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NLUALR

NLUA LAW REVIEW

Articles

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Case Analysis: Chennai Properties and Investment Ltd v. Commissioner of Income Tax

NATIONAL LAW UNIVERSITY AND JUDICIAL ACADEMY, ASSAM

NLUA LAW REVIEW

Volume 6 **2022**

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MESSAGE FROM THE EDITOR-IN-CHIEF

The National Law University Assam Law Review (NLUALR) is a mirror to the quality research orientation of students of NLUJA, Assam. The University represents India with talented students from all over the country, pursuing studies in divergent disciplines and honing inter-disciplinary approach towards pertinent national issues. As diligent students, acquiring and disseminating knowledge in different shades of life, the contributors to NLUALR are serving the great cause of social aspiration to accomplish the right to know more and to update information regarding socio-legal problems and their solutions. This sixth volume of the journal covers a wide range of research areas containing adequate and relevant data, appropriate analysis, thought provoking ideas and new insights along with deep vision of socially desired pursuit of justice.

Articles, case and legislative comments published in this issue contain contributions from students, researchers and academicians. The current issue encompasses writings on contemporary and multidisciplinary facets pertaining to the diverse areas of Arbitration, International Laws, Intellectual Property Rights, Personal Laws, Environmental laws etc. The NLUALR is the result of untiring and relentless efforts of the Editorial Board consisting of talented students devoting their precious time, without impairing the high pursuit of learning and study, under the guidance of the Faculty Advisory Board. The students involved in publication of this Review deserve special congratulations for their meritorious work. As the Editor-in-Chief of NLUALR, I wish all the success to this issue and hand over it to readers to read, evaluate, comment and encourage the budding scholars to work with new zeal for social service and community welfare through constructive, creative and innovative suggestions to solve social-legal problems and eradicate social evils.

Prof. (Dr.) V. K. Ahuja
Vice-Chancellor, NLUJA, Assam
Editor-in-Chief, NLUA Law Review

MESSAGE FROM THE FACULTY EDITORIAL BOARD

The National Law University and Judicial Academy, Assam proudly presents this issue of the NLUA Law Review, our student run peer reviewed journal. It is one of the flagship journals of our university that provides an avenue for the publication of valuable research by the esteemed legal fraternity. This journal comprises a myriad of quality research from across disciplines.

Research, *inter alia*, should aim at contributing to the enhancing the standard of our society and that of its resident individuals. This journal endeavours to house deliberation on topics of law and other multidisciplinary fields ultimately leading to invaluable addition to legal scholarship and policy formulation. The current issue of this journal is an assortment of well researched and thought-provoking pieces covering various relevant facets of contemporary law. The need to research upon diversified areas of law has been recognised and realised through publication of varied legal issues relevant to Constitutional Law, Criminal Law, Environmental Law, Family Law, Human Rights Law, Intellectual Property Rights, Law of Contract, and Public International Law in the present issue of the journal.

At this juncture, we would humbly acknowledge the guidance and support of our Editor-in-Chief and Vice-Chancellor, whose support has been invaluable in bringing forth this issue. We heartily appreciate the work of the Editorial Board for their commitment and dedication towards the publication of this issue. We extend our thanks to the esteemed authors for their valuable contributions to our journal and hope to enjoy their support and contributions in the future. We hope our readers find the articles informative and interesting and we sincerely wish all our readers happy reading and learning experience.

Faculty Editorial Board
NLUA Law Review

EDITORIAL

In 2022, the National Law University Assam Law Review (NLUALR), a peer-reviewed publication native to NLUJA, Assam, celebrated seven years of glorious existence. In these extraordinary times, this modest milestone serves as a motivation and a source of delight for all of us. As students of Humanities, we are taught that what it means to be human is defined by our legacy. Thus, tracing back our legacy, it was in the year 2015 when the foundation stone for NLUALR was established. The foundation stone was built on the principles of collecting, processing, and disseminating tenets of legal academia for the benefit of the global legal community—students, academics, practitioners, and anybody who finds a glimmer of hope in free and bias-free expression. The Law Review has strived for excellence in terms of the research we present to our community over the years, as envisioned by Professor (Dr.) Gurjit Singh and implemented by Professor (Dr.) Vijendra Kumar, remaining both inclusive and restrictive at the same time, the former for ideas from all walks of life in the firm belief that each idea has the power to fundamentally change the world, and the latter for academic excellence. Now, under the auspices of our Hon'ble Vice-Chancellor of NLUJA, Professor (Dr.) V. K. Ahuja, the Editorial Board of this publication, has gone to great lengths to continue the legacy of the luminous past - with a helping hand at every stage.

In this issue, we have selected articles on numerous topics ranging from the diverse fields of Constitutional Law, Criminal Law, Environmental Law, Family Law, Human Rights, Intellectual Property Rights, Law of Contract, and Public International Law.

Dr. Veena Roshan Jose, **Dr. Shivender Rahul** and **Mr. Kaustubh Kumar** in their article titled "USE OF DNA TECHNOLOGY IN CRIMINAL JUSTICE ADMINISTRATION: PROBLEMS AND PERSPECTIVES", discuss the application of DNA technology in criminal justice system to render speedy

justice. The authors elaborate upon the need to regulate its use in India and how the DNA Technology (Use and Application) Regulation Bill, 2019 strives to the same. Further, the authors have critically analyzed the bill and proposed suggestions for the effective use of the DNA technology in the criminal justice administration.

Dr. Abha Yadav in her article "FUTURE PROOFING CORPORATE GOVERNANCE THROUGH ENVIRONMENTAL SOCIAL GOVERNANCE" discusses a new concept of Environment Social Governance which has emerged & which has eclipsed the Corporate Social Responsibility (CSR) domain since it is a concept which is larger and wider that CSR.

Dr. Sachin Sharma in his article "ROLE OF ACCESSIBILITY AND CONSENT: DOMINATING FACTORS IN SEXUAL RELATIONS OF PERSONS WITH DISABILITY", has talked about the role of consent and accessibility in sexual and reproductive rights of persons with disabilities. He has discussed how a person with disability faces discrimination in society right from the time of birth. He has further analysed sexuality from the perspective of persons with disability and the importance of consent and accessibility all through.

Rishika Khare in her article titled "CASTE AND CLASS STRUGGLE IN THE INFORMAL WASTE SECTOR OF INDIA", has explored the conditions of waste workers in the informal municipal solid waste sector of urban India from a legal and political context. The article also discusses the caste dynamics of India from the pre-colonial ideologies of Gandhi and Ambedkar to explore the progression of Indian society towards questioning the casteist exclusion of the workers that form the depressed classes. The article further assesses the execution of Swachha Bharat Abhiyan from a critical caste perspective.

V Suryanarayana Raju and **Simran Lunagariya** in their article titled "PROMOTION AND PROTECTION OF RETAIL INVESTORS IN THE SECURITIES MARKET IN INDIA:

AN ANALYSIS" deal with how in order to uplift and develop sustainable economy in the country, active participation of retail investors in the stock markets is much essential. They further discuss protection of retail investors in securities.

Susmit Isfaq in their article "JEOPARDIZING CIVIL LIBERTIES: COMPARING ROWLATT ACT WITH ITS POST CONSTITUTIONAL COUNTERPARTS" analyses similarities between pre and post constitutional security laws and how it has the capacity to impact the civil liberties of Indians guaranteed by the Constitution of India.

Akrama Javed and **Varun Punera** in their article "CLEARING THE AIR: ANALYSING 10 YEARS OF THE NATIONAL GREEN TRIBUNAL" discuss how the structural framework of the NGT needs to be reworked in order to protect and bolster the autonomy, independence, and authority of the institution.

Srushti S Kekre in her article titled "MICROSCOPIC ANALYSIS OF IMPEDIMENTS TO THE EXERCISE OF THE RIGHT TO VOTE" has talked about the multiple barriers like internal and external migration, political violence, physical disability, illness etc. that keep people from exercising their right to vote. The author also delves into the various lacunas in the current electoral framework. Further, she has discussed several solutions that can be implemented to get rid of the problem.

Ankita Kalita in her article titled "AN EMERGENCY CALL TO PAD INDIA'S RELUCTANCE TO & THE LACUNAS OF THE HAGUE CONVENTION, 1980" discusses the country states' adherence to the 1980 Hague Convention, as well as the main causes of their compliance and non-compliance, and the 1980 Hague Convention's gap regions. Significantly the article gives regard to India's reluctance of being a non-signatory to the Hague Convention,1980 despite the boost in the graph of NRIs throughout the globe.

Pravertna Sulakshya in her article "BALANCING THE RELATIONSHIP BETWEEN INDIAN DEMOCRACY AND FREEDOM OF INTERNET: COMPARATIVE STUDY OF LAWS WITHIN AND BEYOND INDIAN JURISDICTION" attempts to offer a prudent approach to reconciling principles of democracy and the right to internet freedom through a lawful analysis of the right to free expression and the internet, as well as a comparative evaluation of multiple jurisdictions.

Tanisha Saini in her article "CRIMINAL APPEAL BASED ON ABUSE OF DISCRETION: A COMPARATIVE STUDY OF INDIA AND USA" does a comparative study of India and USA. In this paper, the primary focus is on examining the abuse of discretion by judges with the assistance of some case laws and analysing the criminal appeals arising from it in the jurisdictions of India and the United States of America (USA). Followed by this is a comparative study of appeals based on abuse of discretion in India and the USA, and of the procedure applicable to appeals in the two diverse countries.

Deep Basak in his article "AN ANALYSIS OF THE DEFICIENCIES OF PRODUCT LIABILITY AND PRODUCT LIABILITY ACTION IN INDIA" talks about how the drafting of product liability and product liability action is so deficient that it raises many questions ranging from the status of service providers to who could file a product liability action. The paper aims to delve into the legislation and critically analyse and find out the flaws in the drafting of the same.

Chetan R in his article "THE UP-POPULATION BILL: IMPACT ON THE POOR", has critically analyzed the Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021 introduced with the aim of combating the issue of overpopulation in the state. The author has brought forward the ramifications it will have on the poor. The author has also drawn a comparison of the policy enumerated in the Act with China and has given certain plausible solutions to control and regulate the

population of the state through alternate methods that would not lead to oppression of the poor.

Diksha Sharma in her article "DISSENTING WITH HINDSIGHT: AVOIDABLE TRANSACTIONS UNDER IBC, 2016", analyzes the importance of avoidable transactions in the corporate insolvency resolution process. It talks of how the concept of avoidable transactions in the Code has come into play and emanated to close down any way which allows offenders, engaged in fraudulent transactions, to escape from prolonged liabilit*y*. It discusses certain principles that, if adhered to will enable that legal activities practiced in the course of business are not invalidated that could risk a creditors' position.

Aditya Pattanayak in his article titled "THE CHILD STARS OF SOCIAL MEDIA – WHAT THE PHENOMENON REVEALS ABOUT INDIAN LABOUR LAWS" illustrates the various lacunae in the Indian labour law frameworks' attitude towards child labour and primarily focuses on how ambiguity surrounding the classification of child social media stars under Rule 2B and 2C of the Child Labour (Prohibition and Regulation) Amendment Rules 2017 may potentially lead to their financial exploitation.

Tanisha Choudhary in her piece titled "ON THE BASIS OF SEX(UAL ORIENTATION): CASE COMMENT ON HIVELY v. IVY TECH COMMUNITY COLLEGE OF INDIANA" analyses the judgement in the case of *Hively v. Ivy Tech Community College of Indiana* from a statutory point of view mainly focusing on the concurring opinion of Judge Posner, particularly his use of a method called 'judicial interpretive updating' to revitalize the meaning of "sex" in Title VII.

Vidhi Krishali in her case study titled "CASE ANALYSIS: CHENNAI PROPERTIES AND INVESTMENT LTD V. COMMISSIONER OF INCOME TAX" has analysed the judgement in the case of *Chennai Properties and Investment Ltd v. Commissioner of Income Tax (2015)* that set out guidelines

based on which the rental income can be characterized as Profit or Gains from a Business or Profession. She provides a detailed summary of previous judgments on the same issue and how this case has deterred them.

We would like to thank the offices of the Vice-Chancellor and the Registrar of National Law University and Judicial Academy, Assam, for their unwavering support throughout the publication of this edition of the Law Review. A special mention of our gratitude towards our staff members at the University must be made for all of their assistance towards us during this time. We would also like to express our gratitude towards our contributors for their patience and cooperation with our editorial team.

Note: The views of the authors in their respective articles do not necessarily represent the views of the Editors.

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USE OF DNA TECHNOLOGY IN CRIMINAL JUSTICE ADMINISTRATION: PROBLEMS AND PERSPECTIVES

Dr. Veena Roshan Jose[*] ,
Dr. Shivender Rahul and[**]
Mr. Kaustubh Kumar[***]

ABSTRACT

The current criminal justice administration in India is struggling with loads of cases resulting in a serious impediment to the delivery of justice. To cope with this, the Government of India endeavoured to enhance the investigation mechanisms by infusing them with new technological advancements. The application of DNA Technology is one of such mechanisms that is sure to help the criminal investigation, thereby speeding up the delivery of criminal justice. Though the courts in India have started to give DNA analysis reports paramount importance while delivering verdicts, the present legal framework in relation to the use of these technologies is inadequate. In order to fill that void, the DNA Technology (Use and Application) Regulation Bill, 2019 was introduced. This paper is an attempt to analyse the utility of DNA technology and put forth an international comparative study on the use of DNA technologies in the criminal justice administration. The paper also analyses why there is a need to regulate the use and application of DNA technology in India and how the DNA Bill 2019 aims to render the same. The authors try to bring out the lacunas in the proposed Bill and strive to put forth some concrete solutions in

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the form of suggestions and recommendations for the effective use of technology to aid and assist the criminal justice administration in India.

Keywords: *Criminal Justice System, Consent, DNA Bill, DNA Technology, Privacy.*

INTRODUCTION

Deoxyribonucleic Acid (hereinafter referred to as DNA) is the basic genetic material in all living cells. It is present in almost every organism and carries the genetic code. In human beings, it determines the character, behaviour, and body characteristics of an individual. DNA is the genetic material that is inherited from the biological parents to the offspring and it is highly unique and individual specific. The structure of DNA varies from individual to individual, except in monozygotic (identical) twins.[1] Except for the Red Blood Cells, DNA is located in the chromosomes inside the nucleus of every living cell present in the human body.

DNA is a complex molecule with a double helix structure, which can be compared to a twisted rope ladder.[2] The similarity and differences in the DNA depend on the sequence of nitrogen bases.[3] DNA was discovered 'officially' in 1953, by James Watson and Francis Crick at Cambridge University. In 1985, English scientist Alec Jeffreys discovered the technique known as DNA Profiling.[4] DNA Profiling is a method of identifying an individual

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[1] In monozygotic twins, DNA structure is the same because they come forth by the division of a single fertilized egg.

[2] The side arms of the ladder are made up of sugars and phosphates. It is a polymer of Deoxy ribonucleotides with nitrogen bases Adenine (A), Guanine (G), Cytosine (C), and Thymine (T).

[3] 'Base Pair', (*National Human Genome Research Institute*) <https://www.genome.gov/genetics-glossary/Base-Pair> accessed 09 September 2021.

[4] 'DNA Fingerprinting' (*University of Leicester*) <https://le.ac.uk/dna-fingerprinting> accessed 05 September 2021.

at the molecular level using genetic markers present in DNA.[5] Jeffreys identified that certain regions of the DNA contained sequences repeated over and over again and the number of such repeats varies from individual to individual. These variable regions are called Variable Number of Tandem Repeats or VNTR. Thus, it was identified that DNA profiling could be used to identify individuals because of the very characteristics and distinctiveness that each DNA possesses.

DNA plays a crucial role in the formation of the entire genetic makeup of an individual. As mentioned earlier, except that is of identical twins, the DNA of each individual differs from one another. Thus, it contains an enormous potential to assist the law enforcement agencies in the speedy investigation of criminal cases as well as the speedy resolution of the matter by the courts. DNA plays a very important role in criminal investigations by helping the identification of the convicts and removing the others from the list of suspects.

DNA profiling can be done by making use of the samples collected from the scene of occurrences such as blood, hair, semen, saliva, bones, and other tissues. The DNA analysis can help in the identification of the victim/corpses in the cases when the body of the victim is burned, buried or any other act done by the criminals making its identification a difficult task. A forensic serologist may even make use of the semen and bloodstains on the clothes of alleged suspects or even the saliva present in the glass tumbler or cigarette butts to collect the DNA samples. Unlike the other samples found at the crime scene, DNA material remains useful for an endless period of time. DNA technology can be used even on decomposed human remains to identify the victim.[6]

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[5] 'DNA Profiling' (*Science Learning Hub*, 29 November 2016) <https://www.sciencelearn.org.nz/ resources/1980-dna-profiling> accessed 17 October 2021.

[6] Jodie Ward, 'How do we identify human remains?' (*The Conversation*, 15 August 2019) <https://theconversation.com/how-do-we-identify-human-remains-121315> accessed 17 October 2021.

The first instance of DNA analysis took place in the UK in 1986.[7] In a village in England, two young girls were sexually assaulted and killed in the years 1983 and 1986, respectively. A local man confessed that he had sexually assaulted those girls and subsequently killed them. However, the DNA analysis of his blood sample did not match with the DNA analysis of semen samples present on the body of the murdered girls. Consequently, a mass DNA screening was conducted by the law enforcement agencies, taking samples from each adult man residing in that village along with the two nearby villages. However, the agencies failed in their efforts to identify the real culprit. After a year, a lady in a café overheard someone bragging about how he misled the investigation agencies by providing his blood in the place of his friend Mr. Pitchfork. Subsequently, the agencies inquired about Mr. Pitchfork and collected his blood samples. The DNA analysis of the specimen provided by Mr. Pitchfork was perfectly matching with the samples collected from the victims in both cases. This way, DNA acted as a linchpin in guiding the investigation and nabbing the real culprit.[8]

DNA PROFILING IN CRIMINAL INVESTIGATION

DNA analysis helps to a considerable extent in guiding criminal investigations today. Prior to the use of DNA, identification was heavily based on fingerprints, footprints, blood analysis, or other evidence that a suspect may have left behind at the crime scene after committing a crime. It was a too cumbersome method which also consumed a considerable amount of time. However, the matching of DNA found at a crime scene with the suspect's DNA helps in ascertaining the identity of offenders in the best possible way. Thus, DNA profiling/DNA

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[7] 'DNA Profiling and the Different Uses of this Technology' (*Easy DNA*, 23 February 2015) <https://easydna.com.au/knowledgebase/history-testing/> accessed 17 October 2021.

[8] Neal Baker and Aliki Kraterou, 'KILLER'S TALE Who is Colin Pitchfork and when was he released from prison?' (*The Sun*, 02 September 2021) <https://www.thesun.co.uk/news/4901652/who-colin-pitchfork-prison-release/> accessed 17 October 2021.

fingerprinting[9] has gained a unique position in modern-day criminal investigations. The courts of law across the globe have started to give due diligence to the DNA analysis reports in criminal trials as well as civil litigations such as the questions related to disputed paternity and maternity.

Thus, DNA profiling has emerged as the most important method of identification of an individual. It permits the identification of the individual from the comparison of his/her own body materials containing body cells or from the comparison of the samples taken from his/her relatives. It permits the identification of a person's body materials from the body cells of his/her blood relations such as parents, children, and siblings. It helps in the individualisation of the dead/victim as well as the suspect, which is of prime importance in the investigation of crimes. In cases of mutilated non-identified bodies, the identity of the deceased can be established by comparing his DNA profile with those of his suspected parents, brothers, sisters, sons, or daughters.

Since the first successful investigation with the help of DNA analysis, almost thirty-five years ago,[10] DNA analysis has revolutionised the investigation of crimes. Since then, DNA profiling technology has become faster, and more user-friendly. DNA analysis is today augmented to such an extent that the investigators can even retrieve DNA profiles from the skin cells of the suspect that they have left behind while touching any surface.[11] Moreover, the improved sensitivity and use of this technology have made it easier for the investigators to identify and distinguish the data of an individual from the DNA data of the mixed sample. The steps, in furtherance of making such databases

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[9] A DNA fingerprint is an analysis of base sequence of DNA of an individual which is also unique for each individual. It is used to identify an individual from a sample of DNA by looking at unique patterns in their DNA.
[10] ibid at 07.
[11] Sowmyya, 'Touch DNA: An Investigative Tool in Forensic Science' (2016) 8(2) IJCR <https://www.journalcra.com/sites/default/files/issue-pdf/12921.pdf> accessed 17 October 2021.

user-friendly by analysing and sorting out data within minutes, are also underway.[12]

Furthermore, the use of Short Tandem Repeats (STRs) has made it possible to make the DNA profiles even with very less amount of samples. The short tandemly repeated DNA sequences found in many spots or loci help to identify an individual during the investigation process is another recent advancement that accounts for even more specificity to a person's profile.[13] Another aspect that revolutionised DNA analysis is the use of Polymerase Chain Reaction (PCR). In PCR, enzymes 'amplify' the amount of DNA in a sample by copying it multiple times, which increases the sensitivity of the analysis by making the detection of DNA easier as well as restricting greater interference. In such a situation, only a very small quantity of specimen material is required, maybe in micrograms. PCR allows amplifying a single strand of DNA to billions of identical copies in a short time.[14] PCR has also made DNA analysis of degraded specimens collected at the scene of crime viable enough that the reports can be considered accurate.[15]

DEPENDENCE ON THE DNA TECHNOLOGY IN MODERN-DAY CRIMINAL INVESTIGATION

Owing to the positive traits that DNA analysis holds, in the United States, the Federal Bureau of Investigation (FBI) along with other investigation agencies were allowed to use DNA profiling for investigation. Congress passed the DNA Identification Act, 1994, which was implemented in October 1998, and a National DNA Index System (NDIS) was established under the Act.[16] Each State along with other territories administered by

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[12] Celia Henry Arnaud, 'Thirty years of DNA forensics: How DNA has revolutionized criminal investigations' (*c & en*, 18 September 2017) <https://cen.acs.org/analytical-chemistry/Thirty-years-DNA-forensics-DNA/95/i37> accessed 17 October 2021.

[13] 'Polymerase Chain Reaction (PCR) Fact Sheet' (*National Human Genome Research Institute*) <https://www.genome.gov/about-genomics/fact-sheets/Polymerase-Chain-Reaction-Fact-Sheet> accessed 09 September 2021.

[14] It is a kind of 'molecular xeroxing'.

[15] ibid at 13.

[16] DNA Identification Act 1994, 42 U.S.C., s. 14132.

the US is a part of NDIS and contributes its data to it. Further, the aforementioned Act also mandates high confidentiality of the data by the law enforcement agencies. FBI acts as a *parens patriae* to the NDIS, which grants access to individuals and approves all communication between participating Federal, State, and local laboratories pertaining to NDIS.[17] The Act restricts the access of data only to the US law enforcement agencies, and if someone finds acting in contravention to the same, they should be subjected to a criminal penalty of not more than 250,000 US dollars.

The criminal penalties were further enhanced by the Justice for All Act 2004, which was enacted to protect crime victims' rights, eliminate the substantial backlog of DNA samples collected from the crime scenes and of convicted offenders, and improve and expand the DNA testing capacity of the Federal, State, and local crime laboratories.[18] However, the practical scenario is far different from what these legislations aim to achieve. In the US, DNA analyses are often subjected to human errors and human biases where innocent people are linked to crimes. In a research study conducted in 2011, the exact same DNA sample was sent to 17 different laboratories to test the sample. Shockingly, all 17 laboratories and experts came up with different findings.[19] This clearly shows the gross human error that happens while testing or analysing a DNA sample.

Another concern that is frequently raised is the violation of privacy rights and the increase in racial disparities. The US state legislations started expanding their ambit of 'compulsory' DNA collection in order to include arrested persons, thereby

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[17] 'Frequently Asked Questions on CODIS and NDIS' (*Federal Bureau of Investigation (FBI)*), <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> accessed 11 August 2021.
[18] 'Combined DNA Index System Operational and Laboratory Vulnerabilities' (*U.S. Department of Justice*, May 2006) <https://oig.justice.gov/reports/FBI/a0632/laws.htm> accessed 17 October 2021.
[19] Itiel E Dror and Greg Hampikian, 'Subjectivity and bias in forensic DNA mixture interpretation' (2011) 51(4) Sci. Justice pp.204-208.

infringing their privacy, which was subsequently declared unconstitutional by the Hon'ble Supreme Court of the US in the case of *Maryland v. King*.[20] The Hon'ble Supreme Court also took note of the disproportionate collection of DNA samples from African American population. The DNA analysis of African Americans accounts for at least 34% of the US federal database, while they account for merely 13% of the total US population.[21] Thus, these instances showcase the disparity prevalent in the data of the US DNA Databases even after the presence of a regulatory legal framework.

Further, US Government's recently launched Rapid DNA Program which aims to establish a sophisticated integrated system that would run without any human intervention so that even an investigating officer with a non-technical background can also retrieve data without any difficulty. The developers of the system state that it can perform similar purification, amplification, separation, and detection functions that laboratories aim to perform while DNA analysis. It can also generate a DNA report of the concerned person whose sample is analysed, which can be tallied for matches through the combined DNA database of the USA – including National and State DNA databases (CODIS).[22]

The United Kingdom has the world's most efficient and effective approach to the use of forensic DNA technology.[23] The national DNA database of the UK has more than three and a half million DNA profiles (including half a million profiles of

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[20] Maryland v. King, 569 U.S. 435, 465–66 [2013].
[21] Erin Murphy and Jun H. Tong, 'The Racial Composition of Forensic DNA Databases' (*California Law Review*, December 2020) <https://www.californialawreview.org/print/racial-composition-forensic-dna-databases/> accessed 25 October 2021.
[22] 'Rapid DNA' (*Federal Bureau of Investigation (FBI)*) <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/rapid-dna> accessed 11 August 2021.
[23] Christopher H. Asplen, 'The Application of DNA Technology in England and Wales' (*U.S. Department of Justice*, January 2004) Document No. 203971 <https://www.ojp.gov/pdffiles1/nij/grants/203971.pdf> accessed 17 October 2021.

individuals below 16 years of age), making it easier for the investigation agencies to detect the identity of the culprit just on one click of the button.

