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ARTICLES

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Editorial

Research is very important for the development of our society. It is a phenomenon which helps the society and humanity to move forward. With the present state of the art development, there has been constant rework and modification of our ways of doing research. Nonetheless, the basic objective of research is to analyse and have a look into anonymous and unperceived things and bring out new opportunities.

Research articles are a very important method to disseminate new ideas and findings in a consolidated manner. Writing a research article is a phenomenon and it has to be executed in an appropriate manner so that the basic idea of research is justified. They are a medium to showcase one's ability and expertise in a particular or various fields of knowledge and achievements and how it can be communicated to the whole world.

The NLUALPR is a peer reviewed journal with ISSN: 2455-8672. It is a compilation of selected articles contributed by eminent scholars and academicians in various fields of law and recent developments in the same. This journal is a platform to bring out discussions and to analyse various aspects of law and other multidisciplinary areas. This issue has been able to garner positive response in the path of research and development through its articles which reflects on the importance of research and its contribution to the development of the society.

In this issue of NLUALR,

Ashok Wadje, in the article titled 'Connotation of Hacking as Computer Related Offence-A Comparative Perspective of Indian & US Legal System' discusses on the concept of hacking as an instrument of the misuse of the cyberspace by the criminals. It further focuses on the dimensions of the act of hacking and will analyses the US and Indian Legal system pertaining to the phenomenon of hacking as reflected in Section 43 (a) and Section 66 of the Information Technology Act, 2000.

Eramala Dayal, in the article titled, 'Tracing Legal Status of Indian Women: From Vedic Till Contemporary Times', discusses on legal status of Indian women from Vedic till contemporary times. It focuses further on effective implementation of provisions of various international instruments in relation to protection of rights of women in a holistic manner in Indian legal regime.

Arun Kumar Singh, in the article titled 'A Socio-Legal Analysis of Surrogacy in India with Special Reference to its New Dimensions' discusses on the concept of surrogacy and various issues related to it. It further talks about lack of legal mechanism to regulate surrogacy in India and how the judiciary has taken active part towards the same and in spite of that there are various issues which are unsettled till now.

Ravinder Kumar and Tanya Bansal, in the article titled 'Uniform Dress Code over Individual Choice in Educational Institutions: A Critical Analysis In Light Of Hijab Ban in Karnataka', discusses about various tenets of secularism in India and abroad and the prevailing

jurisprudence in relation to it. It also focuses on the judicial approach towards permitting of manifestation of religious symbols including attires in educational institutions.

Saheb Chowdhury, in the article titled, 'Socioeconomic Rights: Addressing the Questions on Their Justification and Enforcement', discusses about basic socio economic rights and their enforcement. It further talks about legitimate role of the government in addressing the questions on their justification and enforcement.

Debanga Bhusan Goswami, in the article titled, 'Preparing a Witness: Where to Draw the Line?' discusses on the importance of preparation of witness and the dichotomies of how versus what, discussion versus instruction and form versus intent with respect to preparation of witness. It also focuses on the understanding and application of these dichotomies can provide an effective roadmap for ethical preparation of witness which will be in consonance with the larger goal of achieving justice.

Ananya Hazarika, in the article titled, 'Response to the Crisis of Rohingya Refugee with Special Reference to India', discusses about the rights of refugees with special reference to Rohingya refugees. It further focuses on the responses that India is making towards Rohingya Refugee in relation with the resilience taken by the government of India to combat an unfortunate protracted situation created from the refugee issue.

Shivani Chauhan, in the article titled, 'Jammu And Kashmir: Article 370 And The National Security',

discusses on geostrategic place of the state from the lens of national security, the roots of the imbroglio, its resolution and the pitfalls that mar the road to integration, and some indications as to the directions any policy must take as a way forward, keeping the human rights orientation of the democracy in mind with special focus on the state of Jammu and Kashmir.

Rahul Vats in the article titled, 'String of Pearls Diplomacy and China: An Overview' discusses upon the comparison of the String of Pearl Theory of China and Necklace of diamond strategy of India. It further discusses upon the theory of String of Pearls with the perspective of China, India, and different countries with the help of a quantitative methodology.

Sanjana Bharadwaj and Rahul Dattu Gangurde, in the article titled, 'Action or Inaction: Radioactive Waste Management in Times of COVID Arena- A Critical Study with Reference to Indian Subcontinent', discusses on types of radioactive waste and their specific management systems. It further focuses on the changing dimensions of the radioactive waste and analyse the action or inaction of the Indian Government with reference to resolving the issue of Covid-19 pandemic.

We extend our warm gratitude to the authors for their well-researched articles and duly acknowledge their contributions. It is expected that several aspects which have been covered in this issue would immensely contribute for further research and study related to contemporary issues in the society.

Editorial Board

A SOCIO-LEGAL ANALYSIS OF SURROGACY IN INDIA WITH SPECIAL REFERENCE TO ITS NEW DIMENSIONS

Arun Kumar Singh[*]

Abstract

Surrogacy is a form of medically-assisted procreation in which a woman lends her uterus to carry out a pregnancy on behalf of a third party. There are various unresolved issues relating to surrogacy. Many people believe that surrogacy should be allowed because it is advantageous for all parties and prohibiting it would limit the autonomy of sterile couples. One group is there who believes that the risks outweigh the benefits. Although, it has been endeavoured to develop legal mechanism in this regard but still it did not get the proper shape. Even judiciary has issued various directions but some of the human rights as well as legal rights issues are still remaining unsettled.

Keywords; Surrogacy, Altruistic, Commercial, Implantation, Fertilized, Gestational, Traditional

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Introduction

The advancement of science and technologies has given a ray of hope to infertile couples around the globe to have children. They choose other woman to be surrogate of their children. The most popular technology that is used in this process is, In Vitro Fertilization (IVF)that has paved way for surrogacy. Surrogacy comes as an important option to fulfil the desire to have a child of such couple for whom it is physically or medically impossible or undesirable to carry a baby to term on their own. Although, surrogacy is for the good cause but it contains various issues.[1] Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant commercial surrogacy and unethical practices. However, the Surrogacy (Regulation) Bill, 2019 which was later on modified in the form of the Surrogacy (Regulation) Bill, have certain clauses 2020 to regulate the surrogacy, but still they did not get the proper shape of law. It had, therefore, become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.[2] This paper aims to discuss the meaning of surrogacy and various glitches related to it. The paper also highlights the relationship between the

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[1] Report of the Select Committee on the Surrogacy (Regulation) Bill, 2019 (Presented to the Rajya Sabha on 5thFebruary,2020,p.2,Retrievedfromhttps://prsindia.org/files/bills_acts/bills_parliament/Select%20Comm%20Report-%20Surrogacy%20Bill.pdf, Accessed on 22/06/2019 at 11.30 p.m.

[2] *Id* p.1

surrogacy and human rights. How does the surrogacy violate human rights and other legal rights are also illustrated in the present work? It has been tried to explain the evolution of surrogacy and the interference of Private International Law in this field. To make the discussion more fruitful various judicial pronouncements have been highlighted. The methodology that has been adopted to discuss the paper is, doctrinal which is based on primary and secondary evidences.

Meaning and Concept of Surrogacy

The word 'surrogate' is originated from the Latin word *'surrogatus',* which means a substitute, i.e., a person appointed to act in the place of another. Thus, a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman. Surrogacy takes place under a contract where a woman carries the pregnancy for other party of the contract. In this process generally money is involved. To understand in a plain language, it is a form of third-party reproductive practice or an arrangement which the intending parents (who are unable to procreate on their own) and the surrogate mother mutually agree that the latter shall become pregnant, gestate and give birth to a child and shall legally and physically transfer the child to the intending parents without retaining any parentage or parental obligations.[3]

[3]*Id* p.2

The American Law Reports define surrogacy as "a contractual obligation whereby the surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of natural father to bear and deliver to the natural father and to terminate all of her parental rights after the child."[4]

According to the Black's Law Dictionary, "surrogacy means the process of carrying and delivering a child for another person".[5] The New Encyclopaedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way.[6]

Surrogacy was started for noble cause and it is not a new social practice or phenomenon. It provides alternative means to conceive and to give birth of children to those parents who are not in position to procure child.[7] It is an altruistic work but gradually it has been converted for commercial purposes where the surrogate mother receives financial reward for her pregnancy.[8] That is why

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[4] Sepah Priya "What is Surrogacy" You Tube,29 Dec.2020, Retrieved from https://www.youtube.com/watch?v=G8uONMqe_e4, Accessed on 18/06/2021 at 7.30. a.m.

[5] *Id*

[6] "Surrogate Motherhood" Apr 27, 2021, Retrieved from https://www.britannica.com/topic/surrogate-motherhood, Accessed on 23-06-2021 at 9.55.am

[7] Fixmer-Oraiz,Natalie "Speaking of Solidarity: Transnational Gestational Surrogacy and the Rhetoric of Reproductive" *Frontiers: A Journal of Women Studies, Vol. 34, No. 3,* 2013, pp. 126-163,Retrieved from https://www.jstor.org/stable/10.5250, Accessed on 16-06-2021 at 9.30 p.m.

[8] "Government of India, Law Commission of India, 228Report(2009), "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a

it is not easy in many foreign countries. In India, before 2019 in a commercial surrogacy agreements, the surrogate mother used to enter into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she was paid by the commission parents a handsome amount. However, this amount was around 1/3rd of that in developed countries like the USA, U.K. France.[9] This attracted foreign couple in India as a favourable destination who looked for a cost-effective treatment for infertility.

Kinds of Surrogacy

The Black' Law Dictionary categorizes surrogacy into two classes: 'traditional surrogacy' and 'gestational surrogacy'. They are defined as follows:

(i) Traditional surrogacy: It is a surrogacy where the sperm of donor is artificially inseminated in the ovum of a woman in which such woman provides her own egg. After artificial insemination she gets pregnant, carries the foetus and gives birth to a child for another person. In this surrogacy such woman is the biological mother of that child as egg belongs to such woman. This surrogacy may also be called partial or genetically contracted motherhood because the surrogate mother is impregnated with the sperm of the intended father making her both the genetic and the gestational mother

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Surrogacy" Retrieved from https://indiankanoon.org/ doc/168220859/) Accessed on 21/06/2021 at 10.25 p.m.
[9]*Id.*

(ii) Gestational surrogacy: This is a surrogacy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the foetus and gives birth to the child. In this surrogacy the sperms and eggs are collected from intended parents and the artificial fertilization takes place by the In -Vitro fertilization (IVF) technique. Once embryo is formed then it is transferred in the womb of surrogate mother through Artificial Reproductive Technology (ART) and the surrogate mother carries the baby until delivery. However, in this case, the surrogate is not the biological mother of such baby as she does not give her egg, rather eggs and sperms are of intended couple. This process is prevalent everywhere,

Sometimes it is also found that the sperm is from intended father but her wife is not in position to give her eggs because of any reason, then egg is taken from other woman and the artificial fertilization takes place by the In Vitro fertilization (IVF) technique. Once embryo is formed then it is implanted in the womb of surrogate mother through Artificial Reproductive Technology (ART) and the surrogate mother carries the baby until delivery. In this process three persons are involved. One intended father(donor) which is also known as commissioning father, the woman who has given her eggs (donor as well as biological mother) and the third one is the woman who carries baby in her womb (surrogate mother)

Issues Relating to Surrogacy

As the surrogacy industry grew in India there were growing concerns of exploitation of women who became surrogates. They have been considered as commodity of

motherhood and their human rights are abused. Many surrogate mothers used to sign contracts agreeing that even if they were to be seriously injured or during the later stages of pregnancy suffer any life-threatening illness, they would be "sustained with life-support equipment" to protect the foetus.[10]This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money. Sometimes, psychological considerations may come in the way of a successful surrogacy arrangement. Whether intended couple will get emotional satisfaction of parenthood or not is also a matter of psychological issue.

As far as the legality of surrogacy is concerned the Universal Declaration of Human Rights 1948 states, *inter alia*, that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family"[11].

Similarly, the European Convention on Human Rights provides a right to respect for private and family life. It states: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the

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[10] Desai, K. ‘Indian surrogate mothers are risking their lives. They urgently need protection’ cited in Astha Srivastava “The Surrogacy Regulation (2019) Bill of India: A Critique” *Journal of International Women Studies*,Vol.22,Issue1,p.144,Retrieved from https://vc.bridgew.edu/jiws/vol22/iss1/8/,Accessed on 14/06/2021 at 9.30.p.m.

[11] Article16(1) of the Universal Declaration of Human Rights 1948

exercise of this right except… for the protection of health or morals, or for the protection of the rights and freedoms of others."[12]

Legal issues relating to surrogacy get manifested in a number of court cases. In India, society is now more accepting of heterogeneous families ranging from gay couples and their children to single parents who do not feel the necessity to marry before having children of their own. This may be violation of right to equality as it is creating discrimination between married couple and single parents. And also, it infringes right to privacy. Surrogacy is based on agreement and this is sought to be governed by the Indian Contract Act, 1872. But the remedies for the breach of contract under the Indian Contract Act is namely compensation for loss or damage caused by breach of contract, or as suit for specific performance under the Specific Relief Act, 1963. But in case of surrogacy agreement neither the remedies provided under the Indian Contract Act nor the remedies of the Specific Relief Act may be applicable, because imposing compensation on breach of contract may be difficult in such case where the surrogate mother refuses to hand over the custody of child or subsequently after the birth she changes her mind. In this issue, the quantification of damages cannot be ascertained. And also, attempt to compelling her to perform the contract specifically whereas she is not willing to do so amounts to forced pregnancy on the surrogate mother against her

[12] Article 8 of the European Convention on Human Rights

will which would be the violation of right to her person dignity under Article 21 of the Constitution of India.

Apart from the above, every woman has the legal rights to terminate her subject to fulfilment of the terms and conditions mentioned under the Medical termination of Pregnancy Act, 1971. Sections 3(2)(a) and 3(2)(b) of the said Act authorises a woman to terminate her pregnancy if the conditions mentioned in this section are fulfilled.[13] Sometimes provisions in the surrogacy agreement are so termed as after the signing of the agreement the surrogate mother relinquishes her right to terminate the pregnancy, because the surrogate was ready to hold such pregnancy for monetary consideration and any effort to seek or abortion on her side would amount to breach of

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[13] Section 3(2)of the Medical Termination of Pregnancy Act,1971 provides; " Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-
(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
(b)where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-
(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

contract. Thus, by this agreement she is denied from her legal reproductive rights.[14]

Development of Surrogacy Laws in India

India is a hub of surrogacy. There are qualified doctors, reliable medical facilities and women ready to carry other people's babies for a fraction of an amount. Earlier there was no surrogacy law in India and surrogacy was very common in India. Even foreigner use Indian surrogate mother for this purpose. That is why India was known as surrogacy capital of the world. Prior to 2008, commercial surrogacy was being carried out in India without any a statutory /regulatory mechanism. In 2008 when the Supreme Court of India was called upon to deal with a case revolving around surrogacy. In the case of *Baby Manji Yamda v. Union of India*[15] the Supreme Court legalised the commercial surrogacy in India. While the judgment was being passed the Assisted Reproductive Technology (Regulation) Bill, 2008 was drafted, unfortunately no steps were taken to table the Bill of 2008 before Parliament. In 2009 the Law Commission of India *suo moto* took up the issue of surrogacy for research and submitted its 228th Report in 2009. In the Report the Commission proposed to bring legislation for regulating the process of surrogacy in India. Acting upon the recommendation of the Law Commission, an

[14] Kusum,Sonali "Legal glitches facing surrogacy agreement in India" Retrieved https://writingsonsurrogacy.wordpress.com/2017/06/02/legal-glitches-facing-surrogacy-agreement-in-india/, Accessed on 20-06-2021 at 5.30.p.m.
[15](2008)13 SCC 518

improved Assisted Reproductive Technology (Regulation) Bill was prepared, which after several modifications came into existence in 2014.But unfortunately it could not get the shape of Act. In 2016 the Surrogacy (Regulation) Bill, 2016 was conceived. This Bill was passed by the Lok Sabha on 19.12.2018. But the Bill was not introduced in the Rajya Sabha. This Bill of 2016 could not become a law despite extensive discourse in the Lok Sabha.

The Bill of 2016 in the same form was re-introduced in the Lok Sabha as Surrogacy (Regulation) Bill, 2019.This Bill was passed from Lok Sabha on 05.08.2019. The objects and aims of the Bill was to curb the unethical practices surrounding commercial surrogacy including the exploitation of surrogate mothers. The beauty of this Bill was that it prohibited commercial surrogacy.[16]It was an appreciable step as the commercial surrogacy had been in the root cause of all evils. Another striking feature of the Bill that the surrogate mother could also be a married woman in the age of 25 to 35 years and have a child of her own.[17] It also provided that an unmarried/ single persons and persons in live-in relationships could not be the commission parent.[18] Apart from the above, another safety measure has also been put into place by requiring the surrogate mother to be a 'close relative' of the intended couple.[19] But this step created confusion because it was not clear that who

[16] Clause..4(ii)(c) of the Surrogacy (Regulation) Bill 201
[17] Clause4(iii)(b)(*I*) of the Surrogacy (Regulation) Bill 2019
[18] Clause 2(r) of the Surrogacy (Regulation) Bill 2019
[19] Clause 4(iii)(b)(*II*) of the Surrogacy (Regulation) Bill 2019

would be covered in the purview of "closed relative" In this Bill a woman can become a surrogate only once in her lifetime.[20] This Bill also confines the surrogacy in India to 'altruistic surrogacy' only which involves no monetary incentives or rewards to the surrogate mother other than the medical expenses incurred and insurance coverage.[21] As per Surrogacy (Regulation) Bill, 2019, an Indian citizens married for at least five years where the wife's age is between 23 to 50 years and the husband is between 26 to 55 years old having no children, excluding mentally or physically challenged children can be the intended couple.[22]

New Dimensions of Surrogacy Law

Despite good things of the Bill of 2019 there were certain issues in it. From International Human Rights Law, it is clear that having a child is a basic human right. The Universal Declaration of Human Rights 1948 says every man and woman of full age have the right to marry and found a family".[23] Even the Indian Judiciary also recognized the reproductive right of humans as a basic right.[24] If the reproductive right is basic constitution right then the right to have a child through surrogacy should also be a basic constitutional right. Also, the Surrogacy (Regulation) Bill,2019 stipulates that there is a legal obligation on the surrogate mother to hand over

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[20] Clause 4(iii)(b)(*IV*) of the Surrogacy (Regulation) Bill 2019
[21]Clause 4(ii)(b)&(c) of the Surrogacy (Regulation) Bill 2019
[22]Clause 4(iii)(b)(*I)(II) &(III)*of the Surrogacy (Regulation) Bill 2019
[23]Article16 of the Universal Universal Declaration of Human Rights,1948
[24] See Baby Manji case(2008) 13 SCC 518, and Devika Biswas v. Union of India (2016) 10 SCC 726

the custody and guardianship right of the child immediately after birth on to the intended couples. These intended couple will be considered as biological parents of the child. However, the Indian Evidence Act, 1872 under section 112 establishes the parentage of the child and sets the presumption of legitimacy of birth for all legal purposes under the Indian law. This section states that "a child born during the continuation of a marriage, the husband of the woman giving birth is presumed to be father of the child". Following this law, the women giving birth during the continuation of valid wed lock is held as the mother in the eyes of law and her husband will be the father of that child and the legal parentage will be vested in them.[25]

The Bill of 2019 provides that infertile couples can go for surrogacy but the definition of infertility has been given a narrow meaning, it means the inability to conceive which is very restrictive because there may be several other reasons that the couple may not be able to conceive. And also, it is not clear that if the child born through an unlawful surrogacy who will take the custody of that child. As this Bill of 2019 states that only infertile couple can be the intended couple but left out a lot of people who might want to have a baby through surrogacy, including widow, widower, divorcee,

[25] Section 112 of the Indian Evidence Act,1872 provides; "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten".

homosexual couples and those who are in live in relationship. Definition of "infertility" as the inability to conceive after five years of unprotected intercourse is too long a period for a couple to wait for a child. Not only this but requirement of the surrogate mother to be a "close relative" imposes such type of restriction that can create crisis of the availability of surrogate mothers.

Considering above problems a new Bill the Surrogacy (Regulation) Bill, 2020 was approved by the cabinet and passed by both houses of Parliament. This Bill permits unmarried people, widows and divorced women to get the benefit of intended couple and is not confined to only infertile Indian couples.[26] In this Bill a liberal approach has been adopted especially regarding the issues of reproductive rights of women.[27]It says that any woman can be surrogate mother if she is willing to do so,[28]and also, the intended couple will include people of 'Indian origin couple'. This Bill permits unmarried person, divorced women, widows, non-resident Indians (NRIs),

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[26]Surrogacy (Regulation) Bill,2020, cl.(2)(r) (a) provides; "Intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail surrogacy."
[27]Burning Issue, The Surrogacy (Regulation) Bill, 2020, https://www.civilsdaily.com/burning-issue-the-surrogacy-regulation-bill-2020, Retrieved 21-06-2021 at 1130pm
[28]Surrogacy (Regulation) Bill,2020, cl.(2)(zg)says,"surrogate mother" means a woman who agrees to bear a child (the Child who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfills the conditions as provided in subclause (b) of clause (iii) of section 4". I says, "a willing woman, shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act; Provided that intending couple or the intending woman shall approach the appropriate authority with a willing woman who agrees to act as a surrogate mother."

persons of Indian origin (PIO), overseas citizenship of India (OCI) to be intended couple.[29] Not only this but the meaning of the 'proven infertility' also, has been reduced to one year instead of five year.[30] This Bill of 2020 seeks to allow ethical altruistic surrogacy to the prospective infertile Indian married couple between the age of 23-50 years for females and 26-55 years for males.[31] The Bill proposes to establish a National Surrogacy Board at the Central level, State Surrogacy Board and appropriate authorities in States and Union Territories respectively to regulate surrogacy. Apart from the above, the Bill makes change regarding insurance by increasing of insurance coverage for surrogate mothers to 36 months[32]. It has been made mandatory for the intended couple to obtain a certificate of essentiality and also a certificate of eligibility for surrogacy.[33]The Bill of 2020 proposes for the prohibition of the commercial surrogacy including sale and purchase of human embryo and gametes.[34] Hence it can be said that the Surrogacy (Regulation) Bill, 2020 is an ethical, moral and social legislation as it protects the reproductive rights of a

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[29] Clause4(ii)(a) of the Surrogacy(Regulation) Bill 2020 see also, Cabinet Approves Bill to Regulate Surrogacy, "IAS Gate Way",27 February,2021 Retrieved from https://iasgatewayy.com/cabinet-approves-bill-to-regulate-surrogacy, Accessed on 23-06-2021 at 7.30.p.m.

[30] Clause2(m) of the Assisted Reproductive Technology(Regulation) Bill 2020

[31] Clause 4(iii)(c)(I) and 4(iii)(c)(II) provide"the intending couple are married and are between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification".

[32] Clause.4(ii) (a)(III)of the Surrogacy(Regulation) Bill 2020

[33] Clause.4(iii)(a)(I) of the Surrogacy(Regulation) Bill 2020

[34] Clause 5 of the of the Surrogacy(Regulation) Bill 2020

surrogate mother. And also, it protects the rights of the child born through surrogacy.

Judicial views

The Judiciary in India has recognized the reproductive right of human as a basic right. The Supreme Court of India *in Baby Manji Yamada v. Union of India*[35] case gave the custody of baby to her genetic father and grandmother. In this case a child name Manji Yamada was given birth by a surrogate mother in Anand, Gujarat under a surrogacy agreement. Dr Yuki Yamada and Dr Ikufumi Yamada a couple of Japan were the commissioning parents (intended couple) in this case. Dr Ikufumi Yamada donated his sperm but egg was not from his wife Yuki Yamada rather it was from a donor. After the implantation of sperm and egg in the womb of surrogate mother there was matrimonial discord between the commissioning parents. The genetic father Dr Ikufumi Yamada desired to take custody of the child, but he had to return to Japan due to expiration of his visa. Yuki Yamada, the wife, was not interested in the custody of child. The Municipality at Anand issued a birth certificate indicating the name of the genetic father. The child was born on 25.07 2008. The grandmother of the baby Manji, Ms Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under Article 32 of the Constitution of India. The Court relegated her to the National Commission for

[35] (2008) 13 SCC 518

Protection of Child Rights. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother.

In *B. K. Parthasarthi v. Government of Andhra Pradesh*[36] the Andhra Pradesh High Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy", and said that the right to reproduce as "one of the basic civil rights of man".

Israeli gay couple's case, [37] the gay couple Yonathan and Omer could not have a surrogate mother in Israel. They came to Mumbai where the selected a surrogate. Yonathan donated his sperm and later on Baby Evyatar was born. The gay couple took son Evyatar to Israel. In *Devika Biswas v. Union of India*[38], the Supreme Court recognized the right to reproduction as an important component of the 'right to life' under Article 21. This reproductive right of women includes the right to carrying a baby to term, giving birth, and raising children. It also includes rights to privacy, dignity, and integrity of the body. Thus, restricting surrogacy only to heterosexual couple and widow or divorcee women within a certain age group and denying reproductive choices to LGBT, single persons, and older couples, violating Article 21.

In *Javed v. State of Haryana*[39] the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained

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[36] AIR 2000 AP 156
[37] JT 2008 (11) SC 150
[38] (2016) 10 SCC 726
[39] (2003) 8 SCC 369

from stating that the right to procreation is not a basic human right.

in *K S Puttaswamy v Union of India*[40] where bench of Supreme Court held that privacy of any person covers personal autonomy relating to the body, mind, and to making choices. The judgment provides a wide affirmation of individual liberty and recognizes the right to privacy as safeguarding an individual's autonomy by seeking to protect the person's bodily integrity as well as her autonomous decision-making capacity. The Supreme Court viewed that right to privacy includes personal autonomy of the mind and body and is not limited by informational privacy. Woman alone should have the right to control her body, fertility and motherhood choices.

Surrogacy and Private International Law

As for as the Private International Law is concerned, there is an issue regarding the domicile of surrogate child. As soon as a child born his father's domicile will be the domicile of such child. But, suppose sperm donor is a foreigner (NRI) who is other than the intended couple and the egg is of surrogate mother, after the birth of such child the domicile of the child will be the domicile of the father. Under the Private International Law, a child can change his domicile after attaining the age of majority. So long he is a minor what will be the domicile of such child? Whether it will be the domicile of sperm donor or of the intended father? Although, the Surrogacy

[40] (2017) 10 SCC 1.

(Regulation) Bill, 2020 proposed for the prohibition of the commercial surrogacy including sale and purchase of human embryo and gametes but if the foreign sperm donor donates his sperm not for commercial purpose rather in good faith, then his act will not be covered under such restriction. The Bill of 2019 as well as of2020 has made it clear that a child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple.

But if that foreigner (sperm donor) makes claim on such child what will be the consequence? Also, in the instant case if foreigner (donor) donates the sperm under a contract that he would not make any clam on such surrogate child, but after the birth of child he makes claim on the child, will he be liable for the breach of contract? If yes, whether the Indian Contract Act 1872 would be applicable to foreigner also? As Indian Contract Act has its territorial jurisdiction. Therefore, to deal with this type of contract where foreign element is involved the Private International Law will be applied. Apart from the above, the Surrogacy (Regulation) Bill also provides that the intending couple should not abandon the child, born out of a surrogacy procedure, whether within India or outside, for any reason whatsoever.

Whether, this provision be applicable to the intended couple who subsequently shifted to other country? Suppose there are different laws regarding surrogacy in both countries and a conflict occurs between the Indian law and the law of such other country where intended couple are domiciled, then which law will govern this issue? This is also a matter of discussion. To establish international collaboration on surrogacy

intergovernmental bodies are attempting stepping forward. In Hague Conference on Private International Law, they have moved towards framing internationally accepted rules to recognize parenthood of children in abroad through surrogacy. However, it may not be easy to come to an international agreement due to the widely varying attitudes towards surrogacy in different countries.

Conclusion

Surrogacy *per se* is a unique amalgamation of social, ethical, moral, legal and scientific issues and it is necessary to harmonise the conflicting interests inherent in the process of surrogacy to ensure betterment of child while protecting rights of surrogate mother. Surrogacy is a procedure which has been permitted for noble cause. Foreign nationals from all over the world have been benefited from the surrogacy in India. India provided an unregulated cheaper alternative to other nations. But later on this philanthropic act commercialized and it became the matter of human rights issue. Many families without paying any attention on their health were involved in surrogacy because of poverty. That is why it has been tried to check it through legal mechanism. However, still there is no proper guidelines to regulate this issue. The Surrogacy (Regulation) Bill, 2020 also did not get the assent of the President of India. Undoubtedly, there are certain good provisions in the present Bill as it has excluded foreign nationals from the purview of surrogacy service in India because many cases of human rights violation in the form of child exploitation were reported, but NRIs, Persons of Indian origin (PIO), Overseas Citizenship of India (OCI) are permitted. In

future, can these people be held liable for violating the provisions of the Indian laws relating to surrogacy? One thing is still debatable, as the right to decide about reproduction is a very personal decision of woman because she has personal rights over her body and State should not interfere there. If a woman wants to help a needy couple, she has to follow the restrictions of the Bill which is violation of right to privacy as provided in the Article 21 of the Constitution. So, the present Bill while giving final shape should consider the socio-economic realities and human rights of the Indian people. And also, the interest of surrogate mother, child and intended couple should be given priority at the time of giving final shape to the surrogacy law. The surrogacy should be evaluated considering public policy in the mind. Besides above, one pertinent question is that why in India, people are practicing surrogacy when millions of children are orphans.[41] Why don't we make the adoption of those children by making the adoption procedure simple as an alternative to surrogacy.

[41] "Why practicing Surrogacy?" https://www.civilsdaily.com/burning-issue-the-surrogacy-regulation-bill-2020, Retrieved 22-06-2021 at 6.30 a.m.

CONNOTATION OF HACKING AS COMPUTER RELATED OFFENCE-A COMPARATIVE PERSPECTIVE OF INDIAN & US LEGAL SYSTEM

*Ashok Wadje**

Abstract

With rise in the usage of the Information and Communication Technologies in every sector and affairs of the human life, there has been significant increase of the misuse of the cyberspace by the criminals. It has become an easy tool for the smart criminals. The unauthorized access which is popularly recognized as the act of hacking has been a worry not just of the individuals but also of the business enterprises and the governmental establishments. The paper seeks to explore the dimensions of the act of hacking and will analyses the US and Indian Legal system pertaining to the phenomenon of hacking as reflected in Section 43 (a) and Section 66 of the Information Technology Act, 2000.

Key Words: Hacking, ICTs, Cybercrime

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Introduction

Computers, Information Technology, cyberspace and internet world has profoundly changed lives of masses, bringing out extreme transformation in the living style of the people. Thinking of human activities without Information Technology, computer and internet, sounds impracticable. What has changed over the period of time is the life style of human beings in different forms ranging from business environment to education, employment, communication, entertainment, governance, commerce and so on and so forth. Especially this trend is global one, having bearing on the global trends, transaction, trade, business, commerce, international relations and communication. This indeed has replaced many of the classical and traditional usages of communication. Information Technology has blessed the globe with constant and healthy changes terms of what has been mentioned above. Today, almost everything is online, available on a single click of the user from any corner of the world.

Referring Information Technology, in several of its form i.e. computer, computer system, computer network, internet and mobile or handheld phones and several other electronic and communication devices has brought this change in the society and in the lives of the people. These devices and services of internet in the cyber world is *sine qua non* for any individual or any entity working in business environment and otherwise. People have actually started interacting very frequently through online devices, bringing them together and more closure like never before. Interaction, communication, exchange of things, goods and services, business activity,

governance and inter-state dealings has increased to such a level, that it is unimaginative to revert back to traditional ways of human intercourse of dealing with each other. But if one looks the other side of the coin, this has indeed, exposed us to several problems and complex questions leading to commission of crime or offences codified by the law of the land. No one could have imaged at the time of adopting these technologies that, it might lead us to some unthinkable human activities on cyberspace including commission of several crimes in respect of said technology or with the help of such technology. In this context it is pertinent to mention one quote:

> *"The modern thief can steal more with a computer than with a gun. Tomorrow's terrorist may be able to do more damage with a keyboard than with a bomb."*[1]

Cyber Crimes: Nature, Scope and Extent

Cyber space has today come to denote everything about computers, the internet, websites, data, emails, networks, software, data storage devices such as hard disks, USB disks etc, and also electronic devices such as cell phones, ATM machines etc. In short, definition of "cyber law" associates with 'law governing cyber space'[2]. Main concern of this branch is to:

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[1] NATIONAL RESEARCH COUNCIL: COMPUTER AT RISK, (National Research Council, USA) (1991), National Research Council, USA.
[2] ROHAS NAGPAL, FUNDAMENTALS OF CYBER LAW, 7, (Asian School of Cyber Law) (2009).

a. ensure 'cyber security and
b. prevent and curb cybercrimes.

Cybercrimes are, in the era of technocrat world, real threat to the technological driven society, making it difficult to legitimate use of the information technology and usages. Cybercrimes comes as a threat in many forms and ways in relation to computer, internet, websites, data, emails, networks, software, data storage devices etc. Cybercrimes can involve criminal activities that are traditional in nature such as theft, fraud, forgery, defamation and mischief. The misuse of computers has given rise to new age crimes such as hacking, cyber stalking, cyber pornography, web jacking, denial of access, introduction of virus, credit card frauds, financial crimes over or through or with the help of information technology.

"Cyber Crime" or "Cybercrime"?

There are wide range of nomenclatures that are being given- computer crimes, cybercrimes, cybercrime, virtual crimes, online crimes, high tech crimes, computer-related crimes, internet-related crimes, electronic crimes, while collar crimes etc. delimiting the scope of computer related misconduct which influences the mind and considerations of legislature to define cybercrime. Arguably, a distinction could be made between 'cybercrime' (a singular concept of crime that could encompass new criminal offences perpetrated in new ways. e.g.: 'cyberstalking', 'cyberterrorism', 'identity theft', 'unauthorized access & modification of data.') and 'cybercrime' (a descriptive term for a type of crime involving conventional crimes perpetrated using new

technologies, for e.g. 'computer fraud', 'computer forgery' 'obscenity' & 'theft of funds electronically.') E.g.: 'Convention on Cybercrime', (Australian) 'Cybercrime Act, 2001'.

Nature of cybercrimes is challenging and requires new definitions and understanding and a restatement of accepted norms of criminal conduct and punishment because of several reasons. Digital Technology lies at the heart of cybercrime and as such 'computing' and 'communications technologies' *facilitates* the commission of the offence but are not *essential* to its commission.

It could be defined in simple words as, "any illegal act that involves a computer, computer system or computer network."[3] Moreover, when it comes to a particular legislation relating to cyber law dealing with the cybercrime, there is further classification as to 'cyber contraventions' and 'cybercrimes. The former is lesser sever and doesn't take into consideration *mens rea* i.e. intention behind the crime and later based on intention to commit offences. In fact it is more about degree and extent of criminal activity rather than anything else.[4] Functionally, the word cybercrime by its very terminology, restricts itself to the offences committed on the internet which is a network of computers that communicate each other. It would also encompass offences committed in relation to or with the help of

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[3] VAKUL SHARMA, INFORMATION TECHNOLOGY: LAW & PRACTICE, 160, (Universal Law Publishing Co, 3rd ed. 2011).
[4] *Id*, at 160.

computers. It has also been defined[5] as: "a wide variety of criminal offences and unlawful activities related to or having connection to computers."

In the personal opinion of the author of the present work, "cybercrime" can be defined in following way:

Cybercrime is a term coined indicating bundle of wrongs either defined or not defined by law, as unlawful, which can be committed, with the intention of wrong doer and with the involvement of computer & related devices, so as to cause loss or injury to a person, property of a person, organization or establishment, including act of unauthorized access or interference in any manner to the computer, related devices and data or information residing therein."

OECD[6], (Organization for Organization for Economic Cooperation and Development) (1983) defined it as: "any illegal, unethical or unauthorized behavior involving automatic processing and transmission of data."

Dr. K. Jaishankar states, "Offences that are committed against individuals or groups of individuals with a criminal motive to intentionally harm the reputation of the victim or cause physical or mental harm, or loss, to the victim directly or indirectly, using modern telecommunication networks such as internet (Chat

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[5] DEVASHISH BHARUKA & AJIT JOY, LEGAL DIMENSIONS OF CYBERSPACE, 228, (S.K. Verma & Raman Mittal eds. 2004, Indian Law Institute).

[6] See: ITU, *Understanding Cybercrime*, http://www.itu.int/ITU-D/cyb/cybersecurity/docs/Cybercrime%20legislation%20EV6.pdf Last updated on Sept. 10, 2016 at 7:30 am

rooms, emails, notice boards and groups) and mobile phones (SMS/MMS)."[7]

Centre for Internet and Society[8] defines Cybercrime as an unlawful act committed using a computer either as a tool or as a target (or both) for facilitating a crime.

United Nations[9], at the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, in a workshop devoted to the issues of crimes related to computer networks, cybercrime was broken into two categories and defined as:

a. Cybercrime in a narrow sense (computer crime): Any illegal behaviour directed by means of electronic operations that targets the security of computer systems and the data processed by them.
b. Cybercrime in a broader sense (computer-related crime): Any illegal behavior committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession [and] offering or distributing information by means of a computer system or network.

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[7] K. Jaishankar (2011)& Ameer Al-Nemrat, Examination of Cyber-criminal Behaviour Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.469.213&rep=rep1&type=pdf Last updated on Nov. 5, 2022 at 08:00 am.
[8] THE CENTRE FOR INTERNET AND SOCIETY, *Cybercrime and Privacy*, http://cis-india.org/internet-governance/blog/privacy/privacy-ita2008 Last updated on Nov. 5, 2022 at 5:30 pm.
[9] *Supra* note 7.

Definition and Jurisprudential Analysis of 'Hacking' & 'Unauthorized Access' as Computer Related Crime:

It becomes very difficult to delimit the scope of cybercrime and for that matter hacking & unauthorized access. The concept of cybercrime, in fact, stared being used in relation to occurrence of incidences like hacking, only.[10] Hacking in simplest sense of term refers to any unauthorized act on the part of offender, in relation to computer, computer system, computer network or information or data residing therein.[11] This very line of definition encompasses several acts in relation to factors mentioned above. That makes it difficult to understand the context in which an offender may be held liable for the act of hacking. The multiple provisions of law/document, domestic, regional and international, defining act of hacking in relation to computer aims at punishing: unauthorized act or omission on the part of accused, in relation to the computer, computer system or computer network or data or information residing therein, of the owner. The same will be discussed in detail in the forthcoming parts.

Firstly, it is very much essential to know, the *context* in which cyber-crime law deals with such unauthorized acts in relation to the computer, computer system or computer network or data or information residing therein. This can well be understood in the light of jurisprudential comparison made below.[12] It makes

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[10] Vide next heading 'Evolution of 'Hacking' & 'Unauthorized Access' as computer related crime'.
[11] Personal opinion of the author.
[12] See the Table of Jurisprudential analysis

distinction in the different disciplines of law dealing with the same activity (unauthorized access/act) of the wrongdoer pertaining to the property (material, virtual or intellectual) in different contexts. The first column is with respect to cyber-crime law where the components given therein will elucidate necessity of punishing any unauthorized act in relation to the computer, computer system or computer network or data or information residing therein. Second column is with respect to same act or activity on the part of the accused but that is in relation to the intellectual property of the owner. Whereas the third column refers to the material property, where, the kind of acts which could be committed are almost similar to what we find in column 1 & 2. Therefore, we find similarity in the acts on the part of accused, the context in which it is to be committed, is different. There is a possibility of overlapping of column 1 & 3 since the activities punished are almost similar and the difference is only as to the form of property (virtual & material property).

Table – 01: Jurisprudential analysis:

Jurisprudential analysis of Hacking to Computer/Compute system/Data/Information		
Unauthorized access + damage/loss/Injury: different perspective of law		
Cyber Crime Law (Virtual property)	Intellectual Property Law (Intangible property)	Conventional Penal Code (material property)

Secrecy, Confidentiality Privacy of data/information	Ownership of the property	Ownership & Possession
Utility of data/information	Restricted use/exploitation	Criminal Trespass
Commercial value of data/information	Assignment/License of IP	Mischief
Critical Information Infrastructure	Infringement of IP: unauthorized use, exploitation and access to IP	Cheating

Definition of Hacking

In the wake of jurisprudential analysis of hacking discussed above, it is worth to mention here some of the definitions throwing some light on the nature, scope and extent of the act of hacking. Some provisions of the law/document, national, international and regional will also be discussed to explore the nature of the same. In the opinion of author of this work, hacking is 'an unauthorized access to data in a system or computer' and "*hacker*" is a cleaver programmer or a someone who tries or tried to break into computer systems. Moreover, hacking refers to or involves a bundle of wrongs, in the nature of:

1. introduction of virus,
2. theft of data,
3. gaining unauthorized access to computer/compute system/data/information,

4. alternation, modification, destroying, deleting, stealing information or data residing in the computer,
5. web defacement & web jacking,
6. denial of service,
7. cheating & impersonation with the help of or involvement of computer, computer system or computer network,
8. computer fraud and computer forgery.

The Budapest Convention on Cyber Crime, 2001 The Budapest Convention on Cyber Crime, 2001, is the first ever international attempt to regulate cybercrime regime by putting obligation not on the State parties to the convention. It is a regional covenant confined only to Europe. Nevertheless, any other States outside EU can be a part of the same. Naturally this convention has defined hacking not explicitly but in the form of multiple provisions and in the form of different facets of hacking, under the head of offences against confidentiality, integrity and availability of computer data and systems and computer related offences, Those provisions are:

1. Illegal access[13]
2. Illegal interception[14]
3. Data interference[15]
4. System interference[16]
5. Misuse of Devices[17]

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[13] Article 2.
[14] Article 3.
[15] Article 4.
[16] Article 5.
[17] Article 6.

