rituals which have become very scarce and respect to the elders has gone to back seat but only thing remaining is the number of Hindu[66] Gods.

Most of the middle class people who have become upper middle class and as well economically better and a great number of them mostly forgotten their traditional heritage and sometimes turn irrational towards following their religious practises and most of the customs and habits are slowly forgotten replaced by modernity and sophistication and amorous mixing of all genders irrespective of age and lavish show of their richness and modernity has become order of the day.

The Hindu value system of large family living together as close knit family for generations has become more or less extinct. Healthy and tasty traditional homemade food mostly been replaced by junk food , restaurant food and packed food which has altogether spoilt the health of most individuals in one way or other. This has given way to acceptance of many new approaches, which includes a recent change which is the sabari mala issue. Wherein, women after attaining puberty and before reaching menopause stage were not permitted to enter the holy temple. But after the recent judgement, all women were allowed. This was religiously contradictory but despite shakening the powerful cultural system, women did enter. Unfortunately, they were not treated in a proper manner, thereby through this we can understand that cultural values does overtake law are order at times.

[66] Hindu - Family Law (Hindu law) – BM ghandi, Second Edition, Volume 1

CONCLUSION

The causes of social change are diverse, and the processes of change can be identified as either short-term trends or long-term developments. Change can be either cyclic or one-directional.

The mechanisms of social change [67]can be varied and interconnected. Several mechanisms may be combined in one explanatory model of social change. In India, the social change that is taking place is for the overall development of the nation as a whole. With respect to women, their importance in the country is growing and it is quite remarkable. But it is well known that there is long way to go. As long as factors that include globalization and modernisation, India will be constantly improving. On this rate, the state of cultural and heritage holding is challenging, especially with the upcoming generations. Despite all the changes around the country, the conclusion will be to hold the heritage of the country for the best.

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(4)

RECONCILING DISCREPANCIES IN ANTI-DEFECTION LAW

Sejal Sri*

Kiran Patel**

INTRODUCTION

The 52nd Amendment of the Constitution, popularly known as the "Anti-Defection Law" officially recognized the important ubiquity of political parties and most of all acknowledged the electorate behaviour which has a tendency to vote for candidates based on the political party that sets up their candidacy. In such a backdrop, defection or floor crossing by a member from one political party to another, becomes undemocratic since such defection runs contrary to the electorate's result. Defection allows a political party that has failed to obtain majority in the House to operate as the winning majority in the House and become the government by actuating support of the defectors from other parties that have won the majority. Thus, a party is able to form the government without the mandate of the people. Changing a political party due to ideological or conscientious disagreements with the party, through whose support one is elected, is very rare. A member would still be required to resign his membership and get re-elected in fresh elections. Experience demonstrates that most defections occur due to an insatiable thirst for power i.e., usually when a member is not allotted any ministry. Defections from one political party to another result in an unstable government because a government mandated by the electorate could fall or collapse through defections when the said government has no majority to continue to stay in power.

The following are the provisions of the Xth Schedule:

(i) A member of a House is disqualified on grounds of defection if-
   a) A member voluntarily gives up membership of such political party; or
   b) Votes or abstains from voting in the House against the directions of the party he belongs to.

(ii) An independent member who joins a political party after getting elected is said to have defected and thus is liable for disqualification on that ground.

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(iii) Defection to another party is exempted in the case of a merger provided that the decision to merge is supported by at least 2/3rd of the merging party.

(iv) The Speaker of the Lok Sabha or the Chairman of the Rajya Sabha is vested with the exclusive authority to determine whether defection of a member has taken place. For this, the Speaker or the Chairman gather relevant facts and if defection has indeed occurred on the basis of such facts, then the Speaker or the Chairman has to effectuate a decision in that regard. The Speaker or the Chairman cannot take up a matter for deciding disqualification *suo moto*, a petition in writing from a member alleging defection must be received for the Speaker or Chairman to exercise their authority in deciding matters of defection.

(v) The jurisdiction of the courts is barred in matters connected with the disqualification of members.

(vi) The Chairman or Speaker of the House is equipped with the powers to formulate rules to give effect to the provisions of this Schedule.

The Anti-Defection Law has been a subject of reassessment in the recent years. The law carries with it an obscure form of difficulty in understanding the objective of the legislation, owing to the fact that it came into existence in 1985 and there are no Constituent Assembly Debates to discern the real intent behind the legislation. One of the concerns that has repeatedly been brought up by critiques is the debate of the anti-defection law curbing a legislator's freedom of conscience and speech. This question was explored in *Kihoto Hillohon v. Zachillu*[69]. The Court in this regard noted that the impugned provision which was alleged to curb the freedom of conscience and speech of a member of a House did not impinge on a member's rights. The court observed that a member is a direct reflection of his political party and as such a member having an opinion independent of his party's will embarrass the party's public image and undermine the public's confidence in the party where such public confidence is the source of its survival. Allowing a member to act contrary to party's direction will de-ideologize a political party which will unfasten the unifying identity or the commonality that runs through all the members of a political party and the electorate will lose a criterion for deciding their votes. Further, the Court noted as following:

[69] AIR 1993 SC 412.

> "The Tenth Schedule does not impinge upon the rights or immunities under Article 105(2) of the Constitution. The freedom of speech of a Member is not an `absolute freedom. That apart, the provisions of the Tenth Schedule do not purport to make a Member of a House liable in any "Court" for anything said or any vote given by him in Parliament."[70]

However, the repercussions of a justification as given in *Kihoto* on the subject of the freedom of speech and conscience of a legislator are far too greater than a public embarrassment to a political party and an assumption that a member of a party has no independent intellect than that of the party's dictate is a fallible proposition because humans are known to be morally autonomous agents. If a membership of an elected member had to depend on the political party, then it would induce the member to put the political party's interests at the forefront of the member's mind instead of the welfare oriented interests of the people from the region he was elected. Most of all, a freedom to express concern that run contrary to the party's interest will prompt more discussions and debate and eventually lead to a quest in search of reforms to rectify such concerns. Such freedom would pressurize the members to research more and argue in favor or against a policy or a bill. However, the Karnataka High Court in *Balchandra Jarkiholi v. BS Yeddyurappa*[71] has been able to strike a balance between the question of dissent and anti-defection through an interpretation which upheld that the defection law recognizes dissent. For this corollary, the court explained that the two grounds under paragraph 2 were mutually exclusive and operated in separate fields. The anti-defection law was enacted to prevent to floor-crossing and destabilizing the Government. The object meant to deliver through the 10th Schedule was that, where a member voluntarily gives up membership to a political party, he should be intercepted from extending support to the opposition party to form the government by his vote. By enacting the tenth schedule, such member would be disqualified from being a member of the House. The membership becomes void if the act of disqualification fell under the ambit of paragraph 2(1)(a). However, if such act of disqualification was attracted under the ambit of paragraph 2(1)(b), his membership is voidable at the option of the political party whereby disqualification would be exempted if the political party has condoned such act or taken him back on account of the member's expression of the intent to return to the party or on the member's presentation of an apology. The Karnataka High court observed:

[70] *Ibid.*
[71] CIVIL APPEAL Nos.4444-4476 OF 2011

"... deserting the leader and deserting the Government is not synonymous with deserting the party. If a Minister resigned from the Ministry, it would not amount to defection. What constitutes defection under paragraph 2(1)(a) of the Tenth Schedule is deserting the party. The learned Judge observed that dissent is not defection and the Tenth Schedule while recognizing dissent prohibits defection."[72]

EXISTING LEGAL SITUATION

The anti-defection law was introduced in the 52nd Amendment and was again amended through the 91st amendment. The legislative intent of the law is to prevent floor crossing and destabilizing the Government. The object meant to deliver through the 10th Schedule was that, where a member voluntarily gives up membership to a political party, he should be intercepted from extending support to the opposition party to form the government by his vote. By enacting the tenth schedule, such member would be disqualified from being a member of the House.

SCOPE AND OBJECTIVE

The paper aims to supply recommendations to the problems being discussed in the paper. The paper limits its discussion to the scope of the Speaker as a quasi judicial authority to decide disqualifications on ground of defection and the role of judiciary is disposing petitions pertaining to defections.