The UK came up with a series of legislations to provide the law enforcement agencies the right to obtain DNA profiles of the suspects and the arrested individuals. The first legislation that granted the right to investigation agencies to take DNA samples from individuals in custody was the Police and Criminal Evidence Act, 1984.[24] However, to maintain the confidentiality of individuals, the retention of such data by agencies was not granted under the legislation. In 2001, the Criminal Justice and Police Act, 2001 granted the right to retention to the investigation agencies.[25] The legislation currently in function, the Criminal Justice Act, 2003, allows the police to retain DNA profiles of the arrested persons regardless of the fact that whether the individual was charged or not or if charged, then subsequently exonerated.[26]

To maintain confidentiality, the UK police, with the help of adequate stringent safeguards, strictly regulate the access to and use of DNA profiles. However, the legislation was challenged on the ground of infringement of the right to privacy of the arrestees. The House of Lords rejected the challenge[27] and the matter was further appealed in the European Court of Human Rights, wherein it was decided in the year 2008 that holding DNA samples of the individuals, arrested but later exonerated or charges against them dropped, contravenes the right to privacy enshrined under European Convention on Human Rights.[28] Privacy concerns are the primary issues raised against the effectiveness of DNA sampling in the UK. The retention of data of

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[24] Police and Criminal Evidence Act 1984, ss. 63A, 63AA.
[25] Criminal Justice and Police Act 2001, Chap. 16, UK Public General Acts.
[26] Criminal Justice Act 2003, Chap. 44, UK Public General Acts.
[27] In R v. Chief Constable of South Yorkshire Police *ex parte* S and Marper [2004] UKHL 3.
[28] S and Marper v. United Kingdom [2008] ECHR 1581.

even innocent individuals is another concern, and as a result, the use of DNA in the UK receives a lack of support from the public.[29]

The Japanese law enforcement agencies also enjoy similar rights and it is estimated that they possess the DNA of every 1 out of 100 citizens in Japan. The DNA database of Japan contains about 1.3 million DNA profiles as of late 2019 to facilitate the agencies in the investigation. However, Japan also has no law to regulate the ever-growing DNA database and keep a check on the working of the authorities. As a result, there is no confidentiality, and the database even contains the profiles of individuals who commit petty offences.[30]

In Australia, to identify the suspects and solve crimes by matching DNA or fingerprints, the Australian Criminal Intelligence Commission provides access to the police and other law enforcement agencies of the National Criminal Investigation DNA Database (NCIDD).[31] The NCIDD was constituted in April 2001 and contains millions of DNA profiles.[32] In November 2014, the NCIDD was integrated with the databases of the USA, the UK, and Canadian DNA databases working on a pilot program allowing sharing of DNA data of suspects from the NCIDD back and forth in these countries.[33] Further, the database was

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[29] Aaron Opoku Amankwaa and Carole McCartney, 'The effectiveness of the UK national DNA database' (2019) 01 FSI: Synergy, 45, 48 <https://reader.elsevier.com/reader/sd/pii/S2589871X19300713?token=01F801D1096ADED6A39BA65CCFDE902E8254540DF37EDE93EF87F2B857A05A55060F4E26CB774DAEBD0ADB9F73ABB7AB&originRegion=eu-west-1&originCreation=20211025034214> accessed 25 October 2021.

[30] 'DNA database of police expanding, as no law limits its collection' (*The Asahi Shimbun*, 23 August 2020) <https://www.asahi.com/ajw/articles/13660754> accessed 17 October 2021.

[31] 'Essentially Yours: The Protection of Human Genetic Information In Australia (ALRC Report 96)' (*Australian Law Reform Commission*, 28 July 2010) <https://www.alrc.gov.au/publication/essentially-yours-the-protection-of-human-genetic-information-in-australia-alrc-report-96/43-dna-database-systems/dna-database-systems/> accessed 17 October 2021.

[32] Laura Thomas, 'Nothing to Hide, Something to Fear: The Use of Partial DNA Matching in Criminal Investigations' (2006) 17 JLIS pp. 76–98.

[33] Marcus Smith and Monique Mann, 'Recent Developments in DNA evidence' (*Australian Institute of Criminology*, 04 August 2020)

augmented in 2018 with the introduction of the National Criminal Investigation DNA Database – Integrated Forensic Analysis (NCIDD-IFA).[34] To deal with the privacy issues and maintain confidentiality, the Australian government has employed Privacy Commissioner to investigate complaints and audit the use of the database by the agencies.[35]

Section 23WA(5) of the Crimes Act 1974 (Cth) of Australia defines destruction of forensic material as the destruction of identifying means from where the forensic material was generated.[36] The Section raises concern as it talks about the destruction of 'means' instead of 'forensic data/samples' itself.

The countries like Germany,[37] the Netherlands,[38] Norway[39] and so on also utilise DNA for investigation, and the legislation regulating the same provides for the complete destruction of the DNA samples after the DNA profile has been obtained, and does not allow for retention of blood or saliva sample from offender so as to protect privacy rights.

In a similar way, Canada also provides the National DNA Data Bank (NDDB) to its law enforcement agencies to compare the DNA profiles of the suspects and victims across the nation in order to facilitate the investigation.[40] The use of NDDB is only restricted for investigation and humanitarian purposes by special

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<https://www.aic.gov.au/publications/tandi/tandi506> accessed 17 October 2021.

[34] 'Biometric and forensic services' (*Australian Criminal Intelligence Commission*) <https://www.acic.gov.au/services/biometric-and-forensic-services> accessed 11 August 2021.

[35] Owen Bradfield, 'The National DNA Database: A Base for Data or Simply Base Data?' (2003) 22(2) Univ. of Tasmania Law Review, 149, 154 <http://classic.austlii.edu.au/au/journals/UTasLawRw/2003/7.pdf> accessed 17 October 2021.

[36] Crimes Act 1914 (Cth), s. 23WA.

[37] Code of Criminal Procedure (Strafprozessordnung) (1996) ss. 8la, 8le, 81f.

[38] Amendments to Dutch Code of Criminal Procedure (1997).

[39] Criminal Procedure Code (DNA-analyse i straffesaker; Norges offentlige utredninger) (1993) s. 160.

[40] 'National DNA Data Bank' (*Royal Canadian Mounted Police*, 04 February 2021) <https://www.rcmp-grc.gc.ca/en/forensics/national-dna-data-bank> accessed 17 October 2021.

legislation – DNA Identification Act.[41] The data stored in the database is divided into four different categories viz. Convicted Offenders Index, Crime Scene Index, Victims Index, and Voluntary Donors Index in order to facilitate the investigation process and maintain the privacy of the individuals.[42]

Canada has the most established and least contested DNA databases as the legislations giving statutory powers provide relatively minimal degree of intervention to the authorities under a legitimately issued DNA warrant, which is recognised by the court itself in the case of *R v. S.A.B.* so as to declare the DNA warrant regime constitutional.[43] The Ontario Court of Appeal in a case, where the retention of DNA data, in DNA databases, was challenged, stated that "the interest of state is much broader, which cannot be restricted only to '*law enforcement*'".[44] Despite the presence of judicial pronouncements and legislations, aiming to broaden the use of the National DNA Databank, the Canadian Government has restricted its policy position to retain the DNA of convicted offenders only.[45]

However, the question of privacy has been raised against even Canadian DNA databases time and again. Considering the same, Hon'ble Justice Cromwell defined 'informational privacy' in a much broader sense as inclusive of three rights *viz.,* right to confidentiality, right to have control over the use of one's private information and the right to remain anonymous (i.e., right to live freely out of state's surveillance.)[46]

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[41] DNA Identification Act, Revised Statutes of Canada (1998, c.).
[42] 'Use of DNA in Criminal Investigation' (*Royal Canadian Mounted Police*, 04 February 2021) <https://www.rcmp-grc.gc.ca/en/forensics/use-dna-criminal-investigations> accessed 17 October 2021.
[43] R. v. S.A.B. [2003] 2 S.C.R. 678.
[44] R. v. Briggs [2001] O.J. No. 3339 (Ontario Court of Appeal).
[45] 'The National DNA Data Bank of Canada - Annual Report 2019-2020' (*Royal Canadian Mounted Police,* 05 October 2020) <https://www.rcmp-grc.gc.ca/en/the-national-dna-data-bank-canada-annual-report-20192020#a3_3_1>
[46] R. v. Spencer [2014] 2 S.C.R. 212.

This way, various nations utilise or aim to utilise DNA data by establishing DNA databases for investigation purposes. However, no matter how well-established or full-proof these databases intend to be, in most jurisdictions, the questions related to privacy and confidentiality remain unanswered as serious human rights concerns. The consent of the concerned persons is not taken into consideration in most cases resulting in unnecessary State intrusion into the genetic privacy of the individuals.

DNA PROFILING: LAW AND PRACTICE IN INDIA

At present, there is no concrete legislation or guidelines backed by the powers of the Parliament of India in order to regulate the utilisation of DNA technology in the criminal justice system. However, in order to maintain the admissibility of the DNA reports, the provision of the Code of Criminal Procedure, 1973 (Cr.P.C.)[47] and the Indian Evidence Act, 1872[48] are made use. Though there is no specific provision in the Cr.P.C. and/or Indian Evidence Act that specifies the DNA evidence, Section 53 of Cr.P.C. allows the investigating officer to examine the accused by a medical practitioner at the request of the police.[49] However, Section 53 did not allow for the collection of samples in order to conduct DNA analysis. Consequently, Cr.P.C. was amended in 2005, thereby an '*Explanation*' to Section 53 was inserted in the Code allowing "*examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and fingernail clippings by the use of modern and scientific techniques including DNA profiling and other such tests which the 'registered medical practitioner' thinks necessary.*"[50] The 2005 Amendment also allowed examination of sexual offenders as well as victims. However, even after the insertion of such clauses and regardless of the scientific accuracy and precision,

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[47] Code of Criminal Procedure Act 1973, No. 02, Acts of Parliament, 1973 (India), s. 293.
[48] Indian Evidence Act 1872, No. 01, Acts of Parliament, 1872 (India), s. 45.
[49] The Code of Criminal Procedure Act 1973, s. 53.
[50] Ibid, ss. 53, 53A.

there is a reluctance shown by the Courts in India to admit DNA profiling as conclusive evidence.

Further, Section 45 of the Indian Evidence Act, in order to form an opinion, allows the courts to seek the help of an expert on a question of '*science or art*' or '*finger impressions*'. The very same provision is invoked to establish the admissibility of DNA reports in the courts.[51] However, the provisions of the Cr.P.C. and Indian Evidence Act mentioned above are not adequate enough to deal with the evolving DNA technology. The technology is slowly becoming a norm in the courts while dealing with paternity and other civil and criminal disputes and has enormous potential to infringe the right to privacy and right to dignity of an individual, thereby creating a void in the criminal justice system. Consequently, a need was felt in 2003 for the formulation and enactment of the DNA Technology Act so as to lay down guidelines to obtain DNA from accused/victims/offenders and others and specify the *modus operandi*.[52] However, even after 18 years since the first initiative, there is no concrete regulation in place, thereby leaving the arena unchecked.

NEED FOR LEGAL REGULATION

The tale of the discovery of DNA is as controversial as the legislations passed by various States to regulate DNA technology and to guide and facilitate the law enforcement agencies in the investigation. Though the creation of big government databases (as some mentioned above) has facilitated agencies in investigating any crime, there is a need to keep a check on their abuse. During the earlier days, each suspect's samples had to be collected various times in order to match his specimen with samples collected from the crime scene. However, after setting up databases by the State governments, this herculean task became

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[51] The Indian Evidence Act 1872, s. 45.

[52] Akshat Rathi, 'India's DNA profiling bill may become one of the world's most intrusive laws' (*Quartz India*, 24 July 2015) <https://qz.com/india/463279/indias-dna-profiling-bill-may-become-one-of-the-worlds-most-intrusive-laws/> accessed 17 October 2021.

easier. Studies and reports state that violent crimes, such as sexual assaults and homicide, have a greater number of repeat offenders,[53] thereby instead of collecting and matching the samples of suspects, again and again, investigating agencies can analyse the data available in the databases and identify the wrongdoer. It also helps the agencies where there are no clues as to the presence of the suspects, and it's the onus of agencies to identify the culprits.

Artificial Intelligence (AI) has also augmented DNA analysis by using algorithms to determine which DNA profile matches, in a better manner, with the available samples.[54] Moreover, it also simplifies the data making it easier for researchers and scientists to even analyse data that was declared inconclusive earlier. Gone are the days, when stress was laid on the laboratories to test blood and other samples collected for DNA analysis. Researches and analysis, so as to develop more sophisticated technologies and new biological methods, to further augment the sphere are underway, which are likely to hold enough potential to be more discriminative and sensitive than the present. It would sooner or later add another string to the bows of law enforcement agencies. Thus, to keep these rapidly evolving technologies, which sooner or later would be used in the courts of law and criminal investigation, legal provisions have to be developed to make the criminal justice system in consonance with them as well as to protect the fundamental rights provided to accused and/or offenders by the Constitution of India.[55]

THE DNA TECHNOLOGY (USE AND APPLICATION) REGULATION BILL, 2019

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[53] Hemani Bhandari, 'Repeated Offenders on the rise in city' (*The Hindu*, 02 December 2017) <https://www.thehindu.com/news/cities/Delhi/repeat-offenders-on-the-rise-in-city/article21245230.ece> accessed 17 October 2021.

[54] 'TrueAllele® DNA Interpretation' (*Cybergenetics*) <https://www.cybgen.com/> accessed 11 August 2021.

[55] Constitution of India, 1950, art. 20(3), 21.

India is one of those nations trying to provide legal backup to the law enforcement agencies using DNA technologies by setting up national and regional DNA data banks. The Government of India in order to draft a Bill to regulate the use of DNA for criminal investigation started its initiative way back in 2003 by establishing the 'DNA Profiling Advisory Committee.'[56] Consequently, the Human DNA Profiling Bill was prepared in 2007 by the Department of Biotechnology for the regulation of DNA fingerprinting and diagnostics. However, the Bill faced severe criticism for privacy reasons and was never seen in the light of the day.[57] In 2013, the Department of Biotechnology constituted an Expert Committee to finalise the Bill by clarifying the issues raised.[58] Though the Bill was finalised in 2015, severe criticism was levelled against the Bill again on the questions related to privacy.[59] The same happened with the 2016 version of the DNA Bill also.[60] However, the State Governments initiated action on their own and the State of Andhra Pradesh became the first state in 2016 to introduce DNA Profiling in the investigation of crimes.[61]

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[56] 'DNA profiling advisory committee to be constituted' (*Zee News*, 11 December 2003) <https://zeenews.india.com/news/nation/dna-profiling-advisory-committee-to-be-constituted_136215.html> accessed 17 October 2021.

[57] 'The DNA Profiling Bill 2007 and Privacy' (*The Centre for Internet and Society*, 25 April 2011) <https://cis-india.org/internet-governance/blog/privacy/dna-profiling-bill> accessed 17 October 2021.

[58] 'Expert Committee Meetings' (*The Centre for Internet and Society*) <https://cis-india.org/internet-governance/blog/expert-committee-meetings.zip/view> accessed 09 September 2021.

[59] Nayantara Narayanan, 'The scariest bill in Parliament is getting no attention – here's what you need to know about it' (*Sroll.in*, 24 July 2015) <https://scroll.in/article/743049/the-scariest-bill-in-parliament-is-getting-no-attention-heres-what-you-need-to-know-about-it> accessed 17 October 2021.

[60] Elonnai Hickok, 'Here's why we need a lot more discussion on India's new DNA Profiling Bill' (*Hindustan Times*, 07 August 2017) <https://www.hindustantimes.com/analysis/here-s-why-we-need-a-lot-more-discussion-on-india-s-new-dna-profiling-bill/story-CojTDv2vfMMMBsW0CaLxIP.html> accessed 17 October 2021.

[61] Ashish Pandey, 'Andhra Pradesh becomes first state to launch DNA profiling of criminals' (*India Today*, 20 August 2016) <https://www.indiatoday.in/india/story/dna-profiling-criminals-andhra-pradesh-chandrababu-naidu-336285-2016-08-20> accessed 17 October 2021.

Once again, the DNA Technology (Use and Application) Regulation Bill was introduced in August 2018, but the Bill subsequently got lapsed. Further, on July 08, 2019, the Ministry of Science and Technology headed by Dr. Harsh Vardhan again introduced the same Bill in Lok Sabha, which was subsequently referred to the Standing Committee.[62] The 2019 Bill aims to regulate the use and application of DNA technology for the identification of a certain person by law enforcement agencies. The Bill allows the use of DNA technology for the investigation only for matters violating provisions of the legislations listed under the Schedule of the Bill. The Schedule includes the Indian Penal Code (IPC), The Motor Vehicles Act, and The Medical Termination of Pregnancy Act. It also includes civil disputes and other civil matters such as paternity disputes, issues pertaining to assisted reproductive technologies, donation of a human organ, ascertaining the identity of an individual and identification of abandoned children.[63]

The DNA laboratories would create DNA profiles. For the storage of such profiles, the Bill lays the foundation for a National DNA Data Bank and various Regional DNA Data Banks that are to be set up in every state or two or more states.[64] The laboratories have to share their data with these Data Banks.[65] As per the provisions of the Bill, each Data Bank is mandated to categorise its data into five indices *viz.*, crime scene index, suspects' or under-trials' index, offenders' index, missing persons' index, and unknown deceased persons' index.[66]

For the collection of any bodily substance in order to create a DNA profile, the Bill mandates consent of the person to

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[62] 'DNA Technology Regulation Bill referred to parliamentary standing committee' (*The Hindu*, 20 October 2021) <https://www.thehindu.com/news/national/dna-technology-regulation-bill-referred-to-parliamentary-standing-committee/article29742461.ece> accessed 17 October 2021.

[63] The DNA Technology (Use and Application) Regulation Bill 2019, Schedule.

[64] Ibid, c. 25.

[65] Ibid, c. 17(1)(d).

[66] Ibid, c. 26(1).

be obtained, by the investigation authorities. The investigating authorities are mandated to obtain written consent when the suspect is arrested for committing an offence providing for less than seven years of imprisonment as punishment. However, if the offence committed provides for more than seven years of imprisonment as punishment, then the authorities are vested with the power to obtain DNA without obtaining the consent of the arrestee. [67] If the person is a victim or a disabled person or a minor or a relative of the missing person, then the authorities are required to obtain their written consent to collect the sample. If the concerned person does not provide his consent, then the authorities may approach the Magistrate and subsequently, he may order the taking of the bodily material of that concerned person.[68]

Further, clause 31 of the Bill provides that the criteria and manner for entry, retention, and removal of any information pertaining to DNA have to be determined by the Regulations.[69] However, the Bill mentions that on receiving a written request of an individual whose DNA profile is entered in the crime scene or missing persons' index and who is neither an offender nor a suspect or an undertrial, the National DNA Data Bank shall remove his DNA profile therefrom.[70] Under the said clause, the Bill also provides for the removal of the DNA profile of a suspect, after the filing of the police report under the statutory provisions or as per the order of the court; and an undertrial, as per the order of the court.[71]

Chapter II of the Bill lays down the foundation of the DNA Regulatory Board to be established through a notification of the Central Government.[72] The Secretary of the Department of Biotechnology shall serve as the *ex officio* Chairperson of the

[67] Ibid, c. 21(1).
[68] Ibid, c. 21(2), 21(3).
[69] Ibid, c. 31(4).
[70] Ibid, c. 31(3)
[71] Ibid, c. 31(2)(i), 31(2)(ii).
[72] Ibid, c. 3.

Board, while an eminent person having experience of not less than twenty-five years in the field of biological sciences shall be the Vice-Chairperson.[73] Further, clause 12 of the Bill mentions the functions to be performed by the Board, including other functions, as specified by the Government.[74] The primary function of the board is to advise the Central and State Governments on all issues pertaining to DNA laboratories and DNA Data Banks and to provide accreditation to DNA laboratories.

The Bill also provides that if someone '*wilfully*' discloses information contained in DNA Data Bank or wilfully uses any DNA sample in an unauthorised manner, then he shall be punishable with imprisonment up to three years and a fine of rupees one lakh.[75] The Bill further mentions that whoever unlawfully gets access to the information contained in DNA Data Bank, then he shall be punishable with imprisonment up to two years and also with a fine of up to fifty thousand rupees.[76] If someone '*wilfully*' destroys, alters, contaminates, or tampers with biological evidence required to be preserved under any law for the time being in force so as to prevent that evidence from being DNA tested or produced or used in a judicial proceeding, then he shall be punishable with imprisonment which may extend up to five years and also with fine up to two lakh rupees.[77] The Bill also mentions the penalties for the offences committed by companies or institutions.[78]

ANALYSING THE UNDERLYING LACUNAS

Though there are a plethora of positive characteristics, due caution must be exercised while considering the utility of DNA analysis by law enforcement agencies in investigations. The Bill, to an extent, violates the rights which are protected under the

[73] Ibid, c. 4.
[74] Ibid, c. 12.
[75] Ibid, c. 45.
[76] Ibid, c. 48.
[77] Ibid, c. 49.
[78] Ibid, c. 51.

Constitution and various other International Conventions, especially those rights relating to privacy and the right against self-incrimination. Apart from the violation of these Fundamental and Human Rights, it also poses various ethical issues.

Privacy, being one of the most significant Human rights, is protected through various international human rights documents, starting from the Universal Declaration of Human Rights (UDHR), 1948.[79] Its importance is ascertained through the later Covenants such as the International Covenant on Civil and Political Rights, (ICCPR), 1966, which under Article 15 provides protection from any form of non-consensual medical treatment,[80] and Article 14(3)(g) expressly mentions that *everyone has a right not to be compelled to testify against himself or to confess guilt*.[81] Apart from the enumeration of the right to privacy as a basic Human Right in UDHR and ICCPR, various Guidelines have been laid down at the national as well as international levels in order to maintain the best form of ethical standards while performing research on human participants.

The 18th World Medical Association General Assembly, in 1964, adopted the Guidelines comprehensively delineating the ethical standards set by the Declaration of Helsinki, 1964 *(amended in 64th WMA General Assembly, Brazil, October 2013)*.[82] The Declaration is an amalgamation of 32 principles that set Guidelines for securing the confidentiality of data, informed consent, the requirement of a protocol while performing research, and so on.[83] The Indian Council of Medical Research (ICMR) has also released a comprehensive set of Guidelines in 2000 *(revised*

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[79] Universal Declaration of Human Rights, 1948, art. 12.
[80] International Covenant on Civil and Political Rights, 1966, art. 14(3)(g).
[81] Ibid, art. 15.
[82] 'WMA Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects' (*World Medical Association*) <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/> accessed 02 September 2021.
[83] WMA, Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects, ibid at 77.

in 2017) providing for the ways to be followed while performing research in order to maintain the dignity of the people by taking their 'consent' and protecting their right to privacy.[84]

Clause 21 of the DNA Bill, 2019 which allows the authorities to obtain a DNA sample from the arrestee who has committed any offence providing more than seven years punishment is a sheer violation of these human rights provided by the above-mentioned International Human Rights Instruments.[85] The Clause also provides authority to the Magistrate to order the taking of bodily material (DNA sample) from the arrested person without his consent.[86]

Further, the recommendations regarding the role of DNA in disaster victim identification laid down by the DNA Commission of the International Society for Forensic Genetics mandate that DNA cannot be considered as the 'only' test for the identification and adherence to quality lab practices should be given so as to obtain reliable data.[87] With the over-dependence of DNA profiling in criminal investigation, it is very likely that the investigation agencies rely only on the DNA data and for arresting people by looking only at their genetic makeup rather than suspicion and criminal background, which is likely to take a toll on the concept of "fairness" in the criminal investigations and trials due to such arbitrary and uncontrolled use of DNA data.

Apart from the above-mentioned ethical issues, there are a number of legal issues also associated with the over-dependence of DNA data in criminal investigations and trial. Though the Constitution does not enumerate the '*right to privacy*' as a

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[84] 'National Ethical Guidelines for Biomedical and Health Research Involving Human Participants (revised)' (*Indian Council of Medical Research*, October 2017) <https://main.icmr.nic.in/sites/default/files/guidelines/ICMR_Ethical_Guidelines_2017.pdf> accessed 17 October 2021.
[85] The DNA Technology (Use and Application) Regulation Bill 2019, c. 21.
[86] Ibid, c. 21(2), 21(3).
[87] M. Prinz, A. Carracedo, et. al., 'DNA Commission of the International Society for Forensic Genetics (ISFG): Recommendations regarding the role of forensic genetics for disaster victim identification (DVI)' (2006) 1 Foreign Science International: Genetics, pp. 3-12.

fundamental right, through various judicial decisions including *K.S. Puttuswamy v. Union of India* in 2017[88], the right to privacy has attained the status of a fundamental right under Article 21 of the Constitution of India. Apart from this, India does not have a Personal Data Protection Law in order to protect the privacy of individuals. In 2019, the Government has initiated its endeavours to enact legislation on the same, however, not been successful till now. The draft of the Personal Data Protection Bill, 2019 provides for the protection of the user sensitive information and personal data of the citizens from the government and private companies.[89] However, the Bill failed to address the grave privacy violations that the DNA Bill, 2019 is likely to cause.

Further, Section 36 of the Personal Data Protection Bill made an exception for the processing of personal data for any prevention, detection, investigation and prosecution of any offence.[90] Thus, for any violation of personal information by investigation authorities, the only resort available to the citizens is a writ petition under Articles 32 and 226[91] for the violation of Article 21, which would surely open the floodgates to a countless number of petitions and overburden the already overburdened courts of law. The result would be that the courts would take enormous time in considering the petitions and disposing of the same, which would result in the violation of the 'right to fair trial' or 'right to speedy trial' propounded by the apex court in *Hussainara Khatoon case*.[92]

Moreover, Article 38 of the Indian Constitution casts a duty on the state to secure a social order for the promotion of the welfare of the people,[93] while Entry No. 65 of the Union List allows the Parliament of India to legislate a law for the '*scientific and*

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[88] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1: 2017 SCC Online SC 996.
[89] The Personal Data Protection Bill 2019, No. 373, Bills of Parliament, 2019 (India).
[90] Ibid, c. 36.
[91] Constitution of India, 1950, art. 32, 226.
[92] Hussainara Khatoon v. Home Secy., State of Bihar, (1980) 1 SCC 81.
[93] Constitution of India, 1950, art. 38.

technical assistance in the investigation and detection of crime.'[94] However, Article 20(3) of the Indian Constitution provides for the 'right against self-incrimination' for the protection of the arrested person.[95] As mentioned, the DNA Bill, 2019 allows acquiring DNA samples from the arrestees without their consent charged under 'specified crimes,' and also grants powers to the Magistrate to pass orders to obtain DNA samples of the arrested person, who would have to face the larger questions related to the violation of Article 20(3) of the Constitution.

