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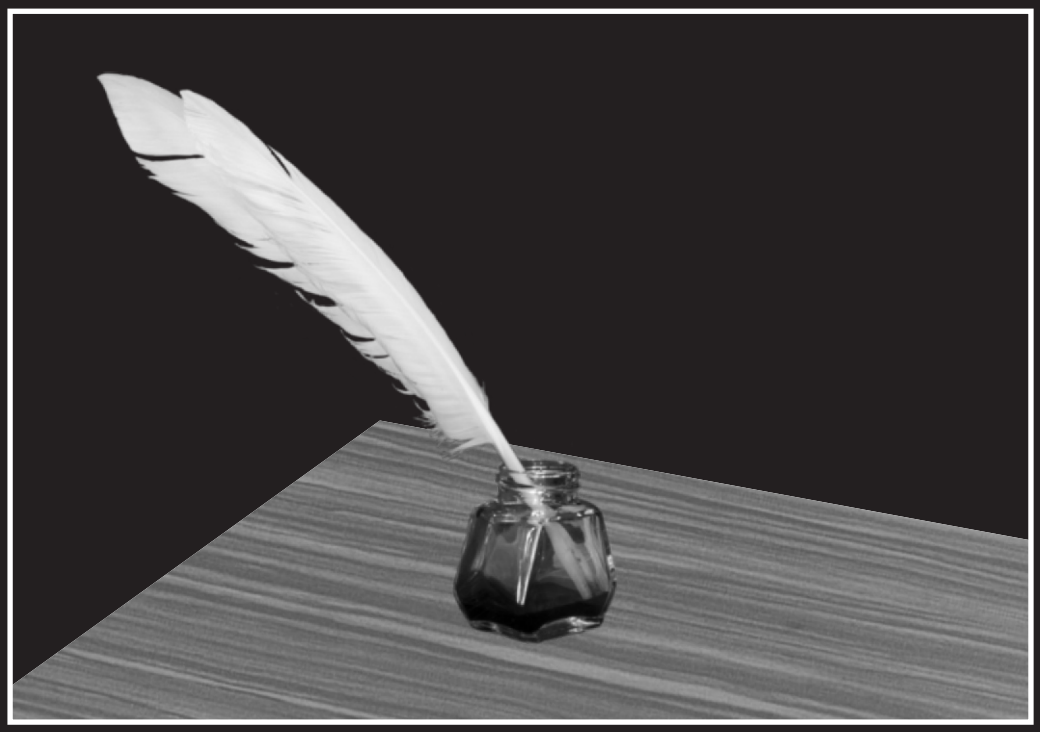

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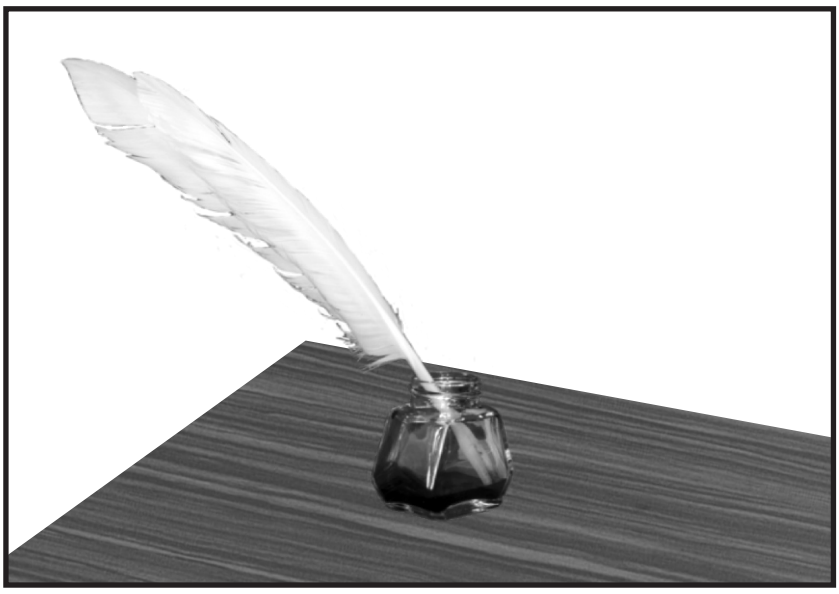

Army Institute of Law

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Contents

A RE-LOOK ON PROTECTION OF THE RIGHTS OF FOREST DWELLERS VIZ-A-VIZ MINING ACTIVITIES IN INDIA

- Dr M P Chengappa* & Ms Manisha Kayal**

INTRODUCTION

India is a very rich land when it comes to mineral resources, and most of these resources are located in the dense forests, which are the home to various indigenous people. The increase in various mining activities has lead to the exploitation of these indigenous populations, which are for commercial gain at the cost of the livelihood of these people. Every sustainable model of development should aim at the indigenous people having rights over their land and the improvement of their livelihood. The Constitution of India, 1950, and various other welfare legislations been enacted for protection of these tribal populations from being exploited, and they deserve the same rights and respect as any other person in the society.

The industrial development and urbanization process has been the cause of the destruction of major portions of the forests throughout the world. Mining activities are one of the activities which causes threat to enviorment as well as promotes economic development of the country which can lead to a negative impact on the forest, ecology, environment and the people living residing near such activities. These adverse impacts on the people and the environment can be prevented by following proper mechanisms and taking necessary precautionary measures.[1] There have been various instances where mining activities have bypassed the various provisions of law as it takes place in remote places where it is impossible to keep a track if 10 hectares of land is permitted and the concerned industry uses 15 hectares of land and damages further 5hectares.

Many people have been forcefully displaced from their land and have been shifted to other places, especially the forest dwellers, and the tribal population has been highly affected by such mining activities. These displacement processes not only take away the land from the tribal people but also affect their health, education, and economic status by forcing them to other places where they have no means of livelihood. The Supreme Court of India has played an active role by looking into the concerns of these people and has tried to create an equilibrium between

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1. Philippe Cullet, 'Mining, Land and Water Law: Ensuring Sustainable and Equitable Outcomes' (The bloomsbury, 11 January 2017)<http://www.bloomsbury.ac.uk/studentships/studentships-2017/mining-land-and-water-law-ensuring-sustainable-and-equitable-outcomes-soas-bbk> accessed 30 March 2019.

the rights of the tribal population and the development projects. The tribal groups in India have been under the constant fight for protecting their rights against the development schemes, which affect their livelihood and force them to be displaced.

The ***Orissa Mining Corporation***[2] case has not only protected the rights of the tribal community but the Court also portrayed that development projects which are a platform for major employment opportunities for many people cannot be implemented by disregarding the rights of the tribal communities and the forest dwellers who mainly depend on the forests for their daily livelihood.This judgment was a landmark case after which the Indian Judiciary has evolved its approach to uphold the rights of the forest dwellers and protect them from unjust encroachment of their land and livelihood.

THE RIGHTS OF THE FOREST DWELLERS

'Tribe' is, in its common meaning, means the people of a social group living in primitive conditions in a fixed territory. They are the people who reside in the forests since the primitive ages and continue living there in modern society[3]. Forest dwellers are these tribal people who live in the forest land and depend on the forest products for their livelihood. They are considered to be a part of the forest itself as they are adapted in the various conditions of the forests. There are still various incidents where many indigenous communities are at the risk of being evicted without a necessary rehabilitation scheme being implemented. The legislative schemes,in many instances, have not beenable to protect the tribal community from large corporations that attempt to amass control over the collective resources of these tribal people and often end up destroying their life support system in the process.

Article 366 (25) of The Constitution of India, 1950, states that Scheduled Tribes are the people of the tribes or the tribal groups, as mentioned under Article 242, and Article 242 states that these are the tribes as declared by the President by the issuance of a public notification. Post-independence various legislations have been enacted to empower the Indian tribal group and upholding their rights like the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as the "FRA") and the panchayats Extension to Scheduled Areas (hereinafterreferred to as the "PESA") Act, 1996.

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2. *Ibid.*
3. Anuj Kumar, 'Rights of tribals in india with respect to access to justice' (Legal desire , 25 June 2016) <http://www.legaldesire.com/rights-of-tribals-in-india-with-respect-to-access-to-justice/> accessed 15 March 2019.

Both the Acts aresocial welfare legislation to protect and promote the different traditions and practices of the forest dwellers.

The FRA states about various customary rights of the forest dwellers and the tribal people for usage of forest land. Sec. 2(o) of the FRA states that a person who lives in the forest or the forest lands and depends on it for his/her livelihood for three-generation is a 'forest dweller.' Sec. 2(c) of the FRA provides that a person belonging to the Scheduled Tribe is also eligible for the rights under FRA, and Sec. 4(1) discusses that a person who resides in the Scheduled Areas is also entitled to the rights under the FRA.

The FRA provides for three types of rights, land rights, use rights, and the right to protect and conserve. The land rights are for the rights over the land that the forest dwellers have been cultivating for their livelihood and residing under Sec. 4(3) and Sec 3(1)(a). Sec 4(4) of the FRA mentions the fact that these lands cannot be sold or transferred and has to be passed only by inheritance. Sec 3(1)(c) states that the forest dwellers are permitted to use the forest products which are traditionally collected by them, and Sec. 3(d) of the Act provides for the rights of using the grazing grounds for cattle and usage of water bodies. Sec. 3(1)(i) of the FRA grants a right and power to the forest dwellers to protect and conserve the forest land and the forest resources. Sec. 6 of the FRA discusses a three-stage process for deciding the rights of the forest dwellers. It states that the Gram Sabha has to propose who should be entitled to use the forest land for cultivation and forest resources. These suggestions have to be sent to the Taluka Committee, and the District Level Committee for their approval and the District Level Committee is empowered to take the final decision. But the Gram Sabha is the main authority to decide the people who would be eligible for any of the rights under this Act.

The PESA was implemented by the Government of India for the purpose of providing the authority to the Gram Sabha of the tribal regions to govern them. The PESA empowers the Gram Sabha to independently make laws about the traditions, customs, land, etc. of the tribal people, and the State legislations are not implemented on them. The Gram Sabha is also entrusted to be consulted before any land is acquired in the tribal area for any development schemes. The recommendations of the Gram Sabha have to be compelled with the purpose of any such development programs .[4]

4. *Supra* Note 4.

The advancement of any country is directly related to the well being and the rights of the common people. Most parts of the lands which belong to the tribal people are immensely rich in minerals and attracting mining based projects, both domestic as well as international investment. This leads to a dispute between the tribal community and the state when the state attempts to exploit these resources for the economic growth of the country[5]. In spite of the existence of stringent mechanisms for ensuring the protection of the tribal people and their rights, there are very fewer instances of strict implementation of them by the State.

JUDICIAL INTERPRETATION OF THE RIGHTS OF FOREST DWELLERS

The Supreme Court of India has been trying to keep a balance between the rights of the forest dwellers and the tribal community with the development projects while taking into consideration the genuine interests of the local inhabitants and protection of the forest lands. In ***Kailas v. State of Maharashtra,***[6] the Supreme Court of India had expressed its concern about the Scheduled Tribes who have been a victim for many years and the community's approach should change towards them and they should be granted social dignity, and their rights should be upheld and protected.

In ***BanwasiSeva Ashram v.State of Uttar Pradesh & Ors.***[7] , the main dispute was relating to the demands of the Adivasis(the tribal population) for their land and land-related rights as the land was being acquired for setting up a thermal power project by the State. The Court, while trying to address the issue,realized that there has to be a balance between development and the traditional rights of the forest dwellers and directed for the settlement of the rights of the Adivasis and also stated that they should be given proper title deeds. In ***Fatesang Gimba Vasava& Ors. v. State of Gujarat & Ors.***[8] , a complaint was filed by the Adivasis as they had been harassed by the Forest Department officers who were depriving them of their rights, such as the collection of forest products like bamboo. The Court upheld the claims and stated that they were entitled to collect forest products on which they have been dependent on primitive times. In ***Pradeep Krishen v. Union of India***[9] , the government had permitted the tribal people to collect leaves from sanctuaries and national parks as a part of their traditional rights which was challenged for

5. Shreya Sood and Shreya Mishre, 'Mineral Rights of Tribal with special reference to the Threesiamma Jacob Judgement' 8 NUALS Law Journal 231 (2014).
6. 1 SCC 793 (2011).
7. 1 SCR 374 (1987).
8. 1 GLR 219 (1987).
9. 8 SCC 599 (1996).

protecting the ecology and the wildlife at those places. The Court stated that the livelihood of the tribal people could not in any manner, destroy or hamper the wildlife or the environment and directed for precautionary measures to be implemented.

In ***Samatha v. State of Andhra Pradesh***[10], the government had by the execution of a lease deed permitted private mining companies to operate in tribal land, but the Supreme Court of India took the side of the tribal people and declared such lease deed to be null and void. Further, the Supreme Court of India issued guidelines to assess any application of mines in the forest area and stated that any mining operation could not be allowed to operate, which is detrimental to the forest growth and violates the rights of the forest dwellers. The case of ***Tarun Bharat Sangh, Alwar v. Union of India***[11] is one of the examples where the Court issued directions for the prevention of mining operations in the forests. The mining of limestone and marble had to lead to the drying of the water bodies in the forests, and the dynamites had mostly destroyed the hills. The Court permitted the mines situated outside the forests but passed immediate order to prevent the mines for operation which were inside the forests and had been damaging the forest.

Thus the Indian Judiciary in the various past instances has been trying to protect and promote the rights of the indigenous people in instances of their exploitation. In most instances, the Courts have realized that these tribal communities are not aware of their rights, and their grievances are not taken into account by the State, and in such a situation, the Courts have acted in a manner to safeguard these people.

THE FOREST DWELLERS' RIGHTS IN LIGHT OF ORISSA MINING CORPORATION LTD V. MINISTRY OF ENVIRONMENT & FOREST JUDGMENT

a) Factual Background

The state of Orissa is one of the richest states concerning minerals in the country. Various international companies like Vedanta Ltd, POSCO, and Arcelor-Mittal have constructed or proposed to construct projects in the state for its rich minerals. The Niyamgiri Hills, located in Orissa, is home to a huge population of tribal groups. These people have resided near the hills and worshiped the Niyamgiri Hills as abode of their god Lord Niyam Raja. A joint-venture project was entered into by the State-run Orissa Mining Corporation (hereinafter "OMC"), and London originated Vedanta Aluminium Ltd's subsidiary in India, Vedanta Resources Plc.For the

10. 2 SCR 305 (1997).
11. 3 SCR 21 (1993).

purpose of extracting bauxite over 250 square kilometers in the Niyamgiri region, which affected 12 villages of the tribal group. The tribal people were against the implementation of this project.

A writ petition had been filed before the Supreme Court of India by OMC against the order passed by the Indian Ministry of Environment and Forest, which had rejected the Stage II clearance of forest lands for mining of bauxite.This rejection was done based on three issues:

- Violation of the rights of tribal groups, which included the primitive tribal group, scheduled tribes, and traditional forest dwellers.
- Violation of provisions of the Environment Protection Act, 1986
- Violation of provisions of the Forest Conservation Act, 1980, dealing with adverse impact on the ecology and biodiversity.

Vedanta Ltd. and Steriline Ltd. were permitted Stage I clearance to set up an aluminum refinery, but the Stage II clearance was rejected for violation of forest laws on the suggestions made by the Saxena Committee. The Saxena Committee, in their report, expressed the grievance of the tribal people whose livelihood and habitat were being affected by the concerned project. Even their religious place which was located on the top of the mountain would be demolished by the mining activities. This raised a major concern among the tribal group and they had expressed their grievances. The forest areaand the environment were also being damaged and highly hampered by the concerned authorities for the execution of the project leading to depletion of soil and drying of flora and fauna.

b) Court's observation on the Rights of the Tribal people

The Supreme Court of India discussed the case of the ***Union of India v. Rakesh Kumar & Ors.***[12] , where it had stated about the rights of the primitive tribal groups and stated that these people were directly or indirectly being deprived of their rights by this mining activity if the clearance was permitted. The mining and the refinery activities were part and parcel of the same bauxite project, and such cannot be permitted to take away the rights of the locals residing in the forest land and forest resources, and their rehabilitation was a major concern. The Court discussed these issues and stated that tribal community plays an important role in developing and managing the environment with their traditional knowledge and traditional practices and the

12. 4 SCC 50 (2010).

State is under the obligation to promote them for effective, sustainable development, and it cannot in any manner take away these rights from the tribal group.

The Court further noted that Articles 244, 342, 362 and 366 of the Indian Constitution, 1950which provides for the socio-economic rights of the tribal people and the forest dwellers who are there to create an ecological balance. Also, the Court stated that religious rights protected under Articles 21,25, and 26 of the Indian Constitution, 1950,cannot be curtailed by the State in any arbitrary manner as the Niyamgiri Hills was a religious place of the tribal it needed to be protected. The Court also stressed on the fact that cultural, sustainability and customary rights of the tribal by looking into various international obligations like International Labour organization (hereinafter "ILO"), Convention on Indigenous and Tribal Populations Convention, 1957, Convention on Biodiversity, 1992 Rio Declaration, 1992 (Agenda 21) and the Earth Summit, 1992, India being a signatory to all these conventions[13]. There was also an international obligation on India to promote and protect the rights of the tribal population while protecting the forest land and not permitting any development project which would damage the environment in any manner.

In this case, the Supreme Court of India protected the rights of the forest dwellers, and by these types of judicial activism, the Court tries to keep a balance and set an example that industrial development cannot hamper the environment and the livelihood of the primitive people. The Court further discussed how the FRA and the PESA should protect and preserve the traditional cultures of the Scheduled Tribes and the forest dwellers, their rights to the community resources, and how the government cannot in any situation deprive them of their rights in the name of industrial development. In a situation where the legislation provides for a wide range of rights for the benefit and welfare of the forest dwellers and the Scheduled Tribes which includes their customary and traditional rights as a community, then they cannot be deprived of it for expansion of industrial development and the rights should be preserved. Most of the tribal population is not aware of their rights and privileges and does not have financial means to fight against the large corporations which damage their cultural heritage[14]. It is an implied responsibility of the State to make the tribal people aware of these rights for the management of the environment and sustainable development. The FRA is not limited to protect the rights of the

13. *Supra* Note 1Para 37-38.
14. *Supra* Note 1 Para 39.

forest dwellers in case of loss of habitat but also for their right to conserve the forest.

c) The Power of Gram Sabha

The main claim of OMC was that the FRA and its rules did not put any mandate on them to acquire the consent of the Gram Sabha to acquire the forest lands if the State government would permit them. The Court discussed the role of the Gram Sabha under the FRA, which had the competent authority to decide the grievances of the locals of the forest area against any mining activity. Sec. 6 of the FRA empowers the Gram Sabha to be the competent authority that had the power to assess the community as well as the individual rights of the forest dwellers. The Gram Sabha after considering them, has to communicate it to the Ministry of Environment and Forest, and the Ministry would take the final measure to protect them. The FRA provides the tribal people various rights, and the Gram Sabha is the central body to administrate the affairs of the tribal people, protect them and empower the tribal people with their rights .[15]

The Court also addressed the religious rights of the affected tribal people and stated that the Gram Sabha had the sole authority to decide over such matters. It stated that the tribal population residing in the forests have a fundamental right to profess religion under Article 25 and 26 of the Constitution and the State was under a mandate to protect such right. The Gram Sabha protected these rights under the FRA.

The decision was a huge disappointment for concerns like Vedanta and OMC as it addressed the grievances of the local habitats and imposed the consent of the Gram Sabha to be mandatory[16]. The Court also directed the State Government along with the Ministry of Tribal Affairs to help the Gram Sabha in settling all individual as well as community claims. The Gram Sabha had to decide in three months of the filing of these claims and had to inform the Ministry about the same, which had the authority to take the final decision and provide for its approval.

Mining activities that cause soil erosion damage the plants and streams of the area an affect the people, and the animals living in the forest area have to be closed down at once. Such activities not only damage the environment presently but also affect the environment for its future use. Any industrial development cannot be permitted to operate at the cost of environmental harm and needs to be stopped. The Indian Judiciary, in various past instances, has taken affirmative action against such activities, which in any manner causes serious damage to the environment.

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15. *Supra* Note 1 Para 55.
16. *Supra* Note 1 Para 36.

Environment protection is the duty of every individual, as well as the State and any activity for the purpose of economic development, cannot be allowed at the cost of environmental damage.

THE PRESENT STATUS OF FOREST DWELLERS' RIGHTS

There are major loopholes in both FRA and PESA, like the claim settlement process operates at a very slow pace because of many structural issues. These Acts fall weak before the industrial development and before the proper mechanisms of its implementation[17]. In most instances, the rights of the forest dwellers have been considered to be secondary when there has been a requirement for extracting resources in the name of development. The traditional customs and the rights of the tribal population and the forest dwellers have to be balanced by the legal framework to empower them to a better future.

In ***K.Guruprasad Rao v. State of Karnataka & Ors***[18], was decided in July after the passing of the judgment of ***Orissa Mining corporation*** case in April, the Court again got the opportunity to discuss the rights of the forest dwellers about this case. The main issue was relating to mining operations being carried out near a temple which has been declared as a "protected monument" by the Government of Karnataka and also 200 meters of the temple was declared as a "safe zone," and no mining activity was supposed to be there. The State had granted a mining lease near the temple, and these activities were damaging the structure of the temple and affecting the lives of the population residing near it. The Supreme Court discussed the principle of sustainable development and how there is a need to keep a balance between development with environmental protection. The Court then referred the case of ***Orissa Mining Corporation Ltd,***[19] where it had previously discussed the customary and cultural rights of forest dwellers that have to protected and preserved and concluded that there is a need to protect the cultural, social, political, and economic rights of the forest dwellers. These rights are inherent rights which need to be respected and promoted. The forest dwellers are a part of the forest, and their rights cannot be separated. The Court then referred to ***AmritlalAthubhai Shah v. Union Government of India***[20], where it had stated that the rights of the forest dwellers have to be protected, and Gram Sabha is under the mandate to protect these rights. The Court finally stated that mining activities

17. MayankVikas , 'Commentary on The Global Indigenous Peoples Movement: It's Stirring in India' [2016] 2(141) Journal of Law, Property, and Society <http://alps.syr.edu/wp-content/uploads/2017/02/JLPS-2016-11-Vikas.pdf> accessed 28 March 2019.
18. 8 SCC 418 (2013).
19. *Supra* Note 1.
20. 4 SCC 108 (1976).

generate financial wealth, and historical monuments are the cultural and historical wealth, and both these have to be balanced. The Court directed for the creation of a buffer zone of 2Km from the protected area and 1 Km of the core zone beyond which mining activities will not be permissible and for control usage of blasting mechanisms.

In ***Wildlife First v. Ministry Of Forest And Environment and Ors.***[21] , it was seen that the FRA is a positive move by the government to address the historical wrongs and flaws to protect the rights of the forest dwellers and prevent their alienation from their land, which is a factor leading to the destruction of forest lands. The FRA is a remedy with its flaws to provide a cure for the historical injustice done to the forest dwellers. The mechanism of setting up the Gram Sabha to protect the rights of these forest dwellers and to allow them to use the forests in a sustainable way for their livelihood is a key factor in the protection of their rights. In furtherance to the same, the Gram Sabha is the body responsible for the conservation of the forest natural resources.

The legislation and the Courts have upheld the rights to the tribal population in most instances, but the problem arises when the industries do not follow the proper mechanisms and try to continue activities for their benefit. The ***Orissa Mining Corporation*** case is a major example as to how the rights of the forest dwellers should be protected and promoted and industries should compel with all the directed guidelines before carrying out mining activities.

CONCLUSION

The decisions of the Supreme Court in the Orissa Mining Corporation case is a major precedent for any issues which arise relating to the rights of the tribal population as it clearly states about the competent authorities to address the issues and also for prohibition of mining activities which might have an adverse impact on the ecology causing a loss to the biodiversity[22]. There have been various legislations and judicial decisions that have been made in favor of the tribal population and the Scheduled Tribes[23]. The Indian Judiciary has been playing an active role in trying to create a balance between the twin needs of the development and preservation of the traditional rights of the forest dwellers. It, in many instances,the proper mechanisms for the rehabilitation of the tribal people who are displaced due to development projects have highly

21. WP 109 (2008).
22. ZubairNazeer, 'Supreme Court Must Safeguard Tribal Rights OverNiyamgiri Hills in Odisha' (The wire, 17 March 2016) <https://thewire.in/25043/supreme-court-must-safeguard-tribal-rights-over-niyamgiri-hills-in-odisha/> accessed 14 March 2019.
23. *Supra* Note 14.

been criticized as the competent authority has not properly implemented them. The rights of these protectors of the forest land have to be taken into account while addressing any such instance.

The struggle between the tribal of the Niyamgarh Forest and one of the most powerful corporations of the world is a historical saga that demonstrates the passion of the tribal population over their forest and habitat. The Indian Government faced severe criticisms for affecting the whole tribal life and their place of worship while destroying a hundred streams that flowed through the region. The first fault done by the Government was permitting Vedanta to construct an aluminum refinery near the bauxite reserves in Niyamgarh Forest. It was obvious from Vedanta's point of view that they would want to get their supply of raw materials from the forest rather than various other regions.

The judgment has also shed some hope in the minds of the tribal people whose rights get violated at the cost of development schemes. First, the banning of mining activities in the State of Karnataka and then this judgment indicates that blind mining activities cannot be encouraged and until the corporations and the industries provide for proper rehabilitation schemes and follow proper mechanisms to get clearance for mining activities, it has become a difficult task to achieve.

With the development of the approach of the Indian Judiciary through time, the approach towards the forest dwellers has been an affirmative one when, in most instances, the Judiciary has attempted to protect the rights of these indigenous people rather than luring after economic benefits. These people and their rights have to be protected to enable them a better living and livelihood. The Bill on the forest dwellers' rights, which is pending at the Parliament, is a classic example that the rights of these people have to be protected, which has been accepted and is being attempted to be protected. In this modern world, it cannot be denied that progress cannot be achieved at the cost of someone else's livelihood, and it can only be achieved which goes hand in hand with every person in the society and their rights.

ADULTERY AND INSTITUTION OF MARRIAGE: AN ANALYSIS WITH SPECIAL REFERENCE TO JOSEPH SHINE V. UOI (2018 SC 1676)

-Dr Devinder Singh* & Mr Varun**

INTRODUCTION

Recently in ***Joseph Shine v. Union of India***[1] a five judges' bench of Supreme Court of India,has struck down the whole Section 497 of the Indian Penal Code, 1860[2] (herein after mentioned as IPC) and Section 198(2) of the Code of Criminal Procedure, 1973[3] (herein after mentioned as CR.PC). It has not been general practice, in the institutional history of Indian Judiciary to strike down the entire provision of the Penal Code. The reason provided by the Apex Court is the discriminatory nature of the said provision in the hands of husband, which violate the Article 14 and 21 of the Constitution of India, 1949 (hereinafter mentioned as Constitution). Section 497 of IPC imposed punishment on the male who had committed consensual sexual intercourse with a married woman knowing her to be married (that is, the male who trespassed into the institution of marriage). But the requirement of "consent and connivance of husband" to bring the adulterous act out of ambit of proscribed punishable offence provided for section 497 of IPC, has been held to be antithesis to the doctrine of equality and personal liberty of a married women[4] without qualifying doctrine of reasonable classification and intelligible differentia as per nature of modern Indian society. Thus, as per section 497 of IPC, a married man can have sexual relations with unmarried women without any proscription, but at the same time, it is held to be discriminatory by the judiciary that the act of consensual sexual intercourse with a married woman by any male, other than her husband was put in the category of an offence. By striking down the adultery law, the Apex Court has overruled the five judges bench judgment of the Supreme Court in ***Yusuf Abdul Aziz v. State of Bombay*** [5], three judges bench decision in ***Sowmithri Vishnu v. Union of India***[6] and the two judges bench decision in ***V. Revathi v. Union***

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1. 2018 SC 1676, 2018 SCC Online SC 1676 (Nov. 12, 2019, 11:20 AM), https://www.scconline.com.
2. Act no. 45 of 1860.
3. Act no. 2 of 1974.
4. *Supra* note 1.
5. AIR 1954 SC 321
6. AIR 1985 SC 1618

of India[7] in which Indian Judiciary upheld the validity of Section 497 by holding that it did not offend either Article 14, Article 15 or 21 of the Constitution.

CONCEPT OF MARRIAGE AND ADULTERY

Since initial days of civilisation in India, marriage has been considered as the most important social institutions. It has been considered as the foundation of peace and order of society.[8] It is a sacred and unique relationship between the husband and wife. The institution of marriage is the foundation of family and thus, directly related with the development of any civilized society in the world. However, the nature and concepts of marriage under various personal laws keep on changing with the changes in the society and the social order.[9] But, marriage is considered as a sacred union even by those societies who view it as a civil contract.[10] In Indian civilisation marriage has been considered as a sacramental union, and this continued to be so during the entire period. Mutual fidelity worked as the main thread to keep the tie intact in this institution.[11] The act of infidelity occurs in the marital tie, when one of the spouses voluntarily gets engage in sexual intercourse with an individual (stranger) of the opposite gender other than one's marital partner. Adultery is regarded as a sin by society and a matrimonial offence, as it shake the mutual thread of faith and trust between spouses towards each other and disturbed the institution of marriage and then family. If one of the spouses gets involved in an extra-marital affair, it will breach the marital vows and can collapse the marital tie beyond hope of its repair. According to the Old Testament, "Marriage is not just a social contract between man and woman; it involves God as well."[12] "God is witness to all marriage agreements and insists that couples should be devoted and completely faithful to each other."[13]

The word adultery derives its origin from the French word *avoutre*, which has evolved from the Latin verb *adulterium* which means "to corrupt."[14] As per Black's Law Dictionary, "adultery is the voluntary sexual intercourse of a married person with a person other than the offender's

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7. AIR 1988 SC 835
8. B.K Sharma,Hindu Law, 35 (Central Law Publication, Allahabad, 4th ed. 2014).
9. Endre Nizsalovsky, Order of the Family, (Nov. 12, 2019, 11:20 AM), https://www.scribd.com/document/268446433/Ch-1.
10. *Supra* note 8
11. Dr. Paras Diwan,Modern Hindu Law, 62-66 (Allahabad Law Agency, Faridabad, 22nd edn. (Reprint), 2015)
12. Adultery Divorce,(Nov. 12, 2019, 11:20 AM), https://www.advocatekhoj.com/library/lawareas/divadultery/3.php?Title=Adultery%20Divorce&STitle=Adultery%20marriage.
13. *Ibid.*
14. *Supra* note 1.

husband or wife"[15]. According to Encyclopaedia Britannica[16], "Adultery means sexual relations between a married person and someone other than the spouse"[17] . According to Merriam-Webster dictionary it is "voluntary sexual intercourse between a married person and someone other than that person's current spouse or partner"[18]. From above definitions we can see that, definition of 'adultery' not limited to specific gender only; it may be committed by either of the Spouse/Sex. But it is very unfortunate, that under most of the statutes owing to patriarchal set up of society, it has been gender favoured and in most of the cases prescribes 'female adultery'. And it is the married woman whose extra-marital consensual sexual intercourse with any male other than his husband without the consent or connivance of her husband is an essential condition for the offence of adultery as per section 497 of IPC, 1860.[19] The current definition of adultery provided in PC, 1860 has been inherited from the cultural context of Victorian morality at the time of British era, where women was considered as the property of her husband and the offence was committed only by the adulterous man.[20] In this concept the act of wife corrupting the marital bond with her husband by having a relationship outside the marriage, was termed as adultery.[21]

HISTORICAL BEDROCK

Almost all ancient religions/civilizations punished the sin of adultery.[22] In one of the oldest, namely, in Hammurabi's Code, death by drowning was prescribed for the sin of adultery, be it either by the husband or the wife.[23] In Indian civilisation also the social condemnation for act of adultery is not new. An incident mentioned in Mahabharata, where Indra comes to Gautama's ashram in the disguise of a Brahmin, and when the sage is away, impersonate his face and asks Ahalya to have sexual act with him.[24] "After the act committed, Gautama orders his son Cirakarika to kill his mother, and leaves for the forest, where he repents for his hasty decision.

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15. *Ibid.*
16. Encyclopaedia Britannica, Adultery, (Nov. 12, 2019, 01:20 PM), http://www.britannica.com/EBchecked/topic/6618/ adultery.
17. *Ibid.*
18. Merriam-Webster Dictionary,Adultery, (Nov. 13, 2019, 11:20 AM), https://www.merriam-webster.com/dictionary/adultery.
19. *Supra* note 1.
20. *Ibid.*
21. *Ibid.*
22. *Supra* note 1.
23. *Ibid.*
24. Rohini Bakshi, Thestory of Ahalya and Indra: Was it really adultery?, (Nov. 15, 2019, 12:30 PM), https://www.dailyo.in/arts/ahalya-indra-purana-hindu-mythology-ramayana-mahabharata-sujoyghosh-lord-rama/story/1/5173.html .

He blames Indra for polluting his wife because of his passion, My wife is thus in no way a culprit in the crime. The son ponders and concludes that a woman is not guilty if she has not consented to the act of adultery willingly; that women are physically weak and have to submit to the desires of men. So if a man leads a woman to adultery, the woman is not to blame."[25]

According to Vishnu Purana verse 3.11 even the thought of adultery has been condemned by stating that "A man should not think incontinently of another's wife, much less address her to that end; for such a man will be reborn in a future life as a creeping insect. He who commits adultery is punished both here and hereafter; for his days in this world are cut short, and when dead he falls into hell."[26] In Bhagavad Gita Chapter 1, versus 40-42[27] it has been mentioned that, "when a family declines, ancient traditions are destroyed. With them are lost the spiritual foundations for life, and the family loses its sense of unity. Where there is no sense of unity, the women of the family become corrupt; and with the corruption of its women, society is plunged into chaos. Social chaos is hell for the family and for those who have destroyed the family as well"[28]. Islamic law has considered adultery as one of the most serious offence, known as Hadd[29] offence, and adultery has been expressly condemned in Quran[30]. Further in verse 17.32 of Quran explained adultery as "Approach not adultery: for it is a shameful deed and an evil, opening the

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25. *Ibid.*
26. H.H Wilson, TheVishnu Puráńa: A System of Hindu Mythology and Tradition, (Nov.15, 2019, 03:00PM), https://books.google.co.in/books?id=rpVTAAAAcAAJ&pg=PA309&lpg=PA309&dq=Let+him+not+think+incontinently+of+another%27s+wife,+much+less+address+her+to+that+end;+for+such+a+man+will+be+born+in+future+life+as+a+creeping+insect.+He+who+commits+adultery+is+punished+both+here+and+hereafter;+for+his+days+in+this+world+are+cut+short,+and+when+dead+he+falls+into+hell.+Thus+considering,+let+a+man+approach+his+own+wife+in+the+proper+season,+or+even+at+other+times.&source=bl&ots=h1BsZfO1IB&sig=ACfU3U3cgvAnxYIRYnjXZ40u58PhOGmVsQ&hl=en&sa=X&ved=2ahUKEwjwz-mQ2_jmAhWipOkKHewzDTMQ6AEwAHoECAkQAQ#v=onepage&q=Let%20him%20not%20think%20incontinently%20of%20another's%20wife%2C%20much%20less%20address%20her%20to%20that%20end%3B%20for%20such%20a%20man%20will%20be%20born%20in%20future%20life%20as%20a%20creeping%20insect.%20He%20who%20commits%20adultery%20is%20punished%20both%20here%20and%20hereafter%3B%20for%20his%20days%20in%20this%20world%20are%20cut%20short%2C%20and%20when%20dead%20he%20falls%20into%20hell.%20Thus%20considering%2C%20let%20a%20man%20approach%20his%20own%20wife%20in%20the%20proper%20season%2C%20or%20even%20at%20other%20times.&f=false.
27. [illegible]
(Nov. 15, 2019, 07:00PM), https://www.holy-bhagavad-gita.org/chapter/1/verse/42.
28. *Ibid.*
29. Oxford Dictionary of Islam,Hadd,It meansLimit or prohibition; pl. hudud. A punishment fixed in the Quran and hadith for crimes considered to be against the rights of God, (Nov. 16, 2019, 04:00PM), http://www.oxfordislamicstudies.com/article/opr/t125/e757.
30. In Islam, in An-Nur, namely, Chapter 24 of the Qur'an, Verses 2 and 6 to 9 read as follow, "The adulteress and the adulterer, flog each of them (with) a hundred stripes, and let not pity for them detain you from obedience to Allah, if you believe in Allah and the Last Day, and let a party of believers witness their chastisement."Supranote 1.

road to other evils."[31] In the Western Societies, adultery met Biblical condemnation[32] . The Common law recognised the "obvious danger of foisting spurious offspring upon her unsuspecting husband and bringing an illegitimate heir into his family."[33]

It is important to note that the original draft of Indian Penal Code, 1860, had not provided for the offence of 'adultery'. It was only after the recommendation of the Second Law Commission that it was added to the Code.[34] It isto be noted that in India, as per section 497 of IPC, a wife is not punished as an adulteress or an abettor for the offence of adultery.[35] It is only the man(stranger) who has such unlawful sexual intercourse with married woman will be punished under Section 497, IPC.[36] The reason given that why the wife would not be punished has been provided as, "The condition of the women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attention of a husband with several rivals to make laws for punishing the inconsistency of the wife, while the law admits the privilege of the husband to fill his *'zenana'* with woman, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy…"[37] Moreover, the wife of the adulterer has no locus *standi* to file a complaint against her deviated husband. It is only the husband of the (adulteress) wife who can file a complaint and upon whose complaint the Court can take cognizance of the offence as per Section 198(2), CR.PC, 1973.[38] The reason behind this position is that, women were treated as the victims and not the authors or abettor of the crime.[39]

It is important to mention here the recommendation of the Law Commission of India in its 42nd

31. Ankith Jain,Overview of section 497 on adultery, International Journal Of Legal Developments And Allied Issues Volume 4 Issue 5 September 2018,(Nov. 16, 2019, 04:00PM), http://ijldai.thelawbrigade.com/wp-content/uploads/2018/09/Ankith-Jain.pdf.
32. Gabrielle Viator, The Validity of Criminal Adultery Prohibitions after Lawrence v. Texas, 39 Suffolk University Law Review 837, 838 (2005), (Nov. 17, 2019, 04:00PM), https://www.google.com/search?client=firefox-b-d&ei=uL4VXsrjHaiN4EPvb23oA0&q=Gabrielle+Viator%2C+%E2%80%9CThe+Validity+of+Criminal+Adultery+Prohibitions+after+Lawrence+v.+Texas%E2%80%9D%2C+39+Suffolk+University+Law+Review++837%2C+838+%282005%29.&oq=Gabrielle+Viator%2C+%E2%80%9CThe+Validity+of+Criminal+Adultery+Prohibitions+after+Lawrence+v.+Texas%E2%80%9D%2C+39+Suffolk+University+Law+Review++837%2C+838+%282005%29.&gs_l=psy-ab.3...115473.115473..115807...0.0..0.0.0.0.......1....2j1..gws-wiz.N9Xgt631sY8&ved=0ahUKEwjKn6rr9PPmAhWoxjgGHb3eDdQQ4dUDCAo&uact=5.
33. Charles Torcia, Wharton's Criminal Law 210, at 528 (15th ed. 1994).
34. Ratanlal & Dhirajlal, Law of Crimes, Vol. 2, (Bharat Law House, 26th ed., 2007).
35. K.D. Gaur, Text Book on the Indian Penal Code, 1052, (Universal Law Publication , 6thed., 2004).
36. *Ibid.*
37. *Id.* at page 1053.
38. *Supra* note 1
39. *Supra* note 35.

report in 1971 where it has suggested substituting section 497 of the IPC, the substituting provision is "Section. 497. Adultery – Whoever has sexual intercourse with a person who is, and whom he or she knows, or has reason to believe, to be the wife or husband, as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape commits adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both"[40] Later in 2005, Malimath Committee on Criminal Justice Reforms has recommended that men and women should be made to stand at the same footing.[41] It has been hold in the report that "A man commits the offence of adultery if he has sexual intercourse with the wife of another man without the consent or connivance of the husband. The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore there is no good reason for not meeting out similar treatment to wife who has sexual intercourse with a married man."[42] Further "The IPC (Amendment) Bill, 1972 suggested that special privilege granted to women under section 497 be done away with."[43] But section was not amended as per suggestion.

The object of the law under Section 497, is to inflict punishment on those who interfere with the sacred relation to marriage,[44] the reason being that as adultery is an anti-social and illegal act [45], no peace loving citizen or person of good morals would like that it should be permitted to be indulged in before his very nose.[46]

JUDICIAL APPROACH

PRE JOSEPH SHINE APPROACH

Within one year of advent of the Constitution of India, 1949, section 497 IPC was assailed on the ground that it goes against the spirit of equality and personal liberty (Article 14 and 21) embodied in the Constitution, in the case of ***Yusuf Abdul Aziz v. The State of Bombay.***[47] A five judges bench of the Supreme Court[48], taking into consideration Article 15(3), opined that

40. Law Commission of India, 42nd Report on Indian Penal Code, page 327, (June, 1971).
41. Government of India, Report: Committee on Reforms of Criminal Justice System, page 190, para 16.3, (Ministry of Home Affairs, 2003)
42. *Ibid.*
43. *Supra* note 35.
44. *Ibid.*
45. *Ibid.*
46. Hatim Khan v. State, AIR 1963 J&K 56.
47. *Supra* note 5.

Section 497 is a special legislative provision in favour of women, taking note of vulnerable status of women in the society.[49] Rebutting the contention that Article 15(3) should be restricted to provisions beneficial to women and should not be used to give them a licence to commit and abet a crime with impunity, the Apex Court opined that, "We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited."[50]

Supreme Court's judgement in ***Yusuf Abdul Aziz v. The State of Bombay***[51] upholding the validity of Section 497 of IPC came for reconsideration in ***Sowmithri Vishnu v. Union of India***[52] on the contention that, it being contrary to Article 14 of the Constitution, makes an irrational classification between women and men as it provide power to the husband to prosecute the adulterer but it does not confer a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery. Further no equal right is there with the wife to prosecute the husband who has committed adultery with another woman, and the provision excluded the cases where the husband has sexual relations with unmarried women, with the result that the husbands have a free license under the law to have extramarital relationship with unmarried women.[53]

The Supreme Court rejected all these arguments and ruled that Section 497 does not offend either Article 14 or Article 15 of the Constitution. Next important Apex Court decision on Section 497 of IPC was ***V. Revathi v. Union of India***[54] where, a wife challenged the validity of Section 198(2) of CR.PC, contended that it discriminatingly empower the husband of the adulteress wife to prosecute the adulterer but does not equally empower the wife of an adulterer husband to prosecute.[55] The Supreme Court observed that, "The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. There is thus reverse discrimination in 'favour' of the woman rather than 'against' her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination

48. *Ibid.*
49. *Ibid.*
50. *Ibid.*
51. *Ibid.*
52. *Supra* note 6.
53. *Ibid.*
54. *Supra* note 7.
55. *Ibid.*

against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other." [56]

POST JOSEPH SHINE APPROACH

In the landmark ***Joseph Shine v. Union of India***[57] , case the Apex Court of India declared that Section 497 to be unconstitutional on ground of violation of Articles 14, 15 and 21 of the Constitution. And consequently, Section 198(2) of the CR.PC, 1973 which contains the procedure for prosecution under Chapter XX of the Indian Penal Code, 1860 are held to be non-applicable, to the extent it was applicable to the offence of Adultery under Section 497, IPC. And the decisions in ***Yusuf Abdul Aziz, Sowmithri Vishnu*** and ***V. Rewathi*** are hereby stand overruled.[58]

The five-judge bench of the Supreme Court has struck down Section 497, IPC and decriminalised adultery in India, however adultery still remains a civil wrong and ground for divorce under all personal laws as it previously stands. The judgment put blow of judicial review on the patriarchal and unequal provision of section 497 of IPC on following considerations

Autonomy and personal liberty of wife: The provision of "connivance or consent of husband" to put the adulterous act out of prescribed nature of wrong as per section 497 of IPC, 1860, has been considered in this judgement. It has been held that, a husband is not the master and equality is the governing parameter and the beauty of the Indian Constitution.[59] The Court referred the constitution of India and asserted that "Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness, which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights."[60] The court further held that, "It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted."[61] The Supreme Court clearly lays down that autonomy, desire, choice and identity

56. *Ibid.*
57. *Supra* note 1.
58. *Ibid.*
59. *Ibid.*
60. *Ibid.*

are the important aspects of the dignity of a woman.[62]

Equality: As per the Apex Court, "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC."[63] The Supreme Court further opined that "Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary."

Privacy and Right to life: The Apex Court refers the landmark judgement on right to privacy delivered in the case of ***K.S. Puttaswamy and another v. Union of India and others***[64] , where a nine judges' bench stated that importance has been given to the dignity of an individual. The judiciary held that "Having stated about the dignity of a woman, in the context of autonomy, desire, choice and identity, it is obligatory to refer to the recent larger Bench decision in ***K.S. Puttaswamy and another v. Union of India and others***[65] , which, while laying down that privacy is a facet of Article 21 of the Constitution, lays immense stress on the dignity of an individual[66]" Therefore, the Apex Court after analysing the whole concept of right to privacy and equality of women declares that section 497 of Indian Penal Code violates Article 21 of the Constitution, as equality and dignity of woman cannot be curtailed in such cases.[67]

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61. *Ibid*
62. *Ibid.*
63. *Ibid.*
64. (2017) 10 SCC 1.
65. *Ibid.*
66. *Supra* note 1.

Adultery as a crime (criminal wrong): The Supreme Court asserted that "There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. However, the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social licence that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain their loyalty. We are not commenting on any kind of ideal situation but, in fact, focusing on whether the act of adultery should be treated as a criminal offence. In this context, we are reminded of what Edmund Burke, a famous thinker, had said, a good legislation should be fit and equitable so that it can have a right to command obedience. Burke would like to put it in two compartments, namely, equity and utility. If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life."[68]

CRITICAL ANALYSIS

In this decision, the Supreme Court has struck down Section 497 IPC. Dilution in the institution of marriage can be the result, upon which the strong foundation of the Indian family system and civilisation rests. The deterrence effect on stranger to marriage to prevent him from trespassing this sacred institution has been out rightly blown. This cessation will lead to rapid profiling in the acts related to adultery. Adultery is no longer a criminal offence now. It is just a civil wrong for which divorce is the remedy.[69]

Judiciary held that a moral wrong is different from legal right and thus morality has not been the only base of state policy while enacting the law. Criminal law also meant to protect the historical cultural roots and moral principles of the society.[70] Moral wrong can shake the conscience of the society and can result into conflict and chaos in the society, especially when a strong cultural and civilisation root of society is interfered.

Declaring adultery as a criminal offence, no doubt amounts to intervention in the right to privacy, but also wrecks the life of another partner in institution of marriage. Further, it not only affect spouse but also takes down with it the children and the other family members. It is to be remembered that rights have corresponding duties and absolute rights can destabilise the

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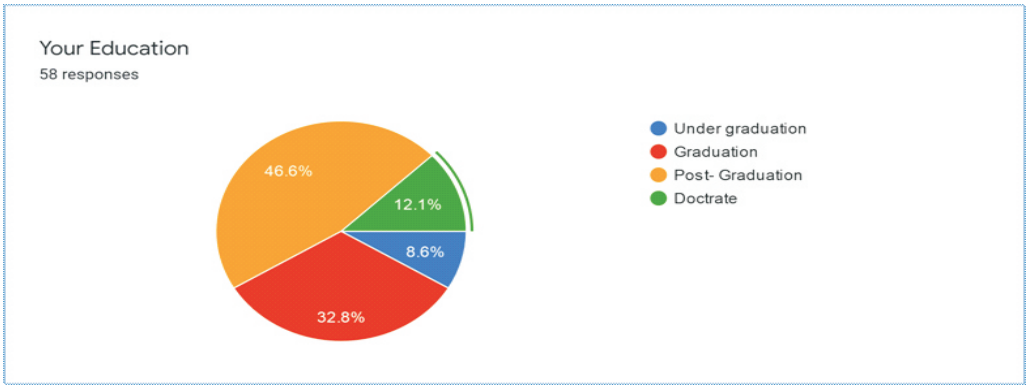
67. *Ibid*
68. *Ibid.*
69. Akar Srivastava and Monica Chhabra,Critical Analysis on the Judgement of Adultery, ILSJCCL,Volume 1 Issue 1, (Nov. 16, 2019, 04:00PM), https://journal.indianlegalsolution.com/2019/01/15/critical-analysis-on-the-judgement-of-adultery-akar-srivastava-and-monica-chhabra/.
70. *Ibid.*

society. The moral and psychological effect on children will be most adverse and severe.

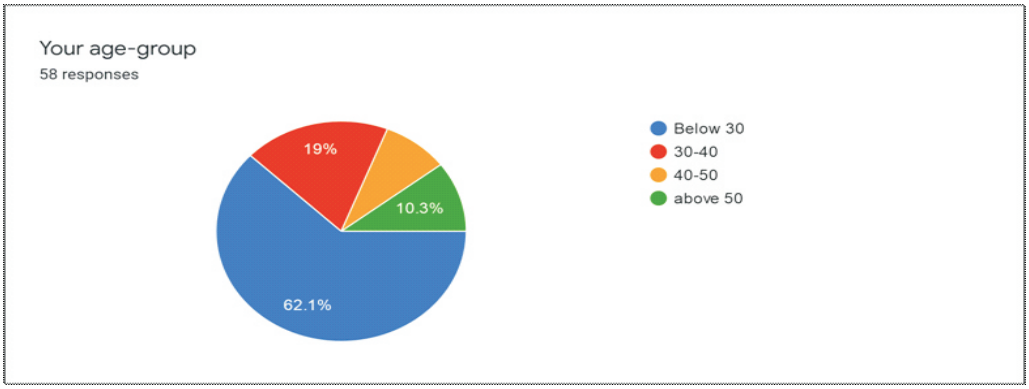
EMPIRICAL STUDY

A survey was conducted through online and offline questionnaire method to get responses from section of the society comprising both males and females who are either married or unmarried; most of the respondents are educated. The object was to know the view of society regarding act of adultery and its effects on the institution of marriage in the age of equality of rights. As a crime is a wrong which shake the sense of security or conscience of the society at large. In modern changing times when the very nature and form of institution of marriage is gradually changing, the perception of society may also be changed. The results of study is analysed as follows:



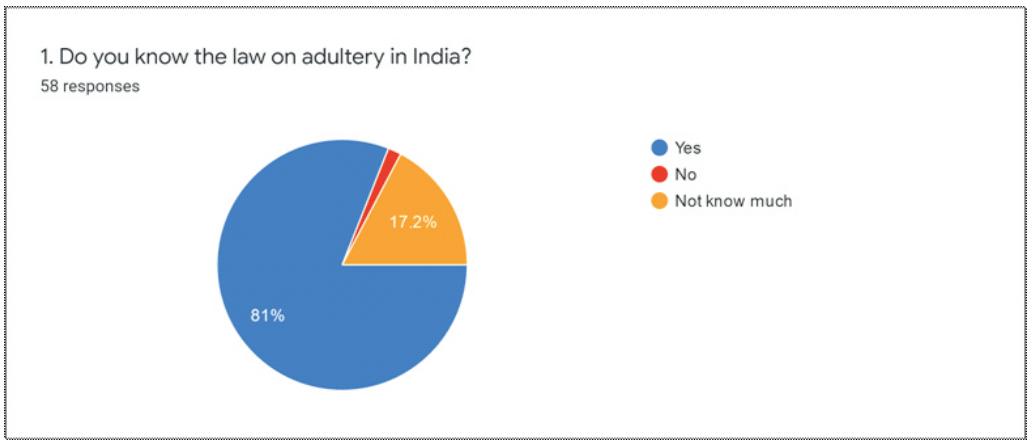
Pie Chart 1

Majority of the respondents are post graduate and least are under graduates.



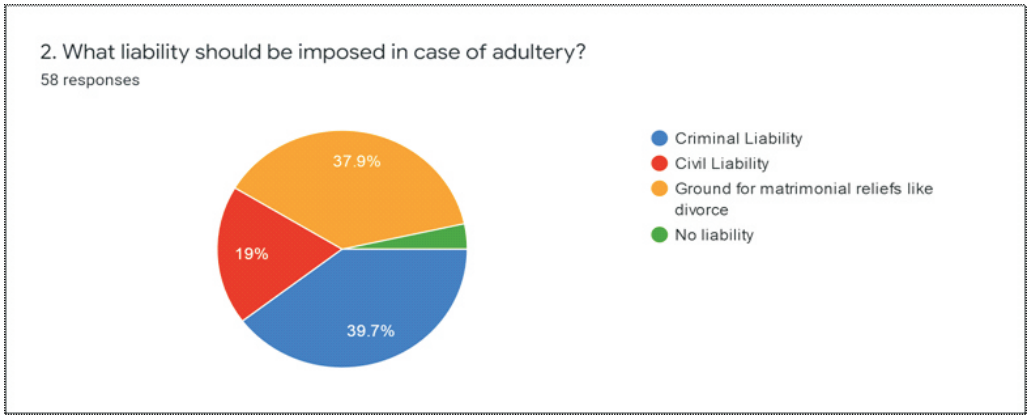
Pie Chart 2

Majority of respondetnts are below 30 years of age.



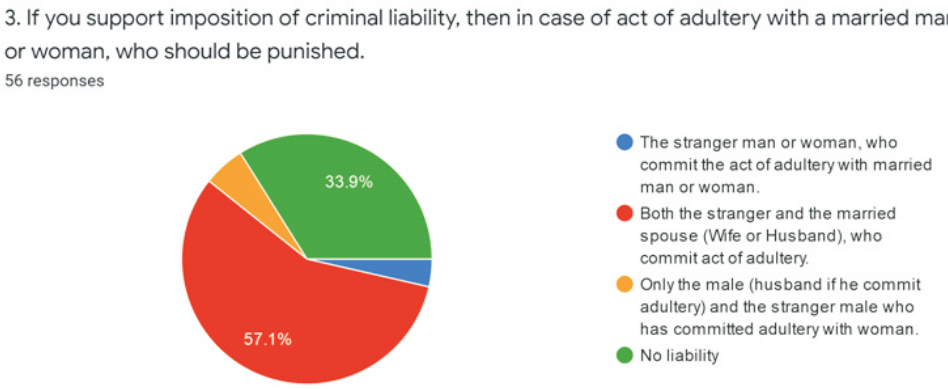
Pie Chart 3

Majority of respondetnts that is almost 4/5th know the law and only 2 percent are totally ignorant of it.



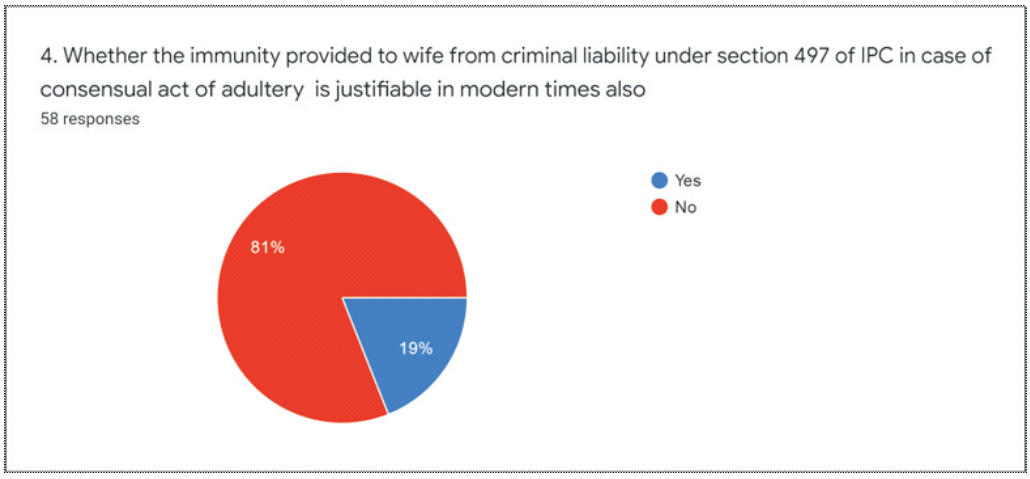
Pie Chart 4

Majority of respondents, i.e. approximatly 40 percent feels that criminal liablity should be imposed to regulate the wrong of adultery, while almost 38percent said that adultery should be limited as ground to dissolve the marriage. Only 19 percent feels it to be regulated by civil laws. And 3 percent respondent want it to be not legally regulated, i.e. a act free from state interferance.



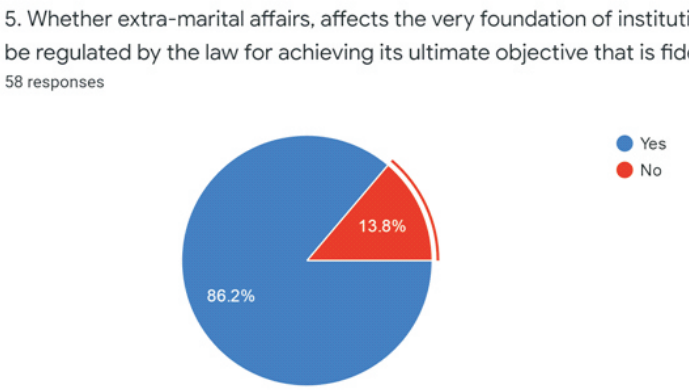
Pie Chart 5

This question is to further get the opinion of respondent regarding the persons to be put under ambit of criminal liability. Majority of respondetnts want to put both the stranger and the married spouse (wife or Husband) who has commited the act of adultery under criminal liablity.where as the respondents who does not support criminal liability in pie chart 3, either choose no liability option or leave this option unfilled.



Pie Chart 6

Majority of respondetnts that is almost 4/5th feels that immunity to wife as provided earlier in Section 497 of IPC, 1860, is not justifiable in modern times.



Pie Chart 7

Majority of respondetnts, that is almost 86 percent, opined that the act of adultery affects the very foundation of institution of marriage and need to be regulated by law for achieving its object of mutual fidelity.

CONCLUSIONS AND SUGGESTIONS

Since the ancient era, almost in all the societies, adultery is a matter of consideration and has been rigorously condemned and punished, usually as a violation of the husbands rights.

In India, the wrong of adultery has been declared as a proscribed act as per state policy, by declaring it a criminal offence as per Section 497 of IPC. As per Section 497 of IPC, a male for committing the act of consensual sexual intercourse with the legally wedded wife of another with knowledge or reason to believe of her to be the wife of another man and without the consent or connivance of that man, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. But as per Section 198(2) of CR.PC only husband can initiate such criminal proceeding, as it has been specifically provided that no person other than the husband of the woman shall be deemed to be aggrieved by any offence. So the legal provision is discriminatory and derogates doctrine of equality against wife as not providing her equal right to initiate proceeding against in case act of adultery by her husband. Further the word consent or connivance of husband to put the act of sexual intercourse out of

required actus rea of section 497 of IPC make sexual autonomy of wife a property of husband, which is against spirit of article 21 of the Constitution of India ,i.e. life and personal liberty. Earlier many times the Apex Court of India upheld the validity of section 497, even in five judges' bench in the case of ***Yusuf Abdul Aziz v. State of Bombay***[71], but in the judgment of ***Joseph Shine v. Union of India***[72] an equal five judges bench has struck down Section 497 IPC and Section 198(2) CR.PC. It is a question of discussion as to whether an equal bench of the five judges can overrule a previous judgement of equal bench.

It is to be noted, that the issue in the case of ***Joseph Shine v. Union of India***[73] is discrimination of provision under Article 14 and 21 of the constitution. The word "consent and connivance" and sole right to husband to prosecute the stranger male who has committed consensual sexual intercourse with his wife has been under consideration in the present case. And declaring the whole provision as unconstitutional is need to be considered by the legislation, that whether Section 497 of IPC need to be redrafted or not.

Section 497 of IPC, 1860 provides special protection to wife as a victim in case of her consensual act of adultery with a male other than her husband. In ***Yusuf Abdul Aziz v. The State of Bombay***[74] , the five judges bench held that Section 497 is a special provision made for women and therefore is saved by clause (3) of Article 15.[75]

As per Indian civilisation setup family is vital social institution and marriage is the foundation of family. No doubt, in the modern era of democracy all social relationships and institutions are undergone a gradual change in India. Liberty, Equality and Fraternity which are three main pillars of idea of democratic society as per Indian constitutional is fully applicable on institution of marriage and consensual sexual relations also. But the institution of marriage can't be allowed to be disintegration or weakened in influence of western idea of marriage and consensual sexual relationships. In India marriage has been considered as sacred and special social institution and not just a civil contract meant to regulate opposite genders consensual sexual relationship and procreation of children. Among Hindus it is considered as holy union[76]

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71. AIR 1954 SC 321.
72. *Supra* note 1.
73. *Ibid.*
74 Supra *note 5.*
75. *Ibid.*
76. *Supra* note 8

and among Muslims as *ibadat* and *maumalat.* [77] Though as per its nature and effect adultery may not be such a serious wrong that it can shake the conscience or sense of security of the society, but it can play chaos in the lives of the people concerned. Thus it can effect concept of marriage, and then family and ultimately of Indian Society. Adultery may not be gravest of crimes but it can bring out grave consequences. The person committing the adulterous act is always aware of the fact that he or she is violating the basic norms and obligation of the institution of marriage, as the very credibility and trustworthiness of one spouse is being targeted.

In the judgement only criminal liability for the act of adultery has been removed. But it is still applicable for ground of divorce along with other matrimonial and civil remedies. But it has not expressly provided in the judgements, though clear if we read in between the lines. Not expressly clearing position for civil liability and consequences under personal law for adultery can be taken as a message to providing it a walk-in and walk-out relationship.

In ***Yusuf Abdul Aziz v. State of Bombay***[78] the Apex Court of India, upheld the validity of section 497 of IPC as per Section 14 and 15 of the Constitution. The Supreme Court declared that Article 15 is not absolute as far as prohibition of discrimination on ground of ex is concerned, as Article 15(3) of the constitution provides for legislation in favour of women. As we understand, that in cases of adultery, there are two types of considerations, one is that wife is not prosecuted, this provision favours the woman and the other is only husband can prosecute the third person (Stranger who trespass the institution of marriage) involved in act of adultery. In our view the Supreme Court in Joseph Shine[79] judgement has addressed the second point, which authorised the husband on behalf of wife or to protect the institution of marriage to take action against such third person. But first point which protects the wife is still open as far as this judgement is concerned. Therefore, we feel too verrule the ratio of Supreme Court in ***Yusuf Abdul Aziz v. State of Bombay***[80] case should have been appropriately considered by the larger bench. In case review by the Supreme Court does not take place because of legal technicalities involved in it, it

77. Abdur Rahim,Nikah, (Nov. 16, 2019, 04:00PM), https://books.google.co.in/books?id=QrMZY vwqYDUC&pg=PA33&lpg=PA33&dq=abdul+rahim,+marriage+id+ibadat+and+muamalat&source=bl&ots=GjcH9DzXTN&sig=ACfU3U26pSJe-BtKFKP49o_uh5a-CsKDdQ&hl=en&sa=X&ved=2ahUKEwie6aj96-bmAhV27nMBHfEhAaQQ6AEwBXoECAoQAQ#v=onepage&q=abdul%20rahim%2C%20marriage%20id%20ibadat%20and%20muamalat&f=false.
78. *Supra* note 5.
79. *Supra* note 1.
80. *Supra* note 5.

is further suggested that legislature can bring an amendment in consonance with the constitutional provision of Article 14, 15 and 21 to provides the best social engineering considering the very basic structure and beliefs of Indian society, rather than repealing or removing the penal provision completely. Legislation should bring husband and wife at equal footing by providing penal provision for act of consensual extra marital sexual intercourse by any stranger (man or woman) with a wedded man or woman. Further punishment should be decreased from five years to sex months.

Proposed legislation for Section 497 of IPC "Adultery — Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife or husband of another man or woman, all such persons; wife, husband and third person are individually guilty of the offence of adultery, and shall be punished with imprisonment for the a term of six months."

Proposed legislation for Section 198(2) of CR.PC "Both the husband and wife shall be deemed to be aggrieved by any offence punishable under section 497.

APPLICABILITY OF RES JUDICATA IN EXECUTION AND WRIT PROCEEDINGS

- Mr Gurpreet Singh*

"Res judicata changes white to black and black to white, it makes the crooked straight and the straight crooked." [1]

INTRODUCTION

Laws of each and every land are based on principles. These principles control the entire domain of jurisprudence in a nation. Such principles navigate legislation, give legitimacy to judicial pronouncements and defend the citizens of a nation. The judiciary embodies such principle in deciding cases and provides conformity by the legislature and executive to suchlike principles.

Res *judicata* is such a principle, whose origin cannot be amply traced. This notion exists in all jurisdictions of the world. Res *judicata* is based on public policy and has universal practice.[2] India has adopted the rule of res *judicata* in section 11 of the Code of Civil Procedure, 1908. Present day society is fraught with disputes and litigations. The courts are fraught with slow, frivolous and cumbersome cases. The incarnation of a rule like res *judicata* is one of the needs in our country. With regard to bring finality to litigation and preclude a person from being dragged to court again and again, res *judicata* is mandatory in any society.[3]

Res *judicata* is a plea accessible in civil proceedings under section 11 of the Code of Civil Procedure, 1908. Its primary aim is to bring finality to "lis" in first or appellate proceedings. The principle implies that an issue or a point once adjudged and accomplished finality should not be permitted to be revived and re-agitated again. Res *judicata* basically means 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgement'. This regulation engrants with a reason that a judgment delivered by a court of competent jurisdiction on the merits is final with respects to the privileges of the parties and their privies and establishes a flat bar to successive action concerning the same demand, claim or cause of action. Plea or right of res *judicata* is not accessible where there is no dispute on an issue among the parties and there is no aware adjudication of an issue.[4]

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1. Black's Law Dictionary 1337 (8th edn., 2004).
2. T.L. Venkatarama Aiyar,Mulla on The Code of Civil Procedure 50-51(Tripathi Private, Bombay 1965).
3. Law student, Res Judicata and Code of Civil Procedure, Law Teacher (Jul, 26, 2019) https://www.lawteacher.net/free-law-essays/constitutional-law/res-judicata-and-code-of-civil-procedure-constitutional-law-essay.php?vref=1.
4. Escorts Farms Ltd. v. Commissioner, Nainital, (2004) 4 SCC 281.

With regard to decide the issue whether a subsequent proceeding is precluded by res *judicata*, it is mandatory to examine the issue with reference to:

a) The form or a competence of the court;

b) The party and the representatives;

c) Matters in issue;

d) Matters which ought to have been made ground for defence or attack in the former suit;

e) The final decision.[5]

The principle of res *judicata* embodies norms of public policy and rule of private justice. It is based on the need of giving finality to judicial decisions and the right of individual to be saved from vexatious multiplicity of proceedings.[6]

CONSTITUTIONAL ASPECT

Constitution of India has been awarded extraordinary remedies as provided under the Act against the State activities. Conferral of such constitutional remedies operates as a check against the misuse of power by the various agencies of State. Article 32, Article 226 and Article 227 of the constitution are most germane articles in this respect. Under these articles certain types of writ petitions can be filed but these articles mainly emphasis on the protection of the fundamental rights of the citizen which are enshrined in the constitution. Our constitution provides fundamental rights under Part-III and also gives liberty to approach the Supreme Court under Article 32 if any of the infringement is done in fundamental rights. Problem aroused in the Supreme Court, whether the rule of res *judicata* will apply to the fundamental rights of the citizen under Article 32? There were numerous conflicted decisions of the Supreme Court which started from the ***Ramesh Thapper vs. State of Madras*** case[7] to ***Srinivasa Reddy vs. State of Mysore***[8] case and the applicability of rule remained silent with respect to the fundamental rights. And finally in ***Daryao vs. State of U.P.***[9] case, the Apex Court stated that no doubt the rule has some technical aspect but it is footed on the rule of public policy i.e. giving finality to litigation and nobody is vexed twice. From these principles, the rule of res judicata will be applicable to writ petitions. The court further added that if a writ petition entertained under

5. Solil Paul and Anupam Srivastava, The Code of Civil Procedure 160-161(Butterworths, New Delhi, 2011).
6. I.T.C. Ltd. v. Central Exicise Commissioner, AIR 2005 SC 1370.
7. (1950) SCR 594.
8. AIR 1960 SC 350.
9. AIR 1961 SC 1457.

Article 226 is dismissed on merit the parties will be bound by the decision until and unless the petition is modified or reversed in appeal or other appropriate proceeding allowed by the law of land.

APPRAISAL OF RES JUDICATA IN EXECUTION PROCEEDINGS

It is found during the research that prior to the Amendment Act, 1976 there were conflicting views regarding the provisions of section 11 of the Code of Civil Procedure, 1908, are applicable to the execution proceedings.[10] The section 11 is not comprehensive on the issue of res *judicata* and its universal principle is applicable to the execution proceedings also. Virtue of the landmarkjudgment of the Privy Council in the case of ***Ram Kirpal vs. Rup Kauri***[11] held in 1883, where Privy Council made a strong base for the application of res *judicata* in execution proceedings. Prior to this decision the general rules of the doctrine are only applicable to the civil suits not in execution proceedings. Privy Council remarked that though the section 11 in terms did not apply to the execution but the doctrine will be applicable in such proceedings. The report of Joint Committee justified that it had been already held by the *Privy Council* as well as the Supreme Court that the doctrine of constructive res *judicata* applies to the execution proceedings. The Committee, therefore, feels that in place of inserting new section 11(A), section 11 should be so amended as to make sure that the doctrine of res *judicata* may apply in its full magnitude, to proceedings in execution; but the insertion of a new explanation VII to section 11 has only codified the judicial dicta.[12]

An order passed in the absence of another party is named as an *ex-parte* order. *Res judicata* does not strictly apply to *ex-parte* orders but the catena of Supreme Court judgments states that in the situations where the courts satisfy that the notice is served upon the defendant, *res judicata* operates. Practically, the defendant takes a vague plea; the court enforces the discretionary power enshrined under section 151 of CPC and restores the particular case which violates the basic rule of public policy (no person be vexed twice). A stringent law must be formed which should state that *res judicata* must be completely applicable in ex-parte proceedings in execution so that there are no loop holes left.T he Orissa High Court in ***Bangsidhar vs. Jagmohan*** case[13] laid down that after the court is satisfied that the notice was served upon the

10. CPC (Amendment) Act 104 of 1976.
11. (1883) 11 IA 37.
12. Report of the Joint Committee, Gazette of India 804(1976).
13. AIR 1945 Ori 21.

respondent, an ex-parte order was granted in execution proceedings, operate as *res judicata.* A notice of attachment of sale is received by the judgement-debtor but cannot claim exemption at initial stage under sec 60(1) (c) subsequently is barred from claiming such exemption at the time of proclamation of sale; constructive res judicata would apply in such cases[14]. But res judicata will not be applicable in *ex-parte* orders in the following circumstances:

i. When no notice is issued,

ii. When the notice is not duly served,

iii. When the notice does not clearly and plainly specify the nature of the claim.

iv. When an application for set aside of *ex-parte* order within limitation period.

Section 11 of the Code of Civil Procedure requires a suit to have been "heard and decided" by a court in order toapply as res judicata in a subsequent suit. However, not all cases conclude with a decisionfollowing full blown adjudication. In many cases, a suit may be brought to an end by acompromise entered into between the parties which may be formalised into a consent decree. A question that has arisen frequently in this context is whether such consent decrees can operate as *res judicata* in subsequent suits between the same parties.

As per the 144th Report of the Law Commission,[15] courts in India have vacillated over whether section 11 would apply in such situations. The High Courts of Sind,[16] Rajasthan,[17] Delhi,[18] Bombay[19] and Guwahati[20] have expressed the view that section 11 would not apply to consent decrees. On the other hand, in a few instances the High Courts of Bombay,[21] Calcutta[22] and Punjab[23] have held that section 11 would apply. The Supreme Court had itself wavered between the two positions between 1954 to 1991. In this context, the Law Commission expressed the need for legislative intervention in the area and recommended the insertion of a new explanation to the section which would clarify that consent decrees would also have a *res judicata* effect. No such amendment to section 11 has however been introduced.[24]

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14. Bhaskar Traders v. MinikipachaKunhiraman, AIR 1988 Ker 227.
15. Law Commission of India, 144th Report on Conflicting Judicial Decisions Pertaining to The Code of Civil Procedure, 1908 (April1992).
16. Ratanchand v. Anandrai, AIR 1933 Sind 53.
17. Bhanwarlal v. Raja Babu, AIR 1970 Raj 104.
18. Manohar v. Naraindass, AIR 1987 Del 226.
19. Minalal v. Kharsetji, (1906) 8 BomLR 296.
20. UphrasLapasam v. Ka Esiboll, AIR 1986 Gau 55.
21. Bhai Shankar v. Morarji, lLR (1912) 36 Bombay 283.
22. Krishna v. Dhanpati, AIR I957 Calcutta 59.
23. Naidermal v. UgerSain, AIR 1966 Punjab 509.
24. *Supra* note 15.

CRITICAL AND COMPARATIVE APPRAISAL OF JUDICIAL DECISIONS

Judiciary in every country plays a prominent role not only in judicial decision but also safeguarding and protecting the interest of society, citizens and State. Judiciary renders direction to the legislature and finds out the weaknesses and ambiguities. The courts in India have acknowledged the principle of *res judicata* in their numerous judgments in positive sense and magnified the scope of the principle by applying the general rule of *res judicata.* As the principle of *res judicata* is salutary one, which is applicable not only to matters governed by the clauses of the Code of Civil Procedure, 1908, but to all proceedings and litigations. The principle of *res judicata* has been applied by the courts with stipulation that there should be no unwanted litigation and whatever claims and defenses are liberal to parties shall all be put up at the similar time so that the finality should attach to the binding adjudication of the courts and the parties should not be vexed again with the identical kind of litigation.

In ***Mohan Lal Goenka vs. Binoy Krishan Mukherjee*** case[25] , Supreme Court follows the Privy Council decision wherein it stated that the rules of constructive *res judicata* would apply even in execution proceedings but this rule would not be applicable wherein the parties and title in subsequent suit are different from the previous suit or the previous application is not heard and finally decided. And in ***Barkat Ali & Another vs. Badri Narain*** case[26] , Supreme Court observed that the matter which has been finalised or deemed to have been finalised at preliminary stage, that matter cannot be re-opened not only in separate proceeding, but also in the later proceedings of the same suit.

For the application of res *judicata*, it is mandatory that the previous application must have been heard and decided. In ***Jethmal vs. Sakina***[27] case, court stated that if an application for execution is rejected for the default of appearance, a subsequent fresh petition cannot be barred by the rule of res judicata. Similarly in ***Kishore Bun vs. Prosuno Coomar***[28] case, an execution application filed under Order XXI rule 32 was rejected as decree-holder did not give an opportunity to the judgement-debtor to obey the decree. It was also stated that after such an opportunity has been provided to the judgement-debtor, later execution application is not restrained by the law of *res*

25. AIR 1953 SC 65.
26. AIR 2008 SC 1272.
27. AIR 1961 Raj 59.
28. (1894) 21 Cal 784.

judicata.

Pursuant to the recommendations made by the Law Commission in its *Fourteenth*[29] and *Twenty Seventh* Report[30] , the amended Code of Civil Procedure expressly provided that all questions including questions of title are to be settled finally in execution proceedings itself and not by a separate suit. So, it is the duty of the executing court to adjudicate all the claims raised before it. In ***Ravinder Kaur vs. Ashok Kumar*** case[31], the Apex Court reiterated that the claim may not be rejected on the sole ground that the claimant has an opportunity to prefer a claim or objection at an earlier stage of the proceeding. The court has to look into the circumstances of the case and come to a conclusion about whether the present claim is aimed at unnecessarily delaying the proceedings. Hence, by considering the above provisions the executing court has to decide the claim petitions effectively. Pleas which have already been adjudicated upon by the trial court cannot be agitated again in execution proceedings under section 47 and Order 21 rule 58 of Code of Civil Procedure because the executing court is not competent to go behind the decree and substitute its own opinion to the one expressed by the court which passed the decree.[32]

In ***Asgar and others vs. Mohan Verma and others*** case[33], the appellants are strangers to the decree. They were required to get that claim adjudicated in the course of their execution application which was under the provisions of Order XXI rule 97. Having failed to assert the claim at that stage, the deeming fiction contained in explanation IV to section 11 is clearly attracted. An issue which the appellants might and ought to have asserted in the earlier round of proceedings is deemed to have been directly and substantially in issue. It has been held that the observations that the appellants were free to pursue an appropriate remedy for the redressal of their grievances in accordance with law contained in the order of court cannot be construed to mean that the respondents would be deprived of their right to set up a plea of constructive *res judicata* if the appellants were to raise such a claim. This must necessarily be construed to mean that all defences of the respondents upon the invocation of a remedy by the appellants were kept open for decision. The liberty granted by this court was not one-sided. It encompasses both the ability of the appellants to take recourse and of the respondents to raise necessary defences to the

29. Law Commission of India, 14th Report on The Reforms of Judicial Administration (September 1958).
30. Law Commission of India, 27th Report on The Code of Civil Procedure, 1908 (December 1964).
31. AIR 2004 SC 904.
32. *Ibid.*
33. 2019(1) ARC 560 (S.C.)

invocation of the remedy. The Hon'ble court held that constructive res judicata, in the same manner as the principles underlying res judicata, is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it at its own peril. In deciding whether the matter ought to have been urged in the earlier proceedings, the court will have due regard to the ambit of the earlier proceedings, and the nexus which the matter bears to the nature of the controversy.

RES JUDICATA IN WRIT PROCEEDINGS

When we read the explanation of section 141 of the Civil Procedure Code, 1908 section 11 is not applicable to the proceedings under Article 226 of the constitution. But the rule of *res judicata* applies to writ petitions under Article 226 in spite of the fact that section 11 has no space in writ mechanism. When there is any violation of the fundamental right of a citizen then the applicability of the rule is stringent. Any issue decided under Article 226 or under Article 32 constitutes *res judicata* in later proceedings. While applying the rule, former decision must be a speaking order with proper reasoning. The res judicata is based on the public policy that when any decision attains finality it is not permissible under the law of land to take a plea that it ultravires Article 14 of the constitution; the parties will not be allowed to re-open the matter already adjudged.[34] The discussion and interpretation of *res judicata* in various Supreme Court judgments expands the scope and applicability of universal rules of res judicata in writ petitions registered under Article 226 and Article 32 of the constitution. As *res judicata* is applicable to various proceedings of the civil law, similarly, if a conclusion has arrived in the initial writ petition, successive writ petitions with regard to same subject matter will be restricted by the rules of res judicata, if challenged again under Article 32.[35]

WRIT OF HABEAS CORPUS IS AN EXCEPTION TO RES JUDICATA.

Where the issue of right to life or liberty is involved, *res judicata* will not be applicable. There is an only exception to the applicability of *res judicata* in writ mechanism i.e. habeas corpus. The English and American courts both agree on the fact that the rule of *res judicata* is not applicable to a writ of habeas corpus. Likewise, Indian courts too, the rule of res judicata is not made applicable to cases of habeas corpus.

In whole of the constitution Article 21 is supreme; neither substantive lawnor any procedural

34. Sir DinshahFardunji Mulla,The Code of Civil Procedure349 (Lexis Nexis, Nagpur, 2011).
35. Sudipto Sarkar and V.R. Manohar, Sarkar's The Code of Civil Procedure 180-181 (Lexis Nexis, Gurgaon, 2011).

law can curtail its scope. In ***Srikant vs. District Magistrate, Bijapur and others*** case[36] the petitioner filed a *habeas corpus* petition under Article 32 of constitution which was opposed by the State and other respondents by taking a plea of *res judicata*. The State urged that the previous petition was also dismissed on similar grounds and the present petition is totally devoid of merits; did not include any new fact or ground. While giving the judgement, the Supreme Court took into consideration the referred judgements of ***Ghulam Sarwar vs. Union of India and others***[37] (pronounced by Constitution Bench), ***Lallubhai Jogibhai Patel vs. Union of India and others***[38] along with ***Daryao vs. State of U.P.***[39] stated that the rule of constructive res judicata is only applicable to civil action. Wherein the issue of personal freedom or illegal detention is involved, the rule of public policy is inapplicable and the successive writ petition of habeas corpus under Article 32 is not barred.

A conflict between Article 21 and the applicability of *res judicata* is cited again in a recent judgement.A set of writ petitions under Article 226 and 227 of constitution are filed in ***Abdul Razak vs. State of Karnataka*** case,[40] in which the Full Bench of Karnataka High Court before pronouncing a judgement framed three issues; which were related to detention. The court reiterated that the rule of *res judicata* does not strike when it conflicts with the Article 21 and second writ petition is maintainable on fresh or new grounds, assailing the same detention order which were dismissed previously. Even the non-mentioning of the period of detention in the previous writ petition would not vitiate the second writ petition.

In ***T.P. Moideen Koye vs. Govt. of Kerala,***[41] the petitioner files a writ of *habeas corpus* before High Courtunder Article 226 against his detention and the petition is rejected (speaking order or by a non-speaking order) and the said order is not questioned by preferring a special leave petition under Article 136 and is permitted to become absolute, it would still be liberal for him to institute an independent *habeas corpus* writ petition under Article 32 of the constitution. The rule of public policy is not completely binding on an illegal detention and does not preclude a next writ petition of *habeas corpus* under Article 32.

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36. (2006) Cri LJ 1557.
37. AIR 1967 SC 1335.
38. AIR 1981 SC 728.
39. AIR 1961 SC 1457.
40. (2017) SCC OnLine Kar 2855.
41. AIR 2004 SC 4733.