ROLE OF THE SPEAKER AND THE JUDICIARY

With the advent of the Constitutional era from the year 1950, the Constituent Assembly had concluded upon following the Westminster system of representative democracy in India. Even with the inclusion of the Anti-defection law by the 52nd Amendment to the Constitution, the looming terror of the adherent role of the Speaker in the legislature continues to be a menace. In the case of *Kihoto Hollohan v Zachilu*[73], the apex court held that "…..adjudicatory function of the Speaker or Chairman is by itself invalid on grounds of political impartiality and bias." The court subsequently ruled that it is inappropriate to express distrust in such offices and an individual residing and exercising duty in such an office must take necessary precautions on matters of defection. 'Aaya Ram, Gaya Ram' is a phrase which continues to climb the ladder of infamy in India's political sphere. This phrase became popular after a Haryana MLA Gaya Lal changed his party thrice within the same day in 1967. The anti-defection law was

[72] *Ibid.*
[73] AIR 1993 SC 412.

introduced to curb such political defections but still comprises of many lacunae which remain unresolved.

The distrust in the office of the Speaker has been proved to be accurate with the way elections have unfolded in our nation post- Nehru governance. A classic example of the tussle between the legislature and the judiciary can be portrayed through the Manipur Legislative Assembly case[74]. In this case, the Speaker of the Manipur State Assembly had disqualified several MLAs under the anti-defection law. The Supreme Court had set aside the order of disqualification passed by the Speaker which the latter refused to obey or co-operate with. The Speaker contested that the order passed by him was immune from the scrutiny under judicial review. This resulted in the passing of contempt proceedings against him under which he was forcefully produced before the court. The votary role of the Speaker was clearly proven and displayed in this case. The focus of such a power in the hands of the Speaker is uncharacteristic. In our current democracy where the Speaker is elected based on his partisan role due to the majority gained by his political party, such focus of power must be avoided. Such authority must either vest with the Election Commissioner or the President of the country to decrease the wariness expressed by the members of the legislature. In *Jarkiholi v. BS Yeddyurappa*[75], it was held that the office of the Speaker insofar as the powers vested with it for the purpose of anti-defection is quasi-judicial and is thus subject to judicial review. In the said case, the Speaker acted on the basis of a presumption that the allegations were proved in spite of any corroborating evidence (allegations were deemed as proved simply because they weren't denied), even the manner in which a show-cause notice was issued to the alleged 13 MLAs was violative of the Rules of Disqualification. The Supreme Court held the following: "the proceedings conducted by the Speaker on the Disqualification Application filed by Shri B.S. Yeddyurappa do not meet the twin tests of natural justice and fair play. The Speaker, in our view, proceeded in the matter as if he was required to meet the deadline set by the Governor, irrespective of whether, in the process, he was ignoring the constitutional norms set out in the Tenth Schedule to the Constitution and the Disqualification Rules, 1986, and in contravention of the basic principles that go hand-in-hand with the concept of a fair hearing."[76]

[74] AIR 1993 SC 1873.
[75] Civil Appeal Nos.4444-4476 OF 2011.
[76] *Ibid.*

The major flaw in the anti-defection law is that the defected ministers have no qualms about contesting under the symbol of the new political affiliation again. This displays the lack of accountability and earnestness on the part of the elected representatives.

Constitutional conventions plays a pivotal role in the smooth functioning of a democracy. These are usually not codified and followed by the political leaders due to the sense of duty owed to the public. It is generally adhered to due to the long following tradition and the value of such conventions are naturally minimized due to codification. The most crucial predicament India faces today is that the scope of constitutional conventions. These conventions expect the Speaker of the House to be free from discrimination and biasness as the office so presided by him demands. 'To act in good faith' has been overshadowed by 'to act in party's faith'. The presumption of impartiality by the Speaker gives rise to another hurdle as they are often against judicial review which is part and parcel of Constitutionalism. A definitive example of this would be the Uttar Pradesh Assembly Elections in the year 2003[77]. This case is also a classical example of the withering relation between the legislature and the judiciary. Out of 109 MLAs of the BSP in the Uttar Pradesh Assembly, 13 MLAs defected on 27th August, 2003 and supported Mulayam Singh Yadav's party. BSP's house leader implored the Speaker of the House to disqualify the defected MLAs under the anti-defection law on 4th September, 2003 as the required number was lesser than 1/3rd of the party. Subsequently, on 6th September, 2003, another set of 23 MLAs defected from the party while pleading the Speaker to recognize the split in the BSP. A clear misuse of power can be elucidated in this case when the Speaker clubbed both the defections together and acknowledged the split in the party. This act is seen to clearly defeat the constitutional convention where the Speaker had to decide both cases of defections separately. In the Allahabad High Court, the Speaker's order was challenged and by a majority in the court, the case was decided in the favour of the petitioner. The court clearly stated that, "the Speaker (MR. Kesrinath Tripathi) was wrong in deciding the issue of recognition of split by 37 MLAs, first before deciding the issue of validity of departure of the original 13; and that the decision of the Speaker stood squashed but the court directed the speaker to reconsider the question of defection raised by the writ petitioner (BSP) in the High Court." Two writ petitions were filed in the Supreme Court following the order passed by the court. First petition was filed by the defected 37 MLAs on the grounds of setting aside the order of the Speaker. The second one was filed against the court for not disqualifying all the 37 MLAs and diverting the matter back to the Speaker. On 14th February, 2007, the apex court

[77] *Rajendra Singh Rana v Swami Prasad Maurya*, 2007 AIR SCW 145.

disqualified the 13 MLAs who held ministerial position and also upheld the decision of the Allahabad High Court on quashing the order of the Speaker. The Supreme Court dismissed the petition filed by the 37 MLAs which became indicative of the ruling on disqualification of all 37 MLAs. Even though the court succeeded in delivering the decision in accordance with the anti-defections laws, the pitfall was the time duration in which it was delivered. The verdict came at the periphery end of the tenure of the government. The government continued to be in power due to the inordinate delay in the verdict by the apex court. The very establishment of the Mulayam Singh government as the party in power was unconstitutional.

Such a hindrance gives rise to the question of the efficacy of the judiciary in successfully resolving issues concerning defection disputes. The futility of judicial review in such cases can be proven when verdicts are passed after a needed time frame. The Mumbai Municipal Corporation Election in 2002 is one such example of the futility of judicial review. Rajendra Kale was elected as the nominee from the Congress party from a ward reserved for other backward classes. It was subsequently found that his caste certificate was fraudulent and was therefore, disqualified in December 2006. This delay reflects upon the loopholes in the anti-defection law which need to be addressed. As per law, the disqualified candidate cannot contest elections for the next six years but his appeal to the division bench gave him the unfair opportunity of contesting in the 2007 elections again. The unwarranted tardiness in such matters bring forth the question of the reliability over the validity of anti-defection laws and the role of judiciary in it. There is also another side to the same coin were a person may be disqualified due to prejudices and providing justice would again be a prolonged process. This is one conclusion one can draw after reading through the anti-defection laws, and that is the party leader's whimsical power. They may become erratic and expel a member from the party leading to his disqualification. Judicial review in such a case may be long over-due resulting in injustice being done to the disqualified minister or representative. There have been instances where the role of the judiciary was completely absent when it was in reality required. Split in the party after the elections is not a ground for disqualification under the anti-defection law given that the split is not less than $1/3^{rd}$ members of the original party. In order to expel the V.P. Singh government in 1990, MP Chandra Shekhar along with 61 MPs left the government to form another government. This wholesale defection was termed as a split and did not extract any penalty under the anti-defection law as $1/3^{rd}$ of the party renounced their alliance with their government. It is quite ironical where the Rajiv Gandhi government introduced such a law to avoid making a mockery of the democracy and provide stability, but resulted in them

supporting the above mentioned split. In such an instance, judiciary hands are bound by the separation of power mechanism attempted to be followed in our country.