In *State of Bombay v. Kathi Kalu Oghad & Ors.*,[96] the Hon'ble Apex Court categorically stated that "*…the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.*"[97] Further, in Selvi & Ors. v. State of Karnataka,[98] differentiating between 'personal testimony' and 'identification evidence,' the three-judge bench of the Supreme Court stated that former is not permitted by virtue of Article 20(3), while the latter is only for the purpose of identification, and is allowed. In a similar manner, it is likely to be said, identification of the accused based on DNA technology can be permitted.[99]

More recently, in *Ritesh Sinha v. State of UP*,[100] Hon'ble Justice Ranjan Desai observed "*taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain.*"[101] Hon'ble High Courts[102]

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[94] Ibid, 1950, art. 226.
[95] Ibid, 1950, art. 20.
[96] State of Bombay v. Kathi Kalu Oghad, (1962) 3 SCR 10.
[97] Ibid at 96.
[98] Selvi v. State of Karnataka, (2010) 7 SCC 263.
[99] Ibid at 98: para 188.
[100] Ritesh Sinha v. State of U.P., (2013) 2 SCC 357.
[101] Ibid at 100.
[102] Rajesh Kumar Pandey, 'DNA test authentic way to prove if wife unfaithful: Allahabad High Court' (*The Times of India*, 18 November 2020) <https://timesofindia.indiatimes.com/city/allahabad/dna-test-most-

at various instances have taken a liberal interpretation and considered DNA results enough for identification of the culprit in the matters of rape, etc.,[103] and do not violate Articles 20(3) and 21,[104] for instance in Naveen Krishna Bothireddy v. State of Telangana,[105] the Hon'ble High Court of Andhra Pradesh upheld that the order passed by the trial court directing the accused to undergo medical tests/ potency test or erectile dysfunction (ED) test do not violate the mandate of Article 20(3) and Article 21 of the Constitution. While some of the Hon'ble High Courts have also stated contrary to it.[106] Thus, the question is still unanswered and open to various interpretations.

CONCLUSION

In order to set up a DNA database and facilitate its arms of the Criminal Justice System, the Government of India came up with the DNA Technology (Use and Application) Regulation Bill, 2019. However, there are various concerns regarding the enactment of this proposed legislation as the provisions in the Bill, 2019 are likely to violate the fundamental rights, especially the right to privacy and the right against self-incrimination guaranteed by the Constitution of India. On the other hand, the

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authentic-way-to-prove-if-wife-has-been-unfaithful-or-not-allahabad-high-court/articleshow/79268753.cms> accessed 17 October 2021.

[103] 'Orissa High Court allows DNA test to determine child's parentage' (*The New Indian Express*, 12 January 2020) <https://www.newindianexpress.com/states/odisha/2020/jan/12/orissa-high-court-allows-dna-test-to-determine-childs-parentage-2088539.html> accessed 17 October 2021.

[104] 'HC upholds lower court order on DNA test to determine paternity' (*The Hindu*, 26 January 2021) <https://www.thehindu.com/news/cities/Madurai/hc-upholds-lower-court-order-on-dna-test-to-determine-paternity/article26097171.ece> accessed 17 October 2021.

[105] Naveen Krishna Bothireddy v. State of Telangana, 2017 (1) ALT (Crl.) 422 (A.P.).

[106] Nitish Kashyap, 'Merely Because DNA Report Does Not Establish Paternity, Is No Ground For Release On Bail; Bombay HC Rejects Plea Of Accused In Gangrape Of Minor' (*Live Law*, 03 August 2020) <https://www.livelaw.in/news-updates/merely-because-dna-report-does-not-establish-paternity-is-no-ground-for-release-on-bail-bombay-hc-rejects-160902> accessed 17 October 2021.

use of DNA analysis can aid the investigating agencies to provide speedier and more accurate investigations, which is endeavoured to promote with the enactment of the legislation to use and apply the DNA technology in a regulated way.

The use of DNA technology for investigation purposes in India is likely to act as a kernel by facilitating the investigations in a speedy way. As mentioned, various nations already use the technology and owing to its positive outcomes such as identifying missing children and unidentified deceased individuals from the mutilated remains, which includes the victims of disasters, apprehending repeat offenders for heinous crimes, etc. The use of DNA techniques in criminal and civil proceedings will help in establishing the identity of the questioned person. However, to take advantage of in such a manner, the negative aspects shall be negated or curbed down to minimal.

SUGGESTIONS

The state has not only to create an enabling system adhering to the letter and spirit of the constitutional provisions and various judicial pronouncements but also strive to implement it in an effective manner by creating adequate checks and balances. Moreover, though rights against self-incrimination cannot be said an absolute right, the legislation must try to infringe this right of an individual as minimal as possible. No person should be compelled to provide evidence against his/her will unless ordered by a court of law. The following suggestions are put forward to increase the effectiveness of the legal regulation of the use of DNA profiling for criminal investigations.

i. The proposed legislation should establish an independent body comprising of an equal number of members from the government as well as the non-governmental side. The body shall act as the direct concern of the office for a consultation, execution/implementation, supervision, or all other functions as laid down under the bill to be executed by the DNA Regulatory Board.

ii. A mechanism shall be laid down to assist all tiers of courts of law to understand the DNA reports and their limitations. The courts shall also be made aware with the help of that mechanism when it would be feasible to exploit the technology. Adequate training shall be provided to the staff members, or experienced individuals aware of the nooks and crannies of DNA shall be recruited so as to facilitate the judicial proceedings.

iii. In order to protect the privacy of individuals, the data collected and the analysis done shall be destroyed after the purpose has been fulfilled, like in the case of acquittal and when the missed person is traced, all data should be erased. If the person is convicted, then the DNA information should be stored to keep a check on the repeated offenders.

iv. The attempt made by the Bill to establish Regional Data Banks is likely to add vulnerability to data stored as they affect the integrity and security of data. Only by establishing a more robust and adequately regulated single DNA Data Bank at the National level, instead of the proposed Regional Data Banks, can the privacy and confidentiality of the subjects be ensured.

v. Adequate provisions for the destruction of data should also be specified so that when the purpose gets fulfilled the data would be erased, and if an individual whose DNA data is stored in the data bank unknowingly shall also get an opportunity to opt for the procedure as specified in order to remove the same from the database.

vi. The National DNA Data Bank should be established as the only *parens patriae* of all DNA profiles, thereby law shall prevent the DNA laboratories from creating their own databanks and storing any data. If they are found in contravention with the same, an adequate mechanism should be laid down to prosecute those laboratories.

vii. The proposed legislation should restrict the arbitrary exercise of power by any Magistrate while ordering obtaining of any DNA specimen from the arrestee by mentioning that as and when the Magistrate gets satisfied that the specimen has enough potential to confirm or disprove the involvement of the concerned

person in the crime, he/she shall order for taking of bodily substance of that person adhering to the principles of natural justice and giving that person an opportunity to present his case before passing the order.

viii. Written consent shall be made mandatory to obtain any specimen from any person and in cases where written consent of the person is necessary, and that concerned person refuses for the same, then the concerned investigation office shall make an application to the Magistrate for ordering obtaining of the bodily substance, and due procedure by the Magistrate as mentioned above shall be followed in such cases.

ix. In Offences and Penalties, the proposed legislation only takes into account '*wilful*' disclosure, tampering, contamination, destruction, or alteration by any person of the information stored in DNA Data Bank. Any negligent behaviour or deliberate reckless behaviour does not fall within the ambit of these provisions. Thus, it shall also be included within the same as any act, be it negligent action, by any official or individual that has the potential to cause irreparable harm to the criminal justice system as well as irreparable harm or benefit to the concerned person whose data gets disclosed or adulterated.

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FUTURE PROOFING CORPORATE GOVERNANCE THROUGH ENVIRONMENTAL SOCIAL GOVERNANCE

Dr. Abha Yadav[*]

ABSTRACT

Corporate Governance in India is a thriving field and it is well established that much more needs to be done to ensure social commitment of the corporates for inclusive growth. Time and again the Companies Act has been amended to bring it in sync with the social realities of the country. The concept of Corporate Citizenship has been debated and discussed in the realm of company law. In the past few years, a new concept of Environment Social Governance has emerged which has eclipsed the Corporate Social Responsibility (CSR) domain since it is a concept which is larger and wider that CSR. At present, ESG reporting and disclosures by companies leave much to be desired. Internationally, many countries have started adopting the ESG regime however there is a lack of international standards for ESG disclosures and ESG ratings that this article tried to cover. In India, the BRSR framework of SEBI attempts to improve the ESG regime.

Keywords: *Sustainability, Corporate, Governance, Environment, Social, Company Law*

INTRODUCTION

Over the years, there has been a transition in the corporate jargon from Corporate Social Responsibility to Environment Social Governance. Environment Social Governance (ESG) is an attempt to improve the present social and environmental

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responsibilities of corporations. It tries to give an ethical dimension to the model of capitalism. It can be said that ESG is an all-encompassing term that includes in its realm, the concept of CSR. The approach towards investment is evolving with the changing times. The investors are no longer looking only for financial gains as a return on investment but also looking at contributing their funds towards environmental sustainability. They are focusing on non-social parameters i.e., ESG (Environment empathy, Social Responsibility, and Corporate Governance). Thus, ESG has evolved as a result of this sustainability revolution of the investors.[1] Henceforth, sometimes it is also referred to as 'Impact Investing', 'Sustainable Investing', 'Responsible Investing' or 'Socially Responsible Investing (SRI).'[2]

The rationale behind imposing the duty on corporates is the concept of 'corporate citizenship'. Corporates thrive and grow by extracting resources from the local environment. Henceforth the liability is upon them to use these resources judicially. To address the same, the CSR (Corporate Social Responsibility) regime is pre-existing under the Companies Act, 2013.[3] However, shreds of evidence suggest that over the years it has become more of a tick-in-box formality and corporations though are meeting their commitments yet the actual impact whether created or not is being overlooked.[4] In this context, ESG can be argued to be an improvement on the prevalent CSR regime. The evolution of ESG can be traced back to 2005 when the then UN Secretary-General, Kofi Anan invited institutional investors around the world to

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[1]Team Mint, *Sustainability revolution sweeps the world of private equity*, MINT (Mar 6, 2022), https://www.livemint.com/companies/sustainability-revolution-sweeps-the-world-of-private-equity-11646588148684.html (last visited Jun 13, 2022).
[2]The Investo Team, Thomas Brock, & Ariel Courage, *Environmental, Social, & Governance (ESG) Criteria Definition*, INVESTOPEDIA (May 18, 2022), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp
[3]Companies Act, 2013, § 135 (m), No. 18, Acts of the Parliament, 2013
[4]Srishti & Tavleen Singh, *Why this is not CSR: A study of 5 major corporates*, DOWNTOEARTH (Dec 10, 2020), https://www.downtoearth.org.in/blog/governance/why-this-is-not-csr-a-study-of-5-major-corporates-74587

develop the world's best practices of responsible investing mostly focusing on ESG. The same is now known as the Principle of Responsible Investment (PRI) which presently has 4000 signatories in over 60 countries.[5] However, there is a fundamental difference between ESG and CSR initiatives. While ESR deals with governance more explicitly CSR deals with it more implicitly.[6] Under the ESR regime corporations cannot be said to comply with the same, merely by engaging or investing their funds in some environment-friendly venture like CSR. Here to be an ESR complaint corporation need to report its day-to-day ESR targeted initiatives which encompass the interest of all its stakeholders.[7] The present ESR targeted initiatives encompass[8] under its environmental head 'Energy consumption', Pollution Control, Climate Change, and Waste Management. Under its Social head, it incorporates concerns related to Human Rights, Child and Forced Labour, Community Welfare, and Stakeholder Health and Safety. Further for 'Governance' under the ESG framework issues related to the quality of Management, Board Independencies, Mitigating Conflicts of Interest, and Board Diversity are discussed. However, both these initiatives are similar in their pursuit of contributing toward the Sustainable development goals.[9]

Thus, the attempt of this article will be in analysing the evolution of the ESG regime both from an international perspective and from the perspective of India. The present

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[5]Annual Report, United Nations Principles for Responsible Investment, 2021
[6]Stuart L. Gillan, Andrew Koch & Laura T. Starks, *Firms and social responsibility: A review of ESG and CSR research in corporate finance*, 66 JOURNAL OF CORPORATE FINANCE 101889, 1, 3-4 (2021).
[7] Divyanshu Sharma, *Does ESG's Success in India Threaten the CSR Regime?*, INDIACORPLAW (Mar 25, 2022), https://indiacorplaw.in/2022/03/does-esgs-success-in-india-threaten-the-csr-regime.html (last visited Jun 16, 2022).
[8]Omkar Vasudev Bhat, *The rise of ESG investing | Value Research*, FUNDWIRE, (Feb 19, 2021), https://www.valueresearchonline.com/stories/49015/the-rise-of-esg-investing/.
[9]ESG to SDGs: Connected Paths to a Sustainable Future – SustainoMetric, SUSTAINOMETRIC, https://sustainometric.com/esg-to-sdgs-connected-paths-to-a-sustainable-future/ (last visited Jun 17, 2022).

regulatory regime concerning ESG in India will be discussed and its prospects and challenges will be critically analyzed.

THE GROWTH OF ENVIRONMENT SOCIAL GOVERNANCE IN THE GLOBAL SPACE

The global investment regime has evolved in the last few decades to a great extent. The focus now has shifted from investment for financial gains to investments like impact financing. This change is mainly addressed to contribute toward the sustainable development goals on a global scale. This need for development financing has found backing through the ESG framework developed as an outcome of the UN's Principle of Responsible Investing (PRI) initiative. These ESG initiatives have since then seen rapid growth mostly in the last two decades.[10] At present, these regulations are in practice across 50 countries.[11] This is because the approach towards investment has shifted. Therefore, the corporates are now expected to be more socially responsible, and the better the reporting framework and transparent the disclosures for ESG, the greater the investments these corporates are attracting as evidence from the past few decades suggest.

While the formal introduction of ESG within the investment regime started with the efforts of the United Nations Principle for Responsible Investing Framework in 2006[12], the practice of ESG investments has its evolution around the 1960s, with exclusion by investors from investing in businesses engaged in non-environmental friendly activities such as tobacco production or South African Apartheid regime.[13] At present

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[10]Chitra S. de Silva Lokuwaduge & Keshara M. De Silva, *ESG Risk Disclosure and the Risk of Green Washing*, 16 AUSTRALASIAN ACCOUNTING, BUSINESS AND FINANCE JOURNAL 4,146–159 (2022).
[11]Guest, *ESG — a value ecosystem for corporates*, BUSINESSLINE (Jul 27, 2021), https://www.thehindubusinessline.com/opinion/esg-a-value-ecosystem-for-corporates/article35567164.ece (last
[12]ibid.
[13]MSCI, The Evolution of ESG Investing, https://www.msci.com/esg-101-what-is-esg/evolution-of-esg-investing (last visited Jun 17, 2022).

starting with the United Kingdom (2000), countries like the USA, Japan, Germany, Sweden, Belgium, France, Canada, the Netherlands including India have started adopting ESG Framework.[14]

One of the primary challenges faced in this evolving ESG regime is the lack of uniformity in reporting requirements. With the rise of sustainability reporting, it has become the determinant for business growth. However, corporate bodies in the absence of a standardized framework use annual reports or the companies' websites to disclose their ESG commitments and the same thus lacks reliability. This lack of international standards for ESG disclosures and ESG ratings[15] has led to the problem of 'Greenwashing'. Greenwashing is the practice of making misleading disclosures concerning green credentials. It can also be considered a marketing strategy to make a preposterous assumption about the company's profits and its contribution toward green energy.[16] Further investors often find it difficult to compare their progress due to the multi-jurisdictional nature of the reporting of sustainability initiatives. Thus, to deal with this a uniform robust international framework must exist.

Though, not uniform, however, standards exist guiding the policy formulation for disclosure requirements for reliable ESG reporting. The World Economic Forum (WEF) and the International Business Council (IBC) along with four other big accounting firms (PWC, Deloitte, KPMG, and Ernst & Young) in the association have developed a 22 specific standardized metrics for reporting the ESG commitments in a 'stakeholder Capitalism approach.'[17] Apart from the same, the five most prominent ESG

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[14]UN SDGs / ESG, UN SDGs | SUSTAINABLE DEVELOPMENT GOALS FOR THE UNITED NATIONS, http://asdun.org/?page_id=2528&lang=en (last visited Jun 17, 2022).

[15]ESG investment and green washing: Myth and reality, DELOITTE CHINA, https://www2.deloitte.com/cn/en/pages/hot-topics/topics/climate-and-sustainability/dcca/thought-leadership/esg-investment-and-green-washing.html

[16] Silva, (n 11).

[17]Betsy Atkins, *Demystifying ESG: Its History & Current Status*, FORBES, (Jun 8, 2020),

reporting frameworks are the Global Reporting Initiative (GRI), Carbon Disclosure Project (CDP), Sustainability Accounting Standards Board (SASB), Taskforce on Climate-related Financial Disclosures (TCFD), and Workforce Disclosure initiative.[18]

- Global Reporting Initiative (GRI): It was created in 1997 along with the support of organisations like the Coalition for Environmentally Responsible Economies and the Tellus Institute. United Nations Environmental Programmes also played an influential role. The idea behind formulating such an initiative was to design a standard for reporting and make the corporations accountable before their stakeholders.[19]

- Carbon Disclosure Project (CDP): This started around 2002. The idea behind the same was to make environmental sustainability reporting a core business practice amongst the corporates to impact a change in the capital markets.[20]

- Sustainability Accounting Standards Board (SASB): Jean Rogers a former management consultant at Deloitte started the SASB in 2011. This is unique from other reporting principles as it includes both sustainability and Financial Fundamentals. This was created so that the investors could compare all the social and environmental issues and invest their capital in the best.[21]

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https://www.forbes.com/sites/betsyatkins/2020/06/08/demystifying-esgits-history--current-status/?sh=2683f4f12cdd (last visited Jun 17, 2022).

[18]Ellen Weinreb, *The backstory and purpose behind 5 leading ESG reporting frameworks | Greenbiz*, GREENBIZ, (Mar 25, 2020), https://www.greenbiz.com/article/backstory-and-purpose-behind-5-leading-esg-reporting-frameworks

[19]Five global organisations, whose frameworks, standards and platforms guide the majority of sustainability and integrated reporting, announce a shared vision of what is needed for progress towards comprehensive corporate reporting – and the intent to work together to achieve it. - CDP, https://www.cdp.net/en/articles/media/comprehensive-corporate-reporting.

[20]John Niemoller, *ESG Reporting Frameworks: Comparing CDP, GRI & More*, PERILLON, (Jun 8, 2021), https://www.perillon.com/blog/esg-reporting-frameworks

[21]Nathaniel Valthaty, Nathaniel Valthaty, *ESG Reporting Standards: A Ready Reckoner*, IRIS CARBON® (2022), https://iriscarbon.com/us/blog/esg-reporting-standards-a-ready-reckoner/ (last visited Jun 17, 2022).

- Taskforce on Climate-related Financial Disclosures (TCFD): In April 2015, G20's Financial Stability Board to deal with climate risk established the TCFD in December 2015. Its framework provides reporting requirements for climate-related financial risk, for investors, lenders, and insurers and is inclusive of physical, liability, and transition risks.
- Workforce Disclosure initiative: It was created in 2016 in the UK, by the "responsible investment' nonprofit share action. It collects data to provide institutional investors with information on the management of both direct employees and supply chain workers.

With the growth of global standards for reporting requirements, a greater need for reliable data is also felt. Reports by KPMG suggest that on the global stage about 85 percent of institutional investors are investing their finance over ESG. Predictions suggest that by 2025 nearly one-third of the global pool of assets will be dedicated to ESG.[22] Surveys conducted and reports published before COP26 suggest that majority of the 325 investors surveyed on a global scale are expressing their commitment to align with ESG.[23] There has been an increase in inflows of the sustainable fund on the global stage. The increase is 88 percent. Europe has the major contribution of 80 percent towards this increase followed by the USA, Asia (excluding Japan) New Zealand, Canada, and Australia.[24] Further UNPRI has also reported a 26% increase in their ESG assets in 2021 as compared to the previous year.[25] All these data suggest a need for a uniform framework in place. To meet the same, reporting agencies are also

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[22]Kundan Pandey, *India's market regulator is looking to standardise green rating agencies*, QUARTZ, https://qz.com/india/2126190/indias-market-regulator-is-looking-to-standardise-green-rating-agencies/ (last visited Jun 16, 2022).
[23] Kundan Pandey, *Market Regulator SEBI Takes A Step To Standardise ESG Rating For Sustainable Corporate Finance -The Dialogue*, (2022), http://thedialogue.co.in/article/fSOJvbFnmtlYN7Wil2Gi
[24]Ria Sinha, *Despite challenges, ESG investing is gaining momentum in India*, MONEYCONTROL, (Sep 28, 2021), https://www.moneycontrol.com/news/opinion/despite-challenges-esg-investing-is-gaining-momentum-in-india-7518081.html
[25] ibid.

needed. At present, the four most reliable and prominent rating agencies for ESG compliance are MSCI, Sustainalytics, RepRisk, and the newly emerging ISS.[26]

Thus, to reform the framework of ESG, the focus should be on introducing global standards of reporting. In this respect OECD in its report titled '*ESG Investing: Practices, Progress, and Challenges*' suggest key arenas those needs to be given attention to reform the existing framework. These efforts will include ensuring consistency, comparability, and quality in core frameworks of ESG disclosures, and ensuring the relevance of financial materiality in ESG data and ratings. Further efforts must be made to improve the uniformity of methodologies of rating to improve its comparability score in the interest of the investors.

INDIA AND ITS ESG REGULATORY FRAMEWORK

In India, the evolution of the ESG framework can be traced back to 2011. [27]In a first attempt, The Ministry of Corporate Affairs released the National Voluntary Guidelines on Social, Environment, and Economic Responsibilities of Business. This guideline provided a framework for ESG disclosure by companies. Thereafter in 2012, SEBI formulated the Business Responsibility Reports (BRR) framework. Under the same, 100 top listed companies in terms of market capitalization were mandated to file their annual report BRR report.[28] In 2015, the same number was increased to the top 500 listed companies.[29] Thereafter in 2017,

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[26] Atkins, (n 18).
[27]Economic Laws Practice (ELP), *The Interplay Between CSR and ESG Norms: What India Inc and Investors Need to Focus on*, THE CSR JOURNAL (July 14, 2021), https://thecsrjournal.in/interplay-csr-and-esg-norms-india-investors-elp/
[28] *Mandatory BRSR reporting for top 1,000 listed companies from FY2022-23 - KPMG India*, KPMG (2022), https://home.kpmg/in/en/home/insights/2021/06/firstnotes-sebi-business-responsibility-sustainability-reporting-listed-companies.html
[29] Moyna Manku, *BSE extends business responsibility reporting to top 500 firms | Mint*, https://www.livemint.com/Companies/TNq1HX1YBMN1xW4yvAjvsI/BSE-extends-business-responsibility-reporting-to-top-500-fir.html (last visited Jun 16, 2022).

the Kotak Committee on Corporate Governance gave its report.[30] It emphasizes more on the role of the Board of Directors in the ESG framework. While the Companies Act, 2013 codified the fiduciary duties of the directors to act in good faith of the shareholders and uphold the interest of the company, the Kotak Committee further emphasized that such fiduciary duties of the directors must also be exercised for implementing the objective of ESG. In doing the same, the interest of the stakeholders must be given greater emphasis.[31] Following the same, in 2018 thereafter Nifty for the very first time launched its Nifty 100 ESG index. This was formulated to track the performance of companies within Nifty 100 solely based on their ESG criteria. The same index has a base date of April 01 2011 and a base value of 1000. [32]However, despite such developments, there was a lack of a proper framework for implementing ESG in India. At the same time in the global space, the growth of ESG disclosure was mandating the fast-growing economies to adopt such practices. SEBI realizing the importance of ESG for developing a sustainable business economy, vide circular SEBI/HO/CFD/CMD-2/P/CIR/2021/562, on 10th May 2021 introduced Business Responsibility and Sustainability Report (BRSR). This replaced the earlier 2015 BRR framework.[33] The same applies to the top 1000 listed companies being mandatory from the financial year 2022-2023.[34] The BRSR framework is governed by the nine principles of the National Guidelines on Responsible Business conduct (NGBRCs). It seeks disclosures from the listed

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[30] Medha Srivastava & Adamya Vikrant, *Analysis Of Kotak Committee Recommendations On Corporate Governance - Corporate Governance - India*, (Jan 3, 2020), https://www.mondaq.com/india/corporate-governance/875864/analysis-of-kotak-committee-recommendations-on-corporate-governance (last visited Jun 16, 2022).

[31]Kotak Committee Report on Corporate Governance, (Oct 5, 2017), https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html

[32] NSE - National Stock Exchange of India Ltd., https://www1.nseindia.com/products/content/equities/indices/thematic_indices.htm (last visited Jun 16, 2022).

[33]Manku, (n 30).

[34] India CSR Network, *SEBI makes BRSR applicable to the top 1000 listed companies*, INDIA CSR NETWORK (2021), https://indiacsr.in/sebi-makes-brsr-applicable-to-the-top-1000-listed-companies/

corporations on their performance as per the nine principles. Further, the reporting is first categorized into three categories. General Disclosures (about the entity), Management and Process disclosure (about the management approach), and principle-wise performance disclosure. The last disclosure is further sub-categorized into other categories like essential (compulsory) and Leadership Indicators (Voluntary).

To enhance environmental sustainability among corporates CSR provisions under the companies' act exist. The same has been amended to strengthen its implementation. Through the January 22, 2021 amendment to sec 135 of the Companies Act and its rules, CSR has now been made mandatory, and using a mere statement of reason by the corporates to default on compliance is no more acceptable.[35]Further, the Chief Financial officer of the company is required to certify that the CSR funds of the company have been utilized in the manner specified by the board.[36] Thus CSR can be said to be playing a vital role in dealing with environmental sustainability among corporates. The evolution of the ESG framework compared to CSR can be said to be an investor-driven effort.[37] As a result of covid-19 corporates couldn't meet their CSR targets. As a result, the focus of investors shifted towards ESG-compliant companies.[38] This thus has further aggravated the need for a stronger ESG reporting framework. However, the present framework developed by SEBI is at a very nascent stage in India and requires further development.

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[35] Practice (ELP), (n 28).