6. Computer related forgery[18]
7. Computer related fraud[19]

The African Union Convention on Cyber Security and Personal Data Protection, 2000 has also attempted to define the horizons of hacking, unauthorized access and computer related offences in the form of Article 29 (1)- State Parties shall take the necessary legislative and/or regulatory measures to make it a criminal offence to:

a) gain or attempt to gain unauthorized access to part or all of a computer system or exceed authorized access;
b) gain or attempt to gain unauthorized access to part or all of a computer system or exceed authorized access with intent to commit another offence or facilitate the commission of such an offence;
c) remain or attempt to remain fraudulently in part or all of a computer system; hinder, distort or attempt to hinder or distort the functioning of a computer system;
d) enter or attempt to enter data fraudulently in a computer system;
e) damage or attempt to damage, delete or attempt to delete, deteriorate or attempt to deteriorate, alter or attempt to alter, change or attempt to change computer data fraudulently.

[18] Article 7.
[19] Article 8.

In England, English Law Commission had proposed hacking as a criminal offence in two different kinds[20]:

a) Simple hacking and
b) Hacking in pursuit of further serious offence.

In fact, it a simple act of unauthorized access was made a serious and criminal offence under the name of hacking by virtue of provisions of the Computer Misuse Act, 1990 in England, which was introduced to help deal with the problems caused by the misuse of computers and communication systems, especially that of hacking and unauthorized access.[21] Currently, in relation to hacking English Law i.e. the Computer Misuse Act, 1990 provides following three kinds of offences:

a) Unauthorized access to computer material[22]
b) Unauthorized access with intent to commit or facilitate commission of further offence[23] and
c) Unauthorized acts with intent to impair or with recklessness as to impairing, operation of computer etc.[24]

So, Section 1 of Computer Misuse Act, 1990, defines hacking as:

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[20] LAW TEACHERS - THE LAW ESSAY FOR PROFESSIONALS, COMPUTER MISUSE ACT. http://www.lawteacher.net/criminal-law/essays/computer-misuse-act.php (last visited on Nov. 10, 2022, at 12:46 am).
[21] *Id.*
[22] Section 1.
[23] Section 2.
[24] Section 3.

a) he causes a computer to perform any function with intent to secure access to any program or data held in computer;
b) the access he intends to secure is unauthorized and
c) he knows at the time when he causes the computer to perform the function that that is the case.

If one observes the above mentioned provisions given in the Computer Misuse Act, 1990 of England, it shows the relevance of use of words like 'intention', 'knowledge', 'recklessness' or 'impair' etc. The whole gamut of these provisions is unauthorized act and unauthorized access to or in relation to computer material, be it with intent to secure 'mere access' or with the intent to secure access in order to facilitate for commission of further offences and to do impair the operation of computer, to prevent or hinder access to any computer programme or data etc. Intention is significant factor in the English cyber law i.e. Computer Misuse Act, 1990 and in any case, if a hacker proves the lack of intention on his or her part, the same may be liable to get the benefit of law. This point was discussed in *R v Bedworth*[25], the case which highlights the problem with section 2 of Computer Misuse Act, 1990 in relation to use of word intent as the offender used the defense of addiction and said he was not liable to form any intention in committing crime. This case necessitated a call to remove word 'intent' from the Act.[26]

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[25] 1991.
[26] *Id.*

Although in Information Technology Act, 2000, there is not definition of cybercrime, yet, related term, cyber security[27] has tried to cover the aspects of cybercrime:

"means of protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorized access, use, disclosure, disruption, modification or destruction."

As discussed above, with the passage of time and advancement of information technology, cyber world has begun to follow an altogether different path i.e. of taking undue advantages and unlawful gains with the help of IT usages by targeting computer, Information Technology and cyberspace or with the help thereof, started committing new kinds wrongs to which a new has been coined in all the legal systems of the globe: cybercrime. This could be committed with respect to following things[28]:

a) Against person
b) Against property
c) Against Organization/Government
d) Society

Such offences, unlike traditional offences, are unique in terms of its crime causation, *modus operendi*, subject-

[27] Section 2 (nb) of IT Act, 2000.
[28] PRASHANT MALI, CLASSIFICATION OF CYBER CRIME, http://www.lawyersclubindia.com/articles/Classification-Of-CyberCrimes--1484.asp#.UpRyXtKnpoE (last visited on Nov. 11, 2022 at 3:36 pm).

matter and tools with the help of which it could be committed. Though it was possible to prosecute the culprit of such offences under traditional penal laws[29], it was felt by Government to have a separate Act altogether to deal with such type of offences. So Information Technology Act was enacted in the year of 2000, which stipulates number of cybercrimes, making it an exclusive law dealing with cybercrimes. So now with respect to cybercrimes, Indian Penal Code is no more applicable when it comes to cyberspace and a case for cybercrime, now, could be registered under Information Technology Act, 2000.

Dimensions of Hacking and Unauthorised Access

It is now clear on the basis above mentioned definitions that hacking mostly involves an act in the nature of unauthorized access to computer, computer system, computer network or information or data residing therein, it is also pertinent to know the other dimensions of the said Act. That means in what contexts or situations or subject matter, it could be performed, since most of the definitions or provisions dealing with offence of hacking, as discussed above, have not clarified or are unclear about the context, situation or subject matter. Below mentioned chart, designed by the author of this work will clarify the context, subject matter, victim, accused and the situations in which the said offence/crime could be committed. This chart, again can throw light on, what acts of unauthorized access, could be considered for prosecution. Not all activities of such

[29] Indian Penal Code, 1860 and allied laws.

nature, are liable to be punished. Author of this work has discussed the cases where an accused can justify his or her act of unauthorized access or hacking.

Table – 02: Dimensions of Hacking

Dimensions of Hacking				
Circumstances u/which act was done can be done	**Who has caused the damage/injury**	**Who has suffered the injury or damage**	**Damage & Injury**	**What was/can be target at**
During the course of employment	Individual or Corporation	Individual or Corporation	mere access (unauthorized)	Computer System
During the continuation of authority	ISP/Intermediary	State	Alteration, Modification, deletion,	Communication Device
In exercise of authority by State	Employee/Servant	Employer	unlawful gain or unlawful loss	Computer Resource
Misuse of computer or communication device by user or by client	Entity in exercise of authority	Host/Principal/Master/Intermediary	Theft of password or sensitive or personal information	Data or Information

Evolution of Hacking and Unauthorized Access as computer related crime

This article is principally concerned with hacking as a cybercrime and its transformation in India in the form of computer related crime. If one would like to trace the origin of cybercrime or for that matter hacking, there won't be any official record as to the first occurrence of such crime. There were multiple wrongs took place with respect to computer in different jurisdictions making it first such occurrence of hacking. There are different events or activities which were noted as the occurrence of cybercrime. Survey of those incidences will clarify how in different jurisdictions and in what context such crimes took place.

1. In 1820, Joseph-Marie Jacquard, a textile manufacturer in France, produced the loom. This device allowed the repetition of a series of steps in the weaving of special fabrics. This result in a fear amongst Jacquard's employees that their traditional employment and livelihood were being threatened. They committed acts of sabotage to discourage Jacquard from further use of the new technology.[30]
2. Ian Murphy (1981) in US, was punished for breaking into computer system and changing internal settings of clock (to allow system to provide free calls) so as to get free calls during such hours, as it was the scheme of Telecom

[30] PRASHANT MALI, CYBER LAW & CYBER CRIMES, 5, (Snow White Publication Pvt. Ltd., 1st ed. 2012)

company to provide such free calls during the certain hours;[31]

3. In 1971, "Creeper" was released as the first computer virus in ARPANET[32] and computers used to get infected.
4. In 1973, New York's Dime Saving Bank was robbed with the help of computer. Money was stolen by one of the employees, Mr. Teller, by computer intrusion and fraud.
5. *R. vs. Gold & Schifreen [1987] QB 1116 1117)*, this is the classical case from UK, which resulted in the first ever enactment on cybercrime in UK, the Computer Misuse Act, 1987. The Computer Misuse Act, 1990 was enacted as a result of hacking (unauthorized access) by two hackers in UK to the computer networks of BT Prestel Computer Network. The access was to the secured areas of the service. BT Prestel computer network was being operated by post office as a communication channel (email services) between subscribers and service providers (Banking, Financial, Travel, and Media organizations), so as to send text, graphics and other information with the help of telephonic lines. Wrongs committed in this case:
    i. Hackers obtained a Prestel username and password

[31] Available at: http://www.symantec.com/region/sg/homecomputing/library/cybercrime.html Last update on Nov. 12, 2022, 3:00 pm.
[32] See: https://en.wikipedia.org/wiki/ARPANET Last updated on Nov. 12, 2022, 4:00 pm.

ii. Access to valuable commercial services providing investment advice for the clients
iii. They managed to gain access to subscriber's personal email account, including email account of one of the subscribers
iv. One of the hackers allegedly sent an email from the personal account of the subscriber, with certain pranks and funny messages.

Problem of identification

Hackers in this case did not cause any damage. They learnt the process in which such service was working. They learnt the password and account details of the customers and subscribers. The problem for the authorities was what they were to be charged with? It was not clear that they had committed a criminal act. There was no theft or damage to property neither it was clear that they committed fraud. They were charged under section 1 of Forgery and Counterfeiting Act, 1981 which states that, a person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice. At trial both of them were found guilty and fined. But Court of Appeal acquitted them of charges under Forgery and Counterfeiting Act, 1981 as it was not an act of forgery. On appeal by Crown (State), both the respondents' were acquitted of charges by saying the said Act contemplates physical transactions or/and physical object or physical

instrument. This led to the enactment of Computer Misuse Act, 1990 on the basis of recommendations of Law Commission recommending to introduce a new offence of unauthorized access to computer data Computer Misuse Act, 1990 punishes several acts relating to computer as offence, including following, in Part I:

a. Unauthorized access to computer material
b. Unauthorized access with intent to commit further offences
c. Unauthorized access impairing operation of computers
d. Making, supplying or obtaining articles for use in offence (Prohibition of hacking tools)

US Law on Hacking, Unauthorized Access and Computer Related Crimes:

In USA, so far as hacking is concerned, 18 USC Sec. 1030 read with the provisions of Computer Fraud and Abuse Act, 1987 has laid down detailed provision concerning such act/offence. Broadly it protects, computers connected with the internet, Bank computers and Federal Computers, from the action in the nature of trespass, threats, damage, espionage and fraudulent activities. Said provision, so far as hacking offence is concerned, can divided as per following chart:

Table – 03: Title 18, USC Sec. 1030

Computer Fraud and Abuses Act, 1987 r.w. Title 18, USC Sec. 1030				
Computer Trespass-ing in Govt. Computer	**Computer Trespass + exposure to certain infor-mation**	**Damaging Computer by interfer-ence**	**U/access + fraud in relation to a pro-tected computer**	**Trafficking in infor-mation**
Sec. 1030 (a) (3)	Sec. 1030 (a) (2)	Sec. 1030 (a) (5)	Sec. 1030 (a) (4)	Sec. 1030 (a) (6)

For the purpose of acts in the nature of offences under this law, certain terms such as computer, protected computer, financial institutions, financial record, Exceeds authorized access damage, loss and person have been defined to make the context of hacking or unauthorized access, clear and certain.[33] There are two actions which can initiated in this context, one criminal prosecution and the second civil action for economic damage, against accused. [34]

Apart from above mentioned law, there are other legislations in USA dealing with the offence of hacking and which are modified by virtue of or give enforcement to the provision cited above:

1. Violent Crime Control and Law Enforcement Act, 1994, to the extent of covering computer damage, accidentally and civil provision to allow victims to claim damages against wrong doer.

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[33] Sec. 1030 (e).
[34] Sec. 1030 (g).

2. Economic Espionage Act, 1996 where with respect to unauthorized access u/Section 1030 (a) (2), it has included any information of any sort, then mere act of reading or merely observing information unauthorized, is an offence. It has also added provisions as to compute extortion and protected computer
3. USA Patriot Act, 2001, as expanded the definition of protected computer including computers located outside USA. It has also added a new category of computer i.e. Computer used by or for administration of justice, national defence, and national security.
4. Identity Theft Enforcement and Restitution Act, 2008, with respect to Sec. 1030 (a) (2) (c) of USC, has included any unauthorized access to any protected computer that retrieves any information of any kind, interstate or intrastate.

With respect to hacking law of US, there has been a concern that was discussed in several cases. The same is as to the clarity in of the provisions of Computer Fraud and Misuse Act. The legality of the said Act, was questioned in many cases on the basis of principle of void for vagueness[35]. This is based on the premise of fair notice, that asks whether the law is so vague and standardize that it leaves the public uncertain as to the conduct it prohibits. Those cases are:

[35] United States vs. Williams 128, S. Ct. 1830, 1845 (2008).

1. US vs. Drew[36]
2. US vs. Nosal[37]
3. LVRC Holdings vs. Brekka[38]

These cases have proved that the law that began as narrow and specific has become breathtakingly broad.[39] The CFAA is, no doubt a broad statute covering each and every aspect. Faced with the uncertainty of the new world of computer crimes, the legislature has opted for very broad and unclear prohibitions. The pressure to interpret the CFAA to avoid vagueness concerns may lead to a new court created jurisprudence of the meaning unauthorized access.[40]

Indian Law on Hacking, Unauthorized Access and Computer Related Crimes:

Information Technology Act, 2000/2008 is the source of Cyber Law and is widely known as Indian Cyber Law,[41] dealing thoroughly with terms cyberspace and information technology.

Broadly, IT Act, 2000 could be classified under two different parts[42]:

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[36] 259 FRD 449 C.D. Cal. 2009.
[37] 2009 N.D. Cal. Apr. 13.
[38] 581 F. 3d 1127, 1132-35 (9th Cir. 2009).
[39] ORIN S. KERR, Vagueness Challenges to the Computer Fraud and Abuse Act (1563) Harvard Law Review, Volume 127, 2013.
[40] *Id.*
[41] Rohas Nagpal, "Commentary on Information Technology Act", 9 (Published by Sun Publications, Pune).
[42] S. K. Verma and Raman Mittal: "Legal Dimensions of Cyberspace", 232 (Indian Law Institute).

1. For legal recognition of 'e-commerce'[43] and 'e-governance[44]' and
2. For making certain acts as cybercrimes[45] punishable by Law.

Table – 04[46]: Scheme of Cybercrimes under I.T. Act, 2000

Cyber Crimes			
Against person	Against Property	Against Organization	Against Society
Email spoofing	Credit Card fraud	Unauthorized accessing of computer	Forgery
Cyber defamation	Intellectual property crimes	Denial of Services	Cyber Terrorism
Harassment & cyber stalking	Internet time theft	Computer contamination or virus attack	Web jacking
Spamming		Email bombing	Pornography or/and Obscenity
		Trojan Horse	

[43] Electronic Commerce.
[44] Electronic Governance.
[45] Broadly speaking this has been given under two different heads under IT Act: "contraventions" and "offences". Contraventions entail penalty on culprit and offences prescribes and imposes punishment.
[46] Prepared with the help of Article/Research paper written by PRASHANT MALI, CLASSIFICATION OF CYBER CRIME, http://www.lawyersclubindia.com/articles/Classification-Of-CyberCrimes--1484.asp#.UpRyXtKnpoE (last visited on Nov. 22, 2022 at 4:50 pm).

Table 05: Cyber Crimes under I.T. Act, 2000/Amended Act of 2008 (Statutory Offences)

Hacking & Cracking	**Cyber Crimes & Intellectual Property**
Unauthorized access + subsequent acts (Section 43 & Section 66)	Software Piracy (Copyright Act)
Web defacement (Computer Related Offence)	Tampering with Computer Source Code (Section 65 of IT Act)
Web jacking (Computer Related Offence)	Infringement of Copyright (Copyright Act)
Denial of Service (Section 43 of IT Act)	
Cyber Bullying	Privacy & Cyber Crimes
Cyber Stalking (defined u/Section 354 D of IPC)	Section 43
Cyber Grooming (Not defined	Section 43A
Harassment (Not defined)	Section 66
Cyber Defamation (declared unconstitutional by Supreme Court of India)	Section 66E: Punishment for violation of privacy
Offensive and derogatory remarks (declared unconstitutional by Supreme Court of India)	Section 67C: Preservation & Retention of information by Intermediaries
Annoyance, insult and causing discomfort (declared unconstitutional by Supreme Court of India)	Section 72: Breach of Confidentiality & Privacy
Offensive message (declared unconstitutional by Supreme Court of India)	Section 72A: Punishment for Disclosure of information in breach of lawful contract
Cyber Pornography/Obscenity (Section 67-Section 67-B)	Computer Related Offences (Section 66-66F
Transmission of 'obscene' MATERIAL	Cheating & Impersonation
Transmission of '(material) Sexually explicit' ACT/ CONDUCT	Computer Forgery & Computer Fraud
Transmission of (material) 'Sexually explicit' act, depicting CHILD	Data Theft & Identity Theft, Cyber Terrorism etc.

In particular following is the scheme of offences[47] as given in IT Act, 2000 and Amended Act of 2008:

1. Tampering with computer source document: Section 65
2. Computer related offences[48]: section 66[49]
3. Offensive messages: section 66-A
4. Receiving stolen computer resource & communication device: section 66-B
5. Identity theft: section 66-C
6. Cheating by personation by using computer resource: section 66-D
7. Violation of privacy: section 66-E
8. Cyber terrorism: section 66-F
9. Obscenity in electronic form: Section 67 (General obscenity)

a. Obscenity in electronic form: Section 67-A (Sexual act or conduct therein)
b. Obscenity in electronic form: Section 67-B (Child pornography)

Before I begin with the problems, issues, questions changes brought in relation to crimes or offences and its intricacies, and changes brought by Information Technology (Amendment) Act, 2008 we must understand what is it that Information Technology is all about, its various forms, its functioning as given and contemplated by Information Technology Act, 2000[50] and Information

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[47] Chapter XI of I.T. Act.
[48] In the original I.T. Act, 2000 it was mentioned as 'Hacking with the Computer System'.
[49] To be read with Section 43 of the Act.
[50] Hereinafter referred as "IT Act, 2000".

Technology (Amendment) Act, 2008[51] so far as cyberspace is concerned.

Computer[52] means any electronic, magnetic optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network,"

Furthermore, with respect to computer three more terms have been defined under Information Technology Act, 2000 which are to be read with. Those terms are: computer network[53], computer system[54] and computer resource[55]

It is pertinent to mention definition of 'Computer System', in respect of which original Act of 2000, mentioned certain activities amounting to hacking.[56] But now amended IT Act of 2008 stipulates the said offence

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[51] Hereinafter referred as "Amended I.T. Act of 2008".
[52] Section 2 (i) of I.T. Act, 2000.
[53] Section 2 (j).
[54] Section 2 (l).
[55] Section 2 (k).
[56] Section 66 of old IT Act of 2000: 'Hacking with Computer System': Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects injuriously by any means, commits hacking.

with respect or under the heading of computer related offences.[57] Definition of computer system runs as follows:

Access[58] with its grammatical variations and cognate expressions means- gaining entry into, instructing or communicating with the logical arithmetical or memory function resources of a computer, computer system or computer network.

Computer System[59] means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and cable of being used in conjunction with external files which contain computer programmes, electronic instructions, input and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions.

Communication Device[60] means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image.

Electronic Form[61] with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.

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[57] Section 66 of I.T. Act, 2000: Computer related offences', inserted by Information Technology (Amendment) Act, 2008.
[58] Section 2 (1) (a).
[59] Section 2 (l) of IT Act, 2000/2008.
[60] Section 2 (ha).
[61] Section 2 (r).

Definition of electronic form to be read with two more terms which are defined in the Information Technology Act, 2000, those are: 'Data'[62] and 'Information'[63] in electronic form. Importantly, definition of term "access" is crucial to know about.

Law Prohibiting hacking in Information Technology Act, 2000 and Issues:

So far as India concerned, originally IT Act comprised of provision directly related to hacking to computer system[64] but by virtue of amendment in 2008, the scope got widened as "Computer related offences," which has covered several wrongs pertaining to computer and network. This amendment was brought into force keeping in view the lapses in the original legislation to deal with hacking as a cybercrime. Cyber offenders were able to take an advantage of this lapse of limited area of operation of original Act. Information Technology Act, 2008 has widened the horizons of law to tackle and deal with illegal activity of unauthorized access or hacking and the same has been incorporated in an expansive manner leaving no scope for cybercriminals.

Indian cyber law, i.e., the Information Technology Act, 2000 makes two direct provisions on the act of hacking as punishable offence. One[65] giving rise to civil action

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[62] Section 2(o).
[63] Section 2 (v).
[64] Erstwhile Section 66.
[65] Section 43 (a).

and the second[66], criminal prosecution. Those provisions are:

1. **Section 43 (a):** If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network, or computer resource-(a) accesses or secures access to such computer, computer system or computer network
2. **Section 66:** If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both

In order to know the law pertaining to hacking (above mentioned provisions) one need to know and understand the context in which such provisions are used. Following are some clarifications which the author of this work would like to make to throw some light on Indian law on hacking.

A. Clarifications pertaining to Section 43 (a):

- Section 43 (a) is a law which gives rise to, if the impugned act/wrong of offender is established prima facie, a civil proceeding[67] before Adjudicating Officer appointed under I.T. Act,

[66] Section 66.
[67] Vide Section 46 of IT Act.

2000, who has been given all the powers of civil court for the purpose of imposing penalty.

- If wrong under Section 43(a) is proved, Adjudicating Officer may impose a penalty by way of compensation, depending on the claim of the victim and extent of wrong done;
- If the claim is more than 5 crore rupees, then the appropriate proceeding will be before the appropriate High Court Appropriate Court is what the expression used);[68]
- An appeal can be made from the orders of Adjudicating Officer to the Cyber Appellate Tribunal.[69]
- A further appeal can be made from the decision of Cyber Appellate Tribunal, on any question of fact or law arising out of such order, to High Court.[70]
- So far as the adjudicate of matter as a part of section 43(a) is concerned, an Adjudicating Officer shall have due regard to the amount of gain of unfair advantage, wherever quantifiable, made as a result of the default, the amount of loss caused to any person as a result of the default and the repetitive nature of the default.[71]
- Wrong under Section 43(a) has identified as the contravention, as opposed to crime or offence. As such, intention (*mens rea*) is not the requirement of this law/section.

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[68] Proviso to Sub-Section (1) of Section 46.
[69] Section 57.
[70] Section 62.
[71] Section 47.

- There are basically three essential requirements that must be proved in order to sustain the case under this provision:
  1) There must be an access
  2) Access was unauthorized (lack of express or implied permission of the owner or person in charge of the computer, computer system or computer network)
  3) access or attempt to access or intended access, must be pertaining to or in relation to computer, computer system or computer network.

Clarifications Pertaining Section 66: Computer Related Offences

Following chart would provide a clear distinction and modifications made by legislature with respect to hacking offence. The chart is about comparison in terms of heading, language and words used in the provision.[72]

Table 06: Hacking under IT Act, 2000 and amended Act of 2008:-

Information Technology Act, 2000: Hacking with Computer System	**Information Technology (Amendment) Act, 2008: Computer related offences**
Section 66. Hacking with Computer System: Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage	Section 66. Computer related offences: If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which

[72] Section 66 of IT Act.

to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects injuriously by any means, commits hacking. Punishment: Imprisonment up to 3 years or fine up to 2 lakh rupees or with both.	may extend to three years or with fine which may extend to five lakh rupees or with both. Explanation:- For the purposes of this section, - (a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code; (b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code. Punishment: Imprisonment up to 3 years or fine up to 5 lakh rupees or with both.

In short, these two provisions, section 43 (a) and section 66 of IT Act, may prohibit conduct of wrong doer or accused from the perspective of:

1. expectation of the User-Victim or Prosecution (Expectation as to Secrecy, Integrity and of Availability of Information, Data or System);
2. accessing a computer in a way that circumvents code based restrictions such as PIN, Password, and Security measures and
3. violation of Contract/norms of computer use.

Issues Pertaining to Provisions Relating to Hacking

From the perspective of prosecution, evidence and trial, it is absolutely difficult to identify certain things in

relation to this law, and the same may be discussed in the form of following questions:

1. How to prove the fact, whether there was any access or not?
2. What are the technical implication of access and how to identify that in a given case, there was an access, as contemplated by section 2 (1) (a)?
3. What kind of access has been taken into contemplation by the legislature, physical, virtual or remote access or only virtual access?
4. If there was any access without permission, whether that has caused any damage or injury to the computer, computer system or computer network or to the data or information residing therein.
5. If there was no such damage or loss caused to the computer, computer system or computer network or to the information or data residing therein, as a resultant of access by wrongdoer, whether access per se, is the wrong as per section 43 (a) of the IT Act?
6. What amounts to authority or lack of authority or authorization by owner or person in-charge or without authorization and exceeds authority?
7. What amounts loss or damage or integrity of data or information stored in the computer system?
8. How to identify that in a given case, unauthorized access was unintentional? If the act/access was intentional, can proceeding under section 43 (a) be still continued?

9. Whether there is any choice on the part of victim to file a case either for damages by way of compensation or to punish accused person by way of criminal prosecution?

Such things have not been clarified by the legislature nor by the judiciary as litigation record pertaining to cybercrime or cyber contravention, has been very poor. [73] As we have seen in the case of *Shreya Singhal v Union of India*[74], that section 66A of Information Technology Act, 2000 was declared as unconstitutional owing to vagueness in the usage of language in the provision. On the similar lines too, it appears that section 43 (a) couple with Section 66 of Information Technology Act, are vague provisions and the legality of which may be questioned owing to vagueness.[75]

Conclusion

It's been more than two decades of the passing of the Information Technology Act, 2000 regulating the behaviour in cyberspace of the individual, however, with respect to some of the offences, the literature available on the topic states there has not been much progress. What conduct or behaviour of the individual is to be regulated or prosecutable by the Law enforcement

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[73] THE ECONOMIC TIMES, India emerging as major centre for cybercrime: UK study, http://economictimes.indiatimes.com/tech/internet/india-emerging-as-major-centre-for-cybercrime-uk-study/articleshow/4911435.cms Last updated on Nov. 20, 2022 at 2:00 pm.
[74] MANU/SC/0329/2015MANU/SC/0329/2015.
[75] As per principle of "void for vagueness".

agency, needs clarity, such as in section 43 (a) and section 66 of the Information Technology Act, 2000 where conduct in the statute book and the conduct in the real cyber world are different. It is seen that the framing of section 43 (a) and Section 66 of the Information Technology Act, 2000 is totally based on the *traditional* notion of the behaviour regulation. The realities in the cyberspace must be identified by involving the experts in the Law making. It has a direct connection with the constitutionality of the Act of 2000 as we have seen above, mentioned cases in the USA where sensitivity of judiciary for the rights of people in the cyber-world is seen. Shreya Singhal case, as referred above has set a parameter with respect to the legislative power in terms of cyberspace and will be a good precedent to look into the aspects of lack of clarity in law.

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SOCIOECONOMIC RIGHTS: ADDRESSING THE QUESTIONS ON THEIR JUSTIFICATION AND ENFORCEMENT

Saheb Chowdhury[*]

What are the responsibilities and obligations of the State towards its people? Is it merely to guarantee civil and political rights and liberties, or does it also extend to guaranteeing entitlements to certain goods and minimum social and economic necessities, which are also known as minimum decencies and standards of life? Although these are not novel questions, the debate hasn't been conclusively settled yet and needs to be talked about even more especially in the light of the ever increasing economic and social disparities. India has witnessed rapid economic growth in the recent past. However, it has also seen massive rise in inequality between the rich and the poor. While the wealthy accumulate more and more wealth, the poor, the vulnerable and the marginalized are deprived of the basic necessities like housing, livelihood, access to quality education and health care services etc. The numbers tell the stories of inequality even better. As per Oxfam India ten percent of Indians hold seventy-seven percent of the total national wealth.[1] While the richest one percent garnered seventy-three percent of the wealth generated

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[1] *Id.*

in the year 2017, the poorest half of India had seen a growth of mere one percent in their wealth.[2] Oxfam India's Inequality Report, 2021 depicts a similar story of inequality in healthcare.[3] This detailed report shows how socioeconomic inequalities in India are disproportionately affecting the health outcome of the marginalized and the vulnerable sections of the society and particularly that of Scheduled Castes and Scheduled Tribes, Muslims, the Poor, Women, Rural Population etc.[4] [5] Another report by the Azim Premji University on how COVID 19 pandemic and the subsequent lockdowns have affected the people show that there has been an increase in the number of individuals, who fell below national minimum wage threshold, by 230 million further worsening the inequalities in the country.[6] Does the State then not have a moral, political and most importantly a legal obligation to reduce such extreme inequalities among its people or should it leave the fate of the people to the vagaries of market forces? Should the state be a passive spectator not bound by obligations to reduce such extreme inequalities? Does the jurisprudence of socioeconomic rights and their

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[2] https://www.oxfamindia.org/knowledgehub/workingpaper/ inequality-report-2021-indias-unequal-healthcare-story (last visited Aug. 16, 2021).
[3] *Id.*
[4] https://d1ns4ht6ytuzzo.cloudfront.net/oxfamdata/ oxfamdatapublic/ 2021-07/India%20Inequality%20Report%202021_ single%20lo.pdf? nTTJ4toC1_AjHL2eLoVFRJyAAAgTqHqG (last visited Aug. 16, 2021).
[5] Page number 116, State of Working India 2021, One Year of Covid, Azim Premji University. https://cse.azimpremjiuniversity.edu.in/wp-content/uploads/2021/05/State_of_Working_India_2021-One_year_of_Covid-19.pdf (last visited Aug. 17, 2021).
[6] ICCPR. art 7.

enforcement provide us with answers to these questions? An answer to that can be aptly started with a brief conceptual analysis of the idea of rights.

Basic Rights and Their Interdependence

A conceptual difference is often made between positive and negative rights based on their correlatives being a positive duty to do or a negative duty to abstain or not-interfere respectively. A similar difference in Human Rights is also made between Civil and Political Rights on the one hand and Socioeconomic Rights on the other based on a similar assumption that the former needs non-interference while the latter involves distributive interference on the part of State. For instance, the right against being subjected to torture, to cruel and inhuman punishment[7] or right not to be held in slavery or servitude[8] are examples of the former kind and the right of an individual to social security[9], education[10] and health[11] etc. are examples of the latter kind. However, a prominent political thinker Henry Shue, in his seminal work on 'Basic Rights'[12], has questioned such distinction as being improper by showing the presence of both positive and negative elements of duties in rights of all kinds.[13] He considers the Basic Rights as those which are essential for the enjoyment of all other rights alluding

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[7] ICCPR. art 8.
[8] ICESCR. art 9.
[9] ICESCR. art 13.
[10] ICESCR. art 12.
[11] HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY 18 (2d ed., Princeton University Press) (1996).
[12] *Id.* At page 35.
[13] *Id.* At page 19.

to the interdependence of rights.[14] He further considers this as a minimum reasonable demand everyone has upon the rest of humanity.[15] Similarly, Justice Albie Sachs, former Judge of Constitutional Court of South Africa also accepted and emphasized on the inseparability and interdependence of socioeconomic rights and civil and political rights.[16] The Universal Declaration of Human Rights, a foundational human rights document adopted in the aftermath of the horrors of the Second World War by the UN General Assembly[17] also made no such distinction among rights. However, this distinction can be seen in practice in the various national constitutions as well International Human Rights instruments. For instance, even in the Constitution of India a similar distinction exists prima facie between the enforceable Fundamental Rights[18] which broadly overlap with the various civil and political rights and the non-enforceable[19] Directive Principles of State Policy[20] which contains provisions that overlap with what are known as socio-economic rights. Further,

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[14] *Id.*
[15] Albie Sachs, Social and Economic Rights: Can They Be Made Justiciable?, 53(4) SMU LAW REV. 1381, 1382 (2000).
[16] Universal Declaration of Human Rights was adopted on 10th of December, 1948 https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Aug. 18, 2021).
[17] Fundamental Rights are contained in Part III of the Constitution of India.
[18] INDIA CONST. art. 37.
[19] Directive Policies of State Policy are contained in the Part IV of the Constitution of India.
[20] The ICCPR was adopted on 16th of December 1966 and came into force on 23rd March, 1976. https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited Aug. 18, 2021).

the emergence of two separate prominent international human rights treaties, i.e. the International Covenant on Civil and Political Rights (ICCPR)[21] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[22], were also based on this distinction. The main reason behind emergence of these two separate human rights treaties was the cold war era ideological differences between the east and the west bloc with the market economies of the west emphasizing on the civil and political rights and the planned economies of the east stressing on the socioeconomic rights.[23] This difference was based mostly on the liberal west's focus on individual liberty and private property and the socialist east's focus on collectivism, equality, re-distribution of wealth, planned economy etc. However, with the end of the cold war, there is the increasing recognition of the fact of interdependence of these rights meaning that realization of any one kind of these rights also requires the realization of other kinds of rights. This distinction as discussed here is the product of two different kinds of political and economic philosophies and has been elaborated in the next section.

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[21] ICESCR was adopted on 16th of December, 1966 and came into force on 3rd of January, 1976. https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (last visited Aug. 18, 2021).

[22] https://www.ohchr.org/en/issues/escr/pages/areescrfundamentallydifferentfromcivilandpoliticalrights.aspx (last visited Aug. 18, 2021).

[23] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 26 (Blackwell Publishers Limited) (1999).

Philosophical Arguments on the Legitimate role of the Government and the Distinction of Rights

The origin of the distinction of the Civil and Political Rights and the Socio-economic Right as discussed above and therefore the consequent legitimate role of the government can be differentiated based on the two prominent ideological positions; although it is not denied that there could be a spectrum of other positions apart from the extremes of these two positions. The first of these two is libertarianism or minimal state approach that believes in a very minimum role of the State and argues for non-interference in liberties of the citizens including property rights. For instance, Robert Nozick in Anarchy, State and Utopia (1974) tries to justify the idea of a minimal state which, according to him, is a natural outcome from anarchy.[24] More specifically in relation to property and distributive justice, the state, according to him, is not justified in taking away acquisitions if they have been acquired in accordance with the principles of justice in acquisition, transfer and rectification.[25] This means that property is legitimate if something that is not owned by anyone is acquired when this acquisition does not detriment others or if it is an outcome of voluntary transfer of ownership. One can also have legitimate property if it is an outcome of rectification of past injustices in acquisition and transfer. If these conditions of legitimacy are fulfilled then no matter how unequal the outcome is, the State is not justified in interfering to bring about equality, no matter how altruistic or

[24] *Id.* at 150.
[25] *Id.*

egalitarian its motive is. In essence his work is an answer and an attempted refutation of the idea of the idea of distributive justice as has been developed by John Rawls by grounding his own position on justness in terms historical conditions. The historical justification of entitlement requires, as described above, that a person acquires a holding in accordance with the principles of justice in acquisition, the principle of justice in transfer and rectification, which shall legitimize only her entitlement to the holding and no one else's.[26]

On the other hand, we have egalitarian thinkers who decide the justness of distribution of resources at a particular frame of time based on identified principles of justice and accordingly for them, the state is justified in bringing about such just distribution based on such principles. John Rawls's work in A Theory of Justice (1971) necessitates a mention here. In this work he tries to reconcile the two seemingly opposite ideas of liberty and equality. It is generally assumed that liberty and equality are necessarily opposite virtues and are not compatible with each other. He, however, conceives of a situation called original position[27], where from behind an imaginary veil of ignorance the parties to a social contract have to choose the principles that will govern them.[28] He essentially re-imagines the theory of social contract from a very neutral standpoint where one is unaware of one's advantages and disadvantages in the

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[26] JOHN RAWLS, A THEORY OF JUSTICE 102 (Harvard University Press, 1999).
[27] *Id.* at 52.
[28] *Id.*

society they are a part of. He, from this position, comes to the conclusion of two different principles of justice[29], the first being "*equal basic liberties of all which are compatible with similar scheme of liberties for others*"[30] and a part of the second principle being the difference principle according to which "*social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage*"[31]. Hence, the state is justified in changing property entitlement of someone if such changes are advantageous to the least well-off. So this approach, essentially, is different from the libertarian approach in the sense that it allows the interference of the state in bringing about justice in distribution here and now without fixating on historical factors. So, it appears that socio-economic rights seem to be possibly justifiable under the Rawlsian egalitarian approach but not under Nozickian libertarianism. Under the Nozickian libertarianism most of welfarist or even administerial activities of the state will not be justified as they would involve, according to the libertarian position, unjust taking away of entitlements, for instance in the form of tax on property, and their redistribution. However, would such a detached approach be justified in a world where there is, as mentioned at the outset, extreme income inequality between the poor and the rich: so much so

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[29] JOHN RAWLS, A THEORY OF JUSTICE 53 (Harvard University Press, 1999).
[30] *Id.*
[31] Himanshu, *India Inequality Report 2018: Widening Gaps*, OXFAM INDIA https://www.oxfamindia.org/sites/default/files/WideningGaps_IndiaInequalityReport2018.pdf. (Last visited June 21, 2018, 1:18 PM).

that the ones at the top can live a lavish and luxurious life without in any way seriously affected by the vicissitudes of market, environment and life generally protected by unimaginable amount of wealth and the ones at the bottom don't even have the basic minimum level of subsistence or its guarantee?[32] Can we say that a theory is a just theory if it chooses to be ignorant of human sufferings caused by massive inequities in wealth and income and is overly fixated on the historical factors? In my view it is not and hence there is a necessity of guaranteeing a bare minimum socioeconomic entitlement to its people by the State. Recognition of socio-economic rights further raises concerns about their enforcement as that involves important questions of distribution of limited resources and legitimacy of institutions.

Socioeconomic Rights and Their Enforcement

At this stage the next question that arises is that if we consider the existence of socio-economic rights, which branch of the government is to enforce it? Enforcing socioeconomic rights have resource implications. If resources were unlimited this debate would not even exist. Limited availability of resources therefore raises the question of the process of distribution. Some constitutions consider socioeconomic rights as a kind of

[32] The Constitution of India is one such example that has directive principles of state policy which are considered fundamental in the governance of the country but non-enforceable in the courts as explained in Article 37 of the Constitution.

commitment of the state to be progressively realized[33] as it becomes capable of and keeping it unjustifiable in the court of law; while some others make it justifiable[34] in the court of law. The Constitution of India, for instance, has under its various Directive Principles of State Policy provided for various ideals of socioeconomic justice to be achieved by the state like free education, livelihood, level of nutrition, standard of living etc.[35] The same, however, has been made non-enforceable in the courts.[36] However, various rights, like right to life and other liberties and freedoms, guaranteed as 'Fundamental Rights' under Part III of the Constitution has been made enforceable. Among many other reasons for the above distinction, one is that judiciary is not considered to be the right institution for enforcement of socioeconomic standards inscribed in Directive Principles and also that it should be left to the legislature to progressively implement and realize the said ideals. Besides that, it is assumed that because socioeconomic rights, as mentioned earlier, would also involve distribution and redistribution of limited resources. These are considered as matters of policy and so it is not within the institutional capacity of the judiciary to enforce or implement them. The said distinction is similar to Ronald Dworkin's distinction

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[33] The Constitution of the Republic of South Africa in its Bill of Rights in Chapter 2 not only recognizes civil and political rights but also socio-economic rights including Housing Rights under Article 26 and Health care, Food, Water and Social Security under Article 27. https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf

34 INDIA CONST. art. 39, 39A, 41, 42, 43, 47.

[35] *Supra* Note 19.

[36] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (Harvard University Press) (1978).

between principle and policy made in 'Taking Rights Seriously (1978)'.[37] For him arguments of policy are those that advance or protect some collective goal of the community as a whole, whereas, arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right.[38] Because the ideals set in Directive Principles of State Policy seem to be welfarist and goal oriented, they seem to be best left to the legislature for implementation. This distinction could also be seen in John Rawls's two principles of justice in which he evidently prioritizes principle of equal liberty over the difference principle dealing with socio-economic inequalities.

A Liberal View of Enforcement

Frank I. Michelman, in "The Constitution, social rights and liberal political justification", identifies and responds to objections to the inclusion of socio-economic rights in a constitution.[39] A brief elaboration of how he deals with the problem of including socioeconomic rights in a constitutional bill of rights is necessary here. In this work he identifies three important objections to it, namely, institutional, majoritarian and contractarian objections. Institutional objection is about judiciary being not the right institution for enforcement of such rights. Secondly, the democratic or majoritarian objection assumes that adding of social rights to the constitution

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[37] *Id.*
[38] Frank I. Michelman, The Constitution, Social Rights, and Liberal Political Justification, INT. J. CONST. LAW 13, 25 (2003).
[39] John Rawls, *The Idea of Public Reason Revisited*, U. CHI. L. REV 765, 765 (1997).

will unduly restrict the policy choices in a democracy where the same should be left for the elected representatives to make. And thirdly, the contractarian objection means that constitution which is an outcome of a social contract, if it includes socioeconomic rights, it will always lead to dissatisfaction about their implementation because they lack the kind of transparency which is there in enforcement of other negative liberty rights. It basically assumes that the matter of social rights is too indeterminate and subjective for rational citizens to agree on any specific content of it. Hence, the same should not be incorporated in a constitution, as rational citizens acting reasonably might disagree about whether the said principles are being followed. Michelman tries to provide a justification from the liberal political perspective by taking up the idea of public reason[40] as was developed by John Rawls. Whereas, according to Rawls certain negative liberties like freedom of expression and conscience are definitely at the centre but a fully legitimating constitution would also include certain other substantive social rights which are looser rights then the former. It basically means that rather than them being enforceable rights in the courts of law they could be directive principles which cannot be ignored by those who participate in the political process as a kind of constraint on public reasoning. Secondly, a looser idea of social right would also escape the democratic objection because the same will not substantively constrain the policy choices in a democracy.