Despite the addition of an additional schedule in the Constitution and various verdicts by judiciary, the anti-democratic elements inducted by the politicians still continue to threaten our democracy. The Election Commission of India needs to play a more stringent role in administering election related activities even after the elections are contested. The constitutional set-up of checks and balances in our country is greatly disturbed when one wing tries to overpower the jurisdiction of the other wing. Another case which again reflects the undermining of the power and jurisdiction of the judiciary is the 2009 Harayana elections. In this particular case, the Supreme Court referred to a larger constitutional bench, whether two expelled MPs of the Samajwadi Party can be disqualified under the anti-defection law, if he defies the party whip. The matter was left pending till August, 2012. This again is clearly indicative of required changes and reforms under the anti-defection law. The judiciary has time and again proved that the constitution of a separate body to handle such cases has become even more crucial in order to protect the democracy and constitutionalism in our country.

RECOMMENDATIONS AND SUGGESTIONS

The anti-defection law is condemned on the argument of the law impairing the parliamentary form of democracy as guaranteed in the Constitution of India. The judiciary which is regarded as the guardian of the Constitution, fails to protect the integrity of both the judiciary and the Constitution. Certain amendments to the anti-defection law has become incumbent in order to safeguard the interests of the citizens and the constitutional principles enshrined. After a thorough research in this area, the recommendations stated are as follows:

- It is necessary to address the issue of the wide powers granted to the Speaker/Chairman in matter of disqualification. Concurring with the 170th Law Commission Report of India, such authority must be granted to an impartial and unbiased body or office. The inclusion of paragraph 6 under the tenth schedule has become a method through which the Speaker misuses his power and authority to decide matters in his party's favour, playing a partisan role. In *Mayawati v Markandeya Chand & Ors*, the Speaker's decisions was challenged as being unreasonable claiming that the Speaker had let to the undue delay in the disqualification proceedings. The court rejected the petition and refused to overturn the order by the Speaker. Such cases become the reason behind the weakening

of trust in the Office of the Speaker. On the decision of disqualification given by former Speaker Shivraj Patil on 1st June, 1993, he fittingly noted that:

"Since Speakers in India are, after all, party members, they should not be burdened with the job of pronouncing on the membership of their fellow members. Whatever they decide, motives would be imputed to them."

- The 170th Law Commission Report recommends the powers of the Speaker in deciding disqualification of defecting members should be vested with either the President or the Governor. However, even the President or the Governor is not stripped off their party affiliations. Therefore, it is recommended that the powers to determine disqualification of members on ground of defection should be vested with the body of the Election Commission. Some of the primary functions of the Election Commission are:
  - Free and fair elections
  - Implementation of model code of conduct
  - To regulate and monitor the functioning of all political parties in elections
  - To introduce electoral reforms in consultation with all concerned stakeholders.

Keeping these functions in mind, the Election Commission is the pertinent body in dealing with quasi-judicial functions concerning decisions of disqualification on ground of defection.

If the recent conduct of the Governor of Maharashtra in the Maharashtra State Legislative Assembly elections is examined, one can conclude his votary role during the formation of the government.[78] The Election Commission also has an advisory jurisdiction in election matters but the President has the power to decide matters of disqualification of members. The partisan role of the President continues to remain, therefore, it's reasonable that the Election Commission, which is an independent body, be directly approached in deciding matters of disqualification. The decisions of the Election Commission in the matters of disqualification is subject to judicial review as already laid down. The Election Commission, in its Report on Proposed Electoral Reforms (2004) also observed the same:

"All political parties are aware of some of the decisions of the Honorable Speakers, leading to controversies and further litigations in courts of law. The Commission sees substance in the (above) suggestion that the legal issues of disqualifications under the Tenth Schedule should

[78] The governor refused to extend the deadline for formation of the government as requested by Shiv Sena. On the other hand, the governor recommended the application of President's rule in the state. In a sudden change of events, the governor invited the BJP to form the government even without having a proof of a majority.

also be left to the President and the Governors of the States concerned, as in the case of all other post-election disqualifications of sitting MPs, MLAs and MLCs, under Articles 103 and 192 of the Constitution. In the case of disqualifications under the Tenth Schedule also, the President or the Governor may act on the opinion given by the Election Commission."

- The right to abstain from voting or voting contrary to the party's whip should not be a ground for defection lest it curbs the freedom of speech and expression of a member of the House. Dissent is the essence of democracy. Such powers vested with the leader of the party is subject to misuse. To simplify such a procedure, the process of voting for a bill should be made anonymous so that members are able to express their views without fear of defection from the party. However, this cannot be made applicable during a vote of proving confidence on the floor of the House.

- There is a need to redefine defection. Defection has been misunderstood as any member of the House withdrawing support of the elected Chief Minister or Prime Minister, where such member has lost confidence. As stated earlier in *Jarkiholi v. BS Yeddyurappa,* dissent in the party is not synonymous with dissent against the Chief Minister. Such narrow interpretation of defection has led to exercise of arbitrary powers in disqualifying members.

- More often than not, cases of members withdrawing support of the government has been owing to the fact that these members were not allotted any ministry by the party. To curb this practice, we recommend a limit of 10%[79] of the total strength of the House. This will keep the size of the ministries in check, disallowing ministerial berths to be held out as douse to silence dissent.

- Concerning the role of the judiciary in speedy disposal of defection petitions, a time limit must be adhered to which must not exceed one year in deciding and disposing off the case based on the findings made by the Election Commission. Moreover, vesting quasi-judicial powers with the Election Commission will reduce the burden on the apex level courts. The same has been reiterated in the most recent judgement of *Keisham Meghachandra Singh vs The Hon'ble Speaker Manipur & Ors*[80] , where the court has explicitly stated that an

[79] Recommended by NCRWC.

[80] SLP (CIVIL) No.18659 of 2019; CIVIL APPEAL NO. 547 OF 2020 (SC).

impartial tribunal needs to be set up under the Tenth Schedule of the Constitution of India concerning anti-defection petitions. The court suggested that the tribunal must be headed by a retired Supreme Court Judge or a former High Court Chief Justice. The court has also gone on to state that the Speaker of the House must decide disqualification of a member within a "reasonable period" which has been equated to within three months by the court.

CONCLUSION

The judiciary and the Speaker have widened the discrepancies due to their functioning and misuse of power respectively. The anti-defection law has, in fact several loopholes, which threaten to deprave or corrupt the democratic fabric of our polity. However, apart from the aforementioned recommendations, political parties across the system need to rise above factional politics and make conscious efforts to make electoral politics transparent and democratic.

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(5)

SECTION 377: THE UNHEARD VOICES STILL EXISTS!

Burra Bhavya Sri Goud[1]

Akshita Kesharwani[2]

INTRODUCTION

India having a population of 1.324 billion, of the 5 million are separated as transgender[3], which amounts to around 0.37% of the Indian population. LGBTQ+ community is the umbrella term of the people who are different in aspects of gender, sexual orientation, and interests. The acronym LGBTQ+ stands for lesbian, gay, bisexual, transgender, queer community and the first time was used in the United States of America. This term started to be in use from the mid-19th century. The Mattachine society[4] is the 1st national gay rights organization started by Harry Hay[5] in 1951. Around the same time, the rainbow-colored flag gained importance as the symbol of the gay community, which is designed by Gilbert Baker, Artist of San Francisco, replacing the darkness of the pink triangle which was prominent at that time. In the early period, people thought that the people who are different from usual beings i.e. LGBTQ+ are considered as a curse to society. Rights of LGBTQ were not recognized in many countries, their struggle for equal rights and movement has been seen in several countries at the International level.