CRITICAL AND COMPARATIVE APPRAISAL OF JUDICIAL DECISIONS

The doctrine of *res judicata* does apply to all writ petitions under Article 226 and Article 32 of the constitution. Therefore, the position is that when once a writ petition has been filed in a High Court or Supreme Court and has been dismissed there on merits, then a successive writ cannot be filed in the same court on the similar cause of action. However, this vision of the Supreme Court has been condemned by various jurists. They have asserted that judiciary has diminished the fundamental right in Article 32 by applying the golden rule. It is submitted that the researcher agrees with the view of the Supreme Court that there has to be finality to litigation. Gazing at the slow process of judicial remedy and frivolous proceedings in our community, it is rather indispensable that the doctrine of *res judicata* be given as liberal as interpretation and its scope and applicability should not be curtailed. Where the applicability of *res judicata* in writ petitions is concerned, the judgment delivered in ***Daryao vs. State of U.P***.[42] strikes first; without which the constitutional aspect of its applicability is incomplete. Thus universal rules laid down by the Supreme Court inthe aforesaid case has been taken as a benchmark for deciding application of *res judicata* in subsequent cases with respect to writ petitions instituted under Article 226 and Article 32 of the Constitution.The Supreme Court has described the following basic principles for the applicability of res judicata:[43]

a) The parties are barred to move Supreme Court under Article 32 with respect to same matter with same facts which was contested previously in a writ petition and was dismissed on merit would bind the parties until and unless it is reversed or modified by appeal.

b) A subsequent petition under Article 32 is not prohibited by law, if a former writ petition is dismissed because of latches or the party had some other alternative remedy but not on the merits.

c) The former petition dismissed in *limine;* subsequent writ petition totally depends upon the order pronounced by the court previously i.e. whether the bar of *res judicata* is to be enforced or not.

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42. Daryao, *supra* note 9.
43. *Ibid.*

In ***Sharma vs. Krishna Sinha*** case,[44] the issue of the applicability of *res judicata* in writ proceedings under Article 32 was raised in the Supreme Court for the first time where the Apex Court had delivered its judgement with positive effects to widen its scope.Prior to this case there was no proper check or limitation on the repeated petitions under Article 226 or Article 32. The court stated that once the writ petition is decided on merit then it is not liberal to a party to move High Court under Article 226 or to Supreme Court under Article 32 for deciding the same issue again unless the order is reversed or modified in appeal.

In ***Pawan Kumar Singh vs. State of U.P. case,***[45] petitioner appealed for the compensation along with the interest in lieu of acquisition of plot under the provisions of the Land Acquisition Act, 1894. The respondent stated that the same petition was filed previously which was dismissed by the High Court on same cause of action and the instant petition is not maintainable under Order 23 rule 1 of CPC. The High Court referred many cases of the Supreme Court and mainly relied on the judgment given in ***Forward Construction Co. vs. Prabhat Mandal case***,[46] where it is held that res judicata is applicable on the order that dismissed the first writ petition and the petitioner has no right to institute another petition on the similar facts and on similar cause of action.

There is no hard and fast rule established by the law or any precedent settled by the court on the summary dismissal of the petition. In ***Hoshnak Singh vs. Union of India***[47] regarding the applicability of *res judicata* in decision without speaking order, the Supreme Court stated that the writ petition dismissed in High Court without speaking order cannot bar a subsequent petition on the same facts. The applicability of the rule would depend upon the order, the facts and circumstances of each case. The High Court in review petition can only correct errors which are face of the petition but the court have no jurisdiction to correct error decision which is decided on merit.

Any dismissal in *limine* of a petition may only prohibit the discretion of the court but lays no effect on the jurisdiction of the court in another writ petition. While pronouncing a judgment, court can consider the issue even the argument in *limine, res judicata* will apply on subsequent petition. *Res judicata* is applicableif a writ petition is dismissed on merit though in *limine*.The

44. AIR 1960 SC 1186.
45. (2019) 134 ALR 552.
46. AIR 1986 SC 391.
47. (1979) 3 SCR 399.

dismissal in limine of a writ petition without a speaking order implies no bar on the later writ petition. Withdrawal of a petition by a workman would not constitute as *res judicata* on another remedy claimed under Labor Court; Order 23, rule 1 is also not applicable to such suit.[48]

In ***Union of India vs. Javier case***,[49] Union of India and the Railway Administration filed a writ petition to quash the order of Central Administrative Tribunal. The respondent applied for the post of Junior EngineerII (Mechanical), Junior Engineer-II (Mechanical CADCAM) and Junior Engineer-II (Carriage and Wagon) and qualified the test but his name was not found in the list of final results. The respondent approached the Tribunal regarding the same. The Tribunal quashed the order and favored the respondent. The railway authority argued that the respondent had filed two different applications; initial before the Chandigarh Tribunal and the later before the Central Administrative Tribunal; and had committed fraud on the railway authority. The former application was dismissed and thus the application before Central Administrative Tribunal is not maintainable on the ground of *res judicata.* The High Court stated that the Chandigarh Tribunal gave liberty to file a fresh application while dismissing the original application, thus the issue framed by the Tribunal was never heard and finally decided. So, *res judicata* does not apply in this petition.

In ***P. Bandhopadhya & others vs. Union of India*** case,[50] the initial appeal was filed by the appellant before Bombay High Court for taking benefits of certain amount of his service in the government which is equal to Provident Fund. The court dismissed the petition and stated that this writ petition is not maintainable as this issue was squarely covered in the matter decided previously on merits by the Division Bench of this court in ***S.V. Vasaikar vs. Union of India*** case.[51] After the dismissal, the appeal was filed in the Apex Court. While awarding the judgment, the Apex Court upheld the Bombay High Court decision and heavily relied on the judgement pronounced by the Constitution Benchin ***Direct Recruit Class II Engineering Officers Association vs. State of Maharashtra & Others,***[52] wherein the court stated that 'general rules of *res judicata* are applicable to writ petitions'. The court further added that where the matter is finally adjudged by the High Court on the merit, later petition would not be

48. Haryana State Co-operative Land Development Bank v. Neelam, AIR 2005 SC 1843.
49. (2018) SCC OnLine All 1782.
50. Civil Appeal No. 3149 of 2019.
51. (2003) 2 MhL.J. 691.
52. (1990) 2 SCR 900.

maintainable on same facts and on similar grounds.

In ***Devilal Modi vs. S.T.O.*** case[53] , the petitioner challenged the validity of an assessment order under Article 226 in High Court. The petition was dismissed on merits and an appeal against the same was also dismissed on merit by the Apex Court. Another writ petition was filed in the same High Court on some additional grounds against the same assessment order and the petition was dismissed again by the High Court. On appeal, the Apex Court stated that the petition is barred by the rules of constructive *res judicata.* If constructive *res judicata* is not applied to such like proceedings, the petitioner will come up with few new facts every time which leads to the violation of the rule of public policy and the doctrine of finality of judgement will never be achieved.

In ***Amalgamated Coalfields Ltd. vs. Janapada Sabha*** case[54] , first time the matter of constructive *res judicata* in writ proceedings arose before the Supreme Court. The court stated *"constructive res judicata is a special and an artificial form of res judicata enshrined in section 11 of CPC should not usually be applied to petitions under Article 226 or Article 32 of the constitution."* No doubt constructive *res judicata* is said to be very technical but after reading a catena of judgements of the High Courts and Supreme Court the rule of constructive *res judicata* is also applicable to the writ proceedings.

CONCLUSION

The judicial system of India has many loopholes which lead to the disposal of cases in quiet slow and ineffective manner. Moreover, if multiplicity of litigations is permitted for the same issues it will not merely make the parties suffer immensely but also lead to the increased burden on the judicial system and also waste its assets by conducting trial on the similar issue. To curtail these issues and problems the principle of *res judicata* is mandatory to be enforced in an effective manner.With the landmarkjudgement of the Privy Council in ***Ram Kirpal vs. Rup Kauri***[55] the principle is widely applied by the court in execution proceedings and finally the amendment in CPC in 1976 give codification to this judgement in the way of explanation VII in section 11. The rule of law has been made applicable even to writ proceedings. The principle laid down in ***Daryao vs. State of Uttar Pradesh*** case[56] has been termed as a landmark judgement for the

53. (1965) 1 SCR 686.
54. (1963) Supp 1 SCR 172.
55. Ram Kirpal, *supra note* 11.
56. Daryao, *supra note* 9.

application of res judicata in subsequent writ proceedings. Some jurists criticise the Supreme Court view regarding applicability of the rule in fundamental rights which challenge the validity of Article 226 and Article 32. But according to present circumstances as the long backlog of cases prevails, there is a need of such principle in the modern society. Keeping in mind the slow process of the judicial decision, it is significant that the scope and applicability of the rule should not be curtailed.

BASIC STRUCTURE DOCTRINE: WIDENING HORIZONS

Dr Monika Ahuja *

Time is not static Time changes and, therefore, the life of a nation is not static but dynamic and living.Its political, social and economic conditions change continuously. Social mores and ideals changes from time to time creating new problems and altering the complexion of the old ones. It is, therefore, quite possible that a Constitution drafted in one era, and in a particular context, may be found inadequate in another era and another context.[1]

Though, the process of judicial interpretation goes on in every constitution to a greater or lesser extent, yet it assumes a crucial importance in a country in which the formal method of constitution¬al amendment is very tardy and difficult.

The best example where this process has been used effectively for adaptation of the constitution is the United States, where the Supreme Court has from time to time given a new meaning tophrases and words in the constitution so as to make the 18th century, *laissezfaire* era document sub serve the needs of a vast, expanding and highly industrialized civilization of the twenty first century without many formal amendments being effectuated in its text.

The US Constitution being brief and couched in general language offers a vast scope for judicial creativity. For example, the First Amendment to the US Constitution guaranteesfreedom of speech in very broad terms. The Amendment says: "Congress shall make no law...abridging the freedom of speech or of the press". The provision lays down no limits or restrictionson the Fundamental Right to freedom of speech. But there can be no unlimited right. Therefore, theUS Supreme Court has taken upon itself to spell out the restrictions on this right.[2]

To a limited extent, in Canada and Australia also, the judiciary has adapted the constitution to the changing circumstances. The process of judicial interpretation is in progress in India as well. The Supreme Court by holding that it can reconsider its decisions from time to time has kept the way open for adjustmentsin constitutional interpretation so as to adapt the Indian Constitution to new situations. The Courthas on several occasions changed its views about the significance and meaning of several constitu¬tional provisions.[3]

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1. M.P. Jain, Indian Constitutional Law 1724 (Lexis Nexis, 8th Edn., 2018).
2. *Ibid.*
3. *Ibid.*

Even though, due to the Indian Constitution being very detailed, and its language being rather specific, and not general, opportunities available to mould the Constitution by the judicial interpre¬tative process are somewhat limited, yet, there have been several outstanding judicial decisions which have had a deep impact on constitutional development. Since 1978, the interpretative process has entered a very dynamic phase because of judicial creativity.[4]

FORMAL METHOD

Practically, every constitution has some formal method of constitutional amendment. This consists of changing the language of a constitutional provision so as to adapt it to the changed context of social needs.

In some countries, the process may be easier than in others, and, accordingly, the constitutions are sometimes classified into flexible or rigid. A flexible constitution is one in which amendment can be effected rather easily, as easily as enacting an ordinary law. The best example of such a Constitution is the British Constitution which can be amended by an ordinary Act of Parliament, and there is, thus, no distinction between ordinary legislative process and constituent process.[5]

A rigid constitution is regarded as the fundamental law of the land in the sense that it lays down the basic principles for the country's governance which are considered to be of a permanent value. It is, therefore, thought that the method of constitutional amendment should ensure that the basic principles are changed only after thorough consideration and deliberation and hasty and ill-considered changes under political pressures of the day are avoided. Accordingly, in such a Constitution, the process of constitutional amendment is more elaborate and difficult than the enactmentof ordinary legislation. There, thus exists a distinction between legislative and constituent process; the former denotes making of an ordinary law and the latter denotes amendment of the Constitution.

If a Constitution is amendable easily by passing an ordinary law, then it will lose all permanence and supremacy. A written constitution usually is of the rigid type. A federal constitution has to be rigid, for it seeks to achieve a balance of powers between the Centre and the States, and it ensures that this balance is not disturbed lightly or unilaterally.

The terms 'rigid' or 'flexible' constitution, the difference being one of degree, because, in the ultimate analysis, a constitution which is incapable of adjustment and adapta¬tion will fail to

4. *Ibid.*
5. *Id.,* at 1727.

endure, and even a constitution of the flexible type may not be lightly amended owing to political repercussions apprehended. A constitution which may be *prima facie* rigid may, in practice, prove to be easily changeable, as has been the case in India so far.

Formal amendment is perhaps the most significant way of adapting the constitution to changing circumstances. The judicial interpretation may help to some extent in this respect but it cannot change the wordings of the basic law. The judicial process is slow and a change may be desired early. At times, some principles laid down by the courts may appear to be against public mores and political needs. An example of such a situation is furnished by the several amendments made in India to Article 31 of the Constitution concerning the Fundamental Right to property to overcome inconvenient judicial interpretation.[6]

SCOPE OF THE AMENDING POWER OF THE PARLIAMENT

Since the commencement of the Constitution, a constitutional battle has been fought, in this regard, both in the Courts as well as, inside the Parliament. It appears that Parliament has been asserting its supremacy as enjoyed by the British Parliament, but the Supreme Court has been interpreting Parliament as a creature of the Constitution,[7] exercising powers under and not beyond the Constitution. The Constitution, though expressly confers amending power on the Parliament, but it is the Supreme Court, which is to finally interpret the scope of such power and to spell out the limitations, if any, on such amending power.

Amendment of Fundamental Rights

The question as to the *scope of the amending power of the Parliament,* came before the Supreme Court for the first time in ***Shankari Prasad v. Union of India.***[8] In this case, the constitutional validity of the Constitution (1st Amendment) Act, 1951,was challenged before the Supreme Court. The Constitution (1st Amendment) was enacted to remove certain difficulties brought to light by judicial pronouncements in regard to Fundamental Rights and the Directive Principles of State Policy.

Soon after the commencement of the Constitution in 1950, some State Governments initiated proposals for incorporation of laws relating to agrarian reforms. These laws contained

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6. *Ibid.*
7. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
8. AIR 1951 SC 458. The Constitution (1st Amendment) Act, 1951 was enacted by the Constituent Assembly, acting as provisional Parliament.

provisions for the abolition of zamindari system, as well, for the compulsory acquisition of property for public purpose. One such measure was the *Bihar Land Reforms Act, 1950,* enacted by the Bihar Legislature. The Act, provided for the acquisition by the State of the estates and tenures of three leading 'zamindars' of the Bihar Province. The Act was challenged in ***Kameshwar Singh v.State of Bihar,***[9] before Patna High Court. The High Court struck down *the Bihar Act,* as unconstitutional and void as it contravened the provisions of *Article 14.* The Central Government felt that such judicial pronouncements would endanger the whole zamindari abolition programme. To overcome the difficulty, a new provision, *Article 31A,* was added by the Constitution (1st Amendment) Act, 1951.[10]

In ***Shankari Prasad v. Union of India***,[11] wherein the1st Amendment was challenged, the question before the Court was *whether an amendment of the Constitution made under Article 368* was included in the term "law" *in Article 13.*

The Court, upholding the constitutionality of the1st Amendment, observed that "Law" in Article 13 did not include an amendment enacted under *Article 368.* The Supreme Court distinguished between the *ordinary legislative power* and the *constituent power.* The Court held that, in the context of *Article 13,*"law" must be taken to mean rules or regulations made in the exercise of *ordinary legislative power* and not amendments to the Constitution made in exercise of constituent power. The Supreme Court, thus, laid down that *Article 368* conferred *constituent power* on the Parliament, in the exercise of which, it could amend every provision of the Constitution, including the Fundamental Rights.

Article 31-A as it stood before the Constitution (17th Amendment) Act, 1964,provided that a law in respect of acquisition by the State of any 'estate' would not be deemed to be void on the ground that it was inconsistent with Fundamental Rights contained in Articles 14, 19 or 31. The expression 'estate' had been defined differently in different States' Statutes, causing difficulties in regard to transfer of land from one State to another under the Scheme of re-organisation of States. To remove such difficulties, the Constitution (17th Amendment) *Act, 1964* modified the definition of the term "estate" in Article 31-A. The17th Amendment also added 44 Acts enacted by States in the *Ninth Schedule*.

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9. AIR 1951 Pat 91.
10. Prof. Narender Kumar, Constitutional Law of India1008 (Allahabad Law Agency, Reprint 2019).
11. AIR 1951 SC 458.

The validity of the Constitution (17th Amendment) Act, 1964, was questioned in ***Sajjan Singh v. State of Rajasthan.***[12] The challenge was not against the power of the Parliament to amend the fundamental rights, but on procedural non-compliance, It was contended that since17th Amendment (it added 44 Acts to 9th Schedule) was likely to affect the powers of the High Courts under *Article 226,*[13] it had attracted the Proviso to *Article 368,*[14] and as the impugned Amendment had not been ratified by half of the State Legislatures, it was invalid. Rejecting the contention, the Supreme Court held that the impugned Amendment did not attract the provision of CI. (b) of the Proviso to *Article 368.* The Court observed that the impugned Act did not purport to change the provisions of *Article 226* and that it could not be said even to have that effect directly or in an appreciable measure. Referring to Article 368, the Supreme Court expressed its full concurrence with the decision in ***Shankari Prasad v. Union of India,***[15] and laid down that *Article 13 (2)* did not affect amendments of the Constitution made under *Article 368*. The Court held that the constituent power conferred by Article 368 on the Parliament, included even power to take away *fundamental rights* under Part III.

Then came the celebrated judicial pronouncement in ***Golak Nath v. State of Punjab.***[16] In this case, the constitutional validity ofthe Constitution 1st Amendment 1951, 4th Amendment, 1955 and 17thAmendment, 1964, was questioned. The petitioners, the son, daughter and granddaughter of one Henry Golak Nath, who had died in 1953, challenged the validity of the *Punjab Security of Land Tenures Act. 1953,* under which a part of their land was declared surplus, to be acquired by the State. They alleged that the provisions of the Act, under which the said area was declared surplus, infringed their fundamental rights secured by *Article 19 (1)* and 31(2) and *Article 14*. As the *Punjab Security of Land Tenures Act, 1953,* was added to the9th Schedule bythe Constitution (17th Amendment) Act, 1964, the petitioners sought a direction from the Supreme Court for striking down the Constitution (1st Amendment) Act, 1951, Constitution (4th Amendment) Act, 1955, and the Constitution (17th Amendment) Act, 1964, so far as they affected their Fundamental Rights.

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12. AIR 1965 SC 845.
13. 44 Acts were added to the 9th Schedule, the High Courts, were excluded from looking into the constitutionality of these laws as a result of Article 31B.
14. The Proviso requires the ratification of the Amendment Bill having been passed by special majority in both Houses of Parliament, by half of State Legislatures.
15. AIR 1951 SC 458.
16. AIR 1967 SC 1643.

The Supreme Court by 6 : 5 majority overruled its earlier decisions in ***Shankari Prashad v. Union of India,***[17] and ***Sajjan Singh v. State of Rajasthan,***[18] and held that Parliament had no power to amend the Fundamental Rights. J. Subha Rao, C.J., speaking for majority, observed that *Article 368,* in terms, only prescribed the various procedural steps in the matter of amendment of the Constitution, but did not confer power on Parliament either expressly or impliedly to amend the fundamental rights. The Court held that an amendment was a legislative process and an amendment of the Constitution was made only by legislative process with ordinary majority or with special majority, as the case may be, and that *an amendment could be nothing but "law".*

The Supreme Court further declared that Parliament would have no power in future (i.e., from the date of Golak Nath decision on 27-2-1967) to amend any provision of Part III, so as to take away or abridge the Fundamental Rights enshrined therein.

In answer to the question as to whether there would be any way to change the structure of Indian Constitution or abridge the Fundamental Rights, J. Hidayatullah referring to the amending process under the French and the Japanese Constitutions, explained that

> *"Parliament could act in a different way to reach the fundamental rights. It could amend Article 368 to convoke another Constituent Assembly, pass a law under Item 97 of List I of Seventh Schedule, to call a Constituent Assembly. That Assembly might be able to abridge or take away the Fundamental Rights, if desired."*[19]

To nullify the effect of Golaknath decision and to provide expressly for Parliament, the power to amend any part of the Constitution, including Fundamental Rights, the Constitution (24th Amendment) Act, 1971 was *enacted.* The 24th Amendment *firstly,* inserted Clause (4) in *Article 13* to the effect that "Nothing in this Article shall apply to any amendment of this Constitution made under *Article 368". Secondly,* the marginal heading to *Article 368* which ran as *"Procedure for amendment of the Constitution",* was substituted by a new heading which runs as *"Power of Parliament to amend the Constitution and procedure there for".* Thirdly, a new Clause (1) was added to Article 368, to confer on Parliament, constituent power to amend by way of addition, variation, or repeal, any provision of the Constitution including Fundamental Rights. *Fourthly,*

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17. AIR 1951 SC 458.
18. AIR 1965 SC 845.
19. The majority of the Supreme Court also spell out this way to change or abridge the fundamental rights, but did not express the final opinion on the question.

it made it obligatory for the President to give his assent to the Bill having been passed by the Houses of the Parliament. Lastly, a new Clause (3) was inserted in *Article 368* to the effect that *"Nothing in Article 13 shall apply to an amendment made under this Article".*

The Constitution (24th Amendment) Act, 1971, thus conferred absolute, unlimited and uncontrolled amending power on the Parliament.

The Constitution (25th Amendment) Act, 1971

After ***Golak Nath v. State of Punjab,***[20] judgment, some important pronouncements came from the Apex Court in regard to *right to property* contained *in Article 31,* as it stood then. In these cases,[21] the Supreme Court applied the *doctrine of "just equivalent"* and observed that *adequacy of compensation* and the *relevancy of the principles laid down for determining compensation,* to be paid to a person for depriving him of his property, were justiciable and that the Court can go into the question whether the amount paid to the owner of the property was *"just equivalent"* of what he was deprived of.

These decisions struck a blow to the government's programme introducing socio-economic reforms and would have stood in the way of implementing the *Directive Principles of State Policy.* To surmount these difficulties, the Constitution (25th Amendment) Act, 1971 was enacted. This amendment substituted the word *"amount" for "compensation" in Article 31 (2)* and it was expressly declared that *"adequacy of the amount"* to be given for depriving a person of his property, would not be called in question in any Court. Further, a *new Article 31-C* was inserted in the Constitution to provide supremacy to the Directive Principles contained in *Articles 39 (b) & (c)* over Fundamental Rights contained in *Articles 14, 19 and 31.*

Fundamental Rights case *(His Holiness Sripadagalvaru Kesavananda Bharati& Ors.v. State of Kerala)*

The Constitution (24th Amendment) Act, 1971 and the Constitution (25th Amendment) Act, 1971 along with the Constitution (29th Amendment) Act, 1972, [22] were challenged before the Supreme Court in ***Kesavananda Bharati v. State of Kerala,***[23] popularly known as *Fundamental Rights case.* This case was heard by a Bench of 13 Judges of the Supreme Court.

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20. AIR 1967 SC 1643.
21. R.C. Cooper v. Union of India, AIR 1970 SC 564 ; Madhau Rao Scindia v. Union of India, AIR 1971 SC 530.
22. The 29th Amendment, 1972 inserted the Kerala Land Reforms (Amendment) Act,1969 and the Kerala Land Reforms (Amendment) Act, 1971, in the 9th Schedule,to provide protection of Article 31-B to these Acts.
23. AIR 1973 SC 1461.

Out of 13 Judges, 11 Judges delivered separate judgments. Its hearing took five long months. In the constitutional history of free India, the Court gave the longest judgment running into 595 pages.[24]

Though all the 13 Judges upheld the constitutionality of the 24th Amendment and held that Parliament under *Article 368* had power to amend the Constitution, they, however, differed among themselves as to the extent or scope of the power. Six of the Judges (Sikri C.J., Shelat, Hegde, Grover, Jaganmohan Reddy and Mukherjee, JJ.) held that the power of amendment contained in *Article 368* was subjected to certain implied and inherent limitations and that in the exercise of its amending power Parliament could not amend the basic structure or framework of the Constitution. They further held that the *fundamental rights* enshrined in Part III related to the basic structure or framework of the Constitution and, therefore, were not amendable. While, the other six Judges (Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ.) were of the opinion that there were no limitations on the power of the Parliament to amend the Constitution.[25]

Khanna J., appears to have reconciled the two divergent views and took a middle path and thus tilted the balance in forming the majority decision with Sikri, C.J., Shelat, Hegde, Grover, Jaganmohan Reddy, Khanna and Mukherjee, JJ. Khanna, J. laid down :

> "The power of amendment under Art. 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various Articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various Articles."

Khanna, J., thus, held that Parliament had wide power of amending the Constitution under

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24. Dissent Judges were Justice Ray, Justice Paleker, Justice Mathew, Justice Beg, Justice Dwiwedi, Justice Chandrachud. Majority judges were Chief Justice Sikri, Justice Hegde, Justice Mukherjee, Justice Shelat, Justice Grover, Justice Jagmohan, Justice Khanna.
25. *Ibid.*

Article 368, it extended to all the provisions of the Constitutions, including those relating to fundamental rights, but the *amending power is not unlimited and it did not include the power to destroy or abrogate the basic structure or framework of the Constitution.* The majority of the Supreme Court, thus, evolved the theory of Basic Structure.

Basic Structure of the Constitution

'Basic' means the base of a thing on which it stands and on the failure of which it falls. Hence, the essence of the 'basic structure of the Constitution' lies in such of its features, which if amended would amend the very identity of the Constitution itself, ceasing its current existence. It is not a 'vague concept' or 'abstract ideals' found to be outside the provisions of the Constitution. Therefore, the meaning and extent of 'basic structure' needs to be construed in view of the specific provisions, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of governance of the country.

In India, the doctrine of Basic Structure is a judicial innovation, and it continues to evolve via judicial pronouncements of the Apex Court. The contours of the expression have been looked into by the Court from time to time, and several constitutional features have been identified as the basic structure of the Constitution, but there is not an exhaustive definition or list of what constitutes the 'basic structure of the Constitution- the Court decides from case to case, whether a constitutional feature can be regarded as basic or not.

Seven of the thirteen Judges in ***Kesavananda Bharati case,***[26] observed that Parliament in the exercise of its amending power under *Article 368,* could not alter *the basic structure or framework of the Constitution. The Basic Structure*[27] has been, thus, held to be a limitation on the amending power of the Parliament. It provides a touch-stone to test the extent of Parliament's power to amend the Constitution.[28] However, it is not possible to ascertain, from the opinions they delivered, as to what constituted the *Basic Structure* or which of the provisions of the Constitution, formed parts of the *basic structure.* Some of the Judges made observations in this regard.

Sikri, C.J., observed that the basic structure was built on the basic foundation, i.e., the dignity

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26. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 at 1903-4.
27. The "Doctrine of Basic Structure" is essentially developed from the German Constitution. M. Nagraj v. Union of India, AIR 2007 SC 7.
28 I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.

and freedom of the individual. The basic foundation of the basic features, in his opinion, could be easily discernible from the Preamble, as well as, from the whole scheme of the Constitution. He articulated the following features as to constitute the basic structure:[29]

(1) Supremacy of the Constitution

(2) Republican and Democratic forms of Government

(3) Secular character of the Constitution

(4) Separation of powers between the legislature, the executive and the judiciary

(5) Federal character of the Constitution

Shelat and Grover, JJ., held that the basic structure was not a vague concept. They maintained that the basic features could only be illustrative and could not be catalogued. According to them the following features constituted the basic structure :[30]

(1) The Supremacy of the Constitution

(2) Republican and Democratic form of Government and Sovereignty of the country

(3) Secular and Federal character of the Constitution

(4) Demarcation of power between the legislature, the executive and the judiciary

(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a Welfare State contained in Part IV

(6) The Unity and the Integrity of the Nation

Hegde and Mukherjee, JJ., illustrated the following as the fundamental features:

(1) Sovereignty of India

(2) The Democratic character of our polity

(3) The Unity of the country

(4) The essential features of the individual freedoms secured to the citizens

(5) The mandate to build a Welfare State and egalitarian society

Jaganmohan Reddy, J., observed that the mere fact that the essential elements constituting the basic structure could not be enumerated exhaustively, was no ground to deny their existence. In his opinion, a Sovereign, Democratic, Republic, Parliamentary Democracy, and the three organs of the State constituted the basic structure.[31]

Khanna, J., by way of instance, held that the *democratic government* could not be changed into

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29. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 at 1535.
30. *Id.,* 1603.
31. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461, 1753-54.

dictatorship or hereditary monarchy, nor the Lok Sabha and the Rajya Sabha be abolished. Likewise, the secular character of the State could not be done away with. Khanna, J., however, categorically said that *right to property* was not the basic structure or framework of the Constitution.69

From the above discussion, it is not easy to identify with certainty, *the basic structure* or the provisions of the Constitution which constitute *the basic structure or the framework.* It *is, therefore, for the Supreme Court, to determine finally, as to what constituted the basic structure or what features and the essential features constituted the framework of the Constitution.* It may be stated that by laying down the concept of Basic Structure, the Supreme Court has assumed to itself the constituent power.

Hon'ble Chief Justice Chandrachud (as he then was), in ***Indira N. Gandhi v.Raj Narain,***[32] explained that for determining whether a particular feature of the Constitution was part of its basic structure :

> *One has perforce to examine in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country governance.*

The Supreme Court decision in *I.R. Coelho v. State of Tamil Nadu,*[33] on subjecting laws placed in the Ninth Schedule of the Constitution to judicial review¬ – on the ground of violation of fundamental rights forming part of the basic structure of the Constitution. It was in 1951 that Parliament through the first amendment to the Constitution carved out the Ninth Schedule as an enclave where laws could be placed beyond judicial challenge on the ground of violation on any of the fundamental rights. That move was a reaction to the spate of challenges to land reform laws. Originally, the Schedule was intended to cover land reform and nationalization laws besides laws to tackle concentration of economic power, and was only to be used sparingly. Yet, as the court has pointed out in its decision, the list expanded from 13 to 284, including many state laws. Parliament does not have a carte blanche to override all the fundamental rights, which is what the Ninth Schedule allows it to do. If in the early years of the Constitution, the courts had

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32. AIR 1975 SC 2299, quoted in I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.
33. AIR 2007 SC 861. The doctrine has been embraced in other countries like Germany having controlled constitution.

conceded to Parliament an unfettered right to amend it, the Kesavananda Bharati case in 1973 introduced the doctrine that the basic structure and framework of the Constitution would be beyond the amending power. Following this line of reasoning, the nine-judge bench of the Supreme Court has now held unanimously that laws placed in the Ninth Schedule after 1973 are subject to judicial scrutiny.[34]

In ***Supreme Court Advocates on Record Association v. Union of India,***[35] the Supreme Court held that there are declared limitations on the amending power conferred on Parliament which cannon be breached. Breach of a single provision of the Constitution is sufficient to render the entire legislation ultra vires the Constitution.

In ***Kuldip Nayar v. Union of India (UOI) and Ors.,***[36] the Supreme Court, while dealing with the question of political party system vis-à-vis democracy observed that "parliamentary democracy and multi-party system are an inherent part of the basic structure of Indian constitution. It is political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures."

34. B.L. Fadia and Kuldeep Fadia, Indian Government and Politics 169 (Sahitya Bhawan, Agra, 2019).
35. AIR 2016 SC 117.
36. AIR 2006 SC 3127.

Evolution of the Basic Structure of the Constitution[37]

.	Name of the Case (Year)	Elements of the Basic Structure (As Declared by the Supreme Court)
	Kesavananda Bharati case 1973) (popularly known as the Fundamental Rights Case)	1. Supremacy of the Constitution 2. Separation of powers between the legislature, the executive and the judiciary 3. Republic and democratic form of government 4. Secular character of the constitution 5. Federal character of the constitution 6. Sovereignty and unity of India 7. Freedom and dignity of the individual 8. Mandate to build a welfare state 3. Parliamentary System
	Indira Nehru Gandhi v. Raj Narayan (AIR 1975 SC 2299) (popularly known as the Election Case)	1. India as a sovereign democratic republic 2. Equality of status and opportunity of an individual 3. Secularism and freedom of conscience and religion 4. Government of laws and not of men (i.e., Rule of Law) 5. Judicial review 6. Free and fair elections which is implied in democracy
	Minerva Mills v. Union of India (AIR 1980 SC 1789)	1. Limited power of Parliament to amend the constitution 2. Judicial review 3. Harmony andbalance between fundamentalrights and directive principles
	S.P. Sampath Kumar v. Union of India (AIR 1987 SC 386)	1. Rule of law 2. Judicial review
	Delhi Judicial Service Association v. Union of India(1991 4 SCC 406)	Powers of the Supreme Court under Articles 32, 136, 141 and 142
	Indra Sawhney v. Union of India (AIR 1993 SC 477) (popularly known as the Mandal Case)	Rule of law
	Kihoto Hollohon v. Zachithu (AIR 1993 SC 412) (popularly known as Defection case)	1. Free and fair elections 2. Sovereign, democratic, republican structure
	S.R. Bommai v. Union of India (AIR 1994 SC 1918)	1. Federalism 2. Secularism 3. Democracy 4. Unity and integrity of the nation 5. Social justice 6. Judicial review
	Indra Sawhney II v. Union of India	Principle of equality

37. M. Laxmikanth, Indian Polity11.2 (McGraw Hill Education, 2019).

	[AIR 2000 SC 498)	
10.	All India Judge's Association v. Union of India[(2002) 1 SCC 119]	Independent judicial system
11.	M. Nagaraj v. Union of India (AIR 2007 SC 71)	Principle of equality
12.	I.R. Coelho v. State of Tamil Nadu (AIR 2007 SC 8617) (popularly known as IX Schedule Case)	1. Rule of law 2. Separation of powers 3. Principles (or essence) underlying fundamental rights 4. Judicial review 5. Principle of equality
13.	Namit Sharmav. Union of India [(2013) 1 SCC 745]	1. Freedom and dignity of the individual.
14.	Madras Bar Association v. Union of India (AIR 2015 SC 1571)	1. Judicial review 2. Powers of the High Courts under Articles 226 and 227

CONCLUSION

It is thus evident that so far, there has been no consensus in this regard laying down the features of the Constitution that may be considered 'basic'. The court has not foreclosed the list of the basic features as suggested by different judges in different cases. In Indira Gandhi's case Justice Chandrachud has observed that "the theory of basic structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem."

In Kesavananda's case it has been expressly held that the right to property is not a part of the basic structure of the Constitution and, therefore, any amendment can be made to the Constitution in total disregard of the right to property. The only restriction on the amending power is that the power cannot be used to alter or destroy the basic structure or framework of the Constitution.

Logically speaking, the limit to the amending power should be that the Constitution cannot be made to suffer a loss of identity through the amending process. The identity of the Constitution is the sum of its essential features,if the Constitution is not to suffer a loss of identity, each of its essential features has to be preserved.

These judgements of the Supreme Court somehow give the impression that there is a confrontation between Parliament and the judiciary. The confrontation is certainly unfortunate.

The parliament should enact laws with greater restraint and the restraint is more necessary in case of amending the Constitution. The amending power should not be used for political stunts and maneuverings.

INDIAN CONSTITUTIONAL MORALITY AND SECULARISM IN REFERENCE TO Dr AMBEDKAR'S PARADIGM

-Dr Bhupinder Kaur*

1. INTRODUCTION

India is a secular state or more correctly, a constitutionally secular state. Some other states are also considered to be secular such as USA, UK, Australia, France, Mexico, South Korea and Turkey, although none of these nations have identical forms of governance. It is many a times alleged that Indian secularism is an imported phenomenon from one or more of these countries, not essentially 'Indian' in character[1]. It is also assumed that as it now stands in the Constitution, is an imposed set of principles carried by some influential members of the Constituent Assembly, namely Pandit Jawahar Lal Nehru and Dr. Bhim Rao Ambedkar inculcated in their conception through the study of the West's medieval Church-State power clashes.

There were three kinds of groups in the Constituent Assembly, first led by Prof. K.T. Shah, an alumnus of the London School of Economics, which argued in favour of total divorce between religion and the state in the sense that for state there is no phenomenon like 'religion'. State does not believe in the legitimacy of religion's interference or obstruction in its way of governance for political, social and economic revolution and therefore, insisted upon the inclusion of the word 'Secular' in the clause 1 of Art.1 which defines the Union of India. The second group consisted of hard-core pro-religion leaders as well as some mild supporters of religious values, who unequivocally, though unable to define or elucidate, were of the view that religion can serve as a good check upon the powers of the State or can better realise it of its duty to protect Bhartiya Sanskriti, which is its sacred duty. The third group led by Pandit Nehru and Dr, Ambedkar rejected the contentions of both these groups. The duo, in the Constituent Assembly, through a majority of members, was successful in fixing the problem by creating a unique fabric of Fundamental Rights and Directive Principles of the State Policy along with the qualifications attached thereto. Ambedkar's approach to the concept of secularism arises more from the discourse of justice and equality than from an anti-religious position. Therefore, he rejected the religious bias of pro-religion statehood supporters as well as differed from the other group, in the Constituent Assembly in regarding the addition of the word 'Secular' as a redundancy.

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1. G.P. Tripathy, Constitutional Law- New Challenges 54(Central Law Publications, Allahabad, 1st ed. 2015)

The term 'secularism' was first used by the British writer George Holyaake in 1851. In relation to Christianity, Holyaake argued that "Secularism is not an argument against Christianity; it is one independent of it. It does not question the pretentions of Christianity, it advances other. Secularism does not say there is no light or guidance elsewhere, but maintains that there is light and guidance in secular truth whose conditions and sanctions exist independently, and act forever". Applying the same lines on our country in the context of majority-minority conflict, it can be retreated that "Secularism is not an argument against Hinduism or Islam or others; it is one independent of them. It does not question the pretentions of them, it advances other. Secularism does not say there is no light or guidance in these religions, but maintains that there is light and guidance in secular truth whose conditions and sanctions exist independently, and act forever". This secular truth is nothing but the rule of law guided by reason and evidence, a rule of law deep rooted with the sense of Justice, equality, freedom and dignity of the human beings and a rule of law which guards its beneficiaries against any assault or obstruction on its secular truth, as and when it comes from anywhere whether religious forces or non-religious forces. Certain constitutionalists name it 'Constitutional Morality' or 'Secular Humanism'. Secularism is neither 'Pro-God' nor 'anti- God', rather independent of both of them. It is in this sense; Indian Constitution retains it through the efforts of Dr. Ambedkar, among others.

2. INDIAN CONSTITUTIONAL LAW OF SECULARISM VIS-A-VIS CONSTITUTIONAL MORALITY

India is a secular state. The concept of secularism is implicit in the Preamble of the Constitution which declares India as a Sovereign, Socialist, Secular and Democratic Republic and the resolve of the people to secure to all its citizens 'Liberty of Thought, Belief, Faith and Worship'. The word 'Secular' was not included in the preamble or in the body of the Constitution at the time of its making in Constituent Assembly, but added by 42nd amendment in 1976, though not defined anywhere, rather, words 'Right to Freedom of Religion' have been used for Art.25 to 28. Thus a question arises- does the term 'Secular' used in preamble conjointly with words Sovereign, Socialist and Democratic means something more than 'Right to Freedom of

Religion' or less than it or equal to it or something else? It needs attention of legal scholars. Was it skipped from Preamble because it is not the same as right to freedom of religion? The problem arises in situations like that of Tripple Talaq when the opponents of Tripple talaq use secularism in their favour in the sense that state can make law to abandon this practice for the sake of justice and equality whereas the proponents of Tripple Talaq also use the same secularism in their favour saying that state cannot interfere in religion as religion has its own divine sanctity and state is a worldly creation and because it has chosen to be secular, now it cannot touch upon religion. Art.25 to 28 thus, do limit the state power in this sense, though opponents find room for them in the form of reasonable restrictions. Thus a quandary arises that whether the state can abandon it because it is a secular state, constitutional morality gives it powers to do so or whether the state cannot abandon it because it is a secular state and being a matter of religion, it is out of its jurisdiction. It may, however be assumed, with probability of error, that due to this slipperiness of the term 'Secularism', Dr, Ambedkar did not approve of the amendments moved by Prof. K.T Shah to include the word 'Secular' in the text of the Constitution.

However, another view is that in responding to this proposal, Dr. Ambedkar said nothing at all about 'Secularism'; his entire response was about the words 'Socialist Republic'. What did he say? "I regret that I cannot accept the amendment of Prof. K.T. Shah. My objections, stated briefly, are two. In the first place, the Constitution, as I stated in my opening speech in support of the motion I made before the House, is merely a mechanism for the purpose of regulating the work of the various organs of the state. It is not a mechanism whereby particular members or particular parties are installed in office. What should be the policy of the state, how the society should be organised in its social and economic side are matters which must be decided by the people themselves according to time and circumstances. It cannot be laid down in the Constitution itself, because that is destroying democracy altogether." Ambedkar went on to make his second point: "The second reason is that the amendment is purely superfluous. My Honourable friend, Prof. Shah, does not seem to have taken into account the fact that apart from the Fundamental Rights, which we have embodied in the Constitution, we have also introduced other sections which deal with Directive Principles of State Policy…. My submission is that these socialist principles are already embodied in our Constitution and it is unnecessary to

accept this amendment"[2] . Thus, Dr. Ambedkar did not say he was opposed to Shah's proposal, he actually said that it was superfluous and that was why he could not accept the amendment .[3]

Secularism in India means that the State has no religion of its own declared to be religion of the state; the State treats all the religions equally and that the State does not discriminate among its citizens on the ground of religion. State is conceived with the relation between individual and individual and not between individual and God. Now again question arises whether the marriage and eating beef is something between individual and individual or something between individual and God. If former is true, the state can regulate, however if the later is true, the state cannot.

The quandary is who is to and how is to decide it is between individuals or between individual and God, the state itself or the religious leaders? The debates of Constituent Assembly are divided on this matter, however, the weight of authority prescribes that Dr. Ambedkar was in favour of giving an influential hand to state in this regard. It is clear from his struggle for the emancipation and empowerment movements of scheduled castes, not only in his speeches but in the provisions of the Constitution under Art. 15 (Right to equality and freedom from discrimination), Art. 16 (Reservation for SCs and STs in public employment and Art. 17 (Abolition of untouchability) through firm state action. For orthodox Hindus, caste division, non-dissolution of Hindu marriage and negation of property rights to women were integral to Hinduism and necessary for Undivided Hindu Family System, however Dr, Ambedkar, in support with other progressive members of the Constituent Assembly, entirely rejected it and supported Hindu Code Bill as a strong reform movement in personal law, an area earlier ruled by religion.

Art. 25 incorporates that there shall be freedom of conscience and the right to freely profess, practise and propagate religion. This provision is however subject to some reasonable restrictions such as public order, morality, health and other provisions of Part-III as well as to the laws regulating or restricting any financial, political or other activity associated with religious practice or any law providing for social welfare and reforms or the throwing open to all persons

2. Sabyasachi Bhattacharya, Secularism and the State (May 20, 2019) http://www.frontline.in/politics/ secularism - and -the-state.
3. *Ibid.*

the religious institutions, belonging to their religion or of a public character. Freedom of conscience means inner freedom of the person to mould his relation with God in whatever manner he likes. Profess indicates the declaration freely and openly of one's faith or belief. Practise means to perform the prescribed religious duties, rites and rituals and to exhibit his religious beliefs and ideas by such acts as prescribed by religious order in which he believes. The word propagate includes to speak and publicize one's religious views for the edification of others without any element of force, physical or mental

'Practice' is controversial term. Answering the question as to which practices can be said to be integral for a religion, the honourable Supreme Court held in ***Commissioner of Police v. Acharya Jagdeshwarnanda***[4] that the test is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion, then such part could be treated as an essential or integral part.

The honourable Supreme Court has declared the practice of Triple Talaq to be unconstitutional. The unconstitutionality has been declared on the basis of principles of constitutional morality as well as religious quandary as to its authenticity in Islam itself. The Court strongly reminded the legislature to play its part. Taking this in present scenario, it is again needful to well research the basic questions such as whether the beef ban is essential part of Hindu religion without which it will lose its character or having Teen Talaq is so essential for Islam that if not preserved, will fundamentally change its character? And further how to arrive at a conclusion whether and what fundamental change has it brought? Who will decide it- State or religious leaders? Therefore, we need to look back to the views of the makers of the Constitution. Whether these practices are fundamental for religion or merely associated with the religion? Mere association with certain religion, not able to change the character of religion- can serve as a test to validate or invalidate such practices.

However, this test is also not short of diversion of opinion. It is argued that "under the essentiality test, the court privileges certain religious practices over others. It does not have the expertise to decide which practice/ritual is essential or non-essential. These are purely religious questions, which is best left to clergy. Triple Talaq is certainly not an essential Islamic practice but its effect in dissolving marriage among most Sunni sects may be part of their core or essential

4. 2004(3) SCALE 146.

beliefs. No Judgement can change such beliefs but if the Muslim clergy itself comes forward, such beliefs may gradually change and the instant triple divorce may eventually end" [5].

Latham C.J. of the High Court of Australia, while dealing with the provision of section 116 of the Australian Constitution which inter alia forbids the Commonwealth to prohibit the 'free exercise of any religion' observed, "It is sometimes suggested in discussion on the subject of freedom of religion that, though the Civil Government should not interfere with religious opinion, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus, the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion" [6].

As early as in 1963, the Supreme Court of India observed in this connection that, "In deciding the question as to whether a given religious practice is an integral part of the religion or not the test always would be whether it is regarded as such by the community following the religion or not. This question will always have to be decided by the court and in doing so the court may have to inquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion" [7].

Appointments of clergy[8], determining the status of second marriage of a Hindu already having a lawful married wife[9], slaughter of healthy chattel[10], right of managers to share the offerings of the deity[11], use of loudspeakers at religious places[12], prohibiting untouchability and discrimination[13], prohibiting misuse of properties of religious places[14] etc. have been held to be

5. Faizan Mustafa, Supreme Court as Clergy, The Tribune (May 20, 2017).
6. Adelaide Company v. The Commonwealth (67 C.L.R. 116, 127).
7. Tikayat Shri Govindlalji Maharaj v. State of Rajasthan AIR 1963 SC 1638.
8. N. Adithayan v. Travancore Devaswom Board (2002) 8 SCC 123.
9. State of Bombay v. N.B.Mali AIR 1952 Bomb. 84.
10. Mohd. Hanif quareshi v. State of Bihar AIR 1958 SC 731.
11. Shri Jagannath Puri Temple Management Committee v. Chintamani Air 1997 SC 3839.
12. Church of God (Full Gospel) in India v. K.K.R.M.C Welfare Association AIR 2000 SC 2773.
13. Venkataramana Devaru v. State of Mysore AIR 1958 SC 255.
14. State of Rajasthan v. Sajjanlal AIR 1975 SC 706.

secular activities by the Courts and thus can be regulated by the state within the ambit of reasonable restrictions attached to the various Articles of the Constitution determining the secularism and providing for freedom of religion in India.

Art. 26 provides that every religious denomination or any section thereof shall have certain rights such as to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire movable and immovable property and to administer such property in accordance with law. However, these rights are subject to reasonable restrictions such as public order, morality and health. Religious denomination must be a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well being, that is, common faith. It must have a common organisation and a distinct name. No person, under Art.27, shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

On prohibition of religious instructions in educational institutions, Art. 28 provides that no religious instruction shall be provided in any educational institution wholly maintained out of state funds except in those institution which have been established under any endowment or trust which requires that religious instruction shall be imparted in such institution. No person attending any educational institution recognised by the state or receiving aid out of state funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Art. 29(2) incorporates that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them. Art. 30 guarantees that all minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Where a law is made providing for the compulsory acquisition of any property of any

educational institution belonging to a minority, it shall be ensured that the amount fixed by or determined under such law is such as would not restrict or abrogate the right guaranteed under clause 1 of Art. 30. Clause 2 of Art. 30 further makes it clear that in granting aid to educational institutions, the State shall not discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. The object is to recognise and preserve different types of people with diverse language and different beliefs, which constitute the essence of secularism. However, it cannot be taken as a privilege but a protection to religious and linguistic minorities to attain a status of equality and dignity with other religious or linguistic groups in India.

Explaining the necessity of Art. 28, Dr. Ambedkar stated in the Constituent Assembly on 7th December, 1948 -"Take a city like Bombay which contains a heterogeneous population believing in different creeds. Suppose, for instance, there was a school in the city of Bombay maintained by the Municipality. Obviously, such a school would contain children of Hindus believing in the Hindu religion, there will be pupils belonging to the Christian community, Zoroastrian community, or to the Jewish community. If one went further and I think it would be desirable to go further than this, the Hindus again would be divided into several varities: there would be Sanatani Hindus, Vedic Hindus believing in the Vedic religion, there would be the Buddhist, there would be the Jains- even among Hindus there would be the Shivites, there would be Vaishnavites. Is the education institution to be required to treat all the children on a footing of equality and to provide religious instruction in all the denominations? It seems to me that to assign such a task to the state would be to ask it to do the impossible" [15].

He further argued in the context of clause two of Art. 28 stating that , " There have been cases where institutions in the early part of history of this country have been established with the object of giving religious instruction and for some reason they were unable to have people to manage them and they were taken over by the State as a trusty for them. Now, it is obvious that when you accept a trust, you must fulfil the trust in all respect. If the State has already taken over these institutions and placed itself in the position of trustee, then obviously you cannot say to the Government that notwithstanding the fact that you were giving religious instruction in these institutions, hereafter you shall not give such instruction. I think that would be not only

15. D.N. Benerjee, Our Fundamental Rights-Their Nature and Extent (As Judicially Determined) 286(World Press Pvt. Limited, Calcutta, 2nd ed. 1968)

permitting the State but forcing it to commit a breach of trust"[16] .

Clause (3) of Art.28 achieves, to quote the words of Dr. Ambedkar, again two purposes. One is as he said "There we are permitting a community which has established its educational institution for the advancement of its religion or its cultural life, to give such instruction in the school. We have also provide that (the) children of other communities who attend the school shall not be compelled to attend such religious instruction which undoubtedly and obviously must be the instruction in the religion of that particular community unless the parent consent to it. As I say we have achieved this double purpose and those who want religious instruction to be given are free to establish their institutions and claim aid from the State, give religious instruction, but shall not be in a position to force that religious instruction on other communities"[17] . It may also be noted that, according to Dr. Ambedkar, once an educational institution, whether maintained by a community, or not, gets a grant out of State funds, it must be open to all communities. Presumably this follows from clause (2) of Art. 29 of the Constitution. The essence of these speeches provides enough light to the people of India to decide upon matters when certain political forces try to implement their religious agenda through government regulations and orders in the name of value-creation in kids.

Speaking on the limitations on fundamental rights, Dr. Ambedkar stated, "The rights of the American Constitution are not absolute. In support of every exception to fundamental rights set out in the Constitution, one can refer to at least one judgement of the U.S. Supreme Court. The purpose of the provisos (reasonable restrictions) was to prevent endless litigation and the Supreme Court having to rescue Parliament. The provisos permit the State directly to impose limitations on the Fundamental Rights. There is really no difference in the result"[18].

3. CONCLUSION

Concluding upon the loom, it can be certainly said that Dr. Ambedkar was a progressive leader as well an egalitarian constitutionalist. He, undoubtedly, held no intention to interfere with the religious sentiments, neither had he endeavoured to validate or invalidate their thoughts, however, he was firm believer of modern democratic values such as equality, justice, freedom

16. *Id* at p.287.
17. *Id* at p.287.
18. Granville Austin, The Indian Constitution: Cornerstone of a Nation 73(Oxford University Press, Oxford, 1st ed. 1972).

and participatory politics and their practical existence in matters of State and governance. He believed in the secular rule of law and wanted the excesses committed upon the women, minorities and backward classes to be eliminated as well as penalised, in appropriated ways backed by justice oriented juristic principles. He seems to have come forward in approving the intellect of the state, its power to bring equilibrium between religion and social reform. He believed in thoughtful legal reasoning to contest the matters in conflict with religion. He was also conceived of the idea that so far as the reforms are concerned, ideological constitutionalism should not come in the way of practical necessity and hinder the progress, an idea cherished by Sir Ivor Jennings that many a times, "the 'Principles' of constitutional lawyers become a dangerous foundation for the formation of policy"[19] .

The Constitution has, through Fundamental Rights and Directive Principles of the State Policy, cast a duty upon the State to continue the reform process till the goals set out in the Preamble are not achieved. This struggle is a continuing phenomenon. However, the co-operation of the masses is also needed. Change is the rule of nature. Dr. Ambedkar also believed that the thrust for it should also come from masses or be recognised by the people in general and reform agenda should be applied to all the creeds without any discrimination. National interest and Constitutional goals should be the guiding force for reforms and not hollow political categorical ideologies which are bound to disrepute the whole process. Thus, State should continue to endeavour to uphold the democratic values and Constitutional morality through an intelligent social engineering approach based on prudent legal postulates and broad consensus of masses as undertaken by the progressive leaders of the Constituent Assembly, including, prominently, the great Dr. Bhim Rao Ambedkar.

19. W. Ivor Jennings, The Law and the Constitution, 317 (University of London Press, London, 5th ed. 1967).

LAW RELATING TO WILLS: INDIAN PERSPECTIVE

-Dr Rattan Singh* & Ms Balwinder Kaur**

I. INTRODUCTION

Ironically, the most certain thing in one's life comes at the very end of it—the curtain call, the death. But life still goes on and beyond. And the dead lives among the alive—in their memories that he leaves behind besides other things. There cannot be a dispute regarding the fond memories, for they can be shared without dispute but the other material things most of the time become a bone of bitter contention. This is where enters the Will. Will is a legal document containing the desire of the dead regarding his/her other material things-his property. A Will goes a long way in precluding the probability of all possible disputes that might arise after the death of the testator among his/her legal heirs.[1] Since wealth is a well known corrupter of mind, which blinds humans from the distinction between the right and the wrong, it is important to preserve the confidentiality of the Will, for, the lack of confidentiality may pose a grave threat to the life of the testator.[2]

A Will is not an instrument of transfer of property by sale, gift, exchange, mortgage, lease or assignment, nor it is an agreement. These transactions need two living persons to execute them, whereas a Will is a unilateral declaration of a person fixing his own line of succession to his estate on his demise. The Will speaks as on the death of the testator. It is an instrument that contains the last desire of the testator. It may change the course of devolution of property as prescribed by law about intestate succession.[3] A Will was generally resorted to when a testator desired to distribute the property after his death according to his wishes contrary to the normal mode in which the property would have passed on the basis of the prevailing customary law.[4]

A coparcener governed by the Dayabhagha law always could and at present can dispose of his coparcenary interest by Will, subject to the claims of those who were entitled to be maintained by him. In case of persons governed by the Mitakshara law, the rule which existed before the promulgation of the Hindu Succession Act, 1956, has been considerably modified by Section 30 of the said Act and this section now permits one governed by the Mitakshara law to dispose of his

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1. H L Kumar, Make Your Will Yourself 322 (Universal Law Publishing, Gurgaon, 7th Edition, 2017).
2. *Ibid.*
3. R.C. Nagpal, Modern Hindu Law 995 (Eastern Book Company, Lucknow, 2nd Edition, 2015).
4. T.P. Gopalakrishnan, Law of Wills 6 (Law Book Company, Allahabad, 3rdEdition, 1975).

undivided interest in the coparcenary property by Will.[5]

II. HISTORICAL PERSPECTIVE

The origin of wills in India is shrouded in obscurity and its investigation is rendered all the more difficult as there is no text at all dealing with the subject expressly. According to Sir Thomas Strange there is no term in Sanskrit or in the local language to express the idea of a will. The seven kinds of documents in use among Hindus, as per description of documents given by the Sanskrit writers, were documents of partition, gift, purchase, mortgage, agreement, bondage and debt. Will was not expressly mentioned. The orthodox Hindu contemplated the claims of his children and dependants as indefeasible and they in their turn revered as laws the authority and wishes of his ancestors. Hence the scarcity of wills were also in ancient times. But it cannot be said that wills were wholly unknown to Hindu law. Gifts were undoubtedly very common and, as in other countries, the conception of a gift gave rise to the conception of a will.

The first known will was executed by the well knownOmichand in 1758. Omichand was a resident of Calcutta and was conversant with the English Laws and customs administered there. The probate of his will was granted by the court of Records of Calcutta. The validity of Wills made by Hindus was, however, not easily established. In 1786, Wills were considered valid by the Supreme Court in two cases.[6] In 1791, the Supreme Court of Calcutta held that the probate of a Hindu will could not be granted. In 1792, the Sudder Court decided in favour of a will by which a father bequeathed his entire Zamindari to his eldest son.[7] The Supreme Court laid down the same rule in 1793.[8] The validity of Hindu Wills was considered as undisputed in the matter of wills of *Raja NabaKissan*[9], NemiCharanMullick (1808)[10] in a Bengal case (1812) [11].

III. CONCEPT OF WILL: MEANING AND DEFINITION

Will is a translation of the Latin word "Voluntas", which was a term used in the texts of Roman law to express the intention of a testator. It is curious that the abstract term has come to mean the document in which the intention is contained. The same has been the case with several other English law terms, the concrete has superseded the abstract-obligation, bond, contract, are examples. The word 'testament' is derived from 'testatiomenties', it testifies the determination

5. S.K. Mitra, Hindu Law195 (Orient Publishing Company, New Delhi, 2nd Edition, 2006).
6. Munnoo v. Gopee and Russick v. ChitonMontrion290, 304.
7. Ehsan Chand v. Eshory Chand I.S.R. 2, 2 Stra H.L. 447.
8. Dial Chand v. KissoryMontriou 371 (India).
9. Gopee Krishna v. Raj Krishna Montriou 381 (India).
10. Ramtanoo v. Ram GopalMullick, Morl. Dig. 39 No. 314 (India).
11. Ram Coomar v. Kishan Kinker 2 S.D. 42 (India).

of the mind.[12]

Will means a continous act of gift up to moment of the donor's death and though revocable in his lifetime, is, until revocation, a continous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designed as beneficiaries.[13]

The expression "Will" has been defined in the Indian Succession Act, 1925, Section 2(h),'Will' means "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."[14]

According to Judicial Dictionary, "a will is the legal instrument whereby a man declares what is to be done with his property after his death. Will means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. The word 'will' shall extend to a testament and to a codicil and to an appointment by a will or by writing in the nature of a will in exercise of a power and also to a disposition by will.[15]

Bouvier's Law Dictionary defines will as the, "disposition of one's property to take effect after death. The term will, as an expression of the final disposition of one's property, is confined to English Laws and those countries which derive their jurisprudence from that source.[16]

TERMS RELATING TO WILLS

Probate: Probate means the copy of a Will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator. The term 'probate' in its strictest sense, signifies the copy of the Will which is given to the executor, together with a certificate granted under seal of the Court, and signed by one of the registrars, certifying that the Will has been proved. This probate or copy of the Will constitutes the executor's title to act, the original document being left in the registry. When the two documents differ, and questions of interpretation arise, the Court may look at the original Will.[17]

Codicil : It is a document executed in the same manner as a Will changing or altering or adding to the disposal made earlier in the Will. Just as a Will can be revoked by subsequent Will, a codicil can also be revoked by subsequent Will or Codicil. It may be noted that putting cross lines on the Will or codicil does not amount to cancellation or revocation of the Will/codicil unless such

12. Acharya Shuklendra, Hindu Law1134 (Modern Law Publications, 2004).
13. T.P. Gopalakrishnan, Law of Wills 22 (Law Book Company, Allahabad, 3rdEdition, 1975).
14. The Indian Succession Act, 1925 (Act 39 of 1925).
15. K. J. Aiyar, Judicial Dictionary, 1027, 13th Edition.
16. Bouvier's Law Dictionary, Third Revision, 3455.
17. *Id.,* at 1189.

cancellation follows the procedure required for making the Will and words are used to that effect.[18]

According to the definition as given in section 2 (b) of the Indian Succession Act, 1925, three things are evident:

i) That a codicil cannot be oral but must be an instrument in writing.

ii) It must have been made in relation to will which has already come into existence.

iii) Its object is to explain, alter or add to the disposition under the will.

Letter of Administration: Letter of Administration is certificate granted by the competent court to an administration where there exists a will authorizing him to administer the estate of the deceased in accordance with the will. If the will does not name any executor, an application can be filed in the court for grant of letter of administration for property. A letter of administration can be obtained from the court of competent jurisdiction to appoint an executor under will or where the executor appointed under a will refuses to act or where he has died before or after proving the will. This is one of the well established maxims of the law of grant of letters of administration that grant follows the interest. In other words letters of administration is to be granted to the person who has the maximum interest in the estate of the testator. The universal legatee is the testator's first choice and thereafter is the residuary legatee. Where there are several residuary legatees, the one who represents the maximum interest will be preferred.[19]

Testator: A male person who makes a Will. A female who makes a Will is known as testatrix.[20]

IV. LAWS APPLICABLE TO WILL

Following are the statutes relating to wills:

i) **The Constitution of India, 1950:** In Indian Constitution, under entry 5 of concurrent list, it is mentioned that all matters relating to wills in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal laws.[21]

ii) **The Indian Succession Act, 1925:** The Indian Succession Act, 1925 is mainly related to the general law of testamentary succession. It is applicable to the wills made by Hindus, Buddhists, Sikhs, Jains, Parsis and Christians but not to Mohammedans. It is

18. H.k.s. Malik, Testamentary Disposition of Property Under The Hindu Succession Act, 1956, 1 (The Commercial Law Publications, Delhi, 1981).
19. The Indian Succession Act, 1925, section 232.
20. *Supra* note 1 at 30.
21. India Const. schedule 7.

only a consolidating and not an amending enactment, prima facie the same effect ought to be given to its provisions as way given to the provisions of the Acts of which it is substituted.[22]

iii) **The Indian Evidence Act, 1872:** A will must be executed in accordance with the formalities as laid down in the Indian Succession Act, 1925. The Evidence Act lays down that whenever a document is produced before a court as evidence at least one atlesting witness shall be called to prove the execution of the document. This principle will apply only if at least one of the giving evidence and subject to the process of the court.[23]

iv) **The Indian Registration Act, 1908:** Will is a document, registration of which is optional under the provisions of the Indian Registration Act, 1908. The registration of a document provides evidence that the proper parties had appeared before the registering officers and the latter had attested the same after ascertaining their identity. The non-registration of a will does not lead to any inference against the genuineness of a will. Once a will is registered under the Registration Act, it is placed in the safe custody of the Registrar.[24]

MUSLIM AND CHRISTIAN LAW ON WILL

Muslim Law: There is no codified law for Wills by Muslims. Wills by Muslims can be made as per their religious books. Further it may be kept in mind that the Muslim Law of Wills is not uniform for all the sections. There are many differences among the Shias and the Sunnis.[25]

It may be mentioned here that the Indian Succession Act, 1925, does not affect the provisions of Muslim Law relating to testamentary succession to the estate of a Muslim. The leading authority on Muslim Will is *Hedaya.* The *Hedaya* was composed by Sheikh Burhan-ud-din-Ali who belonged to *Hanafi* School. Another source is Fatwa *Alamgiri* which was composed by the author belonging the *Hanafi* School.[26]

Capacity to make Will under Muslim Law: Every Muslim who is of sound mind and has attained majority is competent to make a will. To make a valid will, it should satisfy two conditions, viz.:

i) The testator must have a sound mind at the time of making the will, and

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22. Sanjiva Row's, Indian Succession Act,2 (1985).
23. Act No. 1 of 1872.
24. Act No. XVI of 1908.
25. *Supra* note 35 at 112.
26. *Supra* note 1 at 107.

ii) The testator should be major as per Indian Majority Act, 1875.[27]

Limited Power

Muslim Law limits the power of bequests to one-third of the net assets. The two-third must in any case be distributed according to rules of intestacy, unless there are no heirs at all claiming adversely to the legatees, which is rather a remote contingency.

Thus, a Muslim can validly bequeath only one-third of his net assets, when there are heirs. The net assets are ascertained after payment of the funeral expenses of the deceased, his debts, etc.

If there are no heirs, testamentary power can be exercised over the entire property of the testator. If all heirs agree and give their consent, then one-third limit can be exceeded.[28]

Form of Will: A will by a Mohammedan, is not required to be in writing but it may be oral also. No writing is required to make a Mohammedan will valid and no particular form is there for it. Intention of the testator is the prime concern. A Mohammedan will though in writing does not require to be signed or attestation.[29]

Christian Law: According to Indian Succession Act, 1925, except for Muslims, the process and procedure of making or executing a Will is the same for every other community. Therefore, like others, a Christian can make a Will only when he is of sound mind and is free from duress or coercion or fraud. The mental power of a testator may be impaired by old age or disease, but he must be able to comprehend the nature and effect of disposition. He should possess memory and intelligence to form a proper judgment regarding the disposition. Old age itself is no incapacity. The mental capacity and memory must exist at the actual moment of execution.

The formalities required for a Christian to make a Will are--

i) That it must be in writing;

ii) That it must be duly signed or marked by the testator or signed by some other person in the presence of and under the direction of the testator himself;

iii) That it must be attested by two or more witnesses.

Simultaneous presence of both the witnesses is not necessary as such a Will can be proved by one of the attesting witnesses.

Here it must be noted that Christians have the facility to make Privileged Wills also, provided the testator is employed as a soldier in an expedition or engaged in actual warfare, or an airman. He

27. R.k. Bag And D.p. Dey, Wills Law And Practice 358 (Eastern Law House, New Delhi, 2018).
28. *Supra* note 1 at 108.
29. *Supra* note 52 at 360.

should be of 18 years in age. The soldier includes a civilian in actual military service, but a Will made in military hospital eighteen months after the cessation of active military service, cannot be admitted as a Privileged Will.

Privileged Wills may be made by word of mouth, words spoken in course of casual conversation will not constitute testamentary act of disposition. Cogent evidence must be adduced to prove the statements made by the deceased after executing the Will in order to find the contents of the Will.[30]

V. JUDICIAL ATTITUDE TOWARDS WILLS

The Indian judiciary has interpreted the provisions relating to wills, of which some famous cases have been discussed hereunder.

In Tagorev. Tagore case,[31] Privy Council point out that no new form of estate or no new line of inheritance could be started by the donor or testator in order to satisfy his personal whims. Principles governing the construction of a will apply, by and large, to the construction of a gift.

- Inheritance being a thing laid down by the State for reasons of public policy, a private person cannot lay down a mode of inheritance unknown to the law. Thus if a testator grants property to a person and his eldest nephew and the eldest nephew of such nephew, and so forth, here the mode of inheritance not being legal, it fails except as to those persons in whose favour it is valid by way of gift. Here the succession of life-estate, being repugnant to Hindu law, it fails as a mode of inheritance. It remains to be seen whether it can be upheld by the law of gift.
- Under the Hindu Law, in the case of a gift, the donee must be a person in existence.
- Trusts of various kinds have been reorganised and acted on in India and there is no reason why they should not be upheld, if created by Hindus. But the interposition of trustees in this case cannot cure the illegality of the will. Trusts for illegal purposes are invalid.
- The maintenance is sufficient. The amount of maintenance is to be determined by various circumstances among which the magnitude of the property is one; but it is not to have a fixed proportion to the extent of the property.
- A general provision in the will that the heir at law shall be disinherited is ineffectual,

30. *Supra* note 1 at 105.
31. (1872) 9 Beng.LR 377 (India).

without a valid bequest to another person.

- The principles of Hindu Law laid down in this case were a governing factor for half century. Now it has been superseded by the Hindu Disposition of Property Act (XV of 1916) which provided that a gift of bequest to an unborn person is valid, provided he is given an absolute interest and the gift is in conformity with Section 113 of the Indian Succession Act, 1925.

In ***ValliammaiAchi v. Nagappa Chettiar***,[32] the Supreme Court observed that where a person by his 'Will' professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it and in the latter case he shall give up any benefits which may have been provided for him by the 'Will'. The property being joint family property, Pallaniappa's father was not entitled to Will it away and his making a Will would make no difference to the nature of the property when it came into the hands of Pallaniappa. A father cannot make the joint family property into absolute property by merely making a Will. A father in a Mitakshara family has a very limited right to make a Will. The character of the property would not change. No doubt, Pallaniappa had also taken the probate of the Will as a dutiful son, the property would still remain a joint family property in the hands of Pallaniappa.

In ***Raman Nadar Viswanathan Nadar v. Snehappoo Kasalamma***,[33] the Supreme Court held thatAlthough there is no authority in Hindu Law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person yet that doctrine has been engrafted on Hindu Law by the decision of the Judicial Committtee in Tagor's case, 1872 Ind App Supp 47 (PC). Though the decision is based on wrong reading of the relevant verse in Dayabhaga, yet it has taken roots, may be on the basis of the maxim, "communis error facit Jus". This doctrine has not been altered by further legislative measures by which no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of testator's death. This rule, however, is subject to the limitations and provisions contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

In ***S. Rathinam @ Kuppamuthu v. L.S. Mariappan,***[34] in this case, Apex Court declared that the founder of the trust dedicated properties for the maintenance of the temple and performance of

32. AIR 1967 SC 1153(India).
33. AIR 1970 SC 1759(India).
34. AIR 2007 SC 2134(India).

Pujas consisting of four shop rooms in the front and a few residential buildings at the back of the temple. Disputes and differences arose between two branches of the family. It was held that a testator by his Will, may make any disposition of his property subject to the condition that the same should not be inconsistent with the laws or contrary to the policy of the State. A Will being not a transfer, the bar contained in section 6(d) of the Transfer of Property Act, 1882, will have no application and as such the Will is valid.

In ***B. Rajeogowdav. H.R. Shandaregowda***[35], the Apex Court observed that as per section 3 of the Transfer of Property Act, the essential condition of attesting is 1) two or more persons have seen the executants sign the instrument or have received from him a personal acknowledgment of his signature, 2) with a view to attest or to bear witness to this fact each one of them has signed the instrument in the presence of the executants. It is essential that the witness must have put his signature animoattestandi i.e. for the purpose of attesting that he has seen the executants sign or receive from him a personal acknowledgment of his signature. It is for the attesting witness to see the attesting of the document or must have knowledge of the acknowledgment of the signature of the executant.

In ***GurdevKaur v. Kaki***[36], Supreme Court pointed out that when execution of the Will is fully proved then in order to ascertain the wishes of the testator we have to look to the text of the Will. The intention of the testator has to be discerned from the language used in the Will. If a Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Statute, a presumption of due exception and attestation applies.

In***Mathai Samuel v. Eapen Eapen***[37], the Supreme Court held that subsequent events or conduct of parties after the execution of the document shall not be taken into consideration in interpreting a document especially when there is no ambiguity in the language of the document.

The Apex Court in ***Dr. ParkashSoni v. Deepak Kumar***[38], viewed the facts of the case and stated that the entire case revolved around the proof of due execution of the alleged Will and was surrounded by suspicious circumstances. The Court observed that as per the presented case, the Will was executed by the deceased Srimati Mooli Swarnkar on the date of her death and the

35. AIR 2006 Kant. 48 (India).
36. 2007 (2) A.L.D. 20 at p. 26 (S.C.) (India).
37. AIR 2013 S.C. 532 (India).
38. 2017 SCLT 2446 (India).

witnesses who were allegedly present also stated that hands of Srimati Mooli Swarnkar was shivering while signing the disputed Will.

Alleged Will not a result of testator's free will and mind: The Court pointed out that at the time of alleged execution of Will, SrimatiMooliSwarnkar was very weak and she was being ¬¬¬-administered drip. The Court also noted that on comparison of the disputed signature on the Will and other signatures of the deceased, it was observed that they were totally different.

The Court on the basis of facts and circumstances of the case, was of the view that the condition of the testator's mind and body was very feeble and debilitated. The signature of the testator was allegedly taken on the death bed while she was administered drip. The dispositions made in the will may not be the result of the testator's free will and mind.

To prove due execution of Will, suspicious circumstances shall be discharged satisfactorily: The Court held that in such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator.

The Court observed that in the instant case there were many suspicious circumstances hence the dispositions made in the alleged will may not be as a result of testator's free will and mind. The Court further held that the Respondents being the propounders of the will had failed in the case to satisfy the judicial conscience of this Court regarding due execution of the will.

VI. CONCEPT OF LIVING WILL

The issue of euthanasia has a long history stretching back to the Ancient Greeks, Romans, and Indians, the right to a death with dignity was brought to the fore recently. Before this right was considered, the arguments surrounding euthanasia related more to morality (as with the Roman Stoics)[39] and religion (for example, Judeo-Christian philosophy considered suicide to be irreligious).[40]

In ***Aruna Ramchandra Shanbaug v. Union of India***[41], the Supreme Court allowed passive euthanasia, but before the case of Aruna Ramchandra Shanbaug v. Union of India, little was clear in India about the law applicable to terminally ill patients who wished to die a natural death

39. Frederick Lowy, Douglas M Sawyer & John R Williams, "Canadian Physicians and Euthanasia: 4 Lessons from Experience" (1993) 148 CANADIAN MEDICAL ASSOCIATION JOURNAL (CMAJ) 1895.
40. Norman L. Geisler, Christian Ethics: Contemporary Issues And Options 171 (United States of America, Baker Academic, 2nd Edition, 2010).
41. (2011) 4 SCC 454 (India).

by refusing modern medical life-sustaining treatment. The 196th Report of the Law Commission of India had made a study of the law relating to euthanasia and its related facets and had proposed a Bill for its implementation. However, euthanasia was not given legal validity until this landmark judgment.

Common Cause ***(A Regd. Society) v. Union of India***[42], the Supreme Court declared right to die with dignity was a fundamental right and that an advance directive by a person in the form of living will could be approved. Advance Medical Directive cannot operate in abstraction. There has to be safeguards. They need to be spelled out. We enumerate them as follows:

i) The Advance directive can be executed only by an adult who is of sound mind, and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the documents.

ii) It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information.

iii) It should clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.

iv) It should disclose that the executor has understood the consequences of executing such a document.

v) The document should be signed by the executor in the presence of two attesting witnesses, preferably independent, and countersigned by jurisdictional judicial magistrate first class so designated by the concerned District Judge.

vi) In the event, the executor becomes terminally ill and is undergoing prolonged medical treatment with no hope of recovery and care of the ailment, the treating position, when made aware about the advance directive, shall ascertain the genuineness and authenticity thereof from the jurisdictional Judicial Magistrate First Class before acting upon the same.

vii) An Advance Directive shall not be applicable to the treatment in question if there are reasonable grounds for believing that circumstances exist which the person making the directive did not anticipate at the time of the Advance Directive and which would have affected his decision had he anticipated them.

If the Advance Directive is not clear and ambiguous, the concerned Medical Boards

42. AIR 2018 SC 172 (India).

shall not give effect to the same and, in that event, the guidelines meant for patients without Advance Directive shall be made applicable.

VII. CONCLUSION

Wills are legally recognised documents which enables ones property to be distributed according to his or her desires or wishes. In case where a person dies without making a will usually referred to as intestate situation, various issues may arise. Though writing of a will accrues various benefits, very little people do so. The most commonly types of will embraced by individuals are oral and handwritten wills. In cases where no will was written by the deceased person, the governing law automatically controls and regulates property distribution among the beneficiaries. The improvement in current law relating to wills in India is required to make the present status (framework) more effective like a will should be made video-graphed, the person who is making will should medically examined.

LEGAL PROTECTION TO REFUGEES IN INDIA: AN ANALYSIS

-Ms Indu Bala*

I. INTRODUCTION

One of the biggest political and human tragedies of the twentieth century has arisen in the shape of more than fifty million refugees and displaced persons in the world today. Century is referred to by many as the century of the up-rooted and the homeless persons. It has been marked by a seemingly unending number of mass flights of people fleeing their native lands, seeking a new life in foreign countries. Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safe and voluntary return home.[1]

The impact of this problem is felt worldwide and its influence on international politics is increasingly becoming more pronounced. Coming to Indian scene, India is one of the few countries in the world which has experienced refugee situations on a gigantic scale during last century. It has given humanitarian assistance and protection to millions of refugees.[2] When India gained its independence from Britain on August 15, 1947, there followed a phase of armed conflict and enormous human suffering. With the creation of Pakistan, an estimated 5 million refugees arrived in India.[3] There was another steep rise in the number of refugees in 1965, this time from East Pakistan, as a result of the Indo-Pakistani war. People from minority communities fled East Pakistan for India due to fear of persecution by the Pakistani Army. During the period of 1964-1968, a large number of Chakmas migrated to India due to the ethnic disturbances in the Chittagong Hill Tracts area.[4] The largest wave of refugees, however, was admitted in 1971 when the liberation war in Bangladesh began. Another wave of refugees arrived from the Chittagong Hill Tracts in Tripura from Bangladesh in 1986, when the Government of Tripura arranged for rehabilitation packages for these people.[5] Minority population in Bangladesh continue to cross the international border to escape religious

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1. Manik Chakraborty, Human Rights And Refugees: Problems, Law And Practices xi (Deep and Deep Publications Pvt. Ltd., New Delhi, 2001).
2. *Ibid.*
3. Lakshmi Jambholkar And C. Jayaraj, ISIL Year Book Of International Humanitarian And Refugee Law 204 (The Indian Society of International Law (ISIL), Vol. III, Shivam Offset Press, New Delhi, 2003).
4. An Indigenous tribal community generally resides at the Chittagong Hill Tracts of Bangladesh.
5. Malabika Das Gupta, Refugee Influx, 2 Economic And Political Weekly, 39 (1980).

persecution, and the Government of India took several steps to regularise the entry, stay and citizenship process for these persecuted minorities.[6] More than 60,000 Afghan refugees came to India in the years following the 1979 to 1989 due to Soviet–Afghan war. There are more than 1,00,000 Sri Lankan Tamils in India, most of whom migrated during the rise of militancy in Sri Lanka. The Indian government does not officially recognise them as refugees, but has allowed the UNHCR India to operate a programme for them. Rohingya people are ethnic Muslims of Rakhine state, Burma. Rohingyas have been declared as the most persecuted ethnic group in the world by the UNHCR. India hosts a significant number of Rohingyas in Delhi, Hyderabad, J&K, West Bengal and Northeast India. The Indian government does not officially recognize them as refugees.[7]

Tibet is a mountainous State. Chinese interference in Tibet intensified the dispute over its legal status. The People's Republic of China (PRC) claims that Tibet is an integral part of China. The Tibetan government-in-exile maintains that Tibet is an independent State under unlawful occupation. It led to civil war in 1959, due to this 14th Dalai Lama and more than 1,50,000 Tibetan fled to India, took asylum and are residing here for the last 60 years.[8] Jawaharlal Nehru, then Prime Minister, agreed to provide all assistance to the Tibetan refugees to settle in India until their eventual return. 1,00,000 refugees remain in India today. Refugees are eligible to apply for long term visas (LTVs) / stay visas issued by the Government of India. The LTV / stay visa regularises their stay in India and reduces challenges in accessing public services and employment. UNHCR advocates that UNHCR documentation and LTVs are recognised by authorities and service providers to facilitate continued access to basic services and opportunities in asylum. The Tibetan diaspora maintains a government in exile in Himachal Pradesh, which coordinates political activities for Tibetans in India. The Tibetan government-in-exile functions from McLeod Ganj, a suburb of Dharamshala.[9]

II. MEANING AND DEFINITION OF REFUGEE

A refugee is a person who has fled across the physical borders of his homeland to seek refuge in another place and who, upon granting refugee status, receives certain rights not available to

6. Shuvro Prosun Sarker, Refugee Law In India xii (Springer Nature Singapore Pvt. Ltd., 2017).
7. Refugees in India, (July 2, 2019, 4:00 PM), https://www.livemint.com/Sundayapp/clQnX60MIR2LhCitpMmMWO/ Indias-refugee-saga-from-1947-to-2017.html.
8. Tibetan Diaspora, (July 25, 2019, 5:00 PM), https://www.jstor.org/stable/23005991.
9. Tibetan Government in exile, (June 2, 2019, 3:00 PM), https://unhcr.org.in/index.php?option=com_content&view=article&id=18&Itemid=103.

other international migrants.[10] Refugee means one who, owing to religious persecution or political trouble seeks refuge in a foreign country.[11] The Webster's Dictionary defines refugee as "one who flees to a refuge or one who flees from invasion, persecution or political danger."[12]

According to United Nations Convention Relating to the Status of Refugees, 1951 the term refugee shall apply to "any persons who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".[13]

The term 'persecution' comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element. While it is generally agreed that "mere" discrimination may not, in the normal course, amount to persecution in and of itself (though particularly egregious forms undoubtedly will be so considered), a persistent pattern of consistent discrimination will usually, on cumulative grounds, amount to persecution and warrant international protection.[14]

The 1969 Refugee Convention expanded the definition of refugee. It provided that term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[15]

The Cartagena Declaration determine that a refugee include persons who flee their countries because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.[16]

The definition of refugee in the 1951 Convention has been the principal tool for providing effective protection to millions of refugees since it was crafted sixty nine years ago. It has proven

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10. A. Natrajan, Human Rights In International Perspectives 2 (Aavishkar Publishers, Jaipur, 2006).
11. Oxford English Dictionary 493 (Second Edition, Volume-XIII, Clarendon Press, 1991).
12. The New International Webster's Comprehensive Dictionary 1060 (Trident Press Publication, 2004).
13. The United Nations Convention Relating to the Status of Refugees, 1951, article 1 (A) (2).
14. Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, (July 2, 2019, 5:00 PM), https://www.refworld.org/pdfid/3b20a3914.pdf.
15. The Organisation of African Unity (OAU) Convention, 1969.
16. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984, article 1.

its resilience and adaptability over those years, demonstrating that a proper interpretation of article 1 respects and furthers the objects and purposes of the 1951 Convention. A principled approach to the inclusion elements and a careful application of the exclusion and cessation clauses are indispensable for the continuing efficacy of refugee protection, ensuring that refugee protection will neither be brought into disrepute by its abuse, nor weakened by its unwarranted restriction. In sum, a balanced and holistic application of the definition, incorporating human rights law principles, has the best chance of yielding the correct result.[17]

III. INTERNATIONAL EFFORTS FOR REFUGEE PROTECTION

The lack or denial of protection is a principal feature of refugee character, and it is for international law, in turn, to substitute its own protection for which the country of origin could not provide. Non-refoulement is the foundation-stone of international protection. [18] The office of the United Nations High Commissioner for Refugees was established on December 14, 1950.[19] The High Commissioner's work is entirely humanitarian and non political. The basic function of the United Nations High Commissioner for Refugees is to encompass providing international protection and seeking permanent solution to the problems of refugees by way of voluntary repatriation or assimilation in new national communities. Following are the main documents, Conventions and Protocols for the protection of refugees:

A. **Universal Declaration of Human Rights, 1948:** It showed their concern and played very effective role for the protection of refugees. It guarantees right to leave any country including his own and return to his own country.[20] The Declaration also lay down that everyone has the right to seek and to enjoy in other countries asylum from persecution, right to nationality.[21]

B. **Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949:** It provides that the detaining power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.[22]

C. **The Convention Relating to the Status of Refugees, 1951 and its Protocol, 1967:** It

17. Refugee Definition, (May 20, 2019, 5:00 PM), https://www.refworld.org/pdfid/3b20a3914.pdf.
18. S. Guy And Goodwin Gill, The Refugee In International Law 127 (Clarendon Press Oxford, 1983).
19. The United Nation High Commission for Refugees, (May 30, 2019, 11:00 AM), http://www.unhcr.org.
20. Universal Declaration of Human Rights, 1948, article 13.
21. *Id.,* article 14.
22. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, article 44.

considered as an internationally agreed instrument and a milestone of refugee protection. It has given very important rights to refugees. Countries that have ratified the 1951 Convention are obliged to protect refugees that are on their territory, in accordance with its terms. Refugees shall abide by the national laws of the Contracting States.[23] The Member States shall provide free access to courts for refugees, identity papers for refugees, travel documents for refugees.[24] The State Parties shall not discriminate refugees, expel, forcibly return or refoul refugees to the country they have fled from.[25] Therefore, States are obligated under the Convention and under customary international law to respect the principle of non-refoulement. If and when this principle is threatened, UNHCR can respond by intervening with relevant authorities, and if it deems necessary, will inform the public.