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[40] *Supra* Note 19.

In India, although Directive Principles of State Policy have been made non-justiciable.[41] The Judiciary has, however, in its post-emergency jurisprudence taken up a very activistic role in the protection of the ideals present therein by giving an expansive interpretation to the 'Fundamental Rights'. Examples of the same would include *Francis Coralie Mulin v. Union Territory of Delhi*[42], *Olga Tellis and ors Vs. Bombay Municipal Corporation and ors*[43], *PUCL v. Union of India*[44] *etc.* A very wide meaning has been given by the Supreme Court to Article 21 and Right to Life has been held to mean a dignified life that included food, shelter, education, livelihood etc. The court has in the above and various other judgments made a minimum content of these above needs to be prioritized over other goals of the government. Although, the outcomes of the above judgments have been much appreciated, they apparently fail the test of the democratic objection as discussed above.

On the other hand, Natasha G. Menell shows that the democratic objection could be avoided by showing the approach taken by the courts in South Africa.[45] Here the court instead of guaranteeing individualized remedies to citizens, the socioeconomic rights have been considered

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[41] Francis Coralie Mulin v. Union Territory of Delhi, (1981) SCR (2) 516 (India).
[42] Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors., A.I.R.1986 S.C. 180 (India).
[43] People's Union For Civil Liberties v. Union Of India & Ors., WP (C) No. 196 of 2001 (India).
[44] Natasha G. Menell, Judicial Enforcement of Socioeconomic Rights: A Comparison Between Transformative Projects in India and South Africa, CORNELL INT. LAW J 723, 732 (2016).
[45] Government of the Republic of South Africa. & Ors v. Grootboom & Ors., (2000) (11) BCLR 1169 (South-Africa).

to be constitutionally derived check on policy-making. The difference is probably that in this case policy making still remains in the domain of the elected representatives and the socio-economic rights on the other hand becomes a restriction on the policy choices. In *Republic of South Africa v. Grootboom,*[46] *Soobramoney v. Minister of Health, KwaZulu-Natal*[47] etc. it can be seen that the court, instead of providing personalized remedies, directed the government to come up with policies or refused to declare as unconstitutional policies that are in violation of constitutional rights. What is noticed here is that although the court tries to protect these rights it is not done at the cost of due deference to the legislative branch. And because the judiciary here has not made any such policy decisions, it also escapes the second contractarian objection which the Indian judiciary does not.

These above point of views are however predicated on the existence of at least a reasonably functioning democratic system in which there is a sense of approximate political equality of people and participation in the democratic political process. Realities quite often veer far off of this depiction.

The Question of Enforcement in an Unequal, Corrupt and Non-ideal Democracies:

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[46] Soobramoney v. Minister of Health, KwaZulu-Natal, (1998) (1) SA 765 (CC) (South-Africa).
[47] https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_27825_Judgement_30-Apr-2021.pdf (Last visited Aug 22, 2021).

So far in this discussion it can be seen that the idea of rights has been discussed from a modern liberal democratic perspective in which, at the least, an equal participation in the democratic process is considered to be a given. However, the same might not be true everywhere. So what happens when a significant portion of the population is so steeped in poverty, deprivation from food, shelter, basic healthcare, a minimum wage and education that it is unimaginable that they are able to meaningfully participate in the democratic process. It is also not necessary that such a system always works itself pure to be more inclusive and participative democratic system. Further, even a democratic system with all its merits do not necessarily lead to justice and equity for the vulnerable sections of the society. There could be many factors like, corruption, general apathy, polarization and divisiveness in the society and similar other factors that could further disenfranchise the voices of the marginalized and the most vulnerable sections of the society whose basic interests require protection. Will a liberal democratic theory be able to protect their rights to basic necessities of life? In such a scenario should the judiciary still deferentially defer the questions of socio-economic rights to the elected legislature and the executive? Such a deference may have the effect of leaving the vulnerable without any protection whatsoever from the apathy and inefficacy of the government and the court is justified to interject to ensure protection of the rights and interest of the vulnerable people. A recent example in substantiation of the point being made here is the position taken by the Supreme Court of India with

respect to vaccination policy[48] of the central government for people in the age group of 18 to 44 to pay for the vaccine as 'arbitrary[49], irrational'[50] which shall affect the right to health[51] of the people of this age group. It also said that the court, as the Constitution requires, shall not be a silent spectator when the policies of the executive infringe the constitutional rights of citizens.[52] This nudge from the Supreme Court of India had the effect of the government changing its vaccination policy to procuring 75 percent of vaccines made in the country and giving them to the states for free in order to vaccinate all adults.[53] [54]

Similarly, judge Dennis M Davis of High Court of South Africa doesn't think that the court should be over-deferential. He, in his article titled "Socioeconomic Rights: Do they deliver the goods?", suggests that a due

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[48] https://www.thehindu.com/news/national/sc-directs-centre-to-place-on-record-documents-file-notings-on-covid-19-vaccination-policy/article34708361.ece (Last visited Aug 22, 2021).
[49] https://indianexpress.com/article/india/supreme-court-asks-govt-for-a-vaccine-roadmap-calls-policy-for-18-44-to-pay-arbitrary-irrational-7341605/ (Last visited Aug 22, 2021).
[50] https://www.theleaflet.in/centres-vaccination-policy-sc-warns-digital-divide-will-impact-right-to-health-of-those-in-18-44-age-group/ (Last visited Aug 22, 2021).
[51] https://www.newindianexpress.com/nation/2021/jun/03/court-not-a-silent-spectator-when-citizens-rights-are-infringed-sc-2311056.html (Last visited Aug 23, 2021).
[52] https://www.hindustantimes.com/india-news/before-pm-modi-changed-covid-vaccine-policy-a-nudge-from-the-supreme-court-101623134442210.html (Last visited Aug 22, 2021).
[53] https://www.thehindu.com/news/national/prime-minister-narendra-modi-addresses-the-nation-on-june-7-2021/article34753292.ece?homepage=true (Last visited Aug 22, 2021).
[54] Dennis M Davis, *Socioeconomic Rights: Do they deliver the goods?*, 6 INT. J. CONST. LAW 687, 701 (2008).

deference to the legislative and executive branch is ineffective in certain circumstances.[55] In this important piece of work he discusses about the inclusion of socio-economic rights in South African Constitution and the role played by the government and the judiciary in upholding and protecting these rights. He first gives us detailed account of the background in which the socioeconomic rights became part of the Constitution of South Africa. He tells us the role played by Albie Sachs in fusing substantive equality with that of formal equality and how this argument for substantive equality and questions of re-distribution made their way into the South African Constitution with the inclusion of Social and Economic Rights.[56] [57] He explains that this was necessary because of South Africa's experience with racism, poverty and the resultant unequal distribution of wealth on the racial lines.[58] He then inquires into the role and approach of the Constitutional Court in some of the most important cases on socioeconomic rights and observes that although these rights have been made enforceable, the constitutional court in some initial important cases instead of guaranteeing a minimum core protection of rights deferentially deferred them to the legislative branch for them to take reasonable legislative measures within the limited resources available and for

[55] *Id.*
[56] Sec 26, 27 and 29 of the Constitution of the Republic of South Africa consists of some of the most important socioeconomic rights. https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf (Last visited Aug 23, 2021).
[57] *Supra* Note 55.
[58] *Supra* Note 46.

their progressive realization.[59] [60] Judge Dennis suggests that such deference might be an outcome of the Indian experience of the tussle between the Nehru government and the judiciary over property rights. He, however, suggests that a minimum core based approach is taken that obliges the government to ensure, as much as possible, enjoyment of these rights within the availability of limited resources, which is also in consonance with the International Law approach. According to him, this unwillingness on the part of the court has led to the abdication of this power of enforcement of socio-economic rights when it could have actually made the government accountable for the realization of the obligations inscribed in the constitution. His claim is that too much deference to the legislative branches might over-expose the vulnerable to the uncertainties of the political process. Criticising the approach of reasonableness as developed by the South African constitutional court, Judge Dennis has asserted that a minimum core of socioeconomic entitlements should be made available and realized now and the court should play a supervisory role in its enforcement as well when the same could be ignored by the other departments. Moreover, according to him such basic minimum essential entitlement will not depend on the argument of availability of resources and that progressive realisation shall happen over and above the bare minimum. Even when the resources are scarce it shall still be the

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[59] *Supra* Note 47.

[60] Rehan Abeyratne, Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy, BROOK. J. INT'L L. 1, 50 (2014).

obligation of the States to ensure the availability of the minimum core. A total capitulation to the reasonableness principle and complete deference to the legislative and executive would mean making the socioeconomic rights almost ineffectual. For him dignity, equality and freedom will have meaning only if socioeconomic conditions of the people are improved. And hence, the judiciary should enforce these rights in the light of the history, social conditions and the goals as inscribed in the constitution and when the people are disenfranchised, the judiciary can do its part to enfranchise them thereby protecting their dignity.

Similarly, Rehan Abeyratne argued that because of the peculiar problem of corruption plaguing the government and utter inefficacy of the elected branches to provide even the basic needs has further increased the democratic legitimacy of the court as it is the court that has made the elected branches accountable.[61]

Prof. Upendra Baxi while describing an activist judge[62] said that an activist judge does not always look for legitimation from the holders of executive power or of economic power; she rather looks for social legitimation from the deprived, disadvantaged and the dispossessed groups of society.[63] Further, in "Taking Suffering Seriously: Social Action Litigation in the Supreme Court

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[61] Upendra Baxi, *On Being An 'Activist' Judge Not Just An 'Active' One!* http://upendrabaxi.in/documents/On%20being%20an%20activist%20judge%20not%20just%20an%20active%20one.pdf.
[62] Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, 4 THIRD WORLD LEG. STUD. 106, 108 (1985).
[63] *Id.*

of India" he highlights a transition in the attitude of the Supreme Court of India in the post emergency period.[64] The Judiciary, which had a history, during the emergency period, of being subservient to the State, had started taking the rights of the suffering masses seriously and a new form of litigation, which Baxi calls SAL or Social Action Litigation had arisen. A court which had followed the doctrine of separation of power and restricted itself to merely adjudicatory functions had now ventured into administrative functions as well for the protection of the rights and doing justice to the deprived, disenfranchised and the marginalized. Baxi attributes this change to the fact that some of the judges who had earlier given judgments in favour of the establishment during the emergency period were trying to make amends for their perceived misstep. This had an effect leading to the creation of Social Action Litigation or SAL. Although such a development might be called an aberration, Baxi calls it a case of juridical democracy[65] i.e. democratization by the judiciary using its judicial power. This development brought justice to the most marginalized sections of the society in India. He said that the justification for the emergence of SAL can be found in "*the distinctive social and historical forces that shaped it*"[66]. He further says that because of the failure on the part of the legislature and executive, the Supreme Court has been able get social legitimation of this new function taken up.[67] He finds justification of SAL finally in the fact

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[64] *Id.*
[65] *Id.* at 110.
[66] *Id.* at 127.
[67] Mark P. McKenna, *Trademark Use and the Problem of Source*, University of Illinois Law Review, Vol. 2009, No. 3, p. 773 (2009).

that in the light of never ending injustice and tyranny the judiciary has been the only institution which had taken people's sufferings seriously.

The question of enforcement of socio-economic rights then has to be taken seriously by the Courts when the vulnerable and marginalized sections of the society are not able to meaningfully participate in the democratic process. The basic rights in the form of fulfilling the core aspects of socioeconomic rights then must be judicially enforced as it is only then that vulnerable population will have a substantial existence in the polity.

Conclusion

In the light of the above discussion, it is reiterated that the relationship between rights and democracy is of critical importance. A democracy will not survive and flourish without the guarantee of basic rights. Civil and Political Rights and liberties are indispensable aspects the democratic process. However, socioeconomic rights are of no less importance for a healthy and participative democracy. A hungry, sick, under-educated and disenfranchised populace cannot fully participate in the democratic process and guarantee of the core aspects of Socioeconomic Rights are a protection against these threats to dignified human against. Further Socioeconomic Rights cannot be wholly contingent on the political process and a basic minimum core of socioeconomic entitlement has to be guaranteed and enforceable. The protection of a minimum core of such rights should also be an important function played by the judiciary so as to shield the vulnerable from uncertainties and vagaries of the political process.

Therefore, these should be made justiciable in the court of law. Judicial enforcement of core aspects of socioeconomic rights is all the more justified because of the vices of corruption, governmental inefficacy and apathy towards citizens that obstruct the democratic process. Moreover, a judicial enforcement of socioeconomic rights also has the potential to increase the accountability of the elected branches of the government by infusing in them a sense of legislative and governmental responsibility. This position could be aptly concluded with the following quote:

> *"We do not want freedom without bread, nor do we want bread without freedom"*
>
> - *Nelson Mandela*

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TRACING LEGAL STATUS OF INDIAN WOMEN: FROM VEDIC TILL CONTEMPORARY TIMES

Eramala Dayal[*]

"Prajanrtham Mahabhagah Poojaraha Grihadeeptayah; Striyashcha Geheshu Na Vishesho'sti Kashchana - (Chapter 9, 26th Verse, Manusmriti)"[1]

> O Men! Women are great blessings for they bear children, and they are worthy of worship, the light of the house, and the fortune of the family. There is no difference between Shriyah, that is, auspiciousness, beauty, wealth and women.

Introduction

With these noble thoughts as expressed in Manusmriti, the researcher initiates this research journey to trace legal status of Indian women. This research paper has been divided in three parts by the author. In first part the the author shall undertake doctrinal research for tracing legal status of women in India from Vedic period till our independence. In second part the author shall modestly attempt to analyse International legal regime

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[1] Surendra Kumar, The Manusmriti, English Translation by PT. Satyaprakash Beegoo, 462, Govindram Hasanand, Delhi, 2022

related to women. In third part the author shall conduct e survey from a sample size of approximately 100 respondents encompassing legal fraternity in particular and other stakeholders of society.

Research Methodology

The researcher shall adopt both doctrinal as well as non doctrinal research methodologies.

Objective

The objectives of this research paper undertaken by the author are as follows:

- To trace legal status of Indian women from Vedic till contemporary times.
- To understand root causes of deterioration of legal status of Indian women.
- Try to analyse lacuna in our domestic legal regime and thereby make modest suggestions for improvising legal status of Indian women in contemporary ties.
- To trace relevant judicial pronouncements which have contributing in empowerment of women in Indian society.

Hypothesis

I. Legal Status of Indian women has deteriorated post Vedic period.
II. Our contemporary domestic legal regime is at par vis a vis international legal regime for safeguarding human rights of women.

Significance of this research journey

This modest effort by the author can in a small but significant manner contribute towards effectively safeguarding human rights of Indian women. Women belong to vulnerable group and it is responsibility of all stakeholders of society to proactively protect and empower them.

Through this paper the researcher shall attempt to identify relevant efforts by our legislature and judiciary in safeguarding and uplifting status of Indian women.

Hypothesis I: Legal Status of Indian women deteriorated post Vedic period.

The author undertakes both doctrinal research journey and conducts an e survey for testing her first hypothesis. Excerpts from Rigveda, Ramayana, Mahabharata and Manusmriti have been referred for this test.

Rigveda

According to Dr. Justice Seghal and Journalist Kurshid, women in vedic period were treated equally and at par with men in all walks of life.[2] The researcher has traced relevant hymns of Rigveda[3] supporting this thought process and reproduced few of them verbatim underneath:

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[2] Justice Sangita Dhingra Sehgal and Hasan Khurshid, Women Know Thyself, 1, Universal Law Publishing, Gurgaon, 2016.
[3]https://archive.org/stream/rigvedacomplete/Rig%20Veda%20Complete%20%28Sakala%20Shakha%29_djvu.txt, retrieved on 23.10.22

- “Aditi is the heaven, Aditi is mid-air, Aditi is the Mother——-.”
- “Aditi is all Gods,————”
- “May Aditi the Goddess guard us with the Gods; may the protecting God keep us with ceaseless care. This prayer of ours may Yaruna grant, and Mitra, and Aditi and Sindhu, Earth and Heaven.”
- “May Goddess Aditi with Gods defend us, save us the saviour God with care unceasing.”
- “May Aditi defend us, may Aditi guard and shelter us, Mother of wealthy Mitra and of Aryaman and Yanina.”
- “May Aditi the perfect Goddess aid us. Loud may we speak, with heroes, in assembly.”

These hymns glorify women as mother, creator, protector and thus worshipped her as devi. From the above hymns of Rigveda, the researcher gathers that women occupied a vital position during the rigvedic period.

Presence of female characters in epics Ramayana and Mahabharata

The author now takes this research journey further by tracing heart touching instances of empathetic behaviour of Lord Rama towards various female characters in the epic Ramayana:

Sage Gautama’s Wife: Sage Gautama’s wife had been literally petrified and turned into a stone due to a curse. Lord Rama was not judgemental towards her. He freed her from the curse and reinstated her again as sage’s wife.

Shabri: The intent of a gift matters more than its content:

When Rama came before Shabri, her joy knew no bounds. Offering Rama and Laxmana a seat, Shabri proceeded to offer them the best of her berries. She tasted them and offered the sweet ones to the brothers. Here Rama was not taken aback about contaminated berried. He saw beyond them to the purity of heart of Shabari. Appreciating Shabari's pure intention to offer him the best berries, he accepted and ate them. He savoured both, the berries' sweetness and Shabari's devotion.

Tara - wife of Vali: After the death of Vali, Lord Rama ensured that his widow Tara was given a place of dignity in the Kishkinda palace.

Forsaking Sitaji: The author very cautiously attempts to explore this unfortunate incident of Lord Rama abandoning Sitaji. The author acknowledges that Lord Rama's forsaking Sitaji is perhaps epic Ramayana's most challenging incident wherein a King has abandoned his pregnant wife because of baseless and unproven accusations. The author herewith refers to Chaitnaya Charan's thoughts as reproduced by him in his book Wisdom From the Ranayana - On Life and Relationships states The eponymous epic declares Rama the ideal person. A person who abandons his pregnant wife can hardly be considered ideal. But a person who consistently demonstrates the virtue of selflessness, no matter what it costs him - even if it costs him separation from the pregnant wife - that person is extraordinary.

Exhibiting a stoic spirit of sacrifice, Rama deemed his duty as king more important than his duty as a husband, and so he sent away Sitaji to the forest in his kingdom - whereby Sitaji lived in Vamiki's hermitage and where the matronly female hermits took care of her and helped her to take care of her children.

The author further traces vital status of women in Ramayana by stating that as a wealthy King, Rama could have remarried after abandoning Sitaji. But he did not do so since he had promised Sitaji that she would be his only wife. By upholding this promise and pledge, lifelong, Lord Rama has shown love and respect for his beloved wife.

If Lord Rama had wanted to remarry, he could have given up his pledge on the grounds of religious duty - as a king he had to perform sacrifices with his wife for welfare of his kingdom. He respectfully but firmly refused to remarry when priests pointed out that he should remarry. He honoured the traditional requirement by making a golden image of Sitaji and seating it besides him during sacrifices. By this gesture, Lord Rama proclaimed that he still considered her his beloved wife.

On analysing above mentioned four heart touching incidents of Ramayana, the author gathers that Lord Rama was having emphatic nature and women were well cared of and protected in epic Ramayana. The researcher further supports this statement with empirical research conducted amongst a sample size of approximately 100 respondents, reproduced graphically in the third part of her paper.

The author now moves this research journey further by mentioning prominent roles of female characters in the epic **Mahabharata:**

Ganga: Shantanu pleaded with Ganga to marry him. Ganga agreed, but she set a condition, "I will marry you, but no matter what I do, you should never ask me why I am doing it"[4].

From this incident the author mentions that even in ancient times, the women in our epics were assertive and did put forth conditions for marriage.

The researcher refers author Badrinath's views regarding status of women in Mahabharata and has reproduced them verbatim below:

"Women are present throughout the Mahabharata not as listeners but equally as teachers. They are portrayed with utmost respect, as teachers of mankind."[5]

Now the researcher reproduce relevant verses from Mahabharata referring to vital status of women:

"Where women are honoured, there the Gods reside, where they remain not honoured, there nothing can bear fruit." - Verse 46.

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[4] https://isha.sadhguru.org/us/en/wisdom/article/mahabharat-ep5-shantanu-meets-ganga, as retrieved on 23.10.22

[5] Chaturvedi Badrinath, The Mahabharata - An Inquiry In The Human Condition, , 20, Orient Longman, 2007.

Status of Mother:

"In status greater than ten scholars is the teacher and the preceptor, higher than ten preceptors is the father, and higher than ten fathers is the mother: she is higher in status than the entire Earth. There is no guru greater than the other." - Verse 105.15

Property Rights of Daughter

- "In the money and property of a woman inherited from her father, the daughter has a right as the son has, because as a son so the daughter. Daughter is like son - this is the established principle." - Verse 47.25
- "In a daughter the goddess of prosperity lives always. She is established in her always. A daughter is glorious, endowed with all that is good, to be honoured at the beginning of every god work." - Verse 5546
- Just as a precious jewel makes everything worthy, a daughter is like the great goddess of good fortune, for everything good in this world." - Verse 5564

Kunti:

- Kunti's maturity and foresight, the ability to observe life closely and use the learning from experiences to arrive at swift decisions benefiting her children can be traced from the following event of Mahabharata when she in agreement with Lord Krishna urges Yudhisthira to fight for what his rightfully Pandavas. She encourages Krishna, who has come on a peace-embassy, to urge Yudhishthira to fight for their

rights as Kshatriyas must. The researcher has verbatim reproduced the relevant verse here[6]:

"*Can anything be more humiliating than that your mother, friendless and alone,*

should have to eat other's food?

Strong-armed one, recover the ancestral paternal kingdom

use gentleness, dissent, gifts, force or negotiation.

Follow the dharma of rajas, redeem your family honour.

Do not, with your brothers, watch your merits waste away."

—V.132.32-34

- Also Kunti's admirable role as a mother in law can be traced when she reprimands the Pandawas post Draupadi's failed disrobing event by Kaurava Dushahshan in the presence of everyone. The researcher once more verbatim reproduces the relevant verse to add emphasis to her article[7]:

"*The princess of Panchala followed all dharmas, yet in your presence they mocked her—*

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[6] http://www.manushi-india.org/pdfs_issues/PDF%20143/05%20Panchkanya%2025-33%20%202-9.pdf, as retrieved on 23.10.22

[7] *Id.*

how can you ever forgive this insult?
The kingdom lost did not hurt me,
the defeat at dice did not hurt me;
the exile of my sons did not hurt me
so much as the humiliation of Draupadi weeping in the sabha as they mocked her.
Nothing more painful than that insult."

—Udyoga Parva V.137.16-18.

- Kunti shows the right path to her son Yudhishthira:
  Relevant event: Saving their Brahmin host's life from, man eating rakshasha by the name of Baka.

"The Kshatriya who helps the one devoted to learning and knowledge obtains the highest blessings. This I believe."

- Verse 161.22

Draupadi:

- The researcher traces role of **Draupadi as an efficient treasurer** from her following dialogue with Satyambha:

Draupadi-Satyabhama Samvada -

"And while my husbands were engaged in the pursuit of virtue, I only supervised their treasury

inexhaustible like the ever-filled receptacle of Varuna."[8]

- Draupadi's arguments directed towards Yudhishtira for regaining through war what they had been dishonestly deprive of by Kaurava's:
  "Seeing what we are reduced to, and its injustice, how can you not be angry? How can you have feelings of forgiveness towards the enemies? A Kshatriya who does not use force when time demands it, invites from everybody contempt alone."[9]

- "One should neither be always gentle nor be always forceful; rather, according to the different contexts, Kesha and kala, one should be gentle and then forceful. There is a time for forgiveness; and there is a time for force."[10]

From the above suggestions given by Draupadi to Yudhisthira, the author is in complete agreement with author Badrintahji that in the Mahabharata, the wife is often seen as protecting the husband from his wholly mistaken notions of one thing or another concerning life.[11]

Gandhari: Gandhar tries to reason with her son Duryodhan to avoid war:

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[8] https://www.sacred-texts.com/hin/m03/m03231.htm, as retrieved on 23.10.22
[9] *Id* 144
[10] *Id* 147
[11] *Id* 357

"There is no good in war, dear son, nor any holding together in foundations of life. Where can there be in a war any happiness? Nor is there any certainty of victory in every war. Therefore, do not put it in your thoughts and expectations." - Verse 129.40

Kayavya the robber

In his address to an assembly of nearly one thousand robbers, the disciplined robber agrees to become their leader on following conditions:,

"You shall never kill a woman, a child or an ascetic. Nor kill anyone not in combat with you. You shall never hold a woman by force." - Verse 135.13

From the above mentioned samavads, verse of Mahabharata, views of authors and empirical research conducted by the author- which has been graphically analysed in the last part of this paper, one gathers that women in epic Mahabharata have been portrayed as wise, assertive, judicious, efficient managers and treasurers of kingdoms, loving and nurturing mothers. Also substantive offences against women as defined in Indian Penal Code are in tune with above reproduced verse 135.13 of Mahabharata. Also our Article 51A(e) of Part IVA of Indian Constitution can be considered as its extension.

Conflicting portrayal of status of women in Manusmriti

The researcher shall now reproduce certain verses from Manusmriti which depict that women held important status in society. Then the author shall also trace few

verses from Manusmriti[12] which portray quite derogatory status of women.

Verses which pay homage to women

चक्रिणो दशमीस्थस्य रोगिणो भारिणः स्त्रियाः ।

स्नातकस्य च राज्ञश्च पन्था देयो वरस्य च ॥ १३८ ॥

cakriṇo daśamīsthasya rogiṇo bhāriṇaḥ striyāḥ |

snātakasya ca rājñaśca panthā deyo varasya ca || 138 ||

Way should be made for one in a chariot, for one who is in the tenth stage of life, for one suffering from disease, for one carrying a burden, for a woman, for the person who has just passed out of studentship (snataka) (graduate), for the king and for the bridegroom.—(138)

सूक्ष्मेभ्योऽपि प्रसङ्गेभ्यः स्त्रियो रक्ष्या विशेषतः ।

द्वयोर्हि कुलयोः शोकमावहेयुररक्षिताः ॥ ५ ॥

sūkṣmebhyo'pi prasaṅgebhyaḥ striyo rakṣyā viśeṣataḥ |

dvayorhi kulayoḥ śokamāvaheyurarakṣitāḥ || 5 ||

The women shall be specially protected even from the slightest evil inclinations because if they are not guarded they will certainly bring sorrow on two families.

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[12] https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc199606.html

इमं हि सर्ववर्णानां पश्यन्तो धर्ममुत्तमम् ।

यतन्ते रक्षितुं भार्यां भर्तारो दुर्बला अपि ॥ ६ ॥

imaṃ hi sarvavaṃṇānāṃ paśyanto dharmamuttamam |

yatante rakṣituṃ bhāryāṃ bhartāro durbalā api || 6 ||

Considering it the highest duty, the husbands shall endeavour to protect their wives even if they themselves are weak. The protection of women of all Varnas is indeed the highest duty.

काममामरणात् तिष्ठेद् गृहे कन्यार्तुमत्यपि ।

न चैवैनां प्रयच्छेत् तु गुणहीनाय कर्हि चित् ॥ ८९ ॥

kāmamāmaraṇāt tiṣṭhed gṛhe kanyārtumatyapi |

na caivaināṃ prayacchet tu guṇahīnāya karhi cit || 89 ||

Well might the maiden, even though she may have reached puberty, remain in the house till her death; but the father shall never give her to a man destitute of good qualities.—(89)

अनपत्यस्य पुत्रस्य माता दायमवाप्नुयात् ।

मातर्यपि च वृत्तायां पितुर्माता हरेद् धनम् ॥ २१७ ॥

anapatyasya putrasya mātā dāyamavāpnuyāt |

mātaryapi ca vṛttāyāṃ piturmātā hared dhanam || 217 ||

If a son who has no wife and no issues dies, then his mother shall inherit his property, and if the mother also is no more, then the grandmother shall take his property.

द्यूतं च जनवादं च परिवादं तथाऽनृतम् ।

स्त्रीणां च प्रेक्षणालम्भमुपघातं परस्य च ॥ १७९ ॥

dyūtaṃ ca janavādaṃ ca parivādaṃ tathā'nṛtam |

strīṇāṃ ca prekṣaṇālambhamupaghātaṃ parasya ca || 179 ||

He shall also avoid gambling, idle gossips, back biting and lies - falsehood and also starring and touching women and hurting others.—(179)

मातरं पितरं जायां भ्रातरं तनयं गुरुम् ।

आक्षारयंशतं दाप्यः पन्थानं चाददद् गुरोः ॥ २७५ ॥

mātaraṃ pitaraṃ jāyāṃ bhrātaraṃ tanayaṃ gurum |

ākṣārayaṃśataṃ dāpyaḥ panthānaṃ cādadad guroḥ || 275 ||

He who defames his mother, his father, his wife, his brother, his son and his teacher- spiritual master by the use of abusive language and he who does not give way to his guru shall be fined one hundred panas.

न माता न पिता न स्त्री न पुत्रस्त्यागमर्हति ।

त्यजन्नपतितानेतान् राज्ञा दण्ड्यः शतानि षट् ॥ ३८९ ॥

na mātā na pitā na strī na putrastyāgamarhati |

tyajannapatitānetān rājñā daṇḍyaḥ śatāni ṣaṭ || 389 ||

Neither the mother, nor the father, nor the wife, nor the son are worthy to be deserted; he who desserts them, though they are not degraded, he shall be fined six hundred panas by the king.—(389)

यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।

तस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ॥ १३० ॥

yathaivātmā tathā putraḥ putreṇa duhitā samā |

tasyāmātmani tiṣṭhantyāṃ kathamanyo dhanaṃ haret || 130 ||

The son is as one's own self, and the daughter is equal to the son; hence so long as she is there in her own real character, how can anyone else take his property?—(130)

पुरुषाणां कुलीनानां नारीणां च विशेषतः ।

मुख्यानां चैव रत्नानां हरणे वधमर्हति ॥ ३२३ ॥

puruṣāṇāṃ kulīnānāṃ nārīṇāṃ ca viśeṣataḥ |

mukhyānāṃ caiva ratnānāṃ haraṇe vadhamarhati || 323 ||

For stealing from noble families, and specially women, and also regarding the theft of precious gems, the thief deserves corporeal or even capital punishment.

जीवन्तीनां तु तासां ये तद् हरेयुः स्वबान्धवाः ।

तांशिष्यात्चौरदण्डेन धार्मिकः पृथिवीपतिः ॥ २९ ॥

jīvantīnāṃ tu tāsāṃ ye tad hareyuḥ svabāndhavāḥ |

tāṃśiṣyātcauradaṇḍena dhārmikaḥ pṛthivīpatiḥ || 29 ||

The virtuous king must teach a lesson, that is, shall punish those close relatives who try to rob and appropriate the property of those women, and the punishment to be meted to them shall be of the same weight which is given to the thieves. —(29)

कूटशासनकर्तॄंश्च प्रकृतीनां च दूषकान् ।

स्त्रीबालब्राह्मणघ्नांश्च हन्याद् द्विष् सेविनस्तथा ?? ॥ २३२ ॥

kūṭaśāsanakartṝṃśca prakṛtīnāṃ ca dūṣakān |

strībālabrāhmaṇaghnāṃśca hanyād dviṣ sevinastathā?? || 232 ||

Forgers of royal proclamations, sowers of disaffection among the people, the slayers of women, infants and *Brāhmaṇas*, and those serving his enemies,—the king shall put to death.—(232)

मातुस्तु यौतकं यत् स्यात् कुमारीभाग एव सः ।

दौहित्र एव च हरेदपुत्रस्याखिलं धनम् ॥ १३१ ॥

mātustu yautakaṃ yat syāt kumārībhāga eva saḥ |

dauhitra eva ca haredaputrasyākhilaṃ dhanam || 131 ||

Whatever may be the separate property of the mother is the share of the unmarried daughter alone; and the daughter's son shall inherit the entire property of the man who has no son.—(131)

Verses portraying women in derogatory manner

वन्ध्याष्टमेऽधिवेद्याब्दे दशमे तु मृतप्रजा ।

एकादशे स्त्रीजननी सद्यस्त्वप्रियवादिनी ॥ ८१ ॥

vandhyāṣṭame'dhivedyābde daśame tu mṛtaprajā |

ekādaśe strījananī sadyastvapriyavādinī || 81 ||

The barren wife shall be superseded in the eighth year; in the tenth she whose children die off; in the eleventh she who bears only daughters; but immediately she who talks harshly.—(81)

ऊर्ध्वं पितुश्च मातुश्च समेत्य भ्रातरः समम् ।

भजेरन् पैतृकं रिक्थमनीशास्ते हि जीवतोः ॥ १०४ ॥

ūrdhvaṃ pituśca mātuśca sametya bhrātaraḥ samam |

bhajeran paiṭṛkaṃ rikthamanīśāste hi jīvatoḥ || 104 ||

After the death of the father and of the mother, the brothers, being assembled, shall divide equally the paternal property; while the parents are alive, they have no power.—(104)

बाल्ये पितुर्वशे तिष्ठेत् पाणिग्राहस्य यौवने ।

पुत्राणां भर्तरि प्रेते न भजेत् स्त्री स्वतन्त्रताम् ॥

bālye piturvaśe tiṣṭhet pāṇigrāhasya yauvane |

putrāṇāṃ bhartari prete na bhajet strī svatantratām || 148 ||

In childhood she should remain under the control of her father, in youth under that of her husband, and on the husband's death under that of her sons; the woman should never have recourse to independence.—(148).

After analysing above stated verses, the author gathers that verses 5,6,29,89,130, 131,138,179,217, 232, 275, 323, 389 truly pay homage to women.

The author agrees with author, Dr. Surendra Kumar's[13] views that in verse 138 or Chapter 2, Manu has advocated ladies first culture in these verses. Verses 5,6, cast a duty on everyone in general and on husband in particular, to protect women and wives respectively. Verse 89 advocates that maidens should be married to man possessing good qualities. Verse 217 propagates property rights of mothers and grandmothers. Verse 179 prohibits molestation of women. In verse 275, Manu has even prescribed fine of one hundred panas in cases of defamation of mother and wife. Similarly in verse 389, deserters of mother and wife are to be fined six hundred panas. Verse 130 advocates right to equality of daughters. This verse has also been refereed to by Krishna Murarari, J. Of apex court in Aruachala Gounder By Lrs. v Ponnusamy and Ors.[14] Manu has prescribed very strict punishment for thieves who steal from women - capital punishment. He has further stated in verse 29, that even relatives who misappropriate property of women should be punished similarly as thieves. In verse 232 Manu has directed King to put to

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[13] *Id* pg. no. 164
[14] CIVIL APPEAL NO. 6659 OF 2011

death those culprits who kill women. Verse 131 advocates property rights of unmarried women.

The status of women can be traced from the Manusmriti, may it be their physical protection, property rights, right of way, right to their reputation and so on. The author traces similar understanding regarding status of Indian women as depicted in Manusmriti in works of author Ramachandran[15] who has stated that upon death of a husband, a wife inherits the property if there are no children; in the absence of daughters, the properties can go to the daughters; a woman is entitled to stridhanam - in the form of ornaments that are given to her by her father, brothers and even husband. These properties will go to her daughters. Property of unmarried son will go to his mother.

But conflictingly there are also verses in Manusmriti which portray a very derogatory status of females - Verses 81, 104 and 148. The researcher here very cautiously relies once again on view of author Dr. Surendra Kumar who has expressed that there verses are perhaps interpolations and cannot be His - Manu's.[16] They might have been perhaps interpolated by some people and might have been added from time to time by later writers. They seem to be out of context.

Besides, Rigveda, Ramayana, Mahabharata and Manusmriti, the author also refers following authentic

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[15] Ramachandran, Hinduism - In the Context of Manusmriti, Vedas & Bhagvad Gita, 244-245, Vitasta Publishing Pvt. Ltd., New Delhi, 2002.

[16] *Id* pg. no, 66

observations by scholars whereby we can gauge the vital important status of women in bygone eras in India:

Failing male issue, therefore, a widow takes the self-acquired property of her husband. No doubt, on failure of male issue and a widow, the daughter would take.[17]

The digest of 'Yajnavalkya 'states that What has been self-acquired by any one, as an increment, without diminishing the paternal estate, likewise a gift from a friend or a marriage gift, does not belong to the co-heirs.[18]

"In default of the widow, the daughters inherit the estate of the man who died separated (from his coparceners) and not re-united (with them)."[19]

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[17] Standish Grove Grady, A Treatise on Hindu Law, 165, Gantz Brother Mount Road, Madras, 1868.

[18]https://main.sci.gov.in/supremecourt/2009/15692/15692_2009_37_1502_32676_Judgement_20-Jan-2022.pdf, as retrieved on 23-10-2022

[19] Shyama Charan Sarkar, Vyavastha-Chandrika, A Digest of Hindu Law, Clause 118 Section II, I.C.Bose & Co., Stanhope Press, Calcutta, 1878

Hypothesis II: Our contemporary domestic legal regime is at par vis a vis international legal regime for safeguarding human rights of women.

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
Right to Equality	Article 1	Articles 3, 26	Article 3	Articles 14, 15, 16, 17, 18	——	——	——	——	Yes	———	———-
No Discrimination	Article 2	Article 2(1) 26	Article 2(2)	Article 15,16	——	——	——	——	Yes	———	———-
Right to life, liberty and security of person.	Article 3	Article 6 9(1)	——	Article 21	——	——	——	——	Yes	———	———
Abolition of Slavery/ forced/ compulsory labour;	Article 4	Article 8	——-	Article 23	——	——	——	——	Yes	———	The Bonded Labour System (Abolition) Act, 1976

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
No one shall be tortured cruelly /inhumanely punished / degraded	Article 5	Article 7	———	——	Article 21 Sheela Barse v State of Maharashtra D.K. Basu v State of West Bengal Sunil Batra v Delhi Administration.	——	——	——	Yes	———	———
Right to Effective Remedy for violation of their fundamental rights	Article 8	Article 9	——	Article 32	——-	——	——	Article 226	Yes	———	———

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
No one shall be subjected to arbitrary arrest, detention or exile	Article 9	Article 9(1)	——	Article 22	——	——	——	——	Yes	———	———
Right to fair hearing	Article 10	Article 9 14(1)	——	Part V Chapter IV Part VI Chapter V	M.H. Hoskot v State of Maharashtra Maneka Gandhi vs Union Of India	Article 39A	——	——	Yes	———	———
Right to presumption of innocence till proved guilty	Article 11	Article 14(2)	——	——	———	——	——	——	———	———	The Juvenile Justice (Care and Prevention) of Children Act, 2015

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
Right to privacy	Article 12	Article 17	——	——	Article 21 Justice K. S. Puttaswamy and Another v Union of India	——	——	——	Yes	———	——-
Freedom of movement and Right to residence	Article 13	Article 12	——	Article 19(1)(d) 19(1)(e)	——	——	——	——	Yes	———	———
Right to Marry	Article 16	Article 23	Article 10(1)	——	Article 21 Lata Singh v State of U.P. & Another	——	——	——	———	———	———-

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
Right to property	Article 17	———	———	——	Aruachala Gounder By Lrs. v Ponnusamy and Ors	——	——	Article 300A	Yes	———	———-
Freedom of religion	Article 18	Article 18	———	Articles 25-28	——	——	——	——	Yes	———	———
Freedom of opinion and expression	Article 19	Article 19	———	Article 19(1)(a)	Shreya Singhal v Union of India	——	——	——	Yes	———	———
Freedom of peaceful assembly and association	Article 20	Articles 21, 22	———	Articles 19(1)(b) 19(1)(c)	——	——	——	——	Yes	———	——
Right to free and fair elections	Article 21	Article 25	———	——	——	——	——	Part XV	Yes	———	——-

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
Right to social security	Article 22	——	Article 9	——	——	——	——	——	——	———	Unorganised Workers' Social Security Act, 2008.
Right to work	Article 23(1)	——	Article 6	———-	——	Article 41	——	——	Yes	———	——-
Right to Equal Pay for Equal work	Article 23(2)	———	Article 7(a)(i)	——— ——	——	Article 39(d)	——	——	Yes	———	Equal Remuneration Act, 1976.
Right to form and to join trade unions	Article 23(4)	Article 22	Article 8(1)(a)	Article 19(1)(c)	——	——	— —	——	Yes	———	The Trades Union Act, 1926
Right to rest and leisure	Article 24	———	Article 7(d)	——-	——	Article 43	——	—— —	Yes	———	——-
Right to food and	Article 25(1)	———	———	——	Article 21	—— —	— —	—— —	—— —	———	The National Food

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
social services											Security Act, 2013
Motherhood is entitled to special care	Article 25(2)	———	Article 10(2)	Article 15(3)	——	Article 42	— —	—— —	—— —	Yes	Maternity Benefit Act, 1961
Right to Elementary Education	Article 26	———	Article 10(1) 13(2)(a) 14	Article 21-A	——	Article 41	— —	—— —	Yes	———	Right of Children to Free and Compulsory Education Act, 2009.
Share in scientific advancement and its benefit	Article 27(1)	———	Article 15(1)(b)	——	——	——	— —	—— —	—— —	———	Patents Act, 1970
Right to protection of moral and material interests	Article 27(2)	———	Article 15(1)©	——	——	——	— —	—— —	—— —	———	Patents Act, 1970 Copyright Act, 1957

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
resulting from any scientific, literary or artistic production of which he is the author											
Rights of minorities	——	Article 27	———	Articles 29,30	——	——	——	——	Yes	———	——
Duties to communities	Article 29(1)	———	———	——	——	——	Article 51-A	——	Yes	———	——-
Ex post facto laws	——	Article 15	———	Article 20(1)	——	——	——	——	Yes	———	——-
Rule against Self Incrimination	——	Article 14(3)(g)	———	Article 20(3)	——	——	——	——	Yes	———	——-

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
Rule against double jeopardy	——	Article 14(7)	———	Article 20(2)		——	——	——	Yes	———	——-
Improvement of environmental and industrial hygiene	——	——	Article 12	——	——	Article 48A	——	——	Yes	———	Environment Protection, 1986
Prohibition of Child Labour	——	——	Article 10(3)	Article (24)	——	——	——	——	Yes	———	Child and Adolescent Labour (Prohibition and Regulation) Act, 1986
Safe and Healthy Working Conditions	——	——	Article 7(b)	Article 42	——-	——	——	——	Yes	——	The Factories Act, 1948

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
Right to physical and mental health	——	——	Article 12(1)	——	——	——	——	——	——	——	The Mental Healthcare Act, 2017
Prevention of epidemic endemic occupational and other diseases	——	——	Article 12(2)©	——	——-	——	——	——	——	——	The Epidemic Diseases Act, 1897
Rights of accused	——	Article 9	——	Article 22	——	——	——	——	——	——	Cr.P.C., 1973- Section 41D, 50, 50A 53A 54, 55A,56, 57, 227,243(1),

Rights/ Directives/ Duties	UDHR	ICCPR	ICESCR	FR	Vide Judicial Interpretations	DPSP	FD	Other Constitutional Rights	Available to everyone	Available only to women	Relevant domestic law
											273, 303, 304, 311 Indian Evidence Act Sections 24,25,26

For testing second hypotheses the author has undertaken, comparative analysis of of UDHR, ICCPR, ICESCR and Constitution of India with reference to human rights of women.