LGBTQ+ ON INTERNATIONAL PLATFORM

After several years of humiliation, abuses and many more, this indirectly led to the movements for the rights of the LGBTQ+ community. Some of the famous movements are stonewall riots, pride movements, the national gay rights movement, etc. After so much effort, and long struggle, rights of LGBTQ+ were supported and recognized in some of the countries in India, Taiwan, etc. Homosexuality was decriminalized in the UK by sexual offenses act, 1967. LGBTQ+ decriminalized in around 125 nations like Argentina, Australia, Belgium, Brazil, Canada, Denmark, Ecuador, France, Germany, Ireland, Luxembourger, Mexico, New Zealand,

[1] BA LLB (2019-24), Alliance School of Law, Alliance University, Bengaluru, Karnataka
[2] BA LLB (2019-24), Alliance School of Law, Alliance University, Bengaluru, Karnataka
[3] Mathur, Tasha (2018), Tritiya Prakriti: the hidden third gender in Hinduism, available ar URL:https://www.pinknews.co.uk/2018/03/06/tritiya-prakriti-hinduism-hijras/
[4] One of the earliest American gay movement (or homophile) organizations, the Mattachine Society began in Los Angeles in the winter of 1950. It was formed by Harry Hay, a leading gay activist, and former Communist Party member, along with seven other gay men.
[5] He is one of the prominent gay group activists in America and also part of gay movements.

Portugal, Spain, Taiwan, UK, USA, South Africa, etc. The countries in which it's not decriminalized are mostly Commonwealth countries.[6]

The LGBTQ+ liberation movement which was sparked by the 1969 stonewall riot in Newyork city has led to decriminalize homosexuality in many countries yet 36% of countries need to decriminalize. In around 11 countries the death penalty is imposed for being homosexuals, which amounts to 6% of the world. In 27 of 71 countries, homosexuality is illegal to subject to only men[7].

Initially, homosexuality was criminalized under Britain's Buggery Act of 1533[8] which was drafted in the time of Henry IV[9]. This was the first law that brought the sodomy law from the court of the church to state. Later, the act was abolished but it took many twists and turns in enlightening the people. Even today, some countries like Sudan, Yemen, Saudi Arabia, Nigeria, Pakistan, Afghanistan, UAE, Qatar, Iran, Iraq, Syria imposes the death penalty for homosexuality. Recently, some countries like Indonesia, Jordan, Japan, India, Austria, etc. have decriminalized homosexuality. Despite India decriminalizing homosexuality, it abstained from voting in favor of LGBTQ rights at the United Nations Human Rights Council[10]. However, we have to trace back to the 15th century to know the evolution of LGBTQ+ rights and legal provisions.

LEGAL PROVISION RELATING TO LGBTQ+

Evolution of Section 377: Its Process of Decriminalization

The etymology of the word buggery comes from the French term 'Bourges' which means anal intercourse. The Buggery Act was drafted in 1533 in the period of King Henry VIII[11] which punishes people with death punishments, who are involved in doing buggery (anal intercourse) with human (male and female) or beast, which is despicable and detestable. This law was temporarily for one year later extended to two more years. In 1541, the Buggery Act has become permanent. Overall, this law prevailed for 300 long years in the UK. This law is the

[6] An association comprising the United Kingdom, its dependencies, and many former British colonies that are now sovereign states, including Canada, Australia, India, and many West Indian and African countries. It was formally established by the Statute of Westminster in 1931.
[7] C Srravya (2019), LGBT rights across the world: Progress achieved in 50 years, available at URL: https://www.thehindu.com/news/international/state-of-lgbt-across-the-world-2019/article28075901.ece
[8] The act drafted in the UK criminalizing homosexual relationship.
[9] King Henry IV of France, the first monarch of France's Bourbon Dynasty
[10] The UN body, whose delegation is to uphold and protect human rights across the world.
[11] King Henry VIII was crowned King of England in 1509

foundation for the establishment of the legal system in the UK and colonies of the UK in the African continent.

Later the Buggery Act was replaced by “The offenses against the person act 1828"[12] which imposes capital punishments on individuals who perform assault, battery, rape, infanticide, attempted murder till 1861. Buggery Act is also known as ‘lord Lansdowne’s act’. Sir Robert peel[13] who introduced this made sure that almost all criminal offenses are governed by the government. Historian Gregory smith viewed this act as "the first truly comprehensive piece of legislation designed to address interpersonal violence in British society”[14]. Offenses against persons act have fuelled budding reformist attitude toward interpersonal violence. Some of the magazines objectified this act as the law governing assault describing the possible consequences as terrifying. This act has made poor to access the law and justice regarding any small assaults. Hence this act represented the moment of transition in its perception of the legal code as a means of reforming the modern habits of nation and in its heightening of punishments for interpersonal violence.

SECTION 377- PROCESS OF DECRIMINALIZATION

Since the 1860s some changes have been noticed in the colonial era, India was one of the colonies of Britishers. To avoid the corruption and to correct the native customs of Christians, they introduced section 377 in 1861 modeled on basis of "The Buggery Act 1533" i.e. it criminalizes the sexual activities "against the order of nature"[15]. During the 1990s, an organization named AIDS bedhbhav Andolan prepared some documents describing the plight of gay people, discrimination faced ones affected by AIDS and the hardships & violence faced due to government officials. Even the demand for removal of this section made that time.

In 2001, LGBTQ+ and Naz Foundation[16] file a PIL (public interest litigation) regarding making section 377 unconstitutional[17]. In 2004 the case was dismissed saying there is no cause for the action. In 2006 Naz Foundation filed a special leave petition (special permission taken to be heard against high court/ tribunals regarding the appeals. Then home ministry of India files an affidavit making a demand for decriminalizing of homosexuality. In 2009 the judge decides to

[12]Lisa Surridge(2013), on offenses against persons act, 1828, available at URL:https://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offenses-against-the-person-act-1828
[13] A British conservative nationalist, who had served as prime minister twice from 1788 to 1850.
[14] Lisa, 2013
[15] Section 377 of Indian penal code.
[16] A non-government organization which works for HIV/AIDA and sexual health.
[17] Naz foundation vs. Government of NCT (160 Delhi Law times 277).

strike down section 377 as some fundamental rights which include equality, life, and freedom were violated. But, it was challenged by Suresh Kumar Koushal[18]. In 2013 the Supreme Court overturns the previous court decision and quotes that there is no unconstitutionality. In 2016, Navtej Singh Johar[19] filed a case challenging the section 377 of IPC. Later, the Supreme Court decides that privacy is a fundamental right which even includes sexual orientation in Puttuswamy case[20]. Hence, as per the judgment given in 2018, homosexuality is decriminalized by scrapping the section and the judges out looked it as the irrational, indefensible, and manifestly arbitrary.

Hence, in this way, the very long struggle by the LGBTQ+ community ended happily. Judgment on section 377 is considered as a milestone in Indian history. The acceptance of society may take time. Even the laws that protect them need to work effectively.

In the landmark judgment regarding LGBTQ+ community i.e. "*Navtej Singh Johor vs. Union Of India*", the main issue for filing was regarding rights of LGBTQ+ which includes fundamental rights that every individual has a right to enjoy which are: article 14, article 15, article 19, article 21 and article 25. The writ petition was filed by Navtej Singh Johor, a dancer.

The judgment is given by a panel of 5 member judges. The judges considered that one's dignity can't be violated by the fact that they belong to the LGBTQ+ community. Even their right and freedom to express their identity, individual liberty can't be violated.

> "…. Constitutional morality should prevail over social morality. It should rely on principles of transformative constitutionalism and progressive realization of rights to hold that constitution must guide society's transformation from archaic to pragmatic society…." By CJI Dipak Misra and Justice Khanwilkar.
>
> "…Victorian morality, "has long gone" there is no reason for the continuation of the law. He asked to publish this judgment widely to eliminate the stigma faced by LGBTQ+ community …." by justice Nariman.
>
> "…homosexuality is not an aberration but variation of sexuality. The right to privacy extends to spatial and decisional privacy. History owes an apology to members of the LGBTQ+ community and their families for the delay in providing redress for ignominy and ostracism that they have suffered through the centuries" by justice Indhu Malhotra.
>
> "…its effect was to efface identities of the LGBTQ+ community. If section 377 continues to prevail, the LGBT community will be marginalized from health services

[18] Suresh Kumar Koushal v. Naz Foundation (Civil Appeal No. 10972 OF 2013)
[19] Navtej Singh Johor,Indian Bharatnatyam dancer, choreographer.
[20] Puttuswamy v.s. Union Of India (writ petition (civil) no 494 of 2012).

and the prevalence of HIV will exacerbate. Not only must the law not discriminate against same-sex relationships, but it must also take positive steps to achieve equal protection and grant community equal citizenship in all its manifestations…" by justice Chandrachud.