Refugees shall be treated at least like nationals in relation to freedom to practice their religion, labour legislation and social security.[26] Refugees shall be treated at least like other non-nationals in relation to movable and immovable property, the right of association in unions or other associations, wage-earning employment,[27] education higher than elementary, the right to free movement and free choice of residence within the country.[28]

D. **Convention Relating to the Status of Stateless Persons, 1954:** This Convention provides that the Contracting States shall accord to stateless persons within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.[29] A stateless person shall have free access to the courts in the territory of all Contracting States.[30]

E. **International Covenant on Civil and Political Rights, 1966:** This Covenant deals with freedom of movement and to choose residence[31] and prohibition of expulsion of aliens except by due process of law.[32]

F. **The African Convention on Refugee, 1969:** This Convention[33] concerned with the

23. *Id.,* article 2.
24. *Id.,* article 16, 27 and 28.
25. *Id.,* article 3, 32 and 33.
26. *Id.,* article 4, 24.
27. *Id.,* article 13, 15 and 17.
28. *Id.,* article 22 and 26.
29. Convention Relating to the Status of Stateless Persons, 1954, article 4.
30. *Id.,* article 16.
31. The International Covenant on Civil and Political Rights, 1966, article 12.
32. *Id.,* article 13.
33. The OAU Convention governing the specific aspects of the refugee problem in Africa was adopted by the Assembly of Heads of State and government on September 10, 1969 and it came into force from June 20, 1974.

governance of specific aspects of the refugee problem in Africa. It provides that Member States shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who for well founded reasons are unable or unwilling to return to their country of origin or nationality.

G. **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979:** This Convention[34] stated that State Parties shall grant women equal rights with men to acquire, change or retain their nationality and equal rights with men in respect to nationality of their children.

H. **The Cartagena Declaration on Refugees, 1984:** This Declaration also reaffirms the importance of the right to asylum, the principle of non-refoulement and the importance of finding durable solutions. The Declaration also provides to adopt national laws and regulations to promote within the countries of the region facilitating the application of the Convention and the Protocol and, if necessary, establishing internal procedures and mechanisms for the protection of refugees.[35]

I. **Convention on the Rights of the Child, 1989:** It provides that States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the this Convention. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. [36]

IV. NATIONAL LEGAL FRAMEWORK FOR PROTECTION OF REFUGEES

India has attempted to regulate the status and protection of refugees by administrative means as India is not signatory to 1951 Convention. In the absence of a legislative framework, the possibility of bias and discriminatory treatment of refugees cannot be ignored. Owing to the

34. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, article 9.
35. The Cartagena Declaration on Refugees, 1984, (July 1, 2019, 2:00 PM), https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.
36. Convention on the Rights of the Child, 1989, article 22.

absence of specific legislation, the laws relating to the regulation of foreigners are applied to refugees in India with no difference made between foreigners and refugees as a separate class. The primary Indian law relevant to foreigners is the Foreigners Act, 1946 which empowers the Central Government to regulate the entry, presence and departure of foreigners in India. As a result, refugees who have fled persecution are subject to the same rules and regulations as other foreigners entering India for any other purpose, and thus no legislative framework has been developed for identifying and determining refugee status.

The influx of refugees to India is not a recent phenomenon. Refugees started flowing into India during the partition in 1947. Though India is not a party to the 1951 Convention Relating to Status of Refugees and its 1967 Protocol, in the past the Indian Government has always tried to provide prompt relief and rehabilitation to refugees entering India. The relief and rehabilitation process for refugees during the partition of India was based on a very holistic approach and was organised at the highest levels of the Indian Government. Thereafter, refugees started coming to independent India from various neighboring countries as well as the Middle East and Africa. However, the assistance that was provided to refugees during partition, and the protection and rehabilitation extended to the first refugee group in India after independence (namely Tibetans), was not available to the refugees who came later, including those arriving today. It was expected that a country influenced by a rich religious and cultural tradition of hospitality (Atithi Devo Bhava), and governed by the rule of law, would be more proactive in ensuring the rights and protection of refugees in this evolving world of international human rights and protection of vulnerable people.[37]

The United Nations High Commissioner for Refugees (UNHCR) estimates the number of refugees currently present in India at around 2,05,764 of whom only 30,000 are registered with the UNCHR in New Delhi.[38] India chooses to deal with refugee protection through administrative measures coupled with strict laws dealing with the expulsion of foreigners. At the same time, there are several constitutional provisions which affirm the rights of non-citizens in the country, along with India's obligation to uphold international law through various Conventions, Protocols, Resolutions, Declarations, and so forth.[39]

In the absence of specialised statutory framework, India has to rely upon the Registration of

37. Sarker, *supra*, 14.
38. UNHCR Sub regional Operations Profile—South Asia (2015), (June 23, 2019, 2:00 PM), http://www.unhcr.org/pages/ 49e4876e6.html.
39. Sarker, *supra*, 14.

Foreigners Act, 1939, the Passport (Entry into India) Act, 1920 and the Foreigners Act, 1946, which govern the entry, stay and exit of foreigners in India. There are also some provisions of the Citizenship Act, 1955 which deal with granting of citizenship and expulsion of foreigners. The National Register of Citizens (NRC) is a register containing names of all genuine Indian citizens. The Illegal Migrants (Determination by Tribunal) Act, 1983 provides for the establishment of tribunals for the determination, whether a person is illegal migrant or not and to enable the Central Government to expel illegal migrants from India and for matters connected therein.

A. The Constitution of India, 1950

Refugees are entitled to some degree of Constitutional protection in India. These include the protection of the equality clause and the life, liberty and due process provisions of Indian Constitution. Equality before the law and the equal protection of law, classification of persons into separate and distinct classes based on intelligible differentia with a nexus to the object of the classification are allowed. Thus, the executive may distinguish between classes or descriptions of foreigners and deal with them differently.[40]

B. The Foreigners Act, 1946

In the absence of specific statutory framework in India, the chief legislation for the regulation of refugees is the Foreigners Act, 1946[41] which deals with the matter of entry of foreigners in India, their presence therein and their departure therefrom. Under this Act, wide range of powers has been granted to the Central Government. This Act was significant in the drafting of the Foreigners Order, 1948. This Order is an amalgamation of many of the provisions of the Passport (Entry into India) Act, 1920[42] and the Registration of the Foreigners Act, 1939.[43]

C. The Displaced Persons (Compensation and Rehabilitation) Act, 1954

The Displaced Persons (Compensation and Rehabilitation) Act, 1954[44] provides the payment of compensation and rehabilitation grant to displaced persons.

D. The Citizenship Act, 1955

This Act prohibits illegal migrants from acquiring Indian citizenship. To check the

40. The Constitution of India, 1950, art 14.
41. Act No. 31 of 1946.
42. Act No. 34 of 1920.
43. Act No. 16 of 1939.
44. Act No. 44 of 1954.

continuing influx of foreign nationals into Assam and fear about the adverse effect on political, social, cultural and economic life of the State, this Act was amended in 1985 which provide that every person of Indian origin who came on or after the January 1, 1966 but before the March 25, 1971 from territories presently included in Bangladesh and who has been ordinarily resident in Assam ever since and who has been detected in accordance with the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 shall, upon registration, be deemed to be a citizen for all purposes as from the date of expiry of a period of 10 years from the date of detection as a foreigner.[45]

E. The Extradition Act, 1962

This legislation provides some protection to refugees facing extradition by restricting the government's freedom to remove from its territory a particular category of foreigners. This restriction however is so narrowly relevant that it does not provide any real safeguards for the majority of refugees in India whose removal from the territory is most likely to face under the category of expulsion rather than extradition.[46]

F. The Refugee Relief Taxes (Abolition) Repeal Act, 2002

The Refugee Relief Taxes (Abolition) Act, 1973[47] was enacted to give relief to refugees from taxes but this Act was repeal by the Refugee Relief Taxes (Abolition) Repeal Act, 2002.[48]

G. The Asylum Bill, 2015

This Bill[49] was introduced for the establishment of an effective system to protect refugees and asylum seekers by means of an appropriate legal framework to determine claims for asylum and to provide for the rights and obligations flowing from such status and matters connected therewith. But the Bill has not been passed yet in the Parliament.

V. JUDICIAL RESPONSE TOWARDS REFUGEES

In India, the judiciary has played a very important role in protecting refugees. Court orders have filled legislative gaps and in many cases and has provided a humanitarian solution to the

45. Act No. 57 of 1955.
46. Act No. 34 of 1962.
47. Act No.13 of 1973.
48. Act No.70 of 2002.
49. The Asylum Bill, 2015, (June 2, 2019, 5:00 PM), http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3088LS.pdf.

problems of refugees. Moreover, Indian courts have allowed refugees and intervening non-governmental organisations (NGOs) to file cases before them. Furthermore, the courts have interpreted provisions of the Indian Constitution, existing laws and, in the absence of municipal law, provisions of international law to offer protection to refugees and asylum seekers.

The Apex Court in ***National Human Rights Commission v. State of Arunachal Pradesh***,[50] pointed out that a large number of Chakmas from erstwhile East Pakistan (now Bangladesh) were displaced by the Kaptai Hydel Power Project in 1964. They took shelter in Assam and Tripura. Most of them were settled in these states and became Indian citizens in due course of time. Since a large number of refugees had taken shelter in Assam, the state government expressed its inability to rehabilitate all of them. However, about 4,012 Chakmas were settled in Arunachal Pradesh. They were also allotted some land in consultation with local tribals. The Government of India also sanctioned rehabilitation assistance of Rs. 4,200/- per family. The population of Chakmas in Arunachal Pradesh is estimated to be around 65,000. Later, relations between citizens of Arunachal Pradesh and the Chakmas deteriorated and the latter made a complaint that they are being subjected to repressive measures with a view of forcibly expelling them from Arunachal Pradesh. The Court stated, "we are a country governed by the rule of law. Our Constitution confers certain rights on every human being and certain other rights of citizens. Every person is entitled to equality before the law and equal protection of law (article 14). So also, no person can be deprived of his life or personal liberty except according to procedure established by law (article 21). Thus, the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons to threaten the Chakmas to leave the state.

The Hon'ble Supreme Court in ***Louis de readt v. Union of India***[51] , held that article 21 of Constitution of India, which protects the life and liberty of Indian citizens is extended to all including aliens in Indian territory and they shall not be deprived of those rights except according to the procedure established by law.

In ***Chairperson, Railway Board v. Chandrimadas***[52] is a landmark judgment of the Supreme

50. (1996) 1 SCC 742 (India).
51. (1991) 3 SCC 554 (India).
52. AIR 2000 SC 998 (India).

Court on protection of human rights of refugees. Here Hanuffa Khatoon, a Bangladeshi national, was gang-raped in the rail yatri niwas of the Howrah railway station. A writ petition was filed and sum of Rs. 10 lakh was awarded as compensation against the Railway Department. The Supreme Court upholding this decision, held that offence of rape amounts to violation of fundamental right guaranteed to women under article 21 of the Constitution, and the victim, though a national of another country, was entitled to be treated with dignity.

In ***Tenzing Choden Sherpa v. Union of India,***[53] the Meghalya High Court held that on interpreting an unambiguous provision such as section 3 (1) (a) of the Citizenship Act, 1955, the petitioners (progeny of Tibetans) are Indian citizens in every respect and thus are entitled to all benefits and privileges available to the Indian citizens who born in India on/after January 26, 1950 and before July 1, 1987.

Dongh Lian Kham v. Union of India[54] is an important ruling by High Court of Delhi dealing with refugees. Two petitioners, Lian Kham and Zel Khan Mang, whose country of origin is Myanmar, have been staying in India under long term visa and mandate refugees since 2009 and 2011 respectively. The petitioners fled from Myanmar and entered India as they apprehended retaliatory attack by the military. Certificates were issued by the United Nations High Commission for Refugees recognising them to be refugees who are required to be protected from forcible return to their country. The High Court of Delhi held that since the petitioners apprehend danger to their lives on return to their countries, so the petitioners cannot be deported from India.

In ***Mohammad Salimullah v. Union of India***[55] , a petition has been filed before the Supreme Court, challenging the decision to deport Rohingya Muslims who have taken refuge in India to escape persecution in Myanmar. The petition has been filed by two Rohingya immigrants, Mohammad Salimullah and Mohammad Shaqir, who challenged the decision of the Central Government to deport 40,000 Rohingyas back to Myanmar, the country of their persecution. The petitioners have claimed that the proposed deportation violates the Constitutional protection of right to equality under article 14, right to life and personal liberty under article 21

53. WP (C) No. 206 of 2015 (India).
54. 2015 SCC Online Del. 14338 (India).
55. W.P. (C) No.793 of 2017 (India), (July 10, 2019, 5:00 PM), scobserver.in/court-case/rohingya-deportation-case.

and fostering respect for international law and treaty obligations under article 51 (c). The petitioners also claimed that the deportation would be in contradiction with the principle of non-refoulement, generally considered to be a part of customary international law. This petition is presently pending before the Apex Court, which will decide the fate of 40,000 Rohingyas in India will also clarify the extension of fundamental rights to the case of non-citizens like Rohingyas and the degree to which customary international norms are binding on municipal law.

VI. COMPARATIVE ANALYSIS OF SOUTH ASIAN REGION WITH NORTHERN REGION

Some of the important distinctions between the Northern Region and South Asian Region to the refugee problem would include the following. While the developed countries engage in individual determination by and large, the countries in South Asia engage in the group determination of refugees. In this process of determination, the developed countries have established a variety of administrative, quasi-judicial and appellate mechanisms while the countries in South Asia have not. The developed countries have enacted appropriate domestic legislation to give effect to the international obligations they have undertaken under the 1951 Refugee Convention and/or the 1967 Protocol, while there is no such legal framework in the South Asian countries. While the South Asian countries rely very heavily on the bilateral approach to resolve refugee crises, there is no such reliance placed on it by the developed countries. Again the South Asian countries have at tempted to resolve the problems of 'statelessness' by accommodating large numbers of people of their origin and by providing citizenship to them .[56]

The emergence of joint responsibility in this regard can also be seen in that process of resolving the issues arising out of population movements. The willingness on the part of India in according citizenship to 3,38,000 stateless persons from Sri Lanka and the efforts of the Sri Lankan Government to accommodate the rest of them is to be appreciated. The developed countries in resolving some of the refugee problems have also taken up such joint responsibility. Thousands of refugees from Burma, as indicated earlier, have also been assimilated in India without allowing them to create a refugee problem elsewhere. As far as the rights and liberties of the

56. Veerabhadran Vijayakumar, A Critical Analysis of Refugee Protection in South Asia, The Comparison, (July,26, 2020), file:///C:/Users/hp23/Downloads/22073-Article%20Text-22485-2-10-20180807%20(1).pdf.

refugee are concerned, there seems to be a wide gap between these two schemes. The developed countries have provided a number of rights and liberties as well as extended a number of welfare measures when compared to the countries in South Asia. When the systems present in these two groups of states, one can also identify certain similarities. Both the schemes permit the judiciary to resolve certain specific questions of law arising out of their determination, removal or in safeguarding their rights and liberties. There seems to be an active role placed by the human rights institutions, directly or indirectly, in both groups of countries. An increased number of NGOs are taking keen interest in the protection of refugees. Finally, there is an ever increasing awareness arising out of the 'Human Rights' concept that contribute to better protection of refugees through but the world today. The primary task for the developed countries would be to assist the developing countries to establish the appropriate legal framework in the protection of the refugees.[57]

To sustain this effort, an attempt must also be made to establish the necessary links at two different levels, with the academic institutions of higher learning in these countries for a constant and ongoing interaction with those institutions. Networking of educational institutions within these developing countries in the first place and then linking them with the institutions in the developed countries would certainly enhance the pace of establishing a human rights culture in the developing countries in South Asia. Reliance on a comparative analysis coupled with the perspective on human rights and refugee protection would certainly promote best practices in both the Northern and Southern countries in the years to come.

VII. CONCLUSION

Refugee problem is a tragic phenomenon which has always been a matter of concern at international, regional and national level. The tragedy lies with refugees is that they have to cross the borders of their nations and have to look with bare hands towards other states to let them give some space in their land. However, in the past decade, refugee concerns have moved to centre stage, probably because this period has seen some of the most serious cases of human rights violations and mass displacement. Though the basic human rights instruments have been

57. *Ibid.*

in existence since 1950, the contexts in which they are used today are very different. Compared to the post World War II era, refugee rights are being addressed with new concerns in mind.

India has so far dealt with situations of mass influx without a refugee law but with a continuously enlarging population of refugees and asylum seekers, a large section of who may not be repatriated in the near future, a uniform law would allow the government to maintain its huge non-citizen population with more accountability and order, apart from allowing them to enjoy uniform rights and privileges. A regional treaty can be beneficial in improving ties with its neighbours, but India will be better placed by having its own law owing to the large number of different communities that it hosts, and the unstable relations that it shares with several of its neighbours.

Thus, it is always to be remembered that no one becomes a refugee of his own free will rather when his own homeland becomes mouth of shark then one leaves his home and opts to become a refugee. It is the greatest tragedy of the current century that we are still witnessing the refugee crisis. Refugees are hungry for normalcy in their country so that they can go back and start their life afresh there. At present we need to develop a culture of peace so that the present and upcoming generation becomes symbol of peacemakers. Nations must join together to uphold the rule of law and must respect the basic rights of the individuals. The "Karuna Philosophy" propounded by Justice Krishna Iyer must always be kept in mind while

dealing with refugees. Thus the time at present is to join hands together to carve a new world where there shall be peace and where people are not forced to flee from their motherlands and become refugees.

Keeping into the consideration of national interest and measures needed to protect the rights of refugees in India, following are some suggestions:

- India must enact a specific national legislation for refugees. In order to make a good piece of legislation it is important if international law have a bearing on it.
- The definition given under the present 1951 Convention Relating to the Status of Refugees needs to be amended keeping into consideration the current scenario going on in various parts of the world.
- In the absence of Regional Convention in South Asia and also absence of national laws in countries of this region there is a need that refugee rights groups from South Asian Region must join hands and raise their voice on a regional platform.

- There must be need of some amendments in the Foreigners Act, 1946. Section 2(a) defines foreigner which only states that a foreigner is a person who is not a citizen of India.
- A coordinated effort should be made on the part of Central Government of India, UNHCR and various other non-governmental organizations for protecting the rights of refugees.
- Government can also think to establish a separate department that will deal with the issue of refugees in India. The procedural requirements can be simplified in context of providing them long terms visas etc.

MEN'S SEXUAL HARASSMENT AT WORKPLACE: AN EMPIRICAL STUDY

-Ms Amrita Rathi* & Mr Nishant Tiwari**

INTRODUCTION

Sexual harassment is a blasphemous act of encroaching into a person's private space and exploiting him/her in any manner possible, or embarrassing such person with lewd remarks so as to lead or result to forced sexual intercourse or any favors connected or incidental thereto.

It is not only a derogatory act, but also makes a person feel utterly violated and humiliated. Darkest of all shades, this act leaves a touch with the victim that doesn't go no matter how much rubbed, doesn't lessen no matter how much scratched, and doesn't revive no matter how much mollified it is a malpractice that slowly blemishes the day with the pall of gloom, just like the drop of ink stains *muslin*.

Violative of a hundred rights, as many as we can state, above all, it violates the dignity of a person. It is this when the victim would clench his fists and wish for it to revive. It would be this when he would beg the time to take recourse for once in the history, and sweep back the instant memories. It would be this when no matter how dark the night is, the mind is always darker. It is this when no matter how much vibrant the world is, a *Ravana* still comes into being.

It has been now since time immemorial that sexual harassment has been directly associated with ladies, and men are considered to be the aggressors. The concept of gender neutrality was introduced. Reservations for women were booked in the government institutions and the employment sector. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance.[1]

As Rick Bragg rightly quotes, *"every life deserves a certain amount of dignity, no matter how poor or damaged the shell that carries it is."*

But with the advancement of time, the protection meant for safety has begun to be misused. As the feminism took over the world, the essence of making laws for the defense of women started turning into laws for suppression of men. The idea of feminism spread like wildfire to the

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

farthest corners of the world, and the initiative of adulteration of its objective was enthusiastically taken up. Ignorance is bliss, they say. But too much knowledge is no less a fatal thing either.

"Beware of false knowledge; it is more dangerous than ignorance."

–George Bernard Shaw

With the rise of pseudo-feminists, the tables not only turned, but toppled upside down. The balance didn't only come at par, but broke with the shackles of misinterpretation and malicious demands. The justice took another turn. The itinerary of legal system changed. The slogan of "bringing women at par with men" was not the motto anymore, but *"bringing women at power"* was.

In the growing demand of empowerment of women, so that their security is not threatened in the workplace, the Sexual Harassment Act, 2013 was enacted that laid down penalties and safeguards to assure the well-being and welfare of women at their workstations. Apart from defining in black-and-white as to what 'sexual harassment' is, the Act also outlines what is tantamount to any such Act, also chalking down the proper meaning of the term 'workplace'. Now that Act, as the snubs of time corroded its shiny crust, revealed its rough scorching mantle, that if not covered anytime soon, would start flaring up the safety of men community of this nation. And so it happened, the judiciary got all the more burdened with the cases. Initially with the intent to seek aid from law, but later, to seek ulterior motives when men don't budge to the demands. Acts such as this, in the garb of protection to the women, practically in an implied manner defy others the basic right of being 'presumed innocent until proven guilty.'

It is the result of such developments that today in the eyes of law, only dignity of a woman amounts to chastity, dignity of a man means nothing. Not only as a form of sex discrimination, but as a weapon to avenge the mistakes of the past, sexual harassment of men has become one of the biggest unsaid tyrannies of the century.

Roberta Chinsky Matuson[2] has rightly so highlighted the problem, *"Many people mistakenly believe that harassment is limited to females only."*

The immutable statistics just hint at how gruesome the problem has gotten. The PEW Research

2. Human Resource Expert, Florida, United States

of 2014 shows that 25% of women and 13% of men have faced sexual harassment even when online.

By this paper, empowered by deep research and empirical studies, the writers aim to bring into light the urgency of a gender-neutral legislation to protect the dignity of even men from sexual harassment- a vindicatory, inhibitory, and heinous crime in the present era.

MEANING OF SEXUAL HARASSMENT

The definition of 'sexual harassment' has been stated in the Sexual Harassment Act 2013, in line with the Supreme Court's verdict in the Vishaka case, wherein it has been stipulated to be any unwelcome sexually determined behavior (expressed/implied) such as physical contact and advances, demand/request for sexual favors, sexually coloured remarks, exhibiting pornography, or any other unwelcome physical verbal or non-verbal conduct of sexual nature. [3]

CAUSES OF INACTION OF MEN:

Probing into the causes of abuse and the factors that coax the male community to stay silent about the constant blaring violation of their private space and dignity, some of the flagrant ones have been enumerated below:

1. Social Stigma:

Since time immemorial, men have been hailed to be the torchbearers of the traits of valor, power, domination and authority. These characteristics of a "true man" have instead started trampling their rights instead.

First, we progressed from a male dominant society to a comparatively moderate society on the principles of equity. Then we brought the males and females at par with each other. And then the privileges started transitioning into prejudice. In the Indian society, boys are taught not to cry, because a scientific act of releasing toxins is somehow equivalent to exhibit weaker nature of a man. The folkways have had it, a man was always capable enough of protecting his dignity by himself, while the women always needed a man's support to ensure her protection. This notion was aggravated to such an extent where all the possibilities of a man's security getting vulnerable ended. The tunnel was closed, and the "protector" was left susceptible to the unanticipated attacks in the dark.

That today has grown to be a misconception with its oxytocinic roots spread deep into the

3. Section 2(n), The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013.

societal mentality, where now a man simply cannot be sexually abused. That's not an entrusted belief, that is, rather a pragmatic legacy that is not to be questioned.On the contrary, if a woman accuses a man of sexual harassment, even without any proof the world stands by her believing that this must be so. This is a practical example of the social labelling theory purported by the sociologists in the 1960s.

Just as similar case was of Swaroop Raj, a Genpact Executive who committed suicide over allegations of sexual harassment.[4] He was facing the charges of sexual harassment and without even anything being proven he was socially labelled as a man of corrupt demeanor. He was expelled from his office on the pretext of the case being investigated. The last line of his suicide note stated, *"I am going as everyone will look at me with that eye even if I come clean."*

2. Familial factor

More often than not, the generational gap is so potential amongst the two peer groups that genuine understanding is taken over by the societal pressure of fitting their kinsmen into the predefined brackets of "gender roles". On the contrary, at times this humiliating thing is taken sarcastically by the members of the family. The harassment naturally makes the victim feel humiliated. Then the lax remarks add onto the feeling of disappointment and frustration. This leaves the victim helpless and he keeps bearing all of it.

If the male is married it becomes all the more problematic for him to complain about the issue. The main reason being that there are already properly implemented laws for the sexual harassment of women but none for man. so in case a male does that and the woman accuses him of being sexually assaulting in return, it would not be him who would be at stake but his family. It would shatter into tiny pieces and he would be bitterly distances from his kids. The Hindu Minority and Guardianship Act, 1956, as it is presumes wives to be better custodian of the children, this complaint would add fuel to the fire by maligning his character.

Also, it is possible that the victim is being sexually harassed by the aggressor on the pretext of not harming his family. To save his family's disillusioned *prestige* and *image* in the society, the person decides to suffer through all of this alone. Or it is possible too that the aggressor threatens the victim to agree for sexual favors or else the family would suffer the consequences in terms of false criminal cases or fabricated allegations. All these cases successfully seal the conscience of

4. indiatoday.in/india/story/top-genpact-executive-commits-suicide-in-noida-over-accusations-of-sexual-harassment-1413409-2018-12-20 Accessed pn September 26, 2019

the victim and he decides to self-immolate his dignity for the well-being of his loved ones.

3. Legal hassle

In such a populated country such as India where there is an acute shortage of judges, despite the legal system working on its toes, the desired disposal rate of the cases is still an ideal situation to be achieved. A small case takes a couple of years to be finally decided.

On top of that, the right of judicial remedy (the right of appeal to the higher court) has been grossly misused and there is a grave possibility of the case being lingered on for a decade or so. Often being the sole bread-earner of the family, a man would never readily engross himself with such inscrutable legal proceedings, impliedly subscribing to the Court membership for a minimum of couple of years.

Where he tries to go ahead and file a suit, there most probably the first truck that he gets in his way is the police. There have been instances when the police have refused to lodge cases at once. They have even turned cold-shoulder to the most grievous of complaints, by asking such demeaning questions that would upset the sufferer in return, and to save such embarrassment he would not approach the protectors of justice' at all. They often turn despotic in tendencies.

Not only them, but the cross-questioning in the courts where instead of dispensation of justice, some advocates strengthen their case by taking off-guard the opponent's mental will of fighting and reducing his already-vulnerable personal life to shreds in front of public also makes the victim refrain from seeking legal help.

4. Financial favors

India is a developing nation and the first odd that it is tirelessly fighting against is the widespread poverty. Under the umbrella of unemployment, the more complications are faced by disguised labor and underpaid ones. Due to insecurity of job, or the scope of getting paid or promoted, a man is lured into enduring this mental torture with the semblance of searing grief but generous well-being of his family. He gets into believing that every cloud has a silver lining. And with the passage of time, reduces himself just to become a sex-object for someone at the workplace, while questioning his own self-worth.

5. Gender-biased laws

Talking specifically about the legislations in India, they are mainly connected or incidental to the time when the society was staunchly patriarchal and the women had no rights to safeguard their self-sufficiency. Right to the present 21st century, the laws are still based on that notion that

men always are the wrongdoers. This on the other hand gives blaring powers to the women counterparts, which have been so protected and sealed, that they have started suffocating men's rights in return.

For example, until the striking down of Section 497 of the Indian Penal Code, the offence of adultery was punishable only for the men. An adultery committed by the women wasn't legally guarded for, until and unless a bench led by the Former Chief Justice of India Dipak Misra struck it down. Personal laws although are always preferred to be left untouched and are not normally tampered with but they provide a completely different set of conundrums for the men to deal with.

To quote one, under the Hindu Adoption and Maintenance Act of 1956, the daughter is entitled to get maintenance until she gets married while the son is entitled to get maintenance only until he acquires the age of 18. Even under the Special Marriage Act, secular marriage legislation, only the wife can claim permanent maintenance and alimony, but not a man. Also, under the provisions of Section 375, only a male can be accused for the offence of rape. There is no provision for prosecuting a woman who blackmails a male into the practice until her satisfaction is sought.

For instance, in 2018, a married man committed suicide after finding himself helpless due to being constantly pestered for sex by his co-worker. She was constantly demanding him to enter into an illicit relationship, on the failure of which she would lodge a false criminal case against him.[5] His body was found hanging from his ceiling fan on Monday morning and the hand-written note that he left behind narrated the plight of that poor man.

With such gender-biased laws, the law, instead of appearing as a 'resorting' option, acts as a 'restrictive' option for the aggrieved. Instead of inspiring him to be an icon, rise against the injustice, it tacitly intimidates him to strangulate his right to life and survive in injustice.

'Savior' for one, 'Satan' for the other: The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Enacted in consonance with the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW),[6] this act could be justifiably called the most potent propagator of tyranny of falsified cases by women on the men community. Taking into account the women

5. https://www.timesnownews.com/mirror-now/crime/article/married-man-commits-suicide-as-he-was-continuously-sexually-harassed-by-co-worker-in-maharashtra-metoo-stories-metoo-me-too-stories/299937 Accessed on September 26, 2019
6. Ratified by Government of India on 25-06-1993.

community in specific, the act in order to provide them a safe atmosphere of work provides such a pampered cushion that it doesn't leave a room for exercising of rights by their male counterparts.

First and the foremost, it defies the basic structure of the Indian Constitution enshrined under Article 14 wherein the suprema lex guarantees equality before law to all the people in the territory of India regardless of religion, race, caste, sex, or place of birth. Although under Article 15(3) the Constitution also states that special provisions maybe made for women and children by the Indian Parliament, but certainly by the clause the Constitution-makers meant not at the stake of someone else's rights. The law vouches for the principle of equality, but the doctrine of equity in itself has sprouted the concept of law and justice. Therefore, any principle against equity must be taken to be against the real motive of introduction of law in a state. This act, proving to be one such instrument of colorable legislation, is not at all gender-neutral, to start with. It provides security against sexual harassment only to the women, not the men. Anyway due to the societal barriers a lot of men hesitate to bring such malpractices against their will into light but this act totally wipes off the scope of any such complaints only.

Taking into consideration the Synovate Survey by the Economic Times, the staggering figures of sexual harassment serve as a blaring alarm of the dire need for men to be included in the ambit of laws against sexual harassment. Out of the 527 people who participated in the survey[7] , 19% people admitted to having been sexually assaulted at office. In Bangalore, 51% of the respondents agreed to have been harassed sexually, while in Delhi and Hyderabad the figures rose up to be 31% and 28% respectively. In totality, 38% of the respondents around these seven cities vehemently agreed upon the fact that 'men are just as vulnerable to sexual harassment just as women.'[8]

Further, the Internal Complaints Committee and Local Complaints Committee which find mention under Section 4 and 7 of the Act are blind towards the rule of *nemo in propria judex esse debet* i.e. the rule against bias. It is a doctrine of common law system that bars any party having any personal/pecuniary/proprietary/departmental interest/bias in the case from being a judge in that particular matter/case. As per Sections 4(2)(c) and 7(1)(c), it is mandatory to appoint in such

7. The survey was territorially limited to the seven metropolitan cities of Delhi, Chennai, Bangalore, Mumbai, Pune, Kolkata and Hyderabad.
8. <http://www.lawctopus.com/academike/sexual-harassment-workplace-prevention-prohibition-redressal-act-2013-critical-analysis/> Accessed on August 02,2016

committees the members from any such NGOs that are committed to the "cause of women".

No further detailed analysis of the qualifications has been provided as to what cause or what particular field of working. This would definitely be detrimental to the interest of the defendant party because any such member would be emotionally/professionally inclined towards the traditional notions, forever holding that it is always the man who is the aggressor. "If members of the committee of the adjudicatory committee are to be committed to an ideology, there mental frame will be such that it would give an opportunity for unwelcomed bias and their finding also will be in resonance of their personal commitment."[9]

There is no provision that maintains that there must be an appointment of a person who is 'expert in the field of law'. Only terming 'versed with the knowledge of law' opens up the situation to a plethora of interpretations. Further, roping in non-judicial bodies such as NGOs only aggravates the chances of breach of confidentiality, which is a fatal thing to happen in such sensitive issues involving the image of the man.

Therefore, to sum up, it can be concluded that this Act has marred the basic provisions of rule of law in the country by giving unreasonable power to one community over the other.

EMPIRICAL SURVEY- THE RESULTS[10]

Territorial Limits: India

Positive: 12/50 men face sexual abuse

There was an empirical survey conducted by the authors to verify the violating act of sexual harassment of men and reactions to such demeaning act. The authors sent a questionnaire consisting of 13 questions to 50 respondents (all males) within a stipulated time period. All people are from different occupations (in order to verify if sexual harassment prevails over all the major professions in India or not). The frightening results that were received have been stated below:

Question 1: Name (Optional):[11]

This question served dual purpose:

1. By not making it compulsory for the respondents to mention their name or email

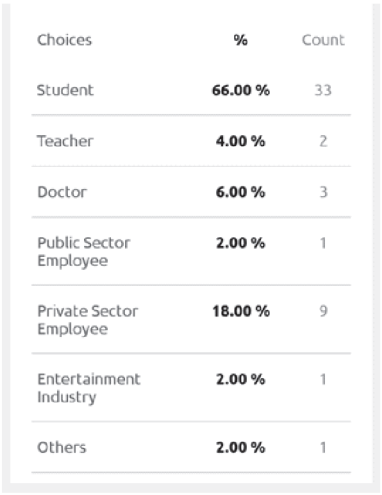
9. M. Pallavi Jane Periera, "Sexual harassment at Workplace in India, Medico Legal aspects", 36 Journal Indian Academic Forensic Medicine (2014).
10. Attached to the Annexure-I
11. *Ibid.*

addresses, the survey gave them a security blanket of their identity not being revealed anyhow.

2. It impliedly chalks out the current scenario regarding the acceptability and openness of the aforementioned heinous crime with respect to men, tacitly telling us the tolerability of such crime in the society and normality/stigma attached to it.

Question 2: Occupation (Required):

The people who participated in this survey belonged to the following fields:

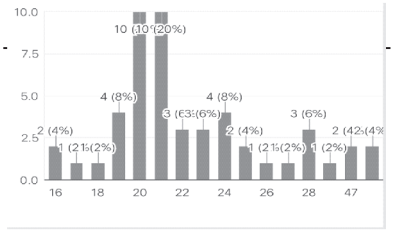


Choices	%	Count
Student	66.00 %	33
Teacher	4.00 %	2
Doctor	6.00 %	3
Public Sector Employee	2.00 %	1
Private Sector Employee	18.00 %	9
Entertainment Industry	2.00 %	1
Others	2.00 %	1

1. Scholars from different arenas of education
2. Academicians
3. Medical experts/practitioners
4. People employed in the public sector of India
5. People employed in the private sector in India
6. Entertainment industry
7. Miscellaneous

The authors assert that the respondents were wantonly not divided uniformly according to their professional background to minimize their intervention in the survey. It went unbridled to the most random people to get a fair idea of the prevalence of the malpractice. By keeping the respondents consistent in representation from different fields, the authors were afraid that would hint at curtailed contamination of the survey, which would negate the entire efforts of the study.

The authors acknowledge that maximum respondents belonged to the student's category and it is grief-stricken meeting with the fact that at this tender age of growing and maturing, nearly 40% of the students had to undergo the torment of facing sexual abuse in their lives. This is not only saddening, but also threatening for the upcoming generation as those who are today the victims, will vent out this frustration tomorrow. This ditches the society into a fatal vortex of anarchy and doom.



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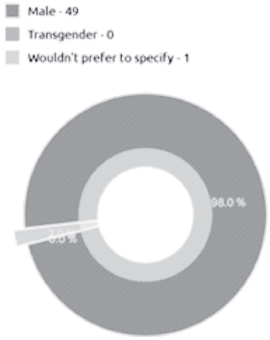

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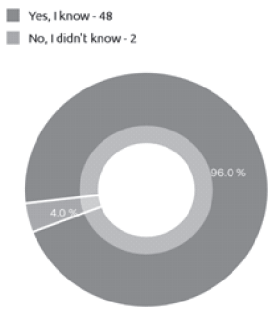

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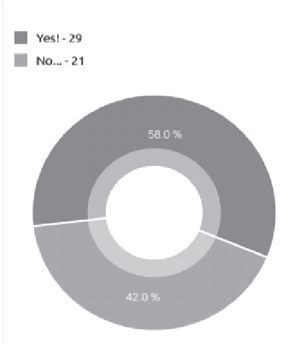
QUESTION 3: YOUR AGE? (OPTIONAL)

Peopleinvariably from a wide age group participated in the survey with no bar at all. Believing

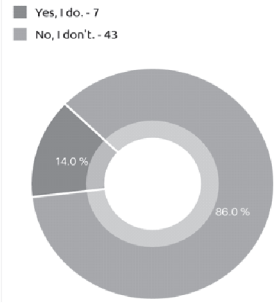
QUESTION 6: IS CASH (COMMITTEE AGAINST SEXUAL HARASSMENT) FUNCTIONAL AT YOUR WORKPLACE/CAMPUS? (REQUIRED)



As per the Sexual Harassment Act of 2013, the formation of committees against sexual harassment has been made necessary at every workplace for the utter protection of the females at their respective places of work. Even though no provision mentions taking the male counterparts into account, and the committee would lend their precious time of enquiry only for the females, it has failed even to keep them safe, let alone the males.

When asked about its existence and efficiency at their respective workplaces or campuses, the respondents got fairly divided into approximate proportion of 50% on each side, which means that every institution/workplace still doesn't have CASH.

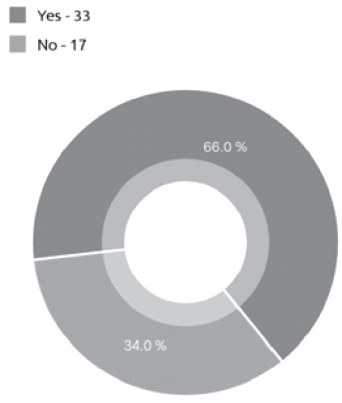
QUESTION 7: IF YES, ARE YOU AWARE OF ANY COMPLAINT THAT WAS INSTITUTED WITH THE CASH? (REQUIRED)



Providing an insight into its fructitiousness, we get an inkling of the productivity of such CASH.

As per the figures obtained, it can be fairly deduced that many people have no idea of any case solved by the CASH or any case instituted with it.

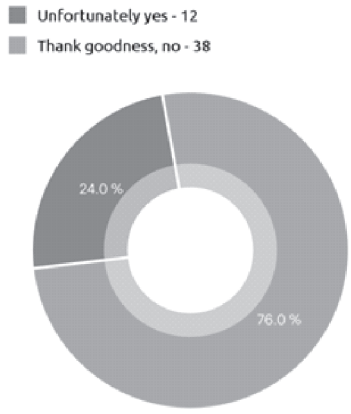
QUESTION 8: HAVE YOU EVER HEARD ABOUT SEXUAL HARASSMENT OF MALES AT WORKPLACE? (REQUIRED)



When asked about this pertinent unspoken issue that still lingers in shade today, the response highlighted the muffled shrieks of men community from underneath the societal pressure and worldly labels.

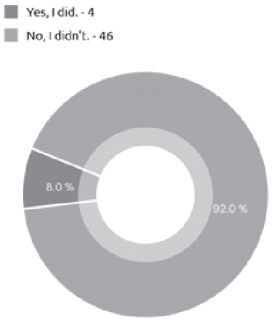
Out of 50 people, a staggering 33 number of males are acquainted with the existence of this problem but the law still chooses to ignore it.

QUESTION 9: AS A MALE, HAVE YOU EVER FACED ANY SEXUAL HARASSMENT BY A MALE/FEMALE HEAD/COLLEAGUE/MATE AT YOUR WORKPLACE/CAMPUS? (REQUIRED)



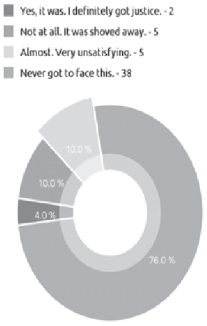
As per the survey, out of 50 men, 12 responded positive to having faced the blatant violation of self-possession. That is a defending percentage of 30 out of 100, and would definitely increase as the student body passes out and starts working in the corporate or the private sector, until the archaic laws change, the notions change, the tables come at equity, and along with the reservation at different levels, the women share the burden of liabilities that men do,

QUESTION 10: IF YES, HAVE YOU COMPLAINED ABOUT IT TO ANYBODY? (REQUIRED)



The gender barriers have always prevented men from telling about such horrendous experience to anyone else.

In previous times the reason was that no one would understand. Today, no one wants to understand. The times have changed, the reason hardly has. Out of 50 men, only 12.5% reported this infringement of rights to their peers or kinsmen, others just gulped down the worng done to them and moved on.

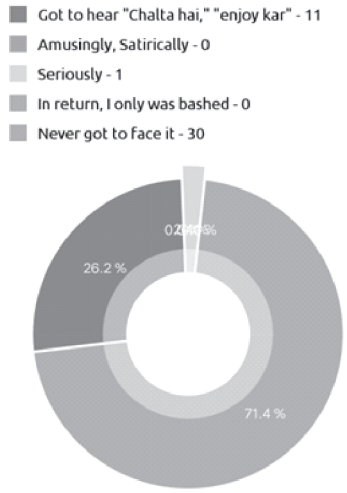


QUESTION 11: DID THAT COMPLAINT EVER GET REDRESSED? (REQUIRED)

For the people who stood up for their rights and merely demanded to be looked upon as a 'human', were rewarded by laughing upon and ignoring the complaints.

Is that what the society has reached to? Are we running in a vicious circle of exiting from the state of nature to protect the rights of man, and then shredding every right into finest fabric so as to return to the state of nature.

The massive figure stated alongside display the number of people who got justice out of the people who faced sexual harassment merely 2 out of 12, which means every 10 men go to bed with the guilt of having been touched inappropriately. Every day 10 out of every 50 men get their day ruined by the choking clouds of helplessness, but the thick dark clouds of lawlessness wouldn't tear apart.

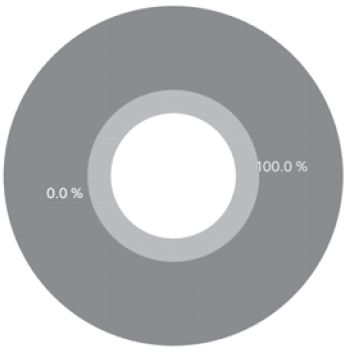


QUESTION 12: HOW DID THE PEERS AROUND TAKE THAT NEWS?

It was always in the theory that the complaints of men being sexually harassed was not taken seriously but the statistics prove the hypothesis so true. With remarks as cruel as *"enjoy"* or *"lucky guy"*, the victim feels all the more suicidal and depressed. Well, this is understood that with his/her dignity flung into air by someone else for some momentary pleasure, does make a person feel dishonored.

This brings into light the sad state of mentality that we have in our country today. A country where by the virtue of being a "man", "dignity" automatically gets eliminated from the itinerary. He also, by the virtue of being a "he", is not entitled to feel the pain or be sad, because he is a "he" and "he" must be therefore equivalent to a skeleton alive who doesn't feel anything.

Such thinking has to be changed and that can be done in the preliminary institutes and schools, wherein the teachers frame basic mindset of children. Compassion can't be bargained for. Inculcating mutual respect and empathy for everyone irrespective of genders and sexuality, will indeed make the circumstances better.



QUESTION 13: DO YOU THINK WE NEED GENDER-NEUTRAL LAWS FOR SEXUAL HARASSMENT NOW? (REQUIRED)

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The Report of 172nd Law Commission, which recommended that laws such as that of rape shall be made gender-neutral (both for the victim and the offender) must be incorporated into law of the land. The report of Justice Verma Committee suggested neutralizing the law but only for the victim, not the offender, which the aimed to keep gender-specific. Even that wasn't adopted by the Indian Parliament.

The horrifying *Nirbhaya* gang-rape case opened doors to some significant amendments in the criminal law. The laws regarding acid attacks, disrobing a woman, sexual harassment, stalking, trafficking, and voyeurism[12] - all of these gender-specific except the laws related to acid attack.[13] This amendment, in the garb of progressing, is petrifying. It doesn't only presume that men are the only wrong-doers, but also that their safety doesn't need legal sanction. That they can't be attacked at and they can defend themselves. This is blasphemy to the sanctum sanctorum of the Indian Constitution- the fundamental rights of the citizens under Article 14 and 19 and and duties of the state, which dictate the State to take all the steps for development of its citizens and providing them means for them to achieve excellence in all spheres of life.

SUGGESTIONS

1. **Constitution of special courts to deal with sexual harassment of men and women as a whole:** Judiciary has customarily advised the formulation of special Courts, like Special Courts for women, youth, and SC/ST, wherever it so deemed necessary. Vide the power vested by the Indian constitution with the Indian Parliament under Article 323-B, new tribunals must be constituted for the adjudication of the disputes for men and women equally without any bias or prejudice.

Being a court of special nature, whose aim would be to deal with the intricacies of the matter dealing with the accused's character, reputation, custody of children, this court should be given the power to evolve its own rules of procedure. It must be advised to stick by the rules of Civil Procedure Court in the normal course of action, but be flexible enough so as to deal with peculiar matters in a different manner. This would allow a holistic inspection of the matter and would ensure proper disposal of the cases with no haste, parallely lightening the burden of the traditional courts.

2. **Increasing the legal fraternity in the courts:** In order to ensure speedy disposal of cases, not only an increased number of benches are necessary, but what is more important is an elevated cap on the limit of judicial fraternity. More division of labor would guarantee better facilitation of justice. But the irony is that we face an acute shortage of judges.

There are still a large number of vacancies in the subordinate judiciary, being 5,924 as on December 31st, 2017.[14] 24 High Courts have 406 posts vacant, whereas Supreme Court has 6

12. The Criminal Law Amendment Act , Section 354 (2013)
13. The Criminal Law Amendment Act , Section 326 (2013)
14. Ministry of Law and Justice, Government of India, Annual Report 2017-18, 109.

vacancies. The total vacancies, thus combined, are of 6,160 judges. Former CJI T.S. Thakur lamented about the "inaction of government on not increasing the number of judges present from 21,000 to 40,000" to handle the "avalanche in litigation. You cannot shift the entire burden on the judiciary," he complained to the Prime Minister. Increasing the number of judges from 10 per 10 lakh people to 50[15] is an urgent need, he reiterated.

Even the present Chief Justice of India, Mr. Ranjan Gogoi has written to Sir Prime Minister bringing into his attention the crippling effect the inadequacy of the workforce is resulting into. He advised raising the retirement age from current) 62 years to 65 years. Quoting that presently there remains a backlog of 58,669 unsolved pending cases with the judiciary, the Prime Minister must also consider tenure appointments of the retired Judges (of the Supreme Court and the High Courts) under Article 128 and 224A of the Indian Constitution to deal with the huge chunk of cases comparatively with ease. [16]

3. **Make the laws gender-neutral:** The society today has reached at the intersection of equal rights for men and the women. It is time to limit the excessive powers on both men's and women's parts and ensure a balanced state of affairs. This is the zenith of the equilibrium that the legal system and democracy were looking for. Now, after the communities have come at par, the laws must come at par too. If it gets late anymore, the society would steeply fall back into the state of nature. And the increasing number of suicides amongst males is a clue of the same awaiting calamity.

Male suicide at workplaces equates to 4 times more than that of women. Moreover, in 2015, as per data released by the National Crime Records Bureau, a whopping number of 1,33,623 suicides were reported across India, out of which 91,528 (68%) was solely constituted by men, while the women constituted only 32% of the entire record.

Approximately 77 countries, including the United Kingdom, Australia, Denmark, and the United States, have taken a step forward to safeguard human rights by turning all the laws into a gender-neutral state.

What is even more heart-wrenching is the plight of male inmates in the prisons. The People's Union of Civil Liberties states that way back in 1981 in the Tihar, as soon as there entered a young boy, the prisoners would bid up on him. The price was paid in terms of 'bidis,' 'soaps' or

15. Law Commission 1987.
16. June 23, 2019, Page 2, The Hindu

addiction such as 'charas'[17].

India, on one hand desiring to leave its mark at the United Nations and the Security Council, on the other hand is not ready to let go of the clutches of the Victorian laws.

The ambit of gender-specific laws should be broadened to turn them into gender-neutral laws. This would not only serve better the purpose of democracy, but would also warrant the rule of equity.

4. **Ensuring stricter guidelines for the media:** Media is often referred to as the fourth pillar of democracy, owing to the crucial role that it plays in mass-communication and bringing to life the spirit of democracy. But such a powerful source, when gets absolutely unbridled, in the absence of limits can lead to some serious irreversible damage. In the influenceof the air of westernization, media has often needlessly portrayed men as Casanova, easy-going beings who have no feelings and can be trodden as and when needed.

The Save Family Foundation revolted against the same idea of portrayal of men and sent a complaint to the Advertising Standards of India against the Kitply plywood commercial in which the wife slapped her husband because of the creaking bed. The foundation alleged that terming "violence" as "fun" was not justified.

Following the suit, *Indiya Kudumba Pathukappu Iyaakam,* a Chennai-based organization filed two similar complaints: one against a Pond's ad commercial where men were portrayed as terrible wife-beaters, another against the ICICI Prudential Insurance that insensitively displayed verbal and economical abuse against men.[18] From making trolls and memes out of every sensitive and grave situation, men are mocked at on the social media platforms and advertisement plates which makes them an easier target to violate the integrity of, without having to pay much in return.

The gravity of the situation can be better understood with the same ads but reversed roles. Such distorted social message when sent across, simultaneously also fits into the mentality of the people that men can be slapped or beaten up anytime anywhere as they are the only delinquents in the society. This sternly only petrifies men to raise questions about the objectionable touches

17. The Tribune Accessed on September 26, 2019 https://www.tribuneindia.com/news/comment/institutionalise-prisoners-conjugal-visits/790734.html.
18. September 16, 2008, DNA India, https://www.dnaindia.com/india/report-men-s-groups-want-offensive-ad-off-air-1190494 Accessed on September 26, 2019

they are subjected to. Therefore, strict and like guidelines must be maintained to keep media under control.

5. **Efficient hand-in-hand functioning of the judiciary and the legislature:** Lastly, in India we have independent branches of legislature, executive and judiciary, but on the contrary, serving as a purposeful benefit of the parliamentary system of democracy, these don't work separately as water-tight compartments unlike the machinery of the United States of America.

Therefore, in order to deal with the issues of gender-neutrality in a collaborative manner, not only the legislature needs to maintain a modern well- equipped approach of the emerging problems, but an effective judiciary exercising a fair right of judicial activism is just as important. This blend of neutral legislature and impartial judiciary will lead to upliftment of the present dull condition of men in the arena.

CONCLUSION

Sexual harassment is a harrowing crime that doesn't only affect the physical state of a human being but even his mental peace. It is just equivalent to mental torture if the circumstances are properly calculated. Dignity ain't defined by the gender or sexuality; it is defined by the character. And to uphold and safeguard a person's character is the state's foremost duty. Protection by laws is important, but above that is character, and that is an endeared constituent of a human life.

This is the need of the hour that men be included under the legislation prohibiting sexual harassment at workplace to fairly enjoy their right of protection under the state's legal system. And only changing legal provisions wouldn't be enough, but changing mentality would be the end of it. Opening our thoughts to the fact that 'it is not always the male who is the wrongdoer' and entertaining the truth that 'a woman can be the aggressor too' would help us not only grow as a community, but as a country as a whole.

As has been put by Nicole Kidman rightly into words, "imagine a bold plan for a world without discrimination, in which women and men are equal partners in shaping their societies and lives. Let's picture it!"

The acts such as this, whether done by a man or a woman, are as equally as heinous as they make an individual question his/her self-worth, which is quite demeaning in nature. It is high time that we look past the ascribed gender roles to us by the society, come together, share the grief, acknowledge that all of us are made from flesh and bones, we all have emotions and it is okay to cry, to vent it out. And when this happens, we would truly take the first step towards acceptability. Rest, as they say, death with dignity is better than life with humiliation.

MISSING DISCOURSE ON TRIPLE TALAQ AND DEBATE ON MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2019

- Ms Meena Kumari*

"Men think themselves superior to the women, but they mingle that with the notion of equality between men and women. It's very odd".

Jean Paul Satre

INTRODUCTION

The Supreme Court in ***Shayara Bano v. Union of India***[1] declared the triple *talaq (talaq-a-biddat)* unconstitutional and void; further instructed the government to legislate a law with this respect. Thereafter the government had struggled to enact the law which ban and punishes the pronouncement of triple *talaq* in any form. For the first time on December 28, 2017, the then Law minister introduces the bill in Lower house of parliament, which was passed by it but remain pending in upper house of parliament. Later on three Ordinances were promulgated (on Sep. 2018, Jan. 2019 and Feb. 2019) to provide immediate relief to Muslim women.[2] On Jun. 21, 2019 bill was introduced in Lok Sabha, on Jul.25, 2019 bill was passed by Lok Sabha and on Jul. 30, 2019 bill was passed by Rajya Sabha; thus on July 30, 2019 Muslim Women (Protection of Rights on Marriage) Bill, 2019 was passed by both houses of parliamen[t3] after a wrangle debate.

On August 23, 2019 Supreme Court of India agreed to examine the bunch of petitions challenging the Muslim Women (Protection of Rights on Marriage) Act, 2019.[4] According to petitioners the Act is unconstitutional as it only criminalizes what is already declared unconstitutional and void and the objective of the Act is to protect the rights of the women but it not provide any provision with regarding maintenance. This acceptance of petition again reignites the debate on the Muslim personal laws and Muslim women rights.

Although there are arguments that triple *talaq,* polygamy, *nikah halaa* etc. are tools used for suppression and oppression of women but the debate on reformation of Muslim personal laws

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1. (2017) 9 SCC 1 (India).
2. Bills Parliament, (May 10, 2019), http://www.prsindia.orgbilltrack/muslim-women-protection-rights-marriage-bill.
3. Acts Parliament, (Sep. 21, 2019), http://www.prsindia.org/billtrack/muslim-women-protection-rights-marriage-bill.
4. Bhadra Sinha,Triple talaq law to come under Supreme Court lens, notice issued to center, HINDUSTAN TIMES (Sep. 21, 2019), http://www.hindustantimes.com>india-news>triple-talaq-law-to-be-review.

generally revolves around the interpretation of Quran, freedom to profess religion, secularism, Uniform Civil Code (UCC) etc without addressing the core issues of women rights, dignity, equality, feminism and patriarchy. The discourse bifurcate the term 'Muslim women'. In all legal discourse- in judgment of the Supreme Court[5] and even the debates in the Rajya Sabha and Lok Sabha the debate is more on 'Muslim' as a religious minority community in India, rather than 'Women'referred as gender and community oriented as the term 'women' involves the feminist approach, difference between sex and gender and dominance of patriarchy.

The research article outlines the brief overview of basic tenets involved in term 'Women' and examine and analyses the ***Shayara Bano*** judgment of Supreme Court and debates of members of parliament on the touchstone of those basic tenets with special reference to Convention on Elimination of All Forms of Discrimination against Women (CEDAW), which is called the Magna-Carta of women rights.

FEMINISM

In 19th century feminism was originated and developed as a women movement. Initially the women movement raised the demand of equality with men in public sphere mainly right to vote and political equality, called the first wave of feminism based on the liberal ideologies demanding equal rights as men had.[6] After achieving the equality at outer sphere still the women was not able to get the real gender-equality, still void was there. This was not sufficient, thus the women movement enter into the second wave of feminism, demanding the equality in inner sphere of family life. According to the second wave of the feminist equal rights are meaningless unless the women enjoy the social equality, which can be realized by the revolutionary process of social change, also referred as radical feminism, which moved beyond the equal rights and gave more emphasis on gender differences in the society- sex and gender; and concept of patriarchy is the main reason of oppression of women, deep rooted in the society and causes inequality.[7] Both concept of patriarchy and difference between sex and gender is provided hereinafter. Twenty-first century see the progression of third wave of feminism, which is not concerning about women in general but a particular category of women- poor women, black women, women of a particular religion or race or region.[8] According to the third wave of

5. *Supra* note 1.
6. ANDREW HEYWOOD, POLITICAL IDEOLOGIES: AN INTRODUCTION 227 (5th ed. 2014).
7. *Id.,* at 242.
8. ANDREW HEYWOOD, POLITICAL THEORY AN INTRODUCTION 264(4th ed. 2015).

feminism it is not that all the women in general suffers the discrimination but it can be a particular group of women, sometimes of particular race or region or color. To compensate the disadvantage and discrimination suffered by them, those women require special care and treatment.

A Muslim husband has a unilateral power t dissolve marriage by pronouncing *talaq,* sometimes without any reason. No such equal right or power was conferred on Muslim women. Triple *talaq* is the innovation of practice of *talaq* emerged during second century of origin of Islam; whereby a Muslim husband may pronounce three *talaqs* in one go, even in absence of wife, which becomes irrevocable and dissolve the marriage without any scope of reconciliation and reconsideration of consequence of the decision. Thus the practice of talaq causes inequality as well as injustice to Muslim women and such women require special treatment to uphold their dignity and equality.

(a) Patriarchy

The term patriarchy was originated from Medieval Latin and Greek term patriarkhias means 'ruling father'; a mass noun referring *'asystem of society or government in which father or eldest male is the head of the family and descent is recognized through the male line*'.[9]

Patriarchy is a social system where men havethe power, control and dominance over property, political leadership and social institutions.[10] Thus it illustrates the power relationship between men and women and refers to 'male dominance' and 'male supremacy' to describe the gender relations in society.[11] It also refers towards the unequal representation and participation of the women social-public life. It is a systematic, institutionalized and persistent form of power of men.

It was argued by traditionalists that practice of *talaq* upholds the principle of equality and fairness; however it was the notion affected by the concept of patriarchy. Practice of *talaq* was not something introduced by Prophet Muhammad but was already prevailed in pre-Islamic Arabia. It is evident that the attitude of people towards practice of *talaq* was affected by the cultural and social conditions of the society. Early Arabs were among the most violent peoples and such culture of violence affected both men and women; therefore generally men were the accused and the victims of murder, war and revenge but the burden of such violence was suffered

9. Meaning of patriarchy in English, (Sep. 22, 2019) https://www.lexico.com/en/definition/patriarchy.
10. Patriarchy, (Sep. 23, 2019)https://en.wikipedia.org/wiki/Patriarchy.
11. *Supra* note 6, at 231.

by women as transformed into the mean of entertainment for the surviving and privileged men and in such environment the ratio between men and women could be approximately three to one.[12] In pre-Islamic Arabia there is no restraint on the power of the husband to pronounce *talaq* for any number of times, after the advent of Islam these numbers were restricted to three with a procedure; although still it was the prerogative of the Muslim husband. Instead of *talaq* under Islamic law *ila, zihare*tc. are the other options given to them to dissolve the marriage; however it was said that *khoola* provides the right to the Muslim women to dissolve the marriage but in fact it is ultimately the decision of the husband to accept and agree to take compensation to pronounce the *talaq* on wife. Ultimately it is the husband who has to pronounce the *talaq.* No such equal rights were given to the Muslim women. It shows the male dominance and supremacy over the women. It is the systematic and institutionalized oppression of the Muslim women under the patriarchy system.

(b) Sex and Gender

On the basis of above arguments the simple question is why a Muslim woman not given the equal right to utter *talaq.* There is no provision in *Islamic* law enabling a married Muslim woman to obtain divorce, except *khoola* to some extent. In India under British rule in 1939, The Dissolution of Muslim Marriage Act, 1939 provides this right to Muslim married woman by filing an application for dissolution of marriage on certain grounds.

What is the difference between the Muslim men and women, whether she is not able to utter this word? The difference lies in the difference of gender and sex. Sex refers to the biological anatomy and has no social and political significance. Anatomically there is only one major difference between man and woman and that is the reproduction ability of woman. Except this the other differences refers the gender having social, political and economical significance. These gender differences are structured and constructed by society (male dominated),[13] it is right to refer this society a patriarchy society. According to patriarchs, gender division prevailing in society is natural[14]; but in fact it is constructed by them like what a woman should wear, eat and behave, pink refers to women blue to men, how many children and at what time etc. not refer to any natural difference but sociallyconstructed difference.

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12. AHMED E.SOUAIAIA, CONTESTING JUSTICE 50 (2008).
13. *Supra* note 6, at 231.
14. *Id.,* at 233.

(c) Approaches of gender justice

There are two main approaches of gender and inequality- sameness and difference approach.[15] According to sameness approach women are same as men, same standard should allotted to women and uphold that men and women are equal before law. Catherine criticized the approach as the standard of equality was the men, scale is men, women is compared with men- refers the male dominance in scaling.According to difference approach sex is the point of differentiation.[16] A woman requires special provision and treatment because of difference of biological anatomy of man and woman. Women should be treated differently (undercover perception may be because women are frail and weak require protection). Catherine criticized this approach as the women are measured at the standard of men. This approach involves a protectionist attitude rather than providing substantive equality.

A new approach of corrective treatment is adopted to provide equal and fair treatment to the women, where women are considered as historically deprived group.Before drafting any legislation or even judgment this approaches and concepts require attention to understand the basic problem from women's sensitivity.

EQUALITY

There are various forms of equality- legal, political and social equality. Conceptually there are two types of equality- Formal and Substantial equality.[17] Legal equality is the key expression of the formal equality i.e. equality before law and equal protection of law.[18] Law treats all equally irrespective of their caste, color, race, gender etc. Article 14 of the Constitution of India titled 'Equality before Law'[19]. Thus, it guarantees formal equality- equality before law. The Formal equality is about the nature of dealing rather than the result of dealing. The test is persons situated similarly should be treated similarly; thus the equal treatment should be given to those who similarly situated and not to persons who by reason of historic and systematic discrimination cannot recognize as similarly situated.[20] On the other hand substantive equality not concern with the equality before law but it considers the discrimination and inequality

15. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED DISCOURSES ON LIFE AND LAW, 32 (1987).
16. *Id.,* at 33.
17. *Supra* note 8, at 270.
18. *Id.,* at 271.
19. INDIACONST. art. 14.Art. 14 provide that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
20. RatnaKapur, Un-Veiling Equality: Discipling the 'Other' Woman, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW SEARCHING FOR COMMON GROUND 267 (Anver M. Menon et. al. ed., 2012).

suffered by particular person[21]; thus provide special treatment- equality of opportunity and equality of outcome. The idea is to remove the impediments in the way of the personal development by providing the special treatment. Article 16 clause (1) of the Constitution of India titled 'Equality of opportunity in matters of public employment'[22].

Further Article 15 clause (3)[23] of the Constitution of India empowers the State to make special provisions for women and children and thus provides an example of substantive equality to some extent.

The CEDAW also emphasis on State parties to incorporate the equality of outcome as a significant aspect of providing substantive equality to women.

The Muslim women in India thus de *jureentitled* to both legal and substantive equality under the framework of the Constitution but de *factounder* the disguise of personal laws cannot avail any of it. These personal laws are based on the notion of patriarchy and gender differences constructed by the male dominated society.

CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

United Nations General Assembly on Dec. 18, 1979 adopted Convention on Elimination of All Forms of Discrimination against Women (CEDAW)[24], which came into force in 1981 as an International treaty after ratified by the twentieth country. It is referred as milestone in women right movement.[25] It is instrumental in bringing to light all the areas in which women denied equality with men.The convention upholds the objectives of United Nation and faith in elementary human rights, dignity and equal rights of men-women. It laid down the meaning of equality, how to achieve it and agenda for action by State party to it. The preamble of the CEDAW provides that"That despite various instrument, extensive discrimination against women continues to exist, Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full

21. *Id.,* at 268-269.
22. INDIA CONST. art.16 (1).Article 16(1) provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
23. INDIA CONST. art. 15, cl.3.
24. G.A. Res.34/184, Convention on Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).
25. SUSANNEZWINGLE, TRANSLATING INTERNATIONAL WOMEN'S RIGHT THECEDAW

development of the potentialities of women in the service of their countries and of humanity"[26].

CEDAW provides the meaning of the term 'discrimination against women' as"Any distinction, exclusion or restriction made on the basis of sex…which impairing or nullify the recognition…of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[27]

It further requires the State parties to condemn all forms of discrimination against women and to take appropriate means by establishing legal protection of rights of women and by espousing legislative and other measures including sanction if necessary to prohibiting discrimination to provide effective protection.[28] It requires the State parties to modify or abolish any laws, customs and practices which constitute discrimination against women.[29] Article 4(1) provides that State parties should take up temporary special measure for accelerating de facto equality between men and women.[30] CEDAW compel the State parties to take all necessary measures to remove discrimination against women in all matters relating to marriage and family relations.[31]

Article 24 of CEDAW provides that"State parties undertake to adopt all necessary measures at the national level at achieving the full realization of the rights recognized in the present Convention"[32].

India had signed the CEDAW on July 30, 1980 and ratified it on July 9, 1993.[33] India ratified the CEDAW with two declarations and a reservation.[34] Reservation is with regarding Article 29(1) of the CEDAW, which not affect the core obligation of it.[35] The two declarations affected the basic purpose of the CEDAW as it is with regarding to Article 5(a), 16(1) and 16(2). India declares that it abide by and guarantee the conformity with the provisions of the CEDAW with the policy of non-interference in the personal affairs of any community without the consent of

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CONVENTION IN CONTEXT 35 (2016)

26. Convention on Elimination of All Forms of Discrimination against Women, Preamble, Fr. India, 13 U.N.T.S. 1249 Jul. 30, 1980 (Sep. 23, 2019)https://www.treaties.un.org/pages/ViewDetails.
27. Convention on Elimination of All Forms of Discrimination against Women, Id., Article1
28. *Id.,* Article 2(b) and (c).
29. *Id.,* Article 2(f).
30. *Id.,* Article 4(1).
31. *Id.,* Article 16(1).
32. *Id.,* Article 24.
33. Status of Ratification, Declaration and Reservation, Office of High Commissioner for Human Rights (Sep. 23, 2019) http://www.indicators.ohchr.org/.
34. Madhu Mehra, India's CEDAW Story, in WOMEN'S HUMAN RIGHTS: CEDAWIN INTERNATIONAL, REGIONAL ANDNATIONAL LAW 386 (Anne Hellum& Henriette Sinding Aasen ed., 2013).
35. *Ibid.*

the community. Declaration with regarding to Article 16(1) is that India supports the compulsory registration of marriage however it is not practicable in India because of hugeness, customs, religion and literacy.[36] The declaration reveals the rooted patriarchy and cultural identity, whereby the equal rights of the women are lost. Question here arises whether the term 'without the consent of the community' involves the consent of the women or whether community involves women or it refers to male-dominant community. India has signed and ratified the CEDAW, however upholds the policy of non-interference in personal affairs, which make the effect of ratification nugatory. Gender equality become irrelevant to the discourse of personal laws.

Committee on CEDAW time to time laid down the agenda and machinery to achieve its purpose in the form of General Recommendation.General Recommendation no.28 urges the State parties to fulfill the obligation by refraining from making laws which directly or indirectly resulted into the denial of equal enjoyment of civil, political, economic, social and cultural rights.[37] This requires the obligation of means, conduct and result. General recommendation no.29 provides that the inequality in family is the basis of discrimination against women which is warranted for the sake of religion, culture and ideology. It specifically provides that State parties should guarantee equality in economic aspect during the relationship and on the dissolution of marriage and should eliminate exemptions that serve the discrimination. These are the guiding light for all State parties to adopt and acted towards equal and non discriminatory rights of women. Article 51(c) of the Constitution also requires that State shall make efforts to comply and promote respect for international law and treaty obligations.[38]

Shayara Bano v. Union of India*[39] *: The Missing discourse

It is the judiciary who serve as a torch bearer on women right. Judicial pronouncement advances the women right and equality and raises concerns against discrimination. It is not the first time that judiciary declare triple *talaq* unreasonable, arbitrary and void. There were many judicial pronouncements which uphold the women equality and dignity. Guwhati high court in ***Jiauddin vs. Anwara Begum***[40] and ***Mst Rukia Khatoon vs Abdul KhaliqueLaskar***[41] , Kerla high court in

36. UnitedNationsTreatyCollection(Sep.23, 2019)https://www.treaties.un.org/.
37. General Recommendationof CEDAW, Office of High Commissioner for Human Rights(Sep. 23, 2019) https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx.
38. INDIA CONST. art. 51(c).
39. *Supra* note 1.
40. (1981) 1 GLR 358 (India).
41. (1981) 1 GLR.375 (India).

A. Yousuf Rawther vs Sowramma[42] and ***Mohammed Haneefa vs Puthummal Beevi***[43], Delhi high court in ***Massor Ahmed vs Delhi (NCT)***[44] and in ***Shamim Ara vs State of U.P.***[45] Supreme Court of India already held that that triple *talaq* is a revocable talaq and dissolution of marriage does not take place immediately at the time of pronouncement.

If we analyze the latest judgment of ***Shayara bano***[46] Supreme court analysis all necessary themes with respect to the term 'Muslim'- Prophet Muhammad, religion (Islam), religious book (Quran), traditions and customs *(Sunna and Hadith)* and changes or reforms takes place in other countries. However not consider the themes related to 'Women'- women right movement, feminism, patriarchy; although referred the CEDAW but not to the extent which was required.

Reason of this approach of Supreme Court in most of the family law cases is these laws called personal laws derived from the religion. While enormous codification has been taking place in Hindus and other religious communities but fewer efforts were make to codify the Islamic law because of lack of the political will and insensitivity towards right of the women. Instead of providing equal rights there were examples where judiciary tried to make efforts to eliminate discrimination but legislature overturned it. In ***Shah Bano vs Union of India***[47] Supreme Court uphold the right of the Muslim women to claim maintenance under section 125 Cr.P.C; however was back lashed by legislative action. In ***Daniel Latifi & another vs Union of India*** ultimately the court interpreted the provision in such manner that uphold the constitutionality of provisions as well as uphold the right of the women; although without reference to CEDAW.

Judiciary may uphold the equal rights of the women with the help of the basic themes of feminism, patriarchy, difference between sex and CEDAW in a better way.

Debate in Parliament of India on Muslim Women (Protection of Rights on Marriage) Bill, 2019: The Missing discourse

On June 21, 2019 the Muslim Women (Protection of Rights on Marriage) Bill was introduced by law minister Ravi Shankar Prasad for second time[48] in *LokSabha,* which was passed on July 25, 2019 and thereafter passed by *RajyaSabha* on July 30, 2019 after a wrangle debate.[49]

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42. A.I.R. 1971 Ker. 261(India).
43. (1972) ker. LT 512 (India).
44. (2008) 103 DRJ 137 (India).
45. (2002) Cri.LJ 4726 S.C. (India).
46. *Supra* note 1.
47. (1985) 2 SCC 556 (India).
48. Earlier bill had introduced in Dec. 28, 2019, which was passed by LokSabha but stuck in RajyaSabha.
49. *Supra* note 3.

For the first time 78 women members are elected in LokSabha ; although the number still nugatory as per the total numbers of seats of *LokSabha*[50] and as per the population of women. Likewise there are 26 women members in *RajyaSabha.* These represents the all the women of country in the parliament but less than ten shared their views on the sensitive matter. The main arguments against the bill in the debate in and *RajyaSabha*[51] and *LokSabha*[52] were as follows: that the bill conflated civil and criminal law by criminalizing the act of triple *talaq,* which is already declared null and void by the Supreme Court; thus framing a law for criminalizing Muslim husband for a void act.It is a class legislation, which is pointed at one community or class thus violated Article 14 of the Constitution.Bill does nothing to improve the status of Muslim women; thus not come under the purview of Article 15 the Constitution.It does not have procedural safeguards, can be easily misused; thus in violation of Article 21 of the Constitution.Bill is in violation of Article 13(2) of the Constitution as it violating the fundamental rights of the citizen under Article 25 of the Constitution. There are only 0.56 percent divorce incident in Muslims 0.56, which is negligible, so no need of any law. There are safeguards under section 498A I.P.C. 1860 and Protection of Woman from Domestic Violence, 2005, which are sufficient to deal with; thus no need of this. This bill is laid for political intention to harass the Muslim men.It provides punishment upto three years, how a husband in jail provides subsistence allowance to wife. Itarouses the communal passion and divides the country and not promotes marital harmony but hatred in relationship.

The arguments in favor of the bill were as follows[54]: that after the Supreme Court judgment in Aug. 17, 2019 345 incidents of triple *talaq* came into light till July 24, 2019; thus it is necessary to provide penal provision for deterrence. Because the Supreme Court urged that the government should legislate on it. Triple *talaq* causes injustice to Muslim women; thus for gender justice and justice to women, law is imperative. Penalization necessary as the idea of triple talaq still symbolize the one-sided end of the marriage. The practice of triple *talaq* is the matter of oppression, exploitation and injustice to Muslim women.

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50. Women Members in LokSabha, LokSabha(Sep. 24, 2019) http://164.100.47.194/loksabha/members/women.aspx.
51. Women Members in RajyaSabha (Sep. 24, 2019) https://rajyasabha.nic.in/rsnew/member_site/women.aspx.
52. Uncorrected Verbatim Debates RajyaSabha(Sep.21, 2019) http://rajyasabha.nic.in>home>debatesofficialdebate.aspx.
53. Uncorrected Verbatim Debates, LokSabha(Sep. 21, 2019 http://loksabha.nic.in/debates/uncorrecteddebate,aspx.
54. *Ibid.*

Above analysis of the debate shows the missing discourse of feminism; although some women member declares that they are feminist but not support the bill because it might be misused against Muslim husbands or it causes fear in community (not able to understand whether this community includes women or not). Some talking about equality of the Muslim women but compared with women of other community. Some calculated divorce rate and argued that it is negligible but forget that injustice to anyone is danger to justice everywhere. The basic themes of women movement, patriarchy, difference between sex and gender are missing there also.

CONCLUSION

Narrative of the women (of any religion, race, region, color etc.) is incomplete without the concept of patriarchy and the ages of discrimination suffered by her. We cannot understand her story until we discuss the difference between the sex and gender because all the rolls given her to perform were constructed by society (male dominant), having no relevancy to her biology. Irrespective of class, color, race all women shared the common narration; however the poor, black and a specific race or community suffers more therefore the concurrent third wave of feminism is related to their equality.

It is the duty of the Supreme Court as well as the government to uphold not only the legal equality but substantive notion of equality. Bare legal enactments are not sufficient until it also provides a mechanism of equality of outcome, whether women are able to assert and get their due or not. For that purpose CEDAW provides an elaborate action plan. In India, the judiciary played an active revolutionary role to uphold the dignity and worth of women; however without discussing the basic themes and their history of discrimination of centuries. The ***Shayara Bano*** judgment[55] referred the CEDAW but for the sake of reference. The court had the opportunity to elaborately discussed and emphasis on CEDAW as the India is signatory to it.It not only laid down the action plan for substantial equality of opportunity but of the outcome and to analyze the results of the corrective steps taken by the State parties. Without the reference of CEDAW no discussion on women right able to achieve its purpose.

The main argument of the government for introducing and passing Muslim Women (Protection

55. *Supra* note 1.

of Rights on Marriage) Bill, 2019 was for improving the position of Muslim Women and to cure the discrimination suffered by them but in debate in parliament while defending the bill nowhere referred CEDAW, even not a single parliamentarian referred it. On the other hand in debate the concept of patriarchy is also missing although equality (legal) to women was the dominant theme without any emphasis on substantive equality.

The two main branches of government might assert the rights of women forcefully with the help of these themes. The parliament also fails to touch upon these narratives so that they vigorously uphold the right of the women.

Again the Supreme Court has the opportunity (as the petition challenging the Muslim Women (Protection of Rights on Marriage) Act, 2019 is accepted) to decide and the women in hope, looking towards it that there real narrative should be put before.

The discussion on these themes will spread awareness not among the women but to the youths of these countries as a source of inspiration towards the sensitization of gender justice and equality.

NIKAH HALALA: A VIOLATION OF MUSLIM DIVORCED WOMAN'S RIGHT TO DIGNITY

- Dr Raghuvinder Singh* & Ms Arti Sharma**

INTRODUCTION

The concept of human dignity acquired universal importance in the year 1948, when the Universal Declaration of Human Rights came into force. Article 1 of the UDHR proclaims that, "All human beings are born free and equal in dignity and rights".[1] The preamble of the International Covenant on Civil and Political rights, 1966 while highlighting the importance of human dignity, states that the recognition of the inherent dignity and equal and inalienable rights of the human family is the foundation of freedom, justice and peace in the world.[2] Further, it says that the rights enshrined in the covenant derive from the inherent dignity of the human person. In India, right to dignity is neither defined nor specifically provided in the Constitution of India. It is only in the preamble where the word dignity appears. It says, 'WE THE PEOPLE OF INDIA, having solemnly resolved...to secure to all its citizens...FRATERNITY assuring the dignity of the individual...' For this pledge, the Indian Constitutional courts, post Maneka Gandhi case, have not only recognised that right to dignity is inherent and intrinsic in all individuals, irrespective of their status, caste, gender, religion etc., but also 'dealt with the task of assuring and preserving it whenever the occasion arises, for without the right to live with dignity, all other rights may not realise their complete meaning'[3].

In the early development of the jurisprudence relating to right to dignity, the courts have regarded it to be a facet of right to life enshrined in article 21 of the Constitution. As in, ***Maneka Gandhi v. Union of India,***[4] the Supreme Court observed that, "dignity of all, is a sacrosanct human right and sans dignity, human life loses its substantial meaning". But later, it has been considered to be closely connected with liberty, equality, and privacy as well. In ***Francis Coralic Mullin v. Administrator, Union territory of Delhi***,[5] the Supreme Court viewed liberty as closely linked to dignity.[6] Justice Bhagwati, in the instant case, observed that, "…right to life

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1. The Universal Declaration of Human Rights, 1948 adopted by Resolution A/RES/3/217A.
2. The International Covenant on Civil and Political Rights, 1966 adopted by Resolution 2200A (XXI).
3. (2018) 1 SCC 791.
4. AIR 1978 SC 597.
5. AIR 1980 SC 849.
6. (2017) 10 SCC 1.

includes right to live with dignity and all that goes along with it namely,…facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings…". Also, in ***Navtej Singh & Ors. V. Union of India***,[7] the court has closely linked it to liberty. Recently, in ***K.S. Puttaswamy & Ors v. Union of India,***[8] the Supreme Court, has perceived privacy as closely connected with dignity and thus observed that, "privacy of the individual is an essential aspect of dignity…Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the constitution has recognized". In the instant case, the Supreme Courtwhile holding that the human dignity is an integral part of the Constitution observed that, "Reflections of dignity are found in the guarantee against arbitrariness (Arti.14), the lamps of freedom (Art.19), and in the right to life and personal liberty (Art.21)"[9]. And also, the Supreme Court, in ***Joseph Shine v. Union of India***,[10] observed that sexual autonomy constitutes an inviolable core of the dignity. At this juncture, it can be said that right to human dignity is an umbrella right encompassing and underpinning rights relating to life, liberty, equality and privacy. Violation of right to life, liberty, equality and privacy would result in the violation of right to dignity.

Divorce ends the marital tie and parties are once again free to marry a person of their choice. But, the practice of nikah halala puts an unwarranted restriction on the autonomy of Muslim divorced woman. It requires her to marry someone else in order to marry her former husband and consummate her marriage, while she is in love with her former husband. It gives unilateral power to the second husband to divorce her and secondly, it is only upon her divorce and actual consummation of her marriage with her second husband that she can remarry her former husband. The question here is, "whether such a situation is or is not derogatory to the dignity of the woman as enshrined in the preamble and part III which form the basic structure of the Constitution? Or is this situation not against the principles of equality, liberty and privacy and thus, should it not be considered a violation of her right to dignity?"

Against this background, the present paper will analyse the practice of nikah halala on the touchstone of right to dignity available to Muslim divorced woman and to find out, whether there is a violation of her right to dignity and if so, then this paper would attempt to provide some suggestions.

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7. *Supra* note 3.
8. *Supra* note 6.
9. *Ibid.*
10. 2018 SCC OnLine SC l676.

This research paper comprises of five parts. The first part is an introductory part which explains that right to dignity is an umbrella right encompassing and underpinning all other rights of life, Liberty, equality and privacy. The second part deals with the concept of nikah halala and its close relation with different modes of divorce in Islamic law. The third part of this paper examines the essential elements of nikah halala on the touchstone of right to dignity available to a Muslim divorced woman under the Constitution. The fourth part analyse the Muslim Woman (Protection of Rights on Marriage) Act, 2019 and the fifth and the last part of the paper attempts to provide suggestions for the violation of her right to dignity.