On comparison of international legal regime related to human rights of women and domestic legal regime, the author gathers that even in contemporary times, there are no express constitutional or statutory provisions prohibiting torture or other forms of inhumane punishments. Wherever reforms in prison manual can be traced are due to judicial pronouncement in Sunil Batra's[20] case of D.K. Basu guidelines.[21] This statutory lacuna should be taken care of. It pertains to rights of women prisoners and detainees also. In Sheela Barse v State of Maharashtra,[22] Supreme Court Bench comprising of Bhagwati, P.N., J., Pathak, R. S.J, And Sen, Amarendra Nath,J. have given directions to curb torture of prison inmate's in general and women prisoners in particular. These directions are given to prison authorities and police forproviding legal aid to the poor prisoners.

Right to privacy has not been expressly specified in our constitution but vide judicial pronouncement in Right to Privacy case - Justice K. S. Puttaswamy and Another v Union of India[23], today right to privacy is considered as our fundamental right as is implicit in Article 21 - right

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[20] 1980 AIR 1579
[21] AIR 1997 SC 610
[22] 983 AIR 378
[23] Writ Petition (Civil) No. 494 of 212

to life. In this case, Sanjay Kishan Kaul, J. has observed that:

"Privacy is essential to liberty and dignity."

Also in the same case it has been observed that "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. Till date appropriate legislation safeguarding our privacy is missing from our national legal regime.

CEDAW and India

India is signatory to CEDAW but has unfortunately not adopted all its provisions in totality. We have adopted this international bill of rights for women only after making following declarations along with below stated reservations:

"With regard to articles 5 (a) and 16, paragraph 1[24], of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent."

On analysis of following judicial decision the author states that Article 44 of Part IV of our constitution is still in the form of a directive to the government only and as

[24] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement, as retrieved on 23.10.22

of today is not justiciable. Even or proactive judiciary is cautiously approaching this criteria as can be gathered from the following observation of Jagdish Singh Khehar, CJI in triple talaq case - Shayara Bano v Union of India and Others.[25]

Keeping in view the factual aspect in the present case, as also, the complicated questions that arise for consideration in this case (and, in the other connected cases), at the very outset, it was decided to limit the instant consideration, to 'talaq-e-biddat – 'triple talaq. Other questions raised in the connected writ petitions, such as, polygamy and 'halala '(-and other allied matters), would be dealt with separately. The determination of the present controversy, may however, coincidentally render an answer even to the connected issues.

It seems though the judiciary at the onset only limited considerations in this case, a positive verdict setting aside the inhuman practice of triple talaq is a laudable judicial contribution by the Bech consisting of Jagdish Singh Khehar, CJI; Kurian Joseph, J; Rohinton Fali Nariman, J; Uday Umesh Lalit, J; S. Abdul Nazeer, J. In view of the different opinions recorded, by a majority of 3:2 the practice of 'talaq-e-biddat – 'triple talaq is set aside.[26]

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[25] Writ Petition (C) No. 118 of 2016

[26] https://main.sci.gov.in/supremecourt/2016/6716/6716_2016_Judgement_22-Aug-2017.pdf, retrieved on 23.10.22

With regard to article 16, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that, though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.

Compulsory registration of marriages can:

- contribute towards reducing gender violence, bigamy and child marriages in our country.
- Decrease pendency in courts of disputes relating to matrimonial status of the parties.
- Contribute towards safeguarding legal status of wives since in absence of proper record of valid marriage, women are often denied the status of wife.
- Protect women in matters of maintenance.
- Safeguard property rights of women.

The researcher hereby traces holistic efforts of different stakeholders towards meeting this important criteria of CEDAW i.e. compulsory registration of marriages in India.

Efforts by various stakeholders:

Stakeholders	**Contribution**
The National Commission of Women	Compulsory Registration of Marriages Bill, 2005
Supreme Court of India	In Seema v. Ashwani Kumar & ors. observed that marriages of all persons who are citizens of India belonging to various religions should be registered compulsorily in their respective States, where the marriage is solemnised.

Committee on Empowerment of Women - "Twelfth Report on the Plight of Indian Women deserted by NRI Husbands"	Observed in 2007 that Government should make registration of all marriages mandatory, making the procedure simpler, affordable and accessible.
In February 2008, the 18th Law Commission of India, in its 205th Report titled "Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws"	Recommended that registration of marriages within a stipulated period, of all the communities, viz. Hindu, Muslim, Christians, etc. should be made mandatory by the Central Government
Commission in its 211th Report proposed an enactment of a "Marriage and Divorce Registration Act" to be made applicable to the whole of India and to all citizens.	Recommended that the Births and Deaths Registration Act, 1886 be repealed and Births and Deaths Registration Act, 1969 be re-named as "Births, Deaths and Marriages Registration Act, 2012".
Law Commission of India, "211th Report on Laws on Registration of Marriage and Divorce – A proposal for Consolidation and Reform" (Oct., 2008).	The Amendment Bill of 2012 passed by Rajya Sabha on 13.08.2013 could not be taken up for consideration in the Lok Sabha and lapsed.
270th National Commission of India Report. Chairman - Justice Dr. B.S. Chauhan.	This Report proposed to amend the Registration of Births and Deaths Act, 1969 to include the compulsory registration of marriages within its purview.

With regard to article 29 of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article.

Article 29[27]

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

The author with reference to this reserved stand of India states that it has ousted ICJ jurisdiction beyond reach of Indian women. Observations from such competent international tribunals can definitely help our legislators to upgrade our national legal regime at par with its global counterparts.

The author regrets to state that India has till date not adopted Optional Protocol to CEDAW which advocates individual complain mechanism. Above stated declarations, reservation and reluctance to adopt OP-CEDAW has indeed in contemporary times lowered the status of Indian women in comparison with their male counterparts in India and female counterparts offshores. Though there are state rules for compulsory registration of marriages, a central legislation is required so that at

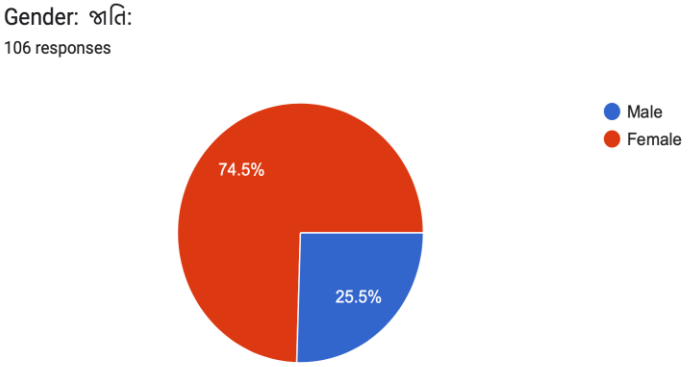
[27] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?, retrieved on 23.10.22

one place, relevant entries regarding marriage can be pursued.

Rashtriya Mahila Kosh

The author now traces the efforts of Ministry of Women and Child Development for socio economic empowerment of women. It provides micro credit facilities to women through NGOs. Amount disbursed since its inception in 1993 till 31st March, 2019 is approximately 31177.38 Lakhs.[28] It promotes entrepreneurship skills of females.

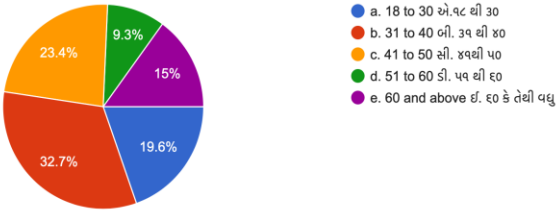
Now the author graphically analyses responses collected from e survey



[28] https://rmk.nic.in/year-wise-data, as retrieved on 23.10.22

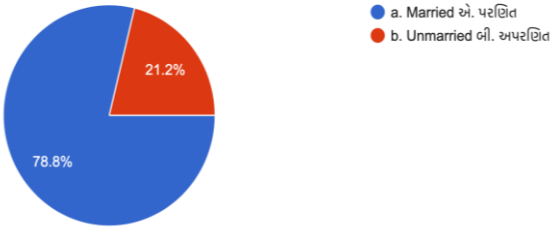
Age: ઉંમર:

107 responses



Marital status: વૈવાહિક દરજ્જો:

104 responses



1. Choose your favourite incidents from the epic Ramayana which illustrate the empathetic role of Lord Rama towards women. ૧. મહાકાવ્ય રામાયણમાંથી...પૂર્ણ ભૂમિકા દર્શાવતી તમારી મનપસંદ ઘટનાઓ પસંદ કરો.

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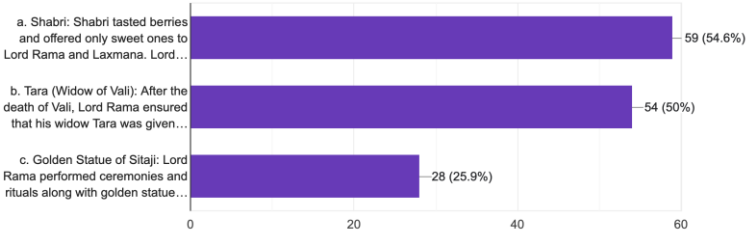
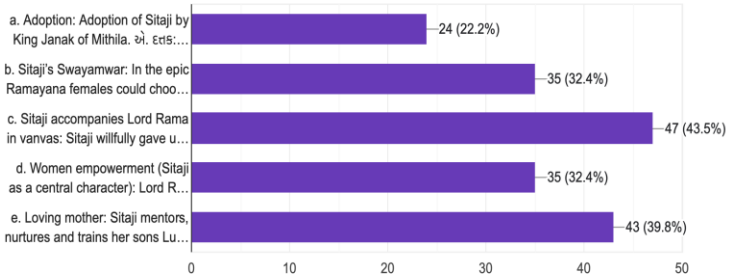


2. Choose your favourite incidents which illustrate Sitaji's vital status in Ramayana. ૨. મહાકાવ્ય રામાયણમાં સ્ત્રીઓનો મહત્વપૂર્ણ દરજ્જો દર્શાવતા તમારા મનપસંદ પ્રસંગો પસંદ કરો.

108 responses



3. Choose your favourite incidents which illustrate Draupadiji's vital status in the epic Mahabharata. ૩. મહાકાવ્ય મહાભારતમાં સ્ત્રીઓનો મહત્વપૂર્ણ દરજ્જો દર્શાવતા તમારા મનપસંદ પ્રસંગો પસંદ કરો.

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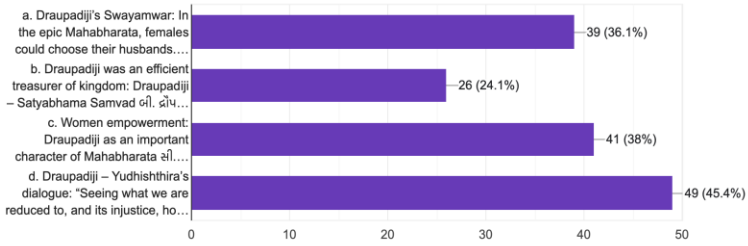
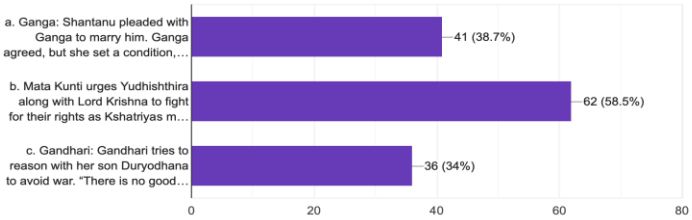


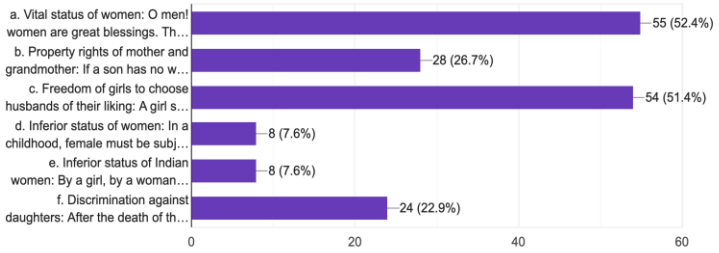
4. Choose your favourite female characters who are wise and assertive from epic Mahabharata. 4. મહાભારતના મહાકાવ્યમાંથી તમારા મનપસંદ સ્ત્રી પાત્રો પસંદ કરો જે સમજદાર અને અડગ હોય.

106 responses



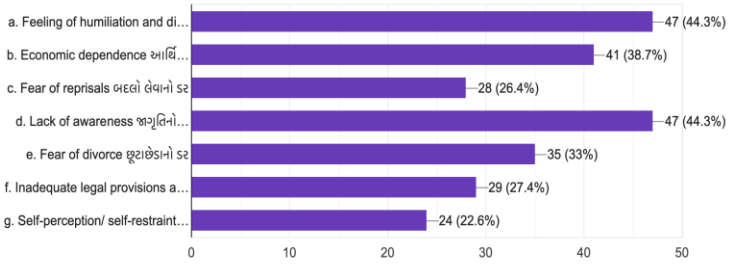
5. Choose your favourite verse from Manusmriti. 5 .મનુસ્મૃતિમાંથી તમારો મનપસંદ શ્લોક પસંદ કરો.

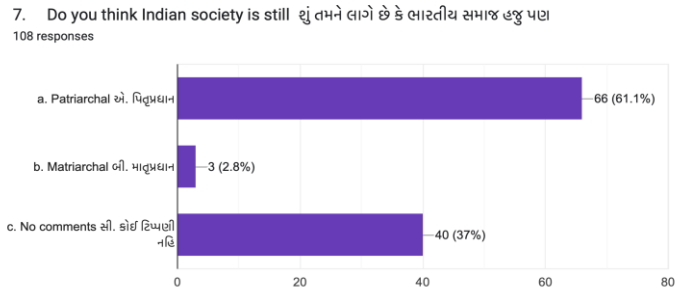
105 responses

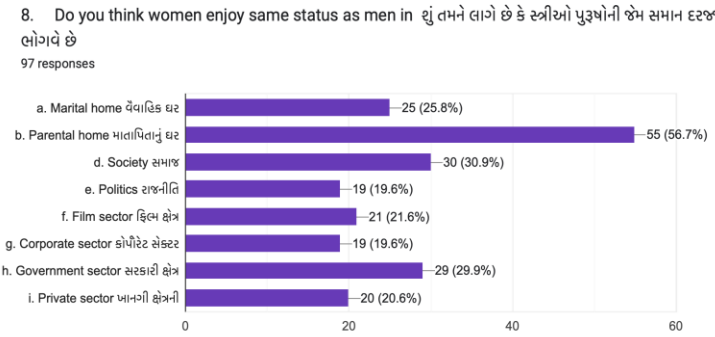


6. According to you, what can be the reasons for not reporting of cases of domestic violence? 6. તમારા મતે, ઘરેલુ હિંસાના દાવાની નોંધણી ન થવાના કારણો શું હોઈ શકે?

106 responses







Nearly 55% of respondents from sample size of approximately 110 are of the opinion that Shabri offering berries to Lord Rama illustrate his emphatic nature towards women in general. Nearly 45% respondents have opined that in the Mahabharata, the wife is often seen as protecting the husband from his wholly mistaken notions of one thing or another concerning life. More than 60% of respondents think that even today we live in a patriarchal society. Nearly 57% respondents think that only in her parent's house, daughters enjoy same status as males and not in other sectors of society. The

researcher reproduces few of suggestions put forward by her respondents for improvising status of Indian women:

- Creating awareness among women regarding schemes initiated by Government.
- Laws should be strengthened
- They should be made aware of their legal rights by conducting workshops in every society
- Strict legal provisions against violation with women
- Only law alone cannot change the legal status of the women, neutral cultural and traditional values plays pivotal role in improve the status of women. If during upbringing or in family people adopt fair or non bias treatment it can change the status of women.
- To provide the right education and spread the awareness are the real weapons to improve the status of women.
- Women must speak out against injustice and pursue suitable legal choices if they want to better legal status

Conclusion:

- During the vedic period, women enjoyed vital status in our society. Even in Ramayana and Mahabharata, women are having pivotal characters. Manny verses of Manusmriti are pro women. As analysed above, the verses which represent women in a derogatory manner might be the handiwork of interpolations by later writers. Yes, status of women, post vedic period has deteriorated.
- On comparing our domestic legal regime with reference to protecting human rights of women

and international legal instruments, the author has identified certain lacuna such as absence of torture laws in India, absence of legislation for safeguarding our privacy and so on.

- Ratifying CEDAW with declarations and reservations and not adopting OP-CEDAW are not at all conducive to promotion of uniform civil code in India.
- Majority of respondents of e survey are women and yet 60% of them are of the opinion that even today we live in a patriarchal society.

Recommendations:

Need for comprehensive uniform civil code encompassing property rights, inheritance rights, right to marry and so on.

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UNIFORM DRESS CODE OVER INDIVIDUAL CHOICE IN EDUCATIONAL INSTITUTIONS: A CRITICAL ANALYSIS IN LIGHT OF HIJAB BAN IN KARNATAKA

*Ravinder Kumar**
*Tanya Bansal***

Abstract

The recent hijab row has hit the nation like a violent storm. There has been a continuous debate whether Karnataka Government order was right? Should Hijab be allowed in classrooms? All these questions were tested on the touchstone of essential religious practice test and even judges came up with a split verdict. But the question which author wants to ask is whether dress is a condition precedent for attaining education? Is our Indian secularism so fragile that it roots will become hollow merely because religious clothing is allowed within classrooms? If yes, are we marching towards 'assertive secularism'[1] as practiced in France than the 'soft secularism'[2] which is cornerstone of Indian Constitution? And if not, what is the need of such restrain? And if restrain is allowed and it has adverse effect on Muslim women education, are we ready to compromise education to give prevalence to uniform dress? And even individuals

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[1] Ahmet T. Kuru, *Secularism and State Policies towards Religion: The United States, France and Turkey (*Cambridge University Press 2009)
[2] Abhinav Chandrachud, *Republic Of Religion: The Rise and Fall of Colonial Secularism in India* (Penguin Viking 2020)

who are firm in donning their religious attires are they ready to give up upon their education and block their avenues of growth? The paper aims to examine all these question in light of tenets of Indian secularism and engage itself with the prevailing jurisprudence and judicial approach towards permitting of manifestation of religious symbols including attires in educational institutions. The paper will also examine the effect of these practices on secular principles followed in India.

Keywords: Indian Secularism, Hijab ban, Religious freedom, Freedom of speech and expression, International position

Introduction

A cyclone of religious attires had hit the educational institutions in the beginning of year. Education that aims to free individual, saw itself confined within the chains of religious costumes. More than the fundamental requirement that each and every student should go to school to get themselves educated and open up wide avenues of their life, the focus was on how one should have recourse to school premises— in religious attires or school uniform. More than the books and pens attire became a priority. Right to education is not only one of the most cherished fundamental right but also a human right. It ensures an individual its individuality, its identity and enables him to live his life fully. But when such a jewelled right starts losing its sheen because of mandatory choice of costume one should wear while taking education, we believe this is most pitiable state. The thrust, should and must always be on education and on none else. However, ironically in the recent hijab ban

controversy the entire thrust is on costume and education is not even seen in vicinity. The author argues that right to education should not be taken lightly. It should not be allowed to be trampled upon by the other rights be it 'right to religion' or 'right to equality'. The issue before the court should not have been whether Hijab be allowed in educational institutions or not? The issue should not have been whether uniform is a condition precedent for receiving education? The question should have been what all steps need to be taken to ensure that all children attend schools and educational institutions transcending the boundaries of religion and other barriers. Authors aim to put light on this aspect and endeavours to examine the relevance of religious manifestations within educational institutions. Furthermore, they aim to enquire whether religious manifestations are allowed in educational institutions? And if they are allowed to what extent and their impact on children's education. Examining all these questions, the paper is sectioned into five parts. The first part enumerates the introduction, second part deals with doctrine of secularism as practiced in India. It is essential to understand Indian secularism so as to embrace the uniqueness and distinctiveness it holds. Third part of the paper deals with hijab ban controversy and the recent judgment which happened to be a split verdict and will envisage the judicial approach taken so far and relevance of permission or denial of these manifestations in educational institutions.. Part four of the paper engages itself with the international position on this aspect and lastly part five of the paper is the conclusion.

Secularism in India

In a pluralistic, multi-cultural society like India whose canvas is painted with multitudinous cultures and religion and which hold the distinction of world's largest democracy, religious freedom is one of the most cherished right. It has been bestowed upon the status of fundamental right as enshrined in Indian Constitution. This is in synchronisation with the secularism model India embraces. Unlike West that advocates for strict severance of state and religion[3], India follows a distinctively Indian[4] secularism where state maintains a principle distance from the religion. Thus, India does not practice religious tolerance rather it enclasps benevolent neutrality towards all religion and state rather than erecting a strict wall of dissociation between state and religion and plays the role of *parens patriae*. This principle distance, therefore, does not mean that State will not interfere into religious matters at all even where the rights of a particular group or of an individual are desecrated. It would rather engage itself and ensure that right to freedom of religion of all individuals is upheld. Within the ambit of Indian secularism State plays a proactive role and accord protection to all religious groups and individuals and brings out reforms in religious practices if they are arbitrary, discriminatory and jeopardise the other fundamental rights. In *MP Gopalakrishnan Nair v. State of Kerala*[5] the Supreme

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[3] Md. Mahtab Alam Rizvi, 'Secularism In India : Retrospect And Prospects' (2005) 66 The Indian Journal Of Political Science 901

[4] Rajeev Bhargava, "The Distinctiveness of Indian Secularism" (2006) Oxford University Press, Delhi 20

[5] (2005) 11 SCC 45

Court laid down the essential principles that constitute the doctrine of secularism. These are:

1. prohibition on establishment of theocratic state

2. the state shall neither have its own religion nor it will favour any other religion

3. the secularist principles does not warrant for establishment of atheist society but it requires that state shall not interfere within religious domain as a matter for favouring a particular religion or discriminating against a particular religion.

On the origin of concept of secularism Abhinav Chandrachud [6] opines that secularism is an imported doctrine and is not indigenous to India. The doctrine was first introduced by colonial government. This was particularly done to avoid any backlash from Indians. The religious affairs of Indians were left to them to be dealt according to their own laws. This provided administrative convenience to Britishers and at the same time they considered it conducive to govern the colonial India. Thus, originated this principle of secularism on Indian soil. Britishers infact used secularism as a tool of divide and rule which was cloaked in policy of separate electorate. Under the garb of protection of religious minorities they sow seed of communalism. And it was after independence that our founding fathers rejected the idea of colonial secularism and adopted the principle of soft secularism. Government decided to interfere in the

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[6] Abhinav Chandrachud, *Republic Of Religion: The Rise and Fall of Colonial Secularism in India* (Penguin Viking 2020)

religious matters so that no one faces discrimination. Reforms were also done in religion by removing social disabilities. For instance people of lower caste were allowed to enter into Hindu temples which was a criminal offence under colonial era. Thus, soft secularism was followed in India by reforming religion with help of legislative and judicial interference. However, today this intervention of State and its extent has turned out to be the biggest question.

On the secularism model that India embraces since Independence Shefali Jha[7] has specified the alternative positions of secularism present before the Constituent Assembly when debate was made on establishing India as a secular state. She opined that Constituent Assembly had three models of secularism before them which could be adopted in India. The first one was based on 'no concern' theory. According to which religion should be relegated to private sphere. It should be a private affair between that individual and God. There should be a clear line of separation between state and religion. Once individuals are given freedom of expression and religious liberty, it should be left to them to decide which religion they want to follow. Some members like Tajamul Husain even contended that religious instruction should be given to children at home and not at any educational institution. Some opined that individuals should also not be allowed to wear any visible mark or such dress which

[7] Shefali Jha, "Secularism in Constituent Assembly Debates" (2002) 37 Economic And Political Weekly 3175

manifests their religious identity. The members of this faction were of view that during this process of building a modern state, distance from religion should be kept as it can be a divisive force. According to second position state and religion should be kept apart because interlinking them would demean the religion. The religion is not subject to whims and fancies of changing majorities. Third position, however, relied on 'equal respect' theory. It stated that religion in a society like India cannot be divested from people. Here it is way of life. Thus, the state should rather keeping distance from religion or tolerating them, respect all religions equally. If religion is allowed in public sphere it would not always lead to inter-sectarian beliefs. All the religion preach tolerance and tolerance implies acceptance. If state would give equal respect to all religions, it would preach to its citizens tolerance. Infact non-concern theory manifests intolerance and for this reason it confines religion to private realm. Today what we follow is this third position of secularism which accounted for equal respect to all religions.

In *S R Bommai*[8] case Court has held that religion, in any manner, should not be mixed with secular activities of the State. And therefore, religion's overreach in secular activities is strictly prohibited.

Under the Constitution, State is only empowered to legislate and regulate on the aspects which pertains to economic, political, financial or secular activities of a

[8] *SR Bommai v. Union of India,* AIR 1994 SC 1918

religious practice.[9] Thus, it is not that the State is prevented from making any law concerning a religious practice but it has only limited jurisdiction.[10]

Hijab Controversy

Supreme Court in *Indian Young Lawyers Association*[11] (Sabarimala Temple dispute case) brilliantly remarked that that "the distinction between the matters of religion and those of secular administration of religious properties may appear to be a thin line". Hon'ble Court also cited the judgment of US Supreme Court, *Church of Lukumi Babalu Aye v. City of Hialeah*[12] where US Supreme Court determined the extent to Government's interference in religious domains of individuals to achieve secular ends. It observed that " Neutral, generally applicable laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and Government." Similar situation got arisen with Hijab ban in Karnataka when it became a condition precedent for some Muslim girls for attending schools. The State Government argued that ban on hijab is only in classroom and none elsewhere. The girls are permitted to don hijab anywhere outside classrooms even in school

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[9] Article 25(2) of Constitution of India, 1950 states that nothing in the article 25 will prevent state from making any law relating to economic, financial, political or other secular activity that may concern with religious practice. And secondly ensure social welfare, Hindu religious institutions having public character will be thrown open for all classes and sections of Hindus.

[10] *TMA Pai Foundation v. State of Karnataka,* (2002) 8 SCC 481

[11] *Indian Young Lawyers Association v. State of Kerala,* 2019 11 SCC 1

[12] 508 US 520 (1993)

premises and therefore, it is not a ban.[13] And this has been done so that there is free flow of education without any hinderances. However, this argument was refuted by Hon'ble justice by saying that rather it act as an opportunity to guide all children that India is a diverse country and cherishes its muti-culturalism.[14]

A close perusal of Aishat case[15] stipulates that the fundamental issue before the Apex Court was whether students be allowed to enforce their religious right in secular institutions such as pre university colleges? The judgment came as a split order of division bench of Supreme Court. The main ground on which this judgment is based is whether wearing of hijab constitutes an essential religious practice or not. But as Justice Sudhanshu very aptly observed that here focal point should not have been essentiality of religious practice because in such case it would have been religious right of an individual vis-à-vis community right. Here the question pertains to individual's right against the state and also his right to freedom of speech and expression under Article 19(1)(a). A similar instance can be seen in *Bijoe Emmanuel v. State of Kerala*[16] wherein similar question involving individual right to profess and

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[13] ' State Has Not Touched Any Religious Aspect In Hijab Ban Case: Karnataka To Supreme Court' (*Outlook*, 22 Sep 2022) https://www.google.com/amp/s/www.outlookindia.com/national/state-has-not-touched-any-religious-aspect-in-hijab-ban-case-karnataka-to-supreme-court-news-225045/amp accessed on October 12, 2022

[14] *Aishat Shifa v. The State of Karnataka & Ors.* 2022 Livelaw (SC) 842

[15] *Id.*

[16] AIR 1987 SC 748.

practice their religion under Article 25 of the Constitution and their freedom of speech and expression under Article 19(1)(a) arose. In this case the students were members of Jehovah community and their religious tenets does not permit them to sing and therefore, they did not sung national anthem sung at school. Resultantly they were expelled from school and the question came up before the Supreme Court. The court held that Article 25 holds the distinction of being the article of faith in the Indian Constitution and glorifies the principle that true democracy is the one where even a miniscule minority will find its identity under the country's Constitution and this had to be borne in mind while interpreting Art 25. And therefore, it is immaterial whether a particular religious practice appeals to one's mind or not. If that particular religious practice or belief is genuine and has been held as part of profession of that religion, it will be protected by Article 25. Here also the fundamental question should not be whether hijab constitutes as an essential religious practice because we are not deciding upon validity of practice of donning of hijab. Here the fundamental question relates to one's own choice to dress in public including educational institution.

Education is integral for the development of an individual. It improves one's knowledge and skills and develops an individual's personality both internally and externally. State has always endeavoured that each citizen of India should get educated and there should not be any barriers whether social, economic or political which impedes this process. The importance of education can be underscored from the fact that Indian

Constitution enshrines right to education as a fundamental right under provisions of Article 21-A. At the same time it incorporates education for children upto 6 years of age as a Directive Principle of State Policy under Article 45 and imposes a duty upon parents or guardians to provide opportunities for education. Having underlined the stature of education in an individual's life and so for the nation, a fundamental question arises what is important— education or attire? The recent hijab row in state of Karnataka has put forth this question only. There can be nothing more agonistic when a person has to choose between the education and religion. To many religion is way of their life and is a feeling which they cherish like any other emotion. Education is at the same time the means of very existence of an individual in today's world where your education becomes your identity and shapes your destiny. Should state be concerned with what students are wearing and can an attire is the only enabling factor which decides that a student is fit enough to get education? The answer is undoubtedly in negative. And even if state for some reason is concerned with a particular attire but this attire is the condition precedent for bringing girls to educational institutions, can state take a narrower approach? Will that be feasible for the state to compromise upon girls' education only because they desire to don hijab or headscarf? Probably we all know the answer that in whose favour the scale of balance is inclined.

Having underscored the importance of education and special value it has for girls in India particularly, it is pertinent to examine the order of Karnataka government

of prohibition of wearing of headscarf (hijab) in educational institutions on the touchstone of Article 25 of Constitution and principles of positive secularism which India follows. India follows the path of positive secularism where all religions are accorded equal status and respect and state does not favour or promote any one religion. This is evident from Article 25 and 26 of the Constitution of India. Here state allows freedom of conscience and thus, leaves the matter upon the individuals to choose their belief or if they want to remain atheist then that is also permitted. Religion for state is a private matter between the individuals where state has not much role to play and its role only comes into picture when there is violation of this right. Therefore, it should not be the State to decide what students would wear in educational institutions. And if Judiciary has also come across this question multiple times. The question whether hijab should be allowed in educational institutions or not came before Kerala High Court. In *Amnah Bint Basheer v. CBSE*[17], the question before Kerala High Court was whether wearing of hijab and full sleeves constitutes an integral part of religion? In this case for the purpose of All India Pre Medical Test, CBSE issued guidelines for the dress code. It required that the dress should be light clothes with half sleeves not having big buttons, brooch/ badges etc with salwar/trouser. Petitioner challenged it on the ground of breach of right to religion as guaranteed under Article 25(1). The Court deliberated upon Quranic injunctions and the Hadiths to hold that it is an obligation to cover the head with scarf

[17] 2016 (2) KLT 601

and wearing full sleeves dress except for face and exposing the body in any form is forbidden. The Court also opined that the views may differ based on *ijithihad* but hijab constitutes an integral part of Islam. Secondly, the Court further examined whether on ground of public order can hijab be prohibited. It was held that rationale for prescribing the dress code was to prevent malpractices which can be taken care of by employing certain different measures for frisking. Therefore, Muslim girls were allowed to wear their attire. In *M. Siddiq v. Mahant Suresh Das*[18] the Apex Court has cautioned that where multiple interpretations of religious doctrine is possible, the courts must steer clear from choosing one of those interpretations and endeavour should be of accepting the faith and belief of the worshipper.

Supreme Court while underlining the importance of religious freedom in *SR Bommai*[19] *case,* has observed that "religious freedom is the hallmark of pluralism and inclusiveness. It is meant to advance social harmony and diversity".

International Position

France

The Hijab controversy that arose in India recently has been a long standing debate in France. French practice strict secularism whereby there is absolute separation between State and religion and therefore, public display

[18] (2020) 1 SCC 1
[19] *SR Bommai v. Union of India,* AIR 1994 SC 1918

of religious identity in form of symbols and attires is strictly prohibited. France follows *laïcité* which stipulates that state should move beyond denominational neutrality and should protect individuals from dominant religious choice.[20] The French state is so stern in its position that the Muslim girls who wore Hijab were declined entry in the schools. As per the law passed in 2004, wearing of Hijab is prohibited in public schools, middle schools and High schools.[21] They were forced to make a choice between religion and education and in many cases religion prevailed. But this defeated the very objective of the State that all children should get educated irrespective of their cultural, religious and economic barriers. French government view these cultural practices as a challenged to their *raison d' etre.* Further they believe that by banning *niqab, burqa* and *hijab* in some cases, they are liberating Muslim women from clutches of oppressive religious practices.[22] This might seem true but where women themselves wishes to wear a costume and when state is imposing restriction on their clothing and their individual choice, it is also an oppression. They feel that they have been denied liberty,

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[20] Eoin Daly ,'The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives', (2012) 32 *Oxford Journal Of Legal Studies* 583

[21] 'Hijab Must In Iran, Burqa Banned In France: Countries That Dictate What Women Should Wear, (*Firstpost,* 22 September, 2022) https://www.firstpost.com/explainers/hijab-must-in-iran-burqa-banned-in-france-countries-that-dictate-what-women-should-wear-11309171.html accessed on September 30, 2022

[22] S. Mootha, "Veiled women and the affect of religion in democracy", *Journal of Law And Society* 34 (1).

equality and breaches fraternity.[23] The women are free when they are allowed to express themselves freely and be allowed to wear whatever they like. If they do not want to wear hijab they should be allowed and similarly where they want to wear hijab they should be allowed. French ban on hijab and other forms of religious clothing in public spaces as illiberal because liberal democracy warrants neutrality between different conceptions of good.[24] French neutrality is forcing people to feel free in the way the State thinks that they will be free. This is not how we cherish the ideals of equality, fraternity and liberty and therefore, this assertive secularism[25] is actually defeating secularism itself.

South Africa

South Africa like India follows a positive secularism and endeavours to safeguard religious freedom of individual. It also cherishes multi-culturalism and pluralism of masses and strives to ensure that individuals are able to freely profess and practice their religious rights.[26] By virtue of Article 15 the state represents accommodative secularism and incorporates religious symbols within their institutions.[27] A case involving manifestation of religious symbols in school

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[23] Raphael Cohen-Almagor, ' Indivisibilite, Securite, Laicite: The French Ban On The Burqa And The Niqab' (2022) 20 French Politics 3
[24] *Id.*
[25] Ahmet T. Kuru, *Secularism and State Policies towards Religion: The United States, France and Turkey* (Cambridge University Press 2009)
[26] Constitution of South Africa, 1996 art. 31
[27] Rahul Mohanty, ' Religious Symbols And Attire In Public Schools: A Comparative Constitutional Analysis', 2014 3 Nirma University Law Journal 45

arose in South Africa also. It involved a class 10th girl who wore nose stud and thus, represented her religious identity of being a Hindu.[28] Wearing of any jewellery was not permitted in school and she being a Tamilian, her mother made her wear the nose stud. She was asked to remove it and on denial her mother was called in school. Her mother explained that its their culture and thus, she made it wear this stud. Resultantly, they have to file a petition before equality court wherein the court upholding the spirit of positive secularism permitted her to wear the jewellery and directed the school to make necessary amends within their rules. The Court further directed that school should draft rules of procedure to be followed so that in future if a similar circumstance of deviation arise, exemption can be sought through prior permission. In this case too questions such as relevance of practice as essential part of religion arose. Many argued that this practice is cultural and not religious and therefore, exemption should not be granted. But the Court opined that it is not them who will decide what is central to their religion and what is not. The Schools authorities even urged that if that child has so much problem with dress code she could leave the school and join another. Court quashed this proposition and stated that this would lead to marginalisation of religion and culture which is antithetical to the values of their Constitution. Therefore, it could be seen that South Africa owing to its accommodative secularist principle ideals cherishes diversity even at school level.

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[28] *MEC for Education Kwazulu-Natal & Ors. v. Pillay* AR 791/05 2006 ZAKZHC 8

United Kingdom

Even without being a secular country, United Kingdom embraces a secular society. Their morning begins with Church prayers but it allows all individuals to practice their faith and gives liberty to non- religious and atheist individuals to keep themselves a bay with religious activities. Thus, even without declaring itself a secular state, UK grants autonomy to all individuals to practice their faith freely, thereby following the principles of a secular state.[29] Sikhs are allowed to carry knives and hijab is allowed in schools as uniforms. According to a survey conducted by Sunday Times around 18% of the 800 primary schools have permitted inclusion of hijab in the uniforms. Section 21 of the Education Act, 2002 of UK provides that while deciding upon the uniform policies, endeavour should be made for the promotion of well-being of the children at school and their social cohesion. According to the School Uniform guidance issued in schools, it permits the pupils to manifest their religion in schools including wearing headscarves or hijab.[30] Further, guidelines have been issued that where religious schools are there they should incorporate provisions permitting students to wear or not wear hijab. Therefore, it is the individual autonomy which has been

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[29] Anthony Bradney, *Secularism in the United Kingdom,* Observatoire des Religions et de la Laïcité, UNIVERSITÉ LIBRE DE BRUXELLES, http://www.o-re-la.org/index.php/analyses/item/1368-secularism-in-the-united-kingdom September 25, 2022

[30] 'School Unoform Policies, Religious Dress And The Legislative Framework' (*Stone King,* 15 Jan 2018) https://www.stoneking.co.uk/literature/e-bulletins/school-uniform-policies-religious-dress-and-legislative-framework accessed on October 15, 2022

given primacy and not the uniform neither in case where schools are secular entities nor in case where schools are religious entities. In *R. (Begum) v. Governors of Denbigh High School*[31], the Court of appeal allowed the complainant girl to wear jilbab in school which is an Islamic attire. The school had allowed to wear hijab, headscarf, trousers and tunic but has banned jilbab but later it was also allowed. Similarly in another instance a Sikh girl was allowed to wear kara by the Wales High Court as a marl of her faith that was denied by the school. [32]

India is also very firm on its secular values and it is the beauty of Indian secularism that it cherishes differences and embraces them suavely. This tenet should be kept preserved and any deviation from this principles taints the values of Indian secularism. Rather it should become an example for the other countries that how India values its diversity and tradition. Indisputably, where such religious practices tramples upon individual autonomy, a proactive state should be taken by State. But in absence of anything contrary, restrain on interference must be exercised.

Canada

It also embraces the doctrine of accommodative secularism wherein the minorities are given freedom to express their faith and their differences are

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[31] (2006) UKHL 15

[32] Rahul Mohanty, ' Religious Symbols And Attire In Public Schools: A Comparative Constitutional Analysis', 2014 3 Nirma University Law Journal 45

accommodated. It does not advocate for one size for all policy and allows individuals to practice their faith. For instance Ontario Human Rights Commission has directed schools and organisation to accommodate religious practices of individuals such as wearing of Turban, carry Sikh Kirpans and for hijab the decision is taken from case to case basis but it is not banned.[33] Recently in Quebec a teacher was removed from school for wearing hijab in classroom. This was widely condemned and since Quebec has its laws and regulation and federal government did not want to interfere within state domain, the intervention was not made. But Prime Minister Trudeau remarked that its hard to believe that an individual can lose job because of religion and it should not have been done.[34] Thus, here also endeavour is made to accommodate different religious practices rather than putting a ban on it. It is only when we see differences from beginning and learn to accept them and live with them giving equal respect, then only we truly understand how to embrace the diversity.