[36] Rajnish Kumar, *Companies (Corporate Social Responsibility Policy) Amendment Rules, (*Jan 28, 2021), https://taxguru.in/company-law/companies-corporate-social-responsibility-policy-amendment-rules-2021.html.

[37] Witold Henisz, Tim Koller, & Robin Nuttall, *ESG framework | McKinsey*, https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value

[38] Divyanshu Sharma, *Does ESG's Success in India Threaten the CSR Regime?*, INDIACORPLAW (Mar, 25 2022), https://indiacorplaw.in/2022/03/does-esgs-success-in-india-threaten-the-csr-regime.html (last visited Jun 16, 2022).

The Companies Act, of 2013 also has an underlying framework supporting the growth of ESG. Under sec 166, directors of the company are duty-bound in sanctioning policies to promote in good faith, the benefit of the company, its members, shareholders, the community, and the protection of the environment. Further, under the Companies (Accounting) Rule, 2014[39] r/w sec 134(m) companies are mandated to make detailed disclosures for energy conservation.[40] The BRSR framework of SEBI further attempts to improve this present regime. Some of the key disclosures under the same framework include:[41]

- Disclosing an overview of ESG risks and opportunities of the corporation and their approach to overcome the same.
- Environment disclosures related to greenhouse gas emissions, pollutant emissions, waste management practices, water pollution, energy usage, etc.
- Disclosures are related to steps taken by the entity toward Sustainable Development goals.
- Further, the social disclosure is related to disclosures for gender and social diversity. Inclusion of specially-abled within the workforce, enduring occupational health, and safety providing welfare benefits to permanent and contractual employees, etc.
- Other such social disclosures include Social Impact Assessment (SIA) and for consumers, disclosures like data privacy cyber security, product labeling, etc.

SEBI apart from formulating a framework for reporting ESG has also started focusing on formulating a policy on ESG rating agencies. SEBI on January 24, 2022, released a consultation paper titled '*Consultation Paper on Environmental, Social and Governance (ESG) Rating Providers for Securities*

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[39] Companies Accounting Rules, 2014, Rule 8

[40] Companies Act, 2013, § 134 (m), No. 18, Acts of the Parliament, 2013

[41] Mini Raman, *New SEBI Norms On ESG Reporting By Listed Indian Companies - Securities - India*, MONDAQ (Apr 22, 2022), https://www.mondaq.com/india/securities/1186256/new-sebi-norms-on-esg-reporting-by-listed-indian-companies (last visited Jun 13, 2022).

Markets'.[42] This paper mainly surrounds the three themes of Transparency, the ESG rating process, and conflict of interest.[43] It suggests measures on how the three themes could be evolved and how the rating providers should disclose their policies on their website to promote transparency and prevent conflict of interest ESG rating providers should not rate their related entities.[44]

This prevalent framework of ESG disclosure will benefit all the stakeholders in the society, be it the customers through quality products, employees through better working conditions and remuneration policies, and the local environment at large through environment-friendly sustainable measures. This stakeholder theory of corporate governance is what makes it different from other approaches like CSR. Thus, the need of the hour must be channelizing its growth by developing a robust framework to instill investor confidence.

Over the last few years, there has been a steady increase in green financing within the Indian Capital Markets.[45] At present in India, there are at least 17 mutual funds based on ESG[46] like SBI Magnum Equity ESG Fund, HDFC Housing Opportunities Fund, ICICI Prudential ESG Fund, Axis ESG Equity Fund, Invesco India ESG Equity Fund, Kotak ESG Opportunities Fund, etc. Further big asset management companies like Aditya Birla Sunlife, Invesco India Fund, and Kotak Fund have schemes for ESG.[47] Further, the inflows in these mutual funds have increased by 76

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[42]SEBI, *Consultation Paper on Environmental, Social and Governance (ESG) Rating Providers for Securities Markets*, (Jan 24, 2022), https://www.sebi.gov.in/reports-and-statistics/reports/jan-2022/consultation-paper-on-environmental-social-and-governance-esg-rating-providers-for-securities-markets_55516.html

[43] Pandey, (n 22).

[44]ibid.

[45]Green finance can bolster India's transition to net-zero. Here's how, WORLD ECONOMIC FORUM, https://www.weforum.org/agenda/2022/01/green-finance-bolster-india-transition-net-zero/ (last visited Jun 16, 2022).

[46] ESG Mutual Funds to Invest in 2022, SCRIPBOX, https://scripbox.com/mutual-fund/esg-funds (last visited Jun 16, 2022).

[47]ibid.

percent in 2021.[48] Further, the NIFTY ESG 100 has also outperformed its previous year's target from 2020 to 2021.[49]

This growth of ESG in India is furthered by initiatives by various Ministries. The Ministry of Corporate Affairs in this respect has taken the first step by developing guidelines and SEBI formulating the BRSR framework. However, apart from the same, ministries like the Finance Ministry have analyzed this trend of impact investing and aim to utilize it for making the economy greener. There has been a declaration made by the finance minister Nirmala Sitharaman that green bonds will be issued.[50] RBI has further commented on associating itself with the Finance ministry on issuing green bonds in the Indian Capital Market.[51] Such issuance of such green bonds are more targeted initiative, as such bonds have a specified and dedicated purpose compared to other bonds and therefore will result in investment in the desired direction.[52] Further, in this respect, the first step was taken by the Ghaziabad Municipal Corporation in Uttar Pradesh by issuing the first green bond in India, which is further listed on the Bombay Stock Exchange. The purpose of issuing such green bonds was to fund the establishment of the water treatment plant and tertiary sewage. In furtherance of the same rupees, 150 crores were

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[48] PTI, *ESG funds: Inflows of sustainable funds surge 76% to Rs 3,686 cr in FY21,* The Economic Times, (Apr 22, 2022), https://economictimes.indiatimes.com/markets/stocks/news/inflows-in-sustainable-funds-surge-76-to-rs-3686-cr-in-fy21/articleshow/82197389.cms (last visited Jun 16, 2022).

[49]Harsha Jethmalani, *Nifty ESG beats Nifty50 in last one year as Indians take to conscious investing*, MINT, August 24, 2021, https://www.livemint.com/market/mark-to-market/nifty-esg-beats-nifty50-in-last-one-year-amid-focus-on-conscious-investing-11629780211287.html (last visited Jun 16, 2022).

[50] Sinha, (n 25).

[51]Siddharth Upasani, *Government, RBI working on framework for Green Bonds*, MONEYCONTROL, https://www.moneycontrol.com/news/business/economy/government-rbi-working-on-framework-for-green-bonds-8302771.html (last visited Jun 16, 2022).

[52] https://economictimes.indiatimes.com/markets/bonds/decision-on-issuance-of-green-bonds-next-month-says-rbi-governor/articleshow/89566002.cms?from=mdr

raised.[53] Further, the Ministry of Electronics and Information and Technology is also taking steps toward ESG compliance. They in collaboration with KITS (Karnataka Innovation & Technology Society) and Nasscom launched the Enterprise Innovation challenge with a focus on ESG goals.[54] Such initiatives are promising steps toward the development of ESG in India.

However, this prevalent regime is yet to overcome many lacunas and challenges. One such challenge will be having trained ESG professionals who understand the ESG framework, and ESG accounting mechanisms, to assist the corporations in compliance.[55] Further, India is a developing country and its energy needs cannot be compared with the west. Therefore, adapting to a new Environmental social governance framework based on global standards will be difficult.[56] Thus, there is a long road ahead for India in terms of its ESG regime however, this early beginning is expected to cater to its energy conservation targets and give impetus to its compliance with sustainable development goals.

THE WAY FORWARD

The world is facing the grappling concerns of climate change. This has necessitated the need for a cumulative effort

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[53]PTI, *Ghaziabad lists India's first green municipal bonds on BSE, what are green municipal bonds?*, https://www.jagranjosh.com/current-affairs/ghaziabad-lists-indias-first-green-municipal-bonds-on-bse-what-are-green-municipal-bonds-1618383905-1 (last visited Jun 16, 2022).

[54] TNN, MeitY launches challenge to further ESG technology, THE TIMES OF INDIA, January 29, 2022, https://timesofindia.indiatimes.com/city/bengaluru/meity-launches-challenge-to-further-esg-technology/articleshow/89190133.cms (last visited Jun 16, 2022).

[55]Srinath Sridharan, *Environment Social Governance: India Inc badly needs ESG talent*, FINANCIALEXPRESS, https://www.financialexpress.com/opinion/environment-social-governance-india-inc-badly-needs-esg-talent/2488334/ (last visited Jun 17, 2022).

[56] Dhwani Pandya, *Implementing Sebi's ESG framework tough for Indian companies: Rating agency | Business Standard News*, BUSINESS STANDARD, https://www.business-standard.com/article/companies/implementing-sebi-s-esg-framework-tough-for-indian-companies-rating-agency-122021000471_1.html (last visited Jun 17, 2022).

from all developed and developing nations for effective contributions toward Sustainable Development Goals. The most amount of contribution towards the same is done by corporates thus, this corporate citizenship has mandated the evolution of frameworks like ESG. Though the development of the same framework is at a nascent stage. Its investor-driven growth is happening rapidly. In such a situation to further impetus, this growth, uniformity of reporting, and rating framework are needed on the global stage.

Concerning India, its target is to become a net-zero carbon emitter by 2070, as committed before the COP26 meeting, reach the target of generating non-fossil energy of 500 GW, and reduce the limit of carbon intensity in its economy by 2030.[57] Further, it is the world's third-largest greenhouse gas emitter after USA and China. In such a scenario it becomes sacrosanct to implement sustainability measures and implement the ESG framework. India's present BRSR framework concerning ESG is very welcoming and is a step in the right direction. However, it is at a very nascent stage. In development, the same inspiration can be taken from the globally developed frameworks. However, it has to be kept into consideration that, India must develop its framework rather than emulating the west. This is because India is a developing country and its energy needs cannot be compared to the energy needs of the west. Its contribution towards Green Houses Gases and past emissions also cannot be compared to the West. Henceforth, a framework similar to the west can pose a challenge for India to meet its energy needs. However, at the same time, India's ambitious targets to meet net-zero carbon emission by 2070 are also becoming a compelling factor for India to pursue the global model. Thus, this paradox must be balanced by the regulators in framing the ESG framework.

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[57] Avik Roy, *Explained: What Modi's 'net zero by 2070' pledge at COP26 means for climate*, HINDUSTAN TIMES, November 4, 2021, https://www.hindustantimes.com/environment/cop26-india-net-zero-target-climate-action-carbon-emmissions-clean-energy-101636034405761.html (last visited Jun 17, 2022).

India's ambitious target for a green economy needs greater finance to deliver upon the same. The ever-growing 1.3 billion population has its needs. The need for greater infrastructure and a larger economy often overpowers the need for the nation to comply with sustainable development goals. Henceforth to achieve the same, India needs greener investment strategies like the issuance of 'green bonds' by the Finance Ministry. All other Ministries must adopt such a targeted approach toward a green economy. ESG framework in this respect must be utilized by all the government agencies towards its fullest potential. At present same is mandatory for thousand listed entities. With better deliberations and experiences gathered from the lacunas of the prevalent framework, the same must soon be extended to all non-listed entities. This will involve legal readiness within the corporate governance framework for non-listed entities, and greater financial resource allocation.

Further, to develop a framework to promote a green economy through the ESG framework, the need of the hour is also to have a green taxonomy.[58] Such an information repository will boost investor confidence and increase investments in green bonds. It will help in having standardized data on sectors that need green investment and which ministries should take steps towards achieving the same. Further, it will bring clarity to investors as to which activity classify as green.[59] Such uniform data on the green economy will help in tracking the progress and help regulators like SEBI, and RBI to amend their policies and the prevalent framework. Further, it is also suggested that to encourage foreign financing and attract foreign investors for green investments ECB framework can also be amended and

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[58] Boffo, R., and R. Patalano (2020), "ESG Investing: Practices, Progress and Challenges", OECD Paris, www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf

[59] ibid.

relaxations must also be given in terms of pricing caps, maturity periods, etc.[60]

Thus, the present ESG framework of India is very progressive and rightly addresses India's goal of a green economy. However, the same should be developed to be a unique framework and not an imitation of the west model balancing against the energy needs of the economy. And for doing the same. it needs the support of a green taxonomy, greater financing, and ESG professionals in place to further the objectives of India's sustainable development goals.

CONCLUSION

ESG is a framework developed to make the corporates accountable for their utilization of the local environment for capital gains. This is modeled on the concept of corporate citizenship. It is a development of the concept of CSR, modeled on the stakeholder theory of corporate governance. While CSR makes it mandatory for corporates to make green contributions, ESG mandates contribution not only towards the environment but also towards social governance i.e., the welfare of all the stakeholders of the corporations like the employees and shareholders, and further aims to achieve the same through principles of corporate governance. The global framework on ESG has developed in the last two decades, however, one of the primary challenges faced in the international space concerning the same is the lack of uniformity in reporting framework thus diminishing the confidence of the investors. Concerning India, the growth of ESG is at a development stage. However, this approach of recognizing the accountability of corporations towards a green economy is not new within the corporate regulatory framework of India. Sec 166 of the Companies Act, 2013 before the introduction of SEBI BRSR had previously mandated the responsibility of the Board of Directors towards

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[60]Boffo, R., and R. Patalano (2020), "ESG Investing: Practices, Progress and Challenges", OECD Paris, www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf

sanctioning plans for the protection of the environment. In the recent observations of the apex court in the Tata-Mistry dispute[61], the court observed the need for having philanthropic approaches to corporate governance and that the stakeholder's group is beyond the shareholders. The same was also highlighted in the Vedanta Resources Limited case[62] and the same is also a classic example of how investor confidence downgrades due to poor governance in complying with environmental norms. Thus, a framework supporting ESG pre-exists in India. In a situation, the need of the hour is to have legal regulations and laws in place to govern green investment and to deal with challenges such as greenwashing when it comes to impact investing. In such a state, The BRSR framework developed by SEBI is a step in the right direction. However, the same to evolve will need the support of mechanisms in place like a green taxonomy to help investors identify sectors for Investment. A transparent ESG rating framework takes into account the conflict-of-interest factors. To bring these mechanisms in place greater strategic and legal readiness is needed at the regulator's end.

The need of the hour is efforts by bigger investors to boost the confidence of other small investors and promote faith in the process. With bigger investors like Reliance[63] and TCS[64] coming into the forefront, the road to ESG governance is expected to see

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[61] *Tata Consultancy Services Ltd. v. Cyrus Investments (P) Ltd.*, 2021 SCC OnLine SC 272.

[62] Legal Correspondent, *Sterlite case: Supreme Court begins hearing Vedanta appeal against Madras High Court decision*, THE HINDU, (Mar 15, 2022), https://www.thehindu.com/news/national/sterlite-case-supreme-court-begins-hearing-vedanta-appeal-against-madras-high-court-decision/article65228722.ece (last visited Jun 17, 2022).

[63] Nevin John, *Reliance Industries announced plans to cut down on CO_2 emissions during its Annual General Meeting in 2020*, BusinessToday.In, (Jul 16, 2020), https://www.businesstoday.in/latest/corporate/story/mukesh-ambani-plans-to-cut-down-carbon-dioxide-emission-at-ril-267328-2020-07-16

[64] Nevin John, *Mukesh Ambani to steer Reliance Industries to a green future; cut in CO2 emission top priority*, BusinessToday.In, (Jul 16, 2020), https://www.businesstoday.in/latest/corporate/story/mukesh-ambani-plans-to-cut-down-carbon-dioxide-emission-at-ril-267328-2020-07-16

growth in the coming years if supported by greater regulatory and financial readiness.

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ROLE OF ACCESSIBILITY AND CONSENT: DOMINATING FACTORS IN SEXUAL RELATIONS OF PERSONS WITH DISABILITY

Dr. Sachin Sharma[*]

ABSTRACT

Consent is the important part of individual's autonomy; it enables individual to have a complete life. Freedom of Consent requires respect for individual autonomy. This respect for person entails to acknowledge dignity and value of other persons and to treat them as ends in themselves. The right to accessibility is very important in exercising and communicating the consent. This is the main factor that bridges the gap between legal capacity and consent. UNCRPD provides a very important place to accessibility in disability-right discourse. The new paradigm of disability discourse strongly believes in the idea of providing a supportive mechanism to facilitate the disabled persons in exercising her cognitive abilities. The researcher through this paper is trying to analyse the role of consent in reproductive and sexual rights of persons with disabilities. The core area of this paper is be the importance of accessibility and consent in relation to the sexual relations of persons with disabilities.

***Key Words**: Accessibility, Consent, Sexual Relation, Disability.*

INTRODUCTION

According to one estimate around ten percent of population of the world lives with different kinds of disabilities. The people with disabilities have the equal reproductive and sexual rights. They are free to exercise their consent by exercising the special modes of facilitated communication. Any discrimination in this regard will amount to the violation of the

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right to life and dignity of the person. As stated by great German philosopher Immanuel Kant that all human beings are equal and worthy of dignity and respect. Hence any discrimination on any ground is a disrespect towards that human being. But there are various barriers to information and accessibility for a disabled persons. This is why there are discriminations against the persons with disabilities. The attitude of society and individuals including healthcare providers is functioning to raise the communication gaps and accessibility barriers. The present situations is resulting into bypassing the individual's right to choice and liberty.

A person with disability may be facing certain challenges in exercising their sexuality rights. The main argument that put forward while restricting their rights is that persons with disabilities especially persons with learning and mental disabilities are unable to communicate their decisions and consent. Though various studies shows that people with intellectual disabilities are able to take an active and central role in healthcare decision making. But they are oftenly rejected by medical practitioners as they underestimate their abilities. There are various legal cases, where even courts have refused to consider the capacity of a disabled person to give consent.

DISABILITY AND DISCRIMINATION: BACKGROUND OF STUDY

Right after the birth of a human being, there starts the competition about providing the identity and personality to that new life. Interestingly parents used to wait eagerly about the new coming life and always keep predicting that whether that will be 'he' or 'she'. In countries like India during pregnancy period, family members used to consult astrologist about the gender and status of the baby in womb. Even there are experiences that shows that people fix their marriage after due consultation with the astrologer, because they can know about the appropriate time to

get marry so that they can blessed with the male child[1]. There used to be huge celebrations after astrologer made an announcement that coming child is going to be a baby boy[2]. This is the beginning of all disrespect, disadvantage, discrimination, humility and injustice towards one who is not *complete* in the eyes of the so called *prudent* and *cognitive* society[3]. The story is more sad and painful for persons with disabilities. They are always considered as the burden on society. Further there is no status and completeness provided to them. The said disrespect and ill-treatment is further got worse if that disabled person belong to the weak, neglected section of the society[4]. Here author is of the opinion that the entire game of personhood and identity is dominated by the power politics. Here it is important to recall Michel Foucault who ones said that, '*Power is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name one attributes to a complex strategical situation in a particular society*.'

As every human being is a selfish being, one who is having power (due to any mean) is always tries to dominate the other. In such a state of power dynamics there is always a state of 'giver' and 'taker'. Unfortunately, this is the criteria on which we try to articulate equality and distribute justice[5]. This is perhaps the main reason that in India we are still struggling to formulate the

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[1] It is strange to believe that even in today's modern and highly scientific world, people are still believing and practicing such acts.
[2] The practice is so deeply rooted that people used to give huge rewards to astrologers who predict according to their wishes. The madness of identity leads even to illegal inquiring about the gender (as in India it is illegal to identify the gender of the baby in a womb).
[3] History has the evidence which shows that, there were the practices like throwing a girl child into river Ganga, as girl was/is considered as the burden on family and that is why she used to be devoted to Ganga, the holy river of Hindus.
[4] A section of a community is neglected because again some hierarchy-based status is provided to it in our society. For example if person with disability belongs to the 'Dalit' community and further if she is a woman, then all such identities will be adding the additional fuel into the discrimination and injustice suffered by that person.
[5] For example state always put itself in a driving seat while deliberating on any policy relating to equality about different individuals in society. As a hard truth one who is powerful is always define the rule of law and justice according to his/her will.

disability laws in consonance with the United Nations Convention on Rights of Persons with Disabilities (UNCRPD). As every time government tries to add some other or subtract the various provisions (based on UNCRPD) related to persons with disability. This is the main reason that still in India we are unable to recognize and appreciate the celebrated slogan, 'nothing about Us, without Us' as promulgated under UNCRPD.[6] It is always the prudence of *others* that is governing the disability policy-making and scholarship. There are incidents in Indian society where even today people with mental illness are treated like animals[7]. These all differences are the result of the unequal treatment of human beings who seems to be different from so called streamline society. There are certain dogmatic narratives formulated by the dominant segment of society which always provide the definition of *rightness* and *justness* according to their own grammar. This is the main reason that the disability activists and thinkers always consider social impairment as more harmful and disastrous[8]. Here it can be said that to an extent the concept of personhood is responsible for disability–dependency discourse. Even all supportive mechanism for disabled person treats them in accordance with the characteristics of personhood as determined by that 'cognitive' world[9]. The said proposition is criticizing the fact that even if we are talking about equal status for persons with disability, the criteria used is the same (which is supported by

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[6] The argument is based on the article on slavery, where it is very clearly stated that how government played an important role in acknowledging and recognizing slavery in United States, which was further to an extent was supported by US judicial system. (the article was circulated during our classes).

[7] It is experienced by the author on one of his visit where he found that a person with mental illness was chained by the family members. Their contention was that the person concern is used to get violent and become threat for others.

[8] But this social impairment is the result of the certain perceptions which justify the unequal and different treatment of person with disabilities across the globe. Further these perceptions are as the outcome of our importance to certain characteristics of personhood which provides the difference of complete and incomplete personality.

[9] For example as argued in Disability Theory by Tobin Siebers that 'linguistic structuralism tends to view language as an agent and never the object of representation.', Page no. 9.

other people) which is the main reason for creating such differences in society.

The term disability is very wide to define. It applies to all persons who have long term physical, mental, intellectual or sensory impairments that in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society.[10] In present time it is the social impairment which is more problematic then medical. It is because of the reason that there is no accessibility to exercise the free consent and choice to persons with disabilities. The person with disability is unable to exercise her choice in sexual, reproductive and marital relationship. The said discrimination is more frequent on the basis of gender differences. People have more access to power, authority, capital, education, public space, and decision making on the basis of their gender.[11]

DIFFERENT MODELS OF DISABILITY: A BRIEF UNDERSTANDING

There are different models of disability. These different models have been evolved with time. There are different perspectives attached to these different models that developed over decades. According to initial moral model, impaired body was the result of the sins or the misdeeds of the person that she has committed in previous life. This model has resulted in social ostracism and self-hatred.[12] In India disability is related to the bad Karma. According to Renu Addlakha, *'Indeed the law of karma decreed that being disabled was the just retribution for past misdeeds. Pity, segregation, discrimination and stigmatisation became normalised in the management of persons with disabilities. Such constructions of the disabled by the non-disabled have the dual effect of not only justifying the complete*

[10] United Nation Convention on the Rights of Persons with Disabilities 2006.
[11] Meekosha (2005) Various reports shows that women with disabilities are more frequent target of sexual violence then man.
[12] Kaplan D,(2007) The Definition of Disability, retrieved from www.accessiblesociety.org./toipc/demographics-identity/dkaplanpaper.htm

marginalisation and disempowerment of a whole population group but also leading to the internalisation of such negative stereotypes by disabled persons themselves.' There are people who consider this to be truth and accept their disability as the result of their past deeds. This model is followed by the charity model. This views the person with disability as a problem and dependant on the sympathy of others to provide assistance in a charity or welfare model. This is even the philosophy with which number of the organization are working even today.[13] This is followed by the medical model of disability. It looks at disability as a defect or sickness which has to be cured through medical interventions. It regards disabled people as bodies that are damaged, broken and being unable to match or fit the norm or 'ideal' body type. Thus, the medical model regards the body of a person with disabilities as pathological. It also looks at disability as a personal tragedy of the person affected by it, which if at all, can only be cured by medicines.[14] Here next comes the rehabilitation model which is highly influenced by the medical model of disability. This model believes that disability is a deficiency that has to be fixed by rehabilitation professionals. It focuses on therapies, exercises and special care to help people with disabilities. This is further followed by the social model of disability. According to it, disability is the result of societal discrimination. It is this social impairment which creates the problem for persons with disabilities. Hence disability is '*the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from the mainstream of social activities.'*[15] The social model argues that people with disabilities are not victims but agents resisting oppression, overcoming challenges and

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[13] Bhagwan Mahaveer Viklang Sahayata Samiti, the organization is famous in the name of Jaipur Foot organization, as there website is jaipurfoot.org. The name of the organisation itself is the indicative of charity model.

[14] Kaplan D, (2007) The Definition of Disability, retrieved from www.accessiblesociety.org./toipc/demographics-identity/dkaplanpaper.htm.

[15] BIID Info. (2007) Impairment v. Disability. Retrieved from http://biidinfo.org/Impairment_vs._Disability

thereby changing social structures.[16] This is followed by the right-based model of disability. It is based on the fact that social model creates and accepts the diversities and differences and argued for the non-discriminative environment in terms of inclusion. This is completed by the right-based model, which argues for the claiming for the rights of differently abled people. According to it, all human beings irrespective of their disabilities have equal rights which are always unchallengeable. The cultural model sees disability as a pervasive system that, through its stigmatisation of certain bodily variations, informs our notions of self, structures institutions and identities, informs cultural and political practices and constitutes sexuality.[17] According to a Feminist disabilities studies theorist Rosemary Garland Thomson cultural model of disability can be defined into four ways. First, it is a system for interpreting and disciplining bodily variations; second, it is a relationship between bodies and their environment; third, it is a set of practices that produces both the abled-bodied and the disabled; fourth, it is a way of describing the inherent instability of the embodied self.[18]

These different models reflect the different approaches towards disability. While summing up the same it can be stated that every model has communicated and conveyed a specific understanding about the wide jurisprudence of disability. Here it is the observation of the author that above mentioned models are evident to describe the prevalent discriminations and stereotype attitude towards persons with disabilities. This is the main reason that even today after the adoption and ratification of United Nations Convention on Rights of Persons with Disabilities, we are still struggling to accept the open minded discourse about rights and justice for disable persons.[19] Hence this is why our argument

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[16] Shakespeare T (2000), *Disabled Sexuality: Towards Rights and Recognition*. Retrived from http:// www.bentvoices.org/culturecrash/ shakespeare.htm

[17] Garland Thomson R (2002), Integrating Disability, Transforming Feminist Theory, *National Women's Studies Association Journal*, 14, 2, p 1-32.

[18] Ibid.