NIKAH HALALA

Nikah halala is made-up of two Arabic words i.e. 'Nikah' and 'Halala'. Nikah means marriage, and 'halala' in Arabic means 'halal' and in English it means 'to make something permissible or lawful'. Nikah halala is a practice by which a Muslim divorced woman is made permissible for her former husband, so that, they can remarry each other. To put it in another way, it is a practice by which a Muslim divorced woman repudiated by her husband is required by the Muslim law to undergo the necessary formalities of nikah halala. Fyzee, in his book has described the following formalities of nikah halala:

- firstly, she is required to observe iddat of divorce;
- Secondly, after observing iddat,she is required to marry someone else;
- Thirdly, the second marriage must be consummated;
- Fourthly, the later husband either must divorce her or had died;
- Lastly, the woman is required to observe iddat of this divorce; after the expiry of iddat the couple can lawfully remarry.[11]

And also, Mulla in §336 of chapter XIV says, where the husband has repudiated his wife by three pronouncements [§311(2)and §311(3)(i)] ,[12] it is not lawful for him to marry her again until she has married another man, and the latter has divorced her or died after actual consummation of the marriage.[13] Thus, the common ingredients of nikah halala as described by Islamic scholars can be reduced to:

11. Outlines Of Muhammadan Law, 81, (Oxford University Press, New Delhi, 5th edn – 2008).
12. Principles Of Mahomedan Law, 429(Lexis Nexi, New Delhi, 22nd edn-2017).
13. *Ibid.*

a) Muslim divorced woman is to marry someone else in order to marry her former husband;

b) The second marriage must be consummated;

c) The later husband either must divorce her or died.

Only upon the fulfillment of the above said conditions the marriage between former couple is considered as lawful and the consequences of lawful marriage flow from the union. Now, the question comes whether the concept of irrevocability of talaq necessitates that a wife must perform halala on any form of talaq becoming irrevocable? Before proceeding to answer this question, it is imperative here to understand the concept of divorce.

KINDS OF DIVORCE UNDER MUSLIM LAW

Under Muslim law, the marriage may be dissolved either; by the will of the husband, without intervention of the court called talaq; by the mutual consent of husband and wife, without the intervention of the court; by the decree of the court at the suit of either husband or wife. At this juncture, it is necessary to state that here we are concerned with the first two ways of dissolving the marriage tie, as the issue of nikah halala largely depends on the method the husband uses to divorce his wife.

I. Divorce by talaq

Talaq is when the divorce proceeds from the husband. It is of three kinds i.e. talaq-e-ahsan, talaq-e-hasan, and talaq-e-biddat. Talaq-e-ahsan is a single pronouncement of talaq during tuhr, by the husband, followed by a period of abstinence called iddat.[14] The duration of iddat is ninety days or three months in case the wife is subject to menstruation otherwise three lunar months. If the couple resumes cohabitation or intimacy within the said period the divorce is treated as having been revoked. Conversely, if there is no resumption of cohabitation, then the divorce is considered final and irrevocable, after the expiry of the iddat period.[15]

Talaq-e-hasan is pronouncing the formula of divorce thrice during three successive tuhrs. After the third pronouncement of talaq, if there is no resumption of cohabitation between the couple in any of the three months the talaq is considered final and irrevocable irrespective of iddat. To illustrate if upon first pronouncement of talaq, there is a resumption of cohabitation within a period of one month, the pronouncement of talaq is treated as having been revoked.[16] The same

14. Shayara Bano v. Union of India, (2017) 9 SCC 1.
15. *Ibid.*
16. *Ibid.*

procedure is adopted after the expiry of the first month if the marital ties have not been resumed. And the husband made the second pronouncement of talaq. The first and second pronouncement of talaq may be revoked by the husband either expressly or by resuming cohabitation and talaq pronounced by the husband becomes ineffective, as if no talaq had ever been expressed.[17] But, if first and second pronouncements have not been revoked and the husband pronounces the third talaq it becomes irrevocable and the marriage stands dissolved irrespective of the period of iddat. Where after, the wife has to observe the required iddat and the husband and wife cannot remarry.

Talaq-e-biddat is the third form of talaq pronounced by the husband. It is recognized by Hanafi sect of Sunni Muslims. In talaq-e-biddat one definitive pronouncement of talaq such as, I talaq you irrevocably or three simultaneous pronouncements like talaq, talaq, talaq is uttered at the same time, simultaneously.[18] Talaq-e-biddat becomes effective immediately as soon as it is pronounced without giving a chance to the husband to revoke it. Thus, there is no chance of reconciliation. It becomes irrevocable the very moment it is pronounced. Thereafter, the wife has to observe the period of iddat and the parties are barred to remarry unless the wife performs nikah halala. The practice of triple talaq has been set aside by the Supreme Court on August 22, 2017 by a majority of 3:2.[19]

II. Divorce by Mutual consent

Under this category, the Muslim law prescribes two kinds of divorce i.e., Khula and Mubara'at. Khula is a divorce with the consent and at the instance of the wife, in which, she offers to give or agrees to give consideration to the husband for her release from the marital tie. Once the offer is accepted it becomes talaq-i-bain.[20] Mubara'at is a divorce by mutual consent of both the parties. Herein, the offer may proceed from the wife or from the husband, but once it is accepted it becomes complete and operates as talaq-i-bain.[21]

Now, the present paper shall examine the question, whether the concept of irrevocability of talaq necessitates that a wife must perform halala on any form of talaq becoming irrevocable? The question was answered by the Bombay High court in Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan[22]. The facts of the instant case are, the appellant (Mrs. Sabah Adnan Sami Khan) and

17. *Ibid.*
18. *Supra n*ote 12 at 343.
19. *Supra n*ote14.
20. *Supra n*ote 12 at 414.
21. *Ibid.*
22. AIR 2010 Bom 109.

the respondent, Adnan Sami Khan were Mahomedans and they belonged to Sunni sect. Both, the respondent and the appellant got married on September 15, 2001 according to Islamic rites. Their marriage was dissolved under the agreement dated April 18, 2004 signed by them and the witnesses. The parties remarried on April 04, 2007 at Jama Masjid, Bandra, Mumbai and got their second marriage registered with the Sub Registrar of Marriage, Bandra, Mumbai on February 02, 2008. Disputes and differences arose between the parties sometime in June and July, 2008, which resulted in execution of reconciliation agreement dated January 01, 2009. The appellant on account of discord filed a complaint under Domestic Violence Act in February, 2009 in the Metropolitan Magistrate Court Andheri. The respondent filed a reply to her application under the Domestic Violence Act. On March 16, 2009, the appellant filed a petition under section 2(viii) the Dissolution of Muslim Marriage Act, 1939 seeking dissolution of the second marriage, along with misc. application for seeking relief under the Domestic Violation Act. The respondent filed reply to application under the Domestic Violation Act, so also, filed a written statement in which for the first time he brought the issue that the appellant did not perform halala formalities before the second marriage and therefore, the second marriage was a nullity. The family court observed that the first marriage was dissolved by mutual consent of the parties and thus, was a divorce by Mubara'at and not by talaq ahsan mode as contented by the appellant. Further, the court held that the appellant had not performed halala formalities before the second marriage thus, the said marriage was held not legal and valid. Thereby, this appeal was filed in the Bombay High court. The court held that merely because talaq in ahsan or khula mode becomes irrevocable does not mean that every irrevocable talaq creates a legal bar to remarriage, necessitating the wife to perform halala. It is only in the case where the husband has repudiated his wife by three pronouncements as provided for in the hasan mode of talaq and in talaq-ul-biddat by three pronouncements, it is not lawful for him to marry her again until she performs halala.

Consequences of re-marrying without performing nikah halala

In ***Saiyid Rashid Ahmed v. Anisa Khatun***,[23] the plaintiffs were the brother and sister of the Ghiyas-ud-din, who would have been the heirs, if respondent's no. 1 to 6 were unable to establish their claim to be widow and legitimate children. The dispute is related to the succession

23. AIR 1932 PC 25.

to the estate of Ghiyas-ud-din, a Muhammadan, who died on April 04, 1920. On September 13, 1905 he pronounced the triple talaq in the presence of the witnesses, though in the absence of his wife. Though, the later received Rs. 1000 as a payment of her dower on the same day for which a registered receipt was produced. There was also prepared a talaqnama, a deed of divorce on September 17, 1905. Anisa Khatun - respondent no.1, challenged the validity of divorce on two grounds that the divorce was pronounced in her absence and second that after divorce Giyas-ud-din and she lived as husband and wife for fifteen years and five children were born to the couple. Thus, Ghiyas-ud-din did not intend to divorce her. The Privy Council held that triple talaq pronounced in the absence of wife by Ghiyas-ud-din was valid and immediately effective. The validity and effectiveness of the talaq would not be affected by Ghiyas-ud-din's mental intention. Further, since the respondent had not undergone nikah halala after divorce, the Privy Council held that she was not legally married to Ghiyas-ud-din and the children born were held to be illegitimate, resulting in rejection of her claim for succession.

Nikah halala: A violation of Muslim divorced woman's right to Dignity

The dignity of the individual encompasses the right of the individual to develop his/ her personality to the fullest of his/her potential.[24] And this development is possible only if an individual has autonomy over fundamental personal choices.[25] Human desire to be intimate with a person of one's choice within marriage or outside comes within these fundamental choices. In ***Joseph Shine v. Union of India***,[26] the Supreme Court observed that human dignity both recognizes and protects the autonomy of the individual in making intimate personal choices as to partner and nature of relationship, and that these choices of an individual cannot obviously be imposed on society and are premised on voluntary acceptance by consenting parties. The court further observed that, "sharing of physical intimacies is a reflection of choice. In allowing individual tomake choices in a consensual sphere, the Constitution acknowledges that even in the most private of the zone, the individual must have the ability to make essential decisions…"

But, Muslim divorced woman is divested to make intimate personal choices as to partner and the nature of relationship as she wishes to pursue. Firstly, because the practice of nikah halala underMuslim personal law requires a Muslim divorced woman to marry someone else while she

24. *Supra* note 6.
25. *Ibid.*
26. *Supra* note 10.

is in very much love with her former husband who has divorced her whimsically, irrationally under zest and anger, without any fault of hers, it requires her to curtail her choice, and thus, it restricts her autonomy in making intimate personal choices guaranteed by the Constitution. She is forced by imposition of law to make choice of someone else over her love. She lives in the fear that if she does not choose to marry someone else before marrying her former husband, her marriage with former husband, if brought to question as in Rashid Ahmed case, would be declared null and void, her children, if born, would be declared illegitimate and she would not be entitled to the benefits of lawful marriage. To avoid such situation if she opts not to re-marry her former husband, it again works like an absolute restriction on her right to make choice of her partner and give free expression to her personality.

In ***Shakti Vahini v. Union of India***,[27] the Court has recognized that the right to choose a partner is a fundamental right under articles 19 and 21 of the Constitution. The court held that "…when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected..." So also, in ***Shafin Jahan v. Asokan***,[28] the Supreme Court set aside, a Kerala High Court judgment which annulled the marriage of a twenty four years old woman with a man of her choice in a habeas corpus petition instituted by her father, on the ground of denying its citizens the right to intimacy. The court observed that the right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship the individual wishes to pursue. As these rights are available to all individuals, so is also available to Muslim divorced woman, but the practice of nikah halala puts restriction not only on the right to make choice of her former husband as her life partner, but also puts restriction on her freedom to decide on the nature of the relationship she wishes to pursue. As in ***Saiyid Rashid Ahmed v. Anisa Khatun, Annisa Khatoon***[29] kept thinking herself to be the legally wedded wife of Ghiyas-ud-din because the later treated her that way for fifteen years, but after his death when her marriage was put to question in the court, her contention was rejected on the ground that she had not undergone the necessary

27. AIR 2018 SC 1601.
28. AIR 2018 SC 1933.
29. *Supra* note 23.

formality of halala. She wasbereft of her freedom to decide the nature of relationship she wanted to have with Ghiyas-ud-din, and she was also denied the right of inheritance to his property as his wife.

Secondly, the practice of nikah halala, requires a Muslim divorced woman to consummate her second marriage against her wishes, while she is in love with her former husband. Additionally, Radhika Iyengar citing Jurist Moulana Ashraf Ali Thanvi stated that, "if the second husband died or divorced her before sexual intercourse, then it will be of no account and she cannot marry the first husband in such condition."[30] This shows that the consummation of marriage with second husband is utmost necessary condition without fulfilling which she cannot marry her former husband. The Supreme Court in ***Navtez Singh& Ors. v. Union of India***,[31] observed that, "autonomy is individualistic. Under autonomy principle the individual has sovereignty over his/her body. He/she can surrender his/her autonomy willfully to another individual and their intimacy in privacy is a matter of their choice. The freedom of sexual autonomy is also available to a Muslim divorced woman. She has sovereignty over her body. She can surrender her body willfully to a person of her choice, even if her choice is her former husband. It is her prerogative; the law cannot dictate her with whom to engage or not to engage in sexual activity. But, the practice of nikah halala dictates that she cannot remarry her former husband unless she has consummated her second marriage with someone else. Thus, it denudes her of the freedom of sexual autonomy protected by the constitution. In ***Joseph Shine v. Union of India***,[32] the court observed that, "In protecting consensual intimacies, the Constitution adopts a simple principle that the state has no business to intrude into these personal matters. In so far as two individuals engage in acts based on consent, the law cannot intervene. Any intrusion in this private sphere would amount to deprivation of autonomy and sexual agency, which every individual is imbued with." So also, in ***Shafin Jahan v. Asokan K.M. & Ors***,[33] the court observed that, "the law [may] prescribe the conditions of a valid marriage. It [may] provide remedies when relationships run aground. [But] neither the state nor the law can dictate a choice of a partner or limit the free ability of any person to decide on these matters. They form the essence of personal liberty under

30. What Is Nikah Halala, How it was established and where it stands in Modern India, INDIAN EXPRESS (Sept. 09, 2019, 11:15 AM), https://indianexpress.com/article/what-is/what-is-nikah-halala-how-it-was-established-and-where-it-stands-in-modern-india-triple-talaq-4618415/.
31. *Supra* note 3.
32. *Supra* note 10.
33. SCC OnLine 2018 SC 343

the constitution."But, the practice of nikah halala intrudes in the private sphere of the Muslim woman and thus, denudes her from exercising her personal liberty.

Thirdly, the practice of nikah halala requires that Muslim woman can marry her former husband only if the second husband has divorced her or died. By providing so it subverts the equality of spouses. It treats Muslim woman as a possession of her second husband. The Supreme Court, in ***Joseph Shine v. Union of India***,[34] while holding that section 497 is manifestly arbitrary and thus, inconsistent with the ethos of the constitution, observed that, "Marriage in a constitutional regime is founded on the equality of and between the spouses. Each of them is entitled to take decisions in accordance with his or her conscience and each must have the ability to pursue the human desire for fulfillment." Further, in the instant case, the court observed that, "the ability to make choices within marriage and on every aspect concerning it is a facet of human liberty and dignity which the constitution protects."[35] In depriving the wife (Muslim woman) of the ability to divorce and recognizing it in the husband (man), alone, the practice of nikah halala fails to meet the essence of substantive equality, liberty and dignity in its application. Equality of rights and entitlement between parties to a marriage is crucial to preserve the values of the Constitution.[36] The practice of nikah halala offends that substantive equality and is violative of art. 14.

The Muslim Women (Protection of Rights on Marriage) Act, 2019- An Analysis

The Muslim Women (Protection of Rights on Marriage) Act, 2019 was passed; firstly, to abolish talaq-e-biddat by declaring it void and illegal; secondly, to punish its use by Muslim husbands to divorce their wives'; thirdly, to protect the rights of married Muslim women as to custody of children and subsistence allowance for herself and her children.; fourthly, to provide for matters connected therewith or incidental thereto. But, it has not expressly abolished the practice of nikah halala which is closely connected with talaq-e-biddat.

Conclusion and Suggestions

In the end, it can be concluded that, the practice of nikah halala involves the violation of, not just one but, several fundamental rights of Muslim divorced woman namely;

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34. *Supra* note 10.
35. *Supra* note 10.
36. *Ibid.*

- right to equality,as contained under article 14 and 15; as it offends the substantive equality by depriving the wife from divorcing her second husband;
- right to liberty, as contained under articles 19(a) and 21;as it denudes the Muslim divorced woman to express her choice of the life partner when that choice is her former husband who has divorced her by talaq-e-ahsan and talaq-e-biddat;
- right to privacy; as it is an interference by way of stipulation of law, which restricts her freedom to marry a person of her choice and exercise her sexual autonomy;
- right to live with human dignity; as the violation of her right to equality, liberty and privacy is ultimately a violation of her right to live with human dignity.

Thus, it is suggested that as regards the practice of nikah halala in case of talaq-e-biddat, the Parliament should make an amendment in the Muslim Women (Protection of Rights on Marriage) Act, 2019 to expressly abolish the practice of nikah halala. Since, the practice of talaq-e-biddat is declared void and illegal, consequently, the Muslim wife would not be required by law to undergo the practice of nikah halala even if her husband pronounces triple talaq upon her and latter retreats his step and starts living with her. Secondly, as regards the practice of nikah halala in case of talaq-e-hasan, the legislature should make a law to ameliorate the plight of Muslim divorced women as this practice takes away her right to live with human dignity.

PAID NEWS PANDEMIC: UNDERMINING CONSTITUTIONAL DEMOCRACY

-Dr Bharat*

"It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more." [1]

Constitutional democracy is the decisive underpin upon which the bravura edifice of India is conceived and construed. The sensitivity of this splendid conception lies in free and fair elections which are based on universal adult franchise.[2] On one hand, the free and fair elections strengthen the democratization of political philosophies & programs; and on the other hand it eggs-on the political liberalization. Mandated by the laudable sovereignty, through the Constitution of India, the Election Commission of India is progressively performing election after elections. With outstanding election management, the Election Commission of India strengthens the Constitutional democracy through its dynamic-direction, crackerjack-control and sterling-superintendence of elections in India to the Parliament and State Legislatures.

Prologue

The freedom of speech and expression not only occupies a 'preferred position in the ladder of the liberty' but it is also christened as 'the very life of liberty'. It is often characterized as the mother of all the other liberties. Moreover, the untrammeled flow of words is the first canon of the Constitutional democracy.

The freedom of press is nowhere recognized as a separate freedom under the Constitution of India in Part III dealing with the Fundamental Rights. Rather, the freedom of press is crinkled within the freedom of speech and expression.[3] Even the Supreme Court of India has described this freedom as the 'ark of the covenant of democracy'. [4]

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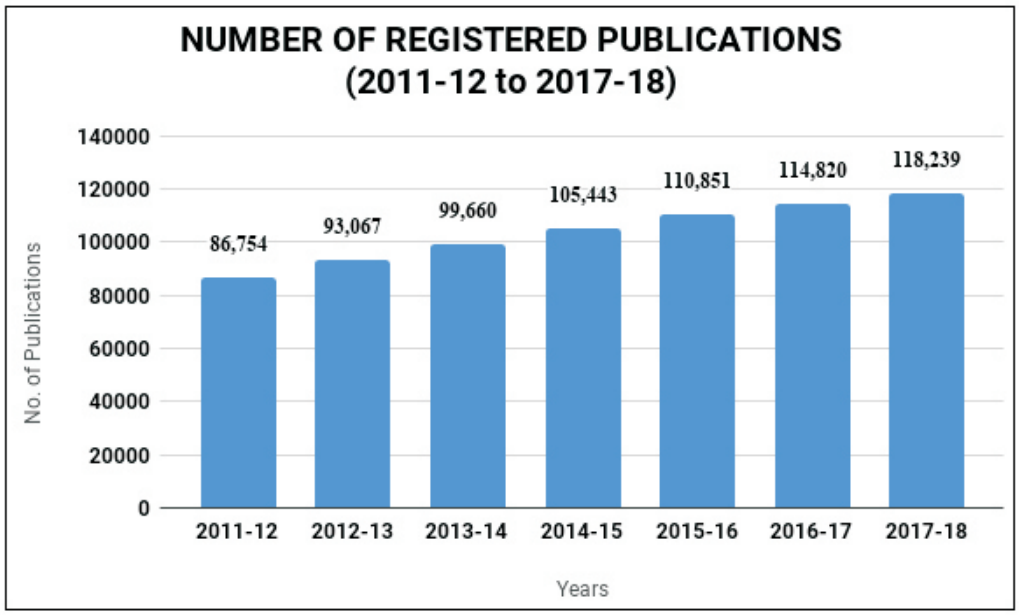
1. Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405, 424, at para 23.
2. The word 'franchise' has its taproot in the French word 'franc' which means free. The phrase 'universal adult franchise' means that the 'right to vote' is available to all the adult citizens of India without any kind of discrimination on the basis of caste, class, colour, region, religion, gender etc.
3. Brij Bhushan and Another v. The State of Delhi, AIR 1950 SC 129; Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305.
4. Bennett Coleman & Co. v. Union of India, AIR 1973 SC 106.

The freedom of the press dishes-up the glory of the right to information between the electorate and the elected. Freedom of the press is undoubtedly indispensable for people to be informed and to participate in a democracy. Through press come beliefs and behavior, dictums and dogma, ideas and information; and hence it is decisive in sustaining the rule of law.

Law is said to be a voyage towards the truth. Being the fourth pillar in a democratic set-up, 'press' plays imperative character in exciting public opinion, revealing corrupt practices, discovering truth, shaping the demand for accountability and responsibility, and above all gearing up for governance.

Despite of the advent of advanced audio, visual, digital and social media; the following bar-chart reflects that there is ever increase in the number of 'registered publications' with the Office of Registrar of Newspapers for India under the Ministry of Information and Broadcasting, Government of India.[5]



5. For details, refer: http://rni.nic.in/all_page/press_india.aspx Last accessed on August 23, 2019.

As on March 31, 2018; 1,18,239 publications (out of which 17,573 falls in the newspaper category and 1,00,666 fall in the category of the periodicals) were registered as against 1,14,820 on March 31, 2017.[6] With this data at the backdrop, India is having every reason to celebrate. But as society advances, new concerns require fresh considerations. Although, technology is expanding our prospects, perspectives and possibilities but it has also brought some novel test along with it. Recent events relating to the news-media, including infringement of privacy, trial by media, fake sting operations, proliferation of social media, pandemic of paid news etc. pretense a set of foreboding.

As Lord Justice Leveson wrote in his path-breaking report on 'Culture, Practice and Ethics of the Press' in Great Britain:

> "With these rights (of press freedoms) come responsibilities to the public interest: to respect the truth, to obey the law and to uphold the rights and liberties of individuals."[7]

The scale and size of media in a democratic set-up becomes predominantly palpable when it comes to challenges confronting media and the elections. While considering the concerns related to electoral reforms, even the Law Commission of India felt the need to address media-related issues associated with free and fair elections, including the pandemic of paid news.[8]

PAID NEWS

As a fourth pillar, media is expected to play a role of building culture and character, society and nation. Free and fair election is not only about exercising the right to franchise in apposite state of affairs, but also about having adequate information about policies, parties, candidates and the election process in itself so that electorates can make a conversant choice. The narration of paid news is as old as the news itself. In the 19th century, US newspapers used to publish "reading notices", which were advertisements presented in the form and format of news.

As such in Indian context, it is easier said than done to pin-down the exact time when the pandemic of Paid News made its entry into the election arena. However, after the 2009 *Lok Sabha* elections, sensing the intense immoral smell from the electoral scene outsized number of

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6. *Ibid.*
7. Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press' (Leveson Inquiry Report, London: November 2012).
8. For details refer, Law Commission of India Report No. 255 (2015) on Electoral Reforms.

sensitized people expressed concerns about the need of ethical journalism for the overall vigor of the democracy. Thereafter, this anxiety aiming for preserving, protecting and promoting the constitutional democracy was timely conveyed to the Election Commission of India. There were discussions and deliberations in both the houses of the Parliament of India; debates and diverges poured from the Press Council of India, round of parlances happened within the Government and heated coverage in media circles calling for remedial measures to curb the pandemic of Paid News.

Constitutionally committed to the core for holding free and fair elections, the Election Commission of India initiated its first concrete step against Paid News in the 2010 General Elections so as not to allow any vitiation of level playing vote field and violation of election related laws. Since then, slowly but steadily, the Election Commission of India is trying its level best to fortify the measures and initiatives to keep all stakeholders well informed.

Paid news, defined by the Press Council of India as "any news or analysis appearing in any media (print and electronic) for a price in cash or kind as consideration" is now a common occurrence that poses a serious threat to democratic processes and financial markets. It misinforms audiences and undermines their freedom of choice.

The pandemic of paid news poses a direct threat to the freedom of speech and expression enshrined under Article 19 of the Constitution of India and also to the very fabric of constitutional democracy. News is meant to be fair and flaxen, neutral and non-aligned, independent and impartial. Media as the fourth pillar is one among the mainstay of democracy. But the blurring distinction between 'news' and 'paid news' is undermining the constitutional democracy in India by defeating the very spirit of free and fair elections.

Paid news is a pervasive in nature and bangs the sanctity of the electoral process. The ugly designs of the paid news operate on different principles and philosophy. It may be in the form of editorial write-up, biased opinion coverage, personality features, bewildering political promotion, statistically dubious opinion polls, soft interviews of candidates, obsequious political stories, publishing the press release word to word etc.

The deplorable fact about this pandemic is that neither the call of the Election Commission of India for self-regulation by political parties / media-houses nor the bid to criminalize the paid news in elections has gone well… jeopardize the very essence of constitutional democracy.

CHALLENGE OF PAID NEWS PANDEMIC

The pandemic of paid news in India and also in others parts of the world essentially springs from the verity that most of the media-houses are corporate conglomerates primarily engrossed in profit maximization. The 'fourth pillar' in the world's largest democracy i.e. India often emphasizes commercial considerations rather than exploration for the truth.

Paid news pandemic is prone, partial, partisan and predisposition. At election time, the concerns about the prejudice of the media are at the heart of debates, putting a big question-mark on its role and responsibilities. The open secret that the proprietors of the print and electronic media-houses have active political affiliations, ambitions and agendas which have (un)knowingly made their news-paper / news-channel preface of their respective associations and aspirations. And this interceded marriage accord between media and politics has lead to polarization of media-houses.

Uncalled incentive and undue influence to electorates pose challenge in the conduct of free and fair elections as it affects the level playing field in the political arena by deceiving the mind of the voter. The voter's right to correct and unbiased information needs protection. Another concern is that paid news deludes the ceiling of expenditure which is a key component in electioneering process.

Last but not the least; the desolate fact is that there can't be a fixed set of parameters to identify paid news as generally black-money is involved in this pandemic which is hard to tag, trace and track. For this and other reasons, the inherent deception involved in paid news as news entails a clandestine activity. Its occurrence, thus, can be reliably established by only its participants and that too by acknowledging that they are guilty of violating various election related laws, besides those relating to deception, fraud and non-payment of taxes.

GLIMPSES OF PAID NEWS PANDEMIC

The following table gives the glimpses of the year/election wise reporting of Paid News cases in India:

Year/Elections	No. of Paid News Cases Reported
2010 Bihar Assembly Elections	121
2011 Kerala Assembly Elections	65
2011 Assam Assembly Elections	42
2011 Tamil Nadu Assembly Elections	22
2012 Punjab Assembly Elections	523
2012 Uttar Pradesh Assembly Elections	97
2012 Uttarakhand Assembly Elections	30
2012 Gujarat Assembly Elections	414
2012 Himachal Pradesh Assembly Elections	104
2013 Madhya Pradesh Assembly Elections	165
2013 Karnataka Assembly Elections	93
2013 Delhi Assembly Elections	25
2013 Chhattisgarh Assembly Elections	32
2013 Rajasthan Assembly Elections	81
2014 General Elections	694
2014 Haryana Assembly Elections	212
2015 Delhi Assembly Elections	59
2016 Assam Assembly Elections	18
2016 Tamil Nadu Assembly Elections	17
2017 Uttar Pradesh Assembly Elections	56
2017 Punjab Assembly Elections	80
2017 Uttar Pradesh Assembly Elections	56
2017 Gujarat Assembly Elections	238
2017 Himachal Pradesh Assembly Elections	85
2018 Karnataka Assembly Elections	15
2019 General Elections	647

The year 2010 witnessed 121 cases of paid news in Bihar Assembly Elections. In 2011, 65 cases from Kerala, 42 cases from Assam were reported. The year 2012 recorded whopping cases of paid news as there were 523 confirmed cases in Punjab, 414 in Gujarat, 104 in Himachal Pradesh, and 97 in Uttar Pradesh. Elections to 2014 Haryana Assembly saw 212 cases and for 2017 Gujarat Assembly Elections the number was 238. General Elections are in no way far behind when it comes to pandemic of paid news, as 694 cases were reported in 2014 where as the number of cases in 2019 it was 647.[9]

In 2015, there were seven confirmed cases in Bihar, while in 2013, Madhya Pradesh saw 165 cases, Karnataka 93, and Rajasthan 81. The following table shows the data of the 2016 elections to the different legislative assemblies:[10]

State/UT	No. of Cases Recorded	No. of Notices Issued	No. of Cases Admitted by Candidate	No. of Cases found true by Media certification and Monitoring Committee (MCMC)
Assam	18	16	5	8
Kerala	5	5	0	0
Tamil Nadu	17	17	2	17
West Bengal	2	2	1	1
Puducherry	12	12	0	9

The most recent examples from the run-up to the 2017 assembly elections, Punjab recorded 80 and Uttar Pradesh recorded 56 cases whereas 2018 Karnataka Assembly Elections witnessed 15 cases. [11]

9. The data is compiled from the Election Commission of India.
10. *Ibid.*
11. *Ibid.*

Paid news is a serious electoral malpractice and the pandemic has continued to grow over the years. It leads to circumventing of the election expenditure limits and hampers the voter's right to reliable information.

So far, only few politicians have been barred by the Election Commission of India from contesting polls, on account of paid news. The most prominent among them are former Jharkhand Chief Minister Madhu Koda, and former Madhya Pradesh Minister Narottam Mishra.

The toughest challenge in these cases is to establish that the news is paid because media-houses do not maintain a distinction between news and paid news. Usually circumstantial evidence is there but with a very little proof. It is almost next to impossible to establish whether such transactions have taken place in cash or kind as usually, they are not carried out in black & white and promptly denied by both parties.

PAID NEWS UNDERMINING CONSTITUTIONAL DEMOCRACY

The counterbalancing influences of the doctrine of check and balance between various organs of the Government i.e. legislative, executive and judiciary is inevitable and the effective task of fourth pillar is imperative to achieve this balance in the very interest of free and fair elections. However, the rise of 'paid news' especially during election, has undermined the essence of a constitutional democracy.

> "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society." [12]

In contemporary times, media is a conscientious collaborator and the independence of the media endeavors to facilitate accountability and reduce corruption. It is not just the 'fourth pillar' but a 'significant pillar' which supports the Indian society in general and strengthens constitutional

12. Thorgeir Thorgeirson v. Iceland, (1992) 14 EHRR 843; 13778/88; [1992] ECHR 51.

democracy in particular through its sheer vigor and vitality. Media plays an imperative role in building the public opinion as it is an effervescent tool for the gamut of societal fabric.

The ability of the media to bring about precision in the system by playing an adversarial role is compromised because of breeding corruption by means of paid news pandemic. It is undermining the constitutional democracy at three levels. At the first level, the reader or viewer is betrayed by compelling him to believe paid news as news. Secondly, the expenditure incurred on paid news is veiled and it is not reflected as election expenditure violating the statutory provisions of the Representation of the People Act, 1951 and the Conduct of Election Rules, 1961. Lastly, the money received from political outfits is not accounted by the media-houses in their account books violating the provisions of the Companies Act, 2013 and the Income Tax Act, 1961 among other laws.

The news is expected to be independent and objective but the phenomenon of paid news projects a wrong picture and defrauds the electorate. This pandemic goes beyond the corruption of individual journalists and owes its existence to the egregious manifestation of the corporate media-houses. It has become highly planned, structured and organized subverting the fundamental ideal of sanctity of the right to vote. Whenever and wherever media adopts such unethical norms it is bound to abrogate its cloak of trust and faith. This section of corporatized media undoubtedly undermines the processes and structures that are meant to uphold and strengthen the constitutional democracy.

Now that there is a paradigm shift from the era of 'secrecy' to dawn of 'transparency', the pandemic of paid news is nothing less than an assault on the right to know true and correct credentials of those in the electoral fray thereby distorting the essence of whole process. If it is not addressed at this juncture, it will become overt as a normal course of the media's function. It is causing double jeopardy as it has put a big question on the very survival of ethical journalism on one side and on the sanctity of media democracy, electoral democracy and above all constitutional democracy on the other side.

CONCLUSION

Free and fair elections are as imperative as a free and independent press. The endurance of constitutional democracy in India owes a great deal to the freedom and vigor of press.

India's sheer scale and size, diversities and complexities are a big challenge in itself. The pandemic of 'paid news' mocks the electoral process and often reducing it to farce. It is pernicious for constitutional democracy and needs to be addressed holistically as it is a serious electoral malpractice which misleads public, influences voters, hampers the ability of electorates to form correct opinions, stalls the voter's right to trustworthy information and circumvents the election expenditure ceiling limits.

Constitutional democracy envisages protecting, promoting and preserving clean, caliber, capacity and character rather than cash, caste, community and criminality. Election Commission of India, the vanguard of Indian democracy, conducts elections as a matter of great pride & honour and strives every single day to ensure people's firm conviction in democracy sustains. It strongly believes in the concept of free and fair elections and continues to evolve itself time and again to support its stand.

Paid news pandemic had started out as an aberration, went on to become a disease and is now an epidemic. Without doubt, tackling of paid news in elections is still an evolving process and would require support of one and all. An alert citizenry can make a beginning in bringing the pandemic of paid news to an end by joining the hands with the Election Commission of India to break the symbiotic nexus between lawmakers and media-houses. What is at stake is not only the trust of public or role of media but the very foundation of our own Constitutional Democracy…!

RELEVANCY OF LEGITIMACY OF CHILDREN BORN OUT OF LIVE-IN-RELATIONSHIP: A SOCIO-LEGAL CONCERN

-Ms Wazida Rahman*

"Mankind owes to the child the best it has to give."

Preamble, UN Declaration on Child Rights (1959)

INTRODUCTION

"Live-in relationship" in straightforward terms, is a relationship in which both persons cohabit without marrying each other. Without marital responsibilities or accountabilities towards each other, it engrosses an established and undisturbed relationship (as cohabitants) between two partners. In such a situation, no law can make bound the two people who are living together, and they can move or separated at any time whenever they feel so; without any further legal consequences. There are an increasing number of couples entering into live - in relationships, not as a forerunner but rather an alternative of formal marriage institution. Such kind of long - term obligation often includes procreation of children. The live in "by circumstances", the cohabitants may procreate on believe that he/she will become legally married as of now they are 'de facto married' and after procreation they will be 'de jure married'. About the status and rights of such children born out of live in relationship, there are various legal issues arise, in comparison to those born out of marriages. Due to lack of proper legal definition of a live-in relationship, the status of such a relationship is unable to fix legally. So it is an ambiguous and uncertain legal issue to be solved in one go. The laws in India, does not provide suitable civil liberties or obligations to the parties who are in a live-in relationship. The children who are born as a result of such a relationship are not given a clear status that is why the courts have made available an explanation to the concept of live-in relationships through an assortment of judgments in the past few years. The courts have substantially stated that any heterosexual persons who are cohabiting for a long time will be presumed as legally married under the law unless contrary is proved.

In all early families in the society, it is very important in particular to have male progeny for the furtherance of the family as well as for the performance of interment rites and offerings. Thus the

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concept of *Aurasa* son was taking very essentially. An *Aurasa* or legitimate son is defined by Manu as one "whom a man begets on his own wedded wife"[1]. The procreation during continuation of a lawful wedlock was essential to represent the son as Aurasa son in the strict sense.[2]

The decision of Privy Council in ***Pedda Ammani v. Zaminder of Marungapuri***[3] that "Hindu law does not require procreation, as well as birth, after marriage to render a child legitimate is binding as law."

LEGITIMACY OF CHILDREN

It is the concept of the past, 'illegitimacy', having origin in Roman law termed as *"Nullius Filius"* and drift to the common law and well entrenched its roots there. However, Muslim law hold it very rigidly but concurrently adopted preventive course to see that all born legitimate child does not befall illegitimate. Thus it introduced the legal concept of *"Acknowledgement of Paternity"* and *"Iddat.*[4]

Under Section 16 the Hindu Marriage Act 1955, it is frequently argued that, the legitimacy of children out of void and voidable marriages, the interpretation and legislation assign a legal status as legitimate in law to children born out of live in relations and create it, a subject to debate regarding their property and maintenance rights. The interpreting analysis of section 16 (3) provides the rights of illegitimate children born from void or voidable marriages only. So it is not possible to legalize the status of children born from a live-in-relation in a reasonable period of time, under section 16 (3) of Hindu Marriage Act 1955. The gist of the provision as we can analyse that a void or voidable marriage is an attempt to enter into a marriage institution, although essential requirements for a valid the marriage could not be fulfilled under Section 5 of the Hindu Marriage Act 1955. However in recent inclination, live-in-relationship does not have any attempt to get married.[5]

The Indian Evidence Act under Section 112 also provides that "the legitimacy of a child is proved only if he/she was born during the continuance of a valid marriage between his/her mother and the father, if consequently they fail to prove the validity of marriage and children

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1. Manusmriti IX:166; Yajn. XI:2.
2. Misra Justice Ranganath & Dr. Kumar Vijender, Mayne's Hindu Law and Usage, 274, (Bharat Law House, 17th Ed., 2014).
3. (1874) I IA 282, 293.
4. Hari Dev Kohli, Law and Illegitimate Child From Sastrik Law to Statutory Law, 34, (Anmol Publication, Edition 1st, 2003).
5. Section 16 (3), Hindu Marriage Act 1955.

born out of such relationship"[6]. So in India, children from parents who are in live in relationship have been given the status of *"Legitimate in law, Illegitimate in fact".*

In ***S.P.S. Balasubramanyam v. Sruttayan***[7], the SC had said, "If a man and woman are living under the same roof and cohabiting for some years, there will be a presumption under *Section 114* of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate." This was one of landmark judgements wherein the apex court for the first time recognised live-in relationship and also preserved the legitimacy of the children from such relationship. The court's interpretation in the status of such a child is to be in accordance with the Constitution of India vide *Article 39(f)*, which imposes the State a responsibility of to provide "the children with adequate opportunity to develop in a normal manner and safeguard their interests."

Mohammedan law is a strict personal law relating to recognition of children. So according to it, legitimate children are those children who are the progeny between a man and his legally wedded wife as. Thus children born from a live - in relationship were "illegitimate" in the eye of existing Muslim personal law.

The Andhra High Court in ***S.A. Hussain v. Rajamma***[8], held that "where the paternity of a child cannot be proved by establishing a marriage between the parents, Islamic law recognises 'acknowledgement' as a method whereby such marriage and such legitimate descent can be established as a matter of substantive law for the purpose of inheritance."

The provision under Section16 (3) of the Hindu Marriage Act 1955 required to be amended to bring the social reform, by recognising the status of legitimacy on children born from live in relationship too. But the society always raising questions in live-in-relationship that it is never performed marriage between the cohabitants and further in those relationships which is not confirm to the established factor, the parties will not be recognised as husband and wife and their children will become illegitimate.[9]

The Supreme Court in ***Bharatha Matha & Anr. v. R. Vijaya Ranganathan & Ors.***[10] observed that "thus, it is evident that Section 16 of the (Hindu Marriage) Act intends to bring about social

6. Section 112, Indian Evidence Act 1972.
7. 1994 AIR 133, 1994 SCC (1) 460.
8. AIR 1977 AP 152.
9. *Supra* note 5.
10. AIR 2010 SC 2685.

reforms, conferment of social status of legitimacy on a group of children, otherwise treated as illegitimate, as its prime object. The Courts in India have continued to support this interpretation of law in a manner to ensure that no child is bastardized without a fault of his/her own, as it has been seen in the above case." In this case, the Supreme Court also had held that "a child born out of a live-in relationship may be allowed to succeed in the inheritance of the property of the parents and subsequently be given legitimacy in the eyes of the law."[11]

In ***Tulsa v. Durghatiya***[12] the Supreme Court held that "a child born from a marriage like relationship will no more be considered as an illegitimate child. The crucial pre-condition for a child born out of a live-in relationship to be not treated as illegitimate is that the parents must have lived under one roof and co-habited for a significantly long time for society to recognize them as husband and wife and it should not be a 'walk in and walk out' relationship." In the similar context, the Supreme Court has pointed out its judgment in ***Madan Mohan Singh and Ors vs. Rajni Kant & Anr***.[13]

The Supreme Court held in ***Vidhyadhari v. Sukhrana Bai***[14], that "even if a person had contracted into second marriage during the subsistence of his first marriage, children from the second marriage would still be legitimate though the second marriage would be void." the Privy Council in ***Mohd. Baukar v. Shurfoon Nissa Begum***[15] held that "legitimacy of children of Mohammadan parents may be inferred without any direct proof of marriage, if there is prolonged and continuous cohabitation. Thus in a case where a couple has lived together for a long term, there shall be presumption of marriage and a child born out of that relationship shall enjoy all the rights of a legitimate child."

In the case of ***Haneefa v. Pathummal Beevi***[16] court held that "where in certain circumstances give rise to the presumption of marriage, they also give rise to presumption of legitimacy of the child."[17]

Justice ***C. S. Karnan ruled in Aysha v. Ozir Hassan***[18] that "the petitioner was not entitled to

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11. Rebecca Furtado, Rights Of Child Born Out Of A Live-in Relationship, I-Pleaders blog, 2016, (21th September, 2019, 04.23 pm), https://blog.ipleaders.in/rights-child-born-live-relationship/.
12. (2008) 4 SCC 520.
13. AIR 2010 SC 631.
14. (2008) 2 SCC 238.
15. (1859) 8 MIA 136.
16. 1972 KLT, 512.
17. Fatima Tanzeem, Islamic Law and judiciary, 152, (Deep and Deep Publication, 2001).
18. 2013 (5) MLJ 31.

claim maintenance as the marriage between the petitioner and the respondent was not proved through documentary evidence but the respondent was the father of the two children and required him to pay them each Rs 500 per month."

MAINTENANCE RIGHTS OF CHILDREN

In civil matters it is always explained maintenance as the obligation to afford for another party. It is necessary to mention that it plays a very important rule for a child born out of a live-in relationship. ***The Hindu Adoptions and Maintenance Act 1956***,[19] states, "a legitimate son, son of predeceased son or the son of predeceased son of predeceased son, so long as he is minor, and even after attained majority if such child is by reason of any physical or mental abnormality or injury unable to maintain itself and a legitimate unmarried daughter or unmarried daughter of the predeceased son or the unmarried daughter of a predeceased son of predeceased son, so long as she remains unmarried, shall be maintained as dependants by his or her father or the estate of his or her deceased father." The "right to maintenance during the life time of his or her father or mother" is always the situation with children from live - in relationships. Under Section 125 of the Code of Criminal Procedure maintenance is provided to children irrespective of legitimacy or illegitimacy while they are minors and when they become major, but he/she unable to maintain himself by reason of any physical or mental aberration or injury.[20] In ***Dimple Gupta v. Rajiv Gupta***[21] the right to maintenance of children born from a live - in relationship was upheld. The Supreme Court in this case held that "even an illegitimate child born out of an illicit relationship is entitled for maintenance under Section 125 of the CrPC (Code of Criminal Procedure, 1973) which provides maintenance to children whether they are legitimate or illegitimate while they are minors and even after such a child has attained majority if he/she is unable to maintain himself/herself." Moreover there are handfuls of cases which have upheld the maintenance rights of live-in partners and the interpretation of the statutes are intriguing in a very broad manner to include female live- in partners regarded as "legally wedded wife". The Supreme Court of India in the case of ***Savitaben Somabhai Bhatiya v. State of Gujarat***[22] made an exception that "the live-in partner had assumed the role of a second wife and was not granted

19. Section 2, Hindu Adoptions and Maintenance Act 1956.
20. Dr. Vijender Kumar, Live-in-relationship: Impact on marriage and family institutions, 19, SCC J-19 , 2012 Vol.4.
21. (2007) 10 SCC 30 : (2008) 1 SCC (Cri) 567.
22. AIR 2005 SC 1809.

any maintenance, whereas the child born out of the said relationship was granted maintenance."[23]

Under Article 32 of the Constitution of India, the rejection to provide maintenance to a child born out of a live-in relationship can be challenged. This is amounting to a violation of the fundamental rights guarantees under Article 21 as Right to Life and Personal Liberty. Denial of such kind can deprive an individual of his right to live life with dignity. The Kerala High Court upheld the same by the in ***PV Susheela v. Komalavally.***[24] Under Article 14 the Equality before Law is the remedy to the unequal treatment of a child born out of a live-in relationship and a child born out of lawful wedding, though in both the cases are perceived as legitimate in the eyes of law[25]. It can be seen in the legal filtration as a very sensitive and a complex issue.[26]

GUARDIANSHIP AND CUSTODIAL RIGHTS

Custody of a child in live in relationship is very significantly legal obstacle as comparison to married one. When there is a child as a result from such live in relationship without a proper legislation, it is easy to get involved in such relationship, but it is tough decision to get out from it. There is no specific law in regarding to take custody of a child born out of a live-in relationship, so the existing law for children born out of married couple, is also applicable to child born out of a live-in relationship.

In the ***Hindu Minority and Guardianship Act, 1956***[27] clearly states that "the father is the natural guardian of his minor legitimate children and the mother becomes the natural guardian only in the absence of the father; which means when the father is not capable of acting as the child's guardian mother becomes guardian of the minor child." And same has been laid down in the case of ***Gita Hariharan v. Reserve Bank of India***.[28]

In Hindu law, after the marriage of a man to a girl who is a legal minor, the husband is the legal guardian of his wife as a minor and is entitled to her custody. The mere fact that she is a minor will not disentitle her from claiming such custody to the exclusion of her parents. Where the father and the mother are not married to each other and a child is born to such parents, the mother and not the father has the parental responsibility for the child. Section 6(a) of the Hindu Minority

23. *Supra* note 11.
24. (2000)DMC376.
25. Bharata Matha & Ors. Vs. Vijaya Renganathan & Ors (AIR 2010 SC 2685).
26. *Supra* note 23.
27. Section 6, Hindu Minority and Guardianship Act, 1956.
28. AIR 1999 2 SCC 228.

and Guardianship Act 1956 provides "the father as the natural guardian of his minor legitimate children and the mother becomes the natural guardian in his absence" i.e. where he is incapable of acting as the guardian. However, Section 6(b) of the Hindu Minority and Guardianship Act 1956 grants an indirect right to custody of a child born from live in relationship to the mother in the impression of illegitimate relation. While we interpret the law positively, it can reach in the conclusion that, if a break-up happens between the live-in the partners, then by being the natural guardian of a legitimate child, the father can be acquired the custodial rights naturally of the concerned child.

It is the ***Hindu Minority and Guardianship Act, 1956 under Section 13*** of talking about the "welfare of the concerned minor to be of paramount consideration and thereby to negate the effect of previous provisions if they are in contravention of the said section."[29]

In ***Shyam Rao Maroti Korwate v. Deepak Kisan Rao Tekam***[30], it was held that "the word, 'welfare' used in Section 13 of the Act has to be inferred literally and must be taken in its broad sense. Such an interpretation is in unanimity with the development of the child as a capable and independent individual."

The Muslim law always recognises the father, for the legitimate children as the natural guardian, but the mother even for a legitimate child, does not become the natural guardian even after death of the father. Only through case law, guardianship of illegitimate children is given to mother, because Muslim law does not provide guardianship of illegitimate children. Till a minor son attains age of 7 years and a daughter till she reaches puberty mother is the guardian according to the Hanafi school of Law. However under Shia School of Law, till he attains the age of 2 years in case of son and of till attains the age of 7 years in case of daughter; mother is the guardian.

It is the settled law that, deciding a matter on custody; age, sex, welfare of the child, his or her wish to stay with whom, the court takes into account. The welfare of the children must be the paramount consideration. This rule also applies in custody issues of the children from live - in relationships.

RIGHT TO INHERITANCE OF CHILDREN

"An illegitimate child inherits the property of his mother only and not putative father," whereas under Shia law, such a child cannot even inherit from his mother. If children from a live - in

29. Section 13, Hindu Minority and Guardianship Act, 1956.
30. 2010 (10) SCC 314.

relationship are still being considered "illegitimate", they will be barred to inherit from the father's estate. In fact, where the live - in relationship has not been continued for a reasonably long period of time, the courts would not consider a child from such relationship to be legitimate, thereby exclusion from inheritance as well.

The Supreme Court in ***Bharatha Matha & Anr. vs. R. Vijaya Renganathan & Ors***[31], held that "a child born out of a live-in relationship is not entitled to claim inheritance in Hindu ancestral coparcenary property (in the undivided joint Hindu family) and can only claim a share in the parents' self-acquired property."

Under the Hindu Succession Act, 1956, "a legitimate Child means both son and daughter from the Class-I heirs in the Joint Family Property" and "an illegitimate child means who can inherits the property of his/her mother only and not of the putative father."

To get the inheritance rights under personal laws, the precondition affair is legitimacy. Subsequently, the Courts have always made certain that a live-in relationship should be of a reasonable period and any child who is born from live-in relationship should not be deprived of the right to inheritance and this must be in conformity with ***Article 39(f)*** of the Constitution of India.[32] The Supreme Court in ***Vidyadhari v. Sukhrana Bai***[33] granted that "the right of inheritance to the children born from a live-in relationship and ascribed them with the status of 'legal heirs'."

Hindu Marriage Act 1955 under Section 16, sub clause (1) & (2) openly declare that "children born out of void or voidable marriage, should be deemed as legitimate children in the eyes of the law." However, live in relationship neither a void nor voidable marriage to be remedied under the above provision. Therefore, to sort out such conflict and to prevent discrimination against children born out of marriage like relationship, and this may lead to and legally entitled to all the rights in the property of their parents, both self-acquired and as coparcenaries, required an amendment in to this section. Subsequently, in ***Parayan Kandiyal Eravath Kanapravan Kalliani Amma and Ors vs. K. Devi and Ors***[34] Supreme Court held that ***"the Hindu Marriage Act 1955,*** a beneficial legislation, has to be interpreted in a manner which advances the objective of the law."

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31. AIR 2010 SC 2685.
32. *Supra* note 26.
33. AIR 2008 SC 1420.
34. (1996) 4 SCC.

If there will be a subsequent amendment of the ***Hindu Marriage Act Act 1955*** relating to Section 16, it will eliminate the dissimilarity between children born out of valid or void or voidable marriages, and children born from any kind of marriage like relationship. This will bring about social reforms and stable social status of legitimacy on innocent children, to whom some restrictions imposed on rights guaranteed under the Section 16.[35] The Supreme Court in ***Revanasiddappa v. Mallikarjun***[36] opined and granted that "the right to inherit the property of the biological father of the four children born from the woman with whom he was a live - in relationship by them 'his legal heirs'." Thus the Court has ensured through many precedents that no child be denied their inheritance right who is born from a live - in relationship of a reasonable period of time.

The Supreme Court had opined in ***SPS Balasubramanyam v. Sruttayan***[37] that "If a man and woman are living under the same roof and cohabiting for a number of years, there will be presumption that they live as husband and wife and the children born to them will not be illegitimate." In this landmark decision the apex court by interpreting the provision in according with Article 39(f) of the Constitution of India and upheld the legitimacy of the children born out of live in relationships and confirmed that "the responsibility on the state to provide children with opportunities to develop in a healthy manner and safeguard their interests." In the case of ***Uday Gupta v. Aysha and Anr***[38] it was held that "if a man and woman are living together for a long time as husband and wife, though never married, there would be a presumption of marriage and their children could not be called to be illegitimate."

STATUS OF CHILDREN BORN OUT OF NON-MARITAL COHABITATION IN OTHER COUNTRIES

Legitimacy is a status conferred by law which has created many issues globally. A child enjoying legitimate status is entitled to full recognition as a member of the family group in question and he or she has all the legal rights which such status involves. The child who does not enjoy such status is illegitimate and will suffer disadvantages as a consequence. In addition to legal disadvantages, there are social consequences which result from being classed as illegitimate, although the stigma attached is not as great as it formerly was. In recent years the general trend in most jurisdictions has been to reduce the consequences of illegitimacy, and some jurisdictions

35. *Supra* note 32.
36. (2011) 11 SCC 1 : (2011) 3 SCC (Civil) 581.
37. AIR 1992 SC 756.
38. SPECIAL LEAVE PETITION (Criminal.) No. 3390 OF 2014.

have even abolished the status of illegitimacy altogether.

UNITED STATES OF AMERICA

In United States of America, children born out of wedlock have not traditionally enjoyed the same legal protections as children born in wedlock. Such children were historically referred to as "bastards" in a legal context. However, many restrictions on illegitimate children have been repealed in most of the states now. State laws have traditionally prevented unmarried couples from adopting children. Though some states have begun permitting unmarried couples to adopt, these couples still must surmount prejudice and may face other difficulties. Married couples, on the other hand, are permitted to adopt and are usually preferred over unmarried individuals.[39]

In US substantial inroads have been made in abolishing the distinction between legitimate children and illegitimate children. The US Supreme Court has held that discrimination against the illegitimate child violates the equal protection clause in the constitution.[40] In ***Trimble v. Gordon***[41] in 1977 the court by 5:4 majorities held that an Illinois statute which provided that illegitimates could inherit from their mothers but not from their fathers was unconstitutional. Here the child's paternity had been established before death, the father was supporting the child and had acknowledged her as his child. The issue of unconstitutionality on the basis of discrimination against illegitimate child has also arisen in connection with the Social Security Act,[42] various support statutes[43] and immigration laws.[44]

UNITED KINGDOM

The couples living together without marriage in the United Kingdom does not enjoy the status of married couple. They do not have same legal rights and duties as assured to married couples. Though they are free to maintain each other separately, there exists no duty or obligation on anyone of them to maintain other. Though the partners do not have inheritance right over each other property but one is eligible to be maintained where a partner had specifically mentioned the name of other partner in the will. Thus couple in such a relationship is not plainly free from all legal consequences. The state pensions that are available to the wives and civil partners who have legalized their status are not similarly applicable to partners who live together unmarried.

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39. Cohabitation and the Rights Conferred under the Law, (July 29, 2020, 11:20 AM), https://www.stimmel-law.com/en/articles/cohabitation-and-rights-conferred-under-law.
40. Homer J. Clark, Constitutional Protection of Illegitimate Child? (1979), 12 U.C.D.L. Rev. 383.
41. (1977), 430U.S 762.
42. Richardson v. Devis (1972) 409 U.S. 1069.
43. Gomez v. Parez (1973) 409 U.S. 535.
44. Fiallo v. Bell (1977), 430 US 7787.

Bereavement allowance that is available to widowed person is also not available to surviving live-in partner if the other dies. However, the law seeks to protect the rights of a child born under such relationships and hence both parents have the responsibility of bringing up their children irrespective of the fact whether they are married or cohabiting'.[45]

FRANCE

Both French tradition and the French law consider the biological parents as the persons most naturally inclined to serve the interests of their children. The right to custody of one's children is included within the scope of parental authority.

A new Article in the Civil Code introduced the principle of equality between legitimate and illegitimate child. This reform allowed an illegitimate child to inherit its father. In case of unmarried parents, same rules apply to cohabiting and non-cohabiting parents regarding establishing filiations.[46] Although in earlier times natural born children inherit only three quarters of the entire estate of their parents, however, now in France a natural child inherits from his parents similarly as a legitimate child does, of course, the estate is divided into equal shares among them and their legitimate siblings, if they exists. More importantly, natural children are now integral parts of their parents' respective families and lineages. Better yet, reciprocal inheritance is now permitted between natural born children and their parents. The central point to grasp with French inheritance laws is that children are specifically protected from being disenfranchised from parent's estate. Parent cannot freely dispose of any part of la réserve, which must be held for children.[47]

The French Civil Code states that the breakdown of a marriage or a relationship does not affect the rules governing the exercise of parental responsibility. Therefore, separated parents continue to exercise joint parental responsibility over their children, which is the general principle provided for by Civil Code.[48]

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45. The English Law Commission, Family Law, Illegitimacy, Working Paper No 74, 1979.
46. Jean Marie Le Goff, Cohabiting unions in France and West Germany: Transitions to first birth and first marriage, 7(18) Demographic Research 602(2002), (July 24, 2020, 05:20 PM), http://www.demographic-research.org/volumes/vol7/18/7-18.pdf.
47. French Inheritance Laws, (July 24, 2020, 12:40 PM), https://www.french-property.com/guides/france/finance-taxation/inheritance/rights/surviving-spouse.
48. Civil Code (France), Article 372.

PHILIPPINES

In Philippines children born outside a marriage are illegitimate.[49] The Family Code of Philippines provides for the legitimization of illegitimate children, however, children of cohabitants having no impediments to marry each other can only be legitimated.[50] Legitimating takes place by a subsequent valid marriage between parents.[51] The effect of legitimating a child retroacts to the time of the child's birth[52] and a legitimated child enjoys the same rights as a legitimate child.[53]

The Philippine Family Code provides that illegitimate child shall use the surname of his/her mother. Such children shall be under the parental authority of their mother and shall be entitled to support in conformity with provisions provided in Family Code of Philippines.[54] The effect of legitimating a child retroacts to the time of the child's birth[55] and a legitimated child enjoys the same rights as a legitimate child.[56] Philippine Civil Code provides that an illegitimate child shall receive a share equivalent to half of the share that will be received by a legitimate child who in turn shall receive a share of half of the value of the whole legitimate.[57]

SCOTLAND

The Family Law (Scotland) Act of 2006 has abolished the discrimination between legitimate and illegitimate child. It provides that no person shall be illegitimate whose status is governed by Scots law; and accordingly, in determining the person's legal status the fact that a person's parents are not or have not been married to each other shall not be taken into consideration; and further, such fact shall be left out of account in establishing the legal relationship between the person and any other relations.[58] Thus it has been made statutorily clear in Scotland that the child born out of wedlock will be legitimate and no person's status shall be illegitimate.

Even if there is no Will, a child of unmarried parents has a legal right to inherit from both parents and the families of both parents like a child born within marriage can inherit automatically from

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49. Family Code of Philippines, 1987, Article 220.
50. Family Code of Philippines, 1987, Article 177.
51. Family Code of Philippines, 1987, Article 178.
52. Family Code of Philippines, 1987, Article 180.
53. Family Code of Philippines, 1987, Article 179.
54. Family Code of Philippines, 1987, Article 176.
55. *Supra* note 13.
56. *Supra* note 14.
57. Civil Code of Philippines, 1949, Article 895.
58. Family Law (Scotland) Act 2006, Section 21 & The Law Reform (Parent and Child) (Scotland) Act 1986, Section1.

both parents and the extended family of both parents.[59]

In China couples also sign a contract for live-in relationship. The child born through such relationships enjoys the same succession and inheritance rights as are enjoyed by children born through marriages.[60]

AUSTRALIA

In Australia only when children are involved, de-facto relationships come under the jurisdiction of the Family Law Act, 1975. Although a parliamentary review committee is considering whether the Act should be extended to cover all de-facto relationships, at present it stands that the legal system is inconsistent in the way it deals with these relationships; laws vary between states, between the states and even between government departments.[61] Law grants common-law partners the same fundamental rights as married couples after two years of cohabitation; it casts a light on how common-law couples are treated. The presence of children can significantly affect the way a common-law relationship is viewed in the eyes of law.[62]

ITALY

In Italy, cohabitation is not as common as in other countries of Europe, because of its Roman Catholicism had a historically strong presence. However cohabitation without marriage has increased in recent years. There are significant regional differences in non marital cohabitation can be found, as non-marital unions are more common in the Northern Italy than in Southern Italy.

A survey report was published in 2006, which said that "long term cohabitation was still novel to Italy, though more common among young people."[63] In 2015, the children born outside of marriage were total of 28.7% which was total of 27.6%, in 2014. But this statics was varied in different parts of Italy as follows- Central Italy from 32.8% to 33.8%, Northeast Italy from

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59. Living Together and Opposite Sex Marriage: Legal Differences, (July 24, 2020, 05:20 PM), https://www.citizensadvice.org.uk/scotland/family/living-together-marriage-and-civil-partnership-s/living-together-and-opposite-sex-marriage-legal-differences-s/.
60. Dr. Swarupa N. Dholam, Socio-legal dimensions of 'live-In relationship' in India, (July 24, 2020, 05:20 PM), http://mja.gov.in/Site/Upload/GR/final%20article%20in%20both%20lanuage%20%281%29.pdf,
See also: Sonali Abhang, Judicial Approach to 'Live- In-Relationship' In India- Its Impact on Other Related Statutes, 19(12) IOSR-JHSS, 34, (2014), (July 24, 2020, 05:20 PM), http://iosrjournals.org/iosr-jhss/papers/Vol19-issue12/Version-4/F0191242838.pdf.
61. Helen Glezer, Cohabitation, https://aifs.gov.au/publications/family-matters/issue-30/cohabitation.
62. Sonali Abhang, Judicial Approach to 'Live- In-Relationship' In India- Its Impact on Other Related Statutes, 19(12) IOSR-JHSS, 34, (2014), (July 24, 2020, 05:20 PM), http://iosrjournals.org/iosr-jhss/papers/Vol19-issue12/Version-4/F0191242838.pdf.
63. Schröder, Christin (2006). Cohabitation in Italy: do parents matter?.Genus. 62 (3/4):53 85. JSTOR 29789325.

31.8% to 33.1%, Northwest Italy from 30.1% to 31.3%, Insular Italy from 22.4% to 24.2%, and South Italy from 19.4% to 20.3%.[64] Urban versus rural living also plays a role in cohabitation arrangements, a 2001 study described cohabitation in Italy as "still rare outside of large cities"[65]. In general, couple's relationships in Italy were characterized by very long engagements.

In 1975, certain fundamental improvements were done in Italian family law. These amended provisions were providing the same right to maintenance to children born out of a valid marriage *(filiazione legittima)* as well as to those born outside marriage *(filiazione naturale)*. Previously, children born outside of a legal wedding had to suffer legal drawbacks. In principle, unmarried parents have the chance to accept parenthood officially. This acknowledgement ensures to the legal validity of rights and duties toward the child. So far, Italy has witnessed no real establishment of legal regulations that regard informal unions. Judgments are basically made on the basis of respective situations. As an independent field of law it has not developed yet.[66]

CONCLUSION

The concept of live-in-relationship is not a new concept in India, although the name "Live-in-relationship" is heard openly in recent times. Avarudh Stris, Maitri Karar, Nata Relationships, Visiting Husband, Polyandry, Dhuka marriage etc.; are the concepts developing in India from the ancient period to existing period of time. There is no legal barricade or need to prevent a man and a woman cohabiting together without entering into the formal marriage in the form of marriage like relationship i.e., "live - in-relationship". The traditional society of India, however, does not endorse such living arrangements as a whole. In the language of Leon R. Yankwich, "There are no illegitimate children – only illegitimate parents." Since there is no specific law that recognizes the status of the couples in live in relationship, hence the law as to the status of children born to the couples in live in relationship is also not very clear. The greatest importance in the protection of child rights parameter is to ascertain the status of such children in law as well as in society. The need of the hour is that it should be the primary agenda of the legislation to ensure the rights of the children born out of marriage like relationships, i.e. live in relationship. The decisions pronounced by the Supreme Court of India hold significant

64. Statistics Report 2015, NATALITÀ E FECONDITÀ DELLA POPOLAZIONE RESIDENTE, 28th Nov 2016, (July 24, 2020, 05:20 PM), https://translate.google.com/translate?hl=en&sl=it&u=https://www.istat.it/it/files/2016/11/Statistica-report-Nati.pdf&prev=search&pto=aue.
65. Christin Löffler, Non-Marital Cohabitation in Italy, (31 March 2009), (July 24, 2020, 05:20 PM), https://www.demogr.mpg.de/publications/files/3367_1248875633_1_Full%20Text.pdf.
66. *Supra* note 65.

assessment in dealing with the fact in issues arising to identify the position of the children born out of live in relationship in socio-legal arena. Now it is out of harm's way to conclude that the modern society while fixing the debated issue turns into the well being of the legal circumstances; as a result the child born from a marriage like relationship is bound to face requirement of clarity of legal status in life, the origin and subsequent rights etc. This can lead to instability and insecurity in the child's life both mentally and emotionally. Legalizing live in the relationship means that a totally new set of laws are required to govern the relationship including protection in case of desertion, cheating, maintenance, inheritance, etc. Even courts are also trying to take the live-in-relation under the presumption of marriage. It is not recognised in any judgment independently as live-in-relationship. The harm caused to a "legally wedded wife" and her children and promotion of bigamy is two main arguments opposed to wholly legalize the live-in-relationships in India. To avoid these circumstances, a set of clear laws should be legislated and amendments to the existing ambiguous terms in present laws must be granted clarity on the status and rights of children born in a live in relationship. This will ensure uniformity and security to establish emotional, mental and physical developments to such a child.

RESPONSE OF LEGISLATURE AND JUDICIARY TO CRYONIC LIFE EXTENSION IN CANADA AND INDIA: A COMPARATIVE STUDY

- Dr Supreet Gill*

1. INTRODUCTION

Regardless of dynamic and rapid development in the field of cryonics, with membership statistics showing growth spurt every year, it largely remains an unregulated activity in major jurisdictions across the globe. This can be attributed to the laziness, denial and callous attitude of governments towards its use and regulation. More often than not, the response of any legal system towards advancement in medical field is that of an unrealistic expectation that it will not cause any conflicts in the judicial arena. However, this expectation is far from reality as tragically, neither society nor cryonics advocates have been able to avoid the inevitable. Cryonic life extension has brought with itself a lot of litigation which could have been avoided if effective legal framework were in place to deal with it. However, the ongoing litigation is expected to spark further litigation as judicial officers dealing with these cases lack a sound legislation that they may rely upon when called to adjudicate upon matters related to cryonic life extension. Whatever little assistance they have is only through already decided cases which actually create more problems than they solve, as current case law falls in realm of varied jurisdictions where judges decide on the basis of sensibilities and perception towards cryonics in a given community, which may or may not be in consonance with other jurisdictions or community set up. Owing to absence of significant case law and authoritative inaction, people in general are left with no legislative assurance which will eventually lead to chaos.

2. CANADA

Canada is by far the only jurisdiction which has addressed the issue of cryonic life extension with a direct legislation. However, what would be disappointing for people interested in cryonic life extension is that, the Province of British Columbia has placed a blanket ban on the practice. The reasons as to why this happened can only be understood by searching deeper into the judicial system of the country in respect of presence of cryonic organisations. In Canada, the

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presence of cryonic organisations offering preservation facilities is not as wide spread as it is in the United States. There are only a handful of cryonic organisations which are actively involved in cryonic preservation or promotion of it. Two of the organisations involved in cryonic preservation are the Cryonics Society of Canada and the Lifespan Society of British Columbia. A brief description of both the organisations and their role in propelling the cryonics movement in Canada is mentioned as follows:

I. CRYONICS SOCIETY OF CANADA

The Cryonics Society of Canada and its publication titled, Canadian Cryonics News (hereinafter CCN) was founded in 1987 by a psychology student at McMaster University named Douglas Quinn as its President. Quinn was heavily influenced by the cryonics ideology owing to the time he spent in United States[1] and he eventually enrolled as a member at Alcor to be cryopreserved upon death. Quinn took responsibility of publicising cryonics in Canada upon himself and also contacted media for the same. Owing to wide scale publicity by Douglas Quinn, few people enrolled with Cryonics Society of Canada to be cryonically preserved. Over the years Cryonics Society of Canada's outreach became more widespread and more people joined in. When the province of British Columbia banned cryonic life extension in the year 1990, the Cryonics Society of Canada was instrumental in lobbying vigorously against the legislation and since then has been making efforts to get it revoked. The province of Alberta also made similar attempts but to the delight of cryonics supporters such regressive legislation could not succeed.

II. LIFESPAN SOCIETY OF BRITISH COLUMBIA

The Lifespan Society of British Columbia is an organisation dedicated to using scientific methods and technology to promote the quality of life and enhancing lifespans. It is their belief that access to medical technology for expansion of lifespans is a fundamental right of each citizen. They organise conferences and talks in order to educate people in Canada about various technologies presently under development that may be instrumental in expanding lifespans of humans in the near future.

A. LEGISLATIVE RESPONSE: BAN ON CRYONIC LIFE EXTENSION IN BRITISH COLUMBIA

The province of British Columbia is the one and only jurisdiction in the whole world which has enacted specific legislation to ban the practice of cryonic life extension. A lot of research has

1. Douglas Quinn had previously worked at Trans Time in 1987,therefore he knew most people in American Cryonics Society.

gone into tracing the real reason and events which led to the passage of this law. The President of Cryonics Society of Canada has published an extensive account of his conversations with various people who were on the committee which recommended this law, but none of them were ready to take individual responsibility for enactment of this law, neither did they divulge the name of the person who added cryonic life extension in that clause. They maintain that it is a result of collective effort of the ministry. However, there are some people who blame religious thinking behind the passage of this law as the idea of preserving a dead body in cold and waiting for its revival is in complete contrast with principles of Christianity.[2] There are two legislations which deal with ban on cryonic life extension.

1. THE CEMETERY AND FUNERAL SERVICES ACT, 1990.

The law which places this blanket ban on cryonic life extension is the Cemetery and Funeral Services Act, Part 5, Section 57talks about "Disposition of Human Remains." This Act is a result of fourteen years of deliberations and suggestions of Gosse Royal Commission of 1976, a study conducted by a former law professor named Richard Gosse. It was passed by the legislature in April 1990.

The language of the section is as follows,

Sale of cryonics, irradiation and other kinds of arrangements forbidden: No person shall offer for sale or sell any arrangement for the preservation or storage of human remains based on cryonics, irradiation or any other means of preservation or storage, by whatever name called, that is offered or sold on the expectation of the resuscitation of human remains at a future time.

The Cemetery and Funeral Services Act 1989, Part 5, Section 53. (Canada).

The section completely prohibits any commercial activity related to offering services to cryopreserve individuals upon death. Section 129 provides for punishment for contravention of provisions of the above section. The section states that if any corporation is found in violation of Section 57 then they shall be liable to pay fine not exceeding ten thousand Canadian dollars. Additionally, each of the directors and officers of the organisation or company who knew about the offence and permitted or acquiesced it, in addition to the company being convicted, shall be liable to fine of ten thousand Canadian dollars or imprisonment for not more than one year or both.

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2. Lincoln Cannon, Resuscitation, by Cryonics or Otherwise, Is a Religious Mandate, Institute for Ethics and Emerging Technologies (Jan. 26, 2019, 10:06 AM), https://ieet.org/index.php/IEET2/more/cannon20140811

The Act is very rigid in its wording as well as its penalties for offences related to contravention of its provisions. However, in the opinion of the researcher, the Act leaves a lot of questions unanswered. It is not clear whether there is a ban on cryonic life extension or just the advertisement of it. Also, nothing has been said about situations where citizens living in British Columbia make arrangements for cryonic preservation outside of their jurisdiction and need to apply for transport related procedure in order to be shipped out of the state. The drafters responsible for the legislation have issued some clarifications when questioned about the above. The Cryonics Society of Canada have been trying for long to seek clarification on the above issue and they quote several instances of written correspondence with the bureaucracy wherein different people have expressed different opinions.

In one such conversation, Bruce McCullen, Director of Policy and Planning, once suggested that such citizens will not face any opposition from law authorities if the facility was located outside of British Columbia[3]. He also stated that the reason behind the legislation was mainly based on consumer protection principles and the intention of the legislators was to protect potential clients from consumer fraud as the science behind cryonics has still not been proved in practice[4].

As more people became aware of the idea behind cryonic life extension, there was a lot of lobbying and support for changing the law. In August 1992 a proposal to amend the Cemetery and Funeral Services Act was made by the Directors of Cryonics Society of Canada. Unfortunately, the request was denied. In written correspondence, dated November 1992, Mr. Moe Sihota, Minister, Labour and Consumer Services wrote that, "commercial transactions concerning cryonic life extension are prohibited because the technologies involved in cryonics are as yet unproven."[5] Appeals to review Section 57 were also denied by Ms. Joan Smallwood who succeeded Mr. Sihota as the Minister of Labour and Consumer Services. By the year 1994 the appeal to amend Section 57 had gathered enough support that the ministry was forced to form a Consultation Group to review the provision, but yet again the group denied any change in law as cryonics was still an "unproven science". In a letter dated October 17, 1994, Joan Smallwood clarifies that the present language of the Act does not prevent preservation of

3. Doughlas Quinn, British Columbia's Anti-Cryonics Law: How Did British Columbia's Anti-Cryonics Law Come to Be?, The Cryonics Society of Canada (Jan. 26, 2019, 10.:06 AM) http://www.cryocdn.org/law57.html#howwhy
4. *Id.*
5. Letter by Moe Sitoha, Minister, Consumer Labour Services, to Mr. Douglas Quinn dated November, 24 1992. (Jan. 26, 2019, 10:06 AM),http://www.cryocdn.org/BC_Nov92.html

humans or organs but targets the sale or advertisement of a technology which is yet not proved scientifically. She writes that, "The present wording of the Act is intended to be representative of the present state of medical technology and to prevent the possible exploitation of individuals at a vulnerable period in their lives."[6]

However, she assures that as and when this technology is proven, the ministry will consider requests for review. Therefore, she basically implied that they will cross the bridge when they come it to and any speculation preceding to the working proof of this science is uncalled for. Further in a letter dated November 2, 1994 she clarifies that there is no ban on research in the field of cryonic life extension and the ministry in fact will be supportive of any life saving or lifespan enhancing scientific technologies if they are discovered in the future.[7]

History repeated itself two years later when in the year 1996 requests were denied to amend the provision yet again and thereafter no attempts were made to review the Act. However, post the revolution in media and technology after the turn of the century, a need was felt to issue some sort of clarification on cryonic life extension as now more and more people could access information about it and had expressed interest in it. So, in September 2002, Solicitor General R.T. (Rich) Coleman issued a letter[8] to Olaf Henry, (who sought the clarification)and Tayt Winnitoy (Registrar of Cemetery and Funeral Services) clarifying his stand on cryonic life extension. Solicitor General Coleman stated that,

Funeral providers are prohibited from offering cryonics arrangements on the expectation of future revival, but that cryonics businesses are not prohibited from operating and consumers are not prohibited from accessing cryonics services. Although a BC funeral director cannot sell cryonics arrangements, a BC funeral director is not prohibited from preparation and transport for cryonics purposes (to an organization outside of BC, presumably).[9]

In the aftermath of this move, Registrar Winnitoy, who was contacted by the Cryonics Institute situated in U.S., reiterated the fact that a funeral director in British Columbia will not be prohibited from assisting in the preparation of transportation of bodies for the purpose of cryonic preservation out of the state.[10]

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6. Letter by Joan Smallwood, Minister, Consumer Labour Services, to Douglas Skrecky, dated October 17, 1994. (Jan. 26, 2019, 10:06 AM),http://www.cryocdn.org/BC_Oct94.html.
7. Letter by Joan Smallwood, Minister, Consumer Labour Services to Yes Bozzonetti dated November 2, 1994. (Jan. 26, 2019, 10:06 AM),http://www.cryocdn.org/BC_Nov94.html.
8. Letter by R.T. (Rich) Coleman, Solicitor General, to Olaf Henry, Dated September 4, 2002. (Jan. 26, 2019, 10:06 AM),http://www.cryocdn.org/BC_Sep02.html.
9. *Id.*
10. Letter by Tayt Winnitoy, Director of Operations to Cryonics Institute, Dated July 7, 2005. (Jan. 26, 2019, 10:06 AM),http://www.cryocdn.org/BC_Jul05.html.

2. CREMATION, INTERMENT AND FUNERAL SERVICES ACT, 2004.

In addition to the above Act and the lack of clarity that surrounded it, the legislature of British Columbia enacted another legislation which once again laid down the same provision. Cremation, Interment and Funeral Services Act of 2004 expressly prohibits any sale of service related to cryonics. Section 14[11] prescribes the ban and Section 62[12] lays down the penalty for the same.

Furthermore, penalties provided for in case of contravention of this statute are more stringent than the previous legislation.

Even after this provision was enacted, the officers in bureaucracy, actually in charge of running day to day procedural formalities maintained that the practice of selling cryonic life extension is illegal, but not the act of buying it from outside. So the citizens of British Columbia are free to enter into such contracts with organisations situated outside of the province but, within the province, no cryonics organisation can be set up business. It is to be noted here that language of the section is quite evasive as any reasonable person reading the legislation would understand that the practice of cryonic life extension is completely prohibited.

A valuable suggestion here would be that the legislature should either add an explanation to that effect or add another provision in the statute which clarifies this stand. Since a lot of funeral directors were taking the language of legislation at face value and rebuffing persons interested in cryonic life extension, a fresh campaign to review and amend the Act was launched in the year 2006. Unfortunately, so far cryonics enthusiasts have not had any luck in getting the legislature to shift their stand.

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11. Section 14 of the Cremation, Interment and Funeral Services Act, 2004 states that,
Section 14: Prohibition on sales, and offers of sale, of arrangements relating to cryonics and irradiation: A person must not offer for sale, or sell, an arrangement for the preservation or storage of human remains that is based on
(a) cryonics,
(b) irradiation, or
(c) any other means of preservation or storage, by whatever name called,
and that is offered, or sold, on the expectation of the resuscitation of human remains at a future time.

12. Section 62 of the Cremation, Interment and Funeral Services Act, 2004 states that,
Section 62: Offence Penalties
(1) an individual who commits an offence under this act is liable to a fine of not more than $10 000 or to imprisonment for not more than 12 months or to both.
(2) a corporation that commits an offence under this act is liable, to a fine of not more than $100 000.
despite subsections (1) and (2), the court may increase a fine imposed under this section by an amount of up to 3 times the court's estimation of the amount of monetary benefit acquired or accrued as a result of the commission of the offence.

B. JUDICIAL RESPONSE

The amount of litigation that was seen in the United States is incomparable to litigation in any other country. This is mainly due to the fact that cryonics movement started and grew in the U.S. and most of cryonic organisations are situated within the United States of America. Canada comparatively has witnessed less need for judicial intervention as they are still struggling with legislative side of it.

There is a singular case which went to court and is still pending in courts. The details of the case are discussed as follows:

LIFESPAN SOCIETY OF BRITISH COLUMBIA

V.

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA[13]

Background: Canada's province of British Columbia had placed a blanket ban on selling or advertising any service related to cryonic life extension and there are several individuals within that jurisdiction who are interested in seeking cryonic preservation upon death.

Facts: Keegan Macintosh, a citizen of British Columbia signed a contract with the province's only cryonic organisation, Lifespan Society of British Columbia to preserve his body after death. However, owing to the The Cemetery and Funeral Services Act, 1990 and Cremation, Interment and Funeral Services Act, 2004, the sale of cryonics was banned and attracted penal provisions which included imprisonment as well as hefty fines. Nonetheless, Mr. Macintosh as well as members of Lifespan were very keen to go ahead with the agreement pursuant to which they signed a four-page contract. This contract was said to be one of a kind and possibly the first ever contract in British Columbia for such arrangement. Once the contract was signed the Lifespan Society moved the Supreme Court of British Columbia in a civil claim filed on July 14, 2015, with their client Keegan Macintosh as co-plaintiff challenging the constitutional validity of Section 14 of the Cremation, Interment and Funeral Services Act, 2004 (hereinafter CIFSA). The President of Society stated that they had to do so as they were left with no choice.[14]

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13. Lifespan Society of British Columbia v. Her Majesty, The Queen in The Right of The Province Of British Columbia, November 27, 2014. Case No. 36041.
14. Carrie Wong, Anti-Cryonics Law Challenged by The Lifespan Society of British Columbia, The Lifespan Society of British Columbia, (Jan. 26, 2019, 10:06 AM), https://www.lifespanbc.ca/home/m/5632614/article/3385410. "Lifespan Society has tried in vain for years to get a good explanation from the government of British Columbia for how this archaic restriction came into existence and to get the government to repeal it….We are left with no choice but to commence this lawsuit."

Issues: The Plaintiffs chose to argue this from the constitutional perspective stating that provisions of Section 14, 61 and 62 infringed the following rights under Section 7 of Charter of Rights and Freedoms:

a. Right to Life: As the restrictive nature of CIFSA deprived a person to possibly extend his lifespan by denying him cryonic preservation.

b. Right to Liberty: As individuals who are interested in cryonics can not dispose off their bodies as per their choice.

c. Right to Security: As organisations or persons who are involved in sale of cryonics technology are threatened to be imprisoned.

The Plaintiffs sought the following declarations in the present case:

a. That pursuant to the Constitution Act, 1982, Section 52, the Cremation, Interment and Funeral Services Act of 2004, Section 14 was of no effect or force.

b. Alternatively, Section 14 does not prohibit selling or offering for sale of cryonic services or an arrangement for cryonics services.

Decision: The final decision in this is case is still pending as of this day (October 19, 2018) and the last date of hearing was June 2018. Hon'ble Justice Stephen Kelleher has dismissed the application for striking down Section 14, however he has still not ruled on the constitutional validity of the provision. He has highlighted the absurdity of the case in following words,

> "This case has bizarre aspects. These questions are academic. The court is being asked to act like a law firm to provide advice about possible future business activities ".[15]

The final outcome of the case is going to be very imperative in paving the path for future of cryonic life extension in Canada as now more people than ever are interested in it and they have to make arrangements with U.S. firms for preserving their bodies.[16] A better approach would be to address both the cryonicists' and public's concerns through community discussions, and then use inclusive regulation to achieve regulation on this untamed field. While an absolute denial may ease any social or moral feelings of dread, this will be brief if cryonics is proceeded in any

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15. Jason Proctor, B.C. man signs first-of-its-kind Canadian cryonic contract, CBC News, Nov. 26, 2016. (Jan. 26, 2019, 10:06 AM), https://www.cbc.ca/news/canada/british-columbia/cryonic-macintosh-life-death-1.3864946

16. Brad Pritchard, Frozen in time: why an Ontario man chose cryonic suspension decision helped Brian Watson stop worrying about the end, Alliston Herald, June 4, 2017. (Jan. 26, 2019, 10:06 AM), https://www.simcoe.com/news-story/7236145-frozen-in-time-why-an-ontario-man-chose-cryonic-suspension.

case, or if the quantity of individuals for cryonic life extension becomes bigger, in which case a noteworthy piece of the populace may have their rights superfluously confined.