A close perusal at various foreign jurisprudence brings us to the conclusion that common wealth countries and even various democracies have embarked upon the journey which leads to accommodation as distinct from assimilation. They have taken efforts to allow individuals

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[33] *Id.*

[34] Leyland Cecco, "Outrage As Quebec Teacher Removed From Classroom For Wearing Hijab', (*The Guardian,* 13 Dec 2021) https://www.google.com/amp/s/amp.theguardian.com/world/2021/dec/13/canada-quebec-teacher-removed-classroom-hijab accessed 25 October 2022

to live their lives and practice their religious activities freely and intervention is done only where breach of rights takes place. The idea behind intervention was not to attain uniformity in law but uniformity in rights. India has been practising this from a long time and that is why it is seen as harbinger of 'unity in diversity'. But recent controversy and High Court judgment has forced us to think that are we marching towards French model of secularism where uniformity matters more than diversity? And if we are what could be its ramifications? But it must be remembered that in India the notion of strict secularism hold no good owing to its diverse and rich religious and cultural heritage.

Conclusion

Education like sun should shine for all and should not be overshadowed by the canopy of religious dogmas and arbitrary state action. The very ground on which this ban is imposed is fear that it may divert children's attention towards religious identities and may have ill impact on their minds. But as aptly remarked by Hon'ble Sudhanshu, J. that such freedom of manifestation may even act as an opportunity to make students learn our cultural differences and appreciate the pluralistic, multi-religious and cultural society we have. Further, Indian secularism is not grounded on shallow waters of absolute separation of religion and state. It has very deep roots and this was the reason that secularistic principles were present in Indian state even prior to its manifestation by word 'secular' inserted through 42nd Amendment Act, 1977. Indian demography is unique and so is its secularism model. It cannot be allowed to divert in any other direction because this model is responsible for

social cohesion of such a pluralistic, multi-religious, multi-cultural and multi-linguistic society. Even within a particular religion various sects exist and within these sects multifarious practices exist. Across the entire geography of India various cultures exist with distinct costumes, food and languages. Such is a pluralistic landscape of India and it is the power of Indian secularism that has embraced this diversity with grace. And therefore, it should not be allowed to depart from its accommodative principles where India practices a positive secularism with benevolent neutrality towards all religions rather than passive tolerance of all religions.[35] It should be remembered that at time extreme state neutrality also acquires the form of dogmas and results in oppression. This can be very well observed in French model where endeavour on part of State is assimilation of all individual identities into national identity. This model does not concern itself with the fact that such oppression is leading to desecration of individuals' religious freedom. Indian secularism cannot march on this path and endorse this ignorant approach where nothing matters beyond national identity. The model of positive or soft secularism which India has followed will remain intact if individuals are allowed to practice their faith. However, State should not let loose its hold and be watchful that no practice is leading to religious fanatism. The authors here are not arguing that religious choices should be given predominance over all other aspects. They are also not stating that religious attires should be allowed in schools and educational

[35] *SR Bommai v. Union of India,* AIR 1994 SC 1918

institutions. But what authors want to emphasize is that in this case donning of hijab is voluntary and in absence of permission granted to wear hijab, it has detrimental effect on women education. Therefore, any decision should be taken in light of this aspect. The authors want to further lay emphasis on the power and indispensability of State to intervene in religious affairs where these practices are instrumentalised to fan religious fundamentalism and subject the constitutional machineries of state to stress and strain, aimed at one's own vested interests and undeterred of the fact that it will cause social disharmony.[36] Under these circumstances State is mandated to take strict action even if it means compromising on religious autonomy of few individuals. It must be remembered that no right is absolute and right to religion can also not be set free like an unruly horse. Reins of this right need to be pulled by the State as and when it appears that it is becoming unbridled. However, a principle distance is the need of the hour and should be maintained.

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[36] *State of Karnataka v. Dr. Praveen Bhai Thogadia* (2004) 4 SCC 684

THE FUNCTIONALITY OF TRADEMARK USE DOCTRINE

Kirti Minhas[*]

Abstract

We understand that property rights were created for social balance in society, according to Locke ownership is acquired by the one who works for it, and puts in labor and hard work and only he deserves ownership of the land. This as a rule is based on the use of the land the one who uses the property and has been putting efforts to make it profitable deserves ownership, but over a period of time property rights have lost this sense and can be owned by anyone who has enough money for it, doesn't matter whether or not they are using it, putting labor into it. Intellectual property like physical property was justified on the basis of growth and welfare of the society at large from the inventions, literature, loyal traders providing the best quality, etc. and only ownership and protection of such rights will be an incentive to share the intellectual wealth with others. Like the land, Intellectual Property has to be used to get protection sometimes, in patents the inventions which have industrial applications only that can be protected, in trademark however the use of a mark is an important element, Geographical indication

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presupposes use and identification of the product, but only in trademark use is a prerequisite of protection.

In this paper we explore what is use of mark and how important use of mark is in giving protection and creating trademark rights by doing a comparative study on laws in USA and India and entertains the question whether the use based protection in trademark should evolve.

Keywords: Intellectual Property, Trademark, Use doctrine

History and Importance of Use of the mark

The ownership of goods in early times was announced by visible marks which the proprietor uses to affix on the goods for example the branding of cattle and sheep by their owners. This for obvious reasons went away but the original marking still gave the concept of awareness of the trademark, the customer associates the goods with the owner. Without the marks it would make it difficult for the consumers to purchase the good quality products again. The common law then came to explain trademarks as a mark used by manufacturers to put distinctive nature upon their goods.

The fact is that under the trademark law the registration confers a permanent and exclusive right with respect to the registered marks but that does not mean the marks which are used without registration don't have any remedy against an infringer, the law provides a common law remedy known as passing-off to all the user of mark if they are the original or honest and concurrent user of

the mark.[1] The object of the trademark protection is to suggest the origin of the goods, so a mark registered or unregistered (just used without registration) is still an asset, but registration confers a permanent right to the owner of the mark against infringement but it does not create a monopoly of the mark for every product, it only gives exclusive rights in association with the goods in relation to which it is used or intended to be used.[2]

Jurisprudence of Use requirement

The use requirement of an Intellectual property can be justified by few legal theories. But it is important to note here that not all Intellectual Property needs 'use' for giving protection. There is trademark which gives too much importance to use as a requirement for protection of Intellectual property and somewhat it can be seen in Patents as well, other forms of Intellectual Property are silent about the use aspect of the property. It is interesting to note that in physical property also the use should be there else by adverse possession[3] the property can be taken by others but creation of rights is not based on use anymore. Protection and exclusive rights are provided to intellectual property to encourage publications, industrial use, distribution and disclosure

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[1] American Home Products v. Mac Laboratories, AIR 1986 SC 137, 154, para 36.
[2] Sukhninder Panesar, *Adverse Possession of Land*, Liverpool Law Review, 237–241 (2002).
[3] William Landes and Richard Posner, *An Economic Analysis of Copyright Law, Journal of Legal Studies*, 325 (1989). [This argument is derived in substantial part from Jeremy Bentham, *A Manual of Political Economy* (New York: Putnam, 1839); John Stuart Mill, *Principles of Political Economy*, 5th ed. (New York: Appleton, 1862)].

of the creation to the public so that the general public at large can also enjoy the creation of mind.[4] Without protection of these new innovated ideas, businesses and individuals would not take the full benefits of their inventions and would focus less on research and development.[5]

Utilitarian theory proposed by Bentham, the theory works on one principle of '*maximum pleasure and minimum pain'* that can be understood as maximum social welfare should be there through the rights which are created by the society for balancing interest. In our case the property rights and it should end up in minimum troubles or problems, the effect of rights should not create more problems than the people it is benefitting. With respect to Intellectual Property (IP) it is believed that it takes a lawmaker to strike an equal balance between the power of exclusive rights which an IP awards to stimulate or promote the creation of inventions or works of art and the partially off-setting tendency of such rights to curtail widespread public enjoyment of those creations. William Landes' and Richard Posner's essay makes an argument in the study of trademark law[6], the primary economic benefits of trademarks, they contend, are:

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[4] Justin Hughes, *The Philosophy of Intellectual Property*, Georgetown Law Journal, 77 (1988).
[5] William Landes and Richard Posner, *Trademark Law: An Economic Perspective*, Journal of Law and Economics, 30 (1987).
[6] Id. at 33

1. the reduction of consumers' "search costs"
2. the creation of an incentive for businesses to produce consistently high-quality goods and service also have an unusual ancillary social benefit, they improve the quality of our language.[7]

The importance of use can be derived from both the theories where in utilitarian theory, if one person comes up with a trademark or a patentable idea or product, giving protection of exclusive use will not bring maximum good out of it if the owner decides not to use the innovation.

According to the Labour theory propounded by Locke, for one person not to encroach upon others property right the owner has to make it public by using and continuing to put efforts on it by using, otherwise it will again be held in commons and any person will be able to take the property. This is not similarly applicable in the exclusive rights given to intellectual property owners which is given for a fixed period of time, (for example patent protection for 20 years, copyright protection for 60 years plus life of the author) because the use after the prescribed time is irrelevant, the monopoly is taken away so that everyone can use the same. Although trademarks are the only Intellectual Property right which is different in this aspect and follows the principle of Locke's theory, the 10 years protection which is provided to trademarks upon registration is perpetual and has to be renewed

[7] Ellen P. Winner, *Trademark Registration – What's the Use*, The Journal of Law and Technology, 23 IDEA 49 (1982).

every 10 years which is of course renewable based on usage.

Now, the question that arises is why only few Intellectual Property has a strict rule of usage and not others, it can be understood based on the type of property it is protecting for example in copyrights the work is artistic, literary etc. compulsory usage will not affect the public so much relying on the utilitarian theory it will not create pain or troubles. But if a trademark or a patent is protected and not used it will create confusion and also hinder the growth of innovation hence creating troubles or pain. If a trademark is protected and not used any person using it will be associated with it and will reap benefits of its labour mere protection without use will not help in protecting rights.

Trademark Protection System

The trademarks as a social and economic phenomenon had existed long before the law regulating trademarks appeared. The use of identifying marks on goods dates to old times when, for example, human beings began to brand cattle and other animals using various designs.[8] The term "brand name" originated from this activity of "branding."[9] The original purpose of such activity, however, was to indicate personal ownership over the goods on which marks were placed.[10] Marks began to be used on goods in order to point to the source of the goods

[8] *Id.* at 28
[9] Daniel M. McClure, Trademarks and Unfair Competition: A Critical History of Legal Thought, Trademark Rep. 305.310 (1979)
[10] Winner, supra note 8, at 52.

with the development of commercial trade in the Roman Empire.[11] In Roman times, however, the owner of marks were not allowed to bring a civil action for the unauthorized imitation of his mark. Rather, it was left to the defrauded consumer to bring an action against the imitator.[12] In medieval times (roughly from the fourteenth to sixteenth centuries) trademarks came to be widely used with a vast expansion of trade. "The judicial conception of the alternative functions of a trade-mark, the designation of 'origin or ownership' of goods, rests upon the uses to which marks were put in the Middle Ages."[13] The marks used in the period may be categorized into two types: the proprietary or merchant's marks, and production marks. Where proprietary marks were affixed to goods in order to indicate the ownership of goods by merchants for the illiterate warehouse clerk and also for the reclamation of pirated or shipwrecked goods. It was common in medieval England and continental Europe for a merchant to adopt an identifying mark that appeared on packages or on the goods, especially when they were to be shipped for considerable distances. Proprietary marks were used to prove the ownership of goods and had nothing to do with the source of production of the goods in question.[14] In this sense, the proprietary marks were very remote, in their essential function, from the modem concept of trademark. In modem times, a trademark is a source-identifying symbol.[15] Only marks, which serve to designate the origin or source of the goods

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[11] M. McClure, supra 10, at
[12] Winner, supra note 8, at 50.
[13] Winner, supra note 8 at
[14] For example, Section 45 of the Lanham Act
[15] Hanover Star Milling Co. v. Metcall, 240 U.S. 403,412(1916)

to which the marks are used, may be protected as trademarks under modem trademark law.[16] The second type of marks used in medieval times was production marks. Craftsman placed their marks on goods in order to indicate the source or origin of goods. This is more closely linked to the modem concept of trademarks. The rise of guilds distinguishes this period. These organizations tightly controlled their member craftsmen. Typically, guild regulations, or sometimes statute, administrative order or municipal regulations, required each local guild or craftsman to use a production mark. Their express purpose was to facilitate the tracing of defective goods and punishment of offending craftsman, for the collective goodwill of the guild.[17] In addition, guild a monopoly in the production and distribution of a product was limited to geographical area, and "the compulsory production mark likewise assisted the gild authorities in preventing those outside the guild from selling their products within the area of guild monopoly."[18] Various kinds of registration system developed in the guilds in connection with the use of marks by individual members of the guilds.

The production marks are, however, still different from the modem concept of trademarks. Although the production marks indicated the source or origin, the purpose of the marks was to fix responsibility for poor quality goods and to facilitate the maintenance of guild

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[16] Winner, *supra* note 8
[17] M. McClure, *supra* 10
[18] Mark P. McKenna, *Trademark Use and the Problem of Source*, U. III. L. Rev. 773 (2009), Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/321.

monopoly. The mark was a "liability," rather than a "right" and it had not yet developed its modem function as a valuable symbol of individual goodwill, and an asset which can be exploited for the direct advantage or for the personal advertisement of the user. The production marks began to evolve into the modem sense of trademarks ("asset marks") in certain trades, especially in clothing and cutlery trades of England, as early as the fifteenth century, because of the goods durability and transportability for long distances.[19] The national expansion of industries resulted in more of the attributes of modem trademarks, and the royalty's interest in the regulation of the industries resulted in fostering and protecting the reputation of the individual and collective marks.[20] This trend was accelerated after the industrial revolution, when greater production capability led to the development of distribution methods to get the goods to the consumers and advertising to acquaint the goods with the consumers.

In India, the Trademark Act 1940,[21] was the first statute law specifically on trademarks, before this the laws of trademark was governed by common Law principles. Registration of a mark was obtained by giving a declaration of ownership under the Indian Registration Act 1908[22]. Which was amended by the Trade Marks

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[19] Winner, *supra* note 8
[20] The Trademark Act, 1940, Act of Parliament, (India). Available at: https://www.wipo.int/edocs/lexdocs/laws/en/in/in128en.pdf
[21] The Registration Act, 1908, Act of Parliament, (India). Available at: https://indiacode.nic.in/bitstream/123456789/12230/1/the_registration_act%2C_1908.pdf
[22] Trade Marks Work Manual under The Trade Marks Act, 1999 and Trade Marks Rules, 2002. Available at:

Amendment Act 1943.[23] When this Act was in enforcement, the Trademark registry was a part of patent office, which was later separated to constitute a separate trademark registry. Thereafter the Act was amended by the Trademarks Amendment Act 1946.[24] There is an overview of the registration system in the United States and India:

Table I: Overview of Trademark Registration System in U.S. and India

	United States	**India**
Source of Law	Common Law Lanham Act (federal) State Statutes	Common Law State Statute TRIPS
Acquiring Rights	First-to-Use System	First to File System
Subject Matter	Any symbol capable of indicating source of goods or services	Device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours capable of indicating source of goods or services.
Requirement of protection	Distinctiveness: Inherently distinctive or secondary meaning	Graphical representation and distinctiveness.

http://www.ipindia.nic.in/writereaddata/images/pdf/proposed-tm-manual-for-comments.pdf

[23] *Id.*

[24] J. THOMAS MCCARTHY, MC CARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 16:1 (4th ed. 2001).

		Section 2(zb), Trademark Act, 1999
Term of protection	Common Law: Perpetual subject to abandonment Federal Registration: 10 years, renewable for 10-year periods	10 years, renewable for 10 year periods. Section 25, Trademark Act, 1999

Use Requirement as prerequisite of Registration

Use is necessary element of trademark, be it use based application attached with statement of use, or a proposed to be used based application or a declaration of use post registration. All are parts of registration process but if no use is there they could lose the registration, or an application for registration.

The United States has adopted first-to-use system for the acquisition of trademark rights and the determination of the priority among competing users. Therefore, in the United States, unlike most civil law countries, trademark rights arise out of actual use of a designation as a mark, not registration.[25] At common law, trademark rights and priority of others are established by adopting a designation and using it to identify a person's goods or services and to distinguish them from those offered by others. Registration is not a prerequisite for trademark protection even though federal registration of a

[25] Lanham Act § 1(a). 15 U.S.C. § 1051(a), Act of the Congress, 1946 (USA). The Lanham Act defines "use in commerce" as the "bona fide use of a mark in the ordinary course of trade, not made merely to reserve a right in a mark." Lanham Act §45.15 U.S.C. § 1127 (definition of "use in commerce")

trademark under the Lanham Act offers significant benefits to the trademark registrants for federal trademark registration, however, an applicant must also prove that it actually used the mark in commerce.[26] Although the Lanham Act allows the intent-to-use application without any proof of actual use of a trademark in connection with goods or services, there must be a proof of actual use of a trademark for the registration of the mark[27]. To be protectable as a trademark under both common law and the Lanham Act, a designation must meet three requirements[28]:

a) tangible symbol (i.e. a word, name, symbol or device, or any combination);
b) function (i.e. to identify and distinguish seller's goods from those made and sold by others);
c) type of use (i.e. actual adoption and use of the symbol by a manufacturer or seller of goods or services.)[29]

In India on the other hand a trademark must be distinctive enough to perform the function of identifying goods or services. India as well for extending the protection of Trademark Laws and establishing Trademark rights on a particular mark it requires the 'trademark use'. The company/ firm/ proprietor who is first to use its brand in association with the goods or

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[26] Lanham Act § 1(b). 15 U.S.C.§ 1051(b), Act of the Congress, 1946 (USA).
[27] Allard Enterprises. Inc. v. Advanced Programming Resources, Inc. 146 F.3d 350.357 (6th Cir. 1998)
[28] Qualitcx Co. v. Jacobson Products Co. 514 U.S. 159. 165 (1995).
[29] Amritdhara Pharmacy v. Satya Deo Gupta, AIR 1963 SC 449

services in a market place is the body that will enjoy the trademark rights over the mark or will own the mark. As we have understood this is because of the role that trademark use plays in consumer confusion, consumer associate brand with quality of product. Trademark use and rights associated with it are geographically circumscribed, two different companies can simultaneously use a particular brand name in different regions exclusively. As discussed in the case of *Amritdhara Pharmacy vs. Satyadeo Gupta*[30], where before the Registrar it was admitted that the respondent's goods were sold mainly in the state of Uttar Pradesh (UP) and only sporadic sales takes place in other states, the registrar considering the facts and geography passed an order allowing registration of 'Lakshmandhara' deceptively similar name for the sale in the State of UP only. There is prohibition from registration on trademarks that are likely to deceive the public or may create cause confusion.[31] The Supreme Court in this case upheld the decision of registrar and said in the plea of acquiescence the registrar was right in imposing limitation of sale region just in UP stating:

"If a trader allows another person who is acting in good faith to build up a reputation under a trade name or mark to which he has rights, he may lose his right to complain, and may even be debarred from himself using such name or work. But even long user by another, if fraudulent, does not affect the plaintiff's right to a final

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[30] The Trademarks Act, 1999, Section 9, Act of Parliament, 1999 (India)

[31] Amritdhara Pharmacy v. Satya Deo Gupta, supra note 30 at

injunction; on the other hand, prompt warning or action before the defendant has built up any goodwill may materially assist the plaintiff's case"[32]

Hence the rights are not worldwide and are restricted geographically except for some marks known as well-known trademark. Well known trademarks which have transnational reputation based on use and consumer associate the trade names to a particular brand. The principle of market segregation is applicable geographically when it comes to use of trademark. Only in rare cases the use of the mark is restricted in another market as well when especially the mark is well known mark as happened in the *Daimler Benz Aktiegesellschaft & Anr. v. Hybo Hindustan*[33] where the defendant was using a three pointed star in a ring in a undergarment business and it was held that Benz and the symbol is associated to a luxury car maker and the defendant was restrained from using it in his business of undergarments.

So, the rights in trademark usually depends on use and not registration per se and in this paper we will discuss how registration become important when the acquisition of the rights is concerned, and what role it plays in the remedies against use of the mark without owner's permission be it the case of infringement, passing off or dilution and what role use have statutorily in the registration process, is it only after registration it is

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[32] Daimler Benz Aktiegesellschaft v. Hybo Hindustan, AIR 1994 Delhi 239.
[33] Paris Convention for the Protection of Industrial Property, 1883. Available at: https://www.wipo.int/treaties/en/ip/paris/

important at time of abandonment or also to save the protection. Both is different in United states and India also, what can be the best way the companies can look into when introducing a brand name.

Table II Overview of Acquisition Rights in US and India

	United States	**India**
TM Use	Use in commerce defined under §1127 of the Lanham Act (15U.S.C.)	Use of the mark is defined under Section 2(zg)(2)(b) of the Trademark Act, 1999
Uses requirement for registration	Application to file for bona fide intention to use while filing application for registration under §1051(b)	Application of registration under for used or proposed to be used mark given under Section 18, Trademark Act, 1999
Abandonment	Abandonment of the mark defined under §1127 of the Lanham Act (15U.S.C.) Cancellation of the mark on the grounds of non – use for a period of five years after registration under §1064 of the Lanham Act (15U.S.C.)	Removal of the mark from the register on the grounds of non-use defined under Section 47(1)(b), Trademark Act 1999 Cancellation of mark on the grounds of non-use for a period of five years three months.

Table III Overview of International filing

Convention	Use of the Mark	Pre and Post Registration Requirements
Paris Convention[34] (1883)	Article 5C (1), (2) 1. Use of the mark as a compulsory ground. 2. Use of the mark in a different form does not attract invalidation.	Cancellation of the mark by any of the parties on the grounds of non-use, if the 'use' of the mark is compulsory in contracting parties local laws.
Madrid Agreement[35] (1891)	Article 5(1) did not specifically mention the use requirement but it can be taken as ground for refusal of registration by national offices.	Post registration cancellation of the mark on the ground of non-use is not a subject.
Madrid Protocol[36] (1989)	In, Article 5(1) refusal and invalidation can take place in certain contracting parties.	The Agreement and protocol to it only talks about registration and not effects post registration.
TRIPS Agreement[37] (1994)	The agreement does not make use as ground for giving protection but under Article 19, widen the meaning of 'use' by adding that use by another person under the control of owner is	Article 15.3 proposed to be used or intent to use application can be taken into consideration. Three years' time period is provided if mark is not used the registration can be refused.

[34] Madrid Agreement Concerning the International Registration of Marks, 1891. Available at: https://www.wipo.int/treaties/en/registration/madrid/
[35] Madrid-The International Trademark System. Available at: https://www.wipo.int/madrid/en/
[36] Trade Related Aspects of Property Rights, 1994. Available at: https://www.wto.org/english/docs_e/legal_e/27-trips.pdf
[37] Trademark Law Treaty (TLT), 1994. Available at: https://www.wipo.int/treaties/en/ip/tlt/

	considered valid use of the mark. Further Contracting parties can make 'use' essential condition for registration.	Further it says the non-use can be allowed under certain circumstances (Article 19) and the use should be in good faith and not unjustifiable by special requirements. (Article 20)
Trademark Law Treaty, (1994)[38]	Article 3 (1) (a) (xvii), a declaration to use the mark, a declaration of actual use of the mark and evidence for it at registration. Article 3 (6) evidence of actual use of the mark	Prohibits the contracting parties to ask for declaration of use or evidence of use complied with renewal request under Article 13 (4) (iii) and also states that notwithstanding this Article government can ask to furnish evidence of use or declaration of use under Article 22 (5).

What constitutes 'Use of Mark'?

One of the very basics legal rules of trademarks is that this is the only intellectual property which will have no existence until it is put into use and 'use' for the purpose of a trademark means that how a trademark appears on the label, package of the product which is in market for commercial purpose or if it's a service the mark is used in advertising that service.

As to what are the attributes of 'use of mark' we will begin with the statutory definition and understanding. Section

[38] TheTrademarks Act, 1999, Section 2 (zg) (2) (b), Acts of Parliament, 1999 (India).

2 (2)[39] states that "any reference to the use of the mark shall be constructed in reference to the use of printed or other visual representation of the mark". The presence of the mark in the register of trademark does not in any way prove its user, it is possible that the mark has been registered but is not used. We cannot draw the inference of use of the mark by just its presence in the register, as discussed in *Corn Products v. Shangrilla Products*[40]. Where a trademark is used the use should be construed as a reference to the use of printed or other usual representation of a mark. There is also an understanding that the trademark if advertised featuring the mark before it is used on goods and marketed will construe as use in course of trade in relation to the goods only.[41]

When the use of the already registered mark discontinues or use of the mark proposed to be used does not start it leads to loss of all the rights or protection over the mark. When after registration mark is not used it is

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[39] Corn Products v. Shangrilla Products, AIR 1960 SC 142.
[40] Stacey L. Dogan, Mark A. Lemley, Grounding Trademark Law through Trademark Use, 92 Iowa L. Rev. 1669 (2007).
[41] Lanham Act (15U.S.C.) A mark shall be deemed to be "abandoned" if either of the following occurs:
(1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Non-use for 3 consecutive years shall be prima facie evidence of abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.
(2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.

known as abandonment of the mark. The time period for which the non-use of the mark is accepted is different for every country, in United States abandonment of the mark is defined under §1127[42] and cancellation of the mark on the grounds of non-use for a period of five years after registration under §1064[43] and in India it is more or less same[44], that is a continuous period of five years and up to three months before the date of application of removal. Although if there has been an attempt to use the mark on market goods but due to some circumstances and other conditions or reasons it failed, this will come under the understanding of abandonment of the mark.[45]

A trademark protection can also be lost by over use of the mark known as dilution of the mark, if a trademark has so widespread use that the general public instead of just using the brand name associate the brand name to the product name. If the mark is diluted like that the whole industry and all the competitors can use the protected trademark brand name as the mark has passed to the generic words in spite of the fact that the product is of one manufacturer and they lose the right to exclusively use it. It has happened with quite a few

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[42] *Id.* at
[43] The Trademarks Act, 1999, Section 47, Acts of Parliament, 1999 (India).
[44] Mousen & Co. v. Boehm, 26Ch. D. 398
[45] Aspirin is a pain relief drug that contains acetylsalicylic acid. Bayer AG combined two German words and trademarked the term in 1917. Aspirin lost its trademark status in 1919, and now it's used in a generic way

trademarks example aspirin[46], escalator[47] and Xerox on the other hand has used trademark awareness advertisements named 'you can't make a Xerox'[48] to prevent the brand from becoming generic.

So, as we understood use of the mark it is important to note that there cannot be an enjoyment of legal protection unless the mark is used on a product. So there has to be an actual use of the mark, no matter how fanciful or artistic the mark might be without use of the mark on goods or services there is no basis of protection unlike copyrights or other intellectual property protections.

Use of Trademark

Use of the trademark is relevant since the filing of the application in Indian trademark registration system. Section 18[49] states that any person can make an application of trademark used or proposed to be used by him. The registration of trademark in India is for a period of 10 years[50] and the registered mark should be used in a manner that it ensures the purpose of registration of the mark during the period of protection or else it may be removed, many provisions support the claim. It is relevant to note Section 47[51] here which opens with the

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[46] Otis Elevator Co. trademarked the term in 1900. "Escalator" became a generic term when the USPTO ruled that Otis itself used the term in a generic way in its own patents

[47] Ginsburg, Jane C., Litman, Jessica, Kevlin, *Mary L. Trademark and Unfair Competition Law* (3rd ed.). New York, 317–318, 322 (2001).

[48] Trademarks Act, 1999, Section 18

[49] Trademarks Act, 1999, Section 25

[50] *Id.*

[51] American Home Products v. Mac Laboratories, AIR 1986 SC 137

title "removal from register on grounds of non-use". Meaning hereby there is an obligation to use the mark, failure to comply may result in removal of the registered mark. Now the removal is not automatic in India, an aggrieved person has to come up and prove that the registration was obtained without bona fide intention to use the mark and also there has been no bona fide use of the mark by anyone including any proprietor up to a date three months before the date of application for removal of mark, the Supreme Court has held that both the conditions should be fulfilled and proved.[52] The Supreme court in this case raised three questions:

1. Whether the appellant had any bona fide intention to use the trademark.
2. Whether this intention to use the mark will be restricted to the intention of registered proprietor use of the mark through itself or will this also include those cases where the registered proprietor does not intend to use the mark.
3. Whether proposed to be used in Section 18(1) includes proposed to be used by registered proprietor. The court observed that:

   "The purposes for which the fiction has been enacted in Section 48(2)[53] are the purposes of Section 46[54] or for any other purpose for which

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[52] The Trademarks Act, 1999, Section 48: Registered User
[53] The Trademarks Act, 1999, Section 46: Proposed use of mark by the company to be formed, etc.
[54] The Trademarks Act, 1999, Section 18(1)
Application for Registration: (1) Any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it, shall apply in writing to the Registrar in the prescribed manner for the registration of his trade mark.

> such use is material under the 1958 Act or any other law. To confine the purpose only to a part of Section 46 would be to substantially cut down the operation of the legal fiction. The purpose for which the legal fiction is to be resorted to is to deem the permitted use of a trade mark, which means the use of the trade mark by a registered user thereof, to be the use by the proprietor of that trade mark. Having regard to the purposes for which the fiction in Section 48(2) was created and the persons between whom it is to be resorted to, namely, the proprietor of the trade mark and the registered user thereof, and giving to such fiction its full effect and carrying it to its logical conclusion, no other interpretation can be placed upon the relevant portions of Section 18(1)[55] and of Clause (a) of Section 46(1) than the one which we have given."

Meaning thereby the intention to use a trademark and a bona fide use associated to it is allowed in absence of abuse of the mark. Registration is provided if the owner or proprietor who is making an application will use the mark himself, which includes the registered proprietor that is 'himself' will include person proposed to be registered as a registered user. There should be a connection in the course of trade and the mark, and registration will also be granted if at the time of application, it is made clear that the mark is to be

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[55] Mousen & Co. v. Boehm, 26Ch. D. 398, AIR 1960 SC 142, page 167, para 70.

assigned after registration to a company or firm which is proposed to be incorporated.

The court is of the understanding that, to register a mark without any intention to use it in relation to the goods but only to gain economic benefits out of it by selling to others the right to use the mark, would be trafficking of the trade mark.[56] The intention therefore to use a mark and get it registered should be genuine.

So, Section 47 provision referring to removal of a mark from the register mentions grounds for removal that are:

ii. Registration obtained without bona fide intention to use it in relation to goods or services
iii. Or there is no bona fide use of the mark thereafter.

Section 47 (1) (b) states about the removal of a registered mark if any person aggrieved applies that up to a date one month before the date of application, a continuous period of five years or longer is over and during which the trade mark was registered and there was no bona fide use. The burden to prove that the owner had intentions to use the mark on the date of the application is on the registered proprietor as held in the case of *Thrukral v. Diesels*[57] and the burden of proving the non-use is always on the party making the petition of removal of trademark on non-use as held in the case of *Eagle Potteries v. Eagle Flask*[58] further it is a duty of the

[56] Thrukral v. Diesels, 2009 (39) PTC193, 204-205
[57] Eagle Potteries v. Eagle Flask, AIR 1993 Bombay 185

registered proprietor to show that non user was because of special circumstances of trade and not due to lack of intention on the part of proprietor.

Conclusion

Trademark is the only right based on use of the Intellectual Property. No other Intellectual Property emphasize on use of the property before and after the protection is provided. It is unique feature of trademark law that the consumer protection and confusion is given primacy in use requirement. Currently, the type of use required for registration and renewal under each country's trademark law varies depending on historical background and policy goals and can be either preferring consumer protection or trademark owner protection.

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PREPARING A WITNESS: WHERE TO DRAW THE LINE?

Debanga Bhusan Goswami [*]

Abstract

Witnesses have an integral part to play in the adjudication process. Hence, though there is no legal affirmative action placed on advocates to prepare witnesses in many legal jurisdictions; advocates across jurisdictions make active efforts to prepare the witnesses before testimony in order to optimize the value of the same. This makes it imperative to correctly trace the fine line which differentiates between the ethical and non-ethical practices during preparation of witness by placing the issue within the context of reconciliation of the conflict between the duty of an advocate towards the client and towards the justice system. In order to do this, it is essential to look into the connection between the preparation of a witness and standards of professional behavior of an advocate. In India, this connection can be found in the duties of an advocate enumerated in the Bar Council of India Rules, 1975. According to these rules, advocates shall protect the interests of his or her clients but he or she shall achieve this objective only through honorable and fair means. Thus, an advocate has simultaneous duties towards the client as well as the justice system and cannot prepare a witness in a manner which will serve the interests of the client at the cost of the justice delivery system. The author illustrates three dichotomies of how versus what,

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discussion versus instruction and form versus intent with respect to preparation of witness. A combined understanding and application of these dichotomies can provide an effective roadmap for ethical preparation of witness which will be in consonance with the larger goal of achieving justice.

Introduction

"Witnesses are the ears and eyes of justice."

- Jeremy Bentham.

Evidence lies at the heart of the criminal justice system. The Indian Evidence Act, 1872 (hereinafter the Evidence Act) defines evidence to mean and include oral and documentary evidence.[1] Section 3 of the Evidence Act defines oral evidence as those statements that are being allowed or required to be made before the Court by witnesses pertaining to facts, which are under inquiry.[2] The same section defines documentary evidence as documents which are provided for the perusal of courts and such evidence includes electronic records. Thus, witnesses are the source of one of the two components of evidence that are being admitted in a court of law.

Witnesses play a very crucial role in a criminal justice system since their testimony has substantial impact on the outcome of a case. Thus, both the parties and the

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[1] The Indian Evidence Act, 1872, Section 3, No. 1, Acts of Parliament, 1872 (India).
[2] *Id.*

advocates representing them as well as the criminal justice system as a whole have a stake in witnesses. Advocates from both the parties i.e. prosecution and defence place great emphasis on the testimony provided by the witnesses. In order to maximize the value of the testimony of a witness, most advocates engage in preparing the witnesses well in advance of the testimony. However, in most of the jurisdictions of the world, there is no affirmative duty placed on the advocates to prepare and train their witnesses before examination, cross-examination and re-examination. In spite of this, it has become a common practice across among advocates of all adversarial jurisdictions to extensively prepare witnesses to give their testimony as well as handle cross-examinations. Preparation of witness also adds value to the justice system by making it more efficient. The purpose of a criminal trial is well served by a fair, complete truthful account of facts provided by a witness in front of a court of justice because it assists the court in arriving at a judgment that delivers justice. It is due to this integral role played by the witnesses in a criminal justice system that the issues associated with ethicality of preparing a witness needs a deep consideration and analysis.

The ethicality of witness preparation is an aspect of a broader issue, i.e. the reconciliation of the conflict between the duty of an advocate towards the client and towards the justice system. The reason behind preparation of witness should be to make the witness capable of conveying his testimony to the court in the most effective manner possible. In other words, a witness is prepared in order to maximize the value of the

testimony. This serves the interests of the client in a better manner. However, when preparation leads to factual inaccuracies in the statement, it becomes a disservice to the justice system.

The discussion in this paper will try to look into three specific aspects. First, it will try to explore the inter-relationship between the standards of professional behavior of an advocate and preparation of a witness. Second, it will try to apply insights from scholars of ethics belonging to eastern and western philosophical traditions to the issue of ethical preparation of witness. Third and most important, it will try to correctly trace the line which distinguishes the ethical practices from the non-ethical ones in the arena of preparation of witness.

Law on Witness Under The Evidence Act

Chapter IX of the Evidence Act extensively deals with the law on witnesses under the Indian legal system. Chapter X of the Evidence Act deals with examination of witnesses. Section 118 of the Evidence Act states that any person is competent to become a witness and testify in court. However, he or she should be able to comprehend the nature and character of the questions posed to provide rational answers to the same.[3] The relevant take away from this section is that in order to be eligible to testify as a witness, it is a pre-requisite for a person to comprehend and answer questions on his or her own and without third party assistance. Also, the

[3] The Indian Evidence Act, 1872, Section 118, No. 1, Acts of Parliament, 1872 (India).

mere fact that a person suffers from certain mental condition is not an outright bar to being a witness unless the specific nature of the condition prohibits him from understanding the questions thrown at him and giving answers. Thus, the law views witnesses as an active and rational participant in the justice system.

As discussed above, witnesses are supposed to provide oral evidence i.e. communicate with the court through the medium of speech. But, the Evidence Act has a special provision for witnesses who are unable to communicate through verbal means. Such witnesses can provide evidence in any other manner in which he can clearly and coherently convey his message to the court. These other means include writing, signs etc, and these communications have to be mandatorily made in the open court. In addition to this, the statement recorded by the court on the basis of the evidence provided by the witness has to be on the basis of the assistance provided by a special educator or interpreter and needs to be video graphed.[4]

It is to be noted at this stage that under the Evidence Act, a witness is mandated by law to answer any question posed to him by any of the parties on the relevant matter. He shall not be excused from answering such questions on any ground including the ground that answering the question will ultimately lead to his conviction in any offence under the Indian law and/or lead to payment of

[4] The Indian Evidence Act, 1872, Section 119 , No. 1, Acts of Parliament, 1872 (India).

any penalty or forfeiture.[5]However, the exception to the provisions also categorically mentions that the answer given by a witness in response to a question will not lead to prosecution or arrest. The proviso on immunity excludes prosecution for false evidence from its ambit. This provision reflects the importance placed on the testimony provided by a witness. The provision tries to ensure the truthfulness and comprehensiveness of evidence provided by witness in a two-prong manner. First, it mandates that nothing can be hidden by a witness under any circumstance whatsoever. Second, it provides certain immunity to witness so that they can state the complete truth without fear or favour.

There are several provisions in the Evidence Act which provides protection to the witnesses from excesses that may be committed by advocates. The court is vested with the discretion to decide whether a witness shall answer particular questions which pertains to an issue not relevant to the proceeding except to the extent it affects the credit of the witness. However, the discretion is to be exercised by the court based on the guidelines provided in the section itself. [6] The court is also vested with the discretion to forbid questions that are scandalous and/or indecent in nature unless they have a direct bearing the decision of the court as to the existence or otherwise of certain facts in issue.[7] Furthermore, the

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[5] The Indian Evidence Act, 1872, Section 132, No. 1, Acts of Parliament, 1872 (India).
[6] The Indian Evidence Act, 1872, Section 148, No. 1, Acts of Parliament, 1872 (India).
[7] The Indian Evidence Act, 1872, Section 152, No. 1, Acts of Parliament, 1872 (India).

court is also provided with the discretion of prohibiting the asking of any question which is intended to unnecessarily annoy or insult the witness or is crafted in such a way as to offend the sensibilities of the witness.[8] Next, a vakil, pleader, attorney or barrister cannot ask a witness any question which pertains to an issue not relevant to the proceeding except on the ground that there is a reasonable basis for the person asking the question to think that there is a strong ground for the imputation. [9] If according to the court a vakil, pleader, attorney or barrister asks the questions mentioned hereinbefore without reasonable grounds, then the court can report such violation to the High Court for appropriate action. [10]

Just as the Evidence Act provides safeguards to the witness under the provisions discussed hereinbefore, it also lays down certain provisions for the advocates to ensure that the witnesses cannot deviate from the truth at their own whims and fancies. The Court is vested with the discretion to permit a party to cross-examine a witness who has been called by it and to rely on the evidence provided by the party. [11] In addition, the court is also vested with the discretion of allowing even the party who calls a witness to impeach its credit by evidence of another witness testifying the former witness

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[8] *Id.*
[9] The Indian Evidence Act, 1872, Section 150, No. 1, Acts of Parliament, 1872 (India).
[10] *Id.*
[11] The Indian Evidence Act, 1872, Section 154, No. 1, Acts of Parliament, 1872 (India).

to be devoid of credit, adducing proof of acceptance of inducement or bribe and inconsistency of evidence.[12]

From the provisions of the Evidence Act discussed above, it becomes abundantly clear that legislature wanted to create a mechanism of checks and balances under which a witness is provided immunity as well as shielded from unnecessary annoyance and agony and at the same time it is ensured that a witness cannot escape by being a turncoat and providing false evidence.

It is to be noted that the aforementioned provisions regulate the relationship and interaction between the witnesses, advocates representing both the parties and the court within the four walls of the courtroom. They do not extend to the out of court interaction between the advocates and the witness. Since the content and form of the evidence provided by the witnesses in the court depend on the out of court interaction between the witness and advocates, these set of interactions need to be carefully analyzed as well as regulated to the extent necessary.

Preparation of Witness and Professional Conduct of Advocates

Advocacy is known as a noble profession. Advocates are regarded as the officers of the Court and it is their professional duty to assist the court in the administration of justice.[13] Taking into account the

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[12] The Indian Evidence Act, 1872, Section 155, No. 1, Acts of Parliament, 1872 (India).
[13] CEO & VC Gujrat Maritime Board v. GP Patel, AIR 1999 Guj 34.

nature of the profession, there is a necessity of an umbrella body which regulates various aspects of the profession. The Bar Council of India (hereinafter BCI) is the body which is entrusted with the regulation of the legal profession of India. BCI was formed under section 4 of the Advocates Act, 1961[14] (hereinafter the Advocates Act) and was structured as a body corporate[15] One of the several specific functions of the BCI is to enumerate standards of conduct and behaviour that every legal professional in India needs to adhere to in letter as well as in spirit.[16] To effectively discharge the functions provided to in the Advocates Act, including but not limited to the one mentioned above, the Advocates Act also provides the power to BCI to frame and implement rules.[17]

In exercise of the rule making power conferred by the Advocates Act, the BCI framed the Bar Council of India Rules, 1975 (hereinafter the BCI Rules) that are divided into nine parts and the parts are further sub-divided into chapters.[18] Chapter II of Part VI of the BCI rules deal with the standards of professional behaviour of an advocate.[19] It is clear from a comprehensive reading of the BCI Rules that a certain behaviour which squarely falls within the

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[14] Advocates Act, 1961, Section 4, No. 25. Acts of Parliament, 1961 (India).
[15] Advocates Act, 1961, Section 5, No. 25. Acts of Parliament, 1961 (India).
[16] Advocates act, 1961, Section 7(b), No. 25. Acts of Parliament, 1961 (India).
[17] Advocates act, 1961, Section 49 (1) (c), No. 25. Acts of Parliament, 1961 (India).
[18] Bar council of India Rules, 1975.
[19] Part VI, Bar council of India Rules, 1975.

bounds of legality for a lay person or for a legal professional in his personal capacity; may not be considered proper for an advocate acting within his professional capacity. This implies that the standard of propriety for an advocate in his professional capacity is definitely higher than that of a common man or even an advocate in his personal capacity. This increased threshold can be attributed to the fact that an advocate is a member of an elite community of professionals and is engaged in an important capacity in the process of dispensation of justice.