Hence these are the following statements given by the judges explained and tried to eliminate the stigma about the LGBTQ+ which was in a complex situation with regards to homosexuality. However, the behavior of society still not change and didn't accept them. Even after decriminalizing, society is not so successful in accepting it as their behavior in society is having a negative image. There were some laws made regarding them but still there exists major discrimination. Most parts of India follow old school in traditions, customs, patriarchal society…. etc. because of the stereotypical and the orthodox people who are denying to change their school of thinking, homosexuals are not getting accepted and still facing discrimination and inequality.

Hence both after and before the judgment of the court, the conditions were the same, as before the homosexuals were not accepted by the society and now even it was decriminalized by the court, which led to the non-discrimination from their rights which they deserve.

LGBTQ+ Issues in India

Homosexuality was prevalent in India from historical time. Around the 4th century, *Kamasutra*[21], the sacred text has categorized person who desires for a person of the same sex are considered as *Tritiya Prakriti*[22] or third nature, which is subdivided into males and females. Most of the modern Hindus are benighted of this rich history and blamed on the west. Around the 19th century, Thomas Macaulay made section 377 modeled based on "The Buggery Act of 1533". Before 2018, Section 377 criminalized homosexuality, and anything against the order of nature which is termed as "unnatural offenses" in the Indian constitution. Finally, 20 long years of struggle resulted in 6 September 2018 Supreme Court in "*Navtej Singh Johar vs. Union of India*"[23] case decriminalized section 377 which was considered as a landmark judgment in

[21] The Kama Sutra is an ancient Indian Sanskrit text on sexuality, eroticism and emotional fulfillment in life.

[22] The idea regarding Tritiya Prakriti goes back to an ancient story which tells that Brahma(the creator god) have decided to create man and women in a body proving both sets of organs for reproduction. By this one can be self-sufficient and produce offsprings independently. But lord shiva opinioned the ultimate bliss can be attained only by uniting a man and a female. So Brahma changed his plan and created a girl. Then Brahma became blissful after lusting her. So he was unsuccessful in his first plan as he got too tempted to the girl. So the one having a unique power of transforming from the man to women possessed by the third gender only, which is to bequeath with the blessings on a fortunate occasion.

[23] Navtej Singh Johar vs. Union of India (2018) 1 SCC 791.

India for transgender rights. But, their marriages are still considered illegal. The people from this community can't adopt, vote, no equal restroom access, etc. After facing many insults, they finally got their identity in society and got legally recognized that they thrived for a very long time. Even though their discrimination did not end, but their pride parades are increasing day today. Section 377 includes bestiality, sodomy, buggery, and incest, which terms people who are having the same-sex relationship as unnatural and against an order of nature.

ROOTS OF SECTION 377

According to the Indian Penal Code, section 377 is defined as, "unnatural offenses- whoever voluntarily has carnal intercourse against the order of nature with any man, women or animal, shall be punished with 1[imprisonment for life] or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine."[24]

Section 377 was drafted by Thomas Macaulay[25] around 1838. At that time the people who had different sexual orientations from normal people are considered abnormal and were punished brutally by imprisonment, death penalty or boycotted from society. Even though the act from which it is taken is abolished, but this section still exists in India. The main ideology behind not scrapping this section is the stereotypical ideology of people on sexism and fear of non-continuation of their lineage. This provision was based upon the moral and ethical standards of Christians and Judaists. Even Mohandas Karamchand Gandhi[26] was not in favor of decriminalizing gay sex.

LGBTQ+ community people are partially denied having fundamental rights like- "equality before the law"[27], "to express one's identity through speech and choice of sexual/romantic partner"[28], "right to privacy"[29]. All these were challenged many times in the court but finally got succeeded in 2018. For the first time, voice to repeal this section in public was done as a successor of protest on police harassment i.e. AIDS Bedhbhav Virodhi Andolan.

[24] Explanation: to constitute an offense as of section, needs an act as carnal intercourse, penetration is enough.
[25] Thomas macauly, british historian, essayist and secretary at the war of great Britain.
[26] Mohandas Karamchand Gandhi was born to a Hindu family on 2nd October 1869, in Porbandar, Gujarat, India. He was the leader of India's nonviolent independence movement against British rule.
[27] Article 15 of Indian constitution
[28] Article 19 of Indian constitution
[29] Article 21 of the Indian constitution.

RIGHTS OF LGBTQ+ IN THE CONSTITUTION OF INDIA

Right to Equality

The constitution of India state that every person should be treated equally before the law and should be given equal protection before law[30], this even allows the individuals to do a distinction but it should be easily understood should have rational reasoning for the distinction. The difference between the people should not be identified by that gender which is in order of nature or against the order of nature.

Right against Discrimination

In the Indian constitution, there is a provision for the protection of the individual against the discrimination on basis of sex, caste, creed, religion, etc[31]. after striking down of section 377 the Supreme Court widened the concept of the role of sex by adding the sexual orientation. Because of the amendment, now the discriminating individuals based on orientation is against the rule of law.

LGBT activist Gautam Bhan expressed that "It clearly states that discrimination against an individual based on sexual orientation is deeply offensive to the dignity of the individual. We hope that this will reinforce the Delhi High Court judgment in the Naz Foundation case as the correct constitutional position,"[32]

Right to Privacy

This provision is covered under Article 21[33]. As there are various interpretations of this article by the apex courts such as the right to live with dignity, the right to autonomy…so on. Denial of this right violates the fundamental and constitutional rights of the individual.

Right to Freedom of Speech and Expression

Under article 19, freedom regarding speech and expression is described. In the recent Supreme Court case of "*Navtej Singh Johor vs. union of India*"[34], the plaintiff challenged that an individual should have a right to freedom regarding speech and expression about their sexual

[30] Article 14 of part III
[31] Article 15 of part III
[32] The Hindu (2017), LGBT community cheerful after the right to privacy ruling, available at URL: https://www.thehindu.com/news/national/lgbt-community-cheerful-after-right-to-privacy-ruling/article19555773.ece
[33] Right to life and personal liberty.
[34] Navtej Singh Johar vs. Union of India (2018) 1 SCC 791.

identity and orientation. And that apex court considered this and amended the constitution of India.

Socio-Legal challenges

There are so many questions raised regarding the equal rights experienced by everyone in our democratic country and the answer is no. LGBTQ+ community is the community that was deprived of its rights. The historic judgment made on 6 September 2018 by the five-judge bench of chief justice Dipak Misra and justices Dhananjaya Y. Chandrachud, Ajay Manikrao Khanwilkar, Indu Malhotra, and Rohinton Fali Nariman Constitution Bench of the Supreme Court in scrapping the provisions of Section 377 and decriminalizing consensual same-sex relations and said that "The Government must give wide publicity and government officers should be sensitized on LGBTs," Justice DY Chandrachud. Also, Justice Indu Malhotra said, "History owes apology to the LGBT community for their sufferings."

The honorable judges gave some of the powerful words which will go down in history. When the judgment came, it had been an emotional moment for one who is of its support because it had been a struggle to get their rights recognized rather humiliations faced in their entire lifetime. The LGBTQ+ community struggled in experiencing some of the fundamental rights such as the right to equality under article 14, right against discrimination under article 15, right to privacy and right to freedom of speech and expression which are mentioned under article 21 and 19 respectively.

There are tons of changes that have been done, the most important is, LGBTQ+ community people are now more confident about themselves. Many individuals are now ready to find the courage and come in front to discuss their identity with parents and peers.

As of 'politics and society between elections 2019'[35] report, the Indian society is still old-fashioned regarding the acceptance of same-sex relationships.

According to a report titled 'Politics and Society Between Elections 2017-19', published by the Azim Premji Foundation and Lokniti, CSDS, the Indian society is still conservative about the idea of accepting same-sex relationships.

[35] Lokniti, center for the study of developmental studies (CSDS) and Azim Prem Ji Foundation published this report.