3. INDIA

In the year 2016, when this research was started, there were very few cases or people in the country which indicated any interest towards cryonic life extension as a science. The only information about an Indian citizen interested in cryonic life extension came from the Cryonics Institute website which states that so far two Indians have enrolled themselves for the program but due to confidentiality agreements, their identities were not made available to the researcher. In the year 2008, Alcor in its quarterly magazine titled, Cryonics, published an article[17] about an Indian citizen named, Kumar Krishnamsetty, who was a qualified software engineer but later moved to film direction. While working in the United States, he came in close contact with some of the members of Alcor and was fascinated by what the science of cryonics had to offer. Additionally, cryonet has made public, an email dated July 8, 1999 written to Alcor by an Indian citizen named Gurvinder (no Last name stated), who proposed to set up a cryonics facility on the moon given the possibility that Earth may be destroyed in the coming centuries.[18] The email also states that this person was personally in touch with Robert Ettinger before his death and inquired about the possibility of brain suspension. The case of fourteen-year-old JS and the impending judgment by Justice Peter Jackson attracted a lot of attention worldwide. Justice Bhanwar Singh is a former judge of Allahabad High Court who co-authored an article with Dr. N.K. Bahl, a former district judge, Uttar Pradesh, on *India Legal* about the legal predicaments that the judiciary will face in the years to come regarding the practice of cryonic life extension in India.[19] The authors suggested that India should equip itself with a legislation before the storm of cryonic life extension hits us. The authors suggested two possible ways to handle the legal problems arising out of cryonic life extension,

"(i) Prohibition on the use or prospective use of cryogenic preservation. Legislation can be drawn to define the scope of any such prohibition, domestically and internationally.

(ii) A formal acceptance of cryogenic preservation in the country with concomitant regulation of the process and actors involved."[20]

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17. Chana de Wolf, Member Profile: Kumar Krishnamsetty,CRYONICSFourth Quarter 2008 at 12-13.
18. Email from Diana Singh dated Thu, 8 Jul 1999 05:34:59 -0700 (PDT),(Jan. 26, 2019, 11:08 AM),http://www.cryonet.org/cgi-bin/dsp.cgi?msg=12089.
19. Justice Bhanwar Singh, Dr. N.K. Bahl, Dead Yet Alive, India Legal Live, (Jan. 26, 2019, 11:08 AM),http://www.indialegallive.com/special-story/cryogenic-preservation-dead-yet-alive-43878.
20. *Id.*

Additionally, there has been some evidence which supports that the Indian Institute of Science, Bangalore has been engaged in research in the science of cryonic life extension and they have even set up a Centre for Cryogenic Technology where they study the physics of life at very low temperature. The Indian Cryonics Society is another organisation, which is a one man show run by Mr. Lovepreet Singh who is engaged in fundraising for the cause of cryonic life extension.

The year 2018, cryonics saw some development and it would not be wrong to state that the year 2018 introduced metamorphic revolution in the country.

A. CRYONICS RESEARCH INSTITUTE PRIVATE LIMITED, KOLKATA:

In April 2018, India witnessed the establishment of its first cryonic life extension organisation titled, Cryonics Research Institute Private Limited, based in a three-bedroom apartment in Kolkata.[21] The company formally registered itself with the Registrar of Companies on March 15, 2018. There are three directors of Cryonics Research Institute Private Limited, namely Parag Chatterjee,[22] Pijush Kanti Chatterjee[23] and Saibal Mazumdar[24] who are very enthusiastic about establishing a full fledged project in India which is estimated to cost around twelve to fifteen crore Indian rupees. They have expressed their intention to buy land in Gwalior or Agra for the same and are presently engaged in fund raising from various governmental and non-governmental organisation as well as private individuals. Mr. Parag Chatterjee stated that they will not be setting up a facility in Kolkata itself because they cannot predict the span of time for which a body may be under cryonic preservation and therefore they cannot establish a facility in a city like Kolkata which may be prone to being submerged under sea in the coming years. From the above statements it is clear that this company is quite serious about establishing a fully functional cryonic organisation. Also, the directors have been quoted saying that in order to resolve any legal issues that may arise, they have written to the central government through the Medical Council of India for which response is awaited as of April 2019.

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21. Achintyarup Ray, Freeze-preserve firm, kms from Behala cold tomb, Times of India, Apr. 10, 2018. (Jan. 26, 2019, 10.:06 AM), http://timesofindia.indiatimes.com/articleshow/63673267.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
22. Parag Chatterjee, 43, one of the three directors and the bra the brains behind the company, is an alumnus of Bengal Engineering College and head of the Department of Computer Science in Engineering at a well known tech-college near the city.
23. Parag Chatterjee's father is a retired government employee.
24. Siabal Majumdar is a schoolteacher in Amtala, South 24 Parganas, Kolkata.

B. INDIA FUTURE SOCIETY:

India Future Society (hereinafter IFS) has been one of the most vocal voices in spreading awareness about cryonics in India. IFS, is a non-profit organisation which campaigns to increase knowledge about the incipient forthcoming technologies for masses and use of technology to enlarge human capacities. Avinash K. Singh is the founder and president of the India Future Society and has played a key role in spreading awareness about cryonics in India. IFS in their mission state that their main focus is on emergent technologies and functional perspectives that can be derived out of it for the benefit of entire human race. They want to attract like minded people who can channel the debate on a number of issues under research namely, mind uploading, simulated/ virtual reality, genetics, nanotechnology, radical life extension and Artificial General Intelligence (hereinafter AGI) that would contribute to the prosperity of our species. IFS had also tried to collaborate with KrioRus but unfortunately nothing could materialise. IFS is also responsible for the establishment of the Transhumanist Association of India (hereinafter TAI) which is a closed group existing on social media[25] with a total of two hundred and forty two members as of February 2019. Transhumanists encourage the use of innovation and hereditary qualities to enlarge human abilities and life expectancies. The TAI also augment an educated and profoundly tolerant discussion on the outcomes of these future progressions, and also other rising innovations.

RIGHT TO BODILY AUTONOMY AND THE CASE OF PRESERVATION OF BODY OF DECEASED GODMAN ASHUTOSH MAHARAJ

In Indian context, the rights of dead bodies find an implied protection under the Constitution of India, under the word and expression 'person' in Article 21, which is interpreted to include a dead person in a limited sense. In the case of ***Mujeeb Bhai v. State of U.P. & Ors.,*** the Allahabad High Court observed that,

The law has not so far defined a person to include a dead person. It, however, has some rights, which cannot be detached from it, even if the body is denuded of the life, which together forms a human being. ….We thus find that the word and expression 'person' in Art.21, would include a dead person in a limited sense and that his rights to his life which includes his right to live with human dignity, to have an extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he

25. (Jan. 26, 2019, 10.:06 AM) https://www.facebook.com/groups/tranhumanistindia.

professed.

Ramji Singh Mujeeb Bhai v. State of U.P. & Ors., Civil Misc. Writ Petition No.38985 of 2004.

The only case which comes close to cryonic preservation for life extension in India is the infamous case of Ashutosh Maharaj and the preservation of his body by his followers with the hope of his revival. Mahesh Kumar Jha, known as Ashutosh Maharaj, headed a religious sect called Divya Jyoti Jagriti Sansthan (hereinafter DJJS) in Nurmahal town of Jalandhar district who was pronounced clinically dead at Apollo Hospital Ludhiana on January 28, 2014. However, his followers declared that he was not dead but merely in 'samadhi' and will return to life when he wishes. Therefore, they preserved his body in an ice chamber. What followed was a highly publicised legal battle the events of which were no less than a movie plot.

In ***Dalip Kumar Jha & Another v. State Of Punjab & Others***[26] it was held that the right to life of an individual, which includes his right to live with human dignity, shall have an extended meaning, which will include the right to treat a dead body with respect, which a person would have deserved, had he been alive, subject to his tradition, culture and the religion, which he professed.[27] The timeline of events that lead to the first ever judgment being delivered on the issue of cryonic preservation are described as follows:

26. Dalip Kumar Jha & Another v. State of Punjab & Others, Civil Misc. Writ Petition. No. 7345 of 2014 & C.R.M. M-9195 of 2014.
27. *Id.*

Date	Detail of Events
January 2014	The godman popularly known as Ashutosh Maharaj was declared dead after he suffered from a fatal heart attack. However, his devotees refuse to accept this fact and declare that their guru is not dead but has merely gone into samadhi and will eventually emerge from it one day and hence they preserve his body in sub zero temperatures similar to that of Himalayan conditions suitable for meditation.
December 2014	1. A person by the name of Pooran Singh files a writ of habeas corpus seeking the release of the godman's body. However, when this writ was rejected by the court he petitioned the court for a post-mortem examination of the corpse. 2. A person named as Dilip Kumar Jha, who claimed to be the son of Ashutosh, also appealed to court, demanding that the body be brought to his home town in Bihar for cremation according to local rituals. The Hon'ble Punjab and Haryana High Court ordered that the last rites for Ashutosh be performed in fifteen days.
February 2015	The above mentioned ruling was later suspended.
July 2017	The Hon'ble Punjab and Haryana High Court granted permission to the followers to preserve his body in a freezer, although it was unclear whether the court had agreed with the sect's argument that its founder was still alive.

As of December 2018, the body of the godman is still being preserved at the premises of the 'dera' and disciples still affirm their belief in his return.

It must be pointed out here that the disciples have merely frozen his body in an ice chamber and

no modern methods of cryonic preservation have been applied to the body. The understanding of the researcher from the medical context is that, since the body was preserved without infusing a cryoprotectant, it is likely that ice crystal formation would have damaged most of the cells in his body.

However, in the tussle between faith and science, things are not always black and white, so one never knows, may be the godman returns to life in the future, true to the faith of his followers.

4. CONCLUSION

Legal problems can never be solved in isolation as law and society are very intimately connected and entangled with one another. Laws cannot be made without weighing its possible consequences on society or the people they intend to govern. It is true that very few legislatures across the world have responded to the problem of cryonic preservation. But the question that needs to be asked before delving into law making is whether our society has progressed to a stage where it is ready for cryonic preservation as an alternative to death. Would it be fair to give some people a second chance at life at the cost of resources of future generations which are not even born yet. Conversely, would it be fair to deny cryonic enthusiasts their chance at second life. Will a blanket ban on cryonic life extension, like the one in Canada give rise to litigation related to curtailment of right to seek medical treatment and right to bodily autonomy? All these questions need to be addressed and fast as the trend of cryonic preservation is catching up in several countries across the globe and if eventually the right to cryonic preservation is granted, it would lead to serious violation of rights of the people who will miss out on it due to lack of regulation. Jurisdictions across the world at least need to make one thing clear; whether they are for or against cryonic preservation, which would practically solve half their problems

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RESTITUTION OF CONJUGAL RIGHTS: CRITICAL APPRAISAL

- Ms Jasleen Chahal* & Ms Sunidhi Singh**

INTRODUCTION

As the common belief goes, marital bonds are pure. It is a sacrosanct union of two souls; a union which continues for forth-coming seven lives. This is the traditional perception of marriage in a common household. We have traveled far from the old days when people looked down at marital breakdowns. Rather, people would not come out only to put up their grievances for the sake of their family's reputation. But gone are the days when marriage got associated to and used decided a person's status in society. Today, marriages do come to an end and relationships do die. Staying away from a person with whom you cannot live is only logical.

Restitution of conjugal rights means bringing together two spouses who have parted. Its etymological meaning is to restore matrimonial relationships. Is this practical, owing to the modern state of affairs? Forcing someone to live with a person whom he/she does not want to live with is not right. It is an infringement of our fundamental rights to freedom, liberty and equality.

Restitution of conjugal rights is a foreign concept adopted by India. British brought it to India with them. It was being used by them in ecclesiastical courts.[1] They had jurisdiction to decide over family and religious matters. British left but the concept of restitution of conjugal rights stayed. Before colonization, there was no such concept in India.

Restitution of conjugal rights has been contained in Section 9 of the Hindu Marriage Act, 1955 for Hindus, Section 22 of the Special Marriage Act, 1954 for couples married under the Special Marriage Act, Section 32 and 33 of the Indian Divorce Act, 1869 for the Indian Christians, Section 36 of Parsi Marriage and Divorce Act, 1936 for the Indian Parsis and in the general law for Muslims. The provisions of the essentials of conjugal rights are the same in all the above statutes. In this paper, we will be discussing restitution of conjugal rights concerning Section 9 of the Hindu Marriage Act, 1955.

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1. HarvinderKaur v. Harmander Singh, AIR 1984 Dell 66.

UNDERSTANDING THE CONCEPT

To begin with, it is of utmost importance that we understand the concept of Restitution of Conjugal Rights first.

Restitution of Conjugal rights means the restoration of marital rights. It is available only for valid marriages. Matrimonial rights are those rights people get after marriage. These marital rights can be of the following broad types:

Right to cohabitation: To cohabit means to live together. After getting married to each other, two people automatically gain the right of living with each other in consortium.

Right to live with dignity and liberty with each other's family: It comes as a part and parcel of a marriage that both the spouses have to live with each other, respect each other's family members and be compassionate towards them.

Right to consortium: Consortium means companionship. It a common belief that in a marital relationship, the felling of oneness is a must. Both the spouses are expected to support each other in all the ups and downs of life.

Restitution of conjugal rights is a remedy provided against desertion. Whenever the aggrieved party applies for this remedy, the court passes an order, when totally satisfied that the plaintiff has been deserted by the spouse, asking the deserting party to resume cohabitation and lead a normal married life. If the deserting spouse refuses to obey the orders of the court, this act amounts constructive desertion and if it continues for the period of one year, this becomes a ground for divorce. When the marriage is voidab initio, this remedy cannot be invoked.

When one of the spouses abandons the other without reasonable cause, the aggrieved party has a legal right to file a petition at the District Court or the Family Court of the appropriate jurisdiction. In this manner, the deserted spouse may actually compel the other person to fulfill his/her conjugal obligations.

Whenever one of the spouses has without any reasonable cause deserted the other spouse and no cohabitation takes place, then, in that case the aggrieved party can approach the court to order the other party start co habitation. It is important that no other remedy should be available with the petitioner and the court is satisfied with the truth of the statements. Essential elements for the filing of a restitution suit are contained in Section 9 of the Hindu Marriage Act 1955.

Following are the essentials for restitution of conjugal rights :[2]

1. Withdrawal from society: For withdrawal to take place, it is important that one of the spouses leaves the other in order to end all marital relations, rights, duties and obligations with them. When the husband deserted his wife and thereafter was totally unresponsive towards her. It was held sufficient to show his withdrawal of society from his wife and therefore, wife's petition for restitution of conjugal rights was allowed.[3]
2. Without any reasonable cause: For this essential to be fulfilled, it is necessary that the desertion should have taken place with no substantial reason supporting it. A reasonable excuse can be an act, omission or conduct on the part of the petitioner which makes it a practical impossibility to live with the person, a sufficiently weighty and grave matrimonial misconduct, cruelty, both physical and mental, failure to perform marital obligations, insanity of the other spouse, remarriage of either of the spouse, ill-treatment by in laws etc.
3. With no other legal remedy available: This essential means that this remedy can be availed against the other party only when the other remedies being like judicial separation and divorce are not available.
4. Court satisfied with the truth of the filed petition: A case can only move forward if the statement in the filed petition if found to be true by the court of law. If the petition is not maintainable, the suit cannot move forward.

While filing the case for restitution of conjugal rights, the petitioner has the capacity to ask for maintenance too. This provision comes in handy when the petitioner does not earn and has no means of livelihood but the deserting spouse does.

Burden of proof is always on the partner who withdrew from the society of the petitioner. But, at first, the petitioner has to prove the truth of his statement. The burden of proof shifts from the petitioner to the respondent during the course of the suit. In the beginning, it stays with the petitioner and then it moves on to the respondent.

The deserting party has to prove the following that there was some reasonable cause behind the party leaving the spouse completely, there was no fault on the deserting party's behalf and

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2. Paluck Sharma, Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws, Indian National Bar Association (September 25, 2019 4:00 pm), https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-indian-personal-laws/.
3. SushilaBai v. Prem, AIR 1986 MP 225.

circumstances had become such cohabitation and resumption of a marital relationship was next to impossible.

This is the basic concept of restitution of conjugal rights. But even after all this; the court has the authority to only order in favor of cohabitation. There are no harsh penalties as such as to the proper implementation of the order. Under Order 21 Rule 32 of CPC 1908, when a person fails to comply with the decree of restitution of conjugal rights, the court can attach his/her property and sell, it under rule 32(3). This penalty also gets ruled out when the parties own no properties as a vast majority of the population is poor. This defies the basic understanding of justice that justice should not only be done but should also be seen to be done. In this case, it cannot even be seen to be done.

There is one positive thing about restitution. Gender discrimination can be observed throughout the statutes of personal laws but the provisions relating to restitution of conjugal rights were meant to be gender neutral. But that fact alone cannot save it as it is against many provision of the Indian Constitution which is the regarded as the grundnorm and is the source of all authority and laws in India.

This concept was brought in India before the commencement of the Constitution, but afterwards it must have been repealed like it has been in major economies of the world owing to its illogical standing. This can also be confirmed from the fact the long debates were held before restitution of conjugal rights could be ratified in the Parliament.

Honorable High Court has held that the concept of restitution of conjugal rights "is a relic of ancient times when slavery and quasi slavery were seen as natural. This is particularly so after the Indian Constitution came in to force, which guarantees personal liberties and equality of status to men and women alike and further confers powers on the state to make special provisions for their protection and safeguard.." [4]

One cannot be forced to spend his/her whole life with a person with whom he/she cannot live even for a moment.

4. ShakilaBanu v. Gulam Mustafa, AIR 1971 Bom 166.

CONSTITUTIONAL VALIDITY OF RESTITUTION OF CONJUGAL RIGHTS

The constitutional validity of restitution of conjugal rights has been tested mainly in the following three landmark cases:

T. Sareetha v. VenkataSubbaiha[5]

In this case, the petitioner (husband) filed a case of restitution of conjugal rights against the respondent (wife), who was a celebrity. In response the wife gave the contention that right to privacy was guaranteed to her under Article 21 of the Constitution, which confers on a woman, a right to free choice as to whether where, when and how her body is to be used for the procreation of children and by whom her body parts are to be sensed. She contended that this freedom of choice is part of her right to privacy and is guaranteed by Article 21 as part of 'liberty'. By recognizing section 9 of Hindu Marriage Act, the State is violating the fundamental right of liberty. Further. It was also contended to be in violation of Article 14 as it was against the true concept of equality.

Justice P.A. Chaudhary struck down section 9 holding that it violates the right to privacy of wife by compelling her to have sexual intercourse against her will, which will be the ultimate consequence of cohabitation and consortium. He held that since section 9 was in violation of the fundamental rights to live with dignity and liberty, it is ultra vires the Constitution.It was held that decree of restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy.State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony.State coercion can neither soften the ruffled feelings nor clear the misunderstanding between the parties.Further, section 9 didn't promote any legitimate public purpose based on any concept of social good, and thus being arbitrary it is in violation of Article 14.

The husband's petition was accordingly dismissed.

HarvinderKaur v. Harmander Singh[6]

In this case the petitioner (husband) had filed a petition for restitution of conjugal rights against his wife (respondent). The Andhra Pradesh Court Judgment was cited in this case to support the invalidity of section 9.

Justice AvadhBihari dissented from the Andhra Pradesh judgment, stating that sexual

5. T. Sareetha v. V. Subbaiha, AIR 1983 AP356.
6. HarvinderKaur v. Harmander Singh, AIR 1984 Del 66.

intercource is only one of the elements of marriage. The Courts do not and cannot enforce sexual intercource. The remedy of restitution of conjugal rights aims at cohabitation and consortium and seeks to uphold the institution of marriage. It enforced not by imprisonment or detention of defaulter, but only by financial sanctions under civil procedure code. Further, it is only a step forward towards divorce. If the decree is not obeyed for one year, the remedy of divorce can be sought to under section 13 (1-A). So, to declare section 9 unconstitutional without giving any regard to section 13 (1-A) would be taking a very narrow view of things.

Validity of section 9 was upheld and the decree of restitution was granted in favor of the husband as the wife could not prove any reasonable cause behind her withdrawal from society. It was observed that the object of restitution decree is to bring about cohabitation between estranged parties so that they can live together in amity in their matrimonial home. Sexual intercourse is one of the elements to constitute consortium and is not the 'summumbonum' (highest good). It is a fallacy to hold that restitution of conjugal rights constitutes the starkest form of governmental invasion of marital privacy. The court further observed that introduction of constitutional law in home is like a bull in a China shop. Restitution was the introduction of the bull in the matrimonial home who will not resist from violation.

Thus, the remedy was held to be intra vires constitution.

Saroj rani v. Sudarshanchadha[7]

In this case, the decree in favor of restitution of conjugal rights was passed by the court. After that, when the wife came to live with the husband she was turned out after 2 months and the husband then filed a case of divorce under section 13 (1-A) of the Hindu Marriage Act, 1955. The wife contended that husband should not be allowed to take advantage of his own wrong.

The court had to decide on two matters, whether the suit of the husband was maintainable and should be allowed? The other question was regarding the Constitutional validity Section 9 of HMA, 1955. The Court discussed that mere non-compliance with a decree of restitution of conjugal rights does not constitute a wrong under section 23. Mere disinclination to agree to an offer of reunion is not serious enough a misconduct to justify denial of the relief to which husband or wife is otherwise entitled [8].It was also approved by the court that a consent decree in all cases could not be said to be collusive decree and where the parties had agreed to pass off a

7. Saroj rani v. Sudarshanchadha AIR 1984 SC 1562.
8. Dharmender Kumar v. Usha Kumar AIR 1977 SC 2298.

decree after attempts had been made to settle the matter[9] . Constitutional validity of restitution of conjugal rights was also discussed. The court held that after considering Section 23 of the HMA, 1955, the suit of the husband was maintainable and upheld section 9 of the Hindu Marriage Act to be constitutional.

CRITICALANALYSIS

1. **Purpose of Restitution of Conjugal Rights does not get fulfilled and there is insincerity of the petitioner in maximum cases:**[10] Even though it has been time and again quoted by the courts that restitution of conjugal rights is a remedy to save the institution of marriage, in reality it has only been used as a legal way of obtaining the decree of divorce. The very fact that the non-compliance of the decree of restitution for one year makes the deserted spouse eligible for filing a decree for divorce makes it a vulnerable rule which has been misused a lot of times. This rule was made in order to promote reconciliation between the spouses but most of such marriages end up in a breakdown. After all, relationships cannot be forced upon anyone.

   In the HarvinderKaur case, Justice Rohtagi has agreed to the fact that the remedy of restitution of conjugal right 'may be outmoded or out of tunes with the time. The restitution decree in the scheme of the Act is apreparation for divorce if the parties do not come together.'[11]

2. It defeats the purpose of fundamental rights guaranteed under the Indian Constitution: Article 21 of the Indian Constitution guarantees the right to life and personal liberty to all the citizens of India. Restitution of conjugal rights as a concept tries to indirectly curtail the rights of both the parties to a marriage by forcing to cohabit in consortium even when their relationship is such that they can't live together. As a consequence, they are forced to live in together, without giving them the option of exercising their right to privacy and right to choose which are vital for a developing society.

   Right to privacy has been held to be an integral part of right to life and personal liberty.[12] It was held that privacy is an essential part of dignity and *'dignity cannot exist without*

9. Joginder Singh v. Smt. Pushpa AIR 1967 P&H 397.
10. Mr. Prashanth S.J, Hindu Women And Restitution Of Conjugal Rights: Do We Need The Remedy?,Manupatra (September 23, 2019 3:34 pm), http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=797c51f7-0615-4fa8-b92e-7d7d24d03689&txtsearch=Subject:%20Family%20Law.
11. HarvinderKaur v. Harmander Singh, AIR 1984 Del 66.
12. K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

privacy. Both reside within the inalienable values of life, liberty and freedom which the constitution has recognized. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.'[13] Forcing an individual to lead a life which is not of their choice defeats the purpose Article 21. When a decree for restitution of conjugal rights is enforced, the spouses are expected to live together in consortium[14] i.e. companionship which is a personal choice of an individual and cannot be forced upon them. It curtails our fundamental right to freedom under article 19 which gives us the freedom of expression and association.

3. **Right to make personal choices gets infringed and a disadvantageous situation for both men and women can be observed:** The word life in Article 21 denotes a life of dignity and not just animal life. It has been established by the Supreme Court of India that right to make choices regarding or privacy is an intrinsic part of the right to live a life of dignity. Whenever court orders in favor of restitution of conjugal rights, the right to self-determination indirectly gets curtailed as neither the husband nor the wife now has the choice of living a life of their choice.[15]

Let's face it that we live in a patriarchal society which has forever been functioning on the guiding principles of Manusmriti which has always looked down upon the weaker sections of the society and women. Women, of all, have had to face quite a lot and have been the victims of the worst of torture. Not stating that men have faced less of anything but women have always been portrayed and thought of as weak and fragile and have been abused to a greater extent. The continuance of this remedy is bound to lead to unwanted pregnancies, which is further an infringement of self-respect and self-fulfillment of women.

For their protection, it has been explicitly mentioned under Article 21 of the Indian Constitution that 'the woman's choice to make reproductive choices is also a dimension of "personal liberty"

13. K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.
14. Black's Law Dictionary, What is consortium?, Law Dictionary 2nd Ed. (September 26, 2019 3:24 pm) https://thelawdictionary.org/consortium/.
15. Paluck Sharma, Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws, Indian National Bar Association (September 25, 2019 4:00 pm), https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-indian-personal-laws/.

as understood under Article 21. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproduction choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on the use of contraceptive methods.' Agreed, that sexual intercourse is only an element of a marital relationship, but the fact that it is one of the most important elements cannot be denied because if keep the emotional bond at back-foot, the concept of marriage had initially emerged to give legality to the procreation of children who are a very important part of the evolution process, without whom the society cannot move forward and progress. The innocent men should also be allowed to use their right to choose and privacy to protect their dignity. Being men should not be used as a bias against our men. We live in the 21st century now and we know that women are not behind men in misusing legal provisions and gaining unnecessary sympathy. Take the example of the Dowry Act; no law has been more misused than this one in India for private gains.

Right to privacy is an integral part of life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. So if a spouse withdraws from the society of the other on being ill-treated, he/she should not be told to resume cohabitation despite their estranged relations [16]. They should be given the freedom of choice.

4. **Self-contradictory judgments:** In the Saroj Rani case, Justice SabyasachiMukherji referred to the case of T Sareetha and relying on the decision in HarvinderKaur, case held section 9 to be Constitutional. From Justice Rotagi's judgment, it can be clearly observed that he himself did not totally believe in the effectiveness of the concept of restitution of conjugal rights. Paragraph 78 of his judgment states that 'even the fervent and sincere hope of either of the spouses that there will be reconciliation cannot create a possibility of reconciliation where the other spouse is irreconcilable.

Whatever may be the cause of breakdown of marriage, if there is a withdrawal from matrimonial obligations with the intention of destroying the matrimonial consortium as well as physical separation, there is a clear sign that the marriage is at an end.[17]

On reading the judgments in HarvinderKaur and Saroj Rani case, it seems as if they have been

16. Ram Jethmalani v. Union of India, Writ Petition (C) No. 176 of 2009.
17. HarvinderKaur v. Harmander Singh, AIR 1984 Del 66.

given for the sake of giving since the statute mentioned the concept because in Para 85 and 87 of his judgment, Justice Rohtagi says that 'what has to be remembered is that it is not for the judges to rewrite the statute. It is for the legislature to amend and abrogate the law. As long as it does not change the law, we must learn to live with it.'[18]

5. **Constitution of India is the grundnorm and it has its full application in the private matters of an individual:** It was held in the Harvinder Kaur case that introduction of Constitutional law in home is like a bull in a china shop, but that is not the case. In India, all laws derive its powers from the Constitution and they become enforceable because of the existence of the Constitution. In Addition to that matters of our homes are deeply connected to our privacy and it has been held in the Puttaswamy judgment that 'the individual is the focal point of the Constitution because it is in the realization of individual rights that the collective well-being of the community is determined.

Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual liberty and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture. Privacy eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of a man.'[19]

SUGGESTIONS:

In today's world, when literacy is growing fast it is impractical to think that any to people would want to consent to living together in cohabitation even after their relationship has worsened. Plus, most of the people now-a-days are not even dependent on each other for maintenance. They are either earning or have some inherited property to take them through the ups and downs of life.

In the poverty stricken sections of the society, restitution of conjugal rights is a far-fetched concept as they have more important problems to tackle first like hunger and thurst. Also, the large amount of money involved in the litigation process is not affordable by many and the awareness regarding State Legal Services Authorities is not yet widespread, let alone the

18. HarvinderKaur v. Harmander Singh, AIR 1984 Del 66.
19. K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

awareness of the law.

Instead of forcing people to stay together against their wills, the following solutions can be sought to:

Out of Court Settlements:

People should be given an option of out of court settlements in the form of conciliation and mediation, where the atmosphere is less formal. For family matters it is necessary that things should be looked upon at with a sensitive mind.

Judges should be trained specially to deal with family matters. Even though there is already such provision but it has not been implemented properly. Family matters cannot be and should not be dealt with a firm approach. They constitute the basic unit of a society and a more practical approach should be made towards solving family disputes.

Repealing Old Laws and Formulating New Laws:

The provision of restitution of conjugal rights must be repealed from all the statutes as it is only worsening the marital ties instead of reconciling the fighting couples.

There is strong need for the formulation of pragmatic laws in India as the western influence on our society is growing by the hour which is making the people more prone to easier breakdown of marriages as marriage is a sacramental tie only in India.

Awareness Campaigns:

Awareness campaigning should be done once in a while by the administrative authorities to sensitize the people regarding the importance of marriage and issues revolving around it.

Government Intervention:

No matter how much we believe that no state intervention should happen in personal matters, there has to be some level of intervention because governments make laws and enforce legislations. Without their role, the society would become an uncontrollable crowd of unregulated people doing whatever they want to do.

CONCLUSION:

The concept of restitution of conjugal right is a foreign concept and made its way to India with the advent of the British administration when India was a colony under the crown rule. Somehow, even after the British left India, this concept managed to stay put. While the Hindu Marriage Act and its provisions were discussed before the enactment of the Act there were long

heated debates on whether the section should be included.

The funny thing here is that the countries which propounded the concept and took it further have now repealed all provisions relating to it calling restitution of conjugal rights to be an illogical and futile law. In today's world, when literacy is growing fast it is impractical to think that any to people would want to consent to living together in cohabitation even after their relationship has worsened. Plus, most of the people now-a-days are not even dependent on each other for maintenance. They are either earning or have some inherited property to take them through the ups and downs of life.

In the poverty stricken sections of the society, restitution of conjugal rights is a far-fetched concept as they have more important problems to tackle first like hunger and thirst. Also, the large amount of money involved in the litigation process is not affordable by many and the awareness regarding State Legal Services Authorities is not yet widespread, let alone the awareness of the law.

At the end, it can be concluded that the human society is still growing and so are the intricacies of their relations. Archaic laws must be repealed as soon as possible and new laws should be formulated which can handle all the new complexities with an open thought process and pragmatic view. If repealing is not the solution then at least, logical amendments should be done.

"If we desire respect for the law, we must first make the law respectable."

-Louis D. Brandeis

RIGHTS OF DIFFERENTLY-ABLED PERSON TO ACCESS HIGHER EDUCATION AND EMPLOYMENT: AN APPRAISAL

-Dr Sanjeeve Gowda G S*

1. INTRODUCTION

Every mother do have a confidence that her child would born, grow and lead a hale and healthy life and never fall prey to any kind of physiological or psychological disorder either at birth or thereafter. Many a time almighty do not belie her buoyancy. To our bad luck some children may bear with innate physiological or psychological 'barriers' either on birth or subsequently owing to accident, surgery, medicinal side effect etc., which would cripple him from, effectively and efficiently, participating in societal activities. This eternal disability is undermining their level of confidence as they are being looked down upon. Today it is, most fiery issue, drawing the attention of everyone with a hope of finding resolute means to resolve. An attempt is made herein to unravel gamut of it.

Today, there are millions of people living with one or multiple disabilities. In India, the population with disabilities is around 26.8 million, constituting 2.21% of India's total population, if one goes by the 2011 population census data.[1] There has been a marginal increase in the differently-abled population in India, with the figure rising from 21.9 million in 2001 to 26.8 million in 10 years. In an era where 'inclusive development' is being emphasised as the right path towards sustainable development, focussed initiatives for the welfare of disabled persons are essential.Despite constituting such a significant proportion of the total population, persons with disabilities live a very challenging life. Their 'disability' is often seen as their 'inability' by many and people in general have preconceived notions about their capabilities. There have been many cases where employers have denied a job to a candidate with a disability, citing the usual 'not found suitable'. The main problem lies in the psyche of a significant mass which considers persons with disabilities a liability, and this leads to discrimination and harassment against them and their isolation from the mainstream.

Persons with disabilities[2] face several forms of discrimination and have reduced access to

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1. Disabled Persons in India: A statistical profile 2016. A report by Ministry of Statistics and Programme Implementation, Govt. of India(Sept. 10, 2019, 10.00 AM), http://mospi.nic.in/sites/default/files/publication_reports/Disabled_persons_in_India_2016.pdf
2. Disabled is now addressed as Divyanginstead of Viklang.The Department of Empowerment of Persons with Disabilities will now be known as 'Divyangjan' SashaktikaranVibhag in Hindi, dropping the word 'viklangjan' from its previous nomenclature.

education, employment and other socio-economic opportunities. Dearth of infrastructural facilities to have access for the physically challenged-ramps, railings and accessible wash rooms – is just one of the reasons which prevent them from pursuing their studies. Trained staff and alternative teaching aides are seldom provided. This would impede differently-abled persons to compete with their peers.

The Constitutional mandate casts obligation on the State machineries to unveil legal measures for the protection and promotion of the interest of Differently-Abled Persons. The Convention on the Rights of Persons with Disabilities, 2006, aims to - empower persons with disabilities, -

a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
b) non-discrimination;
c) full and effective participation and inclusion in society;
d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
e) equality of opportunity;
f) accessibility;
g) equality between men and women;
h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

In furtherance of this Convention, being a party, the State promulgated, on 27th December, 2016, the Rights of Persons with Disabilities Act, 2016,[3] to facilitate the Differently-Abled Persons to lead 'barrierfree life[4]. United Nations General Assembly adopted it on the 13th day of December, 2006 and India ratified the said Convention on the 1st day of October, 2007.

2. CONCEPT OF DISABILITY

Disability is complex, dynamic, multidimensional, and contested. A disability is a result of the interaction between a person with a health condition and a particular environmental context. Individuals with similar health conditions may not be similarly disabled or share the same perception of their disability, depending on their environmental adaptations. Disabled people are the people with physical or mental incapacities, Disability generally varies in severity.

3. *Supra* note 1.
4. Right of Person with Disability Act 2016 §2(c).

Disability has been defined based on an evolving and dynamic concept, the nature of disabilities have been increased from existing 7 to 21[5] and the central government will have the power to add more types of disabilities.[6]

3. INTERNATIONAL INITIATIVES

A clamour for the rights of Differently Abled Persons hold its sway in, 1961, international arena with the adoption of Declaration on Social Progress and Development was adopted by the General Assembly of United Nations. A movement was initiated, in 1970s, to consider it as a human right issue. The concern for Differently Abled Persons made the UN General Assembly to proclaim the year '1981' as International Year of Disabled Persons in 1976. Thereafter, the UN declared 1983-1992 as Decade of Disabled Persons. The UN Convention on the Rights of Persons with Disabilities (UNCRPD), 2006 was a big leap towards viewing persons as "subjects with rights" and not "objects of charity".[7] Further, the 2030 Agenda for Sustainable Development pledges to "leave no one behind" urging that persons with disabilities must be both "beneficiaries and agents of change". However, the World Bank states that attitudinal, institutional, and infrastructural barriers remain with the 15% of the world's population who experiences some form of disability and that they "on average, as a group, are more likely to experience adverse socio-economic outcomes than persons without disabilities".

4. SCENARIO IN INDIA

The India society has been moving from charity to welfare and culminating in right based approach for persons with disabilities. Hitherto, thrust has been given to medical model of disability. Now the paradigm shift is made towards social model emphasizing the need to find attitudinal change bring Differently-Abled Persons to the mainstream and to provide them equal opportunities in order to have a perspective change viewing people with disabilities as subjects and not as objects.

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5. Blindness; Low-vision; Leprosy Cured persons; Hearing Impairment (deaf and hard of hearing); Locomotor Disability; Dwarfism; Intellectual Disability; Mental Illness; Autism Spectrum Disorder; Cerebral Palsy; Muscular Dystrophy; Chronic Neurological conditions; Specific Learning Disabilities; Multiple Sclerosis; Speech and Language disability; Thalassemia; Haemophilia; Sickle Cell disease; Multiple Disabilities including deaf blindness; Acid Attack Victim; Parkinson's disease.
6. The definition of disability as provided by UN Convention on Rights of Persons with Disabilities (UNCRPD) states that "Persons with disabilities include those who have longterm physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their fulland effective participation in society on an equal basis with others." But sometimes, disabled persons prove themselves to be "differently abled" by their intellectuality and positive outlook towards the life.
7. India is a signatory to the UNCRPD and ratified it in 2007.

On realizing the significance of Constitutional mandate[8] the Government accorded statutory status to the rights of differently-abled persons has and assured them with equal opportunities in education, health care, employment etc.[9] accordingly, several policies and schemes are unveiled in tune with the policies, of the Government, aiming at inclusive society.[10] National Policy for Persons with Disabilities, 2006, has termed Differently-Abled Persons as valuable human resource of the country and seeks to create an environment that provides equal opportunities, protection of their rights and full participation in society.

In this regard, it is felt that the Rights of Persons with Disabilities Act, 2016, would offer everlasting remedy to protect and to promote the rights of Differently-Abled Persons. This Act is offshoot of Constitutional mandate vis-a-vis United Nations Convention on the Rights of Persons with Disabilities, 2008 (UNCRPD). This has paved the way to attain legitimate expectations of Differently-Abled Persons.

4.1. THE RIGHT OF THE PERSON WITH DISABILITY ACT, 2016

The Rights of Persons with Disabilities Act, 2016, was promulgated on 27th December, 2016 by replacing the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995,[11] and in furtherance of United Nations Convention on the Rights of Persons with Disabilities,2006, and for matters connected therewith or incidental thereto. The object of the Act is to empower person with disability by providing equality in treatment and opportunities, accessibility to general services, non-discriminating behaviour and respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons. The Act made a move from 'concessional model' to a 'social one' by adopting 'inclusive policy'. Inclusion of acid-attack victims and people with learning disabilities, Parkinson's disease, blood disorders, speech and language disabilities amongst others. In the process of accomplishing the avowed objectives of the Act provisions are made for reasonable accommodation, accessibility, inclusive education, employment security, research and surveys, proactive measures to contain the issue of disability, protection against violence, legal guardianship, rights to appeal, etc.

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8. INDIA CONST. art. 14, 16, 21,38, 41, 42, 43, 46, 47, 48, 249 & 253.
9. The Mental Health Act, 1987, the Rehabilitation Council of India Act, 1992, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities act, 1999, Protection of Human Rights Act, 1993, Employees Compensation Act, 1923, the Employees State Insurance Act, 1948, and Public Liability Insurance Act, 1991, The Juvenile Justice (Care and Protection) Act, 2015.
10. Accessible Indian campaign or Sugamya Bharat Abhiyan, Deendayal Disabled Rehabilitation Scheme.
11. *Supra* note 1.

The Act was commended as it has increased the number of identified disabilities from seven to 21 and ordained to reserve not less than 4% in employment. Individual with at least 40 % of disability is entitled to get the benefits of Government schemes. It speaks about inclusive education and penalties for offences against Persons with Disabilities (PwDs). The Act also made provisions for the constitution of Special Courts (for speedy trial), national fund and a state fund for persons with disabilities.

PROHIBITION OF DISCRIMINATION

The Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995, did not expressly prohibit discriminatory treatment to the persons with Disabilities. Whereas, the Act of 2016, aims to annihilate all forms of discrimination which may include any distinction, exclusion, restriction on the basis of disability with a purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and denial of reasonable accommodation[12]. However, the Act strangely makes the clauses on non-discrimination in employment mandatory only in government establishments. Persons with disability[13] have a right to get higher education and not making adequate provisions to facilitate their proper education would amount to "discrimination",

RIGHT TO EDUCATION

In the matter of higher education, the Act provides a strong set of measures to ensure that disabled students have access to Colleges and Universities

RESERVATION IN HIGHER EDUCATION

Education is an all pervasive right of an individual. It cannot be denied on the ground of disabilities. To ensure the rights of Persons with Disabilities to pursue Higher Education it is ordained that - Section 32 -

(1) All Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than five per cent seats for persons with benchmark disabilities.[14]

(2) The persons with benchmark disabilities shall be given an upper age relaxation of five

12. Right of Person with Disability Act, 2016., § 2(h)
13. Person with Disability: means any person with long term physical, mental, intellectual or sensory impairments which on interacting with barriers hinders effective and equal growth in the society.
14. Persons with benchmark disabilities as those with at least 40% of any of the above-specified disabilities.

years for admission in institutions of higher education."

Albeit,at the outset afore mentioned provisions appears to be attractive in empowering Persons with Disabilities, in fact would give room for self-centric people to take deviation from the enjoined path and deny entitlement owing to lose knitted provisions e.g. recurring clauses like *'within the limit of their economic capacity and development', 'without imposing a disproportionate or undue burden', 'the extension of time depending on their state of preparedness and other related parameters', 'cannot be discriminated on the ground of disability.* Consequently, the goal of empowerment may well remain elusive and undermine the interest of Persons with Disabilities.

All the concerns of the people with disabilities haven't been addressed by the 2016 Act in entirety. Cushioning offered to private establishments is glaring. At first look, the private sector seems to be under the surveillance of the Act. However, it envelops a few areas leaving the rest at their disposition like - barrier-free access at private hospitals and among service-providers, or providing incentives in the case of employment, in which at least 5% of the workforce is made up of or reserved for persons with disabilities and an equal opportunity policy. Today, major players are private sector than public sector. Hence, this vacuum needs to be properly addressed. Trust, Disability Advisory Board would sit in the driving seat in this behalf.

All India Survey on Higher Education conducted by Ministry for Human Resource Development (MHRD) reveals that enrolment of Persons with Disability (PwDs) students in higher education has been increased. Thanks to the Government and University Grant Commission (UGC) has launched many schemes[15] and facilities to enhance the enrolment of the Differently-Abled Students in Higher Education. However, these schemes have not been fully implemented in all the higher educational institutions. The efficiency of the State machineries in providing equal educational opportunities to disabled/differently-able persons in higher education institutions still remains obscure. Thus, it warrants immediate attention to ease-out educational/pedagogical as well as infrastructural barriers that force exclusion of the differently-able persons in higher education.

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15. Upgradation of existing Polytechnics to integrate the Persons with Disabilities (PwD); Higher Education for Persons with Special Needs (HEPSN); Teacher preparation in Special Education Scheme (TEPSE); Financial Assistance to Visually Challenges Teachers (FAVCT); UGC also provide relaxations to PwDs in the National EligibilityTest; Saksham Scholarship Scheme; Reservation in admissions; Facilitating PwD students under Centrally Sponsored Scheme for Integrating PwDs in the mainstream of Technical and Vocational Education;Expert Committee constituted to identify the courses according to the categories of disabilities

Even institutions of higher education shall come forward on its own to satiate the needs of Differently-Abled Persons. But seldom respond to the call.

RIGHT TO EMPLOYMENT

Everyone is aspiring to, be self-reliant, have an employment to possess independent source of income. No one is bereft of it, whether he is rich or poor, haves or have nots, privileged or under-privileged, abled or disabled. Onus to generate employment is on the shoulder of the Government when an individual fails. Of course one has to imbibe employable traits. Employment is a key factor in the process of empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability but for social and practical barrier that prevent them from joining the workforce. Resultantly, many disabled people live in poverty and their conditions are deplorable. In corollary, they find hard to make a useful contribution to their own wellbeing and the community.

According to the employment projection given in the Eleventh Plan, in the Chapter 'Employment Perspective and Labour Policy', "58 million job opportunities will be created in the Eleventh Plan period leading to a reduction in the unemployment rate to below 5%. Over the longer period up to 2016–17, spanning the Eleventh and Twelfth Plan periods, the additional employment opportunities created are estimated at 116 million. The unemployment rate at the end of the Twelfth Plan period is projected to fall to a little over 1%."

There is sea difference in, India, the ratio of employment between the people with and without disabilities. This variance cannot be scaled down unless the employment issues of people with disabilities, who constitute about 5-6% of the population, is properly addressed. Government and the Private Sector, in unison, shall go for proactive initiative to ensure berth for Persons with Disability in their establishments.

The appropriate Government owes a duty to constitute an expert committee to identify posts in the establishments suiting to persons with benchmark disabilities[16] to facilitate the Authorities concerned to reserve such posts to the Persons with Disabilities and the same shall be subjected

16. Person with Benchmark Disability:Persons with "benchmark disabilities" are defined as those certified to have at least 40 per cent of the disabilities in Blindness; Low-vision; Leprosy Cured persons; Hearing Impairment (deaf and hard of hearing); Locomotor Disability; Dwarfism; Intellectual Disability; Mental Illness; Autism Spectrum Disorder; Cerebral Palsy; Muscular Dystrophy; Chronic Neurological conditions; Specific Learning Disabilities; Multiple Sclerosis; Speech and Language disability; Thalassemia; Hemophilia; Sickle Cell disease; Multiple Disabilities including deaf blindness; Acid Attack Victim; Parkinson's disease.

to periodic review at an interval not exceeding three years, Section 33. The posts to be reserved shall be not less than *four per cent* of the total number of vacancies in the cadre strength in each group of posts, detailed hereunder, meant to be filled with persons with benchmark disabilities[17]

Sl.No	Particulars	Percent of reservation
(a)	Blindness and low vision	One percent
(b)	Deaf and hard of hearing	One percent
(c)	Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy	One percent
(d)	Autism, intellectual disability, specific learning disability and mental illness	One percent
(e)	Multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities	

The posts reserved may be carried forward to the succeeding recruitment year and it may be inter-changed too subject to the approval of the appropriate Government. However, an employer may appoint any other person without disability when no person with disability is available for the post in that year.The employers in private sector do get incentives if they employ, minimum of five per cent of their work force, persons with benchmark disability[18].

Private establishments too have statutory obligationstowards employees who are having benchmark disability i.e. setting out of job roles suitable for persons with benchmark disability if it is having 20 or more employees, recruitment process for such roles, trainings provided for these roles, preference in transfer and posting, special leave, assistive devices and measures taken to ensure barrier-free accessibility, appointment of liaison officer, maintenance of records detailing the number of PwDs employed, names, gender and addresses their date of joining, name, gender, addresses, nature of disabilities, nature of work assigned, facilities offered e.g. elevator, ramps, wheel chair, walkways etc. as per standard prescribed, registration of establishment with the Authorities designated and display of particulars/ policy on its official

17. Right of Person with Disability Act, 2016§34.
18. Right of Person with Disability Act, 2016§35.

website if feasible otherwise displaying the same at a conspicuous place of its premises. Failure to comply these statutory obligations enables the Authorities to impose fine, on the erring employers, up to INR 10,000 in the first instance and up to INR 500,000 for subsequent non-compliances.

5. CHALLENGES BEFORE DIFFERENTLY ABLED PERSONS

Differently abled persons, in India, are facing certain challenges owing to their disabilities which are catalogued as under -

a. Inaccessibility- Most of the government buildings or private offices and other infrastructure are inaccessible for disabling population.

b. Low Representation-The Disabled person has a very low representative in fields like government jobs, politics, economy etc.

c. Barriers to Health Care- The lack of appropriate services for people with disabilities is a significant barrier to health care. Affordability of health service and transportation are two main reasons why people with disabilities do not receive needed health care.

d. Attitudinal Barriers- Attitudinal barriers which help in stigmatisation and discrimination deny people with disabilities their dignity and potential and are one of the greatest obstacles to achieving equality of opportunity and social integration.

e. Inaccessible communication systems prevent access to information and knowledge and opportunities to participate. Lack of services or problems with service delivery also restricts the participation of people with disabilities.

f. Institutional Barriers- Institutional barriers include many laws, policies, strategies or practices that discriminate against people with disabilities. Discrimination may not be intended but systems can indirectly exclude people with disabilities by not taking their needs into account.

g. Inadequate Data & Statistics- The lack of rigorous and comparable Data and statics, combined with a lack of evidence on a programme that works, lack of planning, often delay in understanding and actions on disability inclusion.

h. Poor Implementation- Poor implementing policies and plans can prevent the inclusion of people with disabilities.

i. Major barriers identified in higher education and employment

• Environmental Barriers: That is assistive tools/computer software, institutions hesitate

to take up the financial support from UGC and other agencies for helping differently able, personal and interpersonal problems,

- Educational/Pedagogical Barriers: Disabled students face a lot of issues right from the application stage to admission to attending classes to examination and placement. Rigid curriculum frame and rigid methods of teaching.[19]
- Psycho-Social Barriers: lack of support from teachers or the lack of involvement in learning activities.
- Lack of Assistive Devices: Assistive devices are great enablers. They open up opportunities, improve efficiency and enable people with disabilities to work up to their potential. However, majority of disabled people in India have no access to assistive devices.

Physical access is the primary problem in almost all these places. Faculty apathy and under-preparedness to deal with the needs of the students with disabilities including peer insensitivity is a spiteful reality.

Thus, Differently-abled people face many physical and systemic barriers but cognitive and attitudinal barriers are the major concerns. Our society at large, teachers and employers do not expect much from differently-abled people, which hinders them to prove their excellence and worth as any ordinary citizen would normally have. These attitudes keep people away from appreciating and experiencing the full potential of differently-abled. The most pervasive negative attitude is focusing on a person's disability rather than on an individual's abilities.

We need to understand that differently-abled people do not need patronization and the drive to relegate them to low-skill jobs, setting different job standards; one should not expect a worker

19. No Sign language Interpreters in Colleges-"Adarsh College in Chamarajpet, Bangalore has over 10 deaf students and initially provided one interpreter for all of these - who ran from class to class - and then they added another but it did not increase the quality or quantity substantially. Now both have left, as a result of feeling frustrated about not being able to provide good services and the low pay, and so the students have no interpreters. What was especially egregious is that the parents were required to chip in Rs. 2000/- towards the interpreters' pay; Disabled girl refused hostel room in Pune law college-A 17 year-old disabled girl has bagged a seat in a prestigious law college, one among the very few disabled who go in for higher studies in India, but her hopes of becoming a lawyer may be dashed as the college has denied her 'suitable hostel accommodation'; Pooja Sharma, who is crippled below the waist, gained admission in Symbiosis Law College, Pune, one of the top colleges in India. She had scored 71 percent in the Class 12 board examinations. 'As a physically challenged girl, don't I have the right to study like a normal student? Can't I dream big? Can't I ever go out of my city to pursue higher education?' 'I want to become a reputed lawyer and serve my country,' Sharma told IANS. 'The college has backtracked from its promise of giving me a suitable accommodation – a single room in the hostel,' said Sharma, who is a resident of Meerut. She is now in Delhi to take the help of a disabled rights organisation.

with a disability to simply be content by appreciating the opportunity he or she gets to work instead of demanding equal pay, benefits, opportunity and access to workplace amenities.

Access to education and employment will remain a dream for the differently-abled population, even in our strongholds of higher learning, unless we work to break these cognitive and attitudinal barriers.

6. MEANS TO ACCORD HIGHER REPRESENTATION OF PERSONS WITH DISABILITY

Differently abled students have offered certain suggestion to scale down barriers in the institutions they are as under:

1. Mandate physically accessible premises at all public buildings[20]– to accommodate wheel chair users, visual and hearing impaired to use these facilities without impediments. Laws exist even today. What is required is courageous and empathetic implementation.

2. Barriers to accessing the curriculum need to be addressed.Design and implement new inclusive assessment processes. Most of current ones are archaic and obsolete any way.

3. Sensitization of faculty and students on inclusive growth – if they can provide a supportive environment, the students with disabilities will have the strength and courage to face the challenges with more confidence. NGOs can help in this.

4. Monitoring and evaluation of statistics and services for disabled -students also should be streamlined as it will end up purposeful discrimination to the disabled and pave clear pathways for further development.

5. Resource units or help desksare to be provided in the institutions as well as in the hostels

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20. In Disabled Rights Group v. Union of India, (2018)2 S.C.C. 397(India) The Disability Law Initiative has submitted similar arguments as outlined above. The case was prompted by the inability of a wheel chair bound girl to pursue her education in a law college because of inaccessible campus and classroom facilities.
The petition described the difficulties faced by the girl who was admitted to the law college of a reputed university. Requests for reasonable adjustments, such as modifications in the hostel bathroom and the availability of an assistant when required, were not agreed to by the university, whose position was that for such facilities, the girl would need to obtain accommodation off-campus. As a result, the girl and her family had to give up their aspirations and return to their hometown in frustration. The girl later had to pursue her higher education in a college located close to her town so that her family could provide her the necessary support.
When the matter had earlier come before the Court, DLI argued that the 1995 Disability Act mandated making campuses accessible. Also, the University Grants Commission had schemes to fund colleges for this purpose. The Court summoned the Bar Council of India, the apex body for legal education, which agreed that the concerned university and college had been remiss in fulfilling their obligations to the disabled students as required under the 1995 Act. Thereafter, BCI issued mandatory regulations to all law colleges to make their campuses and courses accessible. DLI further argued that the matter did not stop there, as the matter raised the larger issue of accessible higher education all over India. Following the submissions made by DLI, the scope of the petition has been expanded to include all law colleges and institutes of higher education in India.

for providing help and assistance to the students with disability. Self-help groups with involvement of NSS units can be an easy solution.

6. In many cases, in the case of students from poor social settings, the scholarship amounts are given for the family. Instead, a part of the scholarship of the assistance may be provided in the form of assistive devices which will inevitably help them to become more 'abled'.

7. Current provision for disabled students places too much emphasis on providing them with individual support to overcome institutional barriers, rather than on the more fundamental institutional change. In addition to this, more systematic sustainable changes to make the institutions disabled friendly should be made.

8. Employment in Government & Public Sector:Identification of Jobs- At present, the identification of appropriate jobs for disabled people is done in an ad hoc and arbitrary manner. Only 10% of the jobs are identified for disabled people. Eleventh Five Year Plan states that "There is a need to have this task performed by a professional group with the involvement of Disabled Peoples' Organisations". Government should constitute a task force immediately for revising the job list. The task force should analyse jobs in each department and not occupations or positions. There could be committees department wise, with representation of disabled people, particularly disabled employees of that Department to carry out the task. The concept of 'Identification of jobs' itself has been questioned by many people including the World Bank, which has recommended that it should be dropped. There is a need for developing a system / process which is non-discriminatory and inclusive. Campaign to fill Backlog Vacancies Only 0.44% of all the posts in the Government & public sector companies have been filled by disabled people. Eleventh Plan States, "The backlog of vacancies for persons with disability continues to be large. This backlog should be cleared in a time-bound manner and in a campaign mode." Government should immediately launch a campaign and set clear targets to fill the backlog vacancies for people with disability.

7. CONCLUSION

The Rights of Persons with Disabilities Act, 2016, is, a de-novo effort of the legislature, aiming to ameliorate the conditions of persons with disability and find avenues to enhance prospect of their employability. In furtherance of this object, the Act has underlined the significance of educating persons with disability with higher learning and training. In corollary, the Act enjoins that higher educational institutions shall reserve at least - 5% seats to differently abled students

and 4% of the total number of vacancies in the cadre strength in each group of posts in Government and private establishments. The public/ private institutions vis-à-vis employers owes obligation to offer facilities to Persons with Disability to have easy access. They need to submit compliance report to the Authorities designated. Any failure attracts fine up to INR 10,000 in the first instance and up to INR 500,000 for subsequent non-compliances.

The Legislature, indeed, anticipate untiring efforts from the citizenry to aid Persons with Disabilities to facilitate them to accept the challenges on par with the abled persons. Failing which intent of the Legislature remains only on paper.

ROLE OF ELECTION COMMISSION OF INDIA IN CURBING ELECTORAL OFFENCES UNDER THE REPRESENTATION OF PEOPLE ACT, 1951

-Dr Ajay Ranga & Mr Purushotam

"The Ballot is Stronger than the Bullet"

-Abraham Lincoln[1]

INTRODUCTION

The purity and freedom of elections can be ensured only if the supervisory arrangements for ensuring efficient and impartial functioning of the electoral machinery are done by an independent authority. For that purpose the Constitution[2] provides for an independent Election Commission.[3] The Election Commission (herein after EC) heads the entire election machinery in the country and wields plenary powers for taking appropriate steps to ensure free and fair elections. The Commission enjoys wide executive and quasi-judicial powers; it is described as a reservoir of power.[4] The EC plays a very important role in conducting free and fair elections. There are provisions provided both under Indian Penal Code, 1860 and Representation of People Act of 1951 for maintaining the purity and sanctity of the electoral process. Besides, various corrupt practices to maintain the purity of the election process and conduct of free and fair elections, certain undesirable activities have also been declared as punishable electoral offences. Some of such electoral offences had been introduced into the Indian Penal Code, 1860 in the year 1920, on before the passing of the Representation of the People Act, 1951 and the rest are traceable in the Act itself. Section 8[5] of the Act provides for disqualifications for membership of Parliament and State Legislative Assemblies on conviction for certain offences.

In addition to the corrupt practices at elections, various acts of commission and omission have been termed as 'electoral offences'. While the commission of a corrupt practice, if found proved, might cost the elected candidate his election, the commission of an electoral offence would expose a person who commits it for penal consequences. Further a person committing electoral

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1. https://www.news18.com/photogallery/politics/elections-2019-5-famous-quotes-on-voting-and-democracy-2098231-3.html (Sept. 21, 2019, 17:20 PM).
2. Const.of Ind. art. 324.
3. K.C.Sunny,Corrupt Practices in Election Law 241(Eastern Book Company, 2012).
4. Mohinder Singh v. Chief Election Commissioner, 1 SCC 405 (1978).
5. The Representation of the People Act, Section 8 (1951).

offence is liable to punishment irrespective of the fact whether such act was done by him with the consent of the candidate or not. Electoral offences are contained in Part-VII, Chapter-III in sections 125 to 136 of the Representation of People Act of 1951. The electoral offences under sections 125, 133 and 135-A, are also corrupt practices under section 123 of the Act. The following acts are regarded as electoral offences:[6]

PROMOTING ENMITY BETWEEN CLASSES IN CONNECTION WITH ELECTION:

Article 19of the Indian Constitution provides the freedom of speech and expression to the citizen of India as a Fundamental Right. But this right is provided subject to some restrictions. Apart from section 125 of the RP Act of 1951, section 153A of IPC penalizes 'promoting of enmity between different groups on the grounds of religion, race, place of birth, residence, language, etc, and doing acts prejudicial to maintenance of harmony.' Supreme Court of India in the case of ***Brij Bhushan v. State of Delhi***[7] held that "Public order was allied to the public safety and considered equivalent to security of the State.' The object of the provisions is to establish peace and harmony in the society. If any person is found guilty of the offence under section 125 of the Act, then the provisions provides the punishment for imprisonment which may extent to 3 years, or with fine or with both.

Filling False Affidavit:

Section 125A[8] provides for punishment for giving false information as directed under section 33A of the Act by furnishing an affidavit. This sub-section was inserted in 2002.In the case of ***Union of India v. Association for Democratic Reforms***,[9] the Supreme Court directed the Election Commission to call for an affidavit by issuing necessary order in exercise of its power under Article 324 from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, certain information in relation to his/her candidature.[10]

After the issuance of directions by the Election Commission the President of India promulgated an Ordinance named Representation of the People (Amendment) Ordinance, 2002[11] by which sections 33A, 33B and 125A were inserted in the Act. Later the ordinance was replaced by

6. The Representation of the People Act, Section 125 to 136,(1951).
7. AIR 1951 SC 129.
8. The Representation of People Act, Section 125, (1951).
9. 5 SCC 294 (2002).
10. *Ibid.*
11. The Representation of the People (Amendment) Act, 2002.

Representation of the People (Third Amendment) Act, 2002.Section 33 of the Act provides for the presentation of nomination paper and requirements for a valid nomination and the newly inserted section 33A clarifies that along with the information required to furnish with the nomination paper the candidate has to furnish information about his past criminal record if any.[12] It is important that the section is an important one and rightly placed under the Act since the information furnished through an affidavit by a candidate about his past deeds is displayed for public at large and a voter may make up his mind about to whom he or she should vote for. The EC verifies the contents of the affidavit filed by the candidate and takes strict action in case of the information is not correct given.[13]

PROHIBITION REGARDING PUBLIC MEETINGS DURING THE SPECIFIED PERIOD:

The election propaganda in the form of public meetings in the polling area is to end 48 hours before the hour fixed for the conclusion of the poll for any election. It is not merely the convening or holding of a public meeting during this prohibited period which is barred; but attending to any such meeting is equally an offence. Any person who contravenes the above provisions of law is liable to be punished with fine which may extent to rupees two hundred and fifty. Section 126[14] of the Act prohibits the holding or attending any public meeting during period of forty-eight hours ending with hours fixed for conclusion of poll. If any candidate or the political party violates the provisions of section 126 of the Act, the EC can recommend registration of First Information Report against such candidate.[15]

BAN ON EXIT POLL:

Section 126A[16]prohibits regarding publication by means of print or electronic media any result of any exit poll without the permission of EC. The sub-section was inserted in the Act by 2009 Amendment as the electronic media has gained so much power to influence the voters when the election is in process. On 14 May 2019 the Election Commission of India (herein after ECI)issued notice to three media houses for displaying poll surveys predicting results of Lok Sabha elections.[17]

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12. The Representation of People Act, Section 33A, (1951).
13. M. Chandra v. M. Thangmuthu, AIR 2011 SC 146.
14. The Representation of People Act, Section 126, (1951).
15. *Ibid.*
16. The Representation of People Act,Section 126-A, (1951).
17. The Indian Express 3, 15 May 2019.

If the offence of section 126B[18] of the Act is committed by a company the person who is the in charge of and was responsible for the conduct of the business of the company and also the company shall be liable to proceed against and be punished accordingly. Predications by astrologers, tarot readers and political analysts on results cannot be published or broadcast by the media, bypassing the Representation of the People Act provision that bars exit polls during the conduct of elections, according to an EC advisory issued on 30/03/2017. The Election Commission observed that "despite its notification prohibiting exit polls from February 4 till March 9 evening, some T.V. channels aired programmes projecting the number of seats likely to be won by political parties in the recently concluded Assembly elections."[19]

DISTURBANCE AT ELECTION MEETINGS:

Disturbance at an election meeting is prohibited and it is an electoral offence to do so. Any person who at a public meeting of a political character acts, or incites others to act, in a disorderly manner for the purpose of preventing the transition of business for which a meeting has been called commits an electoral offence and is liable for punishment with fine which may extent to rupees two hundred and fifty. Public meetings which are held between the date of issue of notification calling the election and the date on which such election ends only are covered by the above prohibition.[20] The disturbance caused at election meetings during the other periods would be governed by the general law. If the Chairman of an election meeting reports to any police officer about any person acting in disorderly manner at the meeting, such police officer may require that person to declare to him immediately his name and address and if that person refuses or fails to declare his name and address or if the police officer reasonably suspects him of giving a false name or address the police officer may arrest such person without warrant.[21]

Section 127[22] of the Act cautions regarding disturbing at an election meeting. It prohibits any person who incites other and prevent the transaction of the business of the meeting shall be punished for imprisonment of six months and a fine of two thousand rupees or both. It is pertinent to note that the punishment was enhanced to the present limits by amending the section in the year 1996 and by the same amending Act sub-section 1-A was inserted to make the offence a cognizable one. If any candidate or his supporters violates the provisions of the section the EC

18. The Representation of People Act, Section 126-B, (1951).
19. The Hindu(Mohali), March 31, 2017, p.10.
21. S.L. Shakdher, The Law and Practice of Elections in India268 (National Publishing House, 1992).
21. *Ibid.*
22. The Representation of People Act, Section 127, (1951).

recommends the registration of FIR against such candidate or persons involved in such activities.

RESTRICTION ON PRINTING OF PAMPHLETS OR POSTERS:

The election law imposes certain restriction on the printing and publication of posters, pamphlets, etc. by any person. These restrictions have been imposed with a view to establishing the identity of publisher and printer of such documents so that if any such document contains any matter or material which is illegal or objectionable like appeal on ground of religion, race, caste, community or language or character assassination of any opponent etc, necessary punitive or preventive action nay be taken against the persons concerned. Therefore every election pamphlet or poster must bear on its format the name and address of its publisher as well as its printer. Election pamphlet or poster would cover any printed pamphlet, hand-bill or other documents distributed for the purpose of promoting or prejudicing the election of a candidate or group of candidates or any placard or poster having references to an election. However, any hand bill, placard merely announcing the date and time, place and other particulars of an election meeting or written instructions to election agents or workers does not come within the purview of the above restrictions. Any process of multiplying copies of a document, other than copying it by hand would be treated as printing.

The printer of any such document must obtain from the publisher a declaration (in duplicate) as to his identity signed by him and attested by two person to whom the publisher is personally known. Further the printer is also required to send, within a reasonable time of the printing of such documents, one copy of the declaration of the publisher together with one copy of the printed document to the Chief Election Officer where such printing is done in the capital of a State, or to the DM of the District in which it is printed in any other case. Any contravention of the aforesaid provisions is punishable with imprisonment for a term which may extent to six months, or with fine which may extent to rupees two thousands or with both.[23]

Section 127-A[24] of the Act lays down special requirements for printing any pamphlets or posters in connection with election and provides for punishment with imprisonment for six months or fine up to two thousand rupees or both for violation of the requirements. In the case of ***Amolak Chand v. Bhagwandas***,[25] it was held that the requirements for section 127-A, are as follows:

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23. *Ibid.*
24. *Id,* Section 127-A.
25. AIR 1977 SC 813.

(1) It must exhibit the names and addresses of the printer and the publisher,

(2) The publisher must deliver to printer a declaration in duplicate about his identity attested by two person to whom he is known personally,

(3) The printer must send within a reasonable time after printing, one copy of the declaration with a copy of the document printed, to the Chief Electoral Officer if the printing is done in the capital of the State and in any other case to the District Magistrate.[26]

The provisions of the section are attracted to any process of duplication. However, if, the document does not seek to promote or prejudice the prospects of election of a candidate, the provisions of the section are not applicable. One of the most common methods of carrying out the election propaganda is printing and distributing pamphlets, posters, handbills and leaflets among other forms of printed material. It is also common at election times to malign the image of the prospective rival candidates by using offending printed election propaganda materials. Therefore it becomes the bounden duty of law to protect the interest of all the parties chasing victory in elections, Section 127-A has been inserted by the Legislature to serve the same goal. In case of violation of the provisions of the section strict action is taken by the EC against such printer, publisher, political party or a candidate.

MAINTENANCE OF SECRECY OF VOTING:

Section 128[27] of the Act provides that any officer appointed by the Election Commission while performing his duty has to maintain the secrecy of the voting except in the case of election of seat of council of state. Any violation of the provision of the section shall attract the punishment of imprisonment three months as well as fine or both. The Supreme Court in the case of ***Sashi Bhushan v. Balraj Madhok*** [28] observed that:

A general inspection should not be permitted until there is satisfactory proof in support of those allegations. If the learned judge comes to the conclusion that the matter should be further probed into, he may take evidence on the points in issue including evidence of expert witnesses. Thereafter, it is open to him to direct or not to direct a general inspection of the ballot papers. But in doing so he will take care of maintain the secrecy of the ballot. In an election petition, the right

26. *Ibid.*
27. The Representation of People Act, Section 128, (1951).
28. AIR 1972 SC 1251.

of inspection of ballot paper is limited to rejected ballot papers and notes thereof. Unless a strong prima facie case is made out, the order for inspection cannot be granted.[29]

There is section 94[30] in the Act, which also provides for the secrecy of voting. The section says that no witness or other person shall be required to state for whom he has voted at an election. If fact section 94 covers a separate field. It gives the voter a free choice to disclose or not to disclose for whom he voted. There is no provision which would expose him to any penalty if a voter voluntarily chooses to disclose how he voted or for whom he voted. For maintenance of secrecy at the polling station the EC makes the necessary arrangements, so that the right to vote can be exercised in a free and fair manner.[31]

PROHIBITION ON OFFICERS TO ACT FOR CANDIDATE OR INFLUENCE THE VOTERS:

Section 129 castes a duty on officers etc, at elections not to act for candidate or to influence voting. Every officer or the member of police who is performing the election duty must be impartial and any type of favour to any candidate during the process of election is prohibited under the Act. In case of violation of the above stated provision the person shall attract the punishment of imprisonment of six months or fine or with both.[32]

In the case of ***P.R. Belagali v. B.D. Jatti*** [33]Supreme Court observed that:

> "Election must be freely and fairly conducted and the police and Government officers should not create even an impression that they are interfering for the benefit of one or the other candidate."[34]

PROHIBITS REGARDING CANVASSING IN OR NEAR POLLING STATIONS:

Section 130[35]of the Act provides the provisions regarding the prohibition on canvassing within hundred meters of the polling station on the date of poll. The Act further provides the punishment of fine of two hundred and fifty rupees in case of violation of the above stated provision.

In the case of ***G. Panneerselvam v. Narayanaswami***[36] it was held that;

"Wearing of a badge with the inscription of the name of the candidate would amount to

29. *Ibid*.
30. The Representation of People Act, Section 94, (1951).
31. Raghbir Singh Gill v. S. Gurcharan Singh Tohra, AIR 1980 SC 1362.
32. The Representation of People Act, Section 129, (1951).
33. AIR 1971 SC 1348.
34. *Ibid.*
35. The Representation of People Act, Section130, (1951).
36. 46 ELR 36.

canvassing of votes for the particular candidate and the wearing of any such badge within the polling station or within a radius of 100 meters thereof would be violation of section 130 of the Representation of People Act, 1951."[37]

DISORDERLY CONDUCT OR MISCONDUCT AT OR NEAR THE POLLING STATION:

On the date of poll, using or operating, within or at the entrance of the polling station or at any public or private place in the neighborhood of a polling station, any apparatus for amplifying or reproducing the human voice, such as a megaphone or a loudspeaker is prohibited. So that no annoyance is caused to any person visiting the polling station for the poll or that not interference is made with the work of the officers and other persons on duty at the polling station. Likewise shouting or otherwise acting in disorderly manner within or at the entrance of a polling station or in any public or private place in the neighborhood of a polling station is also prohibited. Any person who contravenes or willfully aids or abets the contravention of the above provisions of law is punishable with imprisonment extending to three months or with fine or with both. Section 131 provides the penalty for such conduct.[38]

Section 132[39] of the Act provides for the penalty for doing misconduct at the polling station. For the smooth conduct of poll at the polling station, it is necessary that no person should be allowed to misconduct himself at the polling station during the hours fixed for the poll and every person should be required to obey the lawful directions of the Presiding Officer. The Presiding Officer is empowered to see that if any person misconducts himself or fails to obey the lawful directions of the presiding officer such person may be removed from the polling station by the presiding officer or by any police officer on duty or by any person authorized in this behalf by the presiding officer.[40] The above power is, however, to be exercised by the Presiding Officer with restraint and should not be so exercised as to prevent any elector who is otherwise entitles to vote at the polling station from having an opportunity of voting at that polling station. The EC deploys police and forces to avoid any disturbance at the polling station.[41]

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37. S.K. Menditatta, All You Want to Know about Indian Elections 499 (Lexis Nexis, 1sted. 2009).
38. The Representation of People Act, § 131, (1951).
39. *Id,* Section 132.
40. *Id,* Section 132(1).
41. *Id,* Section 132(2).

FAILURE TO OBSERVE PROCEDURE FOR VOTING:

Section 132-A[42] of Act provides for penalty for failure to observe procedure for voting. This section was inserted by Act 4 of 1986. It says that if any elector, to whom a ballot paper has been issued, refuses to observe the procedure prescribed for voting the ballot paper issued to him shall be liable for cancellation. Here the clarification about the uses of voting machines is needed because such machines are being used at large scale in place of ballot papers. Explanation to section 61-A of the Act (Voting machines at elections) which says that for the purposes of section 61-A, "voting machines" means any machine or apparatus whether operated electronically or otherwise for giving or recording of votes and any reference to a ballot box or ballot paper in this Act, or the rules made there under shall, save as otherwise provided be construed as inculcating a reference to such voting machine wherever such voting machine is used at any election.

BREACH OF OFFICIAL DUTY IN CONNECTION WITH ELECTION:

If any person belonging to any of the specified categories is, without reasonable cause, guilty of any act of omission or commission in breach of his official duty in connection with elections, he commits Section 134[43] of the Act made the breach of official duty in connection with elections a punishable offence.[44]

PENALTY FOR GOVERNMENT SERVANT IN CASES HE/SHE ACTS AS AN ELECTION AGENT:

Section 134-A[45] makes it an offence for Government servants to act as election agents, polling agents or counting agents. It says that if any person in the service of the Government acts as an election agent or a polling agent5 or counting agent of a candidate at an election, he shall be punishable with imprisonment for a term which may extend to three months, or with fine, or with both.[46]

PROHIBITION OF GOING ARMED TO OR NEAR A POLLING STATION:

Section 134-B[47] prohibits going armed to or near a polling station other than polling officer or the returning officer on the polling day. It provides 2 years imprisonment or fine or both in case of

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42. Penalty for failure to observe procedure for voting – If any elector to whom a ballot paper has been issued, refused to observe the procedure prescribed for voting the ballot paper issued to him shall be liable for cancellation.
43. The Representation of People Act,Section134, (1951).
44. Ali Rehan, The Working of the Election Commission 44 (Jnanda Prakhashan, 2001).
45. The Representation of People Act,Section134-A,(1951).
46. *Ibid.*
47. *Id,* Section134-B.

violation or the provisions of the present section. The present section was inserted by Act of 1996 to carry out the electoral reforms proposed by the Election Commission and others considered by the committee on electoral reforms in 1990. Before every general election or bye election, the EC issues the directions and ensures that the licensed arms deposit in the concerned police station or with the arms dealer.

PENALTY FOR EMPLOYER IN CASE OF NOT PROVIDING PAID HOLIDAY ON THE DAY OF POLL:

Section 135-B[48] provides for penalty if any employer fails in granting paid holiday to employees on the day of poll. This section was inserted by Act 21 of 1996. It provides that the day of poll shall be granted as holiday and no deduction of his wages will be allowed. If employer contravenes the provisions than he shall be punished with a fine of five hundred rupees.

BAN ON SELLING OR DISTURBING OF LIQUOR ON THE DAY OF POLL:

Selling, giving or distributing liquor on polling day is a punishable offence under section 135-C[49] of the Act. This provision was inserted by Act 21 of 1996. This provides six months punishment of fine of two thousand rupees or both in case of violation of the provisions of the section. The step of curbing of evils produced out of consuming liquor has been taken in right direction since it is said that "the liquor is the root of many problem". Illiterate population does not think about the importance of voting and its process. The provision may prove helpful to some extent in controlling the activities of the persons having vested interests who disturbs the smooth sailing of the election process.Recently the police on the directions of the EC acting on a tip-off, the Dirba police raided a godown on the Kohriya road and seized illegal liquor worth Rs 9.5 lakh.[50]

CONCLUSION AND SUGGESTIONS:

Indian democracy is the world's largest democracy and it can continue its present status only through free and fair elections. The ECI from time to time issues necessary directions to the poll penal, political parties and candidates. The EC comes into action from the issuance of the election notification and remains in the picture till the announcement of the final results of the

48. *Id,* Section 135-B.
49. *Id,* Section 135-C.
50. The Tribune, January 30, 2017, p. 3.

elections. But sometimes allegations are made that EC is doing its work according to the directions of the government of the day and sometimes it is true. The biggest reason for the allegation of the discrimination is the appointment of the Chief Election Commissioner (herein after CEC) by the government of the day. The provisions relating to the appointment of the CEC need to be reconsidered. It should not be done only by the government of the day. It was the CEC (as he then was) T.N. Seshan, who showed the teeth to the political parties. Before him the EC was called 'toothless tiger'. The Election Commission of India is doing its duties according to the provisions provided for but sometimes it faces the difficulties. The implementation of Model Code of Conduct is the biggest challenge before the EC. The law relating to the use of religion for political benefit is not clear. Even the Supreme Court of India has also interpreted the law from time to time but till now there is no clarity. For example if the third person uses the religion for the political benefit of any candidate and without consent of such candidate, then against whom action can be taken. There should be clear and well defined law on the electoral offences. There is need of enhancement of punishment for the commission of electoral offences because in some cases the provided punishment is only a fine of five hundred rupees only. The punishment should be such which create a deterrent effect on the general public and the political parties.

ROLE OF EXPERT OPINION UNDER INDIAN CRIMINAL JUSTICE SYSTEM

-Ms Panchampreet Kaur*

INTRODUCTION

Crime has existed since the origin of civilization. Where there are conflicting minds there are bound to be conflicts and crimes. Crime occurs due to various factors including greed , poverty , need , enmity etc.

The existence of law is based upon the existence of crime. With the advancement in science and technology, the rate of crime has increased and its execution has changed in many ways. Technology is being used in committing crime as well as in solving the mystery behind it. The police and the courts can no longer rely on old methods of solving the crime. This is where forensic science and expert opinion come in. The development in forensic science has immensely helped the courts in detection of crime.

The word "Forensic" has been derived from the Latin word *Forensis,* meaning "belonging to the market place or forum." In ancient Rome the "forum" or public meeting place was where legal cases were tried & pleaded. The term Forensic Science means the application of the scientific methods for the purposes of law & justice.[1] Scientific method refers to the body of techniques for investigating phenomena, acquiring new knowledge, or correcting & integrating previous knowledge. It is based on gathering observable, empirical & measurable evidence subject to specific principles of reasoning.[2] The term includes the application of all sciences such as physics, chemistry, & biology. It may appear odd at the first instance, but almost all branches of science can help in the administration of justice.[3]

'Forensic science' can be defined more broadly as that 'scientific discipline which is directed to the recognition, identification, individualization, and evaluation of physical evidence by the application of the principles and methods of natural sciences for the purpose of administration of criminal justice'[4]. The term includes the application of all sciences such as physics, chemistry,

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1. What is Forensic Science, What is a Forensic Scientist, (Sep.2,2019,11:30AM), http://www.crimesceneinvestigatoredu.org.
2. ISAAC NEWTON (1687, 1713, 1726), "RULES FOR THE STUDY OF NATURAL PHILOSOPHY,"Philosophiae Naturalis Principia Mathematica.
3. What is forensic science? Forcon Forensic Consulting,(Aug28,2019,3:00PM) http://www.forcon.ca/learning/forensic_science.html.
4. B.S. NABAR, "FORENSIC SCIENCE IN CRIME INVESTIGATION",1(3ed. Asia Law House,2013)

& biology. It may appear odd at the first instance, but almost all branches of science can help in the administration of justice.[5] Forensic reports play a major role in both criminal and civil justice system. The important thing that is to be taken care of is that all important physical evidences must be procured in time, so that the experts can run tests on such physical evidences and furnish reports based on them.

HISTORICAL PERSPECTIVE

In India , the oldest evidence of use of science in law can be traced back to Kautilya's 'Arathshastra' where the investigation of murder was laid down.

The institution of forensic science in crime investigation in the contemporary sense can be traced in India in the middle of 20th century with the establishment of chemical examiner's laboratories created by Britishers at Madras , Calcutta , Agra and Bombay in the years 1849, 1853, 1864 and 1870 respectively. These laboratories worked upon general chemical analysis and toxicological work.

The operation of science & technology to the discovery & investigation of crime & administration of justice is not new to India.[6] Though not known to our ancestors in its present form, scientific methods in one way or the other seem to have been obeyed in the investigation of crime. Its particularised source is found in Kautilya's Arthashastra, which was written about 2300 years ago. Indians studied varied designs of the papillary lines, thousands of years ago. It is presumed that they knew about the continuity & individuality of fingerprints, which they used as signatures. Additionally , Chinese records have proved the use of fingerprints in an ancient kingdom of southern India. The Indians knew for long that the handprints, known as the 'Tarija', were matchless. The use of fingerprints as signatures by illiterate people in India, introduced centuries ago, was considered by some people as conventional only, till it was scientifically proved that identification from fingerprints was unerring [7].

MEANING AND CONCEPT OF AN EXPERT

An expert is a person who has a thorough command in a subject that can be relied upon. Opinion of an expert is considered valuable in various fields and it also holds significance in law. An

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5. *Supra* note 3.
6. B. B NANDA, FORENSIC SCIENCE IN INDIA: A VISION FOR THE TWENTY-FIRST CENTURY, Select Publishers,2001.
7. R.K. Tewari & K.V. Ravikumar, History & development of forensic science in India, Sep.2,2019,11:30AM),http://www.jpgmonline.com.

expert's opinion is admissible in many legal systems throughout the world. With time, the concept of expert opinion has evolved in Indian legal system. The need for an expert's opinion is no longer limited to the field of doctors or engineers, rather now the Courts seek expert opinion in every field.

In other words it can be inferred that an expert opinion is evidence given by experts i.e , the persons who has special skill and knowledge on a particular subject which does not come within the knowledge of the court.[8]

Lawson and Roger have made an attempt to define the term expert. Lawson[9] defines expert as a person who has a special knowledge and skill in the particular calling to which an enquiry relates. Roger gives special emphasis regarding the special knowledge as sciences, art and trade . Thus an expert is a person who dedicates his time and study to a special branch or learning and is especially skilled in those matters on which he is asked to state his opinion. So his evidence on such matters is admissible in the court of law to come into satisfactory conclusion.