The duties of an advocate are divided into four parts, namely duty to the court, duty to the client, duty to the opponent and duty to the colleagues. The fifth duty on the list of duties of an advocate towards his client states that advocates shall protect the interests of his or her clients with grit and he shall do it through all honourable and fair means. We will divide this duty into two parts for the convenience of analysis. The first part that says that the advocate ought to protect the interests of his or her clients reflects the duty of the advocate towards the client. And the second part that says that the protection of interests has to be done through all honourable and fair means reflects the duty of the advocate towards the court which embodies the justice system. To sum up, the duties of an advocate to the client are always subject to his higher duty towards the justice system.[20]

[20] Queen v O'Connell 1844(7) ILR 261.

The ultimate loyalty of an advocate lies with the law. His end goal is to be a medium of dispensation of justice.[21] When an advocate presents his arguments in the court on behalf of clients, he strives to provide the most comprehensive and accurate representation of the position of his or her client so that the court takes cognizance of every phenomenon which is material in that case to arrive at justice.

As discussed above, witness is an important component of the criminal justice system. Thus, preparation of witness is one of the 'means' through which an advocate upholds the interest of his or her clients. Thus, applying the above-mentioned duty of an advocate, an advocate should prepare and make use of a witness in the court, in an honourable and fair manner. From the construction of the rule, it is imperative that the duty cast on an advocate to use honourable and fair means is an ethical duty. The standard of this duty is definitely higher than the offence of perjury.

Preparation of a Witness: The Practicalities

The practical aspect behind preparation of a witness by a advocate can be broken down to a few distinct reasons. These reasons can be mutually exclusive and thus can exist independent of one another. Presence or absence of these reasons will depend on the specifics of the situation and there is a possibility of occurrence of a situation

[21] *Supra* note 13

where none of these reasons apply and hence does not warrant preparation.

First, in most of the cases, a witness is a layperson who may not be articulate or coherent while expressing him. He may not be skilled at culling out the most relevant and material parts from a particular description and effectively conveying it to another person. In such a scenario, the guidance and counsel from an expert becomes imperative. An incoherent and incomplete testimony can cost an advocate his case and has the potential to affect justice.

Second, a layperson who is not a part of the judicial system looks up to the system with a sense of fear induced by deference. This feeling coupled with the first interaction with the judicial system creates an anxiety within the witness, which renders him unable to provide his testimony in a clear and cohesive manner. This problem is mitigated by preparation and consultation with the advocate who can make him understand the functioning of the judicial process and help him manage anxiety.

Third, the moods and mannerisms of a witness while providing testimony in a court of law can have a substantial impact on its evidentiary value in the eyes of law. If the default demeanour of a witness is hesitant or under confident, then hesitation or lack of confidence can be misinterpreted by the judge as lack of truth in the testimony. In addition to this, such demeanour of the witness has the full potential of being exploited by the opposite party to the best of their advantage during cross-examinations. An advocate ought to prepare his

witness to withstand such pressure situations without budging from the true account of the facts.

Relevant Philosophical Strains and Their Application

Determination of the ethical responsibility of an advocate while preparing a witness would require us to make an endeavour of carefully studying and considering the invaluable insights on ethics offered by various great philosophers. After going through the works of some of the noted experts on ethics from both the east and the west, the author has come to a humble conclusion that the ethics behind the preparation of a witness can be best explained through the works of Immanuel Kant and Amartya Sen.

Immanuel Kant

Immanuel Kant's greatest contribution to the world of philosophy is his formulation of categorical imperative. Categorical imperative has two specific formulations. The first formulation is popularly known as 'universality'[22] and the second one is known as 'humanity'.[23] Kant emphasizes on the fact that these imperatives do not change on the basis of situation and context and are craved by every human being. Thus, every human being on earth ought to follow these imperatives. The first formulation of universality states that a person should act only on that maxim which he wants every other

[22] MF Singer, *The Categorical Imperative,* 63 THE PHILOSOPHICAL REVIEW, 577 (1954)
[23] *Id.*

human being to follow.[24] The second formulation of humanity states that human beings should not treat their fellow beings as mere means to an end but should treat them as ends in themselves. [25]

I propose that the second formulation can be adequately applied to resolve the ethical dilemma faced by the advocates while training witnesses. Witnesses are persons who are enshrined with the duty of telling the truth in the court of law so as to capacitate the court to do justice. Till the point the advocates are training the witnesses to present the truth in an effective manner, they are treating the witnesses as ends in themselves. But, the moment an advocate crosses that line and starts manipulating the testimony of the witness in the direction of falsity, he is no longer treating the witness as an end. He is treating the witness just as a means to an end of winning the case by hook or by crook.

Amartya Sen

Amartya Sen is another public intellectual whose expositions of the Indian concepts of 'nyay' and 'neeti' can provide invaluable insights for the present discussion.[26] Nyay is the concept of 'substantive justice' and Neeti pertains to 'behavioral correctness' and 'organizational propriety'. Nyay caters to the realization-focused aspect of justice whereas Neeti caters to the arrangement-focused concept of justice.[27] The ultimate

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[24] MF Singer, *supra note 22*, at 585.
[25] MF Singer, *supra note 22*, at 587.
[26] amartya sen, the idea of justice, 42, (Penguin Books, 2010).
[27] *Id.*

aim of Neeti is to lead to Nyay. Thus, the necessity and relevance of all the institutions and procedural aspects of justice has to be tested on the anvil of their contribution to the realization of substantive justice.[28] Even if the procedural aspects seem to be within the bounds of law but are not resulting in justice, then that is a wakeup call to evaluate the procedure and initiate modification.[29]

Testimony by witness is contained in the Evidence Act which is an adjective or procedural law. According to ancient Indian jurisprudence, it is a part of Neeti. Thus, the aim of witness testimony is to lead to substantive justice, i.e. Nyaya. Thus, if the manner in which a witness is prepared by an advocate doesn't lead to Nyaya, then it points towards the violation of ethical conduct irrespective of the outcome of the case and demands behavioural correctness.

As discussed above, the ethical behaviour of an advocate while preparing a witness can be investigated and explained by equally drawing from eastern as well as western traditions. This highlights the importance and relevance of the diverse philosophical traditions in addressing the present day ethical conundrums faced by the profession.

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[28] Amartya Sen, the Argumentative Indian, 59 (Allen Lane, 2005).
[29] *Id.*

Dilemma In Preparation of A Witness: The Dichotomies And Fault Lines

Section 191 of the Indian Penal Code, 1860, deals with the offence of perjury.[30] That particular section makes it an offence to provide false statement in a court of law when under oath or any other substitute for oath. A condition precedent for this offence is that the concerned witness made a false statement with knowledge of the factual inaccuracy of the statement or with lack of knowledge regarding the factual accuracy of the statement. Punishable up to 7 years[31], the procedure for the same finds a place in the Criminal Procedure Code, 1973[32].

However, there can be conducts of an advocate that are legal but certainly not ethical. Thus, it would be wrong to assume that every conduct of an advocate, which is short of assisting the client to commit perjury, is ethical. An advocate should take it upon himself to maintain highest form of integrity, fairness and honor while training and preparing a witness. [33] At this stage of inquiry, we need to explore three grey areas where ethical considerations have the potential to arise. First, an advocate might train to change or modify the content of

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[30] Indian Penal Code, 1860. Section 191, No. 45, Acts of Parliament, 1860 (India).
[31] Indian Penal Code, 1860, Section 193, No. 45, Acts of Parliament, 1860 (India).
[32] Criminal Procedure Code, 1973, Section 340, No. 2, Acts of Parliament, 1974 (India).
[33] E. Lewis, Witness Preparation: What is ethical and what is not, Litigation, 36 PERSUASION 41,44 (2010).

the testimony. [34]Second, the advocate might coach to change or modify the behaviour. Third, an advocate might provide implied instruction to give false testimony. The last one has gained near unanimous acceptance as violation of ethical conducts.[35] The first and second aspect may very well qualify as unethical practice based on the intent as well as the extent.

In order to trace this fine line of difference, we need to explore certain dichotomies, as illustrated below.

The first dichotomy is *how versus what*. An advocate may very well train the witness regarding the 'how', i.e. the manner of delivering a testimony. But, if he steps in the area of 'what', i.e. the content of the testimony, then he is committing a violation of ethical behavior expected from a legal professional. This is because it is the witness and the not the advocate who has perceived the particular fact(s) which is material to the inquiry. And he has an obligation to describe the same in an unadulterated manner. If the advocate usurps the role of the witness by dictating him the content of the testimony, it is nothing but misleading the Court. Thus, the aim of an advocate while training the witness for a testimony should be to discuss on the 'how' part; in order to make the 'what' more precise and clear.

The second dichotomy is *discussion versus instruction*. Discussion on a subject matter occurs when two or more

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[34] T. Karper, *Preparing a witness for deposition, Litigation*, 24 DISCOVERY · DOLLARS · DEPOSITIONS 11 (1998).
[35] *Id.*

persons who are equally placed in the hierarchy deliberate in order to come to a suitable solution to a certain problem. And instruction is a process in which a person who is in a higher position in the hierarchy provides commands to his subordinate to act in a certain way. In such a scenario, the person which is lower in the hierarchy is stripped of his agency. An advocate should discuss the way in which the witness should present his testimony to make it more effective. There is always a scope to marshal the facts. But, this should not lead to instructions which takes away the authenticity of the evidence and leads to inaccurate presentation of facts. The witness should follow his conscience with respect to the content because of the effectiveness of the testimony should not come at the cost of falsity.

The third dichotomy, which appears to be the most apt in this discussion, *is form versus intent*. An advocate can discuss with a witness in order to modify and improve the form in which he wanted to convey his testimony to the extent the form is not unnecessarily offensive and complies with the provisions of the Evidence Act. If because of the training, there is an alteration in what the witness originally intended to say, then it would be a violation of the ethical principles. The author feels that this dichotomy aptly captures the essence of the ethical dilemma involved in preparation of a witness by an advocate.

Conclusion

The American Bar Association's model code of conduct includes guidelines for preparation of witnesses. Such guidelines provide a framework which can be used as a

checklist by the advocates while preparing a witness. India can also endeavour to have a model code of conduct. The initiative can be taken by the apex court[36] as it has done to ensure the security of witnesses.[37]It can provide guidelines which will include the first principles of preparing a witness and would be premised on the *form versus intent* dichotomy. If the apex court takes initiative, then other stakeholders in the process including the BCI will be convinced about the importance of the issue and will be motivated to act on it. This will pave the path for a comprehensive code of conduct prepared by the BCI after consultation with all the stakeholders.

An advocate acts as an interface between the common people and the justice system. Thus, the standard of behaviour adopted by the advocate forms the baseline for the public perception of the justice system. Since, public confidence is at the heart of a successful judiciary, it is imperative for the advocates to uphold the highest standards of morality, ethics and fairness in their professional as well as personal conduct. Such ethical behaviour is specifically required to be demonstrated in areas like preparing witness which has a direct bearing on the outcome of a case and hence on delivery of justice. And a code of conduct which provides guidance to the

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[36] M.P Nathanel, *A Law for those who Testify*, THE HINDU (May 10, 2022, 09:00 AM), https://www.thehindu.com/opinion/op-ed/a-law-for-those-who-testify/article29127685.ece.

[37] G. Annakrishnan, *India now has a Witness Protection Program in Place,* THE INDIAN EXPRESS (May 10, 2022, 09:05 AM), https://indianexpress.com/article/india/india-now-has-a-witness-protection-programme-in-place-5480579/.

advocates by setting the standards helps in the maintenance of such standards.

It is a very well known fact that perjury has become a norm in the Indian Courts and this has reduced the credibility of the Indian judiciary in the international panorama.[38] It is an undeniable fact that this steep rise in perjury cases can be attributed to advocates and witnesses acting in concert to use unscrupulous means. It is high time to realize that when advocates assist or instigate witnesses to falsify statements in court, they are harming the reputation of the legal profession, the sanctity of statements made under oath and the credibility and reverence enjoyed by the law adjudicating institution. Adoption of a model code of conduct with regard to preparation of witnesses can be an effective method to move towards a more ethical process of witness testimony.

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[38] S. Deshpande, *Perjury not a Crime in India*, THE TIMES OF INDIA (May 10, 2022, 09:10 AM) https://timesofindia.indiatimes.com/india/Perjury-not-a-crime-in-India/articleshow/935160.cms.

RESPONSE TO THE CRISIS OF ROHINGYA REFUGEE WITH SPECIAL REFERENCE TO INDIA

Ananya Hazarika[*]

Abstract

A refugee is the one who has a birth place, but due to uncertain happenings, their country denies to allot them their belonged rights. They are being displaced forcefully or decides to move out from their native place and later on, the domicile they entered into either accepts or rejects their sta. If being rejected the domicile country prefer them as a threat to their own country's men. This paper illustrates the scrutiny of the status of Rohingya Refugee in special reference to India's respond towards tackling the crisis created from the flow of illegal migrants. The history which leads to the cause of this crucial situation gives us a light towards the coming up of refugee problems in India and the measures taken up for tackling the issues. This paper discusses about the responses that India is making towards Rohingya Refugee in relation with the resilience taken by the government of India to combat an unfortunate protracted situation created from the refugee issue.

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Introduction

One of the most crucial problems faced by the global village is refugee crisis. This problem is as a resulted of armed conflicts and internal crisis taking place in different parts of the world. This also accelerates the refugee problems at large scale. The refugee crisis has become the foremost concern of human rights violation which the communities seeking refuge is facing today. This has paved the way for various international organization to take up a prior responsibility to tackle this complex circumstance with the helping hands from across the members of the world states.

Article 1 of the Convention Relating to the Status of Refugee, 1952, refers Refugee as 'someone who is unable or unwilling to return to their country of origin owing to a well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[1] This definition was designed to address the consequences of the World War II, targeting only those who were compelled to leave their country of origin. With the passage of time, various developments took place, this definition became limited and narrow. The definition was never made to tackle huge refugee inflow of the world nor ready for addressing the migration of the mass asylum seekers claiming for the refugee status. This has resulted into too many

[1] The text of the 1951, Convention relating to the Status of Refugees and the text of the 1967 Protocol relating to the Status of Refugees, Office of the United Nations High Commissioner for Refugees (UNHCR), available in http://www.unhcr.org/3b66c2aa10.pdf (last visited 2 August, 2021).

setbacks such as the illegal migrants problems in various countries and people - indulging in criminal activity and smuggling.[2] The Convention addresses the rights of the individual who are to be guaranteed and it states the respective country's prior duty to grant them asylum. The growing problems created by the complex nature of today's evolving nations give us a sight towards the results of the environmental displaced travellers, displaced population due to internal conflict among the population or with the concerned government or warfare-dislocated people.[3] This has rang the bell to get into scrutinizing illustrations and implications that the world - community needs to come to a collective decision making and tackle the rise of refugee crisis, since the time of world wars to the present scenario.

Another important aspect concerning the rights of the refugees is principle of non-refoulment. Although the principle of non-refoulment, i.e., not forcing a country in which they are liable to be subjected to persecution was held central to the Convention but what is more important is whether their home country is able to provide a safe and stable environment for the refugees is not mention. The problem arose when determining the status of the Refugee itself as the definition provide the limited scope of 'fear of persecution' in which the test of

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[2] Adrienne Millbank, The Problem with the 1951 Refugee Convention, Parliament of Australia, available in http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pibs/rp/rp0001/01RP05 (last visited 2 August, 2021).

[3] "SSRN Electronic Library". SSRN 2768162 and Schoenholtz, Andrew I. (11 June 2015). "The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty- First Century". SSRN 2617336.

such persecution was based on the convention guidelines, where only five grounds are expressly stated. The grounds are religion, race, nationality, political opinion and social group. However, in reality there are other factors, which may make people to leave their home country such as wars and conflicts, economic, ecological, or climatic factors.[4] This gave an opportunity to some countries to close their doors for the refugee rather than giving them refuge.

In the context to India tackling the Refugee crisis, is not a new issue. The country has been facing Refugee problems since years to cover its origin and settlements. From the neighbour countries such as Nepal, Bhutan, Afghanistan, Pakistan, Myanmar, Sri Lanka, Bangladesh, Iraq, Iran or Tibet, there is continuous influx of people to our country. There are various groups of refugees such as Chakama, Hajong, Hazara, Sri Lankan Tamil Muslims, Rohingya refugees of Burma and many more crossing India's rates of carrying refugee up to thousands. To deal with this problem, India has taken part in bilateral relations with other countries and in its agreements with respective countries. In those summits, it was held that India had applied the principles of humanitarian traditions, international legal obligations and Constitution of India 1950, Non-Governmental Organization (NGO) and the United Nations High Commissioner for Refugee (UNHCR) who are responsible

[4] Leila Nasr, International Refugee Law: Definition and Limitations of the 1951 Refugee Convention, available at http://blogs.lse.ac.uk/humanrights/2016/02/08/international-refugee-law-definitions-and-limitations-of-the-1951-refugee-convention/ (last visited 2 August, 2021).

to give protection, security and guarantee for basic human rights of the refugees in India.[5]

At present there are about 420,400 refugees in India coming from its next-door countries. Majority are from Tibet and Bangladesh, which estimated, more than 110,000 and 36,000 respectively, and more than 102,300 are the Sri Lankan Tamils.[6] There are 100,000 refugees from Myanmar and 30,000 from Afghanistan, Iran, Syria as estimated during 2008 figures.[7] Now the record has hike up to over 2,00,000 refugees and an estimate of some 4,718 cases of asylum seeker which are pending before the courts in 2014. This is also due to the violence that took place across Africa and Middle East as stated by the United Nation High Commissioner for Refugees.[8]

One of the major chunk of refugees which seek refuge in India is the refugees coming from Myanmar known as Rohingya Refugees as mentioned above. They are originally from the Arakan region in the Rakhine

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[5] Akasha Malhotra and Akshay Kumar, Indian Perspective on Protection of Refugees, Refugee and Human Rights, First Edition, 2008, pp. 8-9.
[6] Refugee Law: The Indian Perspective; Law teachers; Law Teacher, available in http://www.lawteacher.net/free-law-essays/international-law/refugee-law-the-indian-perspective-law-essay.php, (last visited 2 August, 2021).
[7] Human Rights of Refugee in Indian Legal Regime and Role of Judiciary, available in http://shodhganga.inflibnet.ac.in/bitstream/10603/128419/15/12_chapter%204.pdf,(last visited 2 August, 2021)
[8] India home to 2,00,000 refugees in first half of 2014: UNHCR; The Hindu, available in http://www.thehindu.com/news/national/india-home-to-200000-refugees-in-first-half-of-2014-unhcr/article6771040.ece; ,(last visited 2 August, 2021).

province. They have been residing in Myanmar for quite a long amount of time and have their own ethnicity. However, the government of Myanmar does not recognize them as the ethnic community of the country. They justify their statement saying that their roots are belonging from Bangladesh and not Burma. The Rohingya community have been struggling more or less like a stateless people from more than 35 years[9]. After a riot and conflict broke up in 2012, the Rohingya Muslims are in constant oppression and violence, which can even be said as a case of genocide, which caused them to flee their homeland. They have tried knocking the door of Thailand and Malaysia but due to high security measures they could not harbour in their land, even though they did give them health benefit and food. This led them to move straight to Bangladesh and India, which they would travel up to Delhi and Jaipur to get themselves registered under the UNHCR refugee status. However, only a few were registered and most of them are considered by the government as illegal migrant. From the last two years, they have seen the increase of these Rohingya Refugees, which are recorded to be more than 40,000 are in India particularly in West Bengal, Jammu, Uttar Pradesh, Assam and also some parts of Tripura.[10]

The International Organizations have tried to convince the Indian Government not to expel the Rohingya Refugees from the country as they have been suffering as

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[9] Sharadha Devanath, Understanding the Problems created by the Rohingya Refugees in India, Indian News, available in https://indiansnews.com/india/understanding-problems-created-rohingya-muslims-india/, (last visited 2 August,2021).
[10] *Id.*

one of the most persecuted groups in the world of refugees. India has therefore, been dealing with the crisis created by the refugees as well as seeing its principles of non-refoulment which gives the country right to look after its citizens and protect them as threat created by the refugee holders, which may also take up certain actions against the will of the International Organizations.

Genesis of Rohingya Crisis

History and Background

Rohingya refugee are believed to be the earliest settlers in Arakan Region, which began in 7th century as stated by Syed Islam. The Arakan region (before 1989) was the present Rakhine state of Myanmar, which is inhabited by the Rakhine people and the Rohingya people together. They are consisting mainly of Muslim population and have been residing with the other Buddhist and religion people in Myanmar. The Rohingya formed 5% of the majority of the population, which is dominated by the Buddhist terrain and are known to be indigenous to the land. The Rohingya people got its roots from the earlier period of 9th century when the Arab traders came and set their occupation and trading activities. The region of Arakan was known for its richness in oil, minerals resources and other natural fibers which attracted the foreign traders to hold a relation of trade with the native state. The word Rohingya comes from the Arabic word 'Rahm' meaning 'Mercy' when the Arab claim 'Mercy' from the king for survival in Burma and later became the Rohingya people of the region. By 1440, Islam became the prominent religion in the area where a Buddhist ruler

embraced the religion, followed by a Turkish Sultan who strengthened the Islamic hold in the Arakan region from 1430-1784, i.e., for more than 300 years until Burma started gaining control in the region since the Battle of Plassey in 1757. After that, the Rohingya people faced major threat to their lives as a resident of their own territory according to which Burma government and other people of the place do not consider them as the origins of the land.[11] When the reign of the British came on 1824 and took over Burma, divided the geography of the state entirely before Burma came to be known as Myanmar, and some belong to Chittagong, as presently situated in Bangladesh.[12]

Conflict in Rakhine State: Emergence of Rohingya Crisis

Myanmar has been hostile with Muslims community since 1942 in which more than 1,50,500 Muslim people were killed by the Buddhist and continued till 1982.[13] In 1992-93, again migration of about 260,000 Rohingya fled to neighbouring countries.[14] In 1982, a law was passed

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[11] Muhammad Sallemmazhar and Naheed S. Goraya, Plight of Rohingya Muslim, available at pu.edu.pk/images/journal/history/PDF-FILES/3%20Paper_v53_1_16.pdf, (last visited 2 August, 2021)
[12] Adrija Roy Chowdhury, Rohingya Muslim Crisis in Myanmar: The warning Signs of a Possible "Genocide" available at http://indianexpress.com/article/research/rohingya-muslim-crisis-in-myanmar-the-warning-signs-of-a-possible-genocide-4460254/ (last visited 2 August, 2021).
[13] *Supra* note 11.
[14] Syed Mahmood, Emily Wroe, Arlan Fuller and Jennifer Learning, The Rohingya People of Myanmar: Health, Human Rights and Identity, Vol. 309, No. 10081, 2017, pp. 1850, available at http://

by the Myanmar Government that revised the registration of citizen in the country, known as the Union Citizenship Act, 1948. The new legislation facilitated for registration to all "indigenous" groups living on Myanmar and out of the 135 official groups.[15] Rohingyas were not given the Status of Citizenship of the country as they were regarded as Bangladeshi and instead were given a Foreign Registration Card. The Rohingya Muslim became deprived of their freedom was lost from their hands in economic, political or any social rights and activities.[16] This raised the concern of losing their own identity and rights from their own land, hence, arose the conflicts between the Rohingya and the rest. There was a demand of separate and independent state which the Government of Myanmar refused with support of majority of the mainstream people of the land. The monks of the land tried to influence the people by claiming the Rohingya people as threat to their religion, culture and land. This led to the creation of many laws and regulations passed by the government which gradually forced the Rohingya people to flee out their residing territory.

The conflict continued and reached at its peak in 2012, when a riot broke out in Rakhine in which the accusation that Rohingya Muslims rapped a Buddhist woman, after which the Rakhine Buddhist then lost their tolerance

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www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(16)00646_2.pdf, (last visited 2 August, 2021).

[15] Aamna Mohdin, A brief history of the word "Rohingya" at the heart of Humanitarian crisis, Quartz, available at https://qz.com/1092313/a-brief-history-of-the-word-rohingya-at-the-heart-of-a-humanitarian-crisis/, (last visited 2 August, 2021).

[16] *Supra* note 11.

and caused a lot of violence and bloodshed. The Rohingya people were then oppressed by the Myanmar Army, which resulted into the burning down of their houses, rape of their women, murder of their children and force them to live in detention camps within the territory. With this terror being faced dreadfully, more than 1,20,000 people decided to flee the land and take shelter in other states resulting the inflow of migrants (illegal) in parts of Bangladesh, Malaysia, Thailand, India etc.[17]

Rohingya Refugee Arrival in India

The dreadful pack of people flooded from Myanmar quickly took shelters in the first arrival lands they got on their way. A large number of them were settled in Bangladesh. In Bangladesh, due to the Government rejecting the huge inflow of migrant as a threat to influx their own people, they closed their doors and as a result the Rohingya set up camps near the boarder of Bangladesh. Some of them float through boats and landing in the coasts of Thailand and Malaysia.However, due to strict security measures the Rohingya could not harbor in their lands. Indonesia simply did not open their doors to these people for giving any sort of aid or shelter. This led them towards India helplessly.[18]

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[17] EngyAbdelkader, The history of the persecution of Myanmar's Rohingya, available at https://theconversation.com/the-history-of-the-persecution-of-myanmars-rohingya-84040 (last visited 2 August, 2021).

[18] Prabhash Dutta, How Rohingya Reached India and why Government is Not Ready to led them Stay, India TODAY, available at https://www.indiatoday.in/india/story/rohingya-muslims-myanmar-

They entered India from the Indo-Bangla Borders and into the Northeast Region of West Bengal and Assam and spread to various parts of the country like that of Jammu, Tripura, Rajasthan, Delhi, Uttar Pradesh, Andhra Pradesh, Kerala etc. and spread slowly towards other parts of the country. There are over more than 40,000 Rohingya Refugees residing in India, and larger the amount increased by 2015 report which estimated that the rate of the Refugee inhabiting in the land is increasing.[19]

As they are not given any status under our Constitution of India, their only hope is UNHCR, through which they get themselves to register themselves as Refugee under the mandate of the UNHCR and given a Refugee Card. Under the registration it is depicted that more than 16,000 Rohingya Refugee have been registered but the larger population are still lacking behind the prior knowledge. [20]

The problems of the refugees have been dealt by the Indian laws and Government according to the principles led down by the Constitution of India. Under Article 22, Refugees in India are regarded as 'ALIEN' and this status us also given in other statutes such as the Indian Citizenship Act, 1955, the Foreigners Act, 1946 and the

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india-aung-san-suu-kyi-narendra-modi-1039729-2017-09-07, (last visited 2 August, 2021)

[19] *Id.*

[20] ZeeraKazmi, Who are the Rohingya, Why are they Called "Security Threat" and "Nowhere People", The Hindu Times, available at https://www.hindustantimes.com/india-news/the-world-s-most-persecuted-community-who-are-the-rohingyas/story-PgNwZ4URpdpMpZXNryw881.html, (last visited, 2 August, 2021)

Registration Act, 1908. The Constitution has also given benefit and privileges like that of Right to Life, right to Equality, right to move to the Supreme Court, etc. However, India has not yet ratified the Convention Relating to Status of Refugee, 1951, which posed a lot of difficulty for refugee in India. even if they are registered as refugee under the UNHCR, some are not recognized by the Government of India.

It is being stated that the Rohingya Refugee poses security ramification and are suspected to be a pro terrorist community only on the presumption that they are of the Muslim Community and reside mostly in the Jammu which is an unstable place for alien to be. However, disregard of the fact that it will be putting the life of many refugees in danger by deporting them back to the place that might prosecute them. Even though India is not bound by the 1951 Refugee Convention, however, the international treaties today have taken the form of Customary International Law standard which puts India in a questionable role especially with the strict principle of non-refoulment and protection which it holds over the years. Rohingya Muslims are known to be the most threaten race verge of extinction in present International Society, in which most of them are stateless or internally displaced with Myanmar and others live in the borderline of different countries. They either face prosecution or discrimination in any place they go.

India's Response towards the Rohingya Refugees

Rohingya Refugee: A National Threat

The Indians did not welcome the influx of Rohingya Refugees to our country, which is already over populated. It was not a surprise that they along with themselves brought security threat to the citizens of our country (threat to lives, property etc). In 2014, the Intelligence Agency noted a Burdwan Blast case in West Bengal, in which Mohammad Khalid a Rohingya was arrested, who confessed that he has being given training by the Pakistani Taliban[21] and suspected that Jaish-e-Muhammad chief Masood Azhar and Lashkar-e-Taliban founder Hafiz Saeed, both notorious terrorists who operated out of Pakistan and exclusively targeted India, have come out in support of the Rohingya Refugee. The threat arising from this backing can be divided into two parts: Ideological and Operational, which gives aid to the Arakan Rohingya Salvation Army (ARSA) and some of them are hiding in the refugee camps.[22] Most of the Muslim terrorists belonging from the members of Rohingya refugees have vowed to take revenge Myanmar for their oppressive nature towards the Muslims.

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[21] Mohammed Sinan Siyech, India's Rohingya Terror Problem: Real or Imagined? South Asia Voices, available at https://southasianvoices.org/indias-rohingya-terror-problem-real-imagined/, (last visited 2 August, 2021)

[22] Sreemoy Talukdar, Rohingya Crisis: Humanitarian grounds cannot undermine national security; India must defy coercive pressures, First post, available at https://www.firstpost.com/india/rohingya-crisis-humanitarian-grounds-cannot-undermine-national-security-india-must-resist-unhcrs-coercion-4035877.html, (last visited 2 August, 2021).

India's Approach Towards Rohingya Refugee

In the first half of the century India remain silent regarding the inflow of the migrants, the concerns started when these people started bothering the security of the residing civilians. They settled down in many states setting up camps. Some of the people belonging to the refugee started working for their survival needs, like that of small waged labourer, paid servants for household works etc. Some of them faced problem at worked place or to get a work because they were not having proper documents at hands, and very few had a hold to the documents laid by the UNHCR Refugee Card, which is a limited help for them. They don't have the aids for health nor education and nor a proper shelter home, they are all camp up in the Camps that the NGOs provides for them. Nonetheless, they were content with this then the horror back at Myanmar.

Indian government had always tried to put security surveillance around them as they formed illegal migrants so there was a need for intelligence agency always be at their tails in order to restrict them hold any unlawful activities. There were many cases of smuggling, human trafficking (for organ selling, prostitution, personal servants etc.) murders case etc. They do not hold down to any documentation and details that will qualify as a foreigner ID or PAN card under the Government of India. Government also expressed concerned that Rohingya will use up the national scheme and resources which are made available for the Indian citizen only which will in turn deprive the citizen of resources such as medical,

employment, housing and educational facilities. [23] The Government fears that the citizens are the foremost priority to India, especially when a large number are concentrated in Jammu and Kashmir region where there is continuous unrest of conflict and violence [24]. Thus, lead to the decision of the Indian Government to decide to deport the Rohingya Refugee back to Myanmar on August 9, 2017, on which 40,000 Refugee are said to be deported except a few 14,000 [25], who were registered under the UNHCR. The decision of the Indian Government was deeply criticized by the United Nations as well as the World Community. The National Human Rights Commission also intervened on August 18, 2017 in the matter standing against the deportation of Rohingya Refugee as it is believed that this will cause harm and treat for them which is a violation on Humanitarian grounds. [26] On the other hand, an appeal

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[23] Krishnadas Rajagopal, "Illegal" Rohingya Refugees pose Security Threat, Centre tells SC, The Hindu, available at https://www.thehindu.com/news/national/rohingya-refugees-illegal-pose-security-threat-centre-tells-sc/article19708554.ece (last visited 2 August, 2021).

[24] Gauri Naithani, Explainer: Who Are Rohingya Muslims, Why India Want to Deport Them & is it Ethical? Scoop Woop News, available at https://www.scoopwhoop.com/rohingya-muslims-deport-india/#,zwtf11d3j)(last visited 2 August, 2021).

[25] Supreme Court bars Deportation of Rohingya Muslims until case hearing, says govt can't be blind to plight of women, kids, First Post, available at https://www.firstpost.com/india/supremre-court-bars-deportation-of-rohingya-muslims-until-case-hearing-says-govt-cant-be-blind-to-plight-of-women-kids-4139369.html (last visited 1 August, 2021).

[26] Mrinmoy Bhowmick, NHRC to plead against Deportation of Rohingyas on "Humanitarian Ground", Ibtimes, available at https://www.ibtimes.co.in/nhrc-plead-against-deportation-rohingyas-humanitaran-grounds-video-742334 (last visites 29 July, 2021).

was filed by two Rohingya Refugee against their deportation to the Supreme Court by Mohammad Shaqir and Mohammad Salimullah who are registered refugees under the UNHCR.[27]

Legal Protection Towards Rohingya Refugee in India

Rohingya refugees are the most recent refugees that set foot in India due to gross violation that Myanmar Government has done to them that force them to flee their homes altogether. Their faith is however bitter as they faced many challenges in every way, they are being turned down and ignored by many countries and just when there is actual hope for refuge in India, they are being threatened to be deported back. The Indian Government has set its mind to deport the Rohingya Refugees due to Security reason and threat; knowingly they may face threat and persecution by the Myanmar Government. However, while their stay in India they are entitled to some basic rights and protection which are given all refugees in India.

The Constitutional Rights and the Principle of "Non-Refoulment"

The Constitution of India has provided the citizen and foreigners alike the basic fundamental rights guaranteed in the Part III of the Constitution. Thus, Rohingya Refugees have the Right to Equality (Article 14), Right to Life (Article21), Right to Religion and Right to Freedom of Movement. The Indian Judiciary have time and again

[27] *Supra* note 25.

upheld the Fundamental Rights to provide the refugees with Rights and Liberty protection under the Constitution of India. Thus, under the Constitution of India the Right of "non-refoulment" is also covered under the ambit of Right to Life[28]. "Non-refoulment" is the principle of Customary International Law which means the asylum seekers and refugee should not be force to be return to the country which they might be likely to be persecuted or face any threat to their life[29]. Thus, Rohingya refugees should not be deported knowingly they might be prosecuted, especially when the situation in Myanmar does not allow them to return back.

- Principle of Natural Justice

Even though India has the Right to Deport and give permission to stay to refugee without being question, however, if the refugees are decided to be deported, they should be given the right to be heard according to the due process of laws. This is the basic Principle of Natural Justice and if Rohingya Refugees are being asked to be deported without availing this right to them will be a violation of "Audi Alteram Partem" or the Principle of Natural Justice.[30]

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[28] Ktaer Abbas Habib Al Qutaifi v. Union of India & others, 1999 Cri.L.J. 919, https://indiankanoon.org/doc/1593094 (last visited 3 August, 2021).

[29] Brihad Ralhan, The Rohingya Refugee Crisis In India, Vol. 3, Issue 9, 2017, available at https://jcil.lsyndicate.com/wp-content/uploads/2017/10/Brihad.pdf, p. 5, see also file:///D:/Refugee/CHAP%204/Brihad.pdf (last visited 3 August, 2021).

[30] *Id.*

- Bias Classification

Rohingya people also face discrimination even in India in which they are segregated from the rest of they Refugee in India. There is no rational reason for classifying the Rohingya from the other refugees' group and depriving them of the same refugee protection as have given to other refugees group and depriving them of the same refugee protection as have given to others. The segregation of the Rohingya refugees if solely on communal grounds is a gross discrimination on the Rights to Equality and Religion.[31]

Conclusion

India since its Independence, it has applied ad hoc policies when it comes to settling refugee problems. "Bilateral" and "Administrative" policy makes it easy for India to decide to decide on refugee settlement. It sometimes adheres to a "do-nothing" policy which puts it in a safe spot, though it is sometimes often questioned and in case of Rohingya Refugee crisis, India has taken the same approach. India has always had a good relationship with both Myanmar and Bangladesh, it needs Myanmar as it is a gateway to South Asia and for cooperate with the patrolling the Southern Indian Ocean. So also, Bangladesh has always been in a friendly relationship with India. However, India's relationship towards Myanmar may have been beaten up by China, all of its strategic towards economic and political issues

[31] *Id.*

are concerned did not yield any good result.[32] But since the inflow of Rohingya refugee are becoming out of hand and the Myanmar government are giving a silent respond, India is force to take action on August 2017 to deport the illegal migration of 40,000 Rohingya who were taking refuge in India, reasons being that they are illegally crossing the boarders of India without any proper documents that may verify them and thus violates the Foreigners Act, 1946 and more importantly they poses a threat to the security and peace of the country as it was found they might have some connection and harboring terrorist activities in the country. However, India is widely criticized by the world community due to this decision on humanitarian basis.

On the threat of deportation, the Rohingya refugees have taking the step to defend themselves by filing a writ petition to the Supreme Court of India on September, 2017. They have stated that on deporting them they will face grave danger of persecution and this ultimately leads to the violation of Article 21 and Article 51 (a) of the Constitution of India as well as the principle of the non-refoulment. The petitioner also reminded the Government that on 2015, the home minister, asked for an amendment of the Passport (Entry into India) Rules, 1950 and the Foreigners Order, 1948 whereby granting shelter to all those who are facing religious persecution to minority of Bangladesh and Pakistan, without valid

[32] Shreya Upadhyay, The Future of India's Do- nothing Policy Towards the Rohingya, The Diplomat, available at https://thediplomat.com/2017/12/the-future-of-indias-do-nothing-policy-toward-the-rohingya/, (last visited 3 August, 2021).

travel documents who made their entry before 2014. This however did not apply to Rohingya in this after the contrary proclamation of the same Home Minister on 2017 toward the Rohingya refugees.[33]Moreover, the deportation would violate all human rights conventions regardless if India is signatory of the 1951, Convention on Refugees.

The Supreme Court of India while hearing the case from both parties said the balance should be made between national security and human rights. In case of Rohingya refugees is sensitive and should be taken in utmost care and caution and the Government should not be oblivious especially when most of the refugees are innocent children and women. Refugees or not, all person have a Right to Life and Personal Liberty and the issue of the question of the National Security of India, there is no prove as such that all Rohingya refugees are terrorist. With the contingency of the case, the bench comprises of Chief Justice Dipak Misra and Justice Chandrachud and Khanwilkar have delay the deportation of Rohingya refugee as long as the case is still pending in the court.[34] The Central Government however is not please by the decision of the court and has further said that the Supreme Court cannot intervene in the matters of the

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[33] Mohammad Salimullah and others V. Union of India and Others, Writ Petition (civil) SC No. 793 of 2017, available at https://indiankanoon.org/doc/162362659/ (last visited 3 August, 2021). See also file:///D:/Refugee/SP%20III/chap%205/additional%20affidavit%20Rohingya.pdf.

[34] *Id.*

central as they are not contingency at hand and will not stand India to be a "World Refugee Capital" anymore.[35]

It is no doubt that when it comes to refugees' cases, it is a Geopolitical Domain of the Government and must be based on that manner and the relationship of India and Myanmar might hit the rock if it is questioned by the court in its executive decision.[36] However, it also serves as a reminder to the Government that it should not take a blind approach to the situation when Humanitarian basis are also in question, provided it has obligations towards every International Customary norm to upload and not to withdraw from those principles. It is not likely for the Rohingya refugees to actually have connection to Terrorist activity, provided there was no strong evidence as such and India even though is concerned with security issues it should not make such allegations so lightly only on the basis of instability of situation in Jammu & Kashmir, when the instability of Jammu & Kashmir has always been there even before Rohingya refugees arrival. India has been taking refugees under its belt and the question of economic burden has not arisen [37]. Therefore, Rohingya refugees should be accorded the same as the other refugees in India and should not

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[35] India Can't become World's Refugee Capital, Centre tells Supreme Court in Rohingya Deportation Case, The Scroll, available at https://scroll.in/latest/867058/india-cant-become-worlds-refugee-capital-centre-tells-supreme-court-in-rohingya-deportation-case (last visited 3 August, 2021).

[36] Brihad Ralhan, The Rohingya Refugee Crisis in India, Vol. 3, Issue 9, 2017, available at http://jcil.lsyndicate.com/wp-content/uploads/2017/10/Brihad.pdf (last visited 3 August, 2021), p. 7, See also file://D:/Refugee/CHAP%204/Brihad.pdf.

[37] *Id.*

deprive them from any Fundamental aids and assistances on the basis of Humanitarian grounds. It should take into consideration the threat that will be put to Rohingya Refugees if they are too deported back to Myanmar when the situation in Myanmar is in violence and bloodshed and there is no progress in controlling the situations more importantly, they are still denied of their rights and citizenship[38] are not ready to promise any protection and safety to the Rohingya Refugees on their return to their home country. Rohingya Refugees are considered to be the most persecuted group in modern world and situation in Myanmar is an "ethnic cleansing" of the minority which is deeply condemn by the world community. They have gone through many hardships and discrimination for many years and for India to turned a blind eye is a morally and humanitarianly wrong.