As per the report of 'Politics and Society between Elections 2017-19', published by the Azim Premji Foundation and Lokniti, CSDS[36],

> "The greatest support to the LGBT+ relationships came from Uttar Pradesh - nearly 36 percent of respondents in the state agreed that the sexual relationship between two men or women should be accepted by society. Uttar Pradesh is followed by Delhi and Tamil Nadu where 30 percent of respondents showed acceptance to the LGBT+ community. Around 87 percent of respondents in Mizoram strongly disagreed with the acceptance of the LGBTQ+ community in the society, followed by Nagaland (63 percent), Jammu & Kashmir (63 percent) and Kerala (58 percent). Maximum respondents from West Bengal expressed no opinion on the acceptance of same-sex relationships. Six out of every 10 respondents in West Bengal did not express any opinion on the acceptance of homosexual relationships. West Bengal is followed by Assam (over 40 percent), Punjab (39 percent) and Tripura (37 percent) who did not express any opinion on homosexual relationships."

State-wise Statistics show huge inter-state variations while accepting/rejecting homosexual relationships. Sates like Uttar Pradesh, Tamil Nadu, and Delhi have shown their higher acceptance while Mizoram, Nagaland, Jammu and Kashmir and Kerala were the states that showed rejection to same-sex relationships.

People of the LGBTQ+ community faces extortion and blackmailing so fears to come out and file a case as it may reveal their identity to the whole world. And police file these cases as robbery. It lays the undue influence of the biological family in trans-people's lives. It fails to recognize different family structures—it dismisses, however, the *hijra* or *jogta* and such communities have contended larger and additional positive roles in trans-people lives. Biological families, at their core, stay mostly abusive and orthodox for several trans-people folks.

The law-making of mendicancy, and also the opposing Trafficking Bill (which prohibits sex work) takes aloof from trans-individuals' ways of monetary sustenance that have preponderantly been the sole ones with any security for the community. The Bill just brushes upon the concept of social action be it in health care, employment, education or access to public goods. This can be the Bill's loophole. It provides no real remedy or mechanism to integrate trans-individuals into public areas and improve the standard of their lives. The anti-discriminatory policy spoken within the Bill doesn't have any real consequences, as there's no

[36] Nikhil Rampal(2019), Section 377 anniversary: Half of the country still doesn't approve of same-sex relationships, available at URL: https://www.indiatoday.in/diu/story/section-377-anniversary-same-sex-relationships-1596408-2019-09-06

concrete recognition of discriminatory acts against trans-folks[37]. With this Sand lack of any affirmative provisions, the Bill is miles far from recognizing this community as marginalized and undoing this marginalization.

And lastly, the Bill doesn't take into consideration any of the suggestions created by NGOs, Community Based Organisation (CBO)[38], activist bodies, and alternative teams that grew out of private experiences and collective support.

LGBTQ+ community faces a lot of hardships in day to day life. It includes bullying, harassment, abuse, torture, unemployment, poverty, lack of health care and social acceptance. Today they are acceptable by society but their struggle is still in continuity.

Laws related to the LGBTQ+ community are:

Laws relating to the LGBTQ+ community: the constitution of India provides some protection to the LGBTQ+ community i.e. third genders to protect the interests of the people. Over a period of struggle in the decriminalization of homosexuality, many laws were changed in the period.

Army Act, 1950, Navy Act, 1957 and Air Force Act, 1950:

The military law is so stringent. The homosexuals or third gender individuals are not eligible in the recruitment of the military. An effort to include these people was made but it turned out to be futile. The homosexuals or third gender individuals are ineligible to be part of the military. An effort to amend the change in the laws has become a futile effort.

Lt Gen Ashwani Kumar said, "the Army will abide by the law of the land" but "something legal may not be ethical, and vice-versa," he added[39]

There is no allowance of individuals other than females or males. A bill was introduced in the parliament to change the guidelines and include the secluded class people in serving the nation. But the bill never got the proper majority. Under article 46 of the Army Act, punishment is allotted up to 7 years, it was in practice since May 20, 1950. Then article 46 was removed and was legalized on May 20, 1950, it continued till September 19, 2018. At that time

[37] Synonym for trans-gender.
[38] A non-profit group that works at the base level of the village, city, etc. for improving the lives of residents.
[39]unknown(2019), Won't tolerate adultery, homosexuality: Army, available at URL:https://timesofindia.indiatimes.com/india/army-will-not-tolerate-homosexuality-adultery-in-its-ranks/articleshow/71840741.cms

homosexuality was also made legal, but the current status of homosexuals serving openly in the Indian military is illegal.

Parenting/Adopting

This act is applicable all over India. This act can be used in both- protection of children and in punishing them in case of any wrongdoings. Under this act, only the concept of adoption lies**.** According to IPC adoption means " process through which the adopted child is permanently separated from his biological parents and become a legitimate child of his adoptive parents with all rights, privileges, and responsibilities that are attached to the relationship"[40] The constitution does not mention about disallowing the adoption by same-sex couples. But single LGBT's are not barred from adopting children. Nevertheless, the Central Adoption Resource Authority (CARA)[41] prevents foreigners in same-sex relationships from adopting.[42]

According to Indian laws, marriage is the only legitimate form of expressing the emotional and monetary dependency. So the rights of the individual regarding adoption to same-sex couples are closed off.

Voting Laws

The Indian constitution provides individuals to vote under Article 326. According to article 326 of the constitution,

> ".....every person who is a citizen of India and who is not less than 21 years of age on such date as may be fixed in that we have by or under any law made by the appropriate legislature and is not otherwise disqualified under this constitution of any law made by the appropriate legislature on the ground of non-residence, unsoundness.....it is, therefore, proposed to reduce the voting age from 21 years to 18 year"

In this law, there is no mention that the persons who are not straight can't vote. India abstained from the UNHRC resolution regarding providing votes for the LGBTQ+ community. After the legalization of homosexuality, a bill was introduced regarding providing voting rights, but it is not yet accepted.

[40] unknown(), adoption available ar URL: http://www.hellocounsel.com/adoption/

[41] Statutory body of the ministry of women and child development. It mainly regulates adoptions within and outside India.

[42] Dhamini Ratnam(2014) Adoption by same-sex couples may be barred, available at URL:// https://www.livemint.com/Politics/J3opALtv29XMrLV6keC2lO/Adoption-by-samesex-couples-may-be-barred.html

Right to Marry

According to marriage acts in India, the marriage between consent adults is considered as valid. But for the first time, the marriage between the cis-genders is made official upholding their marriage[43]. But the certificate regarding registering their marriage needs to go through many hurdles and doesn't get proper recognition too.[44] When the case was dealt with by the madras high court, then it defined that in "the Hindu marriage act 1995", the term 'bride' also means the transsexual.[45]

Workplace Laws

The company needs to give equal importance and treatment to everyone irrespective of gender like discrimination in workplace laws and maternity benefit laws. But they are failed in the account of the LGBTQ+ community. Even the sexual harassment at the workplace act of 2013 doesn't considers homosexuals. The parliament of India has introduced a bill-Lok Sabha bill which even includes the ensuring of employment to the trans-community.

Surrogacy Law

The surrogacy bill excludes the LGBTQ+ community. Couples can enable the legal right of right to surrogacy only when they are married for 5 years. The exclusion of the LGBTQ+ community from using this legal right is very stringent. Anant Bhan[46] said "… Regulation is much required, but the bill in its current form is quite problematic. The focus on heteronormative couples discriminates against single people, same-sex couples. This, despite the recent Supreme Court judgment."

Property Laws

Inheritance of property is protected under the Hindu succession act, 1956 in which it is mentioned that the property can be inherited by a widow, when her husband dies or a husband when his expires. The terms used in the act puts put away the homosexuals out of view. Hence

[43] unknown(2019), In a first, marriage between man, transwoman set to be registered available at URL:https://www.thehindu.com/news/national/tamil-nadu/in-a-first-marriage-between-man-transwoman-set-to-be-registered/article27190396.ece
[44] Ibid.
[45] Arunkumar vs the inspector general of registration. [WP(MD)No.4125 of 2019 and WMP(MD)No.3220 of 2019]
[46] Anant Bhan. A physician. Has mastered bioethics in medical science from university in Canada.

in this way, in every law related to inheritance or holding of property, homosexuals are not included.