The advancement in science and technology and the increase in the crime rate renders Courts helpless whenever a technical issue is in question. So, whenever such a technical issue arises that the Courts cannot contemplate on their own and is beyond their field of expertise and knowledge, opinion of a person who is an expert in that issue is sought.

The Indian Evidence Act, 1872 defines experts as, "When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.[10]

APPLICATION OF FORENSIC SCIENCE IN LAW

The application of forensic science is required at various stages. The evidentiary value of forensic science is based on the following steps:

- Step-1 – Relevancy of Scientific Evidence

The first step covers the relevancy of scientific evidence. Evidence deduced with the help of scientific techniques must be relevant enough to be considered as evidence in the court of law.

8. From Wigmore statement.
9. Lawson , Evidence Rule 2 , Section 440.
10. The Indian Evidence Act, 1872 , S 45.

This is due to the fact that forensic science being new to the rules of evidence, may or may not be stringently in accordance with the provisions of the statutes. Thus, the first rule is to consider the relevancy of scientific evidence in the criminal justice court.

- Step-2 – Reliability of Scientific Evidence

The second step covers the reliability of the relevant scientific evidence. Various factors such as its authenticity, its use, its results are the base for the reliability of scientific evidence. Furthermore, it is based on the scientific technique. Certain tests and guidelines which are given by the courts and statutes helps in determining the reliability of scientific evidence.

- Step-3 – Admissibility of Scientific Evidence

The third step covers the admissibility of such relevant and reliable scientific evidence as provided by the law. What evidence has to be admitted is the discretion of a judge, what can be admissible or what cannot be is generally determined by long drawn tests and the provisions of the statutes.

- Step-4 – Credibility of Scientific Evidence

The fourth and the last step covers the credibility of the relevant, reliable and admissible evidence in the court of law. Basically the credibility of scientific evidence is laid down in the case laws where there are generally two types of evidences as scientific and conventional. It is the duty of the courts to take an equipoised view and seek that evidence whose credibility cannot be put to question.

RELEVANCE OF FORENSIC SCIENCE IN JUSTICE DELIVERY SYSTEM

The use of science in the field of law is called forensic science. It contains collection, preservation and analysis of physical as well as biological evidences. A Forensic Scientist is an expert in Biology (DNA expert),Chemistry (identification of explosives) and other fields of science . Various civil and criminal cases use forensic science for securing jutice. New techniques are being developed by the forensic scientists for the collection of evidences. Polygraph, brain fingerprinting and narco analysis are the techniques in this direction. In order to develop new techniques, the scientists should be afforded with sufficient funds and

excellently equipped laboratories. U.S. Federal Bureau of Investigation (F.B.I) has the largest laboratory in the world.[11]

The principle of the Criminal Justice System is to protect the innocent from wrong conviction and punishment and this can be done only by search of truth of the matter and justice. The following points based on scientific aspects help to follow the principle of Criminal Justice System:

1) Scientific evidence cannot lie and a decision arrived at by such an evidence is said to be justice through science.
2) To elicit truth from suspect scientific methods like narcoanalysis , brain mapping and lie detector tests used by law enforcement agencies are proving more authentic , accurate and reliable.
3) The principle based on advanced scientific technique, e.g. DNA testing says that every person of this world can be traced at a molecular level except of monozygotic twins.
4) Criminal behaviour of accused is determined by Forensic Psychology.
5) These days advanced science is boon for investigating agencies. These are powerful detective tool to detect crime and criminal.
6) It has also been seen that when there is no way for the court to reach at a point or to arrive to a correct decision, science helps the court to find out the truth and provides aid to the concerned justice .[12]

LEGAL FRAMEWOEK AND JUDICIAL INTERPRETATION RELATED TO EXPERT OPINION IN INDIA

Criminal trials in India are governed by the Criminal Procedure Code & Indian Evidence Act 1872, whereas the Criminal Procedure Code lays down the procedure from the point of taking cognizance of crime by appropriate judicial magistrates till the discharge of final order of conviction or acquittal or any appropriate order looking into the fact of the case. Indian Evidence

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(1) JAMES NORDBY, FORENSIC SCIENCE , (3ed.,CNC Press2009).
(2) B.S. NABAR, FORENSIC SCIENCE IN CRIMINAL INVESTIGATION , (3ed.,Asia Law House,2013).
(3) B.R. SHARMA, FORENSIC SCIENCE IN CRIMINAL INVESTIGATION AND TRIAL, (5ed.,Universal Law Publishing Co.,2014).
(4) YASHPAL SINGH &M.H. ZAIDI'S DNA TESTS IN CRIMINAL INVESTIGATION , TRIAL AND PATERNITY DISPUTES , 2006.

12. Sharique M .Rizvi , Science Meet Law,IIIT Alld.

Act is restricted in its scope of leading evidences in civil or criminal cases either by the prosecution or defendant, applicant or respondent. Act also deals with variety of evidences & relevancy of any fact which can be brought as evidence in any case.[13]

- **The Indian Constitution, 1950**

The constitution of India gives the rights of the accused under Articles 19, 20 and 21. It also provides for free legal aid under Article 39 A of the Constitution. The most debated amongst these is Article 20 (3) which is discussed below. The admissibility of forensic evidence in courts is based upon the manner of collection of evidence. India, follows a strict procedure while taking evidence as in it is the follower of adversarial system. Thus, destroying privacy or taking incriminatory evidence against the will of a person is violative of fundamental rights provided under the constitution.

In ***Nandani Satpathy v. P. L. Dani,***[14] the appellant, a former Chief Minister of Orissa, was given a direction to appear at the Vigilance police Station, Cuttack, for being examined in connection with a case which was registered against her under the Prevention Of Corruption Act, 1947 and under section 109, 161, 165 and 120-B of lndian Penal Code, 1860. 0n the strength of this first information report, investigation was commenced against her (only a suspect at that stage). The Supreme Court in this case held that section 160 (1) of Code of Criminal Procedure, 1973 which barred the calling of woman to a police station was violated in this case. Moreover, it was ruled that Article 20 (3) extended back to the stage of police investigation not commencing in court only, since such inquiry was of accusatory nature and could end in prosecution. It follows that the protection in Article 20 (3) is also available at the stage of police investigation. Further, it was stated that the right of silence guaranteed by Article 20 (3) is not limited to the case for which the person is examined but also extends to the other offences pending or imminent, which may deter him from voluntary disclosure of incriminatory matter. It was also held that the protection could be claimed by a suspect also.

The protection contained in Article 20 (3) is against compulsion “to be a witness". In **M.P.Sharma v. Satish Chandra**[15] a wide implication was given by the Supreme Court, to the expression “to be a witness" so as to include oral, documentary and testimonial evidence.

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13. Karan Ghelot, Forensic Crime Scene Investigation, 4(6), Indian Journal of Research (2005),(Sep.18,2019,9:00PM),http://worldwidejournals.com.
14. AIR 1978 SC 1025.
15. AIR1954 SC 300.

- **The Indian Evidence Act, 1872**

The provisions for relevancy and admissibility of evidence in courts are laid down in the Indian Evidence Act, 1872 . The evidence related to scientific techniques and electronic evidence are mentioned in the act. Where the evidence given by expert and related to handwriting already existed, the provisions related to admissibility of electronic evidence were incorporated in 2005. "When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting (or finger impressions), the opinions upon that point of persons especially skilled in such foreign law, science or art, (or in questions as to identity of handwriting) (or finger impressions) are relevant facts. Such persons are called experts."[16]

The statutes of India do not provide any particular guidelines for the requirements of the expert testimony. The courts have taken distinct factors considering various facts, but, in ***Romesh Chandra Aggarwal v. Regency Hospital, 2010***[17] the Supreme Court detailed the requirements for allowing expert testimony. These are

1. Expert must be within a specialized field of expertise.
2. Evidence must be grounded on reliable principles
3. Expert must be competent in that discipline.

It also enumerated the following factors on which expert testimony maybe thrown out of court or which should become inadmissible.

1. Scientific finding in the question has no relevance with respect to issue in question.
2. Conclusions arrived by the expert are not based on scientific reasoning but speculation.
3. Scientific process was not reliable for want of accuracy or want of better method.
4. On the basis of tampering of expert report.

In ***Ram Narain V. State of UP***[18], the Supreme Court held that there is need of corroboration of expert opinion of finger impression if it is truthful. In this case, DVA J. himself compared the hand-writing in question with the person handwriting of the accused and satisfied himself and held that no corroboration is necessary .

In the case of ***M.S. Ushman Koya v. C.S. Santha***[19] , the Supreme Court rightly observed that an expert can certify only probability and not with 100% certainity. It should be corroborated either

16. *Supra* note 8.
17. Civil Appeal No. 5991 of 2002.
18. AIR 1973 SC 2200.
19. AIR 2003 SC Ker 191.

by direct evidence or by circumstantial evidence .It is the sole discretion of the court whether to admit the forensic report of an expert.

Reference may be given to the case of ***Krishan Chand v. Sita Ram,***[20] wherein in a conflict of expert opinion, it was held that it is the Court who is competent to form its own opinion with regard to signatures on a document. It entirely depends upon the facts & circumstances of the case, & the opinion of the courts, which varies consequently. Though there is no provision in the Indian Evidence Act, which expressly mandates corroboration of expert opinion, but in practical terms, it is the courts which consider it highly unsafe to convict a person on the basis of sole testimony of an expert.

- **The Criminal Procedure Code, 1973**

For collection of blood samples Section 53 of the CrPC is wanted which goes with the marginal heading "Examination of the accused by Medical Practitioner at the request of the Police." This section covers the examination of the accused by a medical practitioner at the request of the police officer, if there are reasonable grounds for accepting that an examination of a person will give evidence as to the commission of offence. So it shall be lawful for a registered medical practitioner at the call of the police officer not below the rank of sub-inspector & for any other person acting in bona fide in his assistance & under his direction, to make such an examination of the person arrested as is reasonably required in order to ascertain the facts which may give such evidence & to use such force as is reasonably necessary. It is nowhere mentioned in this section that the police officer shall be entitled to personally collect semen, blood, hair root, urine, vaginal swab etc. for the purpose of investigation.[21]

Sec. 54 of the Criminal Procedure Code, 1973 further deals with the examination of the arrested person by the registered medical practitioner at the request of the arrested person. The Law Commission of India in its 37th report stated that to facilitate efficient investigation, provision has been made which authorizes an examination of arrested person by a medical practitioner, if from the nature of the alleged offence or the circumstances under which it is alleged to have been committed, there are reasonable grounds for accepting that an examination of the person will give evidence either supporting the allegation or disproving it.[22]

Moreover, Section 293 of the CrPC exempts certain government scientific experts from

20. AIR 2005 P&H 156.
21. NAYAN JOSHI, ,MEDICAL JURISPRUDENCE & TOXICOLOGY, (3ed. Kamal Publishers2014).
22. Law Commission of India, Thirty Seventh Report, Ministry of Home Affairs (1967).

personal appearance before a court of law. The legislative importance behind this provision is to give some immunity to the higher officials in Forensic Scientific Departments. This immunity is given considering their qualifications, experience & work load in their respective fields. But this immunity is not given to the scientists occupied in Private Laboratories. By invoking Section 293, court can admit any report under the hand of

(a) any Chemical Examiner or Assistant Chemical Examiner to government;

(b) the Chief Inspector of Explosives;

(c) the Director of Fingerprint Bureau;

(d) the Director or Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(e) the Director of Haffkeine Institute, Bombay &; (f) the Serologist to the Government.[23]

- **The Identification of Prisoners Act, 1920**

In the Identification of prisoners Act it is provided that before a prisoner is admitted into the prison his measurements as to height, weight, color etc must be taken under sec 5 of the Act. 'Measurements' include fingerprints and footprints as well. The controversy regarding keeping the measurement of voice is still not resolved by the courts. The purpose for taking these measurements is to keep a record in case there is an escape or repeated offence. This helps in identification of the accused.[24] The sections 2, 3, 4, 5 & 6 of the Act deal with the expert evidence. They provide with the legal sanctions which are required for obtaining specimen evidence from the suspects or accused or convicts once they enter the jail.[25]

CONCLUSION

Forensic science has radically changed the process of criminal investigation and justice administration systems. Various techniques such DNA Profiling, Brain fingerprinting, Brain Mapping, Narco-Analysis, Polygraph test, Forensic photography and so on are being used by the investigating agencies and police organizations worldwide to detect and solve such crimes. Still, even the forensic science is not free from deficiencies & issues. The problems dealt with scientific evidence are investigative, scientific & legal in nature.

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23. Code of Criminal Procedure, 1973, S 293.
24. The Identification of Prisoner's Act,1920.
25. *Supra* Note 6.

Firstly, during the phase of investigation, authenticity of evidentiary clues is collected from the crime scene, the vehicle used, the home of victim or accused & other places, all these abovementioned should be proved beyond reasonable doubt by at least two independent witnesses. Lack of knowledge, dearth of time & corruption in police officers preferably means that much of the valuable evidence is lost or its integrity is tampered with.

Secondly, if regard is taken to scientific problems, forensic science is not a science in exact terms. The definite determination of criminality is not merely difficult but impossible to provide. Forensic science works on Law of Probability. Real lacunae in the presentation of forensic evidence are increasing and thus there is a need for standardizing tools & techniques, accreditation of institutions & demand for statistical data.

Lastly, the most essential legal issue relating to forensic evidence in the propagation of justice is a general belief that scientific evidence is weak evidence. Track evidence, though reliable as any other identification is still regarded as fundamental science. The difference must be drawn between charlatan & real expert.

So it is hereby suggested & recommended that the expert from the medical field should be inspired to undertake medico-legal work. The government should come up with more institutes which are particularly specialized in various fields of forensic science. According to the Malimath Committee,forensic science should be used exhaustively in the investigation of crime. The DNA experts should be considered & included in the list of experts as mentioned in the Code of CrP.C, 1973. The Malimath Committee Report has further suggested creation of a DNA database at national level to help in fighting terrorism. So, various efforts must be taken to create awareness among the prosecutors, the judges, the police machinery & the general public. The establishment of well-equipped laboratories are required to handle DNA samples & evidence. Also, an enactment of specific law in the light of framing & giving guidelines to the police machinery is required so as to set up uniform standards for obtaining genetic information and also the creation of adequate safeguards to prevent misuse of the same.

Criminal Judicial System in this country is at cross-roads, many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court & even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear & host of other reasons. Investigating agency has, therefore, to look for other ways & means to improve the quality of investigation, which can

only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices & principles that served in the past, now people think, must give way to innovative & creative methods, if we want to save our criminal justice system. Emerging new types of crimes & their level of sophistication, the traditional methods & tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand & deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote & widen their knowledge to deal with such scientific evidence & to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect & prove crimes over & above the other evidence.[26]

Forensic science indeed is a great help for the Indian legal system. Where the changing scenario has changed the notion of crime, there comes the forensic technology which has helped in investigating the toughest of these crimes where no eye-witnesses were found and it was only the scientific technology which comes to the rescue of investigating agencies and the judiciary. In India it is still growing at a rapid stage. Many statutory provisions have been interpreted in the light of scientific technology and evidence, many new provisions have also been added to the statutes but still, some problems remain unattended. The issues arising in the proper application of forensic science are as under.

26. Dharam Deo Yadav v. State of U.P,(2014) 5 SCC 509

ROLE OF LAW IN POVERTY ALLEVIATION: AN ANALYSIS

Mr Sajandeep Kinra*

INTRODUCTION

Poverty can be regarded as the single most universal phenomenon forming an unvarying and uniform thread that transcends all boundaries and nations. A whole gamut of complexities is encompassed by the single word 'poverty'. Poverty is the mother of many evils.[1] Poverty is the lack of basic human needs, such as clean water, nutrition, healthcare, education, clothing and shelter because of one's inability to afford them.[2] According to World Bank, India accounted for world's largest number of poor people in 2012 using revised methodology to measure poverty, reflecting its massive population. However, in terms of percentage, it scored fairly lower than other countries holding large poor populations. In July 2018, World Poverty Clock, a Vienna-based think tank, reported that a minimal of 5.3% or 70.6 million Indians living in extreme poverty compared to 44% or 87 million Nigerians. Till 2019, Nigeria and Congo surpassed India in terms of total population earning below $1.9 a day. Although India is expected to meet United Nation's Sustainable Development Goals on extreme poverty in due time, a very large share of its population lives on less than $3.2 a day, putting country safely into category of lower middle income economies. In contrast, the international poverty line as updated in October 2015 by the World Bank stands at US$1.90 per day. In 2011, 21.2% of the total population in India was estimated to be living below this poverty line, as per the World Bank data. India is home to over one-third of poor people in the world. If we add the poor of Pakistan and Bangladesh into it, we find that almost half of world.[3]

As per Tendulkar Committee methodology, the national poverty line (in Rs per capita per month) for the year 2011-12 was calculated at Rs 816 for rural areas and Rs 1000 for urban areas. Using this methodology, the National Sample Survey Organisation estimated poverty at 21.9% of the population (269 million) in 2011-12 was poor. That means in the category of poor fell the

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1. S.S. Sharma, Legal Aid To The Poorxi (Deep & Deep Publications, New Delhi, 1993).
2. Maj.Gen. Nilendra Kumar And Kush Chaturvedi, Textbook On Law, Poverty And Developmentvii (Lexis-Nexis, Gurgaon, 2nd Edition, 2016).
3. World Bank Data (July 3, 2019, 9:18 AM),https://www.worldbank.org/en/topic/poverty.

people whose daily income was less than Rs 27 a day in villages and Rs 33 a day in cities.[4] On the other hand, the subsequent Rangarajan Committee pegged the poverty line at Rs 32 in rural areas and Rs 47 in urban areas. On this basis, the number of poor living below the poverty line in India in 2011-2012 was revised to 29.5% of the population (363 million).[5]

MEANING AND DEFINITION OF POVERTY

Poverty is a major roadblock in the path of development of a nation. Development signifies reduction in poverty and law is the tool or mechanism which enables a State to frame policies for poverty reduction and towards development of society. In simplest terms, poverty can be described as the state of being poor. Poverty is an age-old social malaise and global problem.[6] There are various aspects and dimensions of poverty like absolute poverty, relative poverty, asset poverty, economic aspect and social aspect of poverty etc.[7] There are different causes of poverty in India—population explosion, illiteracy and unemployment, inadequate investment and low capital formation, major stress on farm sector and its output affected by floods and droughts, rampant corruption and leakages in delivery of public schemes and programs etc. According to Goddard, "Poverty is insufficient supply of those things which are requisites for an individual to maintain himself and those dependent upon him is his health and vigour."[8]

Schubert saw poverty as either absolute or relative or both. Absolute poverty being that which could be applied at all time in all societies, such as the level of income necessary for bare subsistence, while relative poverty relates to the living standard of the poor to the standards that prevail elsewhere in the society in which they live.[9]

According to the United Nations Committee on Economic, Social and Cultural Rights, "poverty is a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."[10]

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4. India in Figures, 2018, (July 6, 2019, 7:22 AM),http://mospi.nic.in/sites/default/files/publication_reports/India_in_figures-2018_rev.pdf.
5. Planning Commission,(July 15, 2019, 3:00 PM), http://planningcommission.nic.in/reports/genrep/rep_pov.pdf.
6. Ekta Shukla, Singhal's Law, Poverty And Development3 (Singhal Law Publications, Delhi, 1st Edition, 2018).
7. Economics Discussion,(June 12, 2019, 4:00 PM), http://www.economicsdiscussion.net/essays/main-causes-of-poverty-in-india/2277.
8. Sharma, *supra,* 1.
9. A. Schubert, Poverty in Developing Countries: Its Definition, Extent and Implication,Economic, Vol. 49/50,17 (1994).
10. The International Covenant on Economic, Social and Cultural Rights, 1966(July 2, 2019, 2:00 PM), https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx.

INTERNATIONAL EFFORTS FOR POVERTY ALLEVIATION

Through Resolution 47/196 adopted on December 22, 1992, the General Assembly declared 17thOctober as the International Day for the Eradication of Poverty. Various efforts have been made to reduce poverty at international level which are as follows:

A. Agenda 21 (Rio 1992) also deals with the issue of combating poverty. It promotes international cooperation to address the root causes of poverty. It provides that the governments with the assistance of and in cooperation with appropriate international, non-governmental and local community organizations should establish measures that will directly or indirectly generate remunerative employment and productive occupational opportunities.[11]

B. United Nation Commission on the Status of Woman, 1993 also plays role to achieve its objectives and action in the critical area of poverty. The Commission recommended that in formulating strategies to eradicate poverty, Member States take into account the specific requirements of women living in poverty, in both rural and urban areas, in order to enable them to fully exercise their social, economic, cultural, civil and political rights, as well as to maximize their resources and to increase their productivity.[12]

C. Fourth World Conference on Women, Beijing, 1995 is also concerned with women and poverty. This Conference states that more than 1 billion people in the world today, the great majority of whom are women, live in unacceptable conditions of poverty, mostly in the developing countries. The gender disparities in economic power-sharing are also an important contributing factor to the poverty of women. In order to eradicate poverty and achieve sustainable development, women and men must participate fully and equally in the formulation of macroeconomic and social policies and strategies for the eradication of poverty. The eradication of poverty cannot be accomplished through anti-poverty programmes alone but will require democratic participation and changes in economic structures in order to ensure access for all women to resources, opportunities and public services. [13]

D. United Nation Commission on Social Development was established in 1996 which deals with strategies and actions for eradication of poverty.The object of the Commission is to work in coordination with States and people for eradicating poverty in order to decrease the disparities in standards of living and better meet the needs of the majority of people of the world. The Commission also urges governments to formulate policies and programmes that ensure

11. Agenda 21 (The Rio Declaration on Environment and Development, 1992), chapter III.
12. United Nation Commission on the Status of Woman, 1993, chapter I (C).
13. Fourth World Conference on Women, Beijing, 1995, chapter 1 (IV) (A).

access to basic social services for all children and young people, in particular those living in poverty.[14]

E. Habitat II, Istanbul, 1996 is an international Convention deals with eradication of poverty. Governments at the appropriate levels, including local authorities, in partnership with all relevant interested parties, including workers' and employers' organizations should stimulate productive employment opportunities that generate income sufficient to achieve an adequate standard of living for all people, while ensuring equal employment opportunities and wage rates for women and encouraging the location of employment opportunities near and in the home, particularly for women living in poverty and people with disabilities. Also to ensure that people living in poverty have access to productive resources, including credit, land, education and training, technology, knowledge and information, as well as to public services, and that they have the opportunity to participate in decision-making in a policy and regulatory environment that would enable them to benefit from employment and economic opportunities.[15]

F. Earth Summit II (1997) provides for sector and issues relating to women, land and poverty. It states that governments, at their regional level, should frame policies to ensure universal access to basic social services, including basic education, health care, nutrition, clean water and sanitation. Efforts of individual governments and international cooperation and assistance should be brought together in a complementary way to eradicate poverty.[16]

G. The 2030 Agenda for sustainable development calls for an end to poverty by 2030. It seeks to ensure social protection for the poor and supporting people affected by climate-related extreme events. This agenda also ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services.[17]

NATIONAL LEGAL EFFORTS FOR POVERTY REDUCTION

India as a welfare State is committed to the development of its people. The Constitutional responsibility is reflected via legislations and development policies. It is realised that a collaborative measure of emphasis on accelerated growth and direct interventionist-safety net

14. United Nation Commission on Social Development, 1996, chapter III.
15. Habitat II, Istanbul,1996, chapter IV (C).
16. Earth Summit II, 1997, chapter 3(B).
17. A/RES/70/1- Transforming Our World: The 2030 Agenda for Sustainable Development, (June 20, 2019, 3:00 PM), https://sustainabledevelopment.un.org/topics/poverty/decisions.

procedure is the proper approach to optimise the control strategies. Furthermore, it needs to be ensured that the institutions executing these measures complement the policy stance.

A. The Constitution of India, 1950

The concern for the poor is reflected in the various provisions of the Constitution of India. The Preamble, Fundamental Rights, Directive Principles of State Policy and other provisions could be perused in this regard.[18] The Preamble of the Constitution of India resolved to secure to all its citizens justice; social, economic and political and equity of status and of opportunities. The Constitution provides that State shall not deny to any person right to equality before the law or the equal protection of the laws within the territory of India.[19] The Constitution also provides the fundamental rights including the protection of life and personal liberty.[20] The State shall secure that operation of legal system promotes justice, on a basis of equal opportunity and shall in particular provide free legal aid, by suitable legislation or schemes or in other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.[21]

Recently in January, 2019, the benefit of reservation has also been extended to economically weaker sections of the society by amending articles 15 and 16 of the Constitution. It provides ten percent reservation in jobs and education to economically weaker sections. The economically weaker sections will be determined on the basis of value of assets and their annual income of the person. It is also an initiative for poverty alleviation.[22]

B. The Code of Civil Procedure, 1908

The Code of Civil Procedure[23] protects the bonafide claims of indigent persons. The Code exempt indigent person or his dependent to pay court fee for filing suit and assign a pleader, where he is not represented by a pleader.[24] The free legal aid will be provided in case of appeal by any indigent person.[25]

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18. Maj.Gen. Nilendra Kumar And Kush Chaturvedi, Textbook On Law, Poverty And Development14 (Lexis-Nexis, Gurgaon, 2nd Edition, 2016).
19. The Constitution of India, 1950, art 14.
20. *Id.,* art 21.
21. *Id.,* art 39 A.
22. The Constitution (103rd Amendment) Act, 2019.
23. Act No. 5 of 1908.
24. The Code of Civil Procedure, 1908, order XXXIII.
25. Id., order XLIV.

C. The Advocates Act, 1961

The Advocates Act[26] assigns functions to the Bar Council of India to provide legal aid or advice to the poor in accordance with the rules made in this behalf. This Act also assign State Bar Council to organize legal aid in the prescribed manner.[27]

D. The Code of Criminal Procedure, 1973

The punitive arm of the legal order is criminal law. It effects the life and liberty of human being. Therefore, special attention is to be given at the time of administration of criminal law. Justice Krishna Iyer rightly mentioned that to sensitize the criminal process to the wavelength of the poor is the strategy.[28] The legal process without legal aid to the poor may be a guarantee of anarchy and not of order. To hands and feet, we need are efficient means and method to carry out justice in every case in the shortest possible time and the lowest possible cost.[29] The Code of Criminal Procedure[30] provides a pleader to the accused who has not sufficient means for his defence at the expense of the State. The Code also empowered High Court to provide facilities to such pleader for the defence of such accused.[31]

E. The Legal Services Authorities Act, 1987

The main objective of this Act[32] is to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The authorities were constituted at national, state and district level i.e. National Legal Services Authority, State Legal Services Authority and District Legal Services Authority.[33]

F. The Mahatma Gandhi National Rural Employment Guarantee Act, 2005

This Act[34] was introduced with an aim of improving the purchasing power of the rural people, primarily semi or unskilled work to people living below poverty line in rural India.[35] This Act provides a guarantee for one hundred days of employment in every financial year to adult

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26. Act No. 25 of 1961.
27. The Advocate Act, 1961, section 7(1)(ib) and 6(1)(eee).
28. Krishna Iyer, Of Law And Life136 (Vikash Publishing House, Sahibabad, 1971).
29. Krishna Iyer, Social Mission Of Law104 (Orient Longman, New Delhi, 1976).
30. Act No. 2 of 1974.
31. The Code of Criminal Procedure, 1973, section 304.
32. Act No. 39 of 1987.
33. S.S. Sharma, Legal Aid To The Poor104 (Deep & Deep Publications, New Delhi, 1993).
34. Act No. 42 of 2005.
35. Sudhir Vaidya, National Rural Employment Guarantee Act (NREGA): With Schemes And Guidelines3 (Arise

members of any rural household willing to do public work-related unskilled manual work at the statutory minimum wage.[36]

G. The Right of Children to Free and Compulsory Education Act, 2009

This Act[37] was enacted to provide free and compulsory education to the all children of age of six to fourteen years. This Act is also an initiative for anti-poverty programme.

H. The National Food Security Act, 2013

This Act[38] introduced to provide food and nutritional security in human life cycle approach by ensuring access to adequate quantity of quality food at affordable prices to people to live life with dignity. This Act also provides every person belonging to priority households to receive five kilograms per person per month at subsidized prices.[39] The Act entitled pregnant woman and lactating mother to receive meal free of charge during pregnancy and six months after birth of child. The Act also ensured to entitle maternity benefit of Rs. 6,000 to pregnant woman.[40]

ANTI-POVERTY PROGRAMMES

Many poverty alleviation programmes have been started. The Integrated Rural Development Project was introduced in 1978-79 to provide assistance to rural poor in the form of subsidy and bank credit for productive employment opportunities.[41] National Rural Employment Programme (NREP) formulated district level or block level employment plan for skilled or unskilled work and prepared projects for each block.[42] Rural Landless Employment Guarantee Programme (RLEGP, 1983) aimed to eradicate poverty, unemployment and under employment among rural landless. It guaranteed employment to at least one member of every landless labourer household for 80 to 100 days.[43]

The NREP and RLEGP were merged in April, 1989 under Jawahar Rozgar Yojana (JRY). Jawahar RojgarYojna was meant to generate meaningful employment opportunities for the unemployed and underemployed in rural areas through the creation of economic infrastructure and community and social assets.[44] On April 1, 1999, the IRDP and allied programmes were

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Publishers & Distributors, New Delhi, 1st Edition, 2009).

36. The Mahatma Gandhi National Rural Employment Guarantee Act, 2005, section 3.
37. Act No. 35 of 2009.
38. Act No. 20 of 2013.
39. The National Food Security Act, 2013, section 3.
40. *Id.,* section 4.
41. The Integrated Rural Development Project (IRDP), 1978-79.
42. National Rural Employment Programme (NREP).
43. Rural Landless Employment Guarantee Programme (RLEGP, 1983).
44. Jawahar RojgarYojna, 1989.

merged into a single programme known as Swarnajayanti Gram Swarozgar Yojana (SGSY)[45] . The SGSY emphasises on organizing the rural poor into self-help groups, capacity-building, planning of activity clusters, infrastructure support, technology, credit and marketing linkages. The Indira Awaas Yojana (IAY) programme aims at providing free housing to below poverty line (BPL) families in rural areas and main targets would be the households of SC/STs.[46]

Sampoorna Gramin Rozgar Yojana (SGRY) Scheme,2001 was introduced with the objective that the scheme continues to be the generation of wage employment, creation of durable economic infrastructure in rural areas and provision of food and nutrition security for the poor. It is the skill and placement initiative of Ministry of Rural development.[47] It is a part of National Rural Livelihood Mission (NRLM)–the mission for poverty reduction is called Ajeevika, 2011. It evolves out the need to diversify the needs of the rural poor and provide them jobs with regular income on monthly basis. Self help groups are formed at the village level to help the needy.[48] The Pradhan Mantri Awas Yojana (PMAY) Scheme was launched by the Government of India to boost the affordability of houses against an inflated real estate sector. The scheme aims to achieve its objective of housing for all by March 31, 2022, the 150th birth anniversary year of Mahatma Gandhi, by constructing 20 million houses across the nation. The scheme will progress in three phases. In first phase, 100 cities were covered in select states and UTs between April 2015 and March 2017, in second phase, 200 additional cities covered between April 2017 and March 2019 and in third phase the remaining cities will be covered between April 2019 and March 2022.[49] Various scholarship schemes run by Central Government and State Government of Punjab like Post Matric Scholarship Scheme for Scheduled Caste students, Post Matric Scholarship Scheme for other backward classes, Post Matric Scholarship Scheme for Minority students and Central Sector Scheme of Rajiv Gandhi National Fellowship for providing Scholarships to Scheduled Caste students to pursue programmes in Higher Education such as M.Phil, Ph.D etc.[50] Central Sector Interest Subsidy Scheme by State Bank of India provides educational loan on subsidised interest rates for the benefit of all categories of students

45. Swarnajayanti Gram Swarozgar Yojana (SGSY), 1999.
46. The Indira Awaas Yojana (IAY), 1985.
47. SampoornaGraminRozgar Yojana (SGRY) Scheme, 2001.
48. National Rural Livelihood Mission, 2011(July 4, 2019, 6:00 AM),https://www.jagranjosh.com/general-knowledge/anti-poverty-employment-generation programmes-in-india-1448531927-1.
49. Pradhan Mantri Awas Yojana (PMAY) Scheme, 2016.
50. Scholarship Schemes, (Aug. 12, 2019, 4:00 PM), http://punjab.gov.in/documents/10191/51251/Various+scholarship+schemes+run+by+Govt.pdf/98358737-ed42-4375-a82b-401db49eaba0.

belonging to economically weaker sections of the society for pursuing professional or technical courses from accredited institutions in India.[51]

In Punjab, Mid Day Meal Scheme started for the students of first to eighth class. They are served with mid day meal in the school. The main objective of this scheme is to increase enrolment retention and to tone up the learning abilities of the beneficiaries, especially of the children belonging to poor and down trodden sections of the society.[52] The State Government of Punjab has also initiated Shagun Scheme for providing financial assistance of Rs.15,000 to Rs. 21,000 to the girl's marriage under the Department of Welfare of scheduled caste and backward class in the state. The Shagun Scheme is also named as Aashirwad Scheme by the government. This scheme is only for the girls of economically weaker families.[53] In 2011, Mai Bhago Scheme has also started by the State Government of Punjab in order to uplift the condition of women especially in women and the women who belong to the urban poor category.[54] Recently on August 20, 2019, Punjab Government has introduced Punjab Sarbat Sehat BimaYojna under Aushman Bharat Scheme which provides free medical treatment upto Rs. 5,00,000 to the people who have cards of below poverty line.[55]

NALSA (EFFECTIVE IMPLEMENTATION OF POVERTY ALLEVIATION SCHEMES) SCHEME, 2015

The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987. This Authority has formulated a scheme for effective implementation of poverty alleviation schemes. The main objective of this Scheme is to ensure access to basic rights and benefits afforded to socially or economically weaker sections of the society and to strengthen the legal aid and support services at the national, state, district and taluka levels for persons belonging to socially or economically weaker sections in accessing poverty alleviation schemes.[56]

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51. Central Sector Interest Subsidy Scheme, 2019, (Aug. 24, 2019, 5:00 PM), https://www.sbi.co.in/portal/web/student-platform/interest-subsidy.
52. Mid Day Meal Scheme, (Aug. 15, 2019, 7:00 AM), http://www.ssapunjab.org/mdm/.
53. Aashirwad Scheme, (Aug. 12, 2019, 6:00 PM), https://www.indiafilings.com/learn/shagun-scheme-punjab/.
54. Mai Bhago Scheme, 2011, (Aug. 10, 2019, 5:00 PM), https://pmjandhanyojana.co.in/mai-bhago-scheme-punjab-cycle/.
55. Punjab SarbatSehatBimaYojna, 2019,(Aug. 20, 2019, 6:00 AM), https://www.shapunjab.in/home.
56. NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015.

NITI AAYOG

NITI Aayog recommended that the strategy for combating poverty must rest on two legs: sustained rapid growth that is also employment intensive and making anti-poverty programs effective. NITI Aayog further suggested that making anti-poverty programs such as the Public Distribution System (PDS), Midday Meal Scheme, MGNREGA and Housing for all more effective represents the second leg of the strategy to eliminate abject poverty.[57]

REPORTS OF COMMISSIONS AND COMMITTEES

Reports of Law Commission of India: Law Commission of India is an important body in the legal system of India. Its aim is to ensure law keeps up with the times the society live in so as to ensure and maximize justice. Law Commission has made efforts in respect of poverty alleviation. Following are the various reports on poverty alleviation:

The Law Commission of India in its Report suggested that legal aid will have to be first given to person accused of crime, particularly crimes of serious nature. Members of scheduled castes and scheduled tribes who generally are without means will have to receive preferential consideration. Legal aid will have next to be extended to really poor persons and then gradually made available to persons of moderate means who are unable to bear the cost of litigation.[58]

The Law Commission of India has also stated in its Report that every man and woman has the human right to a standard of living facility for health and well being, to food, clothing, housing, medical care and social services. These fundamental human rights are defined in our Constitution. The right to be free from poverty includes the human right to an adequate standard of living, right to live in adequate housing, right to be free from hunger, right to primary health care and medical attention in case of illness. Thus, poverty is a human rights violation.[59]

RANGARAJAN REPORT ON POVERTY, 2014

Expert Group under the chairmanship of Dr. C. Rangarajan to review the methodology for measurement of poverty in the country constituted by the Planning Commission in June 2012 has submitted its report on June 30, 2014. As per the report, poverty line is estimated as Monthly Per Capita Expenditure of Rs. 1407 in urban areas and Rs. 972 in rural areas. The Expert Group

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57. NITI Aayog, (June 29, 2019, 6:00 PM), https://www.niti.gov.in/sites/default/files/201901/Summary_eliminating_poverty.pdf.
58. Law Commission of India, 14th Report on Reforms of Judicial Administration- Vol. I, chapter 27, (September, 1958).
59. Law Commission of India, 223rd Report on Need for Ameliorating the lot of the Have-nots: Supreme Court's Judgments, (April, 2009).

(Rangarajan) has recommended that the poverty line should be based on certain normative levels of adequate nourishment, clothing, house rent, conveyance and education, and a behaviorally determined level of other non-food expenses.[60]

JUDICIAL ATTITUDE TOWARDS POVERTY IN INDIA

The judiciary has kept an intense scrutiny and ensured that Constitutional mandate is properly enforced and any friction between the legislature and the executive is eased. Building upon article 21, the judiciary has adopted an expansive interpretation bringing within its ambit almost all facets of poverty – direct or indirect.

Against the backdrop of the foregoing and in a scathing indictment on the denial of legal services to the poor and in a bold attempt to make courts accessible to the poor, the Supreme Court of India in ***People's Union for Democratic Rights v. Union of India,***[61] observed thatthe rule of law does not mean that the protection of law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only in paper and not in reality. The courts are praised for their boldness and courage and their independence and fearlessness are applauded and acclaimed. But if the fundamental right of the poor and helpless victims of injustice is sought to be enforced by public interest litigation, the so called champions of human rights frown upon it as a waste of time of the highest court in the land which according to them should not engage itself in such small and trifling matters.

The Indian Judiciary in ***Olga Tellisand Ors v. Bombay Municipal Corporation and Ors case,***[62] has also come forward in favour of poor people and the right to life was widened enough so as to bring the 'right to livelihood' within the purview of 'right to life' under article 21 of the Constitution. The Apex Court has justified eviction of slum dwellers that the respondents (Bombay Municipal Corporation) must provide with alternative shelter or accommodation to the slum dwellers before eviction from the pavements.

In an another case, ***People's Union for Civil Liberties v. Union of India,***[63] the Apex Court agitated over the issue of starvation deaths in Rajasthan despite excess grain being kept aside for famine. Various schemes for food distribution throughout India were also non-functional. The

60. Planning Commission, (July 14, 2019, 7:00 AM), http://planningcommission.nic.in/reports/genrep/pov_rep0707.pdf.
61. AIR 1982 SC 1473 (India).
62. 1985 SCC (3) 545 (India).
63. (2003) SCR 1136 (India).

Supreme Court, noting the right to life, stated "would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation." The Court found failure on the part of government to implement various food schemes and the Court directed for more specific measures to be effected.

In ***M.R. Balaji v. State of Mysore,***[64] the Supreme Court held that two tests should be conjunctively applied in determining backward classes; firstly they should be comparable to the schedule castes and schedule tribes in the matter of their backwardness and secondly they should satisfy the means test i.e. the test of economic backwardness laid down by the state government in the context of the prevailing economic conditions.

The Apex Court in ***J. P. Parimoo v. State of Jammu & Kashmir***[65] said that if poverty is the exclusive test, a large population in our countrywould be socially and educationally backward class of citizens. Poverty is evident everywhere and perhaps more so in educationally advanced and socially affluent classes. A division between the population of our country on the ground of poverty that the people in the urban areas are not poor and that the people in the rural areas are poor is neither supported by facts nor by a division between the urban people on the one hand and the rural people on the other that the rural people are socially and educationally backward class.

The Hon'ble Supreme Court in ***Jarnail Singh v. Lachhmi Narain Gupta***[66] decided that reservation should be based on income. The Apex Court stated that reservation in promotions does not require the state to collect quantifiable data on the backwardness of the Scheduled Castes and the Scheduled Tribes, yet makes the creamy layer in either group ineligible for the benefits.

CONCLUDING REMARKS

The Government of India and the State Governments have been implementing several programmes (IRDP, JRY etc) for poverty alleviation in India. While the objectives of these programmes may be commendable,they are based on a belief that spending of money is in itself a necessary and sufficient condition for povertyalleviation. This belief under-plays the role of non-monetary policies and the impact they have on the lives ofthe people. It has been the

64. AIR 1963 SC 649 (India).
65. (1973) 3 S.C.R. 236 (India).
66. 2018 SCC Online SC 1641 (India).

experience of many grassroot workers that often certain government policiesharm the poor much more than any benefit that accrues to them through money-oriented schemes like theIRDP.Strong localgovernance such as expected from Panchayati Raj Institutions – responsive to the needsof beneficiaries, one which encourages mobilisation of the rural poor and is open tosocial audit -- promises better delivery system of the poverty alleviation programmes.It is now a recognised fact, that poverty is a multi-faceted phenomenon going beyond the realms of lack of adequate income; it must be viewed as a state of deprivation spanning the social, economic and political profile of the people that precludes their effective participation as equals in the development process. This recognition has resulted in restructuring and reorganization of various poverty reduction programmes. The formidable challenge faced by India at the time of independence was in the form of a large subgroup of its population being poor. This was an institutional outcome as well as the colonial legacy. During the last seven decades, India's tryst with poverty has met with chequered responses. It is quite obvious that the institutional interface dictated the performance. It would be incorrect to say that all poverty reduction programmes have failed. The growth of the middle class that was earlier virtually non-existent indicates that economic prosperity has indeed been promising in India, but the distribution of wealth has been extremely uneven. The responsibility of mitigating poverty cannot be that of the Government alone; it requires the cooperative efforts of the civil society. Optimization of the strategies should be such that the policies function in an atmosphere of both interdependence and independence simultaneously, thus creating a synergy for yielding better functional linkages and collaboration.

SEXUAL HARASSMENT OF WOMEN: A STUDY WITH REFERENCE TO EDUCATIONAL INSTITUTIONS IN CHANDIGARH

- Dr Babita Devi* & Mr Deepak Thakur**

INTRODUCTION

Man is born out of woman and the word 'Man' included in the word 'woman'. But this slice or part has assumed the proportion of the whole by reducing woman to an appendage of life, a parasite, a domestic pleasure, a pleasure of resort. This is the story of man- made civilization where lies the birth of tragedy of woman. Sexual harassment is an offence, which can destroy human dignity and freedom and confidence of the victim.[1] The term sexual harassment came to be used in the public media only from the year 1975 onwards. Till then no term existed to describe what is now universally called sexual harassment, though the phenomenon itself was well known to women. The term sexual harassment in a legal sense was first coined in the United States of America and subsequently exported from there to other industrialized countries in Western Europe. In India, the term sexual harassment was first defined in a formal legal sense in the year 1997 by the Supreme Court in ***Vishaka v. State of Rajasthan.***[2] Other terms used to describe this malady are 'unwanted intimacy' in the Netherlands, 'sexual molestation' in Italy, 'sexual blackmail' in France and 'sexual solicitation' in the state of Canada.[3]

Sexual harassment may be best conceptualized as one manifestation of the way in which sexual violence against women is committed in society. In the rape – prone culture, women are socialized to expect violence in their everyday lives, and such violence is treated as normal. Sexual violence is the most graphic and visceral tool of women's subordination and sexual harassment is a tool of oppression. Even those women who do not experience any direct form of sexual violence, experience fear which invade nearly all aspects of their public and private lives.[4] Sexual harassment must be understood to exist on the continuum of sexual violence against women.[5] Sexual violence is a violation of the rights of girls, threatening their right to

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1. Vijay Nagpal, Sexual Harassment of Women at Workplace: Legal Contours,P.U. L. Rev., Vol. 45 & 46, Part-II,93, 93 (2003-04, 2004-05).
2. Vishaka v. State of Rajasthan,AIR SC 3011, 3017 (1997).
3. Alok Bhasin, Law Relating to Sexual Harassment at Work 3 (1st ed. Eastern Book Company, 2002).
4. Suman Gupta, Sexual Harassment in Employment and Education: Causes, Consequences and Prevention, Del. L. Rev. Vol. XXVI 68, 68-69 (2004).
5. Vandana, Sexual Violence against Women: Penal Law and Human Rights Perspectives29 (1st ed. Lexis Nexis, 2008).

achieve an education, and injuring their psychological and physical well-being. Many countries do not use the term sexual harassment, but rather use other terms such as sexual bullying, gender-based violence, sexual abuse, and sexual violence among others.[6]

SEXUAL HARASSMENT AGAINST WOMEN IN CHANDIGARH

As per National Crime Records Bureau in Chandigarh under section 354 IPC i.e. assault on women with intent to outrage her modesty 21 incidents were reported in 2011, 45 incidents were reportedin 2012, 136 incidents were reportedin 2013, 87 incidents were reportedin 2014, 76 incidents were reportedin 2015,29 incidents were reportedin 2016, 102 incidents were reportedin 2017 and97 incidents were reported in 2018.[7]

As per National Crime Records Bureau in Chandigarh under section 509 IPC i.e. insult to the modesty of women, 12 incidents were reported2011, 25 incidents were reportedin 2012, 25 incidents were reportedin 2013,2 incidents were reportedin 2014, 10 incidents were reportedin 2015, 13 incidents were reportedin 2016, 12 incidents were reportedin 2017and 5 incidents were reportedin 2018.[8]

The above mentioned data has been reproduced in tabular form for brevity and clear understanding the number of incidents and percentage variation of crime under sections 354 and 509 IPC. Table A shows figures relating to crime against women under section 354 and 509 IPC from year 2011 to 2018 and percentage variation of crime rate from year 2017 to 2018.

Table A

Crime Head	2011	2012	2013	2014	2015	2016	2017	2018	% Variation between 2017 and 2018
Section 354, IPC	21	45	136	87	76	29	102	97	4.90%
Section 509, IPC	12	25	25	2	10	13	12	5	58.33%

MOLESTATION (SECTION 354 OF THE INDIAN PENAL CODE)

Adecrease of 4.90% has been observed in such cases as 97 cases were reported during the year 2018 as compared to 102 in the previous year (2017).

Eve-Teasing (Section 509 of the Indian Penal Code)

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6. Vol. I,Michele A. Paludi, Feminism and Women's Rights Worldwide, 187-88 (Praeger, 2010)
7. http://www.chandigarhpolice.gov.in/crimecht.html (Sept. 20, 2019, 17:30 PM)
8. *Ibid*

A decrease of 58.33% has been observed in such cases as 5 cases were reported during the year 2018 as compared to 12 in the previous year (2017).

After the Criminal Law (Amendment) Act, 2013, four new offences have been inserted in the Indian Penal Code from Section 354A to 354D dealing with sexual harassment, assault on women with intent to disrobe, voyeurism and stalking.In Chandigarh in the year 2014, 31 incidentsof sexual harassment were reported, 3 incidentsof assault on women with intent to disrobe were reported, 2 incidentsof voyeurism were reported and 10 incidentsof stalking were reported. In 2015, 22 incidentsof sexual harassment were reported, 2 incidentsof assault on women with intent to disrobe were reported, 1 incidentof voyeurism was reported and 13 incidentsof stalking were reported.In 2016, 26incidentsof sexual harassment were reported, 4incidentsof assault on women with intent to disrobe were reported, 2incidents of voyeurism were reported and 15 incidentsof stalking were reported. [9]

SEXUAL HARASSMENT AT EDUCATIONAL INSTITUTIONS IN CHANDIGARH

In executing the field work, the data was collected with the help of three sets of questionnaires including one set of females, one set for males and one set common for females and males which were distributed among females and males of different age groups at eight different educational institutions around Chandigarh viz. Panjab University, Sector 14, Panjab Engineering College (PEC) Sector 12, PGIMER Sector 12, Government College for Men (GCM) Sector 11, Government College for Girls (GCG) Sector 11, GGDSD College Sector 32, Dev Samaj College (DSC) Sector 45 and MCM DAV College Sector 36. The three sets of questionnaires had similar questions and were distributed among females and males respondents in the above mentioned educational institutions to the tune of 60 per institution.

The data reveals that generally males and females do take care of their behaviour in public especially in front of persons of opposite sex. This shows that in society males and females generally take care of their conduct. There is also similarity of opinion among the female and male respondents as to their outlook towards sexual harassment in our society and the majority has acknowledged that sexual harassment is prevalent in our society since long which satisfies the main objective of the research which is to measure the incidence and prevalence of sexual harassment among women. Thus, it can be seen that sexual harassment existed in our society since time immemorial and the same has been acknowledged by the respondents.

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9. http://www.data.gov.in/catalog/crime-committed-against-women (Sept. 20, 2019, 17:30 PM)

On being asked about the reasons for the sexual harassment of women in our society, 19% of female and 26% of malerespondents said patriarchal system is the reason; 16% of femaleand 20% of malerespondents said low status of women in the society is the reason; 13% of femaleand 12% of male respondents said women being an easy prey is the reason and 52% of female and 42% of malerespondents said women have been considered as an object of pleasure only which leads to sexual harassment of women in our society. This shows that majority of the female and male respondents are of the view that women have been sexually harassed in our society for reason being considered as an object of pleasure only, followed by the patriarchal system prevalent in the society which only leads to low status of women in the society. However, women being an easy prey has been least opined by both the female and male respondents for being sexually harassed in our society.

An important factor which is considered as a major reason behind sexual harassment is dressing of women. The data collected shows that 4% of female respondents and 24% of malerespondents think that dressing of women is a common cause to attract sexual harassment whereas 28% of femalerespondents and 8% of malerespondents do not think that dressing of women is a common cause to attract sexual harassment and 68% of female and male respondents think that it's the men's mentality that should be changed. The responses of the female and male respondents clearly shows a difference of opinion as very few percent of female said that dressing of women is a common cause to attract sexual harassment though quite high percent of male respondents are of the view that dressing of women does invite sexual harassment. Although majority of both female and male respondents are of view that there is a need to change the mentality of men which depicts that sexual harassment has nothing to do with the dressing of women rather the outlook of men is required to be changed.

The data collected shows that 90% of female respondents are of the view that the present condition of crimes against women is increasing while 10% of female respondents said that it's decreasing. On the other hand 74% of male respondents are of the view that the present condition of crimes against women is increasing while 26% of male respondentssaid that it's decreasing. It thus shows that though both female and male respondents are of opinion that crimes against women is increasing but this perception of female respondents is on the higher side as compared to the male respondents. On the other hand the perception of male respondents is on the higher

side as to the decreasing trend relating to crimes against women as compared to female respondents. Thus it can be said that the opinions of females and males differ as to the increasing or decreasing trend relating to crimes against women.

The data shows that 40% of the female respondents said that they have experienced non-verbal sexual harassment (e.g. looking someone up and down in a sexual way) whereas 56% of female respondents said that they have experienced oral sexual harassment (e.g. dirty jokes being sexual in nature, sexual comments etc.) and only 4% of female respondents said that they experienced physical sexual harassment (e.g. pulling someone's clothing, inappropriate touching, kissing etc.). The above data shows that females feel it difficult to reveal as to what type of sexual harassment they experienced.

The data collected shows that majority of victims of sexual harassment tends to talk about such incidents however most of them feel comfortable to discuss it with their peer groups followed by family members and most likely to the head of the institution if they want to seek redressal. The data collected also reveals that majority of persons have advised the female respondents to file a complaint against the harasser with the police. This reveals that if female becomes the victim of sexual harassment then society in general want to punish the culprit through legal process for such incidents are presumed to be normal by the other members of society.

On being asked as to what would they do in case sexually harassment, 8% female respondents said that they don't know what to do in such a situation whereas 4% of female respondents said that they would remain silent and would not speak about the incident and 88% of female respondents said that they would complain about sexual harassment. The data thus shows that the majority of women will come forward to report the matter to the police or to the institutional machinery in case of any incidence of sexual harassment and very minimal percent of women would remain silent or would not speak about such incident. This shows that women in the present day context are not afraid of any social taboo and will come forward to bring the culprit behind the bars for the offence of sexual harassment. This perception of females matches with that of society in general as gathered from the previous question observation wherein also maximum numbers of persons advised the victim to file a complaint against the harasser with the police.

The data collected shows that 82% of femalerespondentsare aware of laws protecting women from sexual harassmentwhile 18% of femalerespondentsare not aware of laws protecting

women from sexual harassment. On the other hand 81% of male respondents are aware of laws protecting women from sexual harassment while 19% of male respondents are not aware of laws protecting women from sexual harassment. The chart shows that there is similarity of opinion among female and male respondents as to the knowledge relating to laws protecting women from sexual harassment. This shows that female and male are proportionately aware or unaware respectively about the laws protecting women from sexual harassment, however, majority of both the respondents have shown their knowledge regarding such laws.

The data shows that 3% of female respondents and 9% of male respondents think that laws for the protection of women from sexual harassment are properly implemented whereas 32% of female respondents and 49% of male respondents think that such laws are not properly implemented. Further, 35% of female respondents and 36% of male respondents feel that such laws are rarely implemented whereas 30% of female respondents and 6% of male respondents are of view that rights/laws are there but none cares for such laws. Thus, general perception of respondents is that laws made for the protection of women from sexual harassment are either not properly implemented or rarely implemented. Marginal faction of respondents also thinks that no one cares about such laws even if they are enacted. The data thus reveals that there is lacking in the commitment of state agencies in enforcing or properly implementing the laws made for the protection of women from sexual harassment.

The data collected shows that 46% of femalerespondents see effective role of police in curbing crimes against women while 54% of femalerespondentsthink it's ineffective. Similarly,46% of male respondents see the role of police in curbing crimes against women as effective while 54% of malerespondentsthink it's not effective. The data shows that both the respondents see the role of police in curing crimes against women proportionately effective and in-effective respectively, however greater is the proportion of respondents with opinion that police's role is ineffective in curbing crime against women. This shows that role of protective agencies is not satisfactory while dealing with crimes against women.

The data collected shows that 43% of female respondents think that there are enough drives/campaigning by Chandigarh police regarding safety of women from sexual harassment whereas 57% of femalerespondents think that there are not enough drives/campaigning by Chandigarh police regarding safety of women from sexual harassment. On the other hand 37% of male respondents think that there are enough drives/campaigning by Chandigarh police

regarding safety of women from sexual harassment whereas and 63% of male respondentsthink that there are not enough drives/campaigning by Chandigarh police regarding safety of women from sexual harassment. Thus, the majority of female and male respondents are of the view that Chandigarh police's effort in curbing sexual harassment is lacking which in turn becomes one of the reasons in the increase of crime of sexual harassment which relates with the research hypothesis and shows that the role of protective agencies is lacking in dealing with such crimes.

On being asked if there are adequate number of women police personnel in Chandigarh, 47% of female respondents think that there are adequate numbers of women police personnel in Chandigarh while 53% of female respondents think that there are not adequate numbers of women police personnel in Chandigarh. The nature of crime against women requires reporting of incidents to women police personnel which if lacking will result in less number of complaints since it will be difficult for an aggrieved woman to reveal the information before a male police personnel.

The data collected shows that 82% of femalerespondentsthink that there is less deployment of women police personnel during night hours in Chandigarh whereas 18% of femalerespondents think that there is not less deployment of women police personnel during night hours in Chandigarh. Similarly, 82% of male respondentsthink that there is less deployment of women police personnel during night hours in Chandigarh whereas 18% of male respondents think that there is not less deployment of women police personnel during night hours in Chandigarh. The data thus suggests that majority of respondents are of the view that there is less deployment of women police personnel during night hours in Chandigarh which can be a major cause of insecurity among women because if sexually harassed woman victim may not feel comfortable to report the matter to male police personnel and that too during night hours fearing more harassment at the hands of male police personnel.

The data collected shows that 70% of female respondents said that they would avail late night dropping service started by Chandigarh police whereas 30% of female respondents said that they would not avail late night dropping service started by Chandigarh police. This shows that majority of female respondents have shown faith and trust on the Chandigarh police for dropping them during late night at their respective places rather than availing any other source of transportation. It reflects that females are afraid of using other modes of transportation during

night hours for fear of sexual harassment or other grave crimes. It is pertinent to mention here that recently in 2017 the Chandigarh police have also started late night picking and dropping of ladies.

The data collected shows that 90% of female respondents think that there should be notice board/banners prohibiting sexual harassment at educational institutions while 10% of femalerespondents think that there should not be notice board/banners prohibiting sexual harassment at educational institutions. On the other hand 93% of malerespondentsthink that there should be notice board/banners prohibiting sexual harassment at educational institutions while 7% of male respondents think that there should not be notice board/banners prohibiting sexual harassment at educational institutions. The chart shows that highlighting the prohibition of sexual harassment through notice board/banners will be a welcome step as a very high percentage of both the respondents were of this view. Since majority of people are unaware of laws prevalent in the country and sexual harassment has been taken up as a non-serious or casual incident without giving attention to the victims, such highlighting through notice/banners will regulate the behaviour of people and make them think before committing any such act.

The data collected shows that 58% of femalerespondents and 60% of malerespondents are of the view that imposing stringent punishment will help in the implementation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 whereas 42% of female respondents and 40% of malerespondents are of the view that sensitizing the society will help in the implementation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The data thus shows that the views of female respondents and that of male respondents are nearly proportionate for the implementation of the Sexual Harassment Act. However, imposing stringent punishment has been more opined than sensitizing the society for the implementation of the Act.

To see as if the provisions of the Act have been implemented by the educational institutionsinformation was sought under the provisions of Right to Information, Act from eight educational institutions which are the subject matter of the present research. As to the query regarding the number of complaints of sexual harassment dealt with by such institutions on yearly basis from 2006 to 2017, a total of 28 complaints during the period February, 2014 to May, 2017 in Panjab University, none in GGDSD College, in MCM DAV College there was one

complaint in 2016 and one complaint in 2017, in Dev Samaj College no such complaint has been received, in GCM there was one complaint during 2014-15, two complaints during 2015-16 and one compliant during 2016-17, in Government College for Girls no complaint has been received relating to sexual harassment, in PGIMER a total of 14 complaints, have been received.

As to the query,whether the complaintsrelating to sexual harassment were sorted out by the Committee itself or were referred to police under the provisions of Indian Penal Code, Panjab University replied that it depends upon the nature of the complaint, GGDSD College replied that in negative for reason that no documents are available, MCM DAV College replied that the matters were sorted out at the level of committee itself, Dev Samaj College and Government College for Girls replied in negative since no such compliant relating to sexual harassment has been received there, GCM College replied that all complaints were settled by the committee itself, PGIMER only revealed that no complaint has been referred to police.

It has been observed that bigger institutions like Panjab University and PGIMER have received more complaints of sexual harassment and all such complaints have been dealt with by the Complaints Committee only and no police case has been referred in such events. This tends to show that the problem of sexual harassment is more prevalent in bigger institutions as compared to smaller ones. However, these bigger institutions have not replied in spirit as to the query put to them that if the matter was sorted by the Committee then what punishment was given to the guilty person as Panjab University replied that the Committee recommended different punishments in different complaints keeping in view the nature of complaint andPGIMER replied that the findings of the Committee were sent to the concerned authorities for further action. Thus, what type of punishment was given to the harasser by the Committee or what were the findings of such Committee could not been unearthed. This could inadvertently imply that the provisions or procedures for dealing with sexual harassment complaints have not been properly implemented or applied by many educational institutions.

On the basis of information received through RTI from Chandigarh police, it has been observed that a total of 574 numbers of cases were registered under section 354 IPC during the period from 2006 to 2016 in Chandigarh, out of which 49% cases resulted in acquittal of the accused persons and only in 15% of cases the accused persons were convicted. Also, under section 509 IPC a total of 120 numbers of cases were registered during the period from 2006 to 2016 in Chandigarh, out of which 46% of cases resulted in acquittal of the accused persons and only in

18% of cases the accused persons were convicted. Rest 36% of the cases in both the categories are either pending in courts, or are untraced, or are pending investigation, or have been quashed. The above data thus shows that in cases involving sexual harassment of women, the rate of conviction is very less and the rate of acquittal is very high. This shows that there is some procedural lacuna with which the women victims of sexual harassment face a lot of hardship while dealing with their cases in the courts which results in acquittal of the culprits and ultimately in the failure of justice. Thus, the remedial mechanism lacks in providing appropriate relief to the victims of sexual harassment and defies the sufferings and humiliations of the victims.

CONCLUSION AND SUGGESTIONS

The Constitutional mandates as enshrined in the Preamble, Fundamental Rights and Directive Principles of State Policy aims at establishing an egalitarian society in which women can enjoy the same dignity as men. Although the Constitution of India guarantees to every citizen the equality before the law or the equal protection of law, the true equality has not been achieved even after so many years of independence. The Constitution of India assures for all freedom and right to dignity but has been systematically denied to women. In recent past, there has been so persistent and frequent commission of crimes in different shape and size violating their basic rights and outraging their dignity and modesty.

Article 29(2) of the Constitution of India provides that no citizen shall be denied admission into any educational institution maintained by the State. Education is the most effective tool for empowerment and human development. Negative parental attitudes toward educating daughters are a barrier to the girl's education since parents see their daughters' education as a waste of money because she will eventually live with her husband's family. As education helps a person grow cognitively, intellectually and emotionally and enables a person to take right decisions on the basis of logic and reasons. Women are empowered and their human rights are protected and promoted in India if our society concentrates on educating the girl children who are often discriminated against and whose rights are relegated to background in comparison to those of the male children. Hence, it is suggested that education being the most powerful weapon to bring about equality and to prevent the menace of sexual harassment, compulsory and free education should be given to girl children as fundamental right upto 12th standard. With better

education Indian women will try to get all the benefits and come forward to object any objectionable and uncomfortable behavior of men without caring any social taboos.

Students must learn about sexual violence, female equality, good communication skills, boundaries, and respect of gender differences. More female teachers and teacher's assistance should be hired for colleges, universities where most teachers are male. Curriculum development about gender equity, sexual harassment, and effective forms of discipline, among others, should be required in all college teacher education. Colleges should develop, disseminate, and publicize effective sexual violence policies and procedures, as well as monitor their effectiveness. Teachers who sexually abuse a student of any age should be fired and referred to the police.

Though plethora of legislation exists, due to ineffective enforcement, women are exploited by the male dominated society. Male dominated society has found ways to circumvent the provisions of the Act and act as a blockade against women empowerment. Due to the failure of the legislations to protect women, judiciary has come forward to protect women. In protecting the women, the Indian Judiciary has removed all the procedural shackles and has completely revolutionized constitutional litigations. The judiciary has encouraged widest possible coverage of the legislations by liberal interpretationof the terms. The Court has shown greater enthusiasm in granting the constitutional provisions for all women.

Women's cells/women police stations have been set up as special mechanisms to cope with violence against women. The number of women cells /women police stations should be increased and should be given adequate powers, funds and staff. There is also need ofreforms in the police department; often the police are unaware of the police safeguards for women and the amendments to laws relating to such safeguards. Thus, reforms in the police department for quick action, immediate disposal of the case, non-consideration of influence and helping hand to the women victim must be made available. There should be the movement of police control room vehicles within and around the workplaces which will create panic in the minds of doer of sexual harassment.

There is need of framing the National Media Policy and Mass Media like TV and films that do not simply reflect but subtly and indirectly help in shaping social reality. The indecent representation of women in the media is a social evil, which corrupts the young minds and encourages violence against women. Hence, the media should prevent the commoditization of

women. Channels, which spoil the minds of people, should be stopped immediately. Media must highlight the ideas and thoughts relating to human values which develop a social change. The media should give more coverage to sexual harassment issues and should follow up the cases and the public can be informed about the successful conviction of the perpetrators. So that, more women can come out to report sexual harassment incidents.

It is suggested that cases involving sexual harassment of women should be decided in a summarily manner and the courts should not follow the normal procedure of examining of victims/witnesses time and again in the court rooms rather the evidences be taken by way affidavits. This will reduce the time for deciding the cases and also the victims/witnesses will be saved from further mental and physical harassment arising out of the lengthy and cumbersome court's procedures.

Last but not least there is need of an effective implementation law to control and prevent the menace of sexual harassment.

THE SOUTH CHINA SEA DISPUTE: GENESIS, LEGAL ISSUES AND NEW DEVELOPMENTS

-Dr Ajaymeet Singh ?& Mr Ankit Malik ??

"National greatness is inextricably associated with the Sea; with its commercial usage in times of Peace and its control in times of War".

-Rear Admiral Alfred Thayer Mahan (United States Navy)[1]

INTRODUCTION

Rear Admiral Mahan highlighted the importance of sea in these words way back in the year 1890. However, his statement still holds immense significance even in the twenty first century. It is because of the reason that even after the invention of aircraft and aerial transport, 90% of the international trade is carried out via sea.[2] The South China Sea is a marginal sea near the Pacific Ocean, which is spread over an area of around 3.5 million square kilometers. It is a hotly contested maritime area between many countries because it is abundant in oil and natural gas reserves.[3] Apart from being rich in natural resources, the South China Sea is a very vital trade and maritime route as well. The South China Sea Dispute is a maritime conflict pertaining to sovereignty over Spratly and Paracel islands in the South China Sea and the surrounding sea territory. China, Taiwan and five ASEAN (Association of South East Asian Nations) countries, i.e., Vietnam, Philippines, Malaysia, Brunei and Indonesia are involved in this dispute. The exclusive economic zones of these countries also overlap in this area.[4] The dispute involves several complicated issues relating to the interpretation of the UN Convention on Law of the Sea, 1982.[5]

GENESIS AND BRIEF HISTORY OF THE DISPUTE

The South China Sea was very calm in the beginning of the 20th century because China and its neighboring States were focused on other global conflicts like World Wars I and II. In fact, at the end of the Second World War in 1945, no country possessed any island in the entire South China

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1. Alfred Thayer Mahan, Alfed Thayer Mahan Quotes, Goodreads (April 1, 2019, 4:15 PM), https://www.goodreads.com/author/quotes/4090051.Alfred_Thayer_Mahan.
2. In oceanography, a marginal sea is defined as a seapartially enclosed by islands, archipelagos, or peninsulas, adjacent to the open ocean at the surface, and/or bounded by submarine ridges on the sea floor.
3. Introduction to South China Sea, South China Sea (April 2, 2019, 5:30 PM), http://www.southchinasea.org/introduction/.
4. Zou Keyuan, Navigation in the South China Sea: Why Still an Issue?, 32(2) INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 251 (2017).
5. Leszek Buszynski, The Development of the South China Sea Maritime Dispute, National Security College

Sea. It was in 1946 that China took possession of a few islands in the Spratly chain of islands. [6] The interest of various countries like China, Taiwan and Philippines in the South China Sea grew by leaps and bounds over the next 50 years. Between 1955 and 1956, China and Taiwan permanently occupied many islands in this area. But there was no dispute in this area for the next 15 years. However, by the early 1970's, the claimants became active again in order to wrest control of the disputed area because they came to know that there were significant crude oil reserves in the South China Sea. China and Philippines forcibly occupied several islands. The Battle of Paracel Islands was fought between the Naval forces of China and South Vietnam in January 1974. China emerged victorious in this battle and wrested control of several islands from South Vietnam. In this battle, several sailors and officers of the Vietnamese Navy were killed. After this battle, North and South Vietnam fortified their remaining positions in the South China Sea. They also took control of several unoccupied islands. Thereafter, tensions between these countries de-escalated for some years. However, disputes arose again in 1995 because Beijing built several underground bunkers in order to consolidate its position above the Mischief Reef.[7]

SOUTH CHINA SEA DISPUTE IN THE TWENTY FIRST CENTURY

In 2002, ASEAN (Association of South East Asian Nations) countries and China came together and held discussions to resolve the conflict in South China Sea. The discussions culminated in the Declaration on the Conduct of Parties in the South China Sea, 2002. The Declaration motivated the concerned countries to lay down a Code of Conduct for the use of resources of South China Sea. The parties promised not to use armed forces against each other in this

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Occasional Paper, 2013, National Security College (April 3, 2019, 5:45 PM),http://nsc.anu.edu.au/documents/occasional-5-brief-1.pdf. The UN Convention on Law of the Sea may contribute to a solution, but it has also contributed to the scramble for maritime territory and resources. UNCLOS allows each littoral state to claim an Exclusive Economic Zone of 200 nautical miles, and a Continental Shelf, and specifies that islands can generate their own EEZ's or continental shelves. However, what the claimants may be entitled to by asserting sovereignty over islands will be limited by UNCLOS, since not all islands can generate EEZ's or continental shelves. In Article 121(3), UNCLOS distinguishes between islands and rocks or reefs, which cannot generate EEZ's or continental shelves, but which are entitled to a 12 nautical mile territorial sea. Islands may not be entitled to full maritime zones in certain situations where they are close to continental land masses. Coastline length may be used to determine entitlement to the maritime zones of occupied islands, in which case the Philippines and Vietnam would benefit more than China. UNCLOS does not significantly benefit China in this matter, which has sought alternative ways of validating its claim to the area.

6. Sean Mirski, The South China Sea Dispute: A Brief History, Law Fare (April 4, 2019, 6:15 PM), https://www.lawfareblog.com/south-china-sea-dispute-brief-history.
7. David Anderson, Some Aspects of the Regime of Islands in the Law of the Sea, 32(2) INTERNATIONAL JOURNAL OF MAINE AND COASTAL LAW 320 (2017).

maritime area and agreed to solve their conflicts in an amicable manner. Over the next few years, the claimants refrained from provoking each other and did not occupy any other islands in the region. The concerned countries did not use force against each other. However, they started troubling each other by repeatedly sending demarches[8] and notes verbales.[9] Malaysia and Vietnam forwarded a joint memorandum to the Commission on the Limits of the Continental Shelf in May 2009, putting forth their claims in the South China Sea.[10]

China responded to the joint memorandum by submitting a map in which their notorious "nine dash line" was published. This line encompasses the entire South China Sea. China maintains that on the basis of its historical rights, it has unrestricted sovereignty over the islands in the South China Sea as well as the superjacent waters. Ever since the nine dash line was published, other countries interested in the South China Sea have been worried and intimidated by China's nefarious designs in the South China Sea. In 2012, Beijing snatched Scarborough Shoal away from the Philippines. Since then, Philippino boats have not dared to enter the waters of this shoal. [11]

Over the past 9 years, Chinese Navy has become very aggressive in the South China Sea. China has started an extensive land reclamation program in the entire South China Sea by constructing artificial islands. China has also prepared an airstrip on one of the large islands in this zone. Civilian as well as military aircraft are capable of landing on this airstrip. Till date, China has reclaimed over 2000 acres of land in the South China Sea. The other claimants in this region have vehemently condemned this land reclamation. In 2014, US President Barack Obama warned China and asked it to "stop throwing elbows and pushing people out of the way in pursuit of its interests."But unfortunately, China has not adhered to such warnings and requests till date.[12]

ISSUES INVOLVED IN THE DISPUTE

Both economic and strategic issues are involved in this maritime dispute. These issues are explained below:

1. Oil and Gas Reserves: Oil is the backbone of the economy of every country. Malaysian

8. Demarche is a formal diplomatic representation of the official position, views, or wishes on a given subject from one government to another government or intergovernmental organization.
9. Note Verbale is a diplomatic communication drafted in the third person and unsigned.
10. *Supra* note 6.
11. *Ibid.*
12. *Ibid.*

company Petronas is the major oil producer in this region. In 2011, it produced half a million barrels of crude oil per day. Apart from crude oil, it also produced 600 billion m3 of natural gas per year. Vietnamese company Petro Vietnam is also active in this area. With the passage of time the demand for crude oil has increased. As a result, the existing crude oil reserves have depleted. Therefore, both Petronas and Petro Vietnam are looking for new reserves in order to stay afloat in the market. This has irked China because it imports 55% of its crude oil and does not want any other country to explore the resources of the South China Sea.[13]

2. Fish Stocks: Fishing is the main source of earning livelihood for the people residing along the coastal areas. China has a very long coastline and the South China Sea is very rich in fish stock. But unfortunately, the fish stock of this region has been over exploited because of population explosion. As a result, both the quality and quantity of fish in this area has declined considerably. Some recent clashes which have taken place in this zone have been because of fisheries. Many countries have been sending naval and coast guard vessels in this zone for the purpose of supporting and protecting their fishermen. This has resulted in several tense incidents and close shaves.[14]

3. Strategic Value: The busiest sea lanes of the world pass through the South China Sea. It connects North East Asian countries like Japan, Philippines, Taiwan and South Korea with the South Asian countries like Malaysia, Sri Lanka and India. Most of the North East Asian countries import crude oil through the South China Sea because this trade route further extends to the Middle East countries which have abundant reserves of oil. Around 50 percent of the world's maritime trade and commerce is carried out through this area. Therefore, it holds immense strategic significance for North East Asian and South Asian countries. China can very easily hold these countries to ransom by blocking access to this vital trade route. Therefore, the major maritime powers like USA and Japan have always strived to maintain freedom of navigation through the area, which means preventing control over the South China Sea by one power, particularly a potentially hostile one.[15]

So far as China is concerned, it imports 80 percent of its crude oil through the South China Sea. In addition to it, 40 percent of China's entire trade and commerce is carried out through this zone. China is having an apprehension that in case the conflict in this zone aggravates, the US

13. *Supra* note 5.
14. *Ibid.*
15. *Ibid.*

Navy and the Indian Navy may join hands together in order to block China's oil imports and thus bring China down to its knees. Therefore, in order to protect its strategic interests, China has developed a very strong naval force which also includes an Aircraft Carrier and a few nuclear submarines capable of operating even in the Indian Ocean region. It is important to mention here that the US Navy has invited the Indian Navy many times for conducting joint patrolling in the South China Sea, but India has till date refrained from doing so, fearing Chinese aggression.

UNCLOS VERSUS CHINA'S HISTORICAL RIGHTS

China's claims to sovereignty over the South China Sea are based on 'historic rights' supported by imperial maps of the Ming dynasty, which date back to the 13th century.[16] The Chinese put forth the view that their historical notions of sovereignty predate and prevail over Western International Law and should be recognized as valid ab initio. China further argues that the United Nations Convention on Law of the Sea, 1982, is not applicable to the South China Sea because China had indisputable sovereignty over this area even before the coming into force of

16. Abhishek Pratap Singh, South China Sea Arbitration: An Analysis, Eurasia Review(April 5, 2019, 7:00 PM), http://www.eurasiareview.com/16052016-south-china-sea-arbitration-analysis/.

the UNCLOS, 1982. In the above mentioned image, the red line depicts the area claimed by China in the South China Sea. It is notoriously known as "The Nine Dash Line."

However, the Chinese claim of sovereignty over the entire South China Sea on the basis of historical records is not in consonance with modern International Law.[17] Justice Max Huber's test laid down in the ***Island of Palmas Case (United States of America vs. The Netherlands)***[18] *provides that "any rights obtained from history may be lost if they are not maintained in accordance with the changes brought about by the development of modern International Law."*[19]

Legally, most of the provisions of UNCLOS, 1982, are binding on all nations because it has codified pre-existing international customs related to maritime law. This is irrespective of the fact whether they have signed this Convention or not. As of December 2019, 167 countries and the European Union have ratified this Convention. USA is the only major maritime power which has not ratified the UNCLOS. In the ***Case concerning the Continental Shelf of Libyan Arab Jamahiriya/Malta,***[20] decided on 3rd June 1985, the International Court of Justice observed that: *"It cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of states. Hence, it is the duty of this Court even independently of the reference made to the Convention by the parties, to consider that in what degree any of its relevant provisions are binding upon the parties as a rule of customary International Law."*[21]

THE PHILIPPINES VERSUS CHINA ARBITRATION CASE

International Court and Tribunals generally assume jurisdiction on the basis of mutual consent of the parties to the dispute. However, once a State has signed and ratified the UNCLOS, 1982, it has to settle all its disputes pertaining to the Convention by either one of the four methods mentioned in the Convention itself. Such disputes can be brought before the International Court of Justice (ICJ) or the International Tribunal for Law of the Sea (ITLOS). They can also be submitted for Arbitration under Annexes VII and VIII of the Convention. Thus, one of the disputant States can sue the other State or States in either of these forums for resolving a

17. *Supra* note 5.
18. Permanent Court of Arbitration, 1928.
19. Reports of International Arbitral Awards, UN Legal (April 8, 2019, 7:25 PM), http://legal.un.org/riaa/cases/vol_II/829-871.pdf.
20. 1985, ICJ Reports, at 13.
21. International Court of Justice, Continental Shelf Case (Libyan Arab Jamahiriya/Malta), ICJ (April 10, 2019, 8:00 PM), http://www.icj-cij.org/docket/index.php?sum=353&p1=3&p2=3&case=68&p3=5.

maritime dispute if the terms and conditions of the UNCLOS, 1982, are fulfilled.[22] Aggrieved by China's aggressive stance in the West Philippine Sea, which is overlapping with the South China Sea, Philippines brought forth arbitral proceedings against China at the Permanent Court of Arbitration, the Hague on 22nd January 2013, having recourse to Annexure VII of the UNCLOS, 1982.[23] ***In The Republic of Philippines vs. The People'sRepublic of China,***[24] the Philippines challenged the legality of the U shaped line (Nine Dash Line) claimed by China and the legal regime of several other features in the South China Sea. China refused to appear before the arbitral tribunal. It asserted that as per the treaties signed between China and Philippines, territorial disputes have to be settled by mutual negotiations only. The Chinese government further stated that as per the terms of "The Voluntary Declaration on the Conduct of Parties in the South China Sea," signed in 2002 between China and ASEAN (Association of South East Asian Nations) countries, border disputes have to be settled by bilateral or multilateral negotiations. China accused Philippines of violating this Declaration.[25]

China also challenged the jurisdiction of the arbitral tribunal to try the case, citing certain provisions of the UNCLOS, 1982.[26] China further claimed that the dispute settlement

22. Pham Lan Dung & Tran Huu Duy Minh, Some Legal Aspects of Current Developments in the South China Sea Dispute in Examining the South China Sea Disputes: Papers From the Fifth Annual CSIS South China Sea Conference, CSIS (April 11, 2019, 8:30 PM), http://csis.org/files/publication/151110_Hiebert_ExaminingSouthChinaSea_Web.pdf.
23. The South China Sea Arbitration (The Republic of Philippines vs. The People's Republic of China), Permanent Court of Arbitration, (April 11, 2019, 7:55 PM), http://www.pcacases.com/web/view/7.
24. Case No. 19/2013.
25. *Supra* note 22, at 74.
26. *Ibid.* UNCLOS, 1982, provides for optional exceptions for excluding the jurisdiction of dispute settlement forums provided in the Convention. As per Article 298, States may exclude several types of disputes by a declaration, among others, including disputes concerning maritime delimitation or historic title. China made such a declaration in 2006. Article 298(1) provides that when signing, ratifying or acceding to this Convention or at any time thereafter, a State may declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission; (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree; (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties; (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the

mechanism provided under the UNCLOS applies only to the Convention's application or interpretation. Therefore, the parties cannot avail its dispute settlement mechanism for settling their territorial sovereignty disputes. However, just one week before the deadline set by the arbitral tribunal for the submission of a counter memorial, China published a position paper highlighting its case on 7th December 2014.[27] It is important to mention here that China's decision of not participating in the arbitral proceedings cannot prevent the arbitral tribunal from proceeding with the case. Vietnam also submitted its position paper in the capacity of an interested third party, supporting the stand taken by the Philippines. In response to China's claim, Philippines clarified that all arguments put forth by it before the tribunal do not deal with territorial sovereignty only. It has only requested the arbitral tribunal to decide the legality of the U shaped line (Nine Dash Line) claimed by China and the legal status of several other islands in the South China Sea, notwithstanding the fact that who has sovereignty over them.[28]

The hearing of the case began on 7th July 2015. It was attended by observers from Indonesia, Malaysia, Japan, Thailand and Vietnam. The first issue before the Court was pertaining to jurisdiction. On 29th October 2015, the Court held that it has the jurisdiction to hear the case. However, it agreed to take up only 7 out of the 15 submissions put forth by Philippines. Two of these submissions related to the Scarborough Shoal and the Mischief Reef, which is a low tide zone. The issue was whether the shoal and the reef can be considered as islands.

In a landmark verdict delivered on 12th July 2016, the UN Arbitral Tribunal held that *"Philippines has exclusive sovereign rights over the West Philippine Sea (South China Sea). The Court also declared China's Nine Dash Line as invalid. The Court concluded that there is no legal basis for China to claim historic rights to resources in the sea areas falling within the nine dash line. It further observed that China has violated Philippine sovereign rights in the West Philippine Sea."*[29]

POST JUDGMENT DEVELOPMENTS

After the delivery of the judgment by the UN Arbitral Tribunal on 12th July 2016, China

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exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3; (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

27. *Supra* note 22, at 77.
28. *Ibid.*
29. Matikas Santos, Philippines Wins Arbitration Case vs China Over South China Sea, Global Nation (April 12, 2019, 8:30 PM), http://globalnation.inquirer.net/140358/philippines-arbitration-decision-maritime-dispute-south-china-sea-arbitral-tribunal-unclos-itlos.

declared that any decision by the UN Arbitral Tribunal which forces it to compromise with its territorial sovereignty is unacceptable to it. Chinese Foreign Ministry spokesperson Hua Chunying remarked that "on the issues of territorial sovereignty and maritime rights and interests, China will never accept any imposed solution."[30] On the very same day, China threatened to declare an "Air Defence Identification Zone (ADIZ)" over the disputed waters of the South China Sea. Liu Zhenmin, Chinese Vice Foreign Minister remarked that "if our security is being threatened, we have the right to demarcate an air defence identification zone."[31] If such an ADIZ is actually imposed, China would enjoy the right to require every aircraft entering the designated airspace to identify itself, failing which, it could be shot down. In November 2013, China declared an ADIZ over the disputed islands in the East China Sea and named it as "East China Air Defence Identification Zone." Both USA and Japan condemned this move by China. It resulted in the escalation of tensions between these three countries. USA immediately responded by sending two fully loaded B-52 Bombers of the US Air Force in this ADIZ and refused to identify them to China. However, the Chinese did not dare to shoot them down, fearing retaliation by the American forces. USA might respond in a similar manner if the Chinese declare an ADIZ over the South China Sea.[32] But till date, China has refrained from doing so.