[19] As we are unable to pass the present Disability Bill, which is drafted on the basis of UNCRPD.

are very narrow and restricted about sexuality and reproductive rights of the disabled persons.

SEXUALITY AND ITS MEANING: A GENERAL UNDERSTANDING

Every person has the right to sexual identity and access to sexual and reproductive health (SRH) services. Though it is a harsh truth that people with disabilities that constitute a large and diverse population are facing multiple barriers in achieving and exercising their sexual and reproductive health and rights. The sexuality is an integral part of a human being that includes sex, gender identities, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is more than the genital contact and can be experienced and expressed in thoughts, desires, fantasies, beliefs, attitudes, behaviours, practices, relationships, attitudes etc.[20] It does not exist in vacuum and is necessarily influenced by the interaction of biological, psychological, economic, social, political, cultural, legal, ethical and spiritual factors. The mentioned expression is further incomplete because all forms and definitions of sexuality is very difficult to experienced or expressed.[21]

Sexual and reproductive health (SRH) is not just the absence of disease but is a state of physical, emotional, mental and social well-being related to sexuality and reproduction. It requires a respectful approach to sexuality and sexual relationships, free from any coercion, discrimination etc. It is one of the most important human rights of every individual including disabled persons. Though people with disability require the special care and amicable atmosphere to exercise and enjoy their rights. Therefore it is the duty of the state to provide them with all the

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[20] www.ifpa.ie/sites/default/files/documents/briefings/disability_and_sexuality report.pdf.

[21] WHO Report (2006).

protection and freedom so that they can freely exercise their integral rights.[22]

PERSONS WITH DISABILITIES AND SEXUALITY

As discussed earlier that sexuality is the extensive term that covers the range of issues. There are always different external factors that affect the rights of a persons with disabilities. It includes their social structure, status, values, economic background and upbringing etc. This plays a significant role in exercise the free consent of a disabled person. Further sexuality is still considered as the taboo in Indian societies. People are always hesitant in discussing the issues related the same. This is due to this stigmatize nature of the society that persons with disabilities are suffering to the maximum. In the opinion of the people sexuality is only about the sexual relationship, sexual dioceses, pregnancy etc. Here they are ignorant about its other aspect, which is probably is more important and significance, it includes identity, intimacy, self-expression, self-worth and eroticism. Every human being has the right to sexual wellbeing and on the basis of the proposition everyone is free to exercise their free choice and consent. It is the requirement of the time that one should appreciate and promote the different and special methods of communication through which a disabled persons can exercise her consent.[23] Hence there is need to get access to such modes of supportive communicative tools, so that the consent of a disabled person can be exercised in an expressed manner whenever required.

Further according to various linguistic philosophers' language is the one of the means of communication. The purpose behind the evolution of the language is to enhance our communication skills so that human beings can convey their will to other people. In other terms it is the method to exercise our

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[22] The idea is also supported and justified by Fundamental Rights of Indian Constitution.

[23] The idea is very well recognized under United Nation Convention on Rights of Persons with Disabilities, 2006.

right to choice. The one major function of the communication is to develop a world of togetherness, where every person can live her life in a complete and prosper manner. One human being is always there to support or assist the other and it is the inter-dependable phenomenon. The proposition is based on the thought of great Greek philosopher Aristotle who once said that, man is a social animal, who can't live without the assistance of other. But the situation of the disabled person is very different. They are always ignored their place in the society and treated as mere burden, who can't contribute to the society. They are not allowed to exercise their basic inherent rights including right to expression and right to choice. It is always someone other who used to play the big-brother role in decisions making for disabled persons. This is based on the presumption that a disabled person is unable to exercise her cognitive faculties or will exercise it in an improper manner. According to narrow-minded society, one who is unable to speak, walk, see and understand things in 'proper' manners is not competent to exercise her right to decision. The proposition is justified with the resent case of professor Anna Stubblefield- a former chairwoman of the philosophy department at Rutgers University in Newark. She was prosecuted for sexually exploiting a student with learning disability, who she was proving her services. In court it was proved that adult disabled student is unable to exercise his consent, as he is unable to communicate. Hence there is no consent for the sexual relations between him and his teacher and this amounts to sexual assault. There are many other such cases where disabled persons are not accommodated with the measures of communication require for communicating their massage to others.

SEXUAL AND REPRODUCTIVE HEALTH RIGHTS OF PERSONS WITH DISABILITIES

Reproductive health is defined as the state of physical, mental and social wellbeing in all matters relating to reproductive system. it implies that people are able to have a pleasurable and safe sex life and they have the full capacity to reproduce and freedom to decide, if, when and how often to do so. Here the term

people is equally referred to the persons with disabilities. They have the rights to be informed and to have access to safe, effective, acceptable and affordable methods of family planning etc. Sexual health is also the part of reproductive health of a disabled person. Hence one has to protect and respect these rights of every person. Sexual rights states and include that all persons has the right to attain the highest standard of sexual health, including access to sexual and reproductive healthcare services, sexuality education, respect for bodily integrity, consensual sexual relations, consensual marriage, pursue a satisfying and safe sexual life and above all the respect towards each other. Further all these rights are the basic rights of every human being irrespective of any discrimination the ground of bodily differences.[24] But the practice in our society is totally opposite, people with disability doesn't have any right to exercise their free consent, as they are supposed to be the incompetent and incapable of exercising the same. It is there family members or others so called 'normal' people who used to act on their behalf. This is based on the presumption that the guardian is acting in their good faith. Further the opinion about good faith itself is decided by 'others' only. Here there is no scope for the main stakeholders to deliberate. It is a kind of a contract where main party is kept in a total dark, as someone else is representing them, who never ever consult the main stakeholder i.e. persons with disabilities, about their choices. This way very smartly we used to interpret it in terms of democratic practice of deliberation.

The aforementioned situation many a times take an ugly shape and results into sexual abuse of the persons with disabilities. The people with intellectual, mental and developmental disabilities are easy targets of sexual abuses. This is mainly because of the reason of lack of understanding about sexuality arises from lack of information or inability on our part to process the information in accordance with the disability-

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[24] World Health Organisation (2006). *Defining sexual health: A Report of a Technical Constitution on Sexual Health,* 28-31 Jan. 2006, Geneva. Retrieved from www.who.int/reproductivehealth/topics/gender_right/sexual_health/en

friendly means.[25] Further such abuse is often underreported because the abused person may not be able to adequately describe the incident or offender. Even if she is trying her communication will be not considered seriously.[26]

CONCLUSION

Consent is the most important part of the human life. It is the way through which one express herself. Its significance is even more for persons with disability. It is important because it provides the way to the individual autonomy. It enable individual to have a complete life. Freedom of Consent requires respect for individual autonomy. This respect for person entails to acknowledge dignity and value of other persons and to treat them as ends in themselves. But due to narrow and stereotype attitude of the society, persons with disabilities are struggling to exercise their free consent. As according to them they are not considered as complete persons and therefore are not entitled to enjoy the full autonomy. The same problem is there in enjoying and exercising their reproductive and sexuality right. Even healthcare practitioner also uphold the narrow view regarding these rights of disabled persons. There is a need to provide the free and independent space to disabled persons. There is need to develop the supportive rather than substitutive decision-making mechanisms. We should start respecting and following UNCRPD, which expressly and specifically provides for the reproductive and sexuality rights of persons with disabilities. This is time now we should start accepting and recognizing the other means of communications which are different form oral and written forms of communication. Further one should use technology for inventing computerized communicative devices for disabled persons. Above all there is mainly the need to change our attitude

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[25] For example, persons with learning disability requires some assistant to communicate their consent, but state or society always ignores that requirement and presume that they can't communicate.

[26] Though there are reports shows that if proper facilities are provided, they can communicate such incidents. Valeti-Hein D. (2010) *Use of visual tools to report sexual abuse for adults with mental retardation.* Ment Retard, 297-303.

towards disabled persons. As one has to admit that every human being is one way or other is dependent on other. Hence state should provide equal rights and freedom to persons with disabilities. So that a utopian world of prosperity, harmony, justice and true democracy can be achieved.

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CASTE AND CLASS STRUGGLE IN THE INFORMAL WASTE SECTOR OF INDIA

Rishika Khare[*]

ABSTRACT

Waste is an intrinsic truth of the everyday conduct of society. From economic, ecological and administrative concerns, waste management is essential to regenerate resources from waste, prevent land degradation and climate change; and ensure a clean and healthy living environment for its citizens, respectively. A waste worker, both from formal and informal workforces, assisting the state in the waste management cycle, thus becomes indispensable for the state and the society. However, they are still facing the brunt of caste oppression and discrimination in opposition to the assured human dignity. The informal waste worker becomes more vulnerable to discrimination because of extreme poverty and lack of job security. Despite the two legendary advocates in the interest of the depressed classes, Gandhi and Ambedkar, and the multiple protections granted to these classes in the Constitution, the casteist and classist attitude towards them still persists. Much of it can be derived from the environmental concerns pushed by the upper classes for their benefits as opposed to assessing the interest of the deprived urban poor. Also, the state taking a secular approach to the upper-class environmental concerns and the Swachh Bharat Abhiyan only brush the caste discrimination prevalent against the waste workers under the carpet. For the success of the Atrocities Act, Swachh Bharat Abhiyan and any legislative or executive action to address economic, ecological or scientific concerns in relation to solid waste management, must first, inevitably, undertake the social

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dimension to the problem of caste and class discrimination to preserve human dignity.

Keywords: *caste, waste worker, Swachh Bharat Abhiyan, depressed classes, discrimination*

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INTRODUCTION

Waste, when contextualised as a problem, is seen in different ways by experts from different fields. The economists see waste as an externality or a by-product of economic growth, which in theory, can be internalised. This externality which is primarily given birth by human and animal consumption remains a problem on the planet because of the inefficiency of the administration to internalise it, or, in other words, to reuse it as a resource, or because of market failure to innovatively consume or minimise the waste. On the other hand, environmentalists and ecologists see it as a problem contributing to climate change and environmental degradation; they see it as an unavoidable feature in the process of production.[1] 'Given the entropic nature of the economic process, waste is an output just as unavoidable as the input of natural resources.' Further, for state administration waste is a problem affecting the hygiene and health requiring the deployment of state resources in its collection, treatment and disposal. What remains as a uniform fact is the inevitability of waste generation and the state action for its treatment or disposal depending on the choice of the state exercised through its policy. The response to the problem comes in the form of waste management where the economists and ecologists (or ecological economists) are expected to weigh the factors like product life-cycle, 'cost-benefit analysis' etc. at the stage of production; and the rotating executive and legislature are expected to frame state policies and law, respectively, which will attempt to ensure the

[1] Federico Demaria, *Social metabolism, cost-shifting and conflicts: The struggles and services of informal waste recyclers in India* (open access Ph.D. Thesis, The Autonomous University of Barcelona) (on file with the Autonomous University of Barcelona, 2017) 13.

efficiency in the management of waste. While the economists and ecologists are concerned at the stage of production in ensuring that after the consumption of a commodity, minimum to least waste is generated; lawmakers, law enforcers and also ecologists are concerned with the stage after the consumption or where the waste has been generated. The only answer to dealing with the entire problem is efficiency in production and management of waste.

The sector consists of multiple stakeholders starting from informal waste pickers or collectors, to large corporates generating or managing waste, and state administration. For the purpose of waste management, the state may undertake two possible mechanisms, one is to outsource the collection and management to a company through a tender, like the Cuttack Municipal Corporation in Odisha had previously contracted with Hyderabad-based company Ramky Enviro Engineers Ltd. up to 2016 for solid waste management and mechanical sweeping[2]; or it can undertake the management by itself by engaging daily wage workers for collections and disposal of waste. In both direct and indirect engagement by a municipality, the entire waste sector is dependent on the waste workers (or as they are being presently referred to in India – the *safaikaramcharis).* Since waste generation is innate in a society's functioning, waste workers become indispensable for the state for its management and to enforce fundamental rights of health and environment for its people; hence, it is only logical to assume that the state would ensure every measure to care for the waste workers in India. However, the living and working conditions of waste workers, especially from the informal sector in India, provide a narrative indicative of their disposable treatment instead of attaching indispensable status to them.

Building on conditions of the waste workers in the informal sector, the article discusses the caste dynamics of India

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[2] Vikas Sharma, 'CMC bins Ramky after gangster link'[*The Telegraph Online* 12 March 2016, 12:00 AM) <https://www.telegraphindia.com/odisha/cmc-bins-ramky-after-gangster-link/cid/1504325> accessed 12 November 2021.

from the pre-colonial ideologies of Gandhi and Ambedkar to explore the progression of the Indian society towards questioning the casteist exclusion of the workers that form the depressed classes. We then look at how the Gandhian and Ambedkarite ideologies shaped the extension of constitutional and legal protections granted to these workers by the State, followed by assessing the execution of Swachha Bharat Abhiyan from a critical caste perspective.

The scope of this article will be limited to exploring the conditions of waste workers in the informal municipal solid waste sector of urban India from a legal and political context. In the article the words waste workers, and sanitation workers have been used interchangeably. *SafaiKaramchari* is an umbrella term, which denotes different kinds of workers in the Swachha Bharat Abhiyan but the terms in this article have been used to refer to the workers in the informal sector of solid waste management and do not include or extend to manual scavengers. However, the defined scope of the article does not necessarily mean that the article will have no relevance to assess the situation of manual scavengers in India in terms of casteist social structures and legal protection.

INDIAN SOLID WASTE MANAGEMENT STRUCTURE AND ITS INFORMAL WASTE WORKERS

Waste is a part of social construct and inherent within societies. The demand for a waste worker from the state administration is to ensure a safe, clean and healthy environment. Even when not a part of the employment structure of the State, the waste workers work through informal means and groups of gathering and disposing of waste. Millions of people across the globe earn their living as waste workers in the solid waste management industry starting from the cycle of waste picking or collecting, segregation, transportation, treatment and final disposal. At each of these stages, different sets of workers are employed on an everyday basis. Internationally, the terms waste pickers and collectors are preferred over offensive words like

scavengers.[3] India also uses the term *safaikaramchari* (the one employed to ensure clean surroundings) over *kacharawala* (person responsible to collect garbage or waste) to do away with the derogatory salutation of the words. Waste workers' economic contributions include recycling products, producing clean energy by biogas, and providing income to households. Environmentally, they contribute to the reduction of greenhouse gases, decrease in the volume of waste going to landfills, and generation of clean fuels to replace fossil fuels.

The workers in the informal waste sector collect garbage from streets, dumps and landfills. They do not have the mechanism to enter into the settled community of workers and traders. The settled communities or state administration has waste collectors, who collect waste from households, and commercial entities and more importantly have a mode of transportation for the collected waste.[4] The informal waste workers lack such means of transport because they live in extreme poverty, vulnerable households and earn around 40% less than the earnings of a collector.

The Indian waste sector is a reflection of the social relations and the existing power dynamics where the rich often look down upon the poor to collect the left-overs after them. The workers in the sector often face social, political and cultural vulnerabilities created as a consequence of the power dynamics and the consequential inequality around it. 'In most of the Indian cities social and cultural structures of inequality and identity-based exclusion often mimic those found in rural areas.'[5] In the

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[3] The First World Conference of Waste Pickers, held in Bogota from Mar. 1st, 2008 to Mar. 4, 2008 consisting of representative from groups from Asia, Europe, Latin America and Africa to ensure social and economic inclusion of waste pickers and to promote zero waste among other enlisted aims in the Global Declaration of the 1st World Conference of Waste Pickers.

[4] Yujiro Hayami, A.K. Dikshit & S.N. Mishra, 'Waste pickers and collectors in Delhi: Poverty and environment in an urban informal sector', (2007) 42(1) The J. of Dev.t Studies, 41, 47- 48.

[5] Kavya Michael, Tanvi Deshpande & Gina Ziervogel, 'Examining Vulnerability in a dynamic urban setting: the case of Bangalore's interstate migrant waste pickers', (2019) 11(8) Climate and Development 667, 667.

Indian context particularly, these socio-political vulnerabilities widen due to caste polarization which has had an immense role to play to strengthen the power dynamics against the oppressed.[6]

GANDHIAN AND AMBEDKARITE IDEOLOGY ON OPPRESSIONS OF THE DEPRESSED CLASSED

Gandhi and Ambedkar both wrote and advocated against untouchability but with two very different approaches. To Gandhi, untouchability was to be eradicated by the change in the 'soul' whereas Ambedkar saw it as a product of the hierarchical caste structure prevalent in the Hindu religion. Gandhi associated himself with *Bhangi,* the lowest caste amongst the untouchables who is tasked with cleaning toilets and sweeping roads. Gandhi attached religious significance to sanitation arguing that God can only reside in a clean body and a clean mind, and a clean body can only reside in a clean city. Gandhi's attachment of religious importance to waste still continues to be followed in India. In Hinduism, caste and temple are the central important institutions. Thus, the highest caste was reserved for the priest who served the deity who is kept away from dirt through the job done by the lowest caste member that was reserved for the removal of dirt. Hinduism and its interpretation had placed human waste, dirt and menstruation in the filthy category. Therefore, as a matter of fact, the temples and caste could never meet or interact. Thus, a lot of temples also, for this reason, did not have a waste dump or toilets and naturally, the lower caste collecting dirt were kept outside the temples.[7] However, Gandhi's argument was not relating Hinduism to the hierarchy of caste to reinforce discrimination against the dirt collectors. In August 1925, in Young India, Gandhi wrote that '[the] ideal *Bhangi* of my conception would be Brahmin par excellence, possibly even excel

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[6] Federico Demaria (n 1) 24.

[7] Ravichandran, 'By linking cleanliness to spirituality, Gandhi, symbol of Swachh Bharat Abhiyan, valorised inhuman practice of manual scavenging' (*Firstpost,* 14 June 2019 8:21 PM) <https://www.firstpost.com/india/by-linking-cleanliness-to-spirituality-gandhi-symbol-of-swachh-bharat-abhiyan-valorised-inhuman-practice-of-manual-scavenging-6813891.html> accessed on 24 November 2021

him … It is the *Bhangi* who enables society to live. A *Bhangi* does for society what a mother does for her baby … A mother washes her baby of the dirt and insures his health …'.[8] Gandhi denied any connection of discrimination and untouchability with the caste system. Thus, from a sociological view, Gandhi did not deny the existence of the caste system but only denied the hierarchical structure being oppressive, resulting in discrimination. As a result, according to Gandhi untouchability did not have its root in Hinduism.[9] In 1934 Gandhi observed – 'if I discover Hindu shastras really countenance untouchability as it is seen today, I will renounce and denounce Hinduism'.[10] The counter interpretations to Gandhi's writings claim that Gandhi had denounced the *chaturvarna* caste system but believed in different types of occupations only.[11]

In the very famous debate of who was the actual spokesperson of the untouchables, the writings of both Gandhi and Ambedkar are referred to. Gandhi published his article titled 'Caste Has To Go' in Harijan in November 1935 and Ambedkar's book 'Annihilation of Caste' (actually his undelivered speech) came out only in 1936. The clashes were also depicted in the Round Table Conferences from 1930 to 1932.[12]

When Ambedkar returned to India in 1924 from Columbia University in the US, he was nominated by the colonial

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[8] Pragya Akhilesh, 'Do sanitation workers identify themselves with Ambedkar and Gandhi?', (*The Leaflet* 14 February 2021)<https://www.theleaflet.in/do-sanitation-workers-identify-themselves-with-ambedkar-and-gandhi/> accessed 28 November 2022

[9]Ravichandra(n 8).

[10] Sujay Biswas, 'Gandhi denounced caste and untouchability', (*National Herald*29 September 2019, 1:00 PM), <https://www.nationalheraldindia.com/opinion/gandhi-denounced-caste-and-untouchability>accessed 28 November 2022.

[11]Ibid.

[12] Arundhati Roy, 'How Gandhi made Ambedkar a villain in his fight to be the real representative of Dalits',(*The Print* 22 May 2019, 12:02 PM) <https://theprint.in/pageturner/excerpt/how-gandhi-made-ambedkar-a-villain-in-his-fight-to-be-the-real-representative-of-dalits/237642/> accessed 28 November 2022; *See also,* Arundhati Roy, *The Doctor and the Saint: The Ambedkar-Gandhi Debate: Caste, Race, and Annihilation of Caste*, (Penguin, 2019).

government as a representative of the Depressed Classes in the Bombay Legislative Assembly, particularly also because he was a 'potential' leader to counter the Congress policies.[13] Despite Gandhi also being an advocate against caste discrimination like Ambedkar, Ambedkar disagreed with Gandhian ideology on untouchability. Firstly, Ambedkar denied the placement of untouchables as a part of the Hindu community. Secondly, he denied the usage of 'language and customs in the [make-up] of identity'. He claimed that because of the history of discrimination and segregation attached to their sufferings with the untouchables, they need to be kept separate from the larger Hindu community and need to be recognized as an independent political class.[14] Separate political recognition was important to reserve the electorate for the Depressed Classes, to which the colonial government agreed, and it would also ensure that the 'caste Hindus' could not use political power and pressure against them.[15] Gandhi was in complete opposition to this political recognition as he did not want the 'statutory separation' of the depressed classes from the Hindu community. Surprisingly, he was not against the separate electorates given by the colonial state to Muslims and Sikhs.[16] Instead of a political approach to the problem of discrimination, he wanted to take the root of faith and spirituality, as he believed that 'any exploitative relationship could be rectified only when the exploiter has a change of heart. So, he worked with the upper castes to change their mindset'.[17]

Gandhi went on a fast to resist the demand by Ambedkar and its agreement by the colonial government. Due to the deteriorating health of Gandhi; and with newspapers almost

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[13] Jesús Francisco Cháirez-Garza, 'B.R. Ambedkar, Franz Boas and the Rejection of Racial Theories of Untouchability' (2018) 41(2) J. South Asian Studies 281, 289.

[14]ibid 291.

[15]ibid.

[16]Dhrubo Jyoti, 'Gandhi, Ambedkar and the 1932 Poona Pact', (*Hindustan Times*1 October 2019, 05:39 PM), <https://www.hindustantimes.com/india-news/gandhi-ambedkar-and-the-1932-poona-pact/story-5WuyrphB8OwtRp5lC9XQGP.html> accessed on 24 November 2021.

[17]ibid.

being vocal for Gandhi in opposition to Ambedkar; and to avoid the 'prejudice' if Dalits were seen as the reason for Gandhi's poor health, Ambedkar agreed to a compromise, but not voluntarily.[18] Poona Pact was signed on 24th September 1932 as a compromise to declare the Depressed classes as a part of the Hindu Community and not as a separate political minority. Separate electorate demand was given up and settlement was reached to provide reserved electorates to the depressed classes. Placement within the Hindu community took away the possibility of stronger political power that could have been asserted by the depressed classes; on the other hand, it opened doors for the possibility of reforms for the untouchables when the state decided to undertake 'social welfare and reform'[19] for the entire Hindu community.

Gandhian and Ambedkarite philosophies both have found a place in the Indian constitution. With respect to electorates, the Constitution provides only reserved electorates for the depressed classes. Clauses for reservation and special provisions for the depressed classes are still credited largely to Ambedkar. The Indian Constitution is an amalgamative reflection of the two ideologies, particularly in Article 17 to abolish untouchability and criminalize its practice. Untouchability in Article 17 is not just restricted to its understanding in a very strict and literal sense. It includes the purpose of prohibition, the ban on entry from temples,[20] exploitation and payment of lesser wages[21] or the social exclusion or any form of gender discrimination that exists in the Indian society. These objectives are now being dealt with by the Civil Liberties Act 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and other legislations and judgements to some extent. The Indian Constitution also

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[18] Arvind Kumar, 'Why Ambedkar changed on separate electorate, His shift was strategic not voluntary', (*The Print*13 Apr.2021, 12:13 PM)<https://theprint.in/opinion/ambedkar-changed-on-separate-communal-electorate-his-shift-was-strategic-not-voluntary/638904/> accessed on 24November 2021.

[19]The Indian Constitution, art. 25(2)(b)

[20]*India Young Lawyers Association v. Union of India*, 2018 SCC OnLine SC 1690.

[21]*People's Union of Democratic Republic v. Union of India*, AIR 1982 SC 1473

prohibits discrimination on the basis of caste in Articles 15 and 16. The protection granted to the Scheduled Caste communities in the Constitution, through reservations in admissions and employment opportunities are indicative that the Constitution adopted the Ambedkarite ideology for the protection of interest of the deprived communities over the Gandhian principles. However, the Gandhian ideology can still be understood to have been preserved in Article 17 prohibiting untouchability and the non-justiciable but the fundamental principles of governance for the State, the Directive Principles of the State Policy, where it is the duty of the state to 'promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and [to] protect them from social injustice and all forms of exploitation'.[22] (The above two arguments should be supported by the deliberations in the Constituent Assembly Debates.)

What is problematic is that more than 70 years after the adoption of the Indian Constitution and nearly about 90 years from the call for the prohibition of untouchability by Gandhi and Ambedkar, the discrimination against the depressed classes, and specifically the waste and sanitation workers, still continues.

India has now entered into the category of middle-income countries and is reflecting the global capitalist market economy. At an international level, there are concerns about the development flight of India which is allegedly contributing to climate change. However, despite the concerns, India's consumption patterns and volumes seem to be ever-increasing. The increase in income is also projected by the rising upper and middle class of the country who choose to show visible signs of development and growth through 'malls, multiplex cinemas, restaurants and shopping complexes'.[23] Kaveri Gill, in her book 'Of Poverty and Plastic' argues that the '[b]eneficiaries of the new

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[22]The Indian Constitution, art. 46

[23]Kaveri Gill, *Of Poverty and Plastic: Scavenging and Scrap Trading Entrepreneurs in India's Urban Informal Economy* (Oxford University Press, 2010) 191.

found prosperity' choose to dispossess themselves of - the waste generated from their consumption, the plastic discarded for recycling and the growing divide between them and urban poor who settle themselves in the slums around the cities. [24]

This, metaphorically, can be equated to the 'theory of broken men' put forth by Ambedkar. In the theory, Ambedkar explains that the untouchables are a group of broken men who have been defeated by the 'stronger groups'. These broken men settle outside the villages where the tribes have settled, and these men, in exchange for food and shelter, work as watchmen or guards serving the settled village communities. The village communities followed the Hindu religion and Brahmanical system, and they shunned the broken men, who were Buddhists because of their way of living (eating beef) and religion. These broken men were the untouchables and the village communities never mixed with them. Ambedkar mentioned 'the broken men lived in separate quarters outside the village for the reason they belong to a different tribe and, therefore, to different blood'.[25] While Ambedkar gives his theory in the context of caste and Hinduism and Buddhist religion, analogically, it can be used to justify the class differences between the slum dwellers and the fast-gaining-prosperity upper classes. The slum dwellers work as the *safaikaramcharis* deriving their livelihood by serving the settled prosperous classes, and collecting their dispossessed wastes. The prosperous classes are blinded towards this community and their concerns. Evidentially, the *safaikaramcharis,* who are largely the slum dwellers, are predominantly from the deprived caste, the scheduled caste communities.