Same-sex Marriage

The current position of same-sex marriage in India is illegal since December 10, 2013, and this is the reason for the formation of a homosexual union. From July 22, 2011, to December 10, 2013, same-sex marriage was not clear because officially female-female marriage was seen. From December 10, 2013, to September 9, 2018, same-sex marriage was seen varying from region to region but civil union[47] legalization is pending. It was the first time when Gurgaon court recognized lesbian marriage, even though having a husband. The married woman married another woman and the family is not ready to accept the marriage.

Conversion Therapy

Although Conversion therapy[48] in India is not banned but is strongly criticized by both the society as well as the Indian psychiatric society (IPS).[49] The conversion therapy ban is still pending. It is under a ruling by the Supreme Court in legalizing of same-sex activity. The adverse effect of conversion therapy is seen in terms of mental health which can lead to a state of depression and anxiety. This is stilled practiced in India and the law is still taking time to provide the rights deserved by these marginalized groups.

THE JUDGMENT OF CASE ON LGBTQ+

As in Nimeshbhai Bharathbai Desai vs. State of Gujarath[50], Husband forcing married woman to possess unnatural sex- to reach its call with relation to the problem whether or not a married woman will initiate proceedings against her husband for unnatural sex below section 377 of the IPC, the state supreme court heavily relied on Supreme Court's call within the case of '*Suresh Kumar Koushal vs. Naz Foundation & Ors'*, to carry that section 377 of the IPC doesn't criminalize a selected category of individuals or identity or orientation. It simply identifies acts that if committed would represent associate degree offense. Such a prohibition regulates sexual conduct no matter the individual orientation. What has been commanded by the Supreme Court

[47] It is a way similar to marriage, but there is an extension of civil rights and same state benefits as are given to married couples such as adoption and property rights.
[48] Practice of changing one's orientation from homosexual to heterosexual using psychological and spiritual methods.
[49] The largest association of Indian psychiatrists.
[50] Nimeshbhai Bharathbai Desai vs. State of Gujarath criminal misc. application(for quashing and set aside FIR/order) no. 26957 of 2017

is that consent isn't the deciding criterion within the case of unnatural offenses rather, any offense that is against the order of nature {and will and may and might} be delineated as carnal penetration would represent an offense below section 377 of the IPC. Thereby creating it was obvious that a married woman can initiate proceedings against the husband below section 377 for unnatural sex. Thus, once the husband is speculated to have forced his married woman for perversion and truly indulges in a similar, a similar would represent associate degree offense below section 377 of the IPC.

Suresh Kumar Kaushal v Naz Foundation[51]

In this case, the petitioner was Suresh Kumar Kaushal and others and the respondents were Naz Foundation and others. The case was judged by SC two-member bench justice G S. Singhvi and justice Sudhanshu Jyoti Mukhopadhaya. SC had revised the judgment in the case of 'Naz foundation v government of NCT Delhi' by overturning it.

The decision made by the court was the court found that section 377 was constitutional. It was said by the court that parliament has an opportunity to remove section377 but it hasn't, so it should be taken in the presumption that section 377 is constitutionally equal to a post-constitutional law. The judges G S. Singhvi and Sudhanshu Jyoti Mukhopadhaya stated that a minuscule fraction of the country's populations consists of lesbians, gays or transgender. It was also noted that HC relied upon international precedents[52]. On 11th December 2013, SC set aside the HC judgment and stated that judicial intervention was not required in this issue. It was concluded that this is recriminalized sexual intercourse against the order of nature and defended the constitutional validity of section 377 of IPC which says anal sex a punishable offense.

Naz foundation v government of NCT Delhi[53]

The petitioner of the case is Naz Foundation and the respondent is government of NCT of Delhi. A movement of the repeal of section 377 was headed by Naz foundation. This was the second filed petition[54] which was filed in Delhi HC in 2001 seeking the legalization of homosexual intercourse. In 2003 court by saying that since they don't have locus standi[55] for

[51] Suresh Kumar Kaushal v Naz Foundation (Civil Appeal No. 10972 OF 2013)
[52] A rule or a principle which is previously laid by the court in a previous legal case. It has either binding or persuasive value on the cases succeeding cases with similar facts.
[53] Naz foundation v government of NCT Delhi(160 Delhi Law Times 277)
[54] The first filed petition was filed by AIDA bhedbhav Virodhi Andolan in 1994.
[55] This is the ability of a party to demonstrate court connection and harm from the law.

the current matter. Then the Naz foundation appealed in SC which was sent back again to HC to that section 377 violates section 377. This also led to a movement by Delhi based coalition of LGBT, women's and human rights activists. They named it "VOICES AGAINST 377" which supported the demand to read down Section 377.

Judgment on this case was given by chief justice Ajit Prakash Shah and Justice S. Murlidhar on 2nd July 2009. Court guided the rights guaranteed under Article 21 which is right to life and liberty. Then the court stated that criminalization of consensual gay sex violated these rights. The court held that section 377 offends article 14, equality before the law because it's an unreasonable classification and it also targets them as a class. Public animus41 and disgust towards a social group was also a reason. Court also stated that the word 'sex' not just indicates the biological sex but also indicates sexual orientation. On behalf of this discrimination based on is not acceptable. Court noted that article 2142 also includes the right to health and concluded that section 377 impedes public health. Finally, the judgment was made and the section was declared unconstitutional and was also criminalized. The section was not struck down on whole but the judgment was held parliament chose to amend it.

The SC two-member bench, chief justice Ajit Prakash Shah and Justice S. Murlidhar overturned the decision of HC saying "constitutionally unsustainable as the only parliament can change a law, not courts.

Theoretical approaches and Behaviour of the Society

Now let's understand the sociological perspectives regarding LGBTQ+, reasons for why there is inequality and injustice on part of a certain section of society: the perspective is of three types. Which are- functionalist, conflict and symbolic interactionist perspective.

According to a Functionalistic perspective, it's observed how society keeps up the social order? And it's was answered by Emile Durkheim[56] that social order is maintained by individual behavior. An individual entity has prominence to sexuality, which the society only accepts the heterosexuality and their marital relationship. Others are considered as absurd behavior. Even the kinship and familial commitment are only granted to the heterosexual family. The functionalists give importance over the peaceful collaboration of various aspects providing a society suitable to live in. Any aspect which deviates from maintaining stability is called dysfunctional and would be criticized and would be tried to eliminate them. Functionalists

[56]Emile Dhurkheim,A French sociologist. He developed sociology and is now studied as a modern social science.

consider homosexuality as dysfunctional as it goes against the rules of society. So the norms, ideas, principles followed need to be revised based on the current situation.

According to conflict perspective, society consists of various groups and interests challenging one other for supremacy and possessions. In that conflict, heterosexuals are given the upper hand over homosexuals. Society favors heterosexuals more, even the government provides more incentives to heterosexuals. Homosexuals are neglected in every aspect, and it also conflicts with the interests of heterosexuals being overly preferred by everyone. People of this perspective consider homosexuals to fight against all odds to get dominance over the suppression of society.

According to symbolic inter-actionist perspective, it provides a self-impression, based on how others see the one. And that one also perceives and sees himself through that reflection (looking glass theory by Charles Cooley[57]). It also observed as a process of individuals identifying their true identity and coming out to society. It provides individual his true sexual identity along with a public social identity[58]. For this, they need support physically, emotionally, economically, socially and institutional support. Thus, the person can feel free for having an identity that matches his soul.

Even though every individual is born from the womb of a mother, society treats the LGBTQ+ community peculiarly. For instance, Simran from Mumbai was disowned by her family and society for being a transgender woman. To live, she worked as a labor, sex worker, bar dancer. At the same time, she completed her graduation but wasn't accepted by companies in placement for being trans-woman. Later she chose to be a volunteer to bring awareness about HIV, and brought herself into NGO and continuing it. In this long way of her career, society has always given a tough time to Simran by using harsh words, ill-treatment, misbehavior and even treated unequally by not providing job opportunities despite in which she is eligible enough.