On 28th July 2018, China for the first time sent a search and rescue ship to be permanently stationed at one of its manmade islands in the disputed Spratly chain of the South China Sea. China has also built several military outposts on the disputed islands of the South China Sea. It has always maintained that these facilities are for defensive purposes only. However, such moves could actually help to bolster China's claim of sovereignty over the disputed islands.[33]

On 5th July 2020, the US Navy deployed two aircraft carriers, i.e., "USS Nimitz" and "USS Ronald Reagan" in the South China Sea for conducting military exercises. This was done with

30. Matikas Santos, China: We are the Victims in Dispute; Won't Heed UN Decision, Global Nation (April 12, 2019, 9:00 PM), http://globalnation.inquirer.net/126097/china-we-are-the-victims-in-dispute-wont-heed-un-decision.
31. Neil Connor, China Threatens to Impose Air Defence Identification Zone on Disputed Area of South China Sea, The Telegraph (April 15, 2019, 8:00 PM), https://www.telegraph.co.uk/news/2016/07/13/china-declares-right-to-set-up-air-defence-zone-in-south-china-s/.
32. Ralph Jennings, What Happens if China Declares an Air Defence Identification Zone Over The Disputed South China Sea, Forbes (April 15, 2019, 8:30 PM), https://www.forbes.com/sites/ralphjennings/2016/07/27/what-you-do-if-beijing-declares-an-air-defense-zone-over-disputed-south-china-sea/#b07948e6fa55.
33. Jesse Johnson, In a First, China Permanently Stations Search and Rescue Vessel in South China Sea's Spratly Chain, The Japan Times (April 15, 2019, 7:15 PM), https://www.japantimes.co.jp/news/2018/07/29/asia-pacific/first-china-permanently-stations-search-rescue-vessel-south-china-seas-spratly-chain/#.W19BJNUzbIU.

the objective of mounting pressure on China to stop its expansionist activities.[34] In response, the Chinese Army conducted maritime attack drills and the Chinese Navy deployed warplanes in the South China Sea.[35]

INDIA AND SOUTH CHINA SEA

South China Sea holds vital significance for India because 55 percent of India's maritime trade and commerce is carried through the Malacca Strait, which is connected to the South China Sea. The aggressive posture of China in this maritime zone can be detrimental to India's economy as well as national security. If the South China Sea dispute takes a violent form and results in the outbreak of a War between the disputing States or between China and USA, the security of the entire Indian Ocean region would be jeopardized. Such a situation might disrupt India's trade with its South East Asian neighbours. Therefore, India needs to adopt a defensive strategy by entering into military alliances with its South East Asian neighbours in order to counter China's aggressive maneuvers in the South China Sea. Such a strategy has become imperative for India as the Chinese Navy has already established a foothold in a few critical Indian Ocean States like Myanmar and Cambodia.[36]

Although India is not a party to the ongoing conflict in the South China Sea, it needs to keep a keen eye on the dispute in order to maintain peace in the Indian Ocean region. China has poked India several times by stating that the Indian Ocean is not India's Ocean. But no one can deny the fact that India has the largest Navy in the South Asian region and is duty bound to maintain the Indian Ocean as a zone of tranquility. Therefore, India is interested in the South China Sea dispute primarily for three reasons, i.e.,

i) Firstly, to maintain and strengthen its maritime security,

ii) Secondly, to develop close ties with ASEAN countries to fulfill its 'Look East Policy' and

iii) Thirdly, to counter China in the Indian Ocean region.[37]

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34. Shishir Gupta, US Supercarriers in South China Sea: Ambitious Beijing Stretched on Multiple Fronts, Hindustan Times (July 22, 2020, 11:30 PM), https://www.hindustantimes.com/india-news/us-supercarriers-in-south-china-sea-ambitious-beijing-stretched-on-multiple-fronts/story-9TGe3YDqJgi6A304oVo7MM.html.
35. Liu Xuanzun, PLA conducts maritime drills, deploys warplanes in South China Sea amid US aggression, Global Times (July 22, 2020, 11:45 PM), https://www.globaltimes.cn/content/1195104.shtml.
36. Abhijit Singh, India and the South China Sea Dispute, The Diplomat (Sept. 22, 2019, 12:23 PM), https://thediplomat.com/2016/03/india-and-the-south-china-sea-dispute/.
37. *Ibid.*

However, till date, India has maintained a pragmatic position on the dispute. India has not favoured any particular country in the ongoing dispute. But it has always stressed upon the freedom of navigation for all countries. It has also advocated the peaceful resolution of all international disputes in accordance with the well settled principles of International Law.[38] So far as the decision of the arbitral tribunal on the South China Sea dispute, delivered in 2016 is concerned, India has urged all the disputing States to accept the verdict.

CONCLUSION

In the twenty first century, the South China Sea dispute is indeed a boiling point which could trigger a Nuclear War between USA and China in the hotly contested waters and beyond. The Chinese Navy and the US Navy often make aggressive overtures against each other in this sea. Although the South China Sea Dispute has its roots in history, it has assumed greater significance in the twenty first century. This is so because the South China Sea is a major shipping and trade route, it is rich in oil and gas reserves and fish stocks, and has a great strategic and military value. Apart from these factors, the advancement of science and technology has made it possible for China to reclaim land in the South China Sea by constructing artificial islands, which is a cause of concern for the other countries involved in the dispute. China's claim to the whole of the South China Sea on the basis of its nine dash line (U shaped line) cannot be justified by any stretch of imagination. The Chinese claim is in clear cut violation of the United Nations Convention on Law of the Sea, 1982, as well as customary international law. Such an extensive and usurping claim cannot be sustained on the basis of historical rights alone. No country should be allowed to usurp the exclusive economic zone of other countries on the basis of its historical rights. China is trying to aggressively dominate its small and weak maritime neighbors involved in the dispute as they cannot match the manpower and firepower of the mighty Chinese Navy. China is thus hell bent to prove that "might is right." The Chinese claim has been vehemently condemned and opposed by the other countries involved in the dispute as well as by neutral countries like India, Japan and USA.

SUGGESTIONS

In order to settle the South China Sea Dispute permanently, it is suggested that all countries involved in the dispute should whole heartedly accept the verdict of the Arbitral Tribunal

38. *Supra* note 33.

delivered in the case of ***Philippines vs. China.*** For the promotion and sustenance of international peace and security, it is imperative that the dispute should be settled at the earliest, once and for all, on the basis of a liberal and extended interpretation of the United Nations Convention on Law of the Sea, 1982, which is virtually a "Constitution for the Oceans."All countries bordering the South China Sea should bring their maritime claims in conformity with the provisions of the UNCLOS, 1982. This approach seems to be the best for dealing with the underlying sovereignty and maritime disputes in the South China Sea.[39] If China fails to abide by the UNCLOS, it would be a serious violation of International Law. Moreover, it will tarnish China's reputation and will become a hurdle in its quest to become a global leader. [40]

It is further suggested that China must be encouraged to resolve the issue of its claims in the South China Sea in a spirit of mutual cooperation, regional harmony and peace. Unnecessary belligerence and assertiveness will only vitiate the atmosphere and harm its own long term interests. Joint development of the region and sharing of natural resources will be for the common good of the region, as against an attempt to corner them for use by one country flexing its military muscle.[41]

It has been very aptly remarked that *"where the limits of the law are exhausted, it is for the diplomacy to mend friendly relations so that the desired results may be achieved."*[42]

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39. Robert Beckman, The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW163 (2013).
40. Jill Goldenziel, International Law is the Real Threat to China's South China Sea Claims, The Diplomat (April 10, 2019, 8:15 PM), http://thediplomat.com/2015/11/international-law-is-the-real-threat-to-chinas-south-china-sea-claims/.
41. *Supra* note 33.
42. Manimuthu Gandhi, The Enrica Lexie Incident: Seeing Beyond the Grey Areas of International Law, 53 Indian Journal of International Law 26 (2013).

THE TRANSITIONAL SHIFT FROM THE HUMAN RIGHTS OF THE 'MENTALLY RETARDED' TO THE HUMAN RIGHTS OF THE PERSONS WITH INTELLECTUAL DISABILITIES- THE DISABILITY OFTEN IGNORED

-Nidhi Sharma*

"…The Disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and grave problems for the society at large. What the law permits to them is no charity or largesse but their right as equal citizens of the country."[1]

Justice Aftab Alam.[2]

INTRODUCTION

Human Rights are considered as those natural rights which portray the existence of every human being in this society and also accord the right to lead a life of dignity and self-worth. These rights are considered to be inherent to the human survival and have been recognised as well as advocated since the last many centuries. Starting from the rights such as the right to life and right to self-preservation to providing the rights for every human which forms a part of this society, the concept of Human Rights has undergone a lot of evolution. At present, the movement of human rights has reached a point where they are not considered to be a choice but have been made mandatory for the well-being of the citizens of every country. All the national and domestic laws of the countries have these rights embedded within their Constitutions and there are proper remedies available for the violation of the same.

When we talk about the concept of Human Rights it must be seen that it is made up of two important words, Human and Right. The term 'right' which has its genesis in the Latin term 'rectus' i.e. rectify or correct, means something which is 'just.' It must be remembered that a 'Human' without 'Rights' is not a free man and is equivalent to a slave. Thus, all the doctrines and the ideologies as propounded by various writers and authors which talk about the protection of human freedom or upholding their dignity always presuppose the existence of the human

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1. Bhagwan Dass and another v. Punjab State Electricity Board (Supreme Court) Civil Appeal No. 8 of 2008, Judgment dated 4th January 2008.
2. *Id.*

rights. Harold Laski has rightly observed that, 'every state is known by the rights that it maintains'[3]. Even the writers and philosophers existing in the Vedic period were of the view that human rights are those essential rights without which we cannot be accorded with the true status of being a 'human'. According to them these essentials help us to grow and develop in the best possible manner. One of the other important things that they pointed out was that these rights are universal in nature and shall apply to one and all without any kind of discrimination.

Disability is regarded as that component of human existence which results due to the impairments that affect a person's social outlook. There is a lack of ability to take part in the societal affairs at an equal level with others. All human beings in this world are born free and are equal in terms of equal dignity and rights. 'Right' as we understand is nothing but an entitlement which a person may claim either on moral or legal grounds. The specially abled people whom we often regard as 'disabled' persons are considered to be a weaker section of the society and at times sub-human due to which they are at a risk of violence whether physical, mental or sexual in nature.

The concept of disability has been discussed by various thinkers and jurists who have not only tried to define the term but also accorded a viable interpretation to it over the years. When we use the term 'disability' we equate it with some form of incapability or deficiency to perform a physical or mental activity. In other words, disability can be expounded as the lack of ability and opportunities to compete with the world at large standing at the equal pedestal. Persons with disabilities have always been considered as the soft targets of abuse, inequality and charity in our society. For centuries they have been considered nothing but subjects of charity and pity which requires a change.

Even the texts of religious scriptures do not exempt the disabled from being regarded as the weaker and lower section of the society. The religion considers them incapable to perform the religious duties and ceremonies. The importance of rights for persons with disabilities is essential to their struggle for equality and social participation.[4] Before we discuss the shift in the terminology it would be imperative to first get an understanding of the terms 'disability' and 'intellectual disability'.

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3. Prof. S.N. Dhyani, Jurisprudence- Indian Legal Theory 224 (5thed, Central Law Agency., 2019).
4. Jayna Kothari,The Future of Disability Law in India: A Critical Analysis of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 19952 (Oxford University Press, 2012).

DISABILITY- MEANING

Even though the concept and types of disabilities have been recognized around various cultures, the definition of the term disability is subjected to various socio-cultural considerations and the extent to which the persons with disabilities are acknowledged or discriminated varies from culture to culture.[5] Therefore, it would be correct to say that the notion and perception of disability varies according to the customs and culture which shape the attitudes of people living there. Disability is not just confined to the health condition rather covers a wide range of impairments. In order to attain a better clarity of the term disability, it would be imperative that we tend to focus on the various definitions and meanings attributed to it.

To frame a proper legal definition of disability is not exempted from debate itself. The definition of disability varies across the globe. A study which was conducted on the definitions of disability in various European Union countries depicted that the definitions vary not only from country to country but also in different cultures within a country.[6] To articulate and confine the word disability to a single definition is not an easy task since it contains within itself a number of impairments in the mind and the body. To sum it up the boundary between an abled and a disabled persons seems to be unclear.For example in the case of intellectual disability the ability to understand pictures but not words or numbers results in a disability regarded as dyslexia. Therefore, it is difficult to encompass the various impairments of conditions of mind in one single definition. Moreover, we often encounter a change in the definitions of disability with the developments in the field of science and medicine.

Nevertheless, there are some definitions mentioned in the legal instruments which speak about the rights of the disabled persons. The Preamble to the Convention on the Rights of Persons with Disabilities, 2006[7] not only acknowledge that disability is an evolving concept but also stresses that disability is the result of interaction that occurs between a person under an impairment and his environmental and attitudinal barriers. It also stresses that such barriers often hinder their active and full participation in the society. Therefore, to define disability as an interaction means that disability is not an attribute of a person.

Disability has often come to be understood as an existing difficulty in performing one or more

5. Dinesh Bhugra &Kamladeep Bhui, Textbook of Cultural Psychiatry 462 (Cambridge University Press, 2018).
6. Kothari, *supra,* 30.
7. United Nations Convention on the Rights of Persons with Disabilities, 2006GA Res 61/106, GAOR UN A/Res /106 (2006).

activities which in accordance with age, sex and other social factors are generally accepted as an essential basic component of daily living.[8] It is very essential that the meaning of disability is clarified at the very outset so that there persists no ambiguity in the future. Therefore, the terms such as impairment, disability and handicap are not be used synonymously as it will only lead to ambiguity. The World Health Organization has attempted to make a distinction between these three terms.[9] According to WHO impairment refers to the loss of physical or sensory working of any particular organ of the body, while disability means an inability or a limitation to cope up with the normal routine in an equal manner with the others. Handicap on the other hand is an entirely different concept which is nothing but a situation which results from the impairment or disability clubbed along with the response coming from the society.[10]

The definition of disability can be viewed from two perspectives, one being the medical definition and other being the social or legal definition. The legal definitions of disability vary according to the legal purposes that it attempts to fulfil. A law which talks about the social welfare of the disabled shall carry a definition which provides benefits in the society rather than an anti-discrimination law. This debate about the medical definition versus the social or legal definition has had a larger impact on disability studies, as it leads to a shift from the charity oriented understanding to a rights based understanding of the term disability.[11]

While the medical perspective only focuses to reintegrate the person with disability into the mainstream society, the social model defines disability with regard to the social, environmental and attitudinal barriers rather than the lack of ability. The concept of discrimination is the main attribute in the social definition, which focuses on the point that the disabled people do not face disadvantage because of their impairments but experience discrimination in the way a society is organised.

By placing emphasis on human dignity, respect and the right to equality, rather than the simple bio-medical condition the social approach recognises that the attitudes of society and its members often contribute to the idea or perception of a handicap and in fact a person may have limitations in everyday activities other than those reportedly created by prejudice and stereotypes. Since the research paper deals with one important aspect of disability i.e.

8. Dr. Mohd. Ahmad, Disabled Persons and Human Rights,15(4) CMLJ463, 465 (2015).
9. World Report on Disability, Understanding Disability, World Health Organization (Sep. 12, 2017, 11:34 AM), http://www.who.int/disabilities/world_report/2011/report.pdf.
10. *Id.*
11. Kothari, *supra*,30.

Intellectual Disability, it is quite imperative that the term needs to be understood and subsequently the paradigm shift in the concept and terminology from'mental retardation'to 'intellectual disability'will be discussed.

INTELLECTUAL DISABILITY

The meaning and definition of the term intellectual disability has always remained a topic of debate since the times when classification of disorders relating to brain was being done.[12] Since the last decade, the term intellectual disability is more often used instead of the term mental retardation. Esquirol referred to intellectual deficits overall as conditions of incomplete mental development based on known or unknown biological or environmental issues.[13] The Convention on the Rights of the Persons with Disabilities, 2006 does not define the term disability per se, but rather talks about it as an outcome of the interaction between an impairment and the environment. Such a definition highlights the heterogeneity of experiences, life chances, choices and preferences of adults and children with disabilities shaped by a range of socio-economic, cultural and other factors rather than focusing on a condition. Therefore, in line with the Convention, the World Report on Disability[14] defines the term intellectual impairment as:

> "A state of arrested or incomplete development of mind which means that the person can have difficulties understanding, learning and remembering new things and in applying that learning to new conditions. Also known as intellectual disabilities, learning disabilities and formerly as mental retardation or mental handicap."[15]

The American Psychiatric Association[16] also defines Intellectual Disability as something which involves general mental abilities that affect the functioning in two areas i.e the intellectual functioning involving activities like learning or solving problems, etc. The Diagnostic and Statistical Manual[17] defines Intellectual Disability as an inability in the cognitive aspect of the brain and an intelligence quotient below 70. Apart from that the definition also covers the

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12. James C. Harris & Stephen Greenspan, Definition and Nature of Intellectual Disability, Springer (Sep. 15, 2016 21:45 PM), file:///C:/Users/jai%20mata%20di/Downloads/9783319265810-c1%20(1).pdf
13. *Id.*
14. Report of the ninth session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, 2006,United Nations (Sep. 13, 2017, 09:50 AM), http://www.un.org/disabilities/documents/COP/9/cosp9_report_e.pdf.
15. *Id.*
16. Defining Intellectual Disability, American Psychiatric Association (Sep. 9, 2017, 22:13 PM), http://www.apa.org/pi/disability/resources/publications/newsletter/2016/09/intellectual-disability.aspx.
17. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, (5th ed. Arlington: American Psychiatric Association, 2013).

inability to cope up in three areas i.e. conceptual (reading, writing, reasoning etc.), social and practical (taking up job responsibilities, take care of one's own self, etc).

At the national level, The Persons with the Disabilities Act, 2016[18] under its Schedule[19] clearly mentions that intellectual disability includes a disability in the intellectual functioning (reasoning, learning, problem solving) and in adaptive behaviour (every day, social and practical skills, including specific learning disabilities)[20] and autism spectrum disorder.[21] Specific Learning Disability means the condition where there is a deficit in processing language, or difficulty to comprehend, speak, read, write, spell or do mathematical calculations and also includes perceptual disabilities, while Autism Spectrum Disorder is a neuro-developmental condition that appears in the first three years of the life of a person. It affects a person's ability to communicate, understand relationships and relate to others.

Therefore, in the opinion of the researcher, intellectual disability may be defined as a significantly reduced ability to understand new or complex information, to learn new skills and a reduced ability to cope independently i.e. impaired social functioning. A person's mental capacity, the ability to make decisions can vary depending on the environmental or social factors; however, the legal capacity is "a universal attribute inherent in all the persons by virtue of their humanity and can therefore not be stripped of it."[22]

The Conceptual and Terminological shift from the Human Rights of the 'Mentally Retarded' to the Human Rights of the Persons with'Intellectual Disability'

As mentioned earlier, nowadays the term intellectual disability is used instead of mental retardation by the medical practitioners, psychiatrists, counsellors, lawyers and other sections of the society. The question that often arises in our mind is what necessitated or led to this change in the terminology of mental retardation. The laymen in our society often tend to use the term mental retardation whenever they meet any persons suffering from a disability connected to mind. There is a lack of awareness as well as knowledge whereby people fail to understand that a mere learning disability cannot be equated to a severe form of mental disorder. Organizations such as the American Association on Intellectual and Developmental Disabilities and the

18. The Rights of Persons with Disabilities Act, 2016, No. 49, Acts of Parliament, 2016 (India).
19. *Id*., at part 2 (a) of the Schedule.
20. *Id.*
21. Part 2(b) of the Schedule of the Rights of the Persons with Disabilities Act, 2016.
22. United Nations Committee on Rights of Persons with Disabilities, General Comment on Article 12: Equal Recognition before the LawCRPD/C/4/2 (2014).

International Association for the Scientific Study of Intellectual Disabilities have brought this change in the terminology.

The major question that has been addressed by the researcher is that as to why the term intellectual disability has been given preference as compared to mental retardation since the disability includes the same patients who were prior to this shift diagnosed with mental retardation. The only difference is that the ambit has been made wide and also includes the learning and developmental disabilities as well. Moreover, it has become the need of hour that the people have to be made aware that the illness resulting from psychological impairments also do not amount to intellectual disability.

Since time immemorial the society has equated the terms such as idiocy, mental illness, depression, bipolar disorders, epilepsy or simply a feeble mind with mental retardation. The people suffering from mental illness need mental health care and other therapies. In India, the Mental Healhcare Act, 2017[23] talks about the rights of the persons with psychological disorders which constitute 'mental illness' as a part of mental disorder, which also finds place in the Schedule attached to the 2016 Act.[24] The reason for doing so is that the disability that they are suffering from is not permanent in nature and they can live independently when the mental health is stable. On the other hand, in intellectual disability there is an actual impairment due to which it is difficult to cope up with the basic routine activities. If the disability is mild in nature they can live independently but not without support. But, if the disability is severe in nature the persons require a long term medical help and in most cases they remain specially abled for their entire life. Nevertheless, the fact remains that the persons suffering from both intellectual disability and mental disability are the victims of same prejudices and attitudes from the society.

In 1959 the American Association on Mental Retardation, at that time called the American Association on Mental Deficiency, published a definition of mental retardation according to which, mental retardation refers to subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behaviour. The definition was revised in 1961 which specified the meaning of the term subaverage general intellectual functioning in a manner that was to have considerable impact on the field of mental

23. The Mental Healthcare Act, 2017, No. 10, Acts of Parliament, 2017 (India).
24. Part 3 to the Schedule attached to the Rights of the Persons with Disabilities Act, 2016.

retardation. One standard deviation below the mean on an intelligence test was delineated as the point at which intellectual functioning should be considered subnormal. In 1992 the definition was again revised which said that mental retardation refers to a particular state of functioning that begins in the childhood in which the limitations in childhood coexist with related limitations in adaptive skills.[25]

Subsequently, with the emergence of intellectual and developmental disabilities, the name of the association was also changed to American Association on Intellectual and Developmental Disabilities (AAIDD). According to the definition given by the association, intellectual disability is a disability characterized by significant limitations in both intellectual functioning and in adaptive behaviour, which covers everyday social and practical skills. This disability originates before the age of 18.[26] But in defining and assessing intellectual disability, the AAIDD stresses that additional factors must be taken into account, such as the community environment typical of the individual's peers and culture. Professionals should also consider linguistic diversity and cultural differences in the way people communicate, move, and behave.[27] Thus, the term or name for condition we know today as intellectual disability has changed over the time; most recently the condition was primarily known as mental retardation. Although the name has changed, for more than 50 years the three essential elements for all US-based definitions for this condition limitations in intellectual functioning, behavioural limitations in adapting to environmental demands, and early age on onset have not substantially changed.The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders replaced the term mental retardation with intellectual disability and the same was done in consonance with the terminology which was used by the World Health Organization's International Classification of Diseases.[28]

In the earlier times, persons were identified as patients of mental retardation since they were not able to adapt in the environment and suffered various developmental and learning impairments. However, with the coming of medicine there came a shift in the approach whereby the symptoms were identified and later it was designated as a mild, moderate or severe type of

25. Michael L. Wehmeyer, Defining Mental Retardation and Ensuring Access to the General Curriculum,38(3) Edu. & Training in Developmental Disabilities 271, 276(2003).
26. *Supra* note 15.
27. *Id.*
28. DSM-5 Classification, American Psychiatric Association (Sep. 27, 2019, 5:45 pm) file:///C:/Users/jai%20mata%20di/Downloads/APA_DSM-5-Contents%20(1).pdf.

disability. For example dyslexia or dyscalculia is also included within the definition of intellectual disability and autism is also a part of the list. The causes, effects and consequences of both these categories are different but they have an impact on the social and cognitive functioning of an individual so they are referred to be a part of intellectual disability.

With the emerging trend of intelligence being regarded as an important aspect, the concept of IQ emerged and then the hidden forms of intellectual disability came to be recognised. This further led to the IQ-based statistical norms to define and classify the categories of intellectual disability. Moreover, the advocates for persons suffering from intellectual disability are of the view that the term mental retardation has somewhat a negative impact and tends to be degrading to people. Further, due to lack of understanding about the nature and type of disability people tend to confuse even a learning disability as mental retardation. Therefore, it would not be wrong to say that the term mental retardation is still in use in many settings, including by some clinicians, and is found in legal and public policies that determine eligibility for support; however, the use of the term intellectual disability as a direct substitute for mental retardation is increasing.

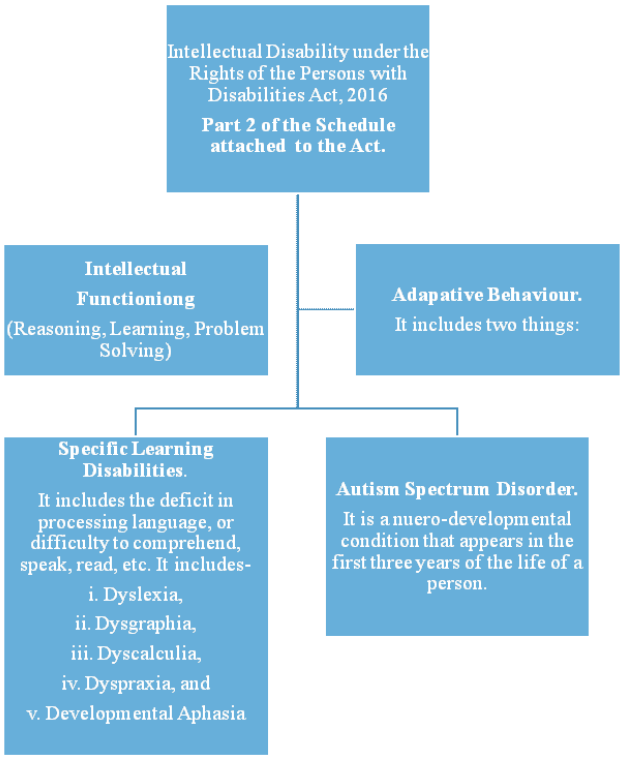
INTELLECTUAL DISABILITY – CHANGE IN TERMINOLOGY IN INDIA

In India like in most of the countries the concept of mental retardation has received a backseat and the term has been replaced by intellectual disability. The 1995 Act[29] on persons with disabilities used the term mental retardation and recognised it as a condition of arrested or incomplete development of mind usually identified by sub normality of intelligence.[30] However, after the coming of the new legislation for The Persons with Disabilities Act in 2016 the term intellectual disability has replaced mental retardation. The schedule attached to the Act as mentioned before refers to the specific disability i.e. the intellectual disability. This particular part gives us various form of disability which are included within the umbrella of intellectual impairments. It includes the limitation not only the intellectual functioning of a person but also the deficit in the adapting to the social environment. Apart from this learning disabilities which are specific in the sense that there is a difficulty in processing language or difficulty in

29. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, No. 1, Acts of Parliament, 1996.
30. Section 3(r) ofThe Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

understanding or reading and writing. The disabilities with regard to perception such as dyslexia, dysgraphia, dyscalculia and dyspraxia are also included in the terminology of intellectual disability. Lastly, the definition also includes autism spectrum disorder.

For a better clarity of the concept of intellectual disability, the researcher has prepared a flowchart (please refer to the next page) which depicts the various specific learning disabilities as enumerated under the national law. Thus, after a perusal of the legislation we get to know that at present nowhere the term mental retardation has been used. Therefore, the shift though late in time has successfully reached in our country as well through the legislation. The Act provides for various rights given to the persons suffering from intellectual disability in India. This particular aspect of disability therefore, contributes greatly to view various forms of human ability and the capability of the brain in conceptualizing this ability.



CONCLUSION

After a complete perusal of the concepts of 'mental retardation' and 'intellectual disability' it can be aptly concluded that this transition and terminological shift was the need of the hour since the application of the word 'mental retardation' for the specially abled persons was considered to be derogatory as well as against the principles and human worth. Moreover, the human rights should be made a prerogative and not a choice when it comes to the persons with intellectual disabilities. The discrimination and the wrath of the society as well as the ignorance of the government against them has never been a healthy scene to encounter. Apart from this, addressing them as 'mentally retarded' and casually using this term required a change and bringing this conceptual change was nothing but a necessity. The efforts that began in the Western and other European countries has also led to a fruitful result in India.

The transition and the journey from the definition of 'mental retardation' under the 1995 Act to now addressing it as 'intellectual disability' and a form of specific disability with its different realms has received a wider connotation in the field of Human Rights. Therefore, this shift has been a tremendous step taken up at the international as well the national levels and led to the recognition of the rights of the specially abled persons who have certain intellectual deficits.In the end the researcher would like to quote Albert Einstein while stressing the need to respect and provide proper dignity to the intellectually specially abled persons. In his words-

'Everyone is a genius. But if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid.'

TRANSGENDERS UNDER INDIAN LEGAL SYSTEM: AN ANALYSIS

- Dr Gurpreet Pannu*

I. INTRODUCTION

When a child is born, at the time of birth itself, sex is assigned to him/her. A child would be treated with that sex thereafter i.e. either a male or a female. Some persons may born with bodies which incorporate both or certain aspects of both male or female physiology. It may also happen that though a person is born as a male, because of some genital anatomy problems his innate perception may be that of a female and all his actions would be female oriented. The position may be exactly the opposite wherein a person born as female may be have like a male person.[1]

Etymologically the term transgender is derived from two words, namely 'trans' and 'gender'. 'Trans' is Latin word which means 'across' or 'beyond'. The grammatical meaning of transgender is across or beyond gender. The 'transgender' term is used for the persons whose identity, gender expression or behaviour does not match with the sex to which they were assigned at birth. Gender identity refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behaviour, clothing, hairstyles, voice or body characteristics.[2]

Transgender is a term referring to when one's gender and sex are not always or even equivalent. This is a broad term that includes transsexual (pre/non or post-operative), non-gender, bi(tri and multi) gender, androgynes, etc.[3] Transgender is defined by Oxford Dictionary as "denoting or relating to a person whose self-identity does not conform unambiguously to conventional notions of male or female gender."[4] The Transgender Persons (Protection of Rights) Bill, 2019 defines 'transgender' as a person, whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinnar, hijras, aravanis and jogtas.[5]

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1. National Legal Service Authority v. Union of India, AIR 2014 SC 1863.
2. Answers to Your Questions About Transgender People, (January 4, 2015),www.apa.org/topics/transgender.
3. Urban Dictionary, (April 09, 2015),www.urbandictionary.com/define.php.
4. Oxford Advanced Learner's Dictionary (2001).
5. The Transgender Persons (Protection of Rights) Bill,2019, Section 2(k).

Justice Radhakrishnan defines transgender as "an umbrella term for person whose gender identity, gender expression or behaviour does not confirm to their biological sex."[6] Transgender may also take in persons who do not identify with their sex assigned at birth, which include hijras/eunuchs who, describe themselves as "third gender" and they do not identify as either male or female. Hijras are not men by virtue of anatomy, appearance and psychologically, they are also not women, though they are like women with no female reproductive organ and no menstruation. Since hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional "third gender". Among them, there are emasculated (castrated, nirvana) men, non-emasculated men and inter-sexed persons (hermaphrodites). Transgender also includes persons who intend to undergo Sex Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. There are persons who like to cross-dress in clothing of opposite gender, i.e transvestites. Resultantly, the term "transgender", in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex i.e. male and female.[7]

Transgender people are individuals of any age or sex whose appearance, personal characteristics or behaviours differ from stereotypes about how men and women are supposed to be. Transgender people have existed in every culture, race and class since the story of human life has been recorded. Only the term 'transgender' and the medical technology available to transsexual people are new. It is a wider term which encompasses anyone whose identity or behaviour falls outside of stereotypical gender norms. [8]

The contemporary term 'transgender' arose in mid 1990s from the grassroots community of gender different people. In the contemporary usage, transgender has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to transsexual people; male and female cross dressers (sometimes referred as transvestites, drag queens or drag kings); intersexual individuals and men and women, regardless of sexual

6. *Supra* note 1.
7. *Supra* note 1, Para 11.
8. TransgenderPeople and their Problems, available at:socialjustice.nic.in/pdf/introduction.pdf (Visited on December 12, 2014),

orientation, whose appearance or characteristics are perceived to be gender typical. It includes people who do not self-identify as transgender, but who are perceived as such by others.[9]

II. CAUSES FOR TRANSSEXUALISM

In this regard there is no consensus even among medical, psychological, psychiatry, genetical and the other scientific communities. A cursory reading of the subject would reveal that there are a number of theories about the cause for transsexualism. Biologists claim that it is because of the chromosomal aberrations. It is well known that if an individual has XX chromosomes, she is a female and if an individual has got XY chromosomes, he is a male. However, there are also persons with XXY and XYX chromosomes. These are chromosomal aberrations. Some people by physical characteristics maybe females though they may have XY chromosomes indicating male characters. Similarly, there are people who are males by physical characteristics, but they have XX chromosomes indicating female characters. According to the medical community, these biological differences cause transsexualism. There are other theories which say that imbalances or fluctuations in hormones or use of certain medications during pregnancy may cause transsexualism. There are also theories to say that transsexualism is, pure and simple, a psychological disorder. The Brain Bank in Netherlands Studies say that there is a "brain sex" difference between men and women and transsexual people have the brain sex of the gender to which they identify themselves. Thus, it is manifest that there is no consensus among various theories as to how the transsexualism happens in human beings. Similarly, there is no recognised or universally accepted mode of drawing a line differentiating transsexuals from the other sexes.[10]

III. CLASSIFICATION OF TRANSGENDER

There is wide range of transgender related identities and cultures which are generally as follows:

a) Hijras

Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or 'not-men', or 'in-between man and woman', or 'neither man nor woman'. Hijras can be considered as the western equivalent of transgender/transsexual (male-to-female) persons but hijras have a long tradition/culture and have strong social ties formalised through a

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9. *Ibid.*
10. I.Jackuline Mary v. Superintendent of Police,available at:indiankanoon.org/doc/144523857 (Visited onMarch 1, 2015).

ritual called "reet" (becoming a member of hijra community). There are regional variations in the use of terms referred to Hijras.

b) Eunuch

Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered that the child previously assigned to the male sex, would be recategorized as an intersexed as a hijra.[11]

c) Aravanis and Thirunangi

Hijras in Tamil Nadu identify as Aravani. Tamil Nadu Aravanigal Welfare Board, a state government's initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male's body. Some Aravani activists want the public and media to use the term 'Thirunangi' to refer to Aravanis.[12]

d) Kothi

Kothis are a heterogeneous group. Kothis can be described as biological males who show varying degrees of 'femininity' — which may be situational. Some proportion of Kothis have bisexual behaviour and get married to a woman. Kothis are generally of lower socio-economic status and some engage in sex work for survival. Some proportion of hijra-identified people may also identify themselves as Kothis. But not all Kothi people identify themselves as transgender or hijras.[13]

e) Jogtas/Jogappas

Jogtas or Jogappas are those persons who are dedicated to and serve as a servant of goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka. Jogta refers to male servant of that Goddess and Jogti refers to female servant.[14] One can become a Jogta (or Jogti) if it is part of their family tradition or if one finds a Guru (or Pujari) who accepts him/her as a chela or shishya (disciple). This term is used to differentiate them from Jogtas who are heterosexuals and who may or may not dress in woman's attire when they worship the Goddess.

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11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. Who is referred as Devdasi.

f) Shiv-Shakthis

Shiv-Shakthis are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression. Usually, Shiv Shakthis are inducted into the Shiv-Shakti community by senior gurus, who teach them the norms, customs, and rituals to be observed by them. In a ceremony, ShivShakthis are married to a sword that represents male power or Shiva. Shiv-Shakthis thus become the bride of the sword. Occasionally, Shiv-Shakthis cross- dress and use accessories and ornaments that are generally/socially meant for women. Most people in this community belong to lower socio-economic status and earn for their living as astrologers, soothsayers, and spiritual healers; some also seek alms.[15]

IV. PROBLEMS OF TRANSGENDER PERSONS

Indian law recognises binary genders, i.e. male and female based on the sex of a person assigned by birth. There is no mention of third gender or transgender under Indian legal system. Due to this they become victim of discrimination, abuse and exploitation. Despite constitutional guarantee of equality, the transgender people have to face discrimination in all spheres of society. They are extremely vulnerable to harassment, violence and sexual assault in public places, at home, in jail and in the custody of police. Sexual assault, including molestation, rape, forced and oral sex, gang rape and stripping is being committed with impunity. They have to face extreme discrimination especially in the field of employment, education, health care etc. They face humiliation in access to public spaces, the restaurants, cinemas, shops, malls etc. Access to public toilets is another serious problem they face quite often. As, there is no separate toilet facilities for these persons, they have to use male toilets where they are prone to sexual assault and harassment.[16]

Transgender people are deprived of social and cultural participation which results into eclipsing their access to education and health services. It is not even easy for such a person to take a decision to undergo SRS procedure which requires strong mental state of affairs. During hormone therapy these persons also suffer from depression, schizophrenia and transverses.[17]

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15. *Ibid.,* at 32.
16. *Supra* note 1.
17. Katherine M. Frank, The Central Mistake of Sex Determination Law: the Disaggregation of Sex from Gender89 (2010).

The other major problems that the transgender people face in their daily life are lack of education facilities, lack of medical facilities, homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse and problems related to marriage and adoption. Transgender people are generally excluded from the society and people think transgender as a medical disease. Much like disability, it is considered as illness.

The transgender communities face several sexual health issues including HIV and they face barriers in accessing treatment services. HIV prevalence among male transgender was 7.4% against the overall adult HIV prevalence of 0.36%. The estimated size of men who have sex with male and male sex workers population in India (including hijras and transgenders) is 23, 52,133 and 2,35,213 respectively.[18] Rate of HIV infection among transgender female sex workers is 27.3% which is nine times higher than other such workers.[19]

V. LEGAL RIGHTS OF TRANSGENDERS IN OTHER COUNTRIES

Many countries have enacted laws for recognizing rights of transsexual persons, who have undergone either partial/complete SRS, including United Kingdom, Netherlands, Germany, Australia, Canada, Argentina, etc. Detail of these laws is given below:

a) United Kingdom

United Kingdom has passed the Gender Recognition Act, 2004. The Act is all encompassing as not only does it provide legal recognition to the acquired gender of a person, but it also lays down provisions highlighting the consequences of the newly acquired gender status on their legal rights and entitlements in various aspects such as marriage, parentage, succession, social security, pensions etc. One of the notable features of the Act is that it is not necessary that a person needs to have undergone or in the process of undergoing a SRS to apply under the Act. Reference in this connection may be made to the Equality Act, 2010 (UK) which has consolidated, repealed and replaced around nine different anti-discrimination legislations including the Sex Discrimination Act, 1986. The Act defines certain characteristics to be "protected characteristics" and no one shall be discriminated or treated less favourably on grounds that the person possesses one or more of the "protected characteristics". The Act also

18. *Supra* note 10.
19. *Ibid.*

imposes duties on Public Bodies to eliminate all kinds of discrimination, harassment and victimization. Gender reassignment has been declared as one of the protected characteristics under the Act, of course, only the transsexuals i.e. those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act.

b) Australia

In Australia, there are two Acts dealing with the gender identity, (1) Sex Discrimination Act, 1984; and (ii) Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013. Act of 2013 amends the Sex Discrimination Act, 1984. Act of 2013 defines gender identity as the appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person's designated sex at birth.

It prohibits discrimination on the ground of sexual orientation,[20] Discrimination on the ground of gender identity[21] and discrimination on the ground of intersex status.[22]

c) United States of America

In United States of America some of the laws enacted by the states are inconsistent with each other. The Federal Law which provides protection to transgenders is the Hate Crimes Prevention Act, 2009, which expands the scope of the 1969 United States Federal Hate-Crime Law by including offences motivated by actual or perceived gender identity. The federal government recognises all same-sex marriages legally authorised under state law. Transgender people have all the legal rights e.g. rights to life, right to work, right to health, right to marry, right of equality, right to social security etc. Around 15 States and District of Colombia in the United State have legislations which prohibit discrimination on grounds of gender identity and expression. Few States have issued executive orders prohibiting discrimination.

d) South Africa

The Parliament of South Africa in the year 2003, enacted Alteration of Sex Description and Sex Status Act, 2003, which permits transgender persons who have undergone gender reassignment or people whose sexual characteristics have evolved naturally or an intersexed person to apply to the Director General of the National Department of Home Affairs for alteration of his/her sex description in the birth register, though the legislation does not contemplate a more inclusive

20. Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013, Section 5A.
21. *Ibid.,* Section 5B.
22. *Ibid.,* Section 5C.

definition of transgenders. Same sex marriage is legal since Civil Union Act came into force in 2006. Discrimination on the basis of gender expression and identity against TGs in prohibited.

e) Argentina

The Senate of Argentina in the year 2012 passed a law on gender identity that recognizes right by all persons to the recognition of their gender identity as well as free development of their person according to their gender identity and can also request that their recorded sex be amended along with the changes in first name and image, whenever they do not agree with the self-perceived gender identity. It is not necessary that they seemed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or anyother psychological or medical treatment had taken place. Article 12 deals with dignified treatment, respecting the gender identity adopted by the individual, even though the first name is different from the one recorded in their national identity documents. Further laws also provide that whenever requested by the individual, the adopted first name must be used for summoning, recording, filing, calling and any other procedure or service in public and private spaces.

f) Germany

In Germany, a new law has come into force on 5th November, 2013, which allows the parents to register the sex of the children as 'not specified' in the case of children with intersex variation. According to Article 22, Section 3 of the German Civil Statutes Act reads as follows:

"If a child can be assigned to neither the female nor the male sex then the child has to be named without a specification"

This law has also added a category of X, apart from "M" and "F" under the classification of gender in the passports. Transgenders have right to marry to a person of their choice. Registered life partnerships have been instituted since 2001 before the enforcement of this Act. Thus, transgenders enjoy freedom and State protect their legal rights. Transgenders have right to equality, right to work, right to health, right to security and other benefits etc.

g) Malta

The State of Maltaenacted the Gender Identity, Gender Expression and Sex Characteristics Act, 2015. The Act confers certain rights regarding gender identity, such as all the persons being citizens of Malta have right to the recognition of their gender identity; the free development of their person according to their gender identity; be treated according to their gender identity and

to be identified in that way as documents providing their identity and bodily integrity and physical autonomy etc.[23] such persons shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.[24]

h) Asia

There is no specific law in any of the Asian countries. Transgender have to face discrimination in their social and daily life, at school and at work place. In Asia, the society distinguishes between male and female, the lack of clear-cut gender puts great limitation on a person's social space. China, Nepal, Pakistan, India and other Asian countries have no specific law for the transgenders. China acknowledge the right of individuals to undergo gender reassignment surgery, but has never enacted formal laws to protect the rights of transgender people, it only allows gender alternation in documents like birth certification, student rolls or academic records etc. There is no law regarding the ability of transgender persons to marry, nor does it place any articulated restrictions on this right. These countries do not allow same sex marriage.[25] Transgenders have to live with heavy stigma directed against their person, their life style, often their chosen profession and their chosen identity. They are routinely marginalised and suffer from severe prejudice and violence at home and in society. Due to this many transgender people get themselves engage in sex-industry and they work as sex workers. Their vulnerabilities to HIV and other infections increases.[26]

VI. Historical Aspect and Position of Transgenders in India

Transgenders are a part of society from the very beginning. It comprises of hijras, eunuchs, kothis, aravanis, jogappas, shiv-shakthis etc. and they, as a group, have got a strong historical presence in our country in the Hindu mythology and other religious texts. The concept of tritiya prakrti or napunsaka has also been an integral part of vedic and puranic litratures. The word 'napunsaka' has been used to denote absence of procreative capability.[27] There are number of references of them in the religious books, which are as:

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23. The Gender Identity, Gender Expression and Sex Characteristics Act, 2015,Section 3(1).
24. The Gender Identity, Gender Expression and Sex Characteristics Act, 2015, Section 3(4).
25. "My Life is Too Dark to see the Light"- A Survey of Living Conditions of Transgenders Female Sex Workers in Beijing and Shanghai, 26. (January 2015)
26. *Id.,* at 45.
27. Sarena Nanda, Gender Diversity: Cross cultural Variations 42 (1999).

Lord Rama, in the epic Ramayana, was leaving for the forest upon being banished from the kingdom for fourteen years, turned around to his followers and asked all the 'men and women' to return to the city. Among his followers, the hijras alone did not feel bound by this direction and decided to stay with him. Impressed with their devotion, Rama sanctioned them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions which, it is believed set the stage for the custom of badhai in which hijras sing, dance and confer blessings.[28]

Another reference is from the Epic Mahabharata, where Aravan, the son of Arjuna and Nagakanya, offers to be sacrificed to Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra war, the only condition that he made was to spend the last night of his life in matrimony. Since no woman was willing to marry one who was going to be killed, Krishna assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis.[29]

Jain Texts also make a detailed reference to transgenders which mentions the concept of 'psychological sex'. Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottaman empires and the Mughal rule in the Medieval India.[30]

VII. TRANSGENDER PERSONS UNDER INDIAN LEGAL SYSTEM

Indian law only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession, and welfare legislations. We have no legislation in our country dealing with the rights of transgender community. Due to absence of suitable legislation protecting the rights of the members of transgender community, they are facing discrimination in various areas.[31] Detailed analysis of historical aspect and legal treatment of transgenders is discussed below:

(i) During British Period

Though historically, hijras/transgender persons had played a prominent role, with the onset of colonial rule from the 18th century onwards, the situation had changed drastically. During the

28. *Supra* note 1, Para 13.
29. *Supra* note16 at 36.
30. Gayatri Reddy, With Respect to Sex: Negotiating Hijra Identity in South India 21 (2006).
31. *Supra* note 1, Para 49.

British rule, a legislation was enacted to supervise the deeds of hijras/TG community, called the Criminal Tribes Act, 1871,[32] which deemed the entire community of hijra persons as innately criminal and addicted to the systematic commission of non-bailable offences. The Act provided for the registration,[33] surveillance and control of certain criminal tribes and eunuchs and had penalised eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place as well as those who danced or played music in a public place.[34] Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the local government had to register the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences under section 377 of the IPC, or of abetting the commission of any of the said offences.[35] Under the Act, any act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine. The Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son. The Act has, however, been repealed in August 1952.

(ii) Constitution of India

Article 14 provides that State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality is declared as a basic feature of the Constitution and treatment of equals as unequal or unequal as equals will be volatile to basic structure of the Constitution. It is a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes so that everyone including transgender may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. Transgender, who are neither male nor female, fall within expression person and are entitled to legal protection of all the laws in the sphere of State activity.[36]

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32. Act no. XXXVII of 1871, passed by the Governor General of India in Council.
33. Criminal Tribes Act, Section 24 (1871).
34. *Id.,* Section 26.
35. *Id.,* Section 24 (a) & (b).
36. *Ibid.,* Para 54.

Articles 15 and 16 prohibit discrimination against any citizen on certain grounds including the ground of 'sex'. Both of the articles prohibit all forms of gender bias and gender-based discrimination. Article 15 states that the State shall not discriminate against any citizen on the ground of sex, with regard to (a) access to shops, public restaurants, hotels and places of public entertainment or (b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.[37]

The requirement of taking affirmative action for the advancement of any socially and educationally backward classes of citizens is also provided in this Article.

Article 16 states that there shall be equality of opportunities for all the citizens in matters relating to employment or appointment to any office. No person shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.[38]

Sex discrimination in public employment is prohibited under Indian Constitution. Article 19 assures the right of freedom of speech and expression.[39] This right also includes one's right to expression of his self-identified gender which can be expressed through dress, words, action or behaviour or any other form. A transgender personality can be expressed by transgender's behaviour, presentation, mannerism or clothing.[40]

Protection of life and personal liberty is available to everyone under article 21 of the Constitution. Right to life is one of the basic fundamental right and not even the State has authority to violate or take away that right. It protects the dignity of human life, one's personal autonomy, has been recognized to be an essential part of the right to life and access to all persons on account of being humans.[41]

In ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi***[42] , the Apex Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings". Similarly, recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender

37. Constitution of India, Article 15(2).
38. *Id.,* Article16 (1) and (2).
39. *Id.,* Article 19(1) (a).
40. *Supra note* 1 Para 66.
41. *Id.,* Para 67.
42. (1981) 1 SCC 608 (Para 78).

constitutes the core of one's sense being as well as integral part of a person's identity. Legal recognition of gender identity is part of right to dignity and freedom which is guaranteed under our Constitution. Thus articles 14, 16, 19 and 21 of Constitution do not exclude transgender community from its ambit, but Indian law on the whole recognise the parading of binary genders of male and female, based on one's biological sex. Binary notion of gender reflects in Penal Code e.g. sections 8, 10 etc. and also in the laws relating to marriage, adoption, divorce, inheritance, successionand other social welfare legislations like MGNAREGA, 2005 etc. Non recognition of identity of third gender in various legislations denies them equal protection of law and thus they face wide spread discrimination.[43]

(iii) The Transgender Persons (Protection of Rights) Bill, 2019

The demand for a specific legislation was being raised by number of social activists since long. Supreme Court of India dealt with this issue in detail by its historical verdict[44] and declared number of rights of transgender. Then a Private Member Bill was introduced by a DMK Member of Parliament, Shiva Triuchi regarding the issues relating to certain basic rights of the third gender in India. On April 24, 2015 the Rights of Transgender Persons Bill, 2014 was passed by the Rajya Sabha. A new Bill, the Transgender Persons (Protection of Rights) Bill, 2016 was introduced to protect the rights of transgenders, but it was not passed by the Parliament and it lapsed. The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in the Lower House during Monsoon Session and was passed on July 19, 2019.

This Bill prohibits the discrimination against transgender persons, including denial of service or unfair treatment in relation to education; employment; healthcare; access to or enjoyment or use of any goods, facilities, opportunities available to the public; right to movement; right to reside, rent or otherwise occupy property; opportunities to hold public or private office; access to a governmental or private establishment in whose care or custody a transgender person is.[45] Chapter III of the Bill deals with recognition of identity of transgender persons. A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgeries to change his/her gender either a male or a female.[46] The Bill also ensures

43. *Supra* note 1, Para 75.
44. National Legal Service Authority v. Union of India, AIR 2014 SC 1863.
45. *Id.*, Section 3.
46. *Id.,* Chapter III, Sections 4 to 7.

that the government will take measures to ensure the full inclusion and participation of transgender persons in society. The appropriate government must also take steps for their rescue and rehabilitation, vocational training and self-employment, to formulate welfare schemes and programmes that are transgender sensitive, non stigmatising and non-discriminatory.[47]

Right of residence has been assured under section 12 of the Bill. It provides that no child shall be separated from parents on the ground of being transgender. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court. The government is duty bound to take steps to provide health facilities to transgender persons including separate HIV surveillance centers and sex reassignment surgeries. The government shall review medical curriculum to address health issues of transgender persons and provide comprehensive medical insurance schemes for them.[48] This Bill imposes duty on educational institutions, funded or recognized by the appropriate government, to provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.[49]

The Bill recognizes certain offences against transgenders like: forced labour (excluding compulsory government service for public purpose), denial of use of public places, removal from household and village, physical, sexual, verbal, emotional or economic abuse. Penalties for these offences vary between six months to two years and fine.[50]

The Bill also proposes for the constitution of National Council for Transgender Persons to advise the Central Government as well as to monitor the impact of policies, legislation and projects with respect to transgender persons. It will also redress the grievances of transgender people.

VIII. ROLE OF INDIAN JUDICIARY IN PROTECTING THE RIGHTS OF TRANSGENDER PERSONS

There is no specific enactment to protect the rights of transgender persons in India. Indian judiciary has protected the rights of transgenders from time to time.

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47. *Id.,* Section 8.
48. *Id.,* Section 15.
49. *Id.,* Section 13.
50. *Id.,*Section 18.

In the case of I. ***Jackuline Mary v. Superintendent of Police***,[51] the petitioner, who identified herself as a, transgender was terminated from service by labeling her as a transgender. The petitioner was recorded as a female child in her birth certificate. She passed her graduation and applied for a job in police department. She cleared all the tests and recruited in Tamil Nadu police. When she was undergoing training, she appeared for medical test. On examination, the medical officer made a mark in the Out Patient slip of petitioner as transgender and medical officer opined that petitioner should go for the tests of biological determination. Then she was declared as transgender by birth. She had to appear for various tests, due to which she was on medical leave and could not complete her training. Ultimately, she was terminated. Then she filed this petition in Madras High Court. The Court observed that, "By compelling an individual to undergo medical examination to declare her as transsexual is violation of right to life. There is no social recognition of transgender. Even many of the parents do not treat such children well. They are thrown out of the families. The agonies suffered by them are unimaginable."

The Court held and declared:

(i). Petitioner is declared as a female for all purposes to retain such identity.

(ii). Petitioner has liberty to choose a different sexual/gender identity as third gender.

(iii). The impugned order of termination from service issued by Superintendent of Police is hereby set aside.

The judiciary again protected the rights of a transgender as an ordinary citizen in Aslam Pasha urf Chandini v. State of Karnataka,[52] the petitioner, who is a transgender field this petition requesting the Court to issue a direction to the respondents to provide reservation of posts to transgender class of persons by the issue of a writ of Mandamus. Court held that the Apex Court has already issued several directions for taking steps by the Central and State Governments to safeguard the interests of transgender under Part III of Constitution of India and laws made by Parliament and State Legislature. So, it is duty of the Government to protect the rights of transgender in the society.

The Apex Court of India gave landmark, judgement ***National Legal Service Authority v. Union of India,***[53] and thus came forward to protect the rights of transgender people. C.K.S. Radhakrishnan, J. observed about the condition of transgender as, "Seldom, our society realises

51. Indianknoon.org/doc/144523857.
52. Judgmenthck.kar.nic.in.
53. AIR 2014 SC 1863.

or cares to realise the trauma, agony and pain which the members of transgender community undergo nor appreciates the innate feelings of the members of the transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theaters, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."[54]

The Court ordered to treat transgender as third gender for the purposes of safeguarding and enforcing their rights guaranteed under the Constitution and gave following directions:[55]

1. Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
2. Transgender persons' right to decide their self-identified gender is also upheld and Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
3. Centre and State Governments to take steps to treat them as socially and educationally backward classes of citizens and to extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
4. Centre and State Government to operate separate HIV surveillance centers since Hijras/Transgenders face several sexual health issues.
5. Centre and State Governments should seriously address the problems being faced by Hijras/Transgender such as fear, shame, gender dysphoria, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
6. Centre and State Government should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
7. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

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54. *Id.,* Para 1.
55. *Id.,* Para 129.

8. Centre and State Government should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
9. Centre and State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

In ***Arun Kumar v. The Inspector General of Registration and Others***[56] , the Madurai Bench of Madras High Court came forward to declare the marriage solemnised between a male and a trans woman as valid under section 5 of the Hindu Marriage Act, 1955. The Court held that he registrar of marriage is bound to register a marriage of a male and a trans woman.

IX. CONCLUSION

Transgenders people have to face various types of problems at home, in the society, at schools, at workplace etc. They are discriminated at various stages of life. They are humiliated socially and publically. They usually become victim of molestation, rape, forced oral and anal sex, gang rape etc. They have to face humiliation at public places e.g. bus stands, restaurants, cinemas, shops etc. There are no separate public toilets for them. They are deprived of education, employment and health care. Following are the suggestions to improve the position of transgender people:

- Transgender persons must be properly documented in census. There is need for statutory reservation in education, elections and employment in both public and private sectors.
- They need to be empowered and uplifted by facilities for higher education and vocational training to upgrade their earnings and status in the society and to promote their acceptability in the society.
- As transgender people are prone to health risks and infections, they need to be provided proper medical facilities, including health insurance and clinics, where free or subsidised treatment should be made available.
- The word 'rape' in section 375 IPC should include all sexual crimes against women, men, children and transsexual/eunuchs, as eunuchs are often the targets of some of

56. WP (MD)No.4125 of 2019, available at:http://www.judis.nic.in (Visited on July 16, 2019).

worst sex crimes.

- There is need to change the mindset of the society. Government should take appropriate and effective steps to regain their respect and place in the society.
- Government should provide special social welfare schemes for the upliftment and betterment of transgender people.
- Problems of transgender people must be tackled properly. Counselling centers should be established at every level to give psychological therapy to transgenders.
- Government and non-governmental organisations should create awareness among the masses that transgender people are also human beings like us and have right to lead their life with dignity and respect.
- There is urgent need for legal and constitutional safeguards to prevent human rights violations of transgender community as well as institutional mechanisms that can address the specific concerns of transgender people.
- There should be an amended column of gender in every type of forms for admission or employment with a new entry of third gender along with male or female.
- Government should develop mechanisms for the facility of loans at concessional rates for transgenders for self-employment. Government and local authorities should initiate programmes of rehabilitation particularly in the area of health, education, employment etc.
- Government must sponsor and encourage regular information campaigns and sensitization programmes to ensure that rights of transgenders recognised by existing statutes must be protected and respected.
- There must be amendments in the existing laws relating to marriage, adoption, inheritance, etc. to avail equal rights to transgenders in India.

The paper would end with a note of hope:

"We need a world where our families no longer disown us, where society treats us as equal, and where governments guarantee our rights; a world that understands the transgender identity."

WOMEN ENTREPRENEURSHIP: A MEANS OF ACHIEVING GENDER JUSTICE

-Dr Jai Mala* & Shivanshi Thakur**

"The idea of perfect womanhood is perfect independence"

~Swami Vivekananda

1.1 INTRODUCTION

The above mentioned quote was given by swami Vivekananda, a true Indian intellectualist, spiritualist and scholar. He considered the downfall of Indian society as the result of neglect of masses and women subjected to subjugation from centuries. Relying on his theory, we consider the education, liberation and empowerment of women as the only key to achieve gender justice.[1] Independence of women consist not only the social liberation but also her financial freedom, and for its accomplishment women entrepreneurship can be a suitable path. Then only women can be fully independent, subject to no dominance and exploitation. In last few decades, the notion of entrepreneurship has evolved as a significant focus of attention.

Entrepreneurship being synonymous with Innovation and creativity is claimed as an economic panacea for some serious problems like lopsided development and unemployment. It is basically a dynamic process which is created and managed by a person called the entrepreneur, who strives to utilize the economic innovation for the creation of a new value in the market for accomplishing a definite goal.[2] As a vital tool for social transformation, entrepreneurship needs to be balanced between both the genders of the society for better economic growth. For achieving gender justice in the society, men and women need to be placed at equal footings, the essence of which lies in the economic empowerment of women.

The relationship between gender impartiality, growth and progress outcomes is multifaceted and there is no automatic 'win-win' among them.[3] Achieving gender equality involves measures to reimburse for existing disadvantages that avert equal opportunities from being offered to both men and women.[4] India being a developing Nation needs entrepreneurs. Our country needs to

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1. Swami Vivekananda, Complete Works of Swami Vivekananda (1st ed. 1947).
2. Poornima M Charantimath, Entrepreneurship Development Small Business Enterprises (3rd ed.2012).
3. N. Kabeer & L. Natali, Gender equality and economic growth: Is there a win win?, 417 I.D.S. Work. Pap. 1, 3 (2013).
4. UNECE, Promoting Gender Equality And Women's Economic Empowerment On The Road To Sustainable Development, Policy Seminar On Women's Entrepreneurship Development, 19 September 2011, Geneva.

utilize and mobilize fully all its resources which include human resources as well.[5] But the Indian women have usually been assumed as home-makers with slight to do with financial system or trade. They have not been vigorously involved in the conventional development, even though they symbolize equal proportion of the populace and labor force. Principally women are the resources of survival of their families, although are generally unrecognized and underestimated, being placed underneath the pile. It may be noted, that in a country like India, majority of females take entrepreneurship not as a career opportunity but because of economic compulsions or otherwise. Financial viability is the basis of social, political and psychological supremacy in the society. Entrepreneurship can help women's economic freedom and perk up their social status. Automatically, the women get empowered once they accomplish economic independence.[6]

Entrepreneurship has been considered as a male-dominated phenomenon from the very early age, but time has changed the circumstances and brought women as today's most unforgettable and inspiring entrepreneurs.[7] Despite this fact, there are numerous areas where women are still lacking such as: right to use resources, impartiality at the workplace, entrepreneurship development, executive powers, and the settlement of work and family responsibilities.[8] The constitution of India has the provision to provide gender equality, which can be seen in the five year plans having the socio-economic as well as legal empowerment of women as the main goal.Women's financial empowerment is a transformational process, where by women gainaccess and power over economic assets &decisions, which results in economic empowerment of women, which is a step towards gender justice.

1.2 CONCEPT AND DEFINITIONS OF ENTREPRENEURSHIP

1.2.1 Defining An Entrepreneur: In its most simplest sense "an entrepreneur" is defined as a person, who is the creator of an enterprise. And the process of creation and action taken by an entrepreneur for the establishment of his Enterprise is known as "entrepreneurship". The term entrepreneur is derived from a French word "enterprendre" which means "to undertake". Some eminent definitions of an entrepreneur are given below :

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5. Charantimath, *supra*, 55.
6. Dr Shefali Raizada, Women's Entrepreneurship Development and Gender Equality, (Sept. 19, 2019, 3:45 PM),http://www.internationalseminar.org/XV_AIS/TS%203/2.%20Dr.%20SHEFALI%20RAIZADA.pdf.
7. S. Saidapur, Women Candle Entrepreneurs in Gulbarg District: A Micro analysis, 4 Spect. J. Multi. R. 7, 17 (2012).
8. UNECE, *supra*, 5.

The word entrepreneur is derived from a Sanskrit word called "Antaraprerana" stated by Poornima charantimath.

"Entrepreneurs are people who have the ability to see and evaluate business opportunities, together with the necessary resources to take advantage of them and to intimate appropriate action to ensure success" by International Labour Organisation (ILO).[9]

The word entrepreneur was taken from the French verb "enterprendre" which means 'to Undertake'. In the earlier part of 16th century, the French men who organised and led military expeditions were referred to as entrepreneurs. The French tradition regarded an entrepreneur as a person who changes a profitable Idea into a productive activity. Also, the Architects and contractors of public works, back in 1700, were called entrepreneurs. Quensnay recognised a rich farmer as an entrepreneur, who manages and makes his trade profitable by his Intelligence and capital. In early 16th century, the entrepreneurs were signified as dealers who bought an article at a certain price & sold it at uncertain price, building profit.[10] By this we understood that although the word entrepreneur is not of Indian Origin but if we look into the history we can surely form an idea that the process of entrepreneurship has not emerged in this century but is of late origin.

Entrepreneurship is a catalyst of trade and fiscal development. The social and financial forces of entrepreneurial activity subsistedprior to the new millennium. In fact, as noted, the entrepreneurial spirit is linked with humanity's achievements. Eventually all this proposes the role of entrepreneur as the "driving force of change," the force that instigates and implements material development. Today, we identify that the agent of revolution in mankind has been and possibly will persist to be the entrepreneur.[11]

Pandit Jawaharlal Nehru rightly said that "when a woman moves forward, the family Moves, the village moves and the nation moves". The socio-economic status of women is perceived as an indication of the budding stage of a society. A considerable amount of academic attention has been gathered by the concept women entrepreneurs in recent years. It is becoming a primary focus for practitioners, policymakers, and even Scholars worldwide who are interested in entrepreneurship as well as small business management.[12] "Women Entrepreneurship" means

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9. Charantimath, *supra,* 99.
10. *id* At 51, 52.
11. Calvin A. Kent, Donald L. Sexton & Karl H. Vesper, Encyclopedia of Entrepreneurship, (1982).
12. Dr. S. Narasimha Chary, Savvasi Sreenivas, Micro Finance In India – Policy Issues And Strategies, 5 O. J. L. S. Sc. 101, 102 (2011).

an act of trade ownership and business creation that empowers women economically increases their economic strength as well as position in society. A female who accepts the demanding role in society, to meet her personal desires by becoming economically independent is known as a "Women Entrepreneur". A powerful desire to do something impressive in a positive manner is an inbuilt feature of entrepreneurial women, who is competent of contributing values in her family and social life as well.[13]

Women became more occupied in the business world simply when the idea of females in business became pleasant to the general public; nevertheless, this doesn't show that there were no female entrepreneurs until that period. Dutch colonists, who came to nowadays New York City in the 17th century, functioned under a matriarchal culture. In this society, loads of women inherited wealth and lands, and through this heritage, became business proprietors. Margaret Hardenbrook Philipsewas one of the most victorious women of this time, who is believed to be a ship owner, a merchant and was also occupied with the trading of commodities. Evidences show that during the middle of 18th century, it was common for women to be the owner of certain businesses like shops, taverns, brothels, and alehouses. The majority of these businesses were not alleged to have good reputations, because, they were measured as shameful acts for women engaging in these occupations. During the 1900s, because of more progressive means of thinking & the augment of feminism, female entrepreneurs commenced to be a widely established term. Although, these entrepreneurs served mostly female consumers.

With the easy accessibility of technology and constant support from different institutions, there is a constant expansion in popularity of business women. Still, female entrepreneurs today are struggling and are confronting a number of challenges and barriers. One such major challenge for women entrepreneurs is to cope up with traditional gender-roles which are structurally internalized by our society. Entrepreneurship is still regarded as a field dominated by males, and it might be difficult to outshine these conventional views, except if women entrepreneurship is boosted by government to achieve real gender justice in the society.[14]

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13. Ranbir Singh, Dr. Nisha Raghuvanshi, Women Entrepreneurship Issues, Challenges And Empowerment Through Self Help Groups: An Overview Of Himachal Pradesh, 2 I. J. M. R. Rev. 81, 82 (2012).
14. Female Entrepreneurs, Entrepreneurship (Sept. 19, 2019, 12:05 PM), https://en.wikipedia.org/wiki/Female_entrepreneurs.

There are certain factors influencing women entrepreneurs such as-

- equivalent status in the social order
- More mobility & freedom
- financial viability
- Motivation
- set up their own creativity and individuality
- Achievement of distinction
- Enhancing risk taking ability
- Building self-reliance and confidence[15]

1.3 ENTREPRENEURSHIP AND GENDER JUSTICE

Since the enactment of our law of the land, the gender equality principle is enshrined in the Constitution of India, in its Preamble[16], Fundamental Rights[17] , Fundamental Duties[18] and Directive Principles[19] . The Indian Constitution not only grants impartiality to women, but also authorizes the State to adopt actions of positive discrimination in women's favour.[20] Apart from these provisions, The Constitution gives every citizen, including women free right to trade and commerce in India[21], but subject to certain reasonable restrictions[22]. All these provisions empowers sate to boost female empowerment, which can be best achieved through entrepreneurship because an entrepreneur is a master of his own and when there will be more females in entrepreneurial field, then there will be economic, social and political empowerment of women in true sense.

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15. Charantimath, *supra*,105.
16. Indian Const. Preamble.
17. *id* At art. 14,15,16. See Article 14 of Indian Constitution, "the State shall not deny to any person the equality before the law and equal protection of laws with in the territory of India", Whereas, Article 15(1) "prohibits the State to discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them".Also, Article 15(3) authorizes "the State to make special provisions for women and children", Article 16 states that "there shall be equality of opportunity for all citizens and they shall not be discriminated on the base of religion, race, caste and sex".
18. *id* At art. 51. See Article 51(A)(e) of Indian Constitution, "it will be the duty of every citizen to relinquish practices which are derogatory to the dignity of women
19. *id* At 39. See Article 39(a) of Indian Constitution, "the state in particular direct its policy towards securing that citizen, men and women equally, have the right to sufficient means of livelihood". Article 39(e) of the Constitution of India provides that "the health and strength of workers, men and women, and the tender age of children shall not be abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength"
20. *id* At art. 14, 15, 16, 39, 51.
21. *id* At art. 301. See Article 301,"subject to the other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free".
22. *id* At art. 302, 304, 305.

The enforcement and protection of intellectual property rights has also received greater attention these days because they also play an important part affecting victorious female entrepreneurship. The intention of IP rights is to promote and expand innovation and creativity, which in return helps perk up the value of our lives. In general views, IPR is associated with inventions in scientific, engineering, technological or mathematical fields but IP exits beyond patented innovation and also includes other exclusive rights like, trademarks, geographical indications, copyrights, industrial designs, so-called traditional knowledge, are few to mention. To enhance entrepreneur spirit, patents provide protection to novel inventions for 20 years[23] , whereas in terms of literary and artistic sector, copy rights protect the work for the entire life of author and additional 60 years.[24] Similarly, trademarks protect the distinguished ability of brands[25], further promoting entrepreneurial development.[26]

We consider women's entrepreneurship development to be a significant channel of women's economic empowerment and also a pillar on the path to sustainable development. By setting up their own ventures, women can transform their prospects to gain economic independence, defeat poverty, and improve their wellbeing. Throughout this process women can become riders of change and obtain a long-term perception accounting for the consequences of actions for our generations in order to safeguard better future. The question, why are actions needed may arise in the minds of many. Women entrepreneurs encounter a range of obstacles in locating up and then running their own establishments due to lack of/restrictions concerning access to resources, which tied together with gender-neutral policies, may put women at a inconvenience in this field. An allowing and supportive environment is fundamental to remove the obstacles & barriers to equal involvement across the different stages within entrepreneurship development.

Within the structure of a democratic republic, our policies for development, various laws, programs and planning processes have always aimed at women's progress in different spheres. The central issue in shaping the status of women is acknowledged as the empowerment of women in recent years. Starting from the 5th 5 Year Plan (1974-1978) there has been a noticeable shift in addressing women's issues from wellbeing to development. It put emphasis on training of women, who needed income and protection and also coincided with International

23. The Patents Act (1970).
24. The Copyright Act (1957).
25. The Trade Marks Act (1999).
26. UNECE, *supra,* 25.

Women's Decade &the preparation as well as submission of report explaining status of women in India. Under this plan only, Women's Welfare &Development Bureau was set up in 1976, under the Social Welfare Ministry. The 7th 5Year Plan (1985-1990) laid the emphasis on gender equality and need for empowerment. During this period, stress was upon qualitative aspects, like generation of awareness with respect to rights, skill training and inculcation of self-confidence for better employment[27]. After these remarkable steps taken by the Government, The National Commission for Women set up by a statute of Indian Parliament in 1990, was established to safeguard the rights along with lawful entitlements of women.[28] The 10th 5 Year Plan (2002-2007) aimed at empowering women through interpreting the newly adopted National Policy for Empowerment of Women. This policy was launched in the year 2001 by Indian govt., with following specific objectives:

Further, The National Policy for Empowerment of Women In order to make women develop & realize their potentials, creating an environment full of positive socio-economic policies.

- Establishment of an atmosphere for enjoyment of all the fundamental freedoms and human rights by women alike with men in all spheres like civil, political, social, economic, and cultural.
- Giving equal access to contribution and decision making power of females in the polity, society and economy of India.
- Providing equal right to health care of women, career and vocational guidance, quality education at all stages, equal remuneration and employment, occupational safety and health, civic life and social security as well.
- Strengthening legal arrangements aimed at eradication of all kinds of discrimination against women.
- Altering societal attitudes and the public practices by active involvement of both the genders.
- Mainstreaming a gender viewpoint in the transformation process.
- Abolition of discrimination &violence (physical, mental, social) against females and

27. Ranbir Singh, Women Entrepreneurs: A Study of Current Status, Challenges and Future Perspective in the State of Himachal Pradesh,Ph.D. Thesis, Shoolini University of Biotechnology and Management Sciences 1, 19(2015).
28. The National Commission for Women Act (1990).

the girl child.

- Constructing and amplifying partnerships with communal societies, principally women's organizations.[29]

One such women oriented organization or agency is The Ministry of Women and Child Development which functions as the nodal agency for every matter pertaining to benefit, growth and emancipation of women, which means that its one hidden objective is to establish gender justice through over all women development. It has developed a lot of schemes and programmes for women's assistance. These plans extend to a very wide spectrum like as women's call for food, shelter, safety, justice, physical, mental and maternal health, nutrition, legal aid, information, etc, along with their need for economic nourishment through education, skill development and access to finance and marketing.

1.3.1 ADDITIONAL SUPPORT TO WOMEN ENTREPRENEURS THROUGH VARIOUS INSTITUTIONS:

- **National Research Development Corporation of India:** This is a government of India enterprise (a non-profit organization) constituted under sec. 8 of the companies Act, 2103and established in the year 1953. Specifically designed for the development and full exploitation of indigenous know-how, patents, processes and inventions originating from all research and development institutions of India.
- **Central Social Welfare Board:** Established in 1953, the board runs vocational training courses for needful and poor women of rural areas in order to provide better employment prospects and acquire leadership qualities.
- **Small Scale Industries Board:** It was constituted in 1954 to advice on improvement of small scale industries in India. Now it's the apex advisory body to make advice on all matters concerning development of small scale industries.
- **Small Industry Development Organisation:** It was also set up in 1954, for the development of all the small scale units in various areas. This nodal agency works for identifying needs and promotion of small scale industries by way of entrepreneurship development, training and consultancy etc. It also provides comprehensive common facilities, marketing assistance and technological support to emerging entrepreneurs.

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29. National Policy for The Empowerment of Women (2001), Ministry of Women and Child Development (Sept. 16, 2019, 10:01 AM), https://wcd.nic.in/womendevelopment/national-policy-women-empowerment.

- **National Small Industries Corporation:** Constituted in 1955, this public sector undertaking provides financial assistance for purchasing raw materials by small scale industries and also helps in providing various other inputs.
- **Khadi and Village Industries Commission:** It is a statutory body established in 1957 and works for the sake of rural development. It engages in preparation, promotion, organisation and execution of programmes for the khadi and various other village industries.
- **National Alliance of Young Entrepreneurs:** It was specially established in 1975 for encouraging women entrepreneurship. Having its wings in 5 states, and in other states by affiliating women through it, it has become most representative association of women entrepreneurs in India.[30]
- **Federation of Indian women entrepreneurs:** This oraganisation was instituted in 1993 and is India's leading institution for entrepreneurship development. Having branches in different states, it aims at providing networking platform, industrial research, skill trainings to women entrepreneurs of the country.[31]
- **National Bank for Agriculture and Rural Development:** NABARD came into existence in 1982, and being an Autonomous financial institution offers liberal credit to women entrepreneurs, especially of rural areas.
- **International Centre for Entrepreneurship and Career Development:** It works as a registered trust founded in 1986, and is involved in training of women entrepreneurs for MSME development at large scale and has also extended its operations internationally to support women entrepreneurs.[31]

On the event of International Women's Day, Women Entrepreneurship Platform was launched on 8th March 2018, by Hon'ble Prime Minister Shri Narendra Modi. Although, the idea of WEP came at the annual Global Entrepreneurship Summit 2017, in Hyderabad combinely by the NITI Aayog and government of USA. This is the first platform which will work with public and private sector to enable the sharing of best practices of entrepreneurship and promote evidence based policy makings by compliance support, Incubation and Acceleration of Entrepreneurship

30. Singh, *supra.* 22.
31. Hina Shah,Creating An Enabling Environment for Women's Entrepreneurship in India, 1309 Dev. Pap. 1, 14 (2013).

Skilling, funding assistance etc.[32]

1.3.2 STEPS TAKEN FOR WOMEN ENTREPRENEURS AT INTERNATIONAL LEVEL

On the occasion of World Youth Skills Day in 2016 ie.15th July, in an event held at UN, New York, "Global Coalition of Young Women Entrepreneurs" was launched in order to promote young women's entrepreneurship and innovation. Many experiences and recommendations were shared by prominent young entrepreneurs and leaders from all over the world. The panel stated that economic empowerment and skills development are the main pillars of United Nation's Youth and Gender Equality Strategy.[33] International Labour Organisation initiated a programme in 2002 on Women's Entrepreneurship Development and Gender Equality (WEDGE) which is a project funded by Ireland and North American Aerospace Defense Command. In furtherance of which a strategy was adopted by ILO in 2008 in Geneva which identifies hurdles that women entrepreneurs face in initiating and rising their business. By means of economic empowerment, it aspires to contribute to enhanced gender equality and more employment opportunities for women.[34]

All the above mentioned laws, institutions, policies and programmes contribute towards achieving the goal of gender justice by making women stand on equal footing as like men. Similarly, various schemes of the Ministry like Swayamsidha, Swawlamban, Swashakti and STEP enable economic empowerment of women in India. Where Working Women Hostels & Creches offer support services, the Short Stay Homes and Swadhar provide safety and rehabilitation to women in hard circumstances. The Ministry also aids autonomous bodies like Central Social Welfare Board, National Commissionand Rashtriya Mahila Kosh whodo continuous efforts for the welfare and improvement of women. Areas upon which Ministry has special focus include financial sustenance of women through skill enhancement, education as

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32. Women Entrepreneurship Platform (WEP), Niti Aayog, (Sept. 22, 2019, 5:20PM),https://niti.gov.in/women-entrepreneurship-platform-wep.
33. Promoting Innovation, Skills and Young Women's Entrepreneurship, Office of the Secretary-General's Envoy on Youth (Sept. 25, 2019, 12:00 PM),https://www.un.org/youthenvoy/2016/07/promoting-innovation-skills-young-womens-entrepreneurship/.
34. Women's Entrepreneurship Development (WED) Programme, International Labour Organization (Sept. 25, 2019 12:00 PM), https://www.ilo.org/empent/areas/womens-entrepreneurship-development-wed/lang--en/index.htm.

well as access to marketing & credit.[35]

1.4 CHANGING SOCIO-ECONOMIC STATUS OF WOMEN

The status of Indian women has been changing due to growth in urbanization, industrialization, spatial mobility and social legislations. Since the century turn, most of the women are going for higher education in manners of professional and Technical Education. Even their proportion in labour force has also seen increasing. With the changing scenario women is shifting from kitchen, handicrafts and some traditional cottage industries to the non-traditional in the higher level of economic activities. The decade of international Women's year (1970's), efforts were made to promote the self employment of women which gathered greater attention from various Government and Non governmental agencies, as discussed above. Indian government new industrial policy has laid emphasis on the need to organise special entrepreneurial programs for training of women for enabling them to start their own Ventures.[36] The following data helps in analyzing the present status of women entrepreneurs in India.

- **Proportional allocation of Enterprises in rural and urban areas :**

Sector	Male	Female	All
Rural	77.76%	22.24%	100%
Urban	81.58%	18.42%	100%
All	79.63%	20.37%	100%

- **Proportional distribution of Enterprises by Male/Female :**

Category	Male	Female	All
Micro	79.56%	20.44%	100%
Small	94.74%	5.26%	100%
Medium	97.33%	2.67%	100%
All	79.63%	20.37%	100%

35. Namit k Srivastava, Women Empowerment in India, Women Empowerment (Sept. 14, 2019, 2:40 PM), https://www.indiacelebrating.com/social-issues/women-empowerment/.
36. Charantimath, *supra*, 105.

From the above extracted data, we find that male dominance in ownership has been more pronounced for Small and Medium enterprises being owned by them, as compared to Micro enterprises owned by males.[37] We also find that the southern States of Andhra Pradesh, Karnataka, Kerala and Tamil Nadu, along with West Bengal, have the highest number of women entrepreneurs in the country with a majority in small- and medium-sized businesses, according to a study. The report on the State of Women Entrepreneurship in India by she at work, a knowledge hub for women entrepreneurs, attributes this to the high literacy rate, along with overall women's empowerment in these States. However, in terms of offering the maximum number of schemes for women entrepreneurs, Goa, Jammu & Kashmir, Karnataka, Rajasthan and West Bengal have emerged as the top five States in the country. The focus of schemes for women entrepreneurs is primarily on financial aid followed by training and skill building of such entrepreneurs. The education sector sees the maximum number of women entrepreneurs followed by financial services, insurance, livestock, forestry and lodging. Further, almost 80% of women entrepreneurs opt to self-finance their businesses with little utilisation of various government schemes that provide financial aid to women entrepreneurs. Incidentally, the north eastern states of Arunachal Pradesh, Meghalaya and Nagaland have lesser number of women entrepreneurs though the ratio of male to female entrepreneurs strongly favours women.[38]

According to the female entrepreneurship and development index of 2015, our country ranks below the 20th percentile in female entrepreneurship index. It is a matter of great worry not only because this rank is below the developed economies like US and UK but also below the developing Nations like Nigeria and Brazil. The Google and Bain &company also reported that the women enterprises in India consist of 20% of all the enterprises in the nation. In the last decade it was 14 %, and despite this growth, we find several constraints restricting women from reaching heights. It is also to be noted that the maximum women oriented business in India is owned by the females only on documents. A Report published during 2019, states that funding raised by a female team in 2018 was an abysmal 0.63 % of the total 13 billion dollars raised by entrepreneurship in the ecosystem. Women also faced constraints in terms of investment where they experienced sexist comments, intrusive questions and lot of investor bias. Such kind of

37. Annual Report, Micro, Small and Medium Enterprise, (2018-19).
38. Business women score high in south : Study, The hindu (Sept. 26, 10:00 AM), https://www.thehindu.com/business/businesswomen-score-high-in-south-study/article20627605.ece.

instances proves it right that women face a tough time getting funding than their male counterparts.[39]

Historical evidences indicate that the women entrepreneurship has evolved from the push factors to the pull factors turning women towards entrepreneurship for fulfilling their aspirations both socially and economically. The number of women entrepreneurs increased especially during 1990's.Their emergence as entrepreneurs and the emergence of women owned firms have significant contribution, which is very much visible in India. However, in future it would be possible for Women entrepreneurs to work from home and also manage work and home with flexible timings. It is crucial to formulate Strategies and policies to support, invigorate and sustain women's efforts in the right direction as they are capable of contributing much more and their business possesses great potential.[40] In developing countries like India, earlier marriage was the only career for most women. Women were restricted to selected professions such as teaching, nursing and office work. Over the years, more and more women are going in for higher, technical and professional education.[41] Empirical evidences demonstrate that the primary entrepreneurial activity of women is mainly focused on small and medium enterprises sector. They widely work in sectors ranging from trade and services to beauty parlors, printing, tailoring, catering etc for which they require small amount of financial assistance. So, in the views of researcher, this may be considered as a root step for their financial independence, but with changing need of time they need more support to establish big ventures so that they could stand on the same place as that of men and thus, establish a just society where men and women are treated equally. If women entrepreneurship is accelerated with all the possible efforts, it can lead to creation of more than 30 million women owned enterprises. This will potentially transform the employment sector in the country with new jobs and economic growth. International labour organisation, provides with a data which showed that 77% of women in India who are of working age are not out of the labour market resulting in a tragic waste of human talent and resources. As stated by IMF, by making these women participate in the national workforce, our biggest democracy would be 27% Richer.[42]

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39. Nirandhi Gowthaman & Tenzin Norzom, Women's entrepreneurship can lead to creation of 30 million women-owned enterprises in India, HerStory (July 23, 2020, 12:20 PM), https://yourstory.com/herstory/2020/03/womens-entrepreneurship-30-million-women-enterprises india#:~:text=Women's%20entrepreneurship%2C%20if%20accelerated%20to,jobs%2C%20according%20to %20the%20study.
40. Charantimath, *supra,* 101.
41. A. Mathur, Women as Change Agents in the Diversified Global Economy, 1(3) J. A. R. Consrt. (2011).
42. Gowthaman & Norzom, *supra.*

1.4.1 MOST INFLUENTIAL WOMEN ENTREPRENEURS OF INDIA

Starting with one of the most widely recognized female entrepreneur of India, Indra Nooyi CEO of the Pepsi Co. India, was awarded "Padma Bhushan" in the field of business and leadership. Indu jain is the chairperson of Bennet, Coleman and Co. Ltd, which is one of the largest media group in the country. She was also awarded "Padma Bhushan" in the year 2016. Kiran Mazumdar Shawwho is the Managing Director of Biocon Ltd., which is India's one of the leading pharmaceutical company, was also awarded with Padma Shri in 1989 and Padma Bhushan in 2005 by the Government of India. Chanda Kochchar, Managing Director and CEO, ICICI Bank Ltd., has been awarded with prestigious Padma Bhushan in the year 2011 and has been over and over again ranked in the record of 'The most powerful women in the World' by the Forbes magazine. Ekta Kapoor the creative head of Balaji Telefilms and the daughter of veteran Actor Jeetendra is also an influential entrepreneur of the Tele industry. She bagged the Hall of Fame award in the Indian Tele awards 2006. [43] The founder of VLCC, Health Care Ltd., Vandana Luthra, was also facilitated with "Padma Shri" in 2013 for her outstanding contributions in the field of business. Falguni Nayar is a well-known and flourishing women entrepreneur who started a multi-product beauty store called "Nykaa". It is an e-commerce store which deals in wellness and beauty products from leading brands like Lakmé, L'Oreal Paris, Kaya Skin Clinic etc.[44] Women entrepreneurs engaging in small foundries and workshops in Maharashtra, manufacturing solar cookers in Gujarat, and T.V. capacitors in Orissa have already proved beyond suspicion that given the chance, they can surpass their male counterparts. Smt. Yumutai Kirloskar (Mahila Udyog Limited), Smt. Sumati Morarji (Shipping Corporation), Smt. Neena Malhotra (Exports) and Smt. Shahnaz Hussain (Beauty Clinic) are only few exemplary names of talented, flourishing and successful women entrepreneurs in our country.[45]

These females may be considered as exemplary figures by Government in order to achieve gender justice in each section of the society. Entrepreneurship as discussed in the paper, results not only in financial but also in over all development of women at large scale. By promoting women entrepreneurship, gender justice can be achieved easily and speedily, which is one of the foremost needs of the country.