Ram Manohar Lohia's definition of the ruling class becomes relevant here to understand their concerns as we will discuss further – he defines the ruling class as 'being high caste,

[24]ibid.
[25] Jesús Francisco Cháirez-Garza (n 14) 293.

English-educated, and wealthy,[26] they are predominantly although not exclusively, upper caste, English speaking, and, more often than not, engaged in regular employment in government and in the private sector'.[27] The definition of an informal waste worker therefore should become – the community or persons being from a low caste, illiterate, coming from the backgrounds of poverty having the lineage of the family with the same profession and lack of regular employment; at the most, they work as daily wagers, that are not always hired by institutions for work, thus have to look for means to earn a livelihood by other means, particularly by collecting, managing or disposing of waste or sweeping streets, or scavenging. A stand-alone rag picker, who collects plastic bags, and approaches a *raddiwala* (an informal scrap dealer in India) to obtain payment against the collected plastic depending on the plastic's weight, is an informal waste worker. Sometimes these workers may also be hired for one time purpose or for periodic works as daily wagers by waste management companies, *raddiwalas* or municipalities.

SECULAR CONCERNS OF THE RULING CLASS

The rich or the prosperous class, or at the least the ruling class, project their environmental concerns by their demands for city beautification, cleanliness and development of a metropolitan space. These demands are, to some extent, implemented through the judicial and executive orders of 'slum demolitions and industrial relocations',[28] where the frontline sufferers are the deprived classes, who relocate to state-mandated spaces. Kaveri rightly uses the term 'bourgeois environmentalism' whereby the environmental concerns of the prosperous class are addressed by affecting the interest of the deprived classes.[29] The waste workers are primarily occupied with earning a living and, therefore,

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[26]Kaveri Gill (n 24) 193; *See also,* D.L. Sheth, 'Ram Manohar Lohia on Caste in Indian Politics', in G. Shah (ed.), *Caste and Democratic Politics in India* (Anthem Press, London 2004) 77-99
[27]ibid.
[28]ibid 191.
[29]ibid.

environmental concerns for them do not take priority. Thus, when the judicial orders banning plastics, or relocation come out, they are not necessarily in the social and economic interest of the waste workers.

Internationally, the environmental concerns are pushed by the developed countries on the developing countries, despite when developing countries have social security measures as their priority. The prosperous nations and the rich classes from the prosperous nations '[focus] on and [seek] to bypass the "brown agenda", supposedly paramount concern in developing countries, in favour of the "green agenda" with which the richer population of the developed world are concerned'.[30] When the international power struggle is imitated in the vertical structures of a developing country, they tend to surpass the interest of the urban poor because environment activism and the advocacy by civil societies or NGOs are for the concerns of the middle and upper classes.

In the case of *M.C. Mehta v. Union of India*[31] (1985), the Supreme Court issued an industrial relocating order for 77,000 polluting plastic industries in the area of Delhi and naturally the task of relocation was to be carried out by the executive, the Delhi government.[32] The relocation was to target small-scale industries' plastic recycling and indirectly the waste pickers and other workers involved in the informal sector located in the slum areas. The 'unpopular judicial order' arguably appears to be in derogation to the idea of public interest litigations which were envisioned to serve justice for the deprived classes and protect their social interest. What the judiciary failed to notice post the order was its unpopularity and the political unwillingness of the state to enforce the order.[33] The urban poor usually have deeper political affiliations and form a large vote bank for the political parties, and their relocation was definitely going to be detrimental

[30]ibid193
[31]*M.C. Mehta v. Union of India,* Writ Petition No. 4677 of 1985
[32]ibid.
[33]Kaveri Gill(n 24)208-210

to the political interest of the state.[34] Possibly, that's why there were repeated delays by Delhi Administration in compliance with the order. This really highlights the issue of whether in order to resolve an environmental concern raised by the middle class and their lawyers, the court was blinded to the interests of the workers in the informal recycling industry.

The natural conjunctive hazard that comes with an ecological and environmental view of the waste sector is that it looks at the sector in a caste-neutral manner. It is opaque to the observance of the class and caste power struggle and dynamics that come along with the employment of waste workers. Therefore, it is through political and legal answers that there is a demand for recognition and remedying of the struggle of the deprived classes, to which, for generations, the *safaikaramcharis* have belonged. The structures of a predominantly Hindu society have ensured that the Dalits are 'pinned' to the same occupation for generations.[35] There are a 'disproportionate number' of Dalits in the occupation of cleaning and sanitation works.[36] All sanitation-related works (including manual scavenging) have been followed as a profession by generations in a family and the social structures force the socially disadvantaged communities to continue in the same line of work. Those involved in the caste-abolition rhetoric never look into such ground realities.

To narrate the caste discrimination against these communities we can draw an example from the photo essay of photojournalist Sudharak Olwe titled 'In Search of Dignity and Justice' in 2013, that of the 30,000 servancy/sweepers employed by the Brihanmumbai Municipal Corporation, all are Dalits, who have 'little to no education' and live in abysmal conditions of housing and poverty and have to work in filth without any

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[34]ibid.
[35] Revathi Krishnan, 'You clapped for them as they picked up garbage. Respect them and Ambedkar would clap for you' (*The Print* 14 April 2020, 5:55 PM) <https://theprint.in/opinion/pov/you-clapped-for-them-as-they-picked-garbage-respect-them-and-ambedkar-would-clap-for-you/401649/> accessed 1 December 2021.
[36]ibid.

protective gears.[37] Several sanitation workers die every year while cleaning sewer and septic tanks because they are not provided with safety instruments. Do their health and life matter to the State? The denial mode of the political executive in respect of their deaths further disheartens them. In 2022, the Union Government announced in the Lok Sabha that there is no death due to manual scavenging in last three years, despite 233 deaths, on the ground that the cleaning of sewer tanks is not manual scavenging.[38] These people are further 'disgusted' by the upper castes and the remaining part of the society which assumes that they are made for this job only.[39]

LEGAL PROTECTION UNDER THE SC/ST ATROCITIES ACT: WHETHER SUFFICIENT?

The recent trends, present a mixed picture of society's attitudes towards these communities, where the attempts of protection for the deprived communities do not always appear to be welcomed. For instance, Activist Bezwada Wilson who was one of the manual scavengers, belonging to a family that was also involved in scavenging, was once told by an employment exchange officer that 'even if you have a PhD in rocket science, you will still not get a job … except as a *safaikaramchari*'.[40] Wilson later went on to found *SafaiKarmachariAndolan*, an NGO, to fight the injustice. Instances of such discrimination and societal perceptions are not rare in Indian society. The problem exaggerates further when the state organs fail to address it. In the 2018 case of *Dr Subhash Kashinath Mahajan v. The State of*

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[37] Sudhakar Owle, *In Search of Dignity and Justice: The Untold Story of Conservancy Workers* (Spenta Multimedia with Sir Dorabji Tata Trust 2014); *See also,* Subhash Gatade (n 39) 29.

[38] 'Parliament proceedings | No manual scavenging deaths in last three years: govt.' (*The Hindu* 14 December 2022, 10:05 AM) <https://www.thehindu.com/news/national/parliament-proceedings-no-manual-scavenging-deaths-in-last-three-years-govt/article66259860.ece accessed 21 January 2023> accessed 6 February 2023.

[39] Subhash Gatade, 'Caste, Sanitising Oppression: Understanding Swachh Bharat Abhiyan'(2015) 50(44) Eco. & Pol. Weekly 29, 29.

[40] Revathi Krishnan (n 36)

Maharashtra[41], the bench comprising Justice A.K Goel and Justice U.U. Lalit, diluted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to do away with the mandatory arrest requirements, where the arrest was to be made out only after the permission of the Senior Superintendent of Police and the FIR was to be registered only after a preliminary enquiry was carried out establishing a prima facie case.

The judgement also invalidated the bar on anticipatory bail. The stringency of the Act was diluted on the basis of the 2017 annual report by the Ministry of Social Justice and Empowerment which claimed that the rate of conviction was only 25% to 30% of the total cases. Drawing from the report the court observed that the complainants over the past decades had used the Act to 'exact vengeance and satisfy vested interest'. The problem here is that there was just an assumption from the judiciary that the low conviction rate was because of misuse of the Act. The court failed to take note of the possibilities of procedural fallacies, threats to victim and witnesses by the accused or police leading to retraction, or lack of evidence that could not lead to conviction in a case under the Act. This judgement further '[exposed] Dalits and Adivasis to casteist oppression by emboldening the perpetrators of atrocities, it may be construed as a grave atrocity in itself'.[42]

In response to the public outrage on the dilution of the Act, it was amended by the legislature in August 2018[43] to overturn the court ruling regarding the filing of an FIR, anticipatory bail and arrest. Arguably, the amendment was also necessary not only to protect the interest of the affected communities but also to safeguard the votebanks of the political parties. The Parliamentary vote on the bill to undo the 2018 judgement saw a severe 'backlash' against the Bharatiya Janta Party, the ruling party back then, the consequence of which was

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[41]*Dr. Subhash Kashinath Mahajan v. The State of Maharashtra,* (2018) 6 SCC 454

[42] Anand Teltumbde, 'Judicial Atrocity?' (2018) 53 (15) Eco. & Pol. Weekly

[43] Ayan Guha, 'Recent debate of landmark anti-caste legislation in India' (2018)19(1) International Journal of Discrimination and the Law 48, 50.

seen in the assembly polls at the end of 2018; whereafter as a remedy, the NDA (National Democratic Alliance) government (with BJP as majority party) had to release the reservations for the economically weaker sections.[44] In furtherance to the amendment, the fault of 2018 has been remedied in 2020 in the judgement of *Prithvi Raj Chauhan v. Union of India*[45] (and later followed in the case of *Pavas Kumar v. State of Chhattisgarh)*[46], wherein the amendment was upheld. The bench of Justices Arun Mishra, M.R. Shah and B.R. Gavai, observed humans failing to be the reason for less conviction rates rather than abuse of the legislation. Court had rightly observed that the previous judgement was against 'basic human dignity' and it's unfair to treat the entire SC/ST community as 'a liar or crook'.[47] These depressed communities are so backward that they cannot even 'muster the courage to lodge an FIR, much less, a false one'.[48] Justice Mishra observed that

> *'we have not been able to provide the modern methods of scavenging to Harijans due to lack of resources and proper planning and apathy. Untouchability though intended to be abolished, has not vanished in the last 70 years. We are still experimenting with tryst with destiny … condition is worse in the villages, remote areas where the fruits of development have not percolated down.'49*

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[44] Amit Anand Choudhary, 'SC reverses dilution of SC/ST Act, restores original sections'(Times of India2 October 2019, 02:09 PM)<https://timesofindia.indiatimes.com/india/sc-reverses-dilution-of-sc/st-act-restores-original-sections/articleshow/71401378.cms> accessed 2 December 2021.

[45]*Prithvi Raj Chauhan v. Union of India,* 2020 SCC OnLine SC 159.

[46]*Pavas Kumar v. State of Chhattisgarh,* 2021 SCC OnLineChh 288.

[47]Krishnadas Rajagopal, 'SC recalls verdict diluting SC/ST anti-atrocities law'(The Hindu 1 October 2019, 10:05PM) <https://www.thehindu.com/news/national/sc-recalls-its-2018-directions-virtually-diluting-provisions-of-arrest-under-scst-act/article29564466.ece> accessed on 18 November 2021.

[48]ibid.

[49]Prithvi Raj Chauhan (n 46).

The two judgements reflect very different, rather opposite sets of ideologies of the judges which are nothing more than reflections of the perceptions against the deprived classes prevalent in the society. Despite the amendment and reversal of the 2018 *Subhash Mahajan* judgement, the Act is not free from further infirmities. For instance, in case of any criminal offence, which is furthered due to a caste-based atrocity, Section 4 of the Atrocities Act makes it mandatory for the filing of an FIR and the refusal to do so is a criminal offence.[50] However, in a lot of criminal cases, even when knowledge of the caste of the victim is present with the accused, yet the police refuse to register the FIR.[51]

It is very unlikely that a waste worker, particularly from an informal sector without any structural or institutional backing would approach the authorities under the Atrocities Act, thus the role of civil societies and NGOs like *Safai Karmachari Andolan* becomes more important to invoke the legislation (for example, in the abovementioned case of employment exchange officer) and the burden then passes on to the state to protect these communities from all forms of exploitation and protect their interest.[52] This has been secured through the provision under section 4 of the Act, as the duty has been placed on the police, which is often not complied with. The police for registering the FIR ask for the caste certificate of the victim, which, whereas, is not required by law. 'No documentary evidence is necessary for the registration of an FIR under the Atrocities Act.'[53] The waste

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[50] The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act 1989, sec.4.
[51] PTI, 'PIL in SC seeks Hathras case under SC/ST Act against cops, govt officials, medical staff', (*The Print*14 October 2020 1:33 PM)<https://theprint.in/judiciary/pil-in-sc-seeks-hathras-case-under-sc-st-act-against-cops-govt-officials-medical-staff/523453/> accessed on 18 November 2021.
[52]The Indian Constitution (n 23); The Indian Constitutionart. 38.
[53] Gayatri Suman, ShobharamGilhare, Divya Jaiswal, Hemlata Pradhan, Rajendra Kumar Banjara & Tendon Kumar Sahu, '[Part 1] Hathras Rape Case: Grappling with the Ground Realities of the Implementation of SC/ST Prevention of Atrocities Act'(*The Leaflet*19 October 2020)<https://www.theleaflet.in/hathras-rape-case-grappling-with-ground-

workers, who come from the same lineage of work by generations, cannot be all expected to have the documents to establish their caste. In some states, obtaining a caste certificate requires complying with a further checklist of documents, like the caste certificate of the father, and the residency certificate of the previous generations, which simply may not be available to these illiterate workers. Hence, police expecting them to produce documentary evidence even for filing a simple FIR is against due process. This practice comes despite the judgement of the Supreme Court in the case of *Lalita Kumari v. Government of Uttar Pradesh (2014)*[54] which absolutely clarifies that the correctness of the facts (caste of the victim suffering atrocities) is not necessary at the stage of filing an FIR. As long as the police is informed of a cognizable offence[55] which appears to be motivated by caste-based bias, the police should register the FIR under the Atrocities Act.[56] A preliminary enquiry is only needed if the offence is not cognizable.

The second infirmity with the legislation is the narrow reading of what should constitute a public place for the purpose of harassment. In November 2020, in the case of *Hitesh Verma v. State of Uttarakhand*[57] the Supreme Court declared that any abuse or insult taking place within four walls of the building will not constitute an insult. This reading also excludes, any insult done in a place outside of public view, thus, hurling abuse on a telephone or insulting someone at home in front of their relatives and friends are also not offences under this Act. One of the reasonings for such an exclusion can be that it is not possible to prove an act committed in private. But then the question that arises here is that, if an act is committed in private and it cannot be proved in the court of law, does that mean that act should not

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realities-of-the-implementation-sc-st-prevention-of-atrocities-act/>accessed on 18 November 2021.

[54]*Lalita Kumari v. Government of Uttar Pradesh,* AIR 2012 SC 1515; Also see, *Superintendent of Police C.B.I. and Ors. v. Tapan Kumar Singh,* (2003) 6 SCC 175.

[55] Criminal Procedure Code, 1973, sec. 154

[56] Gayatri Suman (n 53).

[57]*Hitesh Verma v. State of Uttarakhand,* 2020 SCC OnLine SC 907

be an offence at all.[58] Thus, while the Act imposes criminal sanctions against committing atrocities, its invoking has been made very difficult for an informal sector worker belonging to a deprived social and economic class extremely hard.

SUCCESS OF *SWACHH BHARAT ABHIYAN* WHILE DISCRIMINATION SUBSISTS

Swachh Bharat Abhiyan or Clean India Mission was launched in 2014 on the anniversary of Mahatma Gandhi as a nationwide campaign to eradicate open defecation in India and undertake solid waste management. When the campaign was started by the BJP-led NDA government, Prime Minister Narendra Modi picked up the broom symbolically indicating that sanitation is everybody's business and concern. This move was imitated by several government offices; and for school children, the *abhiyan* became a part of the curriculum for practical learning. However, imitating a *safai-karamchari's* job was different from accepting the work that they did. When it's the specific jobs of the waste workers like picking up waste, undertaking solid waste collection and disposal, manual scavenging and going down into the septic tanks, it was still the job understood to belong to the scheduled caste or the Dalit community. While the broom was portrayed as the symbol of achieving a clean India, it was still a symbol of oppression for the sanitation workers.[59] Thus, arises the question of whether the natiowide sanitation campaign was also addressing the existing caste-based insensitivity and discrimination or not.

While the Ambedkarite ideology may have been adopted as a tool of political and social justice for the deprived classes

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[58] Rashmi Venkatesan, 'Humiliation outside 'public view': A verdict puts focus on a grave flaw in the SC/ST Act'(*The Scroll*19 November 2020, 06:30 AM), <https://scroll.in/article/978462/humiliation-outside-public-view-a-verdict-puts-focus-on-a-grave-flaw-in-the-sc-st-act>accessed on 18 November 2021.

[59] Vidya Subrahmaniam, 'There Can Be No Swachh Bharat Without Ending Institutional Discrimination Against Dalit', (*The Wire*21 October 2017) <https://thewire.in/caste/can-no-swachh-bharat-without-ending-institutional-discrimination-dalits>accessed on 18 November 2021.

ensured through the Constitution, it is really entirely the Gandhian ideology of sanitation that had renounced with the Swachh Bharat Abhiyan on solid waste management, but unfortunately, not his ideology against discrimination. The vision of the Abhiyan being associated with Gandhi only projects his ideologies towards cleanliness and sanitation, conveniently ignoring his fight against colonialism, communalism and caste discrimination. Gandhi is so much associated with the campaign that waste pickers have been given a tool called as '*Ghandhi Chhadi'* for picking up waste[60] and his glasses are used as a symbol for the entire mission. Subhash Gatade argues that the top-down approach has taken away the focus and 'erased' the interest of the Dalits.[61] The harmonious image of the society presented in the *abhiyan* that functions through the idea of *kartavya* (duty) to the motherland has an attractive slogan – *'Ab hamara kartavyahain ki gandagi ko dhoor karke Bharat Mata ki sewa karei'*. While this slogan is in consonance with the Gandhian ideology of observing sanitation, it blurs out and '[fails] to capture the caste-based realities of sanitation and perpetual historical asymmetries, injustices and varied forms of casteism'.[62] The mission preserves the caste-based hierarchies which were sought to be annihiliated by Dr. Ambedkar.

Manjur Ali, in his article titled 'Non-Rhetoric: What Swachh Bharat Abhiyan Really Needs' argues '[quite] a bit of euphoria has been in the air with regard to the *Swachh Bharat Mission,* thanks to the extensive media coverage. Responses to *Swachh Bharat Mission,* can be categorized under two heads. On the one hand, the upper classes/castes have appreciated the effort; they envisage a business opportunity and visualise a dirt-free India (in their eyes, dirt is associated with the lower castes/classes). The upper classes/castes do not have to now feel

[60]Karanvir Singh, 'Gandhi Chhadi: The Innovative Stick That Picks Waste Without Hand Contact'(*NDTV*29 June2017) <https://swachhindia.ndtv.com/gandhi-chhadi-the-innovative-stick-that-picks-waste-without-hand-contact-9341/>accessed on 18 November 2021.
[61]Subhash Gatade (n 29).
[62]ibid.

ashamed in the company of their foreign partners anymore. On the other hand, a large section of the population (the deprived) has no clue as to what has been going around in the name of *swachhta*.'[63]

What appears to be important for the government to realise is that *swachha bharat abhiyan* may not be completely successful without first facing the casteist and hierarchical social structure of India. What also appears problematic is the possibility of a caste-neutral approach in the name of ecological concerns rising from the waste management problem in India; as it does not promise to deal with the deep-rooted problem of discrimination and atrocities against the deprived classes.

CONCLUSION

Waste management should not only be addressed as a technical and scientific problem by the state but also needs to be approached from a social and political viewpoint to enforce the basic human rights of the workers to end the power struggle ensued by the caste dynamics in India. Ecological, economic, administrative actions and even the *Swachha Bharat Abhiyan* looks at the problem of waste management from a neutral and secular point of view. The secular application is like being in denial. Every policy measure needs to consciously address the problem of discrimination, particularly when it is intrinsically present in society and often defended on the pretext of having religious sanctions. The remedies are only in cultural, legal and policy changes and human rights advocacy but not in environmental activism and economic growth (which is only widening the divide between the ruling class and the depressed class). As waste is the inevitable truth, so should the waste workers need to be treated - as indispensable. Thus, the

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[63]Manjur Ali, 'Not Rhetoric: What Swachh Bharat Abhiyan Really Needs' (2015)50(35) Eco. & Pol. Weekly 19,19; *Also see,* EPW Engage, 'Swachh Bharat: Hiding Caste Discrimination in Cleanliness' (2019)Eco & Pol. Weekly <https://www.epw.in/engage/article/swachh-bharat-hiding-caste-discrimination> accessed on 15 January 2022

environmental and economic concerns from the waste sector can never be read in isolation from social concerns and human dignity.

The Dalit Indian Chamber of Commerce and Industry under the aegis of the Union Ministry of Social Justice and Empowerment prepared a draft report to assess the progress of the Scheduled Castes and Scheduled Tribes in India after 70 years of independence and the policy measures that the government can create to improve their situation. The report presents that there are still glaring inequalities that exist within the Indian society which need resolving by policy changes, allocation of more budget to invest in their education, and training and assisting these communities to undertake self-employment. The report demands 'sincerity and honesty [in] implementing the constitutional provisions and mandate', and suggests providing job security to the Scheduled Castes in the private sector.[64] Possibly, formalization of the informal waste sector and providing job security to waste workers can contribute to safeguarding their social status and economic interest. Even with the attempt at structural inclusion, the questions of cultural exclusion will still haunt the state. To trace back to the Gandhian ideology - if independence is not accompanied by 'deep change in social priorities, it will be pointless'.[65]

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[64]Sravasti Dasgupta, 'SC-ST creamy layer is insignificant, inequalities still glaring: Dalit chamber of commerce' (*The Print* 14 April 2021, 1:34 PM)<https://theprint.in/india/sc-st-creamy-layer-is-insignificant-inequalities-still-glaring-dalit-chamber-of-commerce/639027/> accessed 12 January 2022.

[65] Sujay Biswas (n 11).

PROMOTION AND PROTECTION OF RETAIL INVESTORS IN THE SECURITIES MARKET IN INDIA: AN ANALYSIS

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ABSTRACT

Retail Investors are the investors of categories relating to individuals and households invest in securities market in the range of small amounts with limited knowledge and less resources. This situation is taking advantage by the institutional investors which affecting the rights of the retail investors. However, the technological drawbacks and practice of fake transactions on platform of the stock market incurring losses to the retail investors. In order to control the misleading activities by the stock brokers, a strong regulatory regime which is required for achieving the goal of sustainable capital markets? Further the present Laws on protection of retail investors are not effective towards achieving the actual objective? By the same way in order to uplift and development of sustainable economy in the country there should be an active participation of retail investors in the stock markets is much essential. Perhaps on promoting and protecting the retail investors in the securities market it would lead to better economy and sustainable stock markets.

Keywords: *Retail Investors, Stock Market, Sustainable Development, Stock Brokers, Institutional Investors, Securities Exchange Board of India.*

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"The individual investor or retail investor should act consistently as an investor and not as a speculator."

- Ben Graham

Retail investors are the small investors of the securities market which has kept the ball of the Indian economy rolling and active. Generally these investors are the individuals and households. The general understanding of a retail investors is that, non professional investors who buy and sells the securities in the stock market and on the basis of advice given by stock brokers etc. There are many different kinds of investors based on their origin, legal status and size of investment. An investor may be a resident investor or a non-resident investor, can be an individual investor or a corporate investor; can be a retail investor or an institutional investor etc. The focus of this article is on the retail investors who form the backbone of the securities market. The evidence of any healthy stock market is only when the small households and domestic savings turn into investments and come back to them as capital appreciation and interests income. This leads to wealth creation engine among small investors which at most times is not easily achievable for the government[1]

As per regulation 2 (1) (vv) of the "Securities Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018[2]," a retail investor is an individual shareholder who applies or bids for specified securities for a value of not more than two lakhs rupees. However, this definition is specifically intended for in this regulation for in case of public issues by the companies, a certain specified percentage of the total issue has to be allocated to the individual retail investors.

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[1] J William Hicks, *Protection of Individual Investors Under U.S. Securities Laws: The Impact of International Regulatory Competition*, 1 INDIANA JOURNAL OF GLOBAL STUDIES 37, 431.

[2] Securities Exchange Board of India (Issue of Capital and Disclosure Requirements), 2018, S 2(1)(vv)

A retail individual investor is also defined under "Securities and Exchange Board of India (Disclosure And Investor Protection) Guidelines, 2000[3]" as an investor who applies or bids for securities of or for a value of not more than Rs.1,00,000/.

Apart from that there is no particular specific definition is provided for a retail investor, it can be understood that they have been defined to meet a specific object of the legislation. This article will consider retail investors as the investors who invests in the lowest amounts in the securities market relatively, with an objective of gaining occasional incomes and invest mostly for short term considering their duration cap to be one year, or two years at maximum if they choose to retain the shares on the advice of brokers or other investment experts. Even though Indian retail investors are very active and a certain dedicated population invests regularly in stock market, they are often lacking investment knowledge and they fail to realise the importance of a personalised portfolio advice and need for a goal oriented approach[4].

In the FY 20 the market did not see a 10% decline. As a consequence, valuations are rather aggressive, and it is becoming more difficult to deploy capital. The Indian equities market is currently dominated by individual investors.[5] Figures issued by NSE in its Market Pulse monthly analysis of the markets show that retail investors accounted for slight above 43% of all cash sector transactions in FY22. This ratio is somewhat lower than the multi-year high of 45 percent achieved in FY21.[6] It is not only in

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[3] Securities Exchange Board of India (Disclosure and investor protection) guidelines, 2000.