Being born as an LGBTQ+ is not a mistake of a child or parent. And people perceive that it can be treated by yoga, shock treatment, and some treatments. The world health organization has removed homosexuality from the list of the international classification of diseases and related health problems in 1990[59]. Similarly, the American psychiatric association[60] in 2009

[57]Charles cooley, an American sociologist. Academically taught both economics and sociology at the University of Michigan.
[58] Leon Guerrero, chapter 5- sociological perspectives on sexual orientation and inequality.
[59]brian smith, is homosexuality a disease?
[60] An organization of psychiatry and their trainees working towards effective treatment regarding mind by ensuring human care.

expressed that “Same-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality—in other words, they do not indicate either mental or developmental disorders”[61] So scientifically it's is proof that being LGBTQ+ is not a disease or disorder or malfunction in one's body to be treated, it is a normal condition. Ramdev Baba’s controversial statement made in a journal Telegram, 2017, about ‘Homosexuality’ it can be treated like any other congenital defect. Such tendencies can be treated by yoga, Pranayam and other meditation techniques."[62] However, science showcased the real truth. But people still are in the line of believing it as abnormality and disorder. The government has to take several steps to advocate and aware people of the LGBTQ+ community and make them realize that they are normal as others.

T.S. Satyanarayana Rao, a professor in psychiatry from Karnataka observed that “biological and environmental influences combine to produce particular sexual orientation and identity.”[63] This indeed hold-ups that the fear regarding people getting influenced by being around LGBTQ+ people is, as it should be. Because of this society isolates oneself from being influenced.

The relation between other than male and female was considered as unnatural till September 6, 2018. Later it was made legally acceptable in India, through the historic win of Naz Foundation against the Union of India. The core idea laid down was, everything in this world is made by nature and is natural. Drawing a parallel line to the history, Many Hindus emphasized a passage in the Rig Veda "*Vikruti Evam Prakriti*,[64]” which roughly translates to “What seems unnatural is natural” enacts as evidence that Hinduism tolerates homosexuality[65]. Despite India having rich history favoring homosexuality, society presumes it as a violation of the law of nature.

Ellen De Genres[66] from the U.S., her famous assertion was, “find out who you are and be that person. That's what your soul was put on this Earth to be. Find that truth, live that truth and

[61] Robert l Kinley,(2015), Homosexuality and scientific evidence: On suspect anecdotes, antiquated data, and broad generalizations available at URL: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4771012/

[62] YJ editors(2017)Swami "Baba" Ramdev Says Yoga Can "Cure", Homosexuality available at URL: https://www.yogajournal.com/blog/swami-baba-ramdev-says-yoga-can-cure-homosexuality

[63]t.s. Satyanarayana Rao and k.s. Jacob(2012), homosexuality and India, available at URL:https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3339212/

[64] The Indian sub-continent in south-central Asia, has a long history of addressing LGBTQ activity in their culture and society like in epics whose meaning is unnatural is also natural

[65]Nathan McDermott(2015) India's debate: can Hinduism and homosexuality coexist,https://www.washingtonpost.com/national/religion/indias-debate-can-hinduism-and-homosexuality-coexist/2015/07/08/3e124270-25a5-11e5-b621-b55e495e9b78_story.html

[66] Ellen De Genres, American comedian, host. First gay person to host an event.

everything else will come."[67] *On parallel lines*, Vikram Seth[68] from India, in his essay- whether it is heterosexual or homosexual, he stated that "to not be able to love the one you love is to have your life wrenched away. To do this to someone else is to murder their soul."[69]

A person should not feel embarrassed for being oneself and being selfish for a person they love. As acceptance from other matters after one accepts oneself. Love is the purest form of affection, which everyone needs it.

After decriminalization of homosexuality, many people have revealed the true identity of their gender that coincides with their soul which is now legally acceptable. But the community of LGBTQ+ opinioned that there would be fewer atrocities and violence on them. Though they were not given all rights that were enjoyed by a heterosexual, they received a respectful recognition.

Based on the interview collected by the researcher of LGBTQ+ people such as Gaurav, Isha, Kaushik, Vikrant (names changed) collected from one of the Private University in Bengaluru, are still facing discrimination from the society. Gaurav, a student, identifies himself as gay, revealed his gender to his family after the decriminalization of homosexuality. His parent was not hostile towards him and has accepted him as he is, but it took quite a time for them to let it sink in and accept. Even Isha has gone through the same hurdles being a bisexual. Not only, four people, almost every homosexual has to go through this; however, the one who supports them matters a lot. Deepak Kashyap[70], a psychologist and gay activist; identifies himself as gay. He struggled to get accepted because being accepted is the need for human and self-acceptance is the key to that. He even opinioned that "to live we can't be sorry, sorry for being different". People frequently opinion that why do they beg for money? Why can't they earn it respectfully? But people miss out on the point that nobody is willing to employ them. Taking the example of Dutee Chand[71], India's first openly gay athlete, she told in one of her interviews that "What I am doing is not wrong, nor is it a crime"[72]. She came out and revealed that she is

[67]ellen de generes(2020), ellen quotes available at URL:https://www.brainyquote.com/quotes/ellen_degeneres_451757
[68],Indian novelist, and poet. He identifies himself as gay.
[69]Vikram Seth(2013), Vikram Seth on Section 377 and gay rights in India available at URL:https://www.indiatoday.in/magazine/cover-story/story/20131230-vikram-seth-on-gay-rights-homosexuality-769369-2013-12-20
[70] Deepak Kashyap, a gay rights activist and psychologist. He identifies himself as gay.
[71] Dutee Chand, Currently world champion in sprinting of 100metres.
[72] raka Mukherjee(2019), Dutee Chand, India's First Openly Gay Athlete, Is Cosmopolitan's Latest Cover Girl available at URL: https://www.news18.com/news/buzz/dutee-chand-indias-first-openly-gay-athlete-is-cosmopolitans-latest-cover-girl-2223139.html

a homosexual and was in a same-sex relationship. Society was too harsh and difficult to accept her for being a homosexual.

Most People in rural society instead of accepting their child being homosexual, execute scheming plans on them. For being gay to preserve their pride, they were being killed (honor killing) and lesbian are subjected to family-sanctioned corrective rapes, which are often perpetrated by their family members[73]. Sometimes physical and mental abuse on them. All these factors leave no option for LGBTQ+ people, rather than running away from home and live in poverty. This way society pushes the LGBTQ+ people away and creates a society harmful to them.

CONCLUSION

If we compare the changes in the status of homosexuals and queer identities are mostly acceptable by Indian society in the present time than ever before. However, there are some boundaries of family, society, peer groups, and workplaces, etc. To accept their status, images, and freedom to overtly specify their gender decisions still stay as they are continuing struggle for LGBTQ folks. Most of the LGBTQ people are want to stay in the urban area compare to rural because of security, respect, employment, etc. However, in the rural area, most of the LGBTQ people were targeted by the society for speaking their mind. It includes honor killing, corrective rapes, sexual abuse, and harassment, etc. Media, NGOs, INGOs, and institutions are engaged in the activity of advocacy and awareness to people about the right of LGBTQ. Urban area is also providing spaces for LGBTQ people to participate in the public sphere including meeting, media channel, debate, interview, t.v. shows which are helping them to raise their issues.

It has been noticing some improvement initiated by the Indian government which includes the decriminalization of homosexuality in Section 377. However, it has to do a lot concerning the field of education, employment, health, public washroom, and basic amnesties as they are still facing discrimination. Laws such as Army, Navy and Air Force Act of 1950 and 1957 respectively, voting rights, rights of surrogacy, adoption, property, marriage rights are still discriminated against.

[73] Rashmi Patel(2016), Being LGBT in India: Some home truths available at URL:https://www.livemint.com/Sundayapp/sAYrieZdZKEybKzhP8FDbP/Being-LGBT-in-India-Some-home-truths.html

Recently, a review of movies like; *Subh Mangal Jyada savdhan* and *Ek Ladki Ko Dekha to Aisa Laga* indicated that these were mostly watched and accepted which is also a positive sign in the society. However, the behavior of society not changed towards LGBTQ people and their rights.

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