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43. Singh & Dr. Raghuvanshi,*supra,* 81.
44. Swati Mittal,10 Most Successful Female Entrepreneurs in India,Jagran Josh (Sept. 28, 2019, 9:00 AM),https://www.jagranjosh.com/articles/10-most-successful-female-entrepreneurs-in-india-1520423806-1.
45. Ranbir Singh & O.P. Monga, Changing Status of Women Entrepreneurs in Himachal Pradesh, 2 Eu. Acae. R. 5723 (2014).

1.5 CONCLUSION

It may be concluded in the end that a women is the reflection of a society but in India she is still considered to be a part of weaker section. Many statutes have been enacted so far to uplift the status of women in the patriarchal society of India and also at a global level. But only the economic independence of women can lead to their overall development. We know that the population of women is almost equal to men, yet their active participation in economic development did not seem to be significant till 1990. Indian women did not enjoy social freedom so that they could mingle freely with the nation building activity by realizing their full potentials. That is why a drastic change is required in the mindset of men folk towards general women and working women in particular. So finding remedies for the problems of women entrepreneurs becomes a great necessity for the society as well as government. Many steps have been taken to solve the problems of women entrepreneurship by the central and state governments and the non-governmental organizations but some special incentives and subsidies are yet to be provided.[46]

Earlier, woman used to work out of compulsion and to fulfill the basic needs of her family, but as the time is changing this mind set is also changing. Now they are ready to compete with men in every field, be it politics, business, home-making, fashion, television, sports or agriculture, females are seen everywhere. This is how gender justice is being done to women by promoting their financial stability. Most people will believe that women as compared to men have innate capacities and tactics to utilize resources to maximum and make surplus profits, with huge savings. In the Oriental societies it can be observed that the women are born risk seekers. They intended to grow up with the feeling of risk management and adaptation with the environment change. This talent in women makes her superior to men up to some extent. More the women entrepreneurs, more the human resources contributing in economic growth of the nation, further resulting in empowering the better half of the population. Now is the time that a little effort is made to boost the economic participation of women through entrepreneurship, so that appropriate justice is done to this gender of the society and it no longer remains a weaker section.

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46. Dr. G. Jaya Lakshmi, Problems of Women Entrepreneurship in India 5 O. J. L. S. Sc. 78, 83 (2011).

ARTIFICIAL INTELLIGENCE IN HEALTHCARE- A BOON OR BANE

- Ms Aishwarya Jagga*

"Everything we love about civilization is a product of intelligence, so amplifying our human intelligence with artificial intelligence has the potential of helping civilization flourish like never before – as long as we manage to keep the technology beneficial."

- Max Tegmark, President of the Future of Life Institute[1]

INTRODUCTION

The contemporary world is growing at such a rate of knots that with every passing hour the entire world witnesses a technology which is smarter than the former prevailing technology. Artificial intelligence and machine-learning algorithms are the focal-point of many exciting technologies currently in development. From self-driving Tesla's to in-home assistants such as Amazon's Alexa or Google Home, artificial intelligence is swiftly becoming the hot new focus of the technology industry[2].

NITI Aayog has given five sectors that are envisioned to benefit the most from artificial intelligence in solving societal needs :[3]

a) Healthcare: increased access and affordability of quality healthcare,

b) Agriculture: enhanced income for farmers, increased productivity of farms and declining wastage,

c) Education: education with improved access and quality,

d) Smart Cities and Infrastructure: efficient and connectivity for the mushrooming urban population, and

e) Smart Mobility and Transportation: transportation which is smarter and safer

There is no definition of artificial intelligence which has been collectively agreed upon . It was in the mid-1950s that McCarthy, recognized as the father of Artificial Intelligence coined the term

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1. https://futureoflife.org/background/benefits-risks-of-artificial-intelligence/?cn-reloaded=1 (Retrieved on 10 March 2020 7:54 p.m.)
2. Shailin Thomas, Artificial Intelligence, Medical Malpractice, and the End of Defensive Medicine, Bill of Health , Jan 2017 (March, 14 2020 12:48 p.m.) https://blog.petrieflom.law.harvard.edu/2017/01/26/artificial-intelligence-medical-malpractice-and-the-end-of-defensive-medicine/
3. National Strategy for Artificial Intelligence, Niti Aayog, June 2018 (March 14, 2020 11:24 p.m.) https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf

"Artificial Intelligence" which he defined as "the science and engineering of making intelligent machines"[4]. Artificial intelligence generally refers to computing technologies that are analogous to processes associated with human intelligence, such as reasoning, learning and adaptation, sensory understanding, and interaction. A formal definition of Artificial Intelligence would read as "a field of science concerned with the computational understanding of what is commonly called intelligent behavior, and with the creation of intelligent agents that exhibit such behavior"[5]. Artificial intelligence in healthcare and research artificial intelligence is not new, but there have been rapid advances in the field in recent years.

ARTIFICIAL INTELLIGENCE VIS-À-VIS HEALTHCARE

Though artificial intelligence like robots and computers have sneaked into all walks of life but they will never be able to completely substitute the work of doctors, nurses, and other hospital staff members, but there are no two ways about the fact that artificial intelligence is changing the healthcare industry. From productivity at workplaces to treating patients, high tech technology has the potential to improve diagnosis, predicting patient outcomes and creating a more bespoke patient care experience. Artificial intelligence in medicine can be dichotomized into two subtypes[6]:

a) VIRTUAL - virtual part ranges from applications such as electronic health record systems to neural network-based guidance in treatment decisions and

b) PHYSICAL - physical part deals with robots assisting in performing surgeries, intelligent prostheses for handicapped people, and elderly care.

The latest example of artificial intelligence in the healthcare industry is of IBM's Watson which has received substantial attention in the media for its spotlight on precision medicine, particularly cancer diagnosis and its treatment. Watson employs a combination of machine learning and natural language process (NLP) capabilities. However, the early enthusiasm for application of this technology took a back seat as customers realised the difficulty of teaching Watson how to concentrate on particular types of cancer and of integrating Watson into care

4. And Peart, Homage to John McCarthy, the Father of Artificial Intelligence, Industry Insight, Jun 2017, (March 14, 2020 1:24 p.m) https://www.artificial-solutions.com/blog/homage-to-john-mccarthy-the-father-of-artificial-intelligence
5. Sandeep Reddy, Use of Artificial Intelligence in Healthcare Delivery, eHealth- Making Health Care Smarter, Thomas F. Heston, IntechOpen, (March 14, 2020. 1:52 p.m.) https://www.intechopen.com/books/ehealth-making-health-care-smarter/use-of-artificial-intelligence-in-healthcare-delivery
6. Amisha, Paras Malik, Monika Pathanian and Vyas Kumar Rathur, Overview of Artificial Intelligence in Medicine, J Family Med Prim Care. Jul 2019 (March 14, 2020. 1:00 p.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6691444/1

processes and systems. Watson is not a single product but a set of 'cognitive services' provided through application programming interfaces (APIs), including speech and language, vision, and machine learning-based data-analysis programs.[7]

HISTORY OF ARTIFICIAL INTELLIGENCE IN HEALTHCARE

The use of artificial intelligence in the field of healthcare and medicine is a natural corollary to the advent of artificial intelligence in the contemporary world. The same has no element of surprise as the system of artificial intelligence clearly intends to replicate the functioning of the human brain.

In the year 1970, William B Schwartz, a physician interested in the use of computing science in medicine, published that computing science will probably exert its major effect by augmenting and, in some cases; it will replace the intellectual functions of the physician.[8] It was realized by the 1970's that the conservative computing techniques were not appropriate for solution of the complex medical phenomenon. A better computational model that stimulated human cognitive processes, known as Artificial Intelligence was required for solving the clinical problems.

The earliest use of Artificial intelligence in medicine was comprised of setting up of the rule-based systems to help with medical reasoning. However the serious clinical problems were too complex to be dealt with simple rule based problem solving techniques. Problem solving was then sought by computer programs based on models of diseases[9].

In 1976, Gunn a Scottish surgeon used computational analysis to diagnose acute pain in abdominal region. This was achieved through clinical audits of structured case notes through computers, whereby diagnosis through this route proved to be 10% more accurate that the conventional route[10].

By 1980, artificial intelligence was well established all over the globe but especially in learning centers in the United States where, there was use of novel and innovative artificial intelligence approach to medical diagnoses which was majorly based on the expert system methodologies.

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7. Thomas Davenport and Ravi Kalakota, The potential for artificial intelligence in healthcare, Future Healthc J. 2019 Jun (March.14, 2020, 5:30 p.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6616181/#CIT000
8. William B. Schwartz, Medicine and the Computer- the Promise and Problems of Change, New England Journal of Medicine (March.15, 2020, 1:06 p.m.) https://www.nejm.org/doi/full/10.1056/NEJM197012032832305
9. Sandeep Reddy, Use of Artificial Intelligence in Healthcare Delivery, eHealth - Making Health Care Smarter, Thomas F. Heston, IntechOpen, (March.15, 2020, 1:00 p.m) https://www.intechopen.com/books/ehealth-making-health-care-smarter/use-of-artificial-intelligence-in-healthcare-delivery
10. *Id.*

By the end of the 1990's, research in the field of medical artificial intelligence had started to use novel techniques like machine learning and artificial neutral networks to support clinical decision-making.

APPLICATION OF ARTIFICIAL INTELLIGENCE IN HEALTHCARE

Artificial intelligence today is being employed for the three classical medical tasks: diagnosis, prognosis and therapy but most importantly in the area of diagnosis.

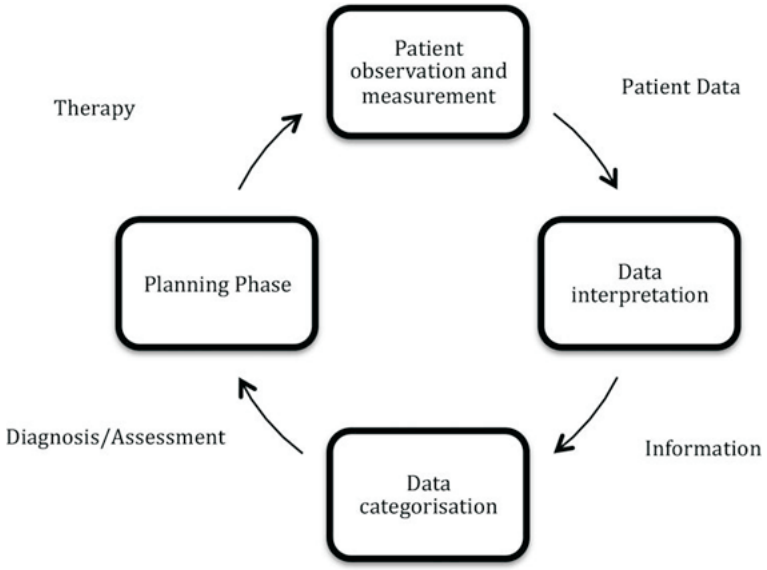

Figure 1

Figure 1 depicts the medical diagnosis cycle which involves observation and examination of the patient, collection of patient data, interpretation of data using the clinician's knowledge and experience and then formulation of a diagnosis and a therapeutic plan by the physician. This concept in the realm of artificial intelligence is replicated by the physician being the intelligent agent, the patient data being the input and the diagnosis being the output.[11]

Artificial intelligence is not a single technology, but rather a compilation of them each of which have inevitable and immediate relevance to the healthcare field. Some particular artificial intelligence technologies of high importance to healthcare are below-

11. Sandeep Reddy, Use of Artificial Intelligence in Healthcare Delivery, eHealth- Making Health Care Smarter, Thomas F. Heston, IntechOpen, (March 14, 2020. 5:52 p.m.) https://www.intechopen.com/books/ehealth-making-health-care-smarter/use-of-artificial-intelligence-in-healthcare-delivery

1. MACHINE LEARNING

Machine learning is a statistical technique for fitting models to data and to 'learn' by training models with data. There are following versions of machine learning in healthcare-

a) Precision Medicine- This is the most common application of traditional machine learning which predicts the best suited treatment for the patient.[12]

b) Neural Network – This is a more complex technology used for categorization applications like determining whether a patient will acquire a particular disease. It resembles to the way neurons process signals, but the analogy to the brain's function is relatively weak.

c) Deep Learning/ Neural Network Models - This is the most complex forms of machine learning with many levels of features or variables that predict outcomes. A widespread application of deep learning in healthcare is recognizing potentially cancerous lesions in radiology images. Deep learning is being applied to radiomics more and more, or for the detection of clinically relevant features in imaging data beyond what can be perceived by the human eye.

2. NATURAL LANGUAGE PROCESSING

Natural Language Process includes applications like speech recognition, text analysis, translation and other such objectives related to language. In healthcare, the dominant applications of NLP involve the creation, understanding and classification of clinical documentation and published research. NLP systems can analyze unstructured clinical notes on patients, prepare reports (for instance- on radiology examinations), transcribe patient interactions and conduct conversational artificial intelligence.[13]

3. RULE-BASED EXPERT SYSTEMS

Expert systems are based on collections of 'if-then' rules. In healthcare, they are being widely engaged for 'clinical decision support' purposes.[14] Expert systems require human experts and knowledge engineers to build a series of rules in a particular knowledge domain. However, when the number of rules is large (usually over several thousand) and the rules begin to conflict

12. Su-In Lee, Safiye Celik, B A Logsdon, et al. A machine learning approach to integrate big data for precision medicine in acute myeloid ¬leukemia. Nat Commun 2018 (March.15, 2020, 2:14 p.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5752671/
13. Thomas Davenport and Ravi Kalakota, The potential for artificial intelligence in healthcare, Future Healthc J. 2019 Jun (March.15, 2020, 2:30 p.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6616181/#CIT000
14. *Id.*

with each other, they tend to break down. Moreover, if there is change in the knowledge domain, bringing about a change in the rules can be difficult and time-consuming. They are slowly being replaced in healthcare by more approaches based on data and machine learning algorithms.

4. PHYSICAL ROBOTS

Physical robots are well known to perform pre-defined tasks like lifting, repositioning, welding or assembling objects in places like factories and warehouses, and delivering supplies in hospitals. They are also becoming extra intelligent, as other artificial intelligence capabilities are being implanted in their 'brains' (that is, their operating systems). Surgical robots, originally approved in the United States of America in the year 2000, endow 'superpowers' to surgeons, advancing their skill to see, craft clear-cut and minimally invasive incisions, stitching wounds and so forth.[15] Crucial and significant decisions are forwarded only by human surgeons, however. Common surgical procedures using robotic surgery include gynecologic surgery, prostate surgery and head and neck surgery.[16]

5. ROBOTIC PROCESS AUTOMATION

Robotic process automation (RPA) doesn't in actual fact involve robots as the name suggests but includes only computer programs on servers. It relies on an amalgamation of workflow, business rules and 'presentation layer' integration along with information systems to operate like a semi-intelligent user of the systems. In healthcare, they are applied for recurring tasks like prior authorization, updating patient records or billing. When combined with other technologies like image recognition, they can be materialized to dig out data from, for example, faxed images so as to input it into transactional systems.

These technologies are mostly individual ones, but increasingly they are being pooled and integrated; robots are getting artificial intelligence supported 'brains', image recognition is being integrated with Robot Process Automation . Perhaps in the upcoming years these technologies will be so intermingled that composite solutions will be more likely or feasible.

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15. Davenport TH, Glaser J. Just-in-time delivery comes to knowledge management. Harvard Business Review 2002. (March.15, 2020, 3;10 p.m.) https://hbr.org/2002/07/just-in-time-delivery-comes-to-knowledge-management.
16. Su-In Lee, Safiye Celik, B A Logsdon, et al. A machine learning approach to integrate big data for precision medicine in acute myeloid ¬leukemia. Nat Commun 2018 (March 15, 2020, 3:00 p.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5752671/

ARTIFICIAL INTELLIGENCE IN HELTHCARE – A BOON

"What all of us have to do is to make sure we are using artificial intelligence ina a way that is for the benefit of humanity, not to the detriment of humanity."

- Tim Cook, CEO of Apple[17]

Artificial intelligence in healthcare today is gaining more and more importance for the following reasons-

1. ARTIFICIAL INTELLIGENCE EXCELS AT WELL-DEFINED TASKS

Research has focused on tasks where artificial intelligence is able to effectively demonstrate its performance in relation to a human doctor. By and large, these tasks have evidently helped define inputs and a binary output which is easily validated.

2. ARTIFICIAL INTELLIGENCE IS SUPPORTING DOCTORS, NOT REPLACING THEM

Machines invariably lack human qualities such as sympathy, empathy and compassion, so it becomes necessary that patients perceive that consultations are being led by human doctors. Furthermore, patients cannot be expected to immediately trust artificial intelligence a technology shrouded by mistrust.[18] Therefore, artificial intelligence commonly handles tasks that are essential, but narrowed down in their scope so as to leave the primary and key responsibility of patient management with a human doctor. There is an ongoing clinical trial using artificial intelligence to calculate target zones for head and neck radiotherapy more accurately and way more quickly than by a human being. An interventional radiologist is still ultimately responsible for delivering the therapy but artificial intelligence has a significant background role in protecting the patient from harmful radiation.[19]

3. ARTIFICIAL INTELLIGENCE SUPPORTS POORLY RESOURCED SERVICES

A single artificial intelligence system is capable of supporting an enormous population and

17. https://www.forbes.com/sites/nicolemartin1/2019/06/27/13-greatest-quotes-about-the-future-of-artificial-intelligence/#637512e63bdf (Retrieved on March 14, 2020 7:46 p.m.)
18. Oppenheim M. Stephen Hawking: artificial intelligence could be the greatest disaster in human history. Independent. Oct,2016 (March 14,2020 6:03 p.m.), http://www.independent.co.uk/news/people/stephen-hawking-artificial-intelligence-diaster-human-history-leverhulme-centre-cambridge-a7371106.html
19. Varun H Buch, Irfan Ahmed, Mahiben Maruthappu, Artificial intelligence in medicine: current trends and future possibilities, Br J Gen Pract. 2018 Mar (March 14, 2020 6:06 p.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5819974/

therefore it is ideally suited to situations where human expertise is a scarce resource, such as in the developing nations. In many Tuberculosis prevalent countries there is a shortage of radiological expertise at remote centers. By means of artificial intelligence, radiographs uploaded via these centers could be understood by a single central system; one of the recent study shows that artificial intelligence precisely diagnoses pulmonary Tuberculosis with a sensitivity of 95% and specificity of 100%. Furthermore, under-resourced tasks where patients are experiencing unsatisfactory waiting times are also attractive to artificial intelligence in the form of triage systems.[20]

Thus, tele-medicine has proved to be a boon in the contemporary world.

ARTIFICIAL INTELLIGENCE IN HEALTHCARE- A BANE

"Success in creating artificial intelligence would be the biggest event in human history. Unfortunately it might also be the last, unless we learn how to avoid the risks."

-Stephen Hawking, Theoretical Physicist [21]

As the use of artificial intelligence in the healthcare sector rises and advances, the legal front will also face issues, particularly with the blooming attention and unique application of customary regulatory principles which are not as of now attuned and accustomed to artificial intelligence. Though there is potential and scope for artificial intelligence to transform healthcare ethical, legal, and cultural factors need to be considered by developers, practitioners, and policy makers when designing, using, and regulating artificial intelligence-

1. DATA PRIVACY AND SECURITY –

Artificial Intelligence applications in healthcare make use of data that many would consider to be sensitive and private[22]. These are subject to legal controls. Patient privacy is a key concern affecting how artificial intelligence is developed and tested.[23] The data of patients should only be used in compliance with patient's expectations as to their usage and requirement. Artificial intelligence could be materialized to detect cyber-attacks and protect healthcare computer systems. However, there is the potential for Artificial Intelligence systems to be hacked to gain

20. *Id.*
21. https://www.forbes.com/sites/nicolemartin1/2019/06/27/13-greatest-quotes-about-the-future-of-artificial-intelligence/#637512e63bdf (retrieved on 14 March, 2020 7:42 p.m.)
22. https://www.nuffieldbioethics.org/assets/pdfs/Artificial-Intelligence-AI-in-healthcare-and-research.pdf (Retrieved on March 15, 2020. 6:34 p.m.)

access to sensitive data, or spammed with fake or biased data in such ways that might not easily be detectable and will jeopardize the security and safety of vital information of the patients.

In 2016, there was hacking of a Mumbai-based diagnostic laboratory database which led to the leaking of medical records (including HIV reports) of over 35,000 patients. This database was holding the records of patients throughout Indian Territory, and many were oblivious that their details and particulars have been exposed. This database had been victim of multiple hacks sometimes even up to three times in a week. However, no action was taken by the laboratory to secure the data.[24]

2. RELIABILITY AND SAFETY

Reliability and safety are primary and principal issues where artificial intelligence is used to control equipment, deliver treatment, or make decisions in healthcare sector. Artificial intelligence could make errors and, if an error is difficult to detect or has knock-on effects, this could have serious implications.[25] The reason for the fallacy can be because patients may react differently to injuries and secondly, an underlying problem in one artificial system might result in injuries to thousands of patients in sharp contrast to the physical presence of a professional. For example, in a clinical trial in 2015, an artificial intelligence application was exercised to predict which patients were expected to develop complications subsequent to pneumonia, and henceforth should be hospitalized. This application erroneously directed doctors to send home patients with asthma due to its failure to take contextual information into account.

3. EFFECTS ON HEALTHCARE PROFESSIONALS

The ethical obligations of healthcare professionals towards individual patients might be affected by the use of artificial intelligence decision support systems, given these might be guided by other priorities or interests, for instance cost efficiency or widespread public health apprehensions. As with many new technologies, the introduction of artificial intelligence is likely to denote that the skills and expertise required of healthcare professionals will change. This could ease up health professionals to splurge more time engaging directly with the patients.

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23. Mary H. Stanfill and David T. Marc, Health Information Management:Implications of Artificial Intelligence on Healthcare Data and Information. Yearb Med Info 2019, (March 15, 2020. 6:10 p.m.) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6697524/
24. ENS (2016, December 3), Maharashtra website hacked: Diagnostic lab details of 35,000 patients leaked, (March 15, 2020. 5:55 p.m.) http://indianexpress.com/article/india/diagnostic-lab-detailsof-35000-patients-leaked-hiv-reports-4407762/
25. https://web.stanford.edu/class/cs240/old/sp2014/readings/therac-25.pdf (Retrieved on March 15, 2020. 6:34 p.m.)

However, there are concerns that the introduction of artificial intelligence systems might be used to justify the engaging of less skilled staff. This could be problematic if the technology is unsuccessful and staff is not able to recognize faults or carry out necessary tasks without computer guidance. A related concern is that artificial intelligence could make healthcare professionals complacent, and less likely to check results and challenge errors.[26]

4. LEGAL LIABILITY:

In case of error in diagnosis, malfunction of a technology or applying inaccurate or inappropriate data the question crops up as to on whom should the liability fall upon – the doctor or the software developer(artificial intelligence). In cases of medical negligence in India, medical professional are held liable, and can further be prosecuted under civil and criminal law of the country. Since software and codes is not technology agnostic, many believe that the creator of the software should be an agent that can be regulated.

Additionally, how does one settle the level of accountability and liability of the doctor in a scenario where he provides the erroneous treatment or diagnosis on account of a glitch in the system or a mistake in data entry? Even though he may not be at fault, liability will fall on him instead of the technology that he relied upon. As a result of such issues of trust and liability and the current capability of artificial intelligence, completely replacing medical professionals with artificial intelligence (that is active assistance by artificial intelligence) is unfeasible at present.[27]

Consequently in light of these disadvantages artificial intelligence should be used cautiously.

POSSIBLE SOLUTIONS

There is a need of responsible and ethical artificial intelligence to make sure that patients are the utmost priority. To combat the problems in the arena of artificial intelligence in healthcare following solutions can be helpful-

1. DATA GENERATION AND AVAILABILITY -

Several risks in Artificial intelligence healthcare exist as to the assembling high quality data in line with the protection of privacy. One set of solutions is provision by government for infrastructural resources for data, varying from setting standards for electronic health records to

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26. https://towardsdatascience.com/the-dangers-of-ai-in-health-care-risk-homeostasis-and-automation-bias-148477a9080f?gi=c7ad6d3ac013 (retrieved on March 15, 2020. 6:24 p.m.)
27. Yesha Paul, Elonnai Hickok, Amber Sinha , Udbhav Tiwari. Artificial intelligence in the healthcare industry in India, the Centre for internet and society, India (March 15, 2020 6:52 p.m.) https://cis-india.org/internet-governance/files/ai-and-healtchare-report

directly providing technical support for high-quality data gathering efforts in the healthcare system that otherwise are not available. Another option is direct investment in the creation of high quality data-sets. Reflecting in this direction, both the United States of America's initiative and the United Kingdom's BioBank aim to assemble comprehensive health-care data on enormous numbers of individuals. Ensuring these effective privacy safeguards for large-scale data-sets is essential to ensure patient trust and participation.[28]

2. QUALITY OVERSIGHT-

Oversight of artificial intelligence system will assist addressing the risk of patient injury. Increased oversights efforts by health systems and hospitals, professional organizations like the American College of Radiology and the American Medical Association, or insurers may be necessary to ensure quality of systems that fall outside the Food and Drug Administration's regulatory authority[29].

3. PROVIDER ENGAGEMENT AND EDUCATION -

The integration of artificial intelligence into health system will undoubtedly change the role of the healthcare professionals. On one side the professionals will be enabled to provide more-personalized and better care, more time to interact with their patients on the other hand the professionals would struggle uninterruptable predictions and recommendations from completing algorithms. In either case medical education would be required to evaluate and interpret the artificial intelligence systems in healthcare.

4. PRIORITY TO PATIENT-

Parallel to the traditional clinical activity, patient safety must remain paramount and artificial intelligence ought to be developed in a regulated way in partnership between clinicians and computer scientists. However, regulation cannot be permitted to asphyxiate innovation.

5. TRANSPARENCY

External critical evaluation and transparency of technology companies is indispensable for clinicians to be in no doubt that the tools they are providing are not dangerous to use. In many respects, artificial intelligence developers in healthcare are not poles apart from pharmaceutical

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28. W.Nicholson Price II, Riska and remedies for Artificial Intelligence in Health Care, The Brookings Institution's Artificial Intelligence and Emerging Technology (AIET) Initiative (March 15, 2020. 11:30 p.m.) https://www.brookings.edu/research/risks-and-remedies-for-artificial-intelligence-in-health-care/
29. *Id.*

companies who comprise of a similar arms-length relationship with care providers. This is a practical parallel and could serve as a guide. As with the pharmaceutical industry, providing license and post-market surveillance are vital and such methods should be advanced that ensure full-proof safety.

Thus for better functioning the above solutions can prove to be a step towards better use of artificial intelligence in the healthcare industry.

ARTIFICIAL INTELLIGENCE IN HEALTHCARE- INDIAN PERSPECTIVE

India presently is in a unique position to be a driver in the artificial intelligence and healthcare space for national and international companies. With large amounts of data and a burgeoning startup community, India has the opportunity to address many health care related problems through the use of artificial intelligence. In its quest for India to join the artificial intelligence revolution, the government has also undertaken a number of initiatives to drive the adoption of artificial intelligence across the country. Yet, many obstacle still stand in the approach to widespread adoption and implementation, arising out of a lack of regulatory clarity on issues of data, design and certification and lack of reliable and ethical collection of data and the processing systems. A robust open data policy, a comprehensive privacy legislation, greater investment in artificial intelligence research and development, robust national infrastructure, equipping labour forces with the necessary skills to adopt artificial intelligence and to be prepared for the changes that artificial intelligence could bring, and a regulatory framework that ensures transparency and accountability but does not hinder innovation, are some of the measures required for the establishment of a flourishing artificial intelligence healthcare ecosystem in India[30]

CONCLUSION

Artificial Intelligence will become the stethoscope of the 21st Century provided there is a high level of co-operation between the law, technology and the medical community. Legal systems around the world will soon be faced with fundamental decisions regarding artificial intelligence systems. These systems will be prone to encountering liability for their decisions in relation to the treatment of patients; in the way similar to doctors who treat their patients.

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30. Yesha Paul, Elonnai Hickok, Amber Sinha , Udbhav Tiwari. Artificial intelligence in the healthcare industry in India, the Centre for internet and society, India (March 14, 2020 8:52 p.m.) https://cis-india.org/internet-governance/files/ai-and-healtchare-report

Watson and other similar artificial intelligence systems are already so well entrenched in, and relied upon by medical practitioners, that the option of imposing an outright ban on such systems has already passed. The only alternative at hand is that the legislators all over the globe enforce a prudent form of regulation of such systems to safeguard the rights of thousands of patients who will be exposed to the diagnosis and therapies put forward by their artificial intelligence systems.

Therefore, it is submitted that to encourage the safe and sound use of the skills these systems undoubtedly have, a new legal action which is based on enterprise liability. Regulations and laws need to be created, which shall also encompass all relevant aspects of medical malpractice, products liability and vicarious liability. Certainty, stability and accountability through far sighted and appropriate legislation will stimulate and entrench this vital new asset within the medical profession.

ARTIFICIAL INTELLIGENCE: LEGAL PERSONALITY AND LIABILITY

-Mr Mayank Sharma*

"It is the year 2023, and for the first time, a self-driving car navigating city streets strikes and kills a pedestrian. A lawsuit is sure to follow. But exactly which laws will apply? No-one knows." [1]

INTRODUCTION

Such legal conundrum is no more theoretical. Technological advancement has led to the rise of intelligent machines, capable of imitating human like intelligence, referred to as Artificial Intelligence (AI). The term Artificial *Intelligence* was coined by John McCarthy in 1956 to describe computer programs which seemingly exhibit intelligence, that is, computers perform tasks which when performed by humans require them to be intelligent.[2] Simply put, AI is a collection of technologies that combine data, algorithms and computing power to perform tasks that would require human intelligence, such as learning, reasoning, analysing, socialising etc. A distinction is made between Artificial Narrow Intelligence (ANI) which is designed to accomplish a specific task and Artificial General Intelligence (AGI) capable of all sorts of general intelligent actions. All the AI systems available today are 'narrow'. Nevertheless such intelligent machines are ubiquitous and exists in various forms such as computers, chat-bots, digital assistants, robots, autonomous vehicles etc.Over the past few years, the availability of big data, cloud computing and the associated computational and storage capacity and breakthroughs in an AI technology called "machine learning" (ML), have dramatically increased the power, availability, growth and impact of AI.[3] All this is transforming communication, businesses, healthcare, medicine, safety, transport, finance, banking, and every other aspect of human life for better. However there must be some safeguards in place to prevent the harm that these machines may cause. For example, autonomous vehicles[4] would be freely

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1. J. Kingston, Artificial Intelligence and Legal Liability(2016), in M. BRAME, & M. PETRIDIS (Eds.), RESEARCH AND DEVELOPMENT IN INTELLIGENT SYSTEMS XXXIII: INCORPORATING APPLICATIONS AND INNOVATIONS IN INTELLIGENT SYSTEMS XXIV (p. 269-279).
2. V. Rajaraman,JohnMcCarthy — Father of Artificial Intelligence, 19 Reson, 198–207 (2014).
3. OECD, ARTIFICIAL INTELLIGENCE IN SOCIETY, (2019) available at: https://doi.org/10.1787/eedfee77-en.
4. Google's driver-less cars have been test-driven on public roads for several years and have logged hundreds of thousands of miles under the brand name WAYMO.

running on roads without human aids in a few years, the trials for which are already underway and robot assisted diagnosis and surgeries are already being performed in hospitals. Today, mankind stands on the threshold of an era where AI is set to unleash a new industrial revolution, which will pervade every aspect of human life and therefore it has become imperative for the legislatures to consider its legal validity, implications and effects, without suffocating research and development.

Intelligence makes humans special among other species because it gives them the ability to think and perform various action. Each individual is responsible for their own actions because their each action is intelligently calculated and they can foresee the consequence of their actions and they are recognised in the eyes of law as persons capable of possessing rights and liabilities. For example, if a person commits a murder, he himself will be liable for his act. However, law makes an exception in case of minors and lunatics who are unable to utilise this intelligence. When it comes to machines operated by humans, liability arising out of any damage or harm caused by machines, is imposed on operator or the manufacturer depending upon the cause. This is essentially the case in, for example, car accident. But what happens in case of machines which operates with their own intelligence without any human aid. Who bears the liability in case damage is caused due to operation of such a machine? This is the case, for example, where an autonomous vehicle[5] causes an accident. Who shall be held responsible: the driver, the car owner, the manufacturer, the programmer or the AI itself? A similar problem arises in case a robot assisted surgery goes wrong. Who shall be held liable: the doctor, the hospital, the manufacturer, the programmer or the robot itself? Therefore, the Author shall, in absence of any specific law on AI, investigate the position of AI in eyes of law by comparing it with that of legal personality of corporation, ship, idol and animals and then explore the contours of liability arising out of any wrongful act or omission by AI.

LEGAL PERSONALITY: A FICTION OF LAW

The foundational principle of a legal system is that it must recognise the subjects it seeks to govern. This is done by the law recognising distinct legal units or "legal persons"[6]. The concept of legal personality constitutes an important subject matter in law, for there cannot be rights and duties without a person. To be a legal person is to be recognised by the law as a subject which

5. Autonomous vehicle refers to the vehicle being driven with the use of an AI without or minimum human interference. Such cars are commercially available such as the Tesla and Google's Waymo.
6. M. Siddiq (Ram Janmabhumi Temple) v. Suresh Das, (2020) 1 SCC.

embodies rights, entitlements, liabilities and duties.

The word "person" is derived from the Latin word *"persona"*. Literally it meant a mask worn by actors in a play to personify God, however later on it was extended to refer to the role played by humans in legal proceedings concerned with rights and liabilities. However human beings and legal person have never been synonymous. Neither all humans were legal persons nor were all legal persons humans. What or who is a legal person has changed with changing time and place. Legal person and legal personality are artificial creations of law with their own distinct features. Salmond has defined a *"person"* as, *"Any being to whom the law regards as capable of rights or duties. Any being that is so capable, is a person whether human being or not and nothing that is no so capable is a person even though he be a man."*[7]

A person in the eyes of law may be a 'natural person' or a 'legal person'. A natural person is a living human being who is a subject matter of rights and liabilities. On other hand, legal persons are 'artificial or juristic person', real or imaginary, who are treated as humans in greater or lesser degree and in whom law vests rights and duties and thus attributes personality by way of fiction. The very words "juristic person" connote recognition of an entity to be in law a person which otherwise it is not. When a legal system confers legal rights and obligations on an entity, it has determined to treat that entity as though it were a person in fact. It is a kind of pretence in which legal systems can decide to engage, regardless of whether an entity really is a person.[8] What law recognises as a legal person depends upon the prevailing social and political conditions. Roscoe Pound has rightly observed, *"In civilised lands even in the modern world it has happened that all human beings were not legal persons. In Roman law down to the constitution of Antonius Pius the slave was not a person. He enjoyed neither rights of family nor rights of patrimony. He was a thing, and as such like animals, could be the object of rights of property."*[9] On the other hand, ancient animals were regarded as subject of legal duty. Under Ancient Jewish Law, if an ox gored a human being to death, it was to be stoned and by way of further punishment its flesh was not to be eaten. Modern system of law, however give no countenance to the theory that animals can be subject to legal duties."[10] The development and advancement of societies demanded the

7. SIR JOHN W SALMON, JURISPRUDENCE OR THE THEORY OF LAW, (12th ed. 2004).
8. J.J. Brynson &M.E. Diamantis, Of, For, and By the People: The Legal Lacuna of Synthetic Persons, 25 Artificial Intelligence and Law, 273–291 (2017).
9. ROSCOE POUND, JURISPRUDENCE, (6th ed. 2008).
10. G. C. V. SUBBARAO, JURISPRUDENCE AND LEGAL THEORY, (9th ed. 2009).

need to recognise other entities as juristic person. In this regard Supreme Court observes, *"Where an individual's interaction fell short of cooperation, a larger circle of individuals was necessitated and therefore institutions like corporations and companies were created, to help the society in achieving the desired result.*[11]*"* Under the Indian law corporations [12], deities[13], idols[14] , mutt[15], mosque[16] and animals[17] are recognised as legal persons.

NECESSITY AND CONVENIENCE AS THE BASIS FOR LEGAL PERSONALITY.

The concept of legal person is an innovation of law that has expanded beyond natural persons due to historical circumstances, legal necessity or adjudicatory convenience. Conferring legal personality is an artifice, a pretence, a trick of speech or a cloak draped around entities for them to be recognised in eyes of law. For the purposes of recognising a legal person, the relevant inquiry is the purpose to be achieved by such recognition. To subject an entity to legal personality is to make it a subject of rights and liabilities. However such rights and liabilities are neither unlimited nor equivalent to those of natural purpose. Since legal personality is a creation of law to fulfil some person therefore law confers only limited rights and liabilities to such fictitious person relevant to the said purpose. The author shall enquire and analyse this purpose for conferring legal personality to corporation, ships, idols and animals and then juxtapose it with that of an AI and make a case as to why conferring legal personality would not serve any purpose.

CORPORATIONS AS A LEGAL PERSONALITY.

Corporation is a classic example of artificial legal person that gives us a great understanding of how legal recognition of an artificial person is useful for the society and a convenience for law. A corporation is a group of individuals which is treated in law, for the purpose of identification, as a single unit.[18] A corporation is a legal person having separate identity apart from its members, capable of rights and liabilities of its own and endowed with the potential of perpetual succession.[19] It can sue or be sued and can sell or buy property in its name. But a corporation is

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11. Shriomani Gurudwara Prabandhak Committee, Amritsar v.Shri Som NathDass&Ors. AIR 2000 SC 1421.
12. Solomon v. Solomon& Co. Ltd.,[1897] AC 22.
13. Moorti Shree Behari Ji v. Prem Dass and Oths.AIR 1972 All 287.
14. Pramatha Nath Mullic v. Pradvumna Kumar Mullick (1925) L.R. 52 Ind. App. 245.
15. Sarangadeva Periya Matam v. Ramaswami Goundar, AIR 1966 SC 1603.
16. Masjid Shahid Ganj v. Shromani Gurdwara Parbandhak Committee, AIR 1938 Lah 369 (FB).
17. Karnail Singh v. State of Haryana &Othrs. (2019) SCC OnLine P&H 704.
18. *Id.*at 6.
19. HAHLO & TREBILCOCK, CASEBOOK ON COMPANY LAW, 42 (2nd ed. 2000).

not merely an institution recognise by law, but a legal device for the attainment of social, political or economic ends.[20] An association in form of a corporation helps individuals to achieve what they can't by themselves. For example, a new business venture through a corporation helps in raising capital and mitigating the risks and liability. Legal personality enables corporation to enter into almost all legal relations with other persons. This has simplified the legal proceedings. In a dispute with a corporation a person proceeds against corporation only and not the number of individuals who are the members. However such immunity is not unlimited as the courts lifts the corporate veil to fasten the liability on human agents such as directors and managers when legal personality of corporation presents obstructions in protection and enforcement of public and private rights. This is because the corporation has no will of its own, will of its human agents is the will of the corporation. Corporations also help in continuous operation of trade and commerce since transfer, resignation or death of a member does not affect the functioning of the corporation. There is also a clear distinction between the assets of the Corporation and that of its members. As a result it can shield its own assets from the intervention of its owners or their personal creditors, because company's creditors are given priority over investors, this is called 'entity shielding' and it helps in ensuring investments which promotes growth.[21] Thus, legal personality of corporation serves a great utility.

This discussion leads us to the question that, what benefits could be derived by conferring AI with legal personality. The significance and utility of AI in present and the near future can hardly be disputed. AI will completely revolutionize human life providing them with better standard of living. Thus it can be argued that separate legal personality of AI, similar to that of a corporation, will limit the liability of human agency operating behind AI in form of its owner, manufacturer or programmer. This would promote research and development and application of AI in varied fields, which will provide enormous utility to humans. Once conferred with such a status of a legal person similar to the extent of a corporation, AI can be sued for its actions and the liability arising thereof just as in case of a corporation. However such a suit would not help secure any relief to the plaintiff since civil liability will requires AI to hold assets and thus the claims would fail. In case of corporate liability the court lifts the corporate veil to determine will of the human

20. E.S. MASON,CORPORATION IN MODERN SOCIETY, (2nd ed. 1967).
21. Henry Hansmann et al.,Law and Rise of Firm, 119 Harv. L. Rev. 1335 (2005-2006).

agents behind it. But such piercing of immunity would not be possible in case of AI because its actions are based on intelligent calculation and its decision is its own and not that of a manufacturer or the programmer. Moreover, the manufacturers or the programmers would often escape from their liability by blaming it on the AI. And therefore a personality similar to that of a corporation would not serve any purpose for AI to be conferred with legal personality.

SHIP AS A LEGAL PERSON

A more relatable example is that of conferment of legal personality on a Ship. Under Admiralty Law, jurisdiction can be exercised either in *persona* i.e. against the individual or the corporation responsible or in *rem* i.e. by proceeding against the ship as a legal person directly in case of any damage. Having been regarded as entirely independent from the action in persona, the action in *rem* is the action against the ship, or, more appropriately against other properties such as cargo and freight but most significantly not against its owner.[22] Jessel M.R. has aptly described the action in rem as, *"You may in England and in most countries proceed against the ship. The writ may be issued against the owner, and the owner may never appear and you get your judgment against the ship without a single person being named from the beginning to end. This is an action in rem, and it is perfectly well understood that the judgment is against the ship."*[23]

The law confers legal personality to ship for adjudicatory convenience. Conferring the ship with a legal personality allows for actions to be taken independent of the presence of ship's owner who may be in another part of the world.[24] Moreover, since most of the admiralty litigation involves international trade, the ship and the accompanying cargo and freight are highly mobile and an action against the ship serves as a security for the claim. After proceedings are initiated against the ship it is arrested, so that it does not move outside the court's jurisdiction. If no person appears in court to defend, the proceeding will continue against the ship and eventually, the ship may be sold by court order to satisfy the claim.[25] In this way conferring legal personality ensures convenience to law and effective adjudication of disputes.

Similar purpose for conferring personality on AI does not seems to provide similar convenience. A ship or its cargo are valuable assets and therefore they can be easily sold out and claims can be

22. CHRISTOPHER HILL, GUIDE TO MARITIME LAW 100 (6th ed.2003).
23. VERONICA RUIZ ABOU-NIGM, THE ARREST OF SHIP IN PRIVATE INTERNATIONAL LAW, (1st ed. 2011).
24. *Id.* at 6.
25. THOMAS J. SCHOENBAUM, ADMIRALITY AND MARITIME LAW506-507 (5thed. 2012).

satisfied. AI would lose its utility as well as its value in case of any act or an omission resulting in an injury. It would lose out on the trust of people and subsequently its goodwill and it will find no buyers and claims would remain unfulfilled. Thus, the purpose which serves basis of legal personality of a ship finds no use in case of AI.

IDOL AS LEGAL PERSONS

An idol refers to a statue created and worshipped by humans. In India, legal personality has been conferred upon Hindu idol. Legal personality vests in the idol however it does not personify the divinity behind the idol which is indefinite, limitless and omnipresent in Hinduism. Legal personality exists for the underlying pious purpose and moving or destroying the idol has no effect on its legal personality.[26] It is a result of historical process whereby the rulers and emperors donated property to Hindu shrines and as a result such shrines came to hold large area of land owned, managed and cultivated by *shebaits* and *mohunts* who were not the owner of this property. This situation presented a problem to colonial rulers and British courts and for this reason the legal concept of the Hindu idol as a juristic entity owning land evolved.[27] The legal personality of idols provided the courts with a conceptual framework within which to practically adjudicate disputes involving competing claims over disputed property endowed to or appurtenant to Hindu idols. However this purpose can't support the claim for legal personality of AI since it would not hold any property, instead it will itself be a property. Property is donated to Hindu shrines for religious and spiritual gains but there is no reason as to why someone will donate property in the name of AI. And therefore the purpose which serves as basis of legal personality of idols cannot provide similar basis for legal personality of AI.

ANIMALS AS LEGAL PERSONS

In the recent judgment in ***Karnail Singh v State of Haryana***[28] the Punjab & Haryana High Court held that the entire animal kingdom including avian and aquatic as legal entities having corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Haryana were held to be persons in *loco parentis* as the human face who could approach for the welfare of the animals. The reason for conferring legal personality is promotion of general welfare of animals, protection of threatened species of animals and their habitat. The

26. Ram Jankijee Deities v. State of Bihar,(1999) 5 SCC 50.
27. Gautam Patel, Idols in Law, 45 E&P W, 49 (2010).
28 2019 SCC OnLine P&H 704.

court held that, *"Article 21 of constitution protects 'life' which means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour or dignity. All the animals have honour and dignity. Every species has an inherent right to live and is required to be protected by law. The rights and privacy of animals are to be respected and protected from unlawful attacks. Their Lordships have evolved the term 'species best interest'."*

Animals are an integral part of our environment. There is an increasing need to protect wildlife and ecology as more and more species are becoming threatened due to deteriorating environment. Animals share common qualities like intelligence, emotion and self-awareness, language, memory, culture, cooperation and altruism with humans.[29] Animals also play a significant role in different cultures and religions and thus are part of common heritage of humans which needs protection. Thus conferring animals with legal personality has made them subject of right rather that as objects. Animals can be directly represented in court through humans and can be a party to legal action. This would help their conservation and protection and prevent their abuse.

Similar arguments however, finds no relevance in conferring legal personality on AI. Though AI possesses intelligence however it does not share other qualities such as emotions, culture, language or altruism. It can neither experience pain nor pleasure. It is often argued that development in technology will lead to machines being self-aware, however as of present it is only a theory and remains a distant possibility. Moreover, neither AI faces any threat from humans nor it can be abused as in case of animals. Thus arguments based on human like qualities or conservation find no relevance in case of AI.

LIABILITY FOR AI

Conferring legal personality to AI seems no way out and therefore we shall explore the liability of AI under present civil liability laws. The contours of civil liability arising out of act or omission by an AI under present legal framework can be explore in two ways – firstly when AI is used as a product and secondly when AI is used as a service.

AI AS A PRODUCT

Product liability is the main basis of manufacturer's liability. A manufacturer of goods may be

29. DAVID R. BOYD, THE RIGHTS OF NATURE: A REVOLUTION THAT COULD SAVE THE WORLD,(1st ed.2017).

held liable to the person injured due to his product either on violation of a statute imposing duty on the manufacturer or under broader principles of law such as negligence and strict liability. In the absence of any statute imposing duty on manufacturer of AI, manufacturer's liability can be explored under the principle of strict liability and negligence.

Strict Liability of manufacturer

Under the theory of strict liability it is the wrongful act alone which makes a person liable, guilty mind, innocent mind or a negligent mind is immaterial. The wrong may have resulted in spite of all the care and caution exercised yet the person is held liable. Any fault or imperfection in the quantity, quality, purity, potency or standard required under law in force amounts to defect.[30] Manufacturing defects arises when a given product does not meet the standards and specifications laid down by the manufacturer.[31] For plaintiff to impose liability on manufacturer it must be proved that the product does not conform to specifications irrespective of any negligence.[32] In case of autonomous vehicles, plaintiff can proceed by proving that the product did not worked as specified by the manufacturer. For example, if an autonomous vehicle fails to detect nearby vehicles and collides then the plaintiff should be able to recover from manufacturer. Under the malfunction doctrine, a variation of the manufacturing defect doctrine, a plaintiff can show a manufacturing defect without specifically proving how it was defective.[33] A plaintiff must prove that:

(1) the product malfunctioned,

(2) the malfunction occurred during proper use, and

(3) the product was not altered or misused in such a manner so as to cause a malfunction.[34]

This can be proved by circumstantial evidence which makes manufacturer strictly liable for the defects in the products.

Negligence

A person who sustains injury to his person or property by the use, storage or consumption of a product may recover damages from the manufacturer under the principle of negligence.[35] Negligence is absence of care. A claim of negligence against the manufacture arises because

30. Consumer Protection Act, 1986.
31. David G. Owen, Manufacturing Defects, 53 S.C. L. REV. 851, 871–72 (2002).
32. *Id.*
33. Victor E. Schwartz, The Restatement (Third) of Torts: Products Liability-The American Law Institute 's Process of Democracy and Deliberation, Haftra L.R. (1998).
34. *Id.*
35. *Id.*

there is duty of care. The theory of negligence is not to be found in the state of mind but in the conduct of person which is to be derived from his external behaviour. The plaintiff in a products liability case may recover damages if he can establish the three essential elements of negligence liability:

(1) there was a duty on the manufacturer,

(2) manufacturer failed to the discharge that duty; and

(3) resulting injury or damage had proximate connection with the breach of duty.[36]

The plaintiff may bring an action against manufacturer for failure to carefully design, manufacture, process, inspect, test, disclose known defects, warn of known dangers, or adequately instruct in the use of the product.[37] Therefore, the manufacturer can be proceeded against in case of damaged caused due to manufacturing defects in AI, under the law of negligence. The manufacturer owes duty of care not only to the consumers but also third parties since privity of contract does not holds good and manufacturer is liable to every person injured as a natural and probable cause of its use.[38] At the same time operators will also have to discharge a range of duties of carerelate to the choice of technology, in particular in light of the tasks to be performed and the operator's own skills and abilities, the organisational framework provided, in particular with regard to proper monitoring and maintenance, including any safety checks and repair.[39] Failure to comply with such duty would trigger liability against operator similar to the liability of operator in case of traditional machines.

AI AS A SERVICE

Vicarious Liability of Master

Under the principle of vicarious liability, for the wrongful acts on one person, another can be held liable. Based on this principle masters are liable for the acts of their servants done in the course of their employment. The legal basis is that a servant carries on the business of master with his express or implied authority and agrees to abide by the lawful orders and direction of the master in respect of certain work to be done.[40] Therefore what follows is that if someone can be

36. Donald M. Jenkins, The Product Liability of Manufacturers: An Understanding And Exploration, Akron Law Review 4 (1971).
37. *Id.*
38. Donoghue v Stevenson, [1932] UKHL 100.
39. European Commission's Expert Group on Liability and New Technologies, Liability for Artificial Intelligence and other Emerging Digital Technologies, available at: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608.
40. Dr. VEENA MADHAV TONAPI, TEXTBOOK ON JURISPRUDENCE, (2nd ed. 2010).

held liable for the wrongdoing of some human helper, why should the beneficiary of such support not be equally liable if they outsource their duties to a non-human helper instead, considering that they equally benefit from such delegation?[41] Thus when an AI is employed by the employer to do certain task any liability arising out of the wrongful act shall fall upon the employer who derives benefits from the servant. For example, a company employing autonomous vehicles for cab services shall be held liable for any accidents that may happen during course of employment. The basis of such a liability lies in the following principles:

(1) *Qui facit per alium facit per se:* it means that the one who does an act through others is said to have done it himself. A servant is engaged by the master and it is the master who decides what to be done and how it is to be done.

(2) *Public Policy:* Master's liability rests on public policy which demands that there ought to be some remedy for the injury caused and since the master is in a better position, the liability falls on him.

Therefore it seems reasonable that in case the AI is provided as a service than any liability arising out of any wrongful act to the consumer or any third party shall fall upon the master under the principle of vicarious liability for he derives the benefit from the work of such servant and is in better position to pay the damages.

CONCLUSION

AI has the potential to change our societies and economies for better. It will completely revolutionize the way we interact with machines. This will lead to a number of legal, moral and ethical dilemmas. And therefore we must prepare for the challenges that we will be faced with in the near future. Our legal systems were designed to regulate human conduct but now we need laws to regulate the conduct of intelligent machines. These machines cannot be a subject of rights and duties and cannot be recognised as a legal person because neither can damages be recovered from them nor can they be prisoned. Thus we will need to broaden our principles of liability to make the human agents behind machines liable. Strict liability of manufacturer under the product liability regime should provide plaintiff with damages for the defects in the AI. Once

41. *Ibid.*

harm is proved by the plaintiff the burden of proof falls upon the manufacturer to show that required level of safety standards were maintained. Similarly under the law of negligence the operator should be held liable for failure of duty of care in terms of maintenance, safety checks and repairs and the manufacturer should be held liable for failure to carefully design, manufacture, process, test, disclose known defects, or adequately instruct in the use of the product. Consider an autopilot system for airplanes manufactured by X and sold to Y. The autopilot system will lead to crash if not turned off in certain circumstances. Here X has the duty to inform Y of risk and the design and will be held liable for any injury caused. At the same time Y has the duty to carefully operate the system and arrange for proper training for pilots and in case of failure of this duty it shall be strictly liable. If harm is caused by AI when used in a way similar to that of human help, the liability for making use of the AI should fall upon beneficiary similar to existing vicarious liability regime of master and servant. The standards to assess the performance of AI should be same as that in case of a human servant however once AI outgrows human intelligence then the standard should be determined by comparing it to similar available AI. Consider a hospital performing surgery using an AI driven robot. Even if hospital fulfils the reasonable duty of care, for any harm caused by the robot which many not have been foreseeable, the hospital should be liable as per the principle discussed.

Both Civil and Criminal legal system will be faced with a number of challenges with the further development of technology. We will have to redefine our legal principles so as to accommodate for machines of the future or will have to come up with new principles. Whichever is the case, the law and the legal system is sure to undergo drastic changes.

LAWS VS. LAWS: MAPPING AUTONOMY OF KILLER ROBOTS*

- Mr Omvir Singh*

INTRODUCTION

"Change is the law of life, those who look only to the past or the present are certain to lose the future."

- John F. Kennedy

Human history has been a witness, time and again, to the deftness of the iron-clad combat fighter sitting confidently on a horse driving the army with armed subordinates into the battleground. Though, with the passage of time, the interminable and catastrophic annals of war operations acclimated themselves to the progressively advancing nature of the battle, which led to gradual increments in the mechanization along with increased effectiveness attributable to elevated mechanization. In the long run, the scrabble of combat supremacy was lost by the horse warrior anddeftly surpassed by ranged weapons which could inflict perilous injuries over larger distances in comparison to the hand-to-hand confrontations. These projectile instruments of assault changed over period from out-dated spears and bows and arrows to the new-age firearms that came into existence after the invention of gunpowder.[1] Consequentially, war at distancebecame a reality with the arrival of these ranged weapons.

In recent times, the world has in reality been experiencing a weapon revolution wherein combatis becoming increasingly covert, atleast in the method of its operational command, if not with respect to its visibility on the battle front. This continuum phase of mechanical and technological advancement in the weapons has fomented several imperativeethical, political, social, and legal debates. For quite a while, the discussion on military technologies was transcendently centred on armed drones which seem to operate regularly all around the air spaces of Afghanistan, Yemen, and other countries irrespective of the host State's consent.[2] With the increasing investments in the innovation of weapons, the genesis of the next phase of unmanned warfare—lethal autonomous weapon systems (LAWS)—has become certain, unless an embargo can be placed on their developmentor they can be controlled in the very least

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1. JOHN KEEGAN, A HISTORY OF WARFARE 04-05 (Penguin Books 1993).
2. Ashley S. Deeks, Consent to the Use of Force and International Law Supremacy, 54 HARV. INT'L L.J. 1, 21 (2013).

through global measures in the near future. The self-determination characteristic of LAWS' in the vital functions of choosing and striking targets collaborated with concordant machine learning helps in distinguishing them from armed drones. Furthermore, the manifestation of unpredictable circumstances in battle zones makes upfor a possibilityfor LAWS to act in a manner which cannot be anticipated, thereby making themthe weapons of extreme contention.While debates on defining LAWS are augmenting, they still cannot seem tobe limned by a universal definition.[3]

DEFINTION OF AUTONOMOUS WEAPON SYSTEMS

An attempt was made by U.S. Department of Defence in its 2012 mandate to define Autonomous Weapon System (AWS), wherein AWS was defined as "a weapon system that, once activated, can select and engage targets without further intervention by a human operator. This includes human-supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation."[4] They are otherwise called 'Robotic Weapons or Killer Robots.[5]' Basically, in order for the weapons to be classified as LAWS they must correspondto the two-fold criteria of being autonomous and de-facto out-of-the-loop in their vital functions,after they have been actuated through human interference regardless of whether humans actually remain on-the-loop in the master plan.[6] Therefore, a weapon can be categorized as autonomous, if the depiction of its tasks is expansive and estimatedand it has the capability of using its computerized artificial intelligence (AI) while deciding on independent courses of action which include a weapon's vital functions after gathering and processing information from its operational environment.[7] Interestingly, technology used in LAWS resembles with the technology that is being currentlyused for the development of autonomous cars using AI.[8]

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3. Michael Horowitz, Why Words Matter: The Real World Consequences of Defining Autonomous Weapons Systems, 30 TEMP. INT'L & COMP. L.J. 85, 92 (2016).
4. U.S. Department of Defense Directive No. 3000.09 on Autonomy in Weapon Systems (2012).
5. HRW, "Losing Humanity: The Case against Killer Robots" (Human Rights Watch, 2012), https://www.hrw.org/report/2012/11/19/losing-humanity/case-againstkiller-robots.
6. ICRC, Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) 11-15 April 2016, Geneva.
7. VINCENT BOULANIN&MAAIKEVERBRUGGEN, MAPPING THE DEVELOPMENT OF AUTONOMY IN WEAPON SYSTEMS 90, 92 (Sipri 2017).
8. Adrianne Jeffries, Only Five Countries Actually Want to Ban Killer Robots, VERGE, May 16, 2014 at 06.

TECHNOLOGICAL SHIFT TOWARDS 'LAWS'

"Technology is always a two-edged sword. It will bring in many benefits, but also many disasters."

- Alan Moore

With the technological advancement towards LAWS, the countries are moving from near-autonomous defensive systems to offensive systems. Autonomous Defensive Systems do not effectively seek out targets but rather respond to preordained dangers, whereas, weapon systems which are Offensive in nature, conversely, can be deployed and used anywhere and do not necessarily shield an object or target. Offensive weapons systems can "hunt, recognize and detect a target without human intervention"[9]. It is a belief of the policymaker that LAWS as Artificial Super Intelligence (ASI) empowered machines are going to affect all aspects of the human experience 'from medicine to driving automobiles.[10]' This march towards greater autonomy therefore seems to be irreversible. This introduction of advanced AI has led to the increasing likelihood that winning the AI race might end up being incompatible with using any safety method which causes a deferral or limits performance.[11]

IMPACT AND CHALLENGES OF 'LAWS'

The debate with respect to LAWS generally revolves around a few propositions: ethical and legal issues bolstered by NGO's; military debate in relation to keep up prevalence in the battle front by countering the enemy's autonomous weapons; political debate relating to the abatement of losses during an armed conflict; and debate encompassingtechnological restrictions as AI is not completely developed at this point;[12] and following all these,there is another important issue of cost.

ETHICAL AND LEGAL ASPECTS

The debate on ethical and legal terms about weapons is not in reality any new. There is discourse going on about these within the international community from the period of Spartan Army's objectionof long-range weapons to the usage of submarines and chemical weapons in recent times. The international community either acknowledges or wants to prohibit yet another new

9. John Markoff, Fearing Bombs That Can Pick Whom to Kill, N.Y. TIMES, Nov. 11, 2014 at 09.
10. Alex Davies, IBM's Watson Lets you Talk to your Self-Driving Car, WIRED, June 16, 2016 at 05.
11. Nick Bostrom, Strategic Implications of Openness in AI Development, 1 OXFORD L.J. 733 (2016).
12. Rodney Brooks, Artificial Intelligence is a Tool, Not a Threat, RETHINK READNESS BLOG (Nov. 10, 2014, 10:04 AM), http://www.rethinkrobotics.com/blog/artificial-intelligence-toolthreat/123323158.html.

technology depending on the assertions mentioned underneath. The argument for restricting LAWS is based on the main concern thatethical and legal principles cannot be developed by a machine or machine programme. The subsequent concernis that if humans will be excluded from the system, then in that case it will turn next to impossible to hold anyone accountable, which is ethically wrong. In simpler terms, a machine can never be trusted entirely owing to its inability to comprehend the value of human life. Another hugeconcern is that the possibility of loss of lives of fewer soldiers might actually bring about more wars or clashes. The expansive usage of drone strikes in Afghanistan by the United States is a valid example. In April 2013, a United Nations (UN) special report affirmed that there is a need for the member states to step up to the occasion in prohibiting these weapons,[13] and that they should not get involved in the development or deployment of these weapons since the weapons are violative of the 'Principle of Distinction' (jus in bello) and 'Principle of Proportionality' *(jus ad bellum)*.[14] Further, it is contented that LAWS should notbe usedirrespective of their ability to meet the requirements of International Humanitarian Law (IHL). The principles of distinction, proportionality and military necessity are used by IHL while governing armed conflict, which have already laid human judgement as a prerequisite through an obligation on states to not designate the capacity to initiate the usage of lethal force to unaided machines or automated processes.

Article 35 of the Additional Protocol to the Geneva Conventions (hereinafter, Additional Protocol I) aims at prohibiting the usage of weapons that 'are of a nature to spawn widespread injury or unnecessary suffering.'[15] Likewise, it bans weapons which are planned, or might be anticipated to cause sweeping, long-term and serious damage to the environment. Therefore, this rule prohibits weapons that owing to their character might cause wide-spread,unpredictable and unclassified harm or through their 'expected' use might have long-haul aftermath.

Further, the deployment of a weapon generally determines its legitimacy as well. In regards to this, Article 36 of the Additional Protocol I to the Geneva Convention of August 12, 1949 provides the legal framework for assessing a new weapon, which is largelysubject to two rules. The first one is to analyse if the weapons are indiscriminate or not. The next assessment will be to determine whether they would inflict unnecessary pain or not.[16] Basically, the primary

13. Winson Campbell, Security Council Adopts First-Ever Resolution Dedicated to Question of Small Arms, Light Weapons, N.Y.TIMES (Sep. 26, 2013), https://www.un.org/press/en/2013/sc11131.doc.html.
14. *Supra* note 11.
15. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art.35 (1949).
16. *Id.*

alludes to the prerequisite that the general population and military targets must be recognized and distinguished during the onset of an armed battle. Whereas the subsequent one is pertaining to the limits which a military can be allowed to cross in order to achieve its aims –though, civilian loss is ought not to transcend the military gains. Moreover, the weapon systems and their usage are required to meet the 'dictates of public conscience', in accordance with a provision in the First Protocol, known as the Martens Clause.[17] Accordingly, numerous scholarscontend that in warfare, an embargo should be put on LAWS permanently and their deployment ought to be limited since machines can never build up the degree of empathy which human beings have as machines intrinsically lack with the capacity of having such emotions.

Many countries cite Ottawa Treaty which is a Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti- Personal Mines and on their Destruction, otherwise called the Mine Ban Treaty as the precedent for pre-emptive limitation on LAWS. Moreover, many NGO's working on the legal aspects of AWS lobby for the total prohibition on these weapons.[18] EvenInternational Committee of Red Cross (ICRC) has indicated that these systems come under the IHL's legal umbrella; even though, some LAWS-specific regulations are still required.

POLITICALASPECT

LAWS can be hacked just like all other computer systems, which would further make it immeasurably difficult to quantify or decide with respect to who ought to be held liable for the harm inflicted since it would not be evident who was verily or effectively handling the machine. Additionally, the world would not become peaceful after the possibility of a 'riskless' war. The other difficulty with LAWS lies in the steps to taken up by the policy development. After taking into consideration the time required for consultations and accord building, it might be safe to presume that it might take a couple of years by the policy makers, before materialising and coming into effect with any regulatory instrument. This implies that AI revolution which will promote the proliferation of LAWS is most probably not going to happen at a rate that policymaking might be able to keep up a pace with. Contrarily, people backing LAWS set forward numerous assertions with regards to giving reasons which makes their development

17.Rupert Ticehurst, The Martens Clause and the Laws of Armed Conflict, INT. REV. OF RED CROSS 317 (1997).
18. ROBIN GEISS, THE INTERNATIONAL LAW DIMENSION OF AUTONOMOUS WEAPONS SYSTEMS06 (Cambridge, 2015).

inevitable. Deployment of drones in Afghanistan by the USA is the most cited example. With the general publicgetting more careful about conflicts, states are becoming hesitant on a constant basis to send their people to strife zones for harmony building and other objectives. Besides, soldiers are regularly getting accused of carrying out atrocities such as war crimes, specifically rape and sexual assault[19]- the LAWS would not commit these unlawful acts. Hence, such autonomous systems are constantly being viewed as a mature innovation, hanging tight for their final-stage development in AI.

SECURITY ASPECTS

The most usually referred security concerns find theirbase in the argument that these autonomous weapons come with the added prospect to augment the acceleration of warfare and the possibility ofpatronizing the war, largely because of the guarantee of considerably decreased military casualties in the war. The weaponsmight ignite and promote races for arms development. Moreover, these weapon systems can be attained and operated by non-state armed groups, including terrorist organisations or rogue states. Additionally, existing laws on warfare, controls, guidelines and regulations are been sabotaged by these systems. No particular hard-to-create materials are required by LAWS, unlike the nuclear and atomic weapons, which makes their monitoring even more strenuous. There are predications that owing to their easy accessibility, 'autonomous weapons of today will turn into the Kalashnikovs of tomorrow.' We have already seen an example of this in the war on the Islamic State of Iraq and Syria (ISIS), where Russia, Iraq, US, Turkey, and Syria used semi-autonomous weapons like drones.[20] Consequentially, the evolution of LAWS would ultimately prompt advancements in unsymmetrical warfare attributable to clear-cut benefits to the user. A report on 'LAWS under International Law', made by the Geneva Academy focuses on the necessity for leaders to consider the balance between advantages and disadvantages of using LAWS for a given operation. Potential advantages involve "the absence of emotions like fear, vengeance, or self-interest which may prompt results that are generally less harmful." However, lack of emotions may be detrimental in certain circumstances since "autonomous weapon systems lack positive

19. Elizabeth F. Defeis, U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity, 7 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 02 (2008).
20. Michael C. Haas & Sophie-Charlotte Fischer, The Evolution of Targeted Killing Practices: Autonomous Weapons, Future Conflict, and the International Order, 38 CONTEMP. SECURITY POL'Y 281, 283 (2017).

human emotions, such as compassion or mercy."[21]

ECONOMIC ASPECTS

Contrasting aggregate costs of armed force troops to LAWS is hard. For this, we can take the case of United States of America wherein multiple general patterns exist, like that of 2012, when the Under Secretary of Pentagon, Robert Hale shared that a regular soldier in Afghanistan costs nearly USD 850,000 per year.[22] In 2012, the Military Retirement Fund paid a total of USD 51.7 billion a year to a soldier.[23] It is estimated that if any armed force replaces individuals with robots, then the expense might be reduced.Back in 2002, the expense incurred in selecting and preparing a Marine trooper was USD 44,877[24]. This expense addresses the value point for acquiring LAWS that will go on to specially replace individuals in the armed forces. Additionally, military workforce has enrolment, training, pay, rewards, housing, and clinical costs which are collected on a yearly base. Moreover, when a soldier leaves the military, there is an expected expense of handicap along with retirement pay. In case if a soldier loses his life, there are internment, security, and stipend instalments to be paid as well. The primary expenses that are traded over in the case of induction of LAWS into the military would involve basic preparation or production, feeding (gas or electric power), and clinical (support). Further, robots have addedhigh costs ofinventive work for upgrades that are not required in case of a human soldier. The real-time opportunity cost for exchanging robots with human beings could be better comprehended with the help of an intensive research about the expenditures. Though, in this regard it can be concluded that an exhaustive report taking a gander at the costs comparisons between a robot and individualmight highly tilt the discussion in favour of LAWS.

RECOMMENDATIONS & SUGGESTIONS

A varied set of complex issues have been identified particularly with the developmental, operational, legal, and ethical aspects of LAWS. A significant number of these issues are already

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21. Charles Christian, Autonomous Weapon Systems under International Law, GENEVA ACADEMY L.J. 04, 05 (2015).
22. Larry Shaughnessy, One Soldier, One Year: $850,000 and Rising, CNN SECURITY CLEARANCE BLOG, (Feb. 28, 2012, 11:13 PM), http://security.blogs.cnn.com/2012/02/28/one-soldier-one-year-850000-and-rising/1445227.html.
23. George Reich, Costs of Military Pay and Benefits in the Defense Budget, CBOBLOG (Apr. 12, 2012, 02:46 PM), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/43574militarycompensationone-col.html.
24. Diana Olick, An Army of One Carries a High Price, NBC NEWS, (Oct. 21, 2002, 10:31 AM), http://www.nbcnews.com/id/3072945/t/army-one-carries-highprice/#.WkTVSNKWYs4.html.

on the plates of competent government, industrial organizations and several NGO's. This segment offers recommendations to facilitate the evolutionary way for the future of certainkey issues influencing the usage of LAWS.

POLICY REQUIREMENT

UN and the ICRC should work towards making a LAWS policy which shouldaim at the inclusion of all unarmed and unmanned platforms capable of causing damage to people or property in case they happen tobreakdown or malfunction or on the off chance, their command and control interface-link is lost. Further, the policy should forsake discrete definitions which pigeonhole systems into classes of autonomy and should rather define the characterization of autonomy. Accordingly, a framework should be laid which considers the autonomous elements of a system and how they may change over the time-span of a given mission. Hence, it is increasingly important to clearly distinguish when autonomous functioning of the unmanned system is planned to occur (intentionally autonomous) along with as to how and when it can occur unintentionally or accidentally (either through normal malfunction, obstruction, or attack by the enemy on the system or its links).

The policy should continue to require measures which permit the exercise of human judgment and control in the operations and tasks of LAWS. This requirement should be further expanded to incorporate greater accentuation for commanders and planners to consider the manner in which the extent of such human control may differ during a given operationalong with the possible strategic implications of any fully autonomous mission segments. Additionally, the development community of LAWS should likewise underline how there is scope for autonomy and human control to differ during operations and design systems that are fault-tolerant incorporating 'fail safe' or 'safeguard' modes for all mission segments, and not only for those which are designated as'intentionally autonomous'. An ethical code of conduct for work on LAWS comparable in nature to that proposed by NGO's such as Human Rights Watch and International Human Rights Council (IHRC) should be developed and promulgated by the development community. All parties who are involved with the development and operation of LAWS should be required to guaranteethat the human dimension is unequivocally emphasized and observed in doctrine, organizations, and procedures. Leaders and planners ought to be

careful enough to guard against any kind of the 'Jupiter Complex' (similar to World War II) which may arise at the strategic level. Preparations should be made by the developers and operators in order to guard against any unfortunate disengagement at the strategic and operational levels.[25]

STATE RESPONSIBILITY

The policy recommendation was in regards to risk management and harm prevention; another important recommendation which needs to be considered is what will happen if something goes wrong on the battle front. According to the general principles on state responsibility,[26] only the liability for all such violations of IHL can be imposed on a state which can be attributed to it. Basically, state liability is imposed based on two essential elements, namely, the attribution of conduct and a violation of international law.

a. Attribution of conduct

There are no specific legal challenges which exist regarding the attribution of acts which are committed by LAWS. Liability can be decided based on the clearly established rules of attribution, till the time the decision pertaining to their deployment has been made by the individuals.[27] It is an age-old and widely-accepted rule in the customary international law (CIL), which was laid down under Article 3 of the 1907 Hague Convention (IV) and reiterated again in Article 91 of the Additional Protocol I of the Geneva Convention which enunciates that states are liable for their state organs, including the liability for "all acts committed by persons forming part of its military". This rule applies by lieu of CIL as affirmed in the ICRC Customary Law Study,which has indicated that "a State is liable for violations of IHL attributable to it, includingviolation(s) committed by the state organs, including its armed forces.[28]" Hence, supposedly if a member from the military, which is a state organ, of state X takes a decision to deploy an AWS for a combat mission, all the activities which will be carried out by that system are going to be attributed to the State X. The mere fact that the system is working under its autonomous capacities does not have any effect on this evaluation.

b. The commission of an internationally wrongful act

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25. Thomas K. Adams, Future Warfare and the Decline of Human Decision-making, 35 PARA L.J. 57, 71 (2002).
26. Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10 (2001), 43–59 (noted in GA Res. 56/83, 12 December 2001, UN Doc.A/RES/56/83 (2001)).
27. *Id.*
28. ICRC Customary Law Study, Rule 149.

Rules of IHL are considered to be violated when their objective prerequisites are met with. According to the Commentary of theInternational Law Commission (ILC), whenever any particular prerequisite of a mental element with respect to the primary obligation is absent, then in that case, it is only the act of the State which matters, entirely independent of anymens rea.[29] In such instance, no specificissues emerge. This can foster a conclusion that whenever an AWS violates such a rule and the act can be attributed to a state, the state liability sets in. In this way, establishing state liability for the improper conduct of AWS will turn out to be a moderately simple and clear exercise,irrespective of one's opinion that all or most of the prohibitionsprovided in IHL do not comprise of such an 'intent' or 'fault' element. For instance, in relation to Additional Protocol II of the Geneva Convention, it was as of late held that: "there is no 'intent' requirement in relation to the restriction under APII, implying that State responsibility is to be evaluated 'objectively' instead of 'subjectively': the intent or advertence of pertinent State authorities or agents is not relevant to an appraisal of whether a violation of APII has taken place."[30]

Though, an element of 'fault' (negligence, recklessness, or intent) is required as a prerequisite by some primary rules of IHL in order to be considered violated. In such an event that the rule in question happens to be a rule which mandates an element of 'fault', it might in reality become extremely troublesome to establish the state liability for the robotic activity 'violating' that rule. Even these scenarios will not pose any form of hardships in certain specific situations, such as in a case wherein the military commander has acted with the definite *mens rea* to break a rule established by the IHL.Hence, if during an armed combat a military commander deliberately programs the AWS to assault civilians, it is more than obvious that the commander shall be held individually liable for perpetrating a war crime.Similarly, the State for which the commander was acting as a State-organ shalllikewisebe held liable for the violation of the laws of armed conflict.[31] Basically, no distinction should be made between a member of the military shooting a civilian or an individual soldier programming an AWS to shoot at civilian or non-military personnel.

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29. ILC Commentaries, Art.2, para. 10.
30. P. Sands et al., The Lawfulness of the Authorization by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen, SAFERWORLD, (Dec. 11, 2015, 06:22 PM), http://www.saferworld.org.uk/resources/view-resource/1023-the-lawfulness-of-the-authorisation-by-the-united-kingdom-of-weapons-and-related-items-for -export-to-saudiarabia-in-the-context-of-saudi-arabias-military-intervention-in-yemen.
31. *supra* note 26.

STRICT LIABILITY REGIME

A liability regime which does not need any proof of 'fault' ('strict liability') or which does not alter the burden of proof('presumed liability') should conceivably be designed effectively for LAWS. Strict liability would basically withdraw that the element of 'fault' (intent, negligence, orrecklessness) from consideration. As soon as the risks integral in unpredictable system behaviour are realised, the responsibility is triggered consequently. The 'thought' of programmer, operator, and officer in chargeor state behind the operation or their 'expectation' of what the system may actually do becomes immaterial, under such a strict liability regime. Only the action of the LAWS matters in such situations. It becomes entirely irrelevant whether this was due to technical glitches of its sensors, unexpected or external impedance, ever-changing ecological conditions, programming faults, any other flaws, or the autonomously determined outcome of the system's algorithms.

It is very common to find strict liabilityregimes whilehandling processes involving high intricacies andhazardous activity which makes it intrinsically hard to distinguish and prove what precisely went wrong. Product liability regimes mostly include strict liability on the domestic levels. The relevant examples are regulations such as the ILC Draft Principles on the Allocation of Loss in the Case of Trans-boundary Harm Arising out of Hazardous Activities,[32] the Outer Space Treaty, 1967 and the Space Liability Convention,1972. Article VII of the Outer Space Treaty imposes a liability on each State Party that dispatches an object into outer space for damage that is caused to other State Parties. The contemplations which prompted for this liability regime to be adoptedwith regards to Outer Space Treatyare in lot many mannerslike the contemplations with respect to LAWS. During the 1960's, when the Outer Space Treaty was been drafted and adopted, the outer space technology was viewed as incompletely understood and was considered to be a high-risk and highly complex undertaking with possibly unpredictable results. It is argued that the very same case applies to LAWS at the present time. Further, the civil usages of Autonomous Technologies are presently being examined under the strict liability regimes domestically. One of the recent examples is that of the Swedish

32. ILC Draft Principles on the Allocation of Loss in the Case of Trans-boundary Harm Arising out of Hazardous Activities, Principle 4 (2004).

automaker Volvo which has vowed to be 'entirely responsible' for any mishaps which will be brought about by its self-driving innovation.

A strict international liability regime would not only help with overcoming particular accountability challenges in relation to the high-risk, uncertain and profoundly complicated activity, but would also create strong incentives to deploy LAWS warily. Additionally, it would open up opportunities for them to take weapons surveys and strides towards risk minimisation and damage prevention more seriously. Further, it would also help in programming LAWS 'conservatively', and in domestic implementation of strict product liability regimes.

LAWS would require a more nuanced liability regime than Outer Space Treaty explicitly customized for the setting of a military conflict. Eventually, the causation of specific damages, for instance a military target's annihilation, is unmistakably permissible amidstwarfare and fails to fosterstate liability of any kind. One could hence imagine an increased liability regime wherein presumed or strict liability can be imposed in some specific situations or with regards to some specificprinciples. Though, this cannot be done in all situations and not in terms of the general causation of harm and destruction, or comparable to the whole assemblage of rules containing the laws of warfare. Such an increased liability regime which consolidates strict liability with different types of liability might be most appropriate in order to give response to the variousrisks and unpredictability's ingrained in LAWS that may be deployed in immeasurably various contexts.

CONCLUSION

Even though machines are already used in the military operations of the present day, still it is extremely hard to conceptualise the dangerous effect of these LAWS.It is almost certain that after the up-gradation of present day's 'war machines' to entirely autonomous ones, leaders may get increasingly inclined towards the usage of lethal force. Henceforth, it is important to get answers to the critical, legal, moral and ethicalquestions pertaining to fully autonomous weapon systems before letting anyone develop them. These questions should also review the possibilities of changes which might be required to be made in the military conventions in accordance with the development and advancement of LAWS. In addition, leaders shouldactually request more research into theconceivablerepercussions that might arise owing to the deployment of LAWS. Armies should also think about the effect of deploying LAWS on the battlefront, particularly, with regards to civilians.

There is undoubtedly huge potential in innovation to make conflicts more secureand reduce blood-shed, which can altogether change the nature of weapons which are used in armed conflicts. Notwithstanding, this potential must becapitalized on only for such duration for which a pledge can be made on our part to adequately regulate new weapons. LAWS must be used to only serve humanitarian purposes and assurances should be made that these machines would not be moved to be used for military purposes. A comprehensive global consensus is required for the same. It has become a common practice for states to pursue their self-interest only in matters of international affairs. Regardless of international law, countries keep on developing nuclear weapons to achieve their various objectives such as security, political and military goals. Likewise, LAWS also grant major states a high ground in conflict, which will make the countries to continue with their development. Therefore, their materialization may in reality cause an application and responsibility gap as discussed above in the paper, but it is indeed bridgeable with the innovative application of the laws that we have now alongsidethe emergence of new, progressively refined and the pertinent ones.

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