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[38] U.N Official Warns "Major New Emergency Looms" in Rohingya Refugee Crisis, CBS news, available at https://www.cbsnews.com/news/u-n-official-warns-major-new-emergency-looms-rohingya-refugee-crisis/, (31-03-18/ 13:33 PM)

JAMMU AND KASHMIR: ARTICLE 370 AND THE NATIONAL SECURITY PARADIGM

Shivani Chauhan[*]

Abstract

The State of Jammu and Kashmir had stood out as a State with special status and its own Constitution for over seven decades since the independence of India and partition of the two nations. The Constitution Orders 272 and 273 brought this long-standing conundrum to a swift end by a final sentence of integration. The present article explores the geostrategic place of the State from the lens of national security, the roots of the imbroglio, its resolution and the pitfalls that mar the road to integration, and some indications as to the directions any policy must take as a way forward, keeping the human rights orientation of the democracy in mind.

Introduction

Constitutional problems of India are unique, in terms of topography, demography, geography, history, heterogeneity and variety of socio-economic interests and above all in the operation and inter-relation of its political institutions. The very tenor and theme of Indian Constitution has assumed a new dimension to adjust to the periodic human crises of a heterogeneous society founded on the recurrent spirit of unity in diversity, of

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centripetal and centrifugal factors and of coherence in divergence. Moreover, in a federal, democratic and pluralistic society, multiple events contribute their own hue and colour to the rainbow of constitutional jurisprudence.

In this perspective, Jammu and Kashmir, often termed as the crown of the Indian subcontinent and article 370 of Indian Constitution has been the most intricate and sensitive issues in the recent memory, which has generated a great deal of controversy among legal scholars, politicians, philosophers and the members of the public. It is, often forgotten that Jammu and Kashmir acceded to Indian union on precisely the same terms as were applicable to the other princely states, which required them to cede only three subjects, defence, foreign affairs and communications. Eventually, however, practically all states surrendered their rights of constitution making under the pressure of public opinion. That did not happen in Jammu and Kashmir. Sheikh Abdullah, whose support to the accession gave it a moral and political legitimacy, was under no compulsion to concede more subjects to the centre. He agreed to concede a few more subjects and signed Delhi agreement in 1952. Article 370 was to be deleted, after the provisions of the agreement were incorporated into the Indian Constitution.

The article was meant to lapse after President, on the recommendations of the State's Constituent Assembly declare the incorporation of a permanent constitutional

relationship of the State with the centre.[1] Variety of politico-legal events intervened and the situation went from confusion to confounding and a permanent conundrum of Indian Constitutional system.

Security Concerns (Defence and Economics)

Geostrategic Importance

Jammu & Kashmir's geographical location has both been a bane and a boon for India. The strategic location of the region cannot be emphasized enough. It lies nestled in the Himalayan mountainous region at the head of India, making the subcontinent virtually inaccessible. It touches the borders of important countries of the region, whose strategic significance has been immense. This strategic significance has, therefore, also been at the core of its fate and trajectory. It was predominantly geopolitical calculations that guided the British decision to keep the northern part under a strong tab during the pre-1947 period.[2]

A complex combination of pertinent geopolitical compulsions, strategic preferences, economic prospects, and ecological calamities have been the guiding force for the fate of the region and the policies of countries surrounding it. While it is strategically unique and, until recently, considered largely inaccessible to outside world, its geographical landlocked position makes it a

[1] "The Unity of India", Mukund Swamier 25 (1996).
[2] "Repositioning Pakistan Occupied Kashmir on India's Policy Map", Priyanka Singh, *IDSA Monograph Series no. 62,* Institute of Defence Studies and Analyses 10 (October 2017).

gateway to important countries in the region. The connectivity quotient is slowly gaining prominence in regional strategic discourse.[3] On top of this, the region is also endowed with vast amounts of natural resources, which have survived in pristine form due to lack of resource-intensive infrastructure investment projects owing to its conflict-ridden history. Many of the Himalayan rivers and tributaries that feed Indian water needs perennially flow through the region. Any impediment put to them may lead to disastrous consequences for the country as a whole.

Pakistan Factor

Pakistan and India have always been on tenterhooks since the independence and partition, with Kashmir being the knot of contention due to its largely Muslim population demographics serving as a foundational ideological battlefield—with one nation propounding two-nation theory, and the other asserting it secular commitments.

A look at the background of accession brings the issue to the fore. At the time of India's Independence, the princely state of Jammu and Kashmir was a single administrative unit under Maharaja Hari Singh, the scion of the Dogra dynasty. Since the Maharaja was undecided on a preferred course, he wished to sign a Standstill Agreement with both India and Pakistan. India refused to sign the agreement immediately, citing other major concerns and issues facing the country in the wake of

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[3] *Id* at 39.

Partition. However, Pakistan readily accepted the Standstill offer, and signed it. However, in a serious breach of the Standstill Agreement, Pakistan not only cut off essential supplies to the Jammu and Kashmir, but also hatched a conspiracy with tribal fighters to commit aggression on the territory belonging to the princely state under Maharaja in an attempt to acquire it by force. In response to the Maharaja of Kashmir's appeal, the Indian government agreed to offer military assistance to avert the invasion, but on the condition that the Instrument of Accession be signed before such help could be extended. The government of India contended that without a legal sanction, they could not offer military assistance in the Maharaja's territory as it would amount to aggression in a neighbouring territory. Hence, the Instrument of Accession was signed in India's favour.

This background becomes more important in light of the valley's insistent long-standing demand for *azadi*. Given the fact that the three choices facing the region were either to merge with one of the two countries or stay independent, the people at large did not get to exercise their right to self-determination due to the undue haste shown by the Pakistan establishment in capturing the region. As such, there is little reason to believe that peace could prevail in a territory that has been the bone of contention for over seven decades. Besides, as already discussed, the location of the region is such that India cannot afford to let it become a base for Pakistan's hostile policy of "bleeding by a thousand cuts." The growing presence of militant training outfits all over PoK is a matter of common knowledge. Further, Pakistan is currently facing an acute energy shortage. The abundant

water resources available make the region a suitable destination for Pakistan to construct huge dams which could alleviate its energy problem. This could result in catastrophic consequences to India's own water problems.

China Factor

The Jammu and Kashmir territory forms the sole land link between China and Pakistan. Especially the Gilgit-Baltistan region which forms a crucial link between Pakistan and its all-weather friend, the People's Republic of China. It is difficult to imagine how their bilateral ties would have flourished had the region, rightfully so, would have been under India's control. The territorial swap effected through the Boundary Agreement between China and Pakistan in 1963, which ceded the Karakoram area to China, presents another issue. According to Article 6 of the agreement, Pakistan may reopen negotiations with China as and when the Kashmir dispute is settled with India.[4] There is no reason to believe that given China's dominant position in Pakistan's economy and its own vested interests in the region, it won't arm-twist the latter into ceding more territory if Kashmir were to fall into Pakistan's hands—

[4] Article 6. The two parties have agreed that after the settlement of the Kashmir dispute between Pakistan and India, the sovereign authority concerned will reopen negotiations with the Government of the People's Republic of China, on the boundary as described in Article Two of the present Agreement, so as to sign a formal Boundary Treaty to replace the present agreement:
Provided that in the event of that sovereign authority being Pakistan, the provisions of this agreement and the aforesaid Protocol shall be maintained in the formal Boundary Treaty to be signed between the Peoples Republic of China and Pakistan.

and this poses a great strategic danger to India, given the obvious expansionist tendencies of the Chinese Republic, especially in the backdrop of the Doklam and Galwan stand-off, Arunachal Pradesh boundary disputes and China's impudent occupation of the nine-dash line islands despite the Permanent Court of Arbitration judgment in favour of Philippines.

The Sino-Pak territorial agreement served as a precursor to the subsequent building of the Karakoram Highway. In the present context, China is seeking to leverage this territorial link to fulfil its ambitious multi-pronged transnational connectivity project known as the China Pakistan Economic Corridor (CPEC). Chinese presence in PoK is a warning bell and needs diligent attention by India. Otherwise, this could translate into serious strategic implications in the future. China's growing stakes in Kashmir may also be detrimental to the natural resources given that as a region, it is largely pristine, and gifted with immense wealth of natural resources. The Indus and its tributaries which flow through the region render opportunities for large scale power generation projects and dams. In addition, Gilgit-Baltistan especially is blessed with large reserves of mineral deposits. This combination serves as a lucrative opening for countries like China. At the same time, being the most populous country of the world and undergoing rapid industrialization, China is fast burning its own resources.

Over the last few years, China has unleashed an aggressive multi-pronged agenda that involves building dams, operationalizing branches of Chinese banks, constructing roads as well as a proposed rail network

under the coveted China Pakistan Economic Corridor. Large scale announcements regarding various infrastructural and developmental projects in the region have been sponsored by China which have resulted in larger Sino-Pakistan ties which, over the years, have evolved into a strong strategic partnership.

Another hydropower project located at Bunji was being built with Chinese assistance. An MoU to this effect was concluded between Pakistan's Ministry of Water and Power and the Three Gorges Project Corporation from China. Apart from this, the Pak-China Joint Energy Working Group held consultations in 2012 to jointly take up important hydropower projects in PoK—the Kohala Power Project (KHP) located in Muzaffarabad in the so called AJK, and the 969 MW Neelum Jhelum Hydropower Project (NJHP), also located in the so called AJK. China has aggressively led and participated in infrastructural development throughout South Asia. However, Chinese flourishing interest in PoK has been very disconcerting for India as the region is claimed by it as part of Jammu and Kashmir. Important activities and projects for which agreements have been finalised between China and Pakistan include widening and realignment of the Karakoram Highway and a proposed road link between Gilgit and Skardu. Other important projects in PoK with Chinese firms comprise the Phandar project, the Harpo hydropower project, the Yulbu power project and the Mangla dam raising project in the so called AJK by the China International Water & Electric Corporation. It was expected that China may invest in housing and communications sector in PoK to the tune of US$ 300 million.

China is also vexed by the growing tide of Uyghur movement in its western province of Xinjiang. For a long time, Xinjiang has been in the grip of a secessionist movement that turned violent owing to the demand for a separate homeland for Uyghurs. Over the years, the Uyghur movement is allegedly said to have developed links with groups such as the Al Qaeda as well as several other groups active inside Pakistan, such as the Tehrik-e-Taliban Pakistan. The possible presence of PLA (People's Liberation Army) in PoK has been acknowledged by high officials of the Indian army, including the former army chiefs, General Bikram Singh and his predecessor General V. K. Singh as well as by former Air Chief Marshall N.A.K. Brown. Interestingly, there was a flurry of reports emanating from the West which endorsed the possibility of a substantial presence of PLA in the Gilgit-Baltistan region.

Internal Disturbances and Growing Insurgency

It is also a matter of common knowledge that insurgency has become deeply entrenched in the soil of Jammu and Kashmir. Subversive elements continue to pose a threat to the democratic process of the region with low election turnouts and political assassinations. The instances of march towards encountered militant Burhan Wani's funeral and stone pelting at the police and extra military forces are aimed at challenging the authority of the state. The separatist narrative has created a deep divide in the minds of the vulnerable youth of the region and poses a grave danger to the unity and integrity of the nation. The heavy military presence and the despair of regular life of a common man have become cyclical processes and the nexus seems to get aggravated at every new subversive

activity or military excess that takes place. It is plain as day that the region has not been stable for decades and the population at large has nothing but despaired at the fallouts of these activities in their daily lives.

Article 35A: A Shaky Edifice Built on an Uncertain Foundation

Following the accession of Jammu and Kashmir, a plebiscite was promised to the people temporary provisions put in place in the then Draft Constitution to adjust the territory. The genesis of the special status of Jammu and Kashmir was a result of inclusion of Article 306A in the Draft Constitution, which later became Article 370 of the adapted Constitution of India. This laid the foundation for a separate Constitution for the State of J&K, following which, Article 35A giving special rights to the residents of J&K was inserted through a presidential order.

Accession

The accession, whose background has hereinbefore been discussed, was preceded by three important factors: the letter of the Maharaja to Lord Mountbatten, Lord Mountbatten's reply and Indian PM Pt. Jawaharlal Nehru's telegram to the PM of Pakistan.

On October 26, 1947 the Maharaja signed the Instrument of Accession offering unequivocal, complete and final accession of the State with India. The defence of the State as an integral part of the country Bharat became the obligation and responsibility of the Government of India under canons of national and

international laws. The possibility of State's accession with the aggressor country Pakistan was incompatible legally, politically, socially, morally, ethically, economically, and all canons of international and diplomatic norms provided in the Transfer of Power enjoined in the Indian Independence Act, 1947. The significant and unequivocal decisiveness of the Maharaja Hari Singh about final, irrevocable, unconditional, constitutional, legal and international canons accession of J&K State to India as one of the Union of States reflects in the contents of his letter to Lord Mountbatten, wherein no term such as "will of the people", "wish of the people" or "plebiscite" or any other condition was mentioned.

The offer of plebiscite arose from the latter two of the documents, *i.e.*, Lord Mountbatten's reply to the Maharaja's letter and Pt. Nehru's wire to PM of Pakistan. The letter dated October 27, 1947 read:

…In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invaders, the question of the State's accession should be settled by a reference to the people.

PM Nehru's wire to PM of Pakistan also reiterated this commitment wherein it stated that "…In regard to accession also it has been clear that this is subject to reference to people of State and their decision. Government of India has no desire to impose any decision and will abide by people's wishes."

Thus, the demand of accession arises not from the Instrument of Accession annexed in the Maharaja's letter but the commitments made by the Government of India vide Mountbatten and Nehru's responses.

Article 306A of the Draft Constitution

Article 306A was not originally a part of the "Draft Constitution" prepared by the Drafting Committee headed by Dr. B. R. Ambedkar and presented in the Constituent Assembly of India under the Chairmanship of Dr. Rajendra Prasad. Article 370 (306A) was a temporary provision for an interim constitutional arrangement to establish only an interim system till a constituent assembly (of J&K) came into being.[5] Article 370 was moved by Shri Gopalaswamy Ayyanger as Article 306A in the Constituent Assembly of India on Monday 17 October 1949. It was passed on the same day after introduction and small intervention by Mr. Maulana Hasrat Mohani. The four representatives of J&K in the Constituent Assembly of India, namely, Mr. Sheikh Mohd. Abdullah, Mr. Afzal Beg, Mr. Maulana Masoodi and Mr. M.R. Baigra, did not overtly and covertly utter a single word on the extent, context and language of Article 306A irrespective of the fact that they were present physically in the Constituent assembly on the day of its presentation in the Constituent assembly. (They were also the signatories to the final adopted Constitution of India). It is also a matter of constitutional history of India that except Mr. Gopalaswamy Ayyangar and Mr. Maulana Hasarat Mohani, no other Member of the

[5] Constituent Assembly Debates, Vol. 10, October 17, 1949.

Constituent Assembly did participate in the debate on the extent and content of Article 306A.

There was no word from Dr. B.R. Ambedkar, because, it is submitted by one scholar, he was not in favour of a separate and interim constitutional status to J&K. It is reported that Ambedkar happened to convey to Mr. Sheikh Abdullah: "You want India to defend Kashmir, give Kashmiris equal rights all over India, but you want to deny India and Indians all rights in Kashmir. I am Law Minister of India. I can't be a party to such a betrayal of National Interest."[6]

The genesis of a separate Constitution of J&K is, in fact, attributed to be the said article, proceeding on which, Article 35A was pushed through a presidential order, giving special rights to the residents of J&K. It is argued that the idea of separate constitution created a sovereignty within a sovereign (Indian) permeating the feelings of a separate country as well as separatism that germinated the movements of secessionism, militancy, *azadi*, self-rule and regional autonomy, which appears to be against the basic structure of the Constitution of India, and, hence, legally and constitutionally incompatible, and not permissible.

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[6] "Kashmir Imbroglio Ignorance or Self-deception", Prof. Balraj Madhok, May 9, 1992. (The present researcher has, however, been unable to locate the primary source of the given statement. Thus, the authenticity may not completely be relied upon, to the effect that other scholars have written opinions of Ambedkar being contrary to the instant statement. For the limited purposes of this article, it may account for only one of the various arguments).

The Constitution of J&K and Article 35A

It is pertinent to note the three important components of Article 370, viz., "in consultation with the Government of the State", "with the concurrence of the Government of the State", and "the recommendation of the Constituent Assembly of the State shall be necessary". This procedure was followed to push the Presidential Order of 1954 which enumerated Article 35A in the Constitution of India.

A look at the preamble of the constitution of J&K, wherein "We the people of J&K…" raises some pertinent questions as to citizenship. Sections 6-9 of the State Constitution spell out the nature, content and context of permanent residents of the State. Though there is single citizenship, but these sections give the fiction-ridden impression that there is dual citizenship. i.e., citizenship of India and separate citizenship for the permanent residents of J&K. Thus, it is seen to be creating a sense of alienation, separatism, secessionism, disintegration and destroying the basic structure of the Constitution of India.

The sole object of addition of Article 35A by the Presidential CO of 1954 seems to be to provide special rights and privileges to the permanent residents of Jammu Kashmir being citizens of the state vis-à-vis the citizens of India, viz., employment in the State Government; acquisition of immovable property; settlement in the State; or scholarships and other forms of aid as per the discretion of the State Government. Article 35A made a fictitious distinction between permanent residents of Jammu Kashmir as citizens of

India and citizens of India not being permanent residents of Jammu Kashmir, and refugees from West Pakistan as citizens of India settled in Jammu Kashmir but not being permanent residents of the State of Jammu Kashmir. The construction leads to the conclusion that permanent residents of the State of Jammu Kashmir being citizens of India enjoy special fundamental right and privileges within the State and also in any part of the territory of India, but citizens of India not being permanent residents of the State enjoy fundamental rights in any part of the territory of India except the State of Jammu Kashmir; refugees from West Pakistan, settled in the State of Jammu Kashmir, not being permanent residents of the State of Jammu Kashmir but being the citizens of India do enjoy the fundamental rights in any part of the territory of India but are deprived of the rights and privileges within the State of Jammu Kashmir.

Thus, the classification created by Article 35A sufferred from the vice of "intelligible differentia"; this differentia is artificial as it has no rational nexus/relationship with the basic object of the Constitution equality. The basic aim and object of equality is rule against arbitrariness, and it appears that Article 35A reflects this arbitrariness, which does not seem to be compatible with the basic feature of the Constitution of India.

The last judgment on the issue of this fictional notion of dual citizenship, *State Bank of India* v. *Santosh Gupta*,

delivered by Rohinton Nariman, J., unequivocally stated that:[7]

… permanent residents of the State of Jammu & Kashmir are citizens of India, and that there is no dual citizenship as is contemplated by some other federal Constitutions in other parts of the world. All this leads us to conclude that even qua the State of Jammu & Kashmir, the quasi federal structure of the Constitution of India continues, but with the aforesaid differences. It is therefore difficult to accept the argument of Shri Hansaria that the Constitution of India and that of Jammu & Kashmir have equal status. Article 1 of the Constitution of India and Section 3 of the Jammu & Kashmir Constitution make it clear that India shall be a Union of States, and that the State of Jammu & Kashmir is and shall be an integral part of the Union of India.

The dispute was pertaining to Section 13 of the SARFAESI Act, which related to taking possession and selling of the secured assets of the borrower outside of the court process.

Abrogation of Article 370: Constitutional Validity

It is argued that although Article 370 enumerated only temporary provisions with respect to the State of J&K, which will be later on resolved by the Constituent Assembly, since the constituent assembly was dissolved without resolving anything on the given Article, by virtue of that fact alone, this "temporary" provision became a

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[7] Civil Appeal Nos. 12237-12238 of 2016. Division Bench, Rohinton F. Nariman, J. and Kurian Joseph, J., at *para* 10.

"permanent" feature of the Constitution of India. The abrogation of Article 370, effected by the President's Constitution Orders 272 and 273, has been described by Prof. Faizan Mustafa as a clever "sleight of hand" by the current government.[8]

Validity: The Black Letter of the Constitution

The procedure followed in the abrogation of the Article stands on sound grounds so far as the strict construction of the letter of the law is concerned. The Constitution Order 272, passed on August 5, 2019, added to Article 367, which was an interpretation clause, a fourth clause, which redefined certain terms contained in Article 370, *viz.*, "person recognized by the President as Sadar-i-riyasat" became the "governor", "government of the state" came to be construed as including the "governor acting on the advice of the council of ministers", and "constituent assembly of the state" for the purposes of Article 370(3) became the "legislative assembly of the state".[9]

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[8] Interview of Faizan Mustafa on Article 370, Karan Thapar, *The Wire*, *available at* https://www.youtube.com/watch?v=YiKuTsnR4VM (last visited on December 9, 2019).

[9] The Constitution (Application to Jammu and Kashmir Order) 2019, C.O. 272.
Section 2. All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:—
To article 367, there shall be added the following clause, namely:—
"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

The third clause of Article 370 provided the special provisions to the State of J&K would cease to operate by Presidential Order passed in consonance with the recommendation of the constituent assembly of the state. Since the interpretation of such constituent assembly changed to legislative assembly by virtue of the interpretation clause previously added, in the prevailing circumstances of the State, wherein the state was being governed under President's Rule, such legislative function was assumed by the President and thus Constitution Order 273 was passed on August 6, 2019, which made all the provisions of the Constitution of India applicable to the State of J&K.[10]

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;
(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;
(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and
(d) in proviso to clause (3) of article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State"."

[10] Declaration under Article 370(3) of the Constitution, 2019, C.O. 273.
In exercise of the powers conferred by clause (3) of article 370 read with clause (1) of article 370 of the Constitution of India, the President, on the recommendation of Parliament, is pleased to declare that, as from the 6th August, 2019, all clauses of the said article 370 shall cease to be operative except the following which shall read as under, namely :—
"370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State

This abrogation was then followed by the Jammu and Kashmir Reorganization Act, 2019, which separated the state of Jammu and Kashmir into two centrally administered Union Territories, *viz.*, Jammu and Kashmir and Ladakh. Again, following the power given under Article 3 of the Constitution of India, which empowers the Parliament to form, alter, increase or diminish any of the boundaries of States (where, by virtue of Explanation I, state includes Union Territory), the given Act was well within the limits of the powers of the Parliament. It is to be noted that the procedural changes brought in by the insertion of clauses in Article 367 were actually just a formalization of the procedure that had so long been followed informally in the State to bring in various Presidential Orders. The questions that have, however, arisen pertain to the spirit of the Constitution.

Counter-arguments: The Spirit of the Constitution

The fact is that despite adhering to the letter of the Constitution, the abrogation was violative of the spirit of the constitution. A first argument may be the violation of the federal spirit of the constitution, which is part of the basic structure of the constitution. Such unilateral

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of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."

imposition of boundary decision poses a grave danger to the idea of union of states.

There were about 14 writ petitions which challenged the constitutional transformation of the state of J&K brought about by the aforementioned President's Orders, which had certain common grounds.

The first was that construing the "government of the state" to mean the president, who is an executive head goes against the democratic nature of our constitution. In a pluralistic democracy, such unilateral imposition threatens the slippery slope of power anarchy. The power under Article 370 was not a constitutive power to begin with. It was to provide certain special provisions to the state, not to make a complete blanket application of the constitution to the region. A plain reading of the language of Article 370 conclusively construes that it does not authorize the executive head of the Indian State, i.e., the President, to add by enacting any new provision in the text of the Constitution of India in its relation as well as application to the State of Jammu Kashmir. Of course, the President of India does not perform the constitutional functions entrusted to him himself rather acts with the aid and advise of the Council of Ministers headed by the Prime Minister of India, and as such, the text of the Constitution of India does not authorize the Council of Ministers to render such aid and advise to the President of India by adding any provision in the text of the Constitution of India in its relation and application to the State of Jammu Kashmir which is contrary to the constitutional permissibility. The constituent power to amend by way of addition, variation or repeal any provisions of the Constitution of India belongs to the

Parliament under the umbrella of Article 368 and this power is an essential constituent function which cannot be effaced or abdicated or handed down to any other agency of the Government including the executive head of the Indian State—the President of India.[11]

The process was also arbitrary inasmuch as the "will of the people" was completely and blatantly ignored. Although the doctrine of *rebus sic stantibus* can aptly be applied to the situation of Jammu and Kashmir, which underwent serious material changes in order that the commitment of plebiscite could not be carried out, the unilateral imposition of the order under directions of the executive head breached the idea of a democracy.

Even if it be argued that the "will of the people" of the Jammu and Ladakh regions was unequivocally in favour of the presidential action, the fact still stands that none of those citizens were given a chance to express such will. The idea of a democracy is not only rule by the majority but equally the protection of the minority whose voice tends to get passed over in the hullaballoo of thumping-majority decisions. Add to this the fact that the government's official stance was that of disseminating false information through official channels before the step was taken. The recall of pilgrims on the pretext of "intelligence reports" pertaining to an impending terror attack and the repeated reassurances that the center will "not touch" Article 370 were two of the instances that stuck out like sore thumb. It sets a very bad precedent

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[11] *Constitutional and Legal Status of Jammu Kashmir*, Prof. K. L. Bhatia, 31 (Regal Publications, New Delhi, 2015).

for the future of democracy when the official channels of the government are used to spread lies and false information and secretly manipulate the state machinery to impose authoritarian rules. The action felt completely arbitrary and unjust.

One more argument pertains to the right of a state to remain as an integrated politico-cultural entity. Given the historic roots and ethnicities of the diverse population of India, this aspect cannot be emphasized enough. In the context of J&K, it becomes more pronounced in light of the fact that the very assembly of the state had left certain seats in the legislature empty in hopes of integrating the remaining parts of the erstwhile state of J&K, which was right now under the administration of Pakistan and China. The central government denied the right of the state to remain as one integrated politico-cultural unit by breaking it up into two separate territories. For all of the aforementioned reasons, despite the abrogation following the letter of the law, it appears to be a fraud on the spirit of the constitution and the people of India.

The Way Forward: A Human Rights Perspective

The lives of Kashmiris have been fraught with violence and despair for decades, caught up between the militants on the one hand and the military on the other. The commitment of democracy has failed to permeate to the roots of the region. A peaceful visit to the State has become impossible and the future of Jammu and Kashmir has become a burning question hovering over the sub-continent and the rest of the world. The issue has been a flashpoint in India's relations with its

neighbours for over fifty years. There exist rival claims over the territory, and all of the governments involved have been inconsiderate regarding the degradation they have caused for the region and its people. Both sides in the political and military conflict share responsibility for the deterioration and devastation in the region. Although India observes that territorial sovereignty is paramount for any state, it did not consent to the original people's mandate as to which land they chose to belong to. It is a glaring contradiction in India's past that, having gained independence through nonviolence and through professing and preaching peaceful resistance, to have to resort to military and violent means in order to control Kashmir These measures highlight the irony in what India finds it necessary to do in order to preserve its territorial sovereignty—and the area has been used as a scapegoat for conflict of the subcontinent.[12]

The July 2019 report of the UN High Commissioner of Human Rights, recording the update on human rights situation up to April 2019 tells a story of its own.[13] According to the report, around 160 civilians were killed in 2018, which is believed to be the highest number in over one decade. Last year also registered the highest number of conflict-related casualties since 2008 with 586 people killed including 267 members of armed groups and 159 security forces personnel. However, the

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[12] "The Kashmir Saga", Navoneel Dayanand, 11 *International Law Students Association Quarterly* 6 (2003).
[13] Office of the United Nations High Commissioner of Human Rights, "Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019" (July 8, 2019).

Union Ministry for Home Affairs claimed only 37 civilians, 238 terrorists and 86 security forces personnel were killed in 2018 up to 2 December 2018. Of the 160 civilians reportedly killed by security forces in extrajudicial killings in 2018, 71 were allegedly killed by Indian security forces. Despite the high number of civilians being killed near encounter sites in 2018, there is no information about any new investigation into excessive use of force leading to casualties. Authorities in Indian-Administered Kashmir continue to use various forms of arbitrary detention to target protesters, political dissidents and other civil society actors. The Armed Forces (Jammu and Kashmir) Special Powers Act 1990 (AFSPA) remains a key obstacle to accountability. Section 7 of the AFSPA prohibits the prosecution of security forces personnel unless the Government of India grants a prior permission or "sanction" to prosecute. In nearly three decades that the law has been in force in Jammu and Kashmir, there has not been a single prosecution of armed forces personnel granted by the central government. The Indian Army has also been resisting efforts to release details of trials conducted by military courts where soldiers were initially found guilty but later acquitted and released by a higher military tribunal. Jammu and Kashmir continues to face frequent barriers to internet access as the authorities continue to suspend arbitrarily internet services. According to a United Nations Educational, Scientific and Cultural Organization (UNESCO), South Asia reported the highest number of shutdowns in the world between April 2017 and May 2018 with India accounting for the highest level of shutdowns in the world. Half of all internet shutdowns in India were reported from the Kashmir Valley.

India has largely approached the 30 years long insurgency in Kashmir through the security framework. It has deployed a military-predominant template—though with a political prong of strategy alongside—aimed mostly at conflict management rather than conflict resolution. Since its August manoeuvre, the clampdown in Kashmir, deterrence messaging to Pakistan, diplomatic offensive and military deterrence signalling through capability upgrades, such as acquisition of the Rafale aircraft, and restructuring of the apex military by moving towards a chief of defence staff system, are indicative of a hardline set to be prevalent in the foreseeable future. The role of political initiatives in counter-insurgency repertoire stands attenuated.[14]

A fact-finding report published by the National Confederation of Human Rights Organizations has also published ground-level details observed by scholars during a visit to valley immediately after the shutdown.[15] The report presents details of illegal detentions, stringent curfews crippling the economic life in the valley and heavy paramilitary presence with implications for surveillance, privacy, freedom of movement of the people. The report emphasizes on the need for peace less by the absence of violence and more through addressing the root causes and delivering social justice.

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[14] "Approaching Kashmir through Theoretical Lenses", Ali Ahmed, 54 *Economic & Political Weekly* 10 (November 2019).
[15] National Confederation of Human Rights Organisations, "Kashmir Caged: A Fact-finding Report", Jean Drèze, Kavita Krishnan, *et.al.* (August 2019).

On the other hand, the State of Jammu and Kashmir has also presented its status report to the Supreme Court of India, denying any casualties or illegal detentions. Although reports in media based on the representation are doing rounds, it is almost impossible to access official records stating the facts.[16]

Going forward however, there need to be certain non-derogable directions that must be emulated in any policy that may be adopted to deal with the issue of Jammu and Kashmir. India's democratic experiment, despite its own pitfalls, has been one of the brightest chapters in the history of multicultural societies. Resolution of the Kashmir issues must be predicated less on absence of violence — "negative peace"—than on addressing root causes by delivering social justice, taken as "positive peace". This can be done by the stakeholders by non-violent means through peace-making techniques that include negotiations. The peace studies framework—conflict prevention, peace-keeping, peace-making, peacebuilding and reconciliation—is a useful alternative heuristic, since it emphasizes on peace-making by addressing the interests and needs of stakeholders. Even if direct violence is absent—negative peace—indirect or structural violence precludes positive peace as the ill-trained and ill-led instruments of suppression remain on site with their propensity for direct violence

[16] The researcher's efforts to locate the official documents yielded no results. Both the High Court of Jammu and Kashmir as well as the Supreme Court of India websites have buried the details of the hearing so deep that it was impossible to find any relevant material. The MHA has only published an organizational chart of the territories of the UTs of J&K and Ladakh so far.

corresponding to frustration levels from protracted deployment.[17]

The peacebuilding theory emphasizes on abandoning a top-down imposition undertaken in the face of continuing instability. The enabling conditions need to be set first by peace-making. The horizons of democratic outreach must continually be expanded in order to engage the grass-roots players, integrating them into political mainstream and bridging the trust-deficit that continues to divide the valley from the rest of the country. An inclusive narrative, reinstating the agency of the people with a phased roll-back of security forces would play down the psyche of the people disenchanted population of a heavily militarized zone. It must be understood that integration of a people in what is known as a secular republic with truly democratic foundations has to take into account the voice of every last minority and respect the fundamental rights which are the fulcrum of the Constitution "we the people of India" adapted at the genesis of our great nation.

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[17] *Supra* note 14.

ACTION OR INACTION: RADIOACTIVE WASTE MANAGEMENT IN TIMES OF COVID ARENA- A CRITICAL STUDY WITH REFERENCE TO INDIAN SUBCONTINENT

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Rahul Dattu Gangurde[**]

Abstract

The gripping effect of Covid-19 pandemic is still visible. Even after a lot of research has been undertaken, the issue of radioactive materials getting deposited on the surface of the earth is a query which still needs a resolution. When discussing the effects of radiation on genetics, it is well knowledge that radiation may have a broad variety of negative effects. Damage to DNA strands is caused by radioactive contamination, which, when left unchecked for fairly long periods of time, might eventually result in various types of genetic fragmentation. It is known that the degree of the genetic mutation, which may lead to changes in the DNA composition, can vary. This variation is caused by the fact that the quantity of radiation to which an organism has been exposed and the kind of radiation both play a role in the process. This paper undertakes to understand the changing dimensions of the radioactive waste and analyse the action or inaction

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of the Indian Government with reference to resolving the issue of Covid-19 pandemic.

Keywords: Radioactive waste, Bio-medical waste, Indian Government, Covid-19

Introduction

In order to safeguard people and the environment, radioactive waste management refers to the proper treatment, storage, and disposal of liquid, solid, and gas discharge from nuclear industrial activities or any activity which might have involved the aspect of using radiotechnology.[1] Any action involving the use of nuclear materials, including those for industrial and medicinal purposes, generates radioactive waste of different kinds. However, because to the higher quantities produced and its extended lifespan, nuclear energy is the most significant generator of these pollutants. Despite their source, radioactive wastes need to be handled in a safe and efficient manner.

According to its amount of radioactivity and how long it will stay dangerous, radioactive waste is often divided into three categories: low-level waste (LLW), intermediate-level waste (ILW), and high-level waste (HLW). While the majority of HLW is securely preserved in designated facilities, the disposal of LLW and most ILW

[1] Radioactive waste management, NUCLEAR ENERGY AGENCY (NEA), https://www.oecd-nea.org/jcms/c_12892/radioactive-waste-management .

is an established procedure.[2] The scientific and technological community recognises the viability of HLW permanent disposal in deep geological repositories, but public society in many nations has not yet agreed.[3]

The body may disseminate radioactive materials given orally, intravenously, or intracavitary, or they may be kept selectively in certain organs. With passing time since the radioactive substance was administered, the patient becomes smaller. This decrease occurs in part from the radioactivity of the substance being used naturally decaying and in part via excretion of the bodily components.[4]

Radionuclides have a long history of usage in medical practise. Different radionuclides may be used widely in contemporary medicine for both diagnostic and therapeutic reasons due to the qualities of specific radionuclides, their marketability, and reasonable cost.[5] Despite the development of non-invasive medical techniques, Ionizing radiation exposure, the usage of sealed radiation sources, and the demand for unsealed radionuclides are all rising annually in both developed and developing nations. An greater use of radionuclides

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[2] Categorisation of radioactive waste | ENSREG, https://www.ensreg.eu/safe-management-spent-fuel-and-radioactive-waste/categorisation-radioactive-waste .
[3] Backgrounder on Radioactive Waste, NRC WEB, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html .
[4] Categorisation of radioactive waste | ENSREG, *supra* note 2.
[5] L. Føyn, *Radioactive Wastes*, *in* ENCYCLOPEDIA OF OCEAN SCIENCES 2331 (John H. Steele ed., 2001), https://www.sciencedirect.com/science/article/pii/B012227430X00057X .

is the consequence of their rising use. Even in developed nations, the output of radioactive waste is declining, disposal prices are rising, and there are fewer disposal choices available.

Radioactive waste is created by any nuclear fuel cycle operation that creates or utilises radioactive substances. Nuclear wastes differ from other types of waste due to the handling of radiation-emitting radioactive material, which is a cause for worry. The public's confidence in the safe handling of radioactive wastes is a key factor in whether or not nuclear energy is accepted by the public. Comparing nuclear waste to other toxic industrial pollutants, not all nuclear wastes are as dangerous or as challenging to handle.

The safe handling of radioactive waste has always been a top objective for our nuclear energy programme. A complete and uniform set of principles and standards for waste management are being applied globally in compliance with international regulations. The management of radioactive waste would take care to minimise radiation risks to the environment, employees, and the general public.

The whole spectrum of tasks involved in managing these wastes includes handling, treatment, conditioning, transport, storage, and disposal. In addition to guaranteeing the greatest degree of safety in the management of radioactive waste, recent technical advancements in India have made it possible to recover valuable radionuclides from nuclear waste for societal applications.

Radioactive Waste Management in Hospitals

Radioactive materials are used in healthcare institutions for both diagnostic (tissue analysis in vitro and imaging) and therapeutic treatments. There are numerous different types of hazardous material, including clothes, biological waste (pathological waste), medical devices polluted with trace levels of particular isotopes, and radiation sources used in radiation treatment (e.g. a cobalt block). Bodily functions and organs may turn into radioactive pathological waste when radioactive substances are injected into patients' bodies, such as iodine to cure a damaged thyroid gland or iridium pellets to eliminate prostate cancers. A method called radioimmunoassay involves infusing radioactive antigens into the circulation to measure the amounts of biochemicals present in the body. Additionally, this produces radioactive clinical waste. Tissue wipes, cleaning agents, and packaging materials might all contain radioactive waste.

It is genotoxic to consume radioactive materials. The good news is that a lot of radioactive substances employed inside the body have very brief half lifetimes. In order to minimise side effects and ensure that leftover radiation does not damage healthy tissue, doctors chose fast-decaying isotopes.[6] Because of this, garbage containing certain isotopes has a chance to decrease its radioactivity fast, posing less of a concern for storage and

[6] Jacklin Kwan published, *How radioactive is the human body?*, LIVESCIENCE.COM (2021), https://www.livescience.com/radiation-human-body .

disposal. To find the optimal method for storage and disposal, radioactive materials must, however, be examined for each situation and application.[7] For instance, pellets used in brachytherapy (sealed source radiation) are constructed from substances with lengthy half-lives. Iodine-125, palladium-103, and iridium-192 are typical brachytherapy isotopes with half-lives of 60 days, 17 days, and 74 days, respectively. Cobalt-60, which is used in radiation therapy for cancer patients, has a half-life of over 5 years and is typically the most problematic radiation source in a hospital.[8]

In contrast to the radioactive waste created by the activities of the nuclear fuel cycle, the radioactive waste generated by the medical sector does not provide a substantial long term waste management concern.[9] The fact that biological waste has a very short half-life and a low radiotoxicity level are two of its most essential qualities. The amount of energy and emitters that are included in biomedical waste is normally modest, and it also typically has a low total and specific activity.[10] The quantities of trash as well as any other hazardous

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[7] C Lee & G Lowe, *Isotopes and delivery systems for brachytherapy*, *in* RADIOTHERAPY IN PRACTICE - BRACHYTHERAPY 0 (Peter Hoskin & Catherine Coyle eds., 2011), https://doi.org/10.1093/med/9780199600908.003.0010 .

[8] Christopher Mayer & Abhishek Kumar, *Brachytherapy*, *in* STATPEARLS (2022), http://www.ncbi.nlm.nih.gov/books/NBK562190/ .

[9] Radioactive Waste Management in Hospitals | Daniels Health, https://www.danielshealth.com/knowledge-center/radioactive-waste-management-hospitals .

[10] Radheshyam Jadhav, *Where did Covid-related biomedical waste go?*, (2022), https://www.thehindubusinessline.com/data-stories/data-focus/where-did-covid-related-biomedical-waste-go/article65340791.ece.

features linked with the waste, such as the biological and chemical dangers, are important factors to take into account.

An efficient program for the management of biomedical radioactive waste is one that adheres to the tenets of waste prevention and waste reduction, while also making provisions for the safety of personnel and the protection of the environment in a manner that is in line with the requirements set forth by the regulatory authority. This kind of management need to include all of the connected dangers that might be discovered in the garbage.

The program for managing radioactive waste must be all-encompassing and should take into account every facet, beginning with the acquisition of radionuclides and continuing all the way until the final clearing of waste packages from the plant before disposal or release. Radioactive waste may only be exempted from further regulatory oversight if a meticulous program of waste flow management and monitoring of residual radioactivity is put into place. In most cases, biomedical waste may be treated most effectively on-site via decay storage, which poses little concerns during transfer and maintains ALARA exposure thresholds.[11] It is essential that trash be segregated both at the time and location where it is produced, since quantitative assessment of isotope activity may be challenging in situations when

[11] ALARA Program | Radiation Safety | University of Pittsburgh, https://www.radsafe.pitt.edu/dosimetry/alara-program.

waste packages include a heterogeneous mixture of - emitters.[12]

The creation of standardized documentation for all waste management processes is an essential component of efficient waste management. These procedures will specify the requirements for actions such as waste segregation at the source and the use of suitable containers and receptacles for the accumulation of trash. Every member of the team needs to have the proper training in order to effectively carry out these operations. During the process of waste management, responsible employees should be designated for each step of the process. Additionally, management should devote their full support to the execution of the overall waste policy.[13]

It is vital to gather facility-specific information as part of the assessment of a waste management program. This information should be as particular as possible. The analysis of these data will serve as the foundation for identifying possible possibilities for further optimization of waste management.[14] The following should be included in the data that is to be stored in a data management system to enable for the tracking of waste flows from their point of origin to their ultimate disposal:

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[12] Radioactive Waste - an overview | ScienceDirect Topics, https://www.sciencedirect.com/topics/earth-and-planetary-sciences/radioactive-was.
[13] Radiation Monitoring and ALARA Exposure Limits, ENVIRONMENT, HEALTH & SAFETY, https://ehs.wisc.edu/labs-research/radiation-safety/radiation-monitoring/.
[14] Specific Instruction for Medical Waste, (2020), https://www.radsafe.pitt.edu/program-areas/waste/specific-instruction-medical-waste.