[4] Destu Argiyanto, *Protection In Retail Investors Disadvanted By Fake Transaction Practice (Cornering The Market)*, 2 JOURNAL OF PRIVATE AND COMMERCIAL LAW 11 (2018).

[5] Kaushal Shroff, *India's Stock Market Swings Give Millions of New Retail Investors a Taste of Storm*, THE WIRE (Jan. 26, 2022, 10:00 AM), https://thewire.in/economy/indias-stock-market-swings-give-millions-of-new-retail-investors-a-taste-of-the-storm.

[6] NSE, *Market Pulse*, STATIC NSE INDIA (Jan. 26, 2022, 11:00 AM), https://static.nseindia.com//s3fs-public/inline-

the equities category that retail investors have dominated. Retail investors' participation in Index Options and Stock Options has likewise been continuously strong. Individual investors controlled a sizable 34% of premium turnover in both situations.

Despite this, ordinary investors typically face the severity of a sales. There was a dramatic drop in the percentage of individual investors who owned floating stock between 2001 and 2021. In light of the incredible returns that have been generated by the markets over the last two decades, it is clear that FIIs outperform regular investors in this critical criterion. By and large, direct retail investors don't make the type of money they expect from the markets.[7] In panic situations, investors sell their holdings, while in speculative booms, they buy high and overconfident. mainly because ordinary investors are typically driven by fear and greed.

In light of the present market conditions, the issue arises as to whether the Securities Exchange Board of India, which performs considerably better than the other regulatory organisations, is regulating and taking sufficient steps to meet the requirements. The sole objective of the establishment of Securities Exchange Board of India by the way Act of 1992 to protect the investors and promote the securities market.[8] In light of that, the major question in front of the Securities exchange board of India is that whether the present Jurisprudence on retail investors is sufficient or not. If not what kind of mechanism which required for the protection of retail investors in the securities market.

Retail investors are currently in the more volatile situations by the actions of stock brokers and activities made by companies' managements. On the other side most appropriately

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files/Market_Pulse_September_2021.pdf#NSE_Clientwise_Turnover_Distribution.

[7] *Shroff* (n 7).

[8] VAISH LAW COLLEGE, http://vaishcollegeoflaw.co.in/wp-content/uploads/2020/09/SEBI-2018.pdf (last visited Jan. 26, 2022).

they are looking for investment environment and they can able to invest and participate in the active stock markets[9]. The regulatory body is doing its best to ensure that the investors remain educated and protected from scrupulous risks. However, there is a need for more awareness among the general masses so that they can able to open a De-mat account at the earliest and start investing in the securities markets.

By seeing the objective of the SEBI Act, 1992 the protection of the interest of the investors under the securities market is primary essential task. Investors include retail investors. Investor protection is one of the primary duties of the Securities Exchange Board of India. It is mandated under Section 11(1) of the SEBI Act 1992[10] to protect the interest of investors and regulate and promote the development of securities market. To achieve these objectives, it can do every such act which may be necessary on its part, more precisely mentioned in Section 11(2) of the Act[11]. As per the understanding of the problems facing by the retail investors in the present juncture, there has to be some specific regulation is required for the protection of the retail investors. Under the present regulations of the securities exchange board of India there is no specific regulations or provisions for the protection of retail investors or small investors. The counterparts like United States of America and some other developed countries which having some specific jurisprudence in promotion and protection of the retail investors.

Securities Exchange Board of India also has to ensure that the confidence of investors is maintained in the system and among community of retail investors. The investors would get confidence only when the corporate governance framework in the country will be strong and it is able to root out any possibilities of any scrupulous activities by the company. Apart from mentioned

[9] *Hicks* (n 3).
[10] Securities Exchange Board of India Act, 1992, S 11.
[11] ibid.

above, the processes in the stock trading mechanism have to be fair and reliable[12].

Out of this we can draw our attention towards some important problems facing by the community of the retail investors. Those problems which include,

Fraudulent techniques opted by the Brokers in the stock market.

The present systems are not technological friendly.

No restriction on the day to day trading activities in case loses happened to retail investors.

No control against the brokers who collecting the amounts by way of false promises.

Unawareness of the retail investors.

Lack of advocacy programmes and absence of investor education programmes.

Lack of control against the fake transaction practice under the stock market.

Out of these serious concerns we may draw some loopholes in the present law relating to the protection of retail investors under the securities market. By drawing those concerns,

Whether there is any present existing law on protection of retail investors in India?

The present form of investor protection education awareness regulations is sufficient towards the protection of retail investors under the securities market in India?

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[12] Gala Balp, *THE CORPORATE* GOVERNANCE *ROLE OF RETAIL INVESTORS*, 2018 (31) LOYOLA CONSUMER LAW REVIEW, 48.

What type of role should be taken by the regulator in order to protect retail investors in the securities market?

What type of changes should be required in the law relating to Securities for the promotion and protection of the retail investors in the securities market?

What type of supportive measures needs to be taken in order to develop the role of retail investors under the securities markets?

The raising concerns categorically want to answer by the author in this research paper for the promotion of retail investor's strength in the securities market for the sustainable growth of the stock market and their participation in the markets. When there is an active participation of the retail investors exists under the stock markets then markets are sustainable. Perhaps, on the other side when the institutions and promoters of the big companies which holds the major shareholding in the issued share capital then the markets are more volatile and it is not sustainable[13]. In the developed countries the involvement of the general public which means retail investors role in the market is so high. [14]Because of the reason that, the developed countries markets are so systematic and in the case of recessions, the markets are somewhat less volatile. On the other hand Indian stock markets contains less participation from the retail investors which is causing ineffective volatility and unsustainable. Out of this very important reason for non participation may be the unawareness towards the stock markets[15].

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[13] Roberta Romanot, *Empowering Investors: A Market Approach to Securities Regulation*, 107 THE YALE LAW JOURNAL 73.
[14] World Federation of Exchanges, *Enhancing Retail Participation in Emerging Markets*, WORLD EXCHANGES. ORG (Jan. 26, 2021, 12:00PM), https://www.world-exchanges.org/storage/app/media/research/Studies_Reports/WFE%20Enhancing%20Emerging%20Market%20Retail%20Trading%20Report%20-%203%20August%202017.pdf.
[15] ibid.

UNAWARENESS OF THE INVESTORS

Taking lessons from the scams of the past decade, the government has tightened the law and its operations to avoid occurring of similar acts in the future. For example, trading of any person in the securities market may be suspended in case he knowingly indulge in an act which creates false or misleading appearance of trading in the securities market. Apart from tightening the laws, there are some other initiatives specifically aimed towards the interest of investors. One such initiative is the Investor Education and Protection Fund, which is required to be established under Companies Act 2013. Section 125 of the Companies Act, 2013[16] which given a provision for establish investor education and protection fund. One of the major objectives relating to the prescribed fund is that promotion of awareness among the investors and protection of investors. Further the mentioned provision is somewhat helpful to retail investors who have lost the amount in securities by the wrong committed by any other person includes stock broker. This fund is established for promotion of awareness among investors and protection of their interest. The fund corpus contains the amounts of the dividends which have not been claimed by the shareholder of the company for seven years and it contains those underlying shares too, among other things[17].

The Securities Exchange board of India in the year 2009, enacted the certain regulation named as "Securities Exchange Board of India (Investor Protection and Education Fund) regulations, 2009[18]" by the exercising the power under section 11 of the SEBI Act, 1992. This regulation also established a fund called Investor Protection and Education Fund. The fund needs to be utilized in the following manner for the welfare of the investors in the securities market.

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[16] Companies Act, 2013, S 125.
[17] *Hicks (n* 3).
[18] Securities Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009.

i. In order to conduct Advocacy programmes such as seminars, conference and workshops for promoting awareness among the investors includes retail investors.

ii. Awareness programmes under the media relating to the securities market.

iii. Aiding investor associations.

iv. Refund of the security deposits to the investors on the de-recognition of the stock exchange etc.

Though as promising as it may sound Securities Exchange Board of India has not been able to effectively implement this provision in an effective manner. The above said regulation which talking about broadly relating to investor protection although it is not covering overall protection of the retail investors. Moreover it is not specifically covered on relating to provisions on retail investors. It intended for overall development and protection of the investors. [19] Perhaps the investors includes retail investors but this individual group which having separate sanctity and needs to be protected separately. Somewhat either a separate regulation or within this regulation some immediate provisions are required for the protection and promotion of retail investors in the securities market.

In order to see a case study example it is apparent when Peerless General Finance and Investment Company transferred its long standing and unclaimed deposits worth Rs. 1,514 crores to the Investor Education Protection Fund.[20] These were the depositor's money that were pending with the company for 15 years. Both the shares and the unclaimed dividend were transferred. These amounts corresponded with more than 1.49 crores share certificates and majority were of the value of Rs.

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[19] SEBI, https://www.sebi.gov.in/legal/regulations/apr-2017/sebi-investor-protection-and-education-fund-regulations-2009-last-amended-on-march-6-2017-_34705.html (last visited Jan. 26, 2022).

[20] ET Bureau, *MCA Body Recovers Rs. 1514 Crore Deposits from Peerless General Finance*, ECONOMIC TIMES (Apr 24, 2019, 8:01 AM), https://economictimes.indiatimes.com/news/politics-and-nation/mca-body-recovers-rs-1514-crore-deposits-from-peerless-general-finance/articleshow/69017662.cms.

2000 or less. This shows that the level of ignorance of the companies towards these provisions is grave and they have adopted a careless attitude towards the retail investors and even towards Securities Exchange Board of India.

Moreover, in the recent past Securities Exchange Board of India sent notices to 4000 companies seeking information why they had failed to deposit the stipulated amounts and shares to the fund. There are cases where the companies had published information regarding these shares and unclaimed dividend in their annual balance sheets but didn't care to forward it to the Fund. The effective implementation towards transferring fund to the Investor Education Protection Fund is much essential and need to be taken care by the authorities prescribed under the law from time to time.

In case we discuss second story of the problems facing by the retail investors or individual investors, it includes the not claiming of the dividend declared to them out of the profit earned by the company in a particular financial year. [21]This alarming situation highlighting the level of unawareness on the side of individual investors are having. They are not often aware of their right to collect the dividend on their shares every year it is announced. While some investors don't keep track of the titles in the shares which they may or their parents might be holding at a certain period of time. This needs an immediate attention of the Securities Exchange Board of India to promote awareness to the general public so that they may their rightfully owned shares and the dividend accrued. The situation today is that the investors' money is lying with the regulator and waiting to be claimed back by the same investors who had once deposited their money with the company and effectively becoming owners of the same.

[21] Babar Zaidi, *Rs 82,000 Crore Lying In Unclaimed Bank A/Cs, Life Insurance, Mutual Funds, PF: How To Get Your Money Back*, ECONOMIC TIMES (Jul. 6, 2021, 10:04 AM), https://economictimes.indiatimes.com/wealth/invest/rs-82000-cr-lying-in-unclaimed-bank-a/cs-life-insurance-mutual-funds-pf-how-to-get-your-money-back/articleshow/84089095.cms.

THE NEED FOR EDUCATING THE INVESTORS

In order to develop a sustainable market, retail investors needs to be educated. They are not assisted by big corporate advisors in management of their portfolio and have no awareness about different investment instruments present in the market. In order to channelize their savings to investment, they need to be inspired confidence in the securities market as well as educated about the basic principles of operation in the stock market. [22]They need to be made aware of the benefits of the investment, probable tax benefits and the concept of time value of money so that the household savings do not lose their value over time.

Unless the investors gets to be educated that the technicalities and operation of securities law does not aware by the retail investors, perhaps they not able to survive in the stock market. They need to understand that different investors have different short and long term goals, varying risk appetite and purposes of investment. Therefore, an investment plan which may cater to the need of one investor might not serve its neighbour investor. Making informed decision when purchasing securities is also another skill need to be learnt by the investors. It is not necessary that each time the price of a particular security reflects the correct valuation of the stock. The price may at times be overvalued or undervalued depending upon several factors such as upcoming opportunities for the company, business environment of the territory, quality of the management, etc. [23]

In these situations, even though there may be stringent corporate governance framework and robust business ethics present in the country, it would be futile since the investment levels could not meet the highest mark due to non-education of the investors. People are yet not able to free their hands in the de-

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[22] Annamaria Lusardi & Olivia Mitchell, "The Economic Importance of Financial Literacy: Theory and Evidence" (Netspar Discussion Paper, 2 April 2013) at 2.
[23] Nikhil Kamath, *Why You Must Be Aware of The Bull Trap in An Overvalued Market*, FORBES INDIA (Jan. 8, 2021, 5:08 PM), https://www.forbesindia.com/blog/finance/why-you-must-beware-of-the-bull-trap-in-an-overvalued-market/.

mat mode and still struggles to understand how to execute a trade deals in the market. This requires the regulatory (Securities Exchange Board of India) body to be more proactive in educating the investors, especially at a time when the Indian economy is struggling to keep its stand afloat.

It is to be noted that the population in the Tier II and Tier III cities has enormous potential to bring investments on to the mainstream economy and as such should firstly be targeted. It is most often seen that people in such territories do not consider stock market as a source of income and there are complete drapes on the benefits of stock markets. This prompts the need to first shift the focus on such people so that they be made aware of the corporate market scenario and the trading in the stock markets.[24]

The another aspect which affecting the rights of the retail investor in the present securities market is that the type of Ponzi schemes operating by fraud companies and attracting the individual investors with higher rate of interest and higher rate of returns. The regulator also needs to be concentrate on elimination of these types of schemes from the market.

PONZI SCHEMES

Nothing attracts a person other than lucrative investment returns, in the form of dividend or otherwise. Fraudsters make use of such statements and launch a Ponzi scheme to extract money from the public and use it for their dark ulterior motives. The fact that such schemes are not prevalent today than it was in the past needs reconsideration. After looting the investors by showing high dividends when in fact the money received from the public was used for his personal business rather than actual further investments. [25]This is one among the strongest reason of

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[24] ET Bureau, *Is This Era of Retail Investors?*, ECONOMIC TIMES (Oct. 24, 2021, 1:07 PM), https://economictimes.indiatimes.com/markets/stocks/news/is-this-the-era-of-the-retail-investor/articleshow/87236474.cms?from=mdr.

[25] Bhumika Indulia, Ponzi Schemes in India –The Legal and Regulatory Landscape, SCC ONLINE (Jan. 26, 2022, 3:00 PM),

an need for investor education is more than ever today as the dynamic young generation starts to become financially independent. Investors have to remain extremely cautious of such schemes and have to understand that promises of extraordinary returns are often the ones without any basis. Moreover, someone who doesn't explain the downside of investment are more likely to be the deceivers.

CONCLUSION

Awareness of the public is easier said than done. Merely publishing pdfs in its website won't help unless it reaches the masses. It has to happen systematically and through a targeted approach. Some of the effective ways to raise awareness of people are includes the Ministry advertisements on television, newspapers, YouTube and other public media. On the other side interactive sessions may be conducted for the benefits of investing securities markets. Apart from the above mentioned further the following programmes may be drawn for the promotion and protection of retail investor in the securities market.

i. Special training of professionals on how to create awareness in their respective local territories.

ii. Investor education programmes on all cities and possibly villages with special focus on tier II and tier III cities.

iii. Increased tax benefits for investment in equities which will attract attention of working population. Easing of norms for opening a demat account for investment up to certain limits. Further emphasis should also be placed on mutual fund schemes as they are one of the most reliable ways of money making through stock markets. Increased concentration of regional offices will boost the confidence of the public in the institution and the market. Continuing the existing way of organizing workshops in both urban and rural areas may be one of the solutions for promoting awareness in the retail investors.

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https://www.scconline.com/blog/post/2021/08/11/ponzi-schemes-in-india-the-legal-and-regulatory-landscape/.

SUGGESTIONS

i. Reducing the practice of fake transactions in stock exchanges.

ii. Technological upliftment and date protection of retail investors.

iii. Need of a strong regulatory regime.

iv. There should be enactment of an separate regulation on protection and promotion of retail investors.

v. There should be requirement of full and fair disclosure of material facts in the purchasing, trading and tendering of securities.

vi. Of course, not least creating awareness among the retail investors.

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JEOPARDIZING CIVIL LIBERTIES: COMPARING ROWLATT ACT WITH ITS POST CONSTITUTIONAL COUNTERPARTS

Susmit Isfaq[*]

ABSTRACT

Security legislations in India have always remained controversial. There are instances where these acts are being used as a weapon to curb dissent. It is not new with the security legislations as in the colonial period, British used similar legislations against Indians who were advocating to make India a free nation. It has always been a challenge to balance security of the State without curbing civil liberties of the people. India's present security laws has certain provisions which are similar to the security legislations enacted by the British and it has to be seen from the lens of the Constitution of India as post constitutional legislations cannot undermine the fundamental rights ensured by the Constitution except certain necessary situations. This paper shall try to analyse India's security laws and what similarities it has with the Rowlatt Act used by the British. It will try to analyse similarities between pre and post constitutional security laws and how it has the capacity to impact the civil liberties of Indians guaranteed by the Constitution of India.

Keywords: *Security Laws, Rowlatt Act, preventive detention, UAPA.*

INTRODUCTION

Civil liberties are sacred sets of rights that people of a civilized nation ought to have. At the time of drafting the

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Constitution of India, the constituent assembly members had serious debates and discussions as to which rights should be 'fundamental' to citizens of the country (and some to all person residing in this territory) After a set of debates, certain rights were incorporated in the Constitution in its Part-III which bears the flag of civil liberties. The makers of the constitution had their experience of the British Raj and how they hampered rights of people through various legislations. Learning from the experiences, they carefully drafted the Indian constitution so that the state cannot, in its whims and fancies, curb away or abridge those rights. Yet, after 74 years of independence these rights are being curbed away through various security legislations, like the British Raj did with some of its draconian laws.

The Anarchical and Revolutionary Crimes Act of 1919, popularly known as the Rowlatt Act was famous for targeting Indian revolutionaries which were active in many parts of British ruled India fighting against the Colonial power. The Rowlatt Act was designed in the similar way as Defence of India Act 1915 which was enacted in the time of World War I, giving enormous power to the Police to deal with threats of 'National Security'. Many famous Indians, then the leaders of the Congress party, were arrested under this Act and massive protests broke out. This Act had its chilling effect on the question of Civil liberties. People were arrested without any reasonable grounds, were not getting their trial, were harassed in custody and so on. People of India were in forefront protesting against this Draconian law and while the protests continued, the Jallianwala Massacre took place. Seeing widespread protest against this Act, the British had to repeal it after two years of its enactment, in 1921. Though the Rowlatt Act was repealed and the Indian Independence Movement strengthened, the reminiscence of the Act remained even after independence. Immediately after the Constitution of India came into force, the Preventive Detention Act of 1950 was passed to deal with the violence related to partition. This act too had provisions similar to that of Rowlatt Act and gave extraordinary powers to the Police and the Administration. Not only this, subsequently acts like Armed Forces Special Powers Act

(AFSPA), 1958, The Unlawful Activities (Prevention) Act, 1967, Maintenance of Internal Security Act (MISA), 1971, National Security Act,1980 etc were passed which were/are being used to restrict civil liberties of people of Independent India.

FROM DORA TO ROWLATT - A HISTORICAL OVERVIEW OF COLONIAL OPPRESSION THROUGH SECURITY LAWS

DORA TO ROWLATT - THE FOUNDATIONS

One of the most criticized acts passed by the United Kingdom legislature was the Defence of the Realm Act, 1914 ("DORA") which was passed just four days after the British Empire joined the Allied Forces entering into World War I. This act was brought with the intention to restrict 'anti-war' activities which included different kinds of economic, social and political control mechanisms. It gave extraordinary powers in the hands of the executive so that it could deter activities which are not at par with 'His Majesty in Council's morality. It was mainly preventive in nature and hence was arbitrarily used by the Armed forces. Not only it restricted certain activities, it empowered the Armed forces to try civilians booked under DORA in martial courts and the accused had no rights to approach civil courts. Though it was created to be operative in wartime, it was later extended with amendments till 1921.[1] A similar act was enacted by the Governor General of India to restrict wartime activities in India too. It was the Defence of India Act, 1915. The sharp similarity between DORA and Defence of India Act 1915 lies in the fact that both of these acts empowered the executive with a wide range of powers regulating and preventing speech, expression and other activities even before the crime was committed. This was in departure with the common law jurisprudence that the elements of crime are not

[1] Gregory Hynes, 'Defence of the Realm Act (DORA)', (*1914-1918-online International Encyclopedia of the First World War* 10 October, 2017), <https://encyclopedia.1914-1918-online.net/article/defence_of_the_realm_act_dora> accessed February 21, 2022.

fulfilled without the presence of *actus reus*. Though provisions were similar, the application of DORA and Defence of India Act 1915 deferred. DORA was usually applied to persons having belligerent associations, it was not the case with the Defence of India act 1915 as the latter was liberally applied to any subject of the king [2] and hence was extensively used against Indians to suppress dissent and nationalist movements. Due to its frequent abuse and misuse the act was not welcomed by the Indians. In spite of being an emergency law and was initially passed with the expiry date of six months after the war was over, the Defence of India Act 1915 was further extended in various forms and was enforced for a long time. It categorically gave power to the Governor-General in Council to make provisions for securing public safety. Along with it, Sec. 3(1) directed to form special tribunals so the accused can be tried for participating in certain offences under this Act. Shockingly, Section 4 of the act stated that two out of three commissioners having legal knowledge are sufficient to try a case lodged under its provisions.[3] Though most of the common law provisions give a chance to appeal the decision to the aggrieved party, under this act there wasn't any such right and the decision taken by the commissioners were deemed to be final.[4]

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[2] Online version: B.G. Horniman, *British Administration & The Amritsar Massacre* (1st edn, Mittal Publications 1984), <https://books.google.co.in/books?id=zgkAXH0L5DkC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false> Accessed February 21, 2022.

[3] Defence of India (Criminal Law Amendment) Act, 1915, s. 4. "All trials under the act shall be held by three Commissioners of whom two at least must have certain legal qualifications and such Commissioners are to be appointed by the Local Government for the whole or any part of the province or for the trial of particular persons or classes of persons."

[4] Ibid., s. 8(1). "Notwithstanding the provisions of the Code of Criminal Procedure, 1898, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of Commissioners appointed under this act and no Court shall have authority to revise any such order or sentence, or to transfer any case from such Commissioners, or to make any order under Section 491 of the Code of Criminal Procedure, 1898, or have any jurisdiction of any kind in respect if any proceedings under this Act."

The Defence of India act 1915 indeed was somewhat successful in curbing revolutionary movements especially in Bengal and Punjab provinces. Yet with growing atrocities on Indians, the resistance against it also grew alongside strengthening nationalist movements. Fearing growing political movements in India, A resolution bearing No. 2884 was passed by the Governor-General in Council on 10th December 1917[5] which appointed a committee to 'investigate and report on the nature and extent of the criminal conspiracies connected with the revolutionary movement in India'[6] and to advise the government to deal effectively with them. The Committee which was known as the 'Sedition Committee' was formed with five members in it and was presided by Sir Sidney Arthur Taylor Rowlatt, who himself served as a judge of the King's Bench Division. On 15th April 1918, the Committee handed its 226-page report to the then Secretary to the Government of India and analysed in depth the political activities that were going on especially in Bengal and Punjab provinces. It found its link to the Germans and the Bolsheviks and concluded that they were helping Indian revolutionaries to oust the monarch out of power and hence suggested extending provisions of Defence of India Act 1915 so that preventive measures could be taken. The British administration too agreed that without such extraordinary powers they would not be able to suppress nationalist movements and further discontent among people against British rule.

ROWLATT AND BEYOND - THE REPERCUSSIONS

As World War I got over in mid-November 1918 and the expiry date of Defence of India Act 1915 was nearing, the Indian legislative Council after getting assent of the Governor General passed Act no. XI of 1919, having the short title 'Anarchical and Revolutionary Crimes Act,1919'. It was the result of the Sedition Committee's suggestion to deal with political movements in India

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[5] *Sedition Committee Report* (1918), (Superintendent Government Printing 1918) <https://dspace.gipe.ac.in/xmlui/bitstream/handle/10973/33651/GIPE-000645-Contents.pdf?sequence=3&isAllowed=y> Accessed February 22, 2022
[6] *Id* at 5.

and hence was famously known as the 'Rowlatt Act'. The long title of the Rowlatt Act suggested that it was introduced to cope with anarchical and revolutionary crimes which would supplement the ordinary criminal law by giving extraordinary powers to the Government.[7] It was extended to the whole of British India and was supposed to be operative till three years after the termination of World War I. Just like the Defence of India Act 1915, Rowlatt Act also punished political dissent with life imprisonment and even death. The Sedition Committee in its report also suggested that ordinary rules of evidence should not be followed and trials should be held in closed doors by a special tribunal where the presence of the person against whom investigation is going on is not needed.[8] Most of the suggestions given by the Sedition Committee were incorporated in the Act. The Rowlatt Act was to be applied on persons having booked under certain provisions of Indian Penal Code,1860 (IPC) relating to waging or attempting to wage war, collecting arms with intention of waging war against Government of India etc. Interestingly, provisions of IPC related to sedition, rioting, murder, hurt, dacoity etc. were also bought under this act with only distinction with the earlier offences that here the Government has to opine that these offences are related to anarchical and revolutionary movements. Apart from IPC, All offences under Explosive Substances Act 1908 and Section 20 of Indian Arms Act,1878 were brought under the Rowlatt act.[9] Furthermore, most of the provisions of Defence of India Act 1915 were retained giving extraordinary powers in the hands of administration to detain, search without warrant, incriminating without trial etc.

To go in depth, Section 3 of the Act, which is in relation to application of the Part I of the act, it says that when the Government is satisfied with the proposition that in any part of

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[7] Long title of Anarchical and Revolutionary Crimes Act,1919, A collection of the Acts passed by the Governor General of India in Council, 26, <https://legislative.gov.in/sites/default/files/legislative_references/1919.pdf> accessed February 23, 2022

[8] Report (n 6).