1. Information on any and all features of the radionuclides used inside the plant as well as the waste that is produced;
2. a reference to the authorizations and specifics of the routes that are permitted for trash disposal;
3. Duty of the organization for the radioactive waste management program (including collection, transportation, storage for decay, and clearance);
4. A discussion of the practices that are now put into place for the administration of radioactive waste;
5. Detailed instructions on the procedures that are used to quantify and verify the radioactive material and activity included in each waste package;
6. Information on the dosage rate and the contamination;
7. the many kinds of packaging that are appropriate for the various kinds of radioactive medical waste;
8. Information on the decay storage and pre-treatments of radioactive waste from medical facilities;
9. Inclusion of a reference to quality control methods and, if applicable, auditing as a component of an overall quality assurance program;
10. Information to be used in determining whether or not all regulatory standards are being fulfilled;

11. A confirmation of the accuracy of the measurements taken.[15]

Recycling and Other Efforts to Reduce Waste

The avoidance of waste is a vital first step in the implementation of any plan for managing radioactive waste. The necessity to employ radionuclides should always be justified when designing experiments or preparing a patient diagnostic, and only the amounts that are necessary should be acquired.[16]

In the case of medical treatments, this decision is made based on an analysis of the individual benefits and risks involved, but in the case of research, crucial factors include the availability of an emerging method and the high costs of managing radioactive waste. In addition, the general public is becoming more aware of the dangers associated with the dumping of radioactive waste into the environment.[17] The institution that generates garbage should be concerned about this for a number of reasons, including how the public will judge their corporate image and how it will affect their ability to make a contribution to sustainable environmental and global development. As replacements for radio-immunoassays, calorimetric or

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[15] *Id.*
[16] Storage and Disposal Options for Radioactive Waste - World Nuclear Association, https://world-nuclear.org/information-library/nuclear-fuel-cycle/nuclear-waste/storage-and-disposal-of-radioactive-waste.aspx.
[17] V. VALDOVINOS, F. MONROY-GUZMAN & E. BUSTOS, TREATMENT METHODS FOR RADIOACTIVE WASTES AND ITS ELECTROCHEMICAL APPLICATIONS (2014), https://www.intechopen.com/chapters/undefined/state.item.id.

chemiluminescent tests may be used. Alternatively, radionuclides with shorter half-lives can be used. This is because the shorter decay durations will allow for storage for decay and disposal at clearance levels.

A management system must have a description of the procedures and supporting material that describe how work is to be planned, reviewed, carried out, documented, evaluated, and improved. In the design of work processes, a thorough sequence of stages in the activities for pre-treatment, treatment, conditioning, and disposal of wastes should be taken into consideration.[18] These steps include:

i. characterisation of waste at each step in the overall waste management program;
ii. analytical methods such as sample procedures for waste characterization or process control;
iii. monitoring of discharges;
iv. monitoring for clearing purposes;
v. non-destructive examination and testing;
vi. non-destructive examination

Establishing and documenting the identification of objects should be done on the basis of the relevance of the items to either the safety and environmental protection or the isolation of trash. The following information must be included in the records:

(a) the origin of the waste and the procedures that created it;

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[18] *Id.*

(b) the pre-treatment of the waste;
(c) the clearing of the trash;
(d) the discharge of the waste;
(e) characterization of the waste;
(f) treatment of the waste; and
(g) the design of the containers and/or packages as well as the equipment, structures, systems, and components for the pre-treatment and treatment of the waste.

Changing Dimensions of Radioactive Waste With Reference To Covid 19

Waste management has been greatly impacted as a result of efforts to halt the pandemic caused by the COVID-19 virus as well as restrictions placed on commercial activity, travel, and the industrial sector. The management of waste is very important for human growth and health outcomes, particularly during the COVID-19 pandemic. The indispensable service that is supplied by the waste management industry guarantees that the atypical mounds of rubbish that pose threats to people's health and accelerate the spread of COVID-19 are not allowed to accumulate.

It has been stated that the lockdown period brought on by social distancing measures used to prevent the spread of COVID-19 has increased the usage of plastics, which is a circumstance that has ramifications for policy. Plastics have a harmful impact on the environment at every stage of their lifetime, beginning with their extraction and ending with their disposal. Refineries for plastic are said to increase the exposure to harmful chemicals, which in turn leads to higher health

consequences such as mortality, morbidity, and disability-adjusted life-years.[19] Therefore, the increased usage of plastics during the lockdown and stay-at-home measures serves as a conduit for contamination between pathogens of animal and human origin, which increases the spread of illnesses. It has been reported that over a million synthetic face masks and gloves have been discarded on sidewalks in cities, contributing to the pollution that already exists there.[20]

As a result of millions of individuals using and discarding face shields, surgical masks, gloves, and PPE suits, which were formerly used solely in hospitals but are now an essential part of daily life, the dilemma of plastic and biomedical waste is becoming worse with each new case of Covid.[21] The Central Pollution Control Board (CPCB) estimates that between June 2020 and May 10, 2021, India generated a total of 45,308 tonnes of COVID-19 biomedical waste. This equates to an average daily output of 132 tonnes of garbage connected to COVID-19.

This is in addition to the 615 tonnes of biomedical waste a day that was being generated before to COVID-19, which amounts to an increase of 17 percent in the output

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[19] Atanu Kumar Das et al., *COVID-19 pandemic and healthcare solid waste management strategy – A mini-review*, 778 SCI. TOTAL ENVIRON. 146220 (2021).
[20] Samuel Asumadu Sarkodie & Phebe Asantewaa Owusu, *Impact of COVID-19 pandemic on waste management*, 23 ENVIRON. DEV. SUSTAIN. 7951 (2021).
[21] Hassan El-Ramady et al., *Planning for disposal of COVID-19 pandemic wastes in developing countries: a review of current challenges*, 193 ENVIRON. MONIT. ASSESS. 592 (2021).

of biomedical waste that is purely attributable to the pandemic.

Like the rest of the world, the COVID-19 pandemic boosted demand and use of single-use plastic goods in India, particularly in the biomedical, pharmaceutical, and food-and-delivery sectors. This has led to a dramatic increase in the amount of garbage generated by various sectors of the economy. [22]The plastic garbage produced by the shift in consumer habits brought on by the pandemic is yet unclear, but it is known that biomedical waste production in India has grown by 17% in the last year (2020–2021).[23]

In August of 2021, it was predicted that between 4.4 and 15.1 million tons of plastic garbage connected to the epidemic would have been produced worldwide, with around 25,000 tons having already made its way into the seas.[24] Nearly 90% of this was identified as having originated in healthcare facilities, mostly in the form of plastic wrap, gloves, bottles, and syringes. Discarded face masks may be the most conspicuous piece of plastic from the epidemic that is now contaminating the seas,

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[22] Sarkodie and Owusu, *supra* note 20.
[23] By Avee Mittal & 2021 Mar 17, *The Changing Face of Waste Management in the COVID Era* -, ENVIRONMENTAL PROTECTION, https://eponline.com/articles/2021/03/10/the-changing-face-of-waste-management-in-the-covid-era.aspx.
[24] COVID-19 and the changing nature of waste, MONGABAY-INDIA (2022), https://india.mongabay.com/2022/01/covid-19-and-the-changing-nature-of-waste/.

but they only make up around 12-13% of the plastic wastes that have been produced thus far.[25]

Between August 2020 and June 2021, the Central Pollution Control Board (CPCB) estimates that India generated 47,200 tons of biological waste connected to COVID-19. This trash includes personal protective equipment (PPE) kits, face masks, gloves, needles, and other medical objects contaminated with blood or other human fluids. This is in addition to the pre-COVID standard of over 600 tons of biological waste being created per day.[26] As a result of the ongoing economic crisis, the typical customer is becoming more price conscious, and as a result, items that are economical are being prioritized above those that are ecologically friendly. Customers who are short on money should prioritize purchasing food items that are packaged in plastic since these products are almost always less costly. And although takeaway has been a lifesaver for a lot of establishments, it's also adding to the increasing mountain of single-use plastic throughout the world. A significant portion of this kind of plastic cannot be recycled.[27]

However, the waste management industry in India was not ready for the increase in biological waste that

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[25] Yiming Peng et al., *Plastic waste release caused by COVID-19 and its fate in the global ocean*, 118 PROC. NATL. ACAD. SCI. U. S. A. e2111530118 (2021).
[26] Dave Ford, *COVID-19 Has Worsened the Ocean Plastic Pollution Problem*, SCIENTIFIC AMERICAN, https://www.scientificamerican.com/article/covid-19-has-worsened-the-ocean-plastic-pollution-problem/.
[27] *Id.* at 19.

resulted.[28] Since September 2020, COVID-related garbage in Mumbai has increased by a factor of three, straining the city's already-overburdened waste disposal infrastructure.

Wuhan, China, produced 250 tons of biomedical waste per day at the height of the pandemic in February and March of 2020. Despite this fact, there are growing concerns about unaccounted-for biomedical waste and underreported waste generation in Indian cities.

Although the Central Pollution Control Board (CPCB) claimed that India's 198 biomedical waste treatment facilities (incinerators) could handle about 800 tons per day of biomedical waste, a lot of the improperly disposed waste can be found in landfills and as litter along roads, beaches, and open dumps near hospitals and crematoriums.[29] As an added note, personal protective equipment (PPE) kits, masks, face shields, and gloves are frequently found in the trash of many countries, including India.

Legal Provisions Relating To Biomedical Waste In Indian Subcontinent

In India, the average waste generation rate in a hospital is 1-2 kg per bed per day, while the average waste generation rate in a clinic is 600 gm per bed per day. Of

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[28] Ashish Dehal, Atul Narayan Vaidya & Asirvatham Ramesh Kumar, *Biomedical waste generation and management during COVID-19 pandemic in India: challenges and possible management strategies*, 29 ENVIRON. SCI. POLLUT. RES. 14830 (2022).
[29] CPCB | Central Pollution Control Board, https://cpcb.nic.in/covid-waste-management/.

this waste, more than 15% is hazardous or infectious, and this hazardous waste is mixed with the remaining waste, which results in the contamination of the entire waste stream. Because of this, there is a need for laws and regulations that are appropriate, effective, and efficient regarding the separation of trash and its disposal. The social duty and legal obligation for the environmentally responsible handling of these wastes falls not only on the shoulders of the government but also on the general people. Therefore, it is imperative that these wastes be collected, transported, and disposed of in an appropriate manner in order to protect the environment. In order to standardize and simplify these processes, the Government of India issued a set of guidelines and rules in the year 1998 that were collectively referred to as the Biomedical Waste (Management and Handling) Rules, 1998.[30]

Recommendations on the disposal of COVID-19-related biological waste have been produced by the World Health Organization and the Government of India. These guidelines address a variety of topics, such as the correct segregation of waste and the protection of sanitation workers, among others. Nevertheless, during the pandemic there was a disruption in the disposal chain of conventional biological waste, which included sorting, segregating, transporting, temporarily storing, and managing the trash. There is still a lack of attention paid to the correct separation of trash into dry and moist

[30] Authorisation under Bio-Medical Waste (Management and handling) Rules,1998 | Maharashtra Pollution Control Board, https://mpcb.gov.in/consentmgt/authorize-bmw.

categories, and this is having a ripple effect across the whole disposal chain.

The provision of appropriate personal protective equipment kits, soap, and water, which are fundamental need during this epidemic, is seldom made available to sanitation personnel. Municipal corporations in general pay these employees less than they are worth, and in cases when the job in question is outsourced to contractors, safety rules are only sometimes adhered to. In most cases, the appropriate checks and balances to protect the safety of employees are not maintained.[31]

Because efficient administration is essential to achieving a cleaner and more environmentally friendly workplace, these regulations are routinely analyzed, modified, and brought up to date as required. The government of India made the decision in 2016 to publish a new set of rules known as the Biomedical Waste Management Rules, 2016, which superseded the previous ruleset and included a number of modifications and additions. This was done with the intention of enhancing the facilities for the collection, segregation, treatment, and disposal of biomedical waste that is generated by hospitals and laboratories in an effort to reduce environmental pollution. Incineration, microwave heating, autoclaving, and chemical treatment are among the several treatment methods that have been found.

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[31] Biomedical Waste Management in India: Still a looming concern, https://www.downtoearth.org.in/blog/health/biomedical-waste-management-in-india-still-a-looming-concern-63896.

These guidelines have been overhauled entirely in order to bring the country into compliance with international standards for the management and control of biological waste. The word "handling" is also going to be eliminated from the name, which will result in more transparency about the administration and repercussions of the regulations.[32] The following is a list of some of the most recent and important additions to the rules:

1. As a result of this rule expansion, wastes from surgery camps, blood donation camps, and vaccine camps are now considered to fall within the purview of the regulations as well.
2. The duties of occupiers (a person who has administrative control over the health care facilities that are generating biomedical wastes) and operators (a person who controls the facilities of collection, reception, transportation, treatment, and disposal of biomedical wastes) are unambiguously specified in these rules. Occupiers have administrative control over the health care facilities that are generating biomedical wastes. Operators control the facilities.
3. The establishment of a barcode system for the transportation of biological waste that is destined for treatment or disposal.

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[32] Medical Waste | Background | Environmental Guidelines | Guidelines Library | Infection Control | CDC, (2019), https://www.cdc.gov/infectioncontrol/guidelines/environmental/background/medical-waste.html.

4. The operator or occupier must ensure that the biomedical waste register is kept up to date on a daily and monthly basis on the website, as well as ensure that all records pertaining to the operation of the hydroclaving, incinerating, and autoclaving processes are kept up to date for a period of five years.
5. The procedure for effectively managing biological wastes, including its separation, packing, transportation, and storage, has been refined, and the waste itself has been divided into four categories, down from ten. This makes for more efficient management.
6. There should be a distance of 75 kilometers between a common biomedical waste treatment facility and an onsite treatment or disposal facility. It is also the responsibility of state governments to provide the land available for the construction of a centralized facility for the treatment and disposal of biological waste.
7. It is recommended that the usage of chlorinated plastic gloves, bags, blood bags, and other similar items be phased out gradually.
8. Mandatory on-site processing of all microbiological waste, blood bags, and laboratory waste prior to disposal at a common biomedical waste treatment facility or on-site. It is essential that the procedure for sterilization and disinfection adhere to the standards set out by

either the World Health Organization or the National AIDS Control Organization (NACO).[33]

The Biomedical Waste Management Rules, 2016 were also modified and brought up to date in order to enhance compliance and to make the implementation process more robust for the sake of improving the environment. The Indian government issued the Bio-Medical Waste Management (Amendment) Rules, 2018 in the year 2018. Some of the most significant changes to the regulations for 2018 are as follows:

1. The complete and total elimination of chlorinated plastic products, such as bags and gloves, from the biomedical waste producers, which may include hospitals, dispensaries, animal kennels, clinics, nursing homes, blood banks, and other similar establishments.
2. All organizations are required to upload their most recent annual report to their respective websites within two years of the publication of these guidelines.
3. In order to properly manage biomedical waste, all operators of common biomedical waste treatment and disposal facilities are required, in accordance with the instructions published by the Central Pollution Control Board, to construct both a global positioning system and a barcoding system.
4. The State Pollution Control Board is responsible for compiling, reviewing, and analysing the

[33] *Id.*

information that is received from the operators. In addition, the State Pollution Control Board is required to send these reports to the Central Pollution Control Board, which maintains detailed information regarding waste generation by district.

Lack of finances will be one of the primary obstacles that will be encountered by healthcare facilities and hospitals in the process of implementing these regulations and recommendations. This is due to the fact that in order to phase out chlorinated plastic bags and to develop a worldwide positioning and a barcode system for biomedical waste, a substantial expense will be paid, and the time span for the same is extremely short, which is two years. In addition, the time period for the same is very short, which is two years.

The usage of incinerators and the risks that come with it is still another significant obstacle. India had a surge in the number of incinerator installations after the first regulation implementation in the year 1998. The method that relies on a high temperature is the one that eliminates the infection, and in the process, it also destroys the substance that the microorganisms call home. The fact that this process results in the production of a variety of toxic by-products, such as dioxins and other by-products of incomplete combustion, is one of the system's major drawbacks. Particles are produced as a by-product of incineration and the subsequent dissociation of waste components, and these particles are referred to as the results of incomplete combustion. Metals, rather of being eliminated by this process, are

instead spread into the environment, producing severe issues for human health. These poisons have a propensity to gather in fatty acids and then go further up the food chain. The human immune system and endocrine system are both harmed as a result of this.[34] The building and usage of incinerators are prohibited in some foreign nations, such as the Philippines and Denmark; hence, the government of India need to implement measures that are analogous to these restrictions in order to remove these pollutants from the environment.[35]

According to figures from the Ministry of Environment that were given to the Rajya Sabha at the beginning of this month, the nation produced 651.23 tonnes of BMW each day in the year 2020.[36] The daily production of BMW grew by about 962.31 tonnes between May 2020 and March 2022 as a direct result of the pandemic caused by the Covid-19 virus.[37] Therefore, sixty percent of the approximately 1,613.54 tonnes per day of BMW that was produced during this time period was attributable to Covid.

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[34] Dehal, Vaidya, and Kumar, *supra* note 28.
[35] Incineration Not a Solution, Green Groups Warn Western Brands Found Polluting the Philippines - GAIA, https://www.no-burn.org/incineration-not-a-solution-green-groups-warn-western-brands-found-polluting-the-philippines/ .
[36] Maharashtra topped in bio-medical waste generation in past year: Report, THE INDIAN EXPRESS (2021), https://indianexpress.com/article/cities/mumbai/maharashtra-topped-in-bio-medical-waste-generation-in-past-year-report-7455517/ .
[37] Jadhav, *supra* note 10.

According to Jugal Kishore, Director Professor and Head of the Department of Community Medicine at Vardhman Mahavir Medical College and Safdarjung Hospital, biomedical waste rules have been in place for some time and are being adhered to very precisely in their facility; however, he cautioned that everyone should exercise caution and be aware of their surroundings.[38]

We have a responsibility to make certain that the individuals working in health care and the surrounding environment are kept risk-free. The biomedical regulations in India are stringent, and they are being adhered to. During past epidemics, such as swine flu or Nipah, same preventative measures were advised to be taken.[39] The CPCB's rules are helping to ensure that the necessary stringent precautions are taken. Segregation of these things (biomedical waste) at the time of waste formation, which might be much greater during outbreaks, is the most effective method for managing this kind of trash. As a result of being understaffed and overcrowded, hospitals face a significant obstacle in the form of the possibility that infectious trash may get mixed up with routine medical waste.

When the Centre for Science and Environment (CSE) performed a research in Jharkhand (2017), similar problems were also detected. The study found that

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[38] Jugal Kishore et al., *Awareness about biomedical waste management and infection control among dentists of a teaching hospital in New Delhi, India*, 11 INDIAN J. DENT. RES. OFF. PUBL. INDIAN SOC. DENT. RES. 157 (1999).
[39] Jugal Kishore, *Biomedical Waste Management Practices in a Tertiary Care Hospital in Delhi*, 3 INT J HEALTHC. EDU MED INF. 2016 334 13-17 13 (2016).

hospitals and nursing institutions in Jharkhand flagrantly flouted BMW rules with regard to segregation, collection, storage, treatment, and disposal. It was also deduced that the majority of the central and eastern areas of the nation, such as Bihar, Uttar Pradesh, Chhattisgarh, Odisha, and West Bengal, are considerably breaking the law to a far greater extent than other parts of the country.

At first glance, it would seem that the nation is well prepared to deal with the increased strain that will be placed on it. In a report that was submitted up to the National Green Tribunal (NGT) on January 14, 2021, the CPCB said that the nation's 198 common biomedical waste treatment and disposal facilities, together with the numerous such captive facilities located inside hospitals, had a combined capability to process 826 tonnes of biomedical waste every single day.[40]

The Aspect of 'Action' or 'Inaction' With Reference To Radioactive Waste

If we travel to health centres and hospitals in more rural locations, we will find that these standards regarding biological waste are not effectively followed for a variety of reasons, including a lack of training and frequent staff turnover among medical professionals.[41] In order to guarantee that such trash does not wind up infecting

[40] COVID-19 will place India's biomedical waste management under terrible strain, https://www.downtoearth.org.in/news/waste/covid-19-will-place-india-s-biomedical-waste-management-under-terrible-strain-77714 .
[41] *Id.*

other people, stringent monitoring is essential. Also, we need to make sure that individuals who are at home properly dispose of their used tissues, paper towels, and other items so that they do not end up spreading the disease on to anybody else, including the workers who collect rubbish. What we need instead is for everyone to exercise extreme prudence. In addition, to the rules specified that CBWTF operators "*must guarantee frequent sanitisation of staff engaged in handling and collecting of biomedical waste and that they should be equipped with suitable personal protective equipment including three-layer masks, splash-proof aprons/gowns, nitrile gloves, gumboots, and safety goggles*."[42]

It instructed the facilities to collect the garbage from the COVID-19 ward using specially designated vehicles and requested that they disinfect those vehicles after each journey. The pollution watchdog suggested that COVID-19 trash should be disposed of promptly upon arrival at facilities and emphasized that they should not allow "any worker displaying indications of sickness to operate at the facility." This was one of the recommendations made by the environmental watchdog.

In addition to the regulations that are already in place concerning the management of biomedical waste, the CPCB made it clear that these guidelines must be adhered to by all parties involved. This includes isolation

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[42] Guidance for Reducing Health Risks to Workers Handling Human Waste or Sewage | Global Water, Sanitation and Hygiene | Healthy Water | CDC, (2022), https://www.cdc.gov/healthywater/global/sanitation/workers_handlingwaste.html .

wards, quarantine centres, sample collection centres, laboratories, urban local bodies, and CBWTFs. In furtherance to this, it was noted that these recommendations are based on current understanding of COVID-19 as well as existing practices in the management of infectious waste created in hospitals when treating viral and other contagious illnesses, and that they would be updated as necessary.

In spite of the fact that the BMWM Act has been in place since 1998 and that it has been amended in the recent past, there is still a lack of systematic measures to reduce the dangers connected with such waste in many parts of the nation. According to a source from the CPCB, *"compliance with laws is still actively being worked on around the nation, and the legislation in several states is now well-established."* There is an absence of concern, desire, knowledge, and expense factor in effective biological waste management, and the legal responsibility has been reduced to a mere paper formality.[43]

Conclusion

Before the pandemic, the handling of medical wastes in the vast majority of underdeveloped nations was quite rudimentary. In our present circumstances, the inappropriate handling and disposal of these wastes may further expedite the spread of COVID-19, posing a severe concern for employees in the medical and sanitation industries, patients, and all of society as a whole. As a

[43] Biomedical Waste Management in India, *supra* note 31.

result, it is of the utmost importance to have a discourse about the newly arising difficulties in the management, treatment, and disposal of medical wastes in poor nations both during and after the COVID-19 epidemic. It is essential to identify the most effective methods of waste disposal in light of the restrictions and constraints that developing nations work under.

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STRING OF PEARLS DIPLOMACY AND CHINA: AN OVERVIEW

Rahul Vats[*]

Abstract

In the modern era of globalization, China's geopolitical and military agenda mirrors its aim in the Indian Ocean Region by associating through an arrangement of Chinese military and business exercises around the Sea Lines of Communications that begins from China to the Port of Sudan in Africa which rises the fear of India in case of international conflict, as there is a rise in the development of Pearls around and that it is financed by China. Not just the Pearls, but also India is threatened by the Belt and Road Initiative. Hence, the authors would put an insight into the effects of String of Pearls upon India; and India's counter Necklace of diamond strategy, views of the Chinese government on its establishments and development of ports and roads, China leading countries into a debt trap. USA and India have been two nations that have been scrutinizing String of Pearls ever since due to China's tremendous strategically and Economical advantages. The authors plan to consider and examine the theory of String of Pearls with the perspective of China, India, and different countries with the help of a quantitative methodology. In the era of globalization, India

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or any other country is not supposed to anticipate that its neighbouring countries should close down financial and business commitment with China; However, the Sovereignty of each nation ought to be respected by China or probably various nations like India and USA will harshly remain against China even in the projects thoroughly identifying with trade.

Keywords: China, Economical, India, Military, Ports, Strategically, String of Pearls.

Introduction

Strategic culture has changed away from the traditional twentieth-century paradigm and toward new areas of security, such as ecology, economics, the environment, population, energy, and unborn human rights, in the twenty-first century. China emphasizes these features, which are supported by marine security strategies such as the "String of Pearl" and the One Belt, One Road Initiative (OBOR). The Chinese government seeks to establish its military influence in the geopolitical world, particularly in the Indian Ocean Pacific, through the programs stated above (IOR). The fundamental goal of this policy is to encircle the Indian Oceans for trade and commerce, as well as to destabilize the region through the closure of Indian ports' marine channels and the neighbouring Strait and Ocean. Furthermore, the goal of this approach is to strategically connect these pearls to build a chain of economic hubs throughout the Indian Ocean region.

The Indian government has devised a plan to combat the draconic idea of the string of pearls policy, called the

"Diamond Necklace Policy." The 'Necklace' is made up of the following elements: Changi Naval Base in Singapore, Iran's Chabahar Port, Seychelles' Assumption Islands, Indonesia's Sabang Port, Oman's Duqm Port.

The writers of this study emphasize using a quantitative methodology to explore and examine the String of Pearl's theory from the perspectives of China, India, and other countries. In the age of globalization, India or any other country should not expect its neighbouring countries to cut off financial and business ties with China; however, each nation's sovereignty must be respected by China, or else various nations, such as India and the United States, will vehemently oppose China even in trade-related projects.

Implications and effects of "String of pearls" on India:

According to defence analysts, "the String of Pearls idea, as well as measures like the China–Pakistan Economic Corridor and other components of China's One Belt and One Road Initiative, poses a threat to India's national security". As a result, such a system would circle India, posing a threat to India's military projection, trade, and territorial integrity. The questions that grind in mind that whether and how far this strategy would affect the Indian Ocean and if so, what are the steps to be taken by the Indian government to tackle the same.

Effects on India:

1. It jeopardizes India's maritime security. With new submarines, destroyers, boats, and ships, China

is strengthening its weaponry. Their presence by the river will endanger India's security.

2. Resources will be diverted to defense and security, which will have an impact on the Indian economy. As a result, the economy will be unable to reach its full potential, restricting economic development. In India and the region's east and southeast, this could aggravate insecurity.
3. India's current geopolitical clout in the Indian Ocean will be reduced. The Strings of Pearl will lead to China surrounding and conquering India because China lacks any exits in the Indian Ocean. In the face of China, countries that see India as a partner risk sliding into China's hands.

Now, China's being an alliance of Pakistan and India's rival since inception, laying of Gwadar Port is considered as harmful and has intensified the fears that China may plan to design an external naval military post in Gwadar and permitting it to prepare continental warfare in the Indian Ocean region.

Response by the Indian government:

India has been planning a four-way approach to curb China's String of Pearls Strategy. Construction of ports, expanding extensive CSR systems to trap Chinese warships and submarines, promoting importation of state-of-the-art surveillance planes and other systems which can track down Chinese submarines, shaking hand with neighbouring countries and operationalizing airports in a friendly states to keep watch on the port built up by China, strengthening defence collaboration, expanding bilateral relations with South Asian countries,

Island nations in the Indian Ocean region, Southeast Asian countries, and scheduling and operating regular military war fare are all on the table. The following are some of the important steps taken by the Indian government to tackle the issues:

The Modi government introduced the Act East Policy in 2014, which is built on four Cs: culture, commerce, connectivity, and capacity building. SAGAR (Security and Growth for All) was one of the Policy's goals. The Look East Policy object is to strengthen and promote economic cooperation, cultural relations, and strategic ties with countries in the Asia-Pacific region through continuing relations at the bilateral, regional, and multilateral levels, which will be fruitful in improving connectivity between states in the North-East, including Arunachal Pradesh, and other friend countries in our region.

1. India and Iran, are building the Chabahar port, which will facilitate for a new land-sea route to Central Asian countries without entering boarder of Pakistan. It is strategically located in Pakistan, near the Chinese port of Gwadar and the Hormuz Strait. Chabahar offers India a strategic advantage because it overlooks the Gulf of Oman, a critical oil supply route.
2. Deep-sea port is being built up in Sabang, Indonesia and India. Because of its proximity to the Malacca Strait and India's Andaman & Nicobar Islands, it is strategically important.
3. Near 2016, India built a deep-water port in Myanmar's Sittwe.

4. India's support in renovating the Mongla Sea Port would benefit Bangladesh. In exchange, India will have access to Bangladesh's Chittagong port.
5. India has negotiated agreements with Oman to gain access to its strategically positioned naval installations which are located near the Hormuz Strait that carries more than 30% of all oil shipments.
6. India and Singapore have agreed to share access to Singapore's Changi Naval Base, which is strategically placed near Malacca Port.

Military and Naval ties:

India has created a tactical naval coalition with Myanmar for advancement and train its navy, giving it a larger presence in the IOR region. It has also signed military cooperation agreements with Japan, Australia, and the United States in the region, technically known as the 'QUAD". The 'Quad' is a group of four countries that conduct combined military exercises in the IOR region.

Bangladesh- Bangladesh and India have agreed to build *"20 Coastal Surveillance Radar Systems"*[1]along the country's coastline. This will aid India in maintaining track of Chinese vessels in the Bay of Bengal.

India has proposed to establish ten Coastal Radar Systems in the Maldives. These radars will communicate passing confidential images, videos, and location data of

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1. Byju's Exam Prep available at< https://byjus.com/free-ias-prep/daily-news/.

ships in the Indian Ocean region in real-time. Bharat Electronics Limited has been planning this project since 2019. Ever since 2019, seven CSR have been finished, with minor setbacks due to the Maldives government. The project is progressing at full speed now that a pro-India government has taken office.

Sri Lanka- In Sri Lanka, nearly six CSR have already been installed. According to some sources, India intends to build at least ten more CSRs in Sri Lanka. The Indian and Sri Lankan governments are continually attempting to improve India-Sri Lanka relations.

Mauritius – Mauritius has erected eight Coastal Surveillance Radars.

Seychelles – Seychelles has installed one Coastal Surveillance Radar (CSR). In 2015, Seychelles' first Coastal Surveillance Radar went live. On the main island of Mahe, it was commissioned. Seychells also has planned to establish more Coastal Surveillance Radar on the small islands of Astove, Assumption, and Farquhar. *"There are plans for 32 more Coastal Surveillance Radar Systems in Seychelles. India – BEL had set up 46 Coastal Radar stations and 16 command and control systems in 2015 in India. In the next phase, 38 more Coastal Radar stations and 5 command and control systems will be set up."*[2]

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2. Byju's Exam Prep available at < https://byjus.com/free-ias-prep/chinas-string-pearls/ >.

Views of Chinese Government on its establishments and developments of ports and roads:

Beginning from Hainan Island towards the south in the South China Sea, incorporating Thai canal, then covering for the most part all the eastern piece of India and later then going through Sri Lanka it goes towards the Middle East region of the globe. China, because of the foundations around India in the Indian Ocean area has turned into an inquiry to the aims of the People's Republic of China. Any sort of foundations made under the supposed technique is just seen by the world strategically rather than monetarily. China doesn't utilize *String of Pearls* name to its projects around India, however it calls it the strategy of USA to slander China in the worldwide world so the nations can cut their monetary relations with the People's Republic of China. Myanmar, Bangladesh, Sri Lanka, Maldives, Pakistan having PRC's task: Transportation passageway, Chittagong port, Colombo port, Unaffordable advances, Gwadar port, respectively. China opened up its economy in the late 1970s[3] to enter in the world of globalization. The PRC has been ascending since and making foundations on a case by case basis for their monetary development yet that goal is suggested by the USA in haphazard manner. Pearl necklace strategy is a piece of Belt and Road drive dispatched by PRC's leader Xi Jinping in mid 2010s to interface PRC with different regions of the planet like Africa, Europe and Asia. PRC

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3. The World Bank in China<https://www.worldbank.org/en/country/china/overview#1>, accessed 16 Dec 2021.

has again and again reiterated that the country's military stance has and always will be *defensive*[4], totally opposite from the blames put on by the countries like India and USA. The recent conflict of PRC's military's soldiers with the Indian armed force in the Himalayas has additionally been called as a defensive strike by the PRC i.e. absolutely inverse to the stance claimed by the Republic of India. It involved first combat death among India and China since 1975. String of Pearls is a part of BRI which by and large covers the shores of India by the ports and the presence of China and its military. The BRI initiative won't just help the PRC however will likewise help each and every country participating in it. The BRI won't just give immense monetary advantages to the interested nations however will likewise interface the one region of the planet to the next area of the planet. The problem which India has raised with the very project is the passing of OBOR initiative of PRC within the POK. The PRC's export with the help of the BRI will rocket and the PRC will reap the economic and political benefits of the initiative. PRC also aims to become independent in most areas of the trade so that it could on its own, without the help of any other country can reach the heights of growth, and success.[5] For the venture of the String of Pearls, PRC intends to give securities in its own currency so that, in contrast with the US dollar ($), the Chinese money is utilized to support the very task and in this

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4. STRATEGIC FORESIGHT FOR ASIA 'STRING OF PEARLS – CHINA'S EMERGING STRATEGIC CULTURE' <https://strafasia.com/string-of-pearls-chinas-emerging-strategic-culture/>, accessed 16 dec 2021.

5. China Power 'How will the belt and road initiative advance China's interest?' <https://chinapower.csis.org/china-belt-and-road-initiative/>, accessed 16 Dec 2021.

manner, the acknowledgment of PRC's currency on the planet turns out to be more than that of monetary forms like USD, Euro and so forth. According to the fundamentals of Economy, when the interest for a specific currency ascends in the worldwide market, it's worth additionally builds, which makes the import of an item modest. Yet, in this sort of a circumstance PRC follows depreciation of the money to make its import costly for its residents thus that the residents lean toward purchasing nearby Chinese things rather than those coming from a foreign country. PRC and Republic of India are one of the two most impressive nations in Asia; this is the explanation there has been dependably a rivalry among them, regardless of whether it as in regards to the Economy or Military angle. India has been significantly developing its GDP somewhat recently, which makes PRC feel awkward and this issue can be settled by the achievement of String of Pearls drive of the BRI project. According to the Chinese government, India is getting involved with US, Japan and Australia in *QUAD forum* just to contain China in its ambitions. String of Pearls strategy of China will help it contain India subsequently.[6] In this way, the initiative of String of Pearls by the PRC whenever utilized financially can make every one of the associated countries increasingly prosperous and can assist with eliminating the shades of malice of the general public like hunger, poverty, terrorism and so forth.

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6. Press Trust of India, 'China Slams Quad' *Times of India* (India, 24 Sep 2021).

Debt Trap Diplomacy

In the modern era of globalization, not only India but no country is supposed to anticipate threats in the times when there is growth and development taking place around them, it happens to be a part and parcel of globalization. And in the case of string of pearls diplomacy, we can always say that there are always two ways to subjugate a territory, one is by war and another is by trapping them in a debt, and in our case it is a financial debt. These old practices have been taken up by China to become the world biggest creditor extending debt to many developing nations.

The official organization of lending in the world such as the World Bank & International Monetary Fund (IMF) and the whole of Organization for Economic Cooperation and Development (OECD) have been left behind by China with by issuing a huge loan amounting to more than 5% of the world GDP. It has increased its clout over financially fragile governments by issuing large loans with strings attached, but it has also caught some of them in sovereignty-eroding debt traps.

The debt trap laid by China has caught many nations such as Small Lao where the government has signed a 25 year agreement of concession that gives a sovereign power to China on the matters of supply of electricity in that nation. In between the pandemic that originated from China itself, it has never stopped weaponizing debt to bring in terrible conditions of economy, politics and military in the debtor nations.

Something that is very questionable, and that is China without assessing the borrowing country's creditworthiness, is ready to lend them in the times of their financial crisis. And the point that is to be focused is that the larger the borrower's debt burden, the greater is the China's leverage.

A new international research examined 100 of China's loan contracts with 24 nations, many of which are part of the Belt and Road Initiative (BRI), an imperial project aimed at making the fabled Middle Kingdom a reality.[7] According to the report, these agreements provide China significant influence by including stipulations that go beyond conventional international financing agreements. In order to advance the trade and geopolitical interest, China state-sponsored loans, and study reporting pervasive links between Chinese financial, trade and construction contracts with developing countries.

Secondly the secrecy clause contained in the loan agreement violates the right of taxpaying citizens of a country of right to be informed about the public debt which promotes the accountability of a government.

The fact that China's loan agreements provide it *"wide discretion to cancel loans or expedite repayment if it disagrees with a borrower's actions,"* whether internal or international policy, necessitates forcing the other party to keep contractual clauses hidden. According to the

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7. Miller, T, ' China's Asian dream: Empire building along the new silk road. Zed Books Ltd' (2019) <https://www.ingentaconnect.com/content/paaf/paaf/2018/00000091/00000001/art00019> accessed 10th December 28, 2021.

contract the debt is excluded from any comparable debt treatment which increases the dependency of the debtor nation to China.

On the other hand, the lender controlled revenue accounts ensure that the repayment of loans is gathered from the export of commodities as well. The debt for equity exchanges are another way of harassment which makes the debtor nation sacrifice its key assets and also limits the crisis management system of the debtor nations. *"Water-rich Laos handed China majority control of its national electric grid after its state-owned electricity company's debt spiraled to 26 percent of national GDP".* [8] Because hydropower accounts for more than four-fifths of Laos' total electrical output, the transfer has consequences for national water resources.

The first achievement of China's debt trap policy was securing of parts of Pamir Mountains in lieu of loans from Tajikistan. Tajikistan's never-ending debt problem has prompted government to hand up mining rights to Chinese corporations for gold, silver, and other mineral ores. Thanks to corrupt power elite in Tajikistan, China has increased its grip in the country, as evidenced by the Chinese military installation in the Badakhshan area.

The lease of Hambantona Port is yet another example of Sri Lanka leasing a whole territory which is one of the most strategically positioned ports in the India Ocean and has drawn a widespread dissent from the

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8. Ma, D., & Adams, W. In Line Behind a Billion People: How Scarcity Will Define China's Ascent in the Next Decade. (2014).

neighbouring countries of Sri Lanka. The wrath of China's debt trap policies have not spared our neighbouring Pakistan as well which has been hugely indebted giving its Gwadar port to China for administration for a long period of four decades, in exchange of a tax break. A total 91% of earnings from the port are now earned by China and it is also a major concern of security for India and other countries as China has shown its interest for constructing a their navy outpost in that port.

China has also engulfed the whole of two islands namely Maldives archipelago & Solomon Islands in lieu of loans granted to them China has transformed large loans into the acquisition of whole islands through exclusive development rights in tiny island states. Meanwhile, the European Union has declined to bail out Montenegro, a small Balkan country that has mortgaged itself to China.[9]

Conclusion

On observing and evaluating the ongoing study the author(s) analysed that "when the explorer Zheng He embarked with his "treasure fleet" for the glory of China 600 years ago, he encountered nothing but wind and waves as he voyaged across empty oceans".[10] However, the People's Republic of China's (PRC)

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9. Andromidas, D, 'China develops Balkan infrastructure that the European Union won't build' (2013) EIR 40, 33-39.
10. Chinas String of Pearl Strategy < https://www.scribd.com/doc/16098614/Chinas-string-of-pearl-strategy > 13 December 2021.

increasing maritime spirits, both within its territorial waters and in neighbouring oceans, having encroached and expanded its horizon in the last decade, and India is responding by building strong naval tactical relations with friendly countries i.e. Vietnam, Japan, France, Australia, and the United States to avoid falling into the trap. In the Indian Ocean area, China has employed the String of Pearl policy to encircle India with its powerful military base, thanks to the debt trap, CPEC, and the OBOR Project. As a result, India has begun to implement the "Necklace of Diamonds" strategy. This approach tries to surround or garland China, to put it another way. India's "Necklace of Diamonds" is a reaction to China's "String of Pearl" initiative. It is part of a long-term strategy to oppose China's ambitions in the Indian Ocean region and the Indo-Pacific region. As China improves its ability to explore beyond its frontiers, it is becoming more likely to face US maritime presence.[11] China's growing interests and influence along the String of Pearls, driven primarily by the need to secure energy resources and trade routes, present a complex strategic situation that could influence the future direction of China's relationship with the US, as well as China's relations with its neighbours throughout the region. Strategic cooperation is a challenging task that will take leadership, knowledge, understanding, and prudence on both sides of the Asia Pacific. The United States has an extraordinary chance to shape and influence China's future orientation through its diplomacy, economic policies, and military policy. For the future prosperity

11. Kaplan, Robert D, 'The geography of Chinese power: how far can Beijing reach on land and at sea?' (2010) Foreign Affairs 22-41

and security of governments in the area and throughout the world, overcoming the potential obstacles posed by the String of Pearls and successfully integrating China as a responsible player in the international map system is essential.[12] In reality, both China and India have compelling motivations to keep strategic competition at bay while they expand their world influence on diplomacy, economic policies and military policies.

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12. Pehrson, Christopher J, 'String of pearls: Meeting the challenge of China's rising power across the Asian littoral', (2006) ARMY WAR COLL STRATEGIC STUDIES INST CARLISLE BARRACKS PA.

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