[9] Anarchical and Revolutionary Crimes Act,1919, The Schedule, No.XI, Indian Legislative Council, 1919 (India)

British India anarchical and revolutionary movements are being promoted, for the purpose of *public safety and speedy trial* provisions of this part will come into effect. Subsequently, S. 5 empowers the Chief Justice to nominate three High Court judges who will try such cases. This section established the adjudicating authority who had the power to try and punish offenders under this act. Also, the court had the power, if they believed it to be in *public interest* to restrict publication or disclosure of the proceedings relating to certain offences.[10] The trial begins after the Local government forwarded a statement writing the grounds of arrest and all other material facts and circumstances relevant to the investigating authority.[11] The investigating authority was mandated to hold the trials *in camera* which essentially meant it would be a closed door trial. [12] Part III of this act was most controversial. If the government *reasonably believed* that anarchical and revolutionary activities are going on, It had provisions to arrest persons without warrant[13] confine persons where they *believed* activities were going on and to search the premises without any delay.[14] Moreover, It empowered *any* police to do so. It had to report the arrest to the local government and if the government approved such custody the accused had to stay in such custody till the investigating authority directed otherwise. It is also pertinent here to mention that without receiving any such assent from the government, the police could keep the accused in their custody till seven days.[15] Additionally the provision of appeal was quashed and the decision of the investigating authority was deemed final. Also, it gave safeguard to *any person* who in *good faith* did an act under this act.[16] On March 1, 1919 Gandhi wrote a letter addressing the press about his discontent on recommendations of the Rowlatt Committee. He wrote that the Rowlatt Committee quoted isolated incidents that happened in

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[10] Anarchical and Revolutionary Crimes Act,1919, § 11, No.XI, Indian Legislative Council, 1919 (India)
[11] *Id.* § 26.
[12] *Id.* § 26(2)
[13] *Id.* § 34 (1) (a)
[14] *Id.* § 34 (1)(b) and 34 (1)(c)
[15] *Id.* § 35
[16] *Id.* § 42

very small parts of India and to a *microscopic body of people*. Yet, the Committee suggested imposing harsher laws in the whole of India.[17]

JALLIANWALA TRAGEDY - THE END OF ROWLATT

As a result of implementation of the Rowlatt Act, there were massive protests especially in Northern states. At the time of war, many Indian soldiers were recruited by the British crown, almost half of them belonging to Punjab provinces. At war many of them died. People were anyway not happy with the war. And then, the British introduced the emergency laws and as a result people were out on streets in protest. A massive protest was held in the Amritsar city of Punjab on April 10th 1919. The British administration was not able to suppress their existing forces.Three days after the protest began,Brigadier-General Reginald Dyer issued Amritsar proclamation to prevent growing dismay of British rule. The proclamation imposed martial law in the city. It prohibited any person from going outside their home after 8 pm and banned public gatherings altogether. It also gave shoot at sight order if anyone found contravaning the proclamation.[18] It is still not surely known how widely this proclamation was publicised. Yet on the same day more than 10,000 people gathered in a public park named Jallianwala Bagh for two purposes. First, it was the festival of Baisakhi that day and a large number of women and children hence gathered in the park. Also, a meeting was called in that place to protest against the arrest of two prominent leaders, Saifuddin Kitchlew and Dr Satyapa who were detained as they were holding rallies against Rowlatt Act and other emergency provisions of British Administration. The gathering at Jallianwala Bagh was peaceful

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[17] People Union for Civil Liberties, *Black Laws 1984-8*5 (Model Press pvt. Ltd. 1985) 39

[18] Binda Preet Sahni, 'Effects of Emergency Law in India 1915-1931' (2012) 2(2) Studies on Asia- Illinois State University <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174900> accessed 22 February 2022

and unarmed.[19] General Dyer proceeded to the park with more than fifty armed guards and with tanks. He sealed off the exit gate and gave command to openly shoot at the gathering. No one surely knows the number of casualties that followed after the shooting. Yet according to the official record, 379 people died in that incident.[20] This number is said to be a grossly underestimated version where in reality more than 1,000 people died in that incident. Immediately after the incident happened, the nation was shaken to its core. Never in the history of India, has such a mass massacre happened before. Large Scale protests broke out against this tragedy. Gandhi too started his non cooperation movement across India.

The British set up a commission[21] to investigate what happened in Jallianwala Bagh on 13th April 1919. Three years later, the British set up a Repressive laws Committee to look into the acts which were being used as repression and this committee suggested to repeal 22 such laws which included the infamous Anarchical and Revolutionary Crimes Act of 1919 and thus, the act was finally repealed in March 1922.[22]

SECURITY LAWS IN POST-COLONIAL INDIA - A MISPLACED VESTIGE IN A CONSTITUTIONAL DEMOCRACY

After India achieved its independence on 15th August 1947, the constituent assembly was given the task for drafting a constitution for the independent India. The delegates of the

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[19] Mahatma Gandhi, *Freedom's Battle: Being A Comprehensive Collection of Writings and Speeches on The Present Situation* (Ganesh and Company 1922)

[20] Mandira Nayar, 'Jallianwala Bagh @100: How many people actually died? A numbers' tale', *The Week* (13 April 2019)<https://www.theweek.in/theweek/cover/2019/04/12/jallianwala-bagh-100-how-many-people-actually-died-a-numbers-tale.html> accessed 4 March 2022

[21] The Repressive Laws Committee, 1921

[22] Badri Raina, 'A Second Black Act, a Second Non-Cooperation: Will a Second Repeal Follow?', *The Wire* (6 Jan 2020) <https://thewire.in/rights/rowlatt-act-caa-non-cooperation-india>accessed 4 March 2022

assembly sat for 114 days over 3 years to come up with the Constitution of India 1950. (The Constitution) It included a part that gives people of India certain fundamental rights to be enjoyed by them with certain reasonable restrictions. There were vigorous debates on the constituent assembly over these rights and finally Part III of the constitution was inserted. It is pertinent to note that delegates of the assembly were all subjects of the British administration for most of their life and had faced atrocities of different levels by the administration. They were keeping in mind all those things while drafting the constitution.

PREVENTIVE DETENTION LAWS IN POST-COLONIAL INDIA - AN ANALYSIS

The new constitution of India empowered the parliament and the state legislative assemblies to enact laws related to preventive detention. The main argument in support of introducing preventive detention in the constitutional scheme is that it was regarded as necessary evil. Ambedkar relied upon the argument that even if provisions of preventive detention are placed in the Constitution, enough safeguards have been provided so that it cannot be misused.

After the enactment of the Constitution it was specified that any preventive detention laws could be enacted for reasons connected with defence, Foreign affairs, or the security of India. [23] Starting two clauses of Article 22 states some general principles as to the rights of the detainees. From clause (3) to (7) it states what procedural safeguards have to be adopted to become preventive detention laws constitutionally valid. One of such safeguard is mentioned in Clause (4) of the Article 22 which says that no preventive detention laws shall authorise any detention more than three months without the direction of the advisory boards. The period of three months mentioned in the Constitution is much more than that of Rowlatt Act which provided detention for a maximum of fifteen days without express assent of the

[23] Constitution of India, Sc. 7,list I, en. 9

government. However, in this case of Article 22 (4), it has to be passed by the advisory board which would be composed of persons "who are or have been, or are qualified to be appointed as, judges of a High Court."[24] In this case, the Indian Constitution seems more harsher than that of Rowlatt Act. Adding to that, It says that when a person is detained under any law providing preventive detention, he has the constitutional right to know his grounds of arrest as soon as he is detained and gives an opportunity to appeal against the order.[25] But it follows with an exception that if that disclosure goes against *public interest* the authority can choose not to disclose it.[26] This makes the provision very similar to that of Rowlatt Act. Clause (7) under this article equivocally nullifies safeguards provided under Clause (4). It empowers the parliament to virtually decide anything related to preventive detention laws. After getting a green signal from the Constitution itself, the provisional Parliament of independent India enacted its first act related to preventive detention.[27] The Preventive Detention Act,1950 (PDA) was enacted to detain persons without specific charge or trial in the name of security and public Safety. Violence regarding partition was increasing and the government thought it would be best to enact this legislature to curb widespread incidents of violence. The act was initially enacted for one year during the transition period but was in force till 1969.[28] The constitutional validity of this act was first challenged in the year 1950 itself when a prominent Communist leader A.K. Gopalan was detained under this act.[29] The petitioner challenged the act as it contravenes the provisions of Article 13,14, 19,21 and 22 of Indian Constitution. It filed a habeas corpus petition challenging his detention. The court however rejected his contention as the court observed that it followed the mandate of 'procedure established by law' and rejected the petition. It

[24] Constitution of India, art.22, cl.4
[25] Constitution of India, art. 22, cl.5
[26] Constitution of India, art. 22, cl. 6
[27] Preventive Detention Act,1950,No. IV, Acts of Parliament, 1950 (India).
[28] Derek P. Jinks, 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India' (2001) 22 (2) MJIL https://repository.law.umich.edu/mjil/vol22/iss2/3 accessed 13 March 2022
[29] A.K. Gopalan v. State of Madras AIR 1950 SC 27.

however held Section 14 of the Act which provided that the grounds of detention communicated to the detenu or any representation made against these grounds cannot be disclosed in a court of law. It also forbade the disclosure of the proceedings of the advisory board's report violative of Article 22 and hence severed the provision from the act making the remaining provisions constitutional.[30]

After PDA was repealed in 1969, two years later another security legislation was enacted. It was the Maintenance of Internal Security Act (MISA) 1971[31]. This legislation however was almost similar to the PDA giving extraordinary powers to the administration in the name of *defence of India, relation with foreign powers, public order etc*. The misuse of the Act was evident in the time of national emergency. Hundreds of persons including politicians, journalists, social workers etc. were detained and put in jail without trial. The act was also extended to be applicable to foreigners[32] In most of the cases national security laws in India justify its excessive power in the name of 'public order'.

Furthermore, The Unlawful Activities (Prevention) Act, 1967("UAPA ") is one of most misused laws in recent times. It is primary law to counter terrorism in India. But it has been seen that the law has been misused in a number of cases. UAPA was first enacted in 1967 four years after the Indian parliament brought its 16th Amendment to the Constitution in 1963. The Amendment was done after getting recommendations from the Committee on National Integration and Regionalism appointed by the National Integration Council to amend Article 19 so that the Union gets adequate power to preserve and maintain integrity and Sovereignty of the Nation. It was not a anti terror law back

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[30]'Detention Act except Sec 14 held valid', *Indian Express*, (Madras, 20 May 1950) <https://news.google.com/newspapers?id=p7w-AAAAIBAJ&sjid=OowMAAAAIBAJ&pg=1782%2C5547992> accessed 13 March 2022

[31] Maintenance of Internal Security Act,1971, No. 26, Acts of Parliament, 1971(India).

[32] *Id.,* § 3,cl.a

then as it was only concerned with sovereignty and Integirty of the Nation. But a major amendment was done In 2004, adding a chapter in the Act to punish terrorist activities. The saga of amendments continued and scope of the act was broadened from time to time. Before UAPA was amended, Terrorist and Disruptive Activities Prevention Act, 1987 (TADA) was the principle law against terrorism. It was repealed in 1995 after accusations were made by human rights organizations for its application on innocent people. After TADA was repealed another similar law Prevention of Terrorism Act, 2002 ("POTA") was introduced. POTA also acted in the similar way as previous anti terror laws. It also had provisions deceptively similar to that of TADA.

Another such draconian law that is still in force is the National Security Act, 1980 ("NSA") 'Section 3 of the NSA empowers the central or the state government if it is on the opinion that if any person acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community to detain. Also provisions of representing one in the court of law and cross examination also can't find a place in the NSA.

AFFIRMING THE RIGHT TO KILL - A MISNOMER IN A CONSTITUTIONAL DEMOCRACY

Acts that have been discussed till now, had its impact someway or the other in curtailing certain basic rights which includes right to free movement, Freedom of speech and expression etc. Going a step forward, the Parliament of India in 1967 enacted The Armed Forces Special Powers Act, 1958 ("AFSPA"). AFSPA claims its heritage to another law which was promulgated exactly five year before India got its independence. Lord Linlithgow, to suppress the Quit India Movement, enacted the Armed Forces Special Powers (Ordinance), 1942 at the time when the Quit India Movement was going on one hand and

Britain was in the middle of World War II on the other. An atmosphere of violence was in the year as Armed forces used this ordinance to control Indian protesters.

After independence, The Nehru government enacted the AFSPA which has indeed given extraordinary powers in the hands of the Armed forces. The Act at first extended to the North Eastern states and later was implemented in the hitherto Jammu and Kashmir state. Section 3 of the AFSPA confers power in the hands of the governor of the state or administrator of a Union Territory or the central government to issue notification to mark a certain area as 'disturbed area' if the deciding authority is of opinion that the condition of that area is disturbed or dangerous, which will give extraordinary powers in the hands of the Armed forces. The powers in true sense are extraordinary. It gives power to search and arrest even with reasonable suspicion. Going one step further, it empowers the forces after giving warning to use force or fire, even to causing death of a person.[33] One safeguard against the provision of arrest is that the Armed forces had to hand over the arrested person without *delay* to the nearest police station.[34] Yet, there are many cases in the North Eastern States that Armed Forces killed persons before handing over to police to cover custodial violence.[35] The blatant use of power under AFSPA is known to every state where AFSPA was extended to. AFSPA not only restricts certain facets of Article 21, it wholly negates it. Seeing the unconcealed misuse of the Act the Apex court tried to restrict the powers under this Act by ruling that a notification under Section 3 cannot be construed as giving power without any limit. It has to be revised periodically before expiration of six months from the date of last notification.[36] AFSPA has extended

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[33] The Armed Forces Special Powers Act, 1958, § 4, cl. a, No. 28, Acts of Parliament, 1958 (India)

[34] *Id.* § 4,cl. c

[35] Arunabh Saikia, 'This Assam town hasn't forgotten how the Army took away five civilians and killed them in 1994', *Scroll*, (19 Oct. 2018) <https://scroll.in/article/898739/this-assam-town-hasnt-forgotten-how-the-army-took-away-five-civilians-and-killed-them-in-1994> accessed 14 March 2022

[36] Naga People's Movement of Human Rights v. Union of India, AIR 1998 SC 431

the preventive detention power of the government to an extent that it could now kill a person with mere reasonable suspicion.

CIVIL LIBERTIES V. SECURITY LAWS - A CONTRADICTORY RELATIONSHIP

The phrase 'human rights' is commonly used in the International legal context. Various documents such as the United Nations' Universal Declaration of Human Rights, European Convention on human rights etc. have used it. Many times the term 'civil liberties' is used interchangeably with 'human rights'. Though not exactly the same, there is a large area that overlaps. It is however important to distinguish the two before we move on. It can fundamentally be distinguished in two parts. First, the difference lies in the terminology of Right and Liberty. Hohfeldian jurisprudence teaches us to break down the term 'Right' into smaller specific meanings. The characteristics of right or 'claim' is that it places duty on others. On the other hand, the correlative to liberty or 'privilege' is absence of a right in anyone (no right).[37] Thus, in the Hohfeldian structure, for example, Freedom of Expression would be a 'liberty' rather than a 'right.' Secondly, Human rights can be termed as whole which civil liberties are part of. Human rights are more fundamental in nature and include a vast range of rights. Another interpretation of the term civil liberties can be said as specific rights given by the constitution of the country of which the person is 'citizen' of. The distinction between the two concepts however is blurred and there's not much harm using it interchangeably.[38]

The concept relating to civil liberties arose out of the infamous French Revolution. France gave the world a new dimension to the rights of every free man. It enshrined the ideas of equality, liberty and fraternity. After France, many constitutions of the world enumerated their versions of *Liberty, Equality and Fraternity* in their Constitution. India too,

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[37] Suri Ratnapala, *Jurisprudence* (Cambridge 2009) 297

[38] Richard Stone, *Textbook on Civil Liberties and Human Rights* (9th Vol. Oxford University Press 2010) 5

borrowed the concept in its Constitution. Indian constitution endows civil liberties to its citizens (in some cases to all persons) in its Part III. But, a historical analysis would certainly show that one of the main areas that is susceptible to the erosion of civil liberties is the Criminal justice system of this country. Challenges that Indians faced during the time of colonial rule are still relevant till date. It includes the use of security laws, preventive detention, unconstitutional methods of interrogation etc. [39]

One thing that can be noted here is that regimes, be it the British or the independent parliament of India have enacted laws that were to be dealt with emergency situations but were in force for several years thereafter. At a time when PDA was in force another act, the Defence of India Act 1962 was enacted amidst the first national emergency when India was at war with China. It remained in force till 1967 several years after war got over. For over two years from 1969 India was without any security legislation. After MISA was enacted, it became the worst instrument of executive abuse of power in India's history. After the emergency period got over, the Janata Party in its electoral promises took up this issue of abuse of power and promised to amend the laws related to it. It restricted President's power to curtail Article 20 and 21 at the time of emergency and repealed the provision of enforcing national emergency on the ground of *internal disturbances*[40] . It further added procedural protections to Article 22(4-7)[41] and was also signed by the President[42]. Interestingly, it was never officially notified and hence legislations enabling preventive detention continued to be passed.[43]

UAPA,1967 V. ROWLATT - A COMPARATIVE ANALYSIS

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[39]A.G. Noorani, Challenges To Civil Rights Guarantees in India (Oxford University Press 2012) 6

[40] Constitution of India. Art. 359, *amended by* The Constitution (Forty-fourth Amendment) Act,1978

[41] The Constitution (Forty-fourth Amendment) Act,1978

[42] A.K. Roy v. Union of India AIR 710 1982

[43] India (n 41).

There are many similarities between the erstwhile Rowlatt Act with present national security laws in India. Not only the similarities in provisions of the Acts but then also its target group. Where the Rowlatt Act was enacted to curb revolutionary and anarchical activities, it mainly targeted the political groups and dissidents. Same is the case with present security laws in India. The dramatic increase in the cases related to 'sedition', 'Preventive detention' in India is pointing out similarities between the colonial era laws and these laws. As many as 326 sedition cases were registered under section 124A of Indian Penal Code 1860 from 2014-19.[44] But only in 141 cases where police filed a charge sheet and just six people were convicted in these six years. Conviction rate is as low as 1.84%. Also, from 2014-2020 in these seven years, 6900 UAPA cases were registered across India.[45] Among which, more than 70% were acquitted. This shows how most of the accused are innocent and they have to go through the judicial process and stay in jails only to be acquitted.

The people who were targeted under colonial laws were limited to political activists. But, the security laws in India, mostly Unlawful Activities (Prevention) Act, 1967 ("UAPA") are used against a large section of the society. It has targeted students, lawyers, teachers, journalists and other political activists.

The preamble of the Rowlatt Act says It is a supplement to the ordinary criminal law to give emergency powers so that the government can deal with anarchical and revolutionary activities. Whereas, in UAPA it says it is enacted to prevent certain unlawful activities of individuals and associations and later it was amended to add dealing with terrorist activities. The purpose behind both the acts looks similar yet in the preamble itself it is clear that the objective of UAPA is wider. It not only deals with unlawful

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[44]'326 sedition cases were filed during 2014-19' *The Hindu* (19 July 2021) https://www.thehindu.com/news/national/326-sedition-cases-were-filed-during-2014-19/article35398559.ece accessed 15 March 2022

[45]Gautam Doshi, 'In seven years, 10,552 Indians have been arrested under UAPA – but only 253 convicted', *Scroll*, (15 November 2021) <https://scroll.in/article/1010530/in-seven-years-10552-indians-have-been-arrested-under-uapa-and-253-convicted> accessed 15 March 2022

activities but also with terrorist activities. Nowhere in the Rowlatt Act the definition of 'anarchical or revolutionary activities' can be found. But it mentions in its schedule II the offenses for which the provisions of this Act can be used. That means, the anarchical or revolutionary activities do not constitute separate offense and punishment for those offenses already existed in the ordinary criminal law but it was the 'intent' that made the difference and the local government had the power to check on the intent to register a case under this Act. In UAPA, however, the definition of 'unlawful activity' is given under Section 2(o) of the Act. It includes any act of individual or association whether by words spoken or written or by any signs intent cession, disrupt sovereignty and integrity or cause disaffection against India is an unlawful activity. It is a very wide definition and directly controls freedom of speech and expression given by Article 19(1). Again, though there is no definition of terrorist activities in definition section, in Section 15 it gives a very vast understanding of what a terrorist act could be. This definition under section 15 goes beyond the general conception of terrorist activities and includes death, injury of any person, use of criminal force to disrupt public functionary, compel government of doing an act or abstain from doing etc. It has been seen that right to protest of any individual could be labelled as terrorist act under this Act. Also, a layman understanding of the term terrorism means a serious act committed in furtherance of a communal, ideological, religious or political issue. But under UAPA no such thing is mentioned.

Rowlatt on the other hand does not have such far reaching provisions. It was focused on the arrest and search of premises where the local government suspected that revolutionary activities were going on. In case of punishment, Section 16 of the Rowlatt Act says that the judges can pass any sentences provided in law for that offense. Under UAPA penalty for unlawful activity may extend for seven years with fine[46] and for terrorist act it can

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[46] The Unlawful Activities (Prevention) Act, 1967,§ 13, No. 37, Acts of Parliament, 1967 (India)

be declare death sentence or imprisonment for life.[47] It is to be noted that whoever even attempt or try to commit unlawful or terrorist act also gets same punishment. So, the same punishment is given without even committing the crime. It is a derogation of ordinary criminal jurisprudence where *actus reus* is an ingredient of a crime. Another derogation from ordinary criminal law that can be found in UAPA is the bail provision. Normally, bail is a rule, jail is an exception. But in UAPA it's the other way around. Section 43(D)(5) bars the court from giving bail to an accused if there are reasonable grounds for believing that the accusation against such person is prima facie true. This virtually makes getting bail impossible for an accused. Courts, however, have tried to interpret this provision with a transformative view so that the state can't use it to deny personal liberty in its whims and fences. The Apex court while granting bail to the accused in *Union of India v. KA Najeeb*, held that keeping a person in jail for a long time without trial is against the constitutional guarantee of speedy trial. Recently, Delhi High Court in granting bail to three student activists discussed elaborately the provisions of UAPA and granted bail to all three. Though courts are now trying to interpret the provision liberally, yet it is very hard to get a bail under UAPA and hence a serious threat to personal liberty.

Nevertheless, under the Rowlatt Act, A special court was constituted with no more than three judges. The judgment of that court was deemed final and no appeal lies against such judgements. On the other hand, offenses under UAPA are to be tried by a special court constituted under Section 11 of The National Investigation Agency Act, 2008 but in contrast to Rowlatt Act the judgments given by the special courts can be challenged on both the grounds of fact and law.[48] An overall view of both the Acts gives out two important points. Firstly, the Rowlatt Act is more concerned with the procedure by which someone engaging in revolutionary activities would be punished.

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[47] *Id.*, § 16

[48] The National Investigation Agency Act,2008,§ 21, No. 34, Acts of Parliament, 2008 (India)

UAPA is less procedural and more substantive. Secondly, the provisions of UAPA are much more stringent than that of Rowlatt Act. From arrest, detention to deciding who a 'terrorist' is, UAPA give unfettered power in the hands of the government which is much more than that of Rowlatt.

CONCLUSION

The British administration, like all other ruling powers, tried to crush these peoples' movements through different state mechanisms: using brute force, threatening and through abuse of power. These powers were handed over to the administration through different legislations enacted at the behest of the Crown. The Defence of India Act 1915 and the Anarchical and Revolutionary Crimes Act 1919 (Rowlatt Act) were two of the most misused acts that targeted the Indian Freedom fighters and used to destroy the freedom struggle. The Rowlatt Act was an extension of the Defence of India Act which gave extraordinary powers to the British government as a supplement to the ordinary criminal law provisions so that they have in hand emergency-like measures.

Not much changed after India got its independence in terms of abuse of security legislations. The independent India's constitution was drafted and the constituent assembly which was in charge of gifting Independent India's Constitution to the people incorporated provisions relating to preventive detention of persons. India is one of the few countries that have incorporated preventive detention in its constitution. Ironically, many of the leaders present in the constituent assembly were themselves at some point of time being subjected to detention without any crime being committed. Nevertheless, the incorporation of Article 22 (Cl.3-7) had its impact on the post-colonial security legislations of India. In the year 1950 itself, the Preventive Detention Act was introduced and the saga went on. Newer acts with more stringent provisions were kept on passing and many people were subjected to these harsher laws.

An inquiry made in this paper points out to the fact that security laws in India have certain sections which may violate Article 14, 19 and 21 of Indian Constitution. The Rowlatt Act as discussed, had certain provisions which were draconian in nature and it gave a wider power in the hands of the police. As this was a pre constitutional legislation and was repealed much before the Constitution of India was adopted, it didn't have to pass the test of constitutionality. But, post constitutional security legislations has to restrict itself so that it doesn't infringe fundamental rights of the concerned individuals except according to the procedure established. A close look into provisions of the erstwhile Rowlatt Act shows that it gave extraordinary powers in the hands of the police which were keen to be misused. It was based on subjective satisfaction of the executive to decide whether a person should be booked under the Act or not. The procedure to ensure fair and just trails of the accused persons were also not clearly stated in the Act. It emphasized more on 'speedy trials' and less on just and fair trails. The post constitutional security legislations also have provisions which may deprive one from their basic rights guaranteed by the Constitution of India. Subjective satisfaction of the executive to book someone under laws like UAPA and NSA can have wider implications and could be misused. For instance, the scope of s.3 of the NSA is very wide in nature. Person "acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India" could virtually be anyone as it is not defined what constitutes 'prejudicial action' under this Act. Similarly, under UAPA, the definition of 'unlawful activity' is also broad enough to be used against a very wide range of people. Moreover, them term 'terrorist act' under s.15 of the Act is also loosely defined which is susceptible to malafide use. Apart from these two Acts, the AFSPA has also remained controversial mostly because of the special powers it gives to the members of armed forces. It is truly extraordinary as it goes one step ahead and authorises the armed forces to use force to the extent of causing death of a person on mere suspicion. This makes the Act even more powerful than the much-debated Rowlatt Act.

It is always challenging to maintain the balance between security of state and personal liberties. In fact, B.R. Ambedkar, defending the inclusion of 15A to the draft constitution opined that when it comes to security of state and personal liberty it is the former one that triumphs. But, the experience of security laws in these 75 years has been proved otherwise. It is high time to repeal these existing security laws to the extent that it gives room for fundamental civil liberties and has adequate statutory provision for judicial review. Without these, it might be used to curb dissent, and justify brute use of force.

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CLEARING THE AIR: ANALYSING 10 YEARS OF THE NATIONAL GREEN TRIBUNAL

*Akrama Javed**

*and Varun Punera***

ABSTRACT

The National Green Tribunal is the sentinel for environmental protection in India, but is often criticized for its lack of autonomy, independence, and authority. This article critically analyzes the past ten years of the NGT, using both doctrinal and empirical tools to provide solutions for the issues plaguing the institution. While various studies have analysed the working of NGT based on doctrinal research tools, none of them have taken an empirical perspective which the authors of this article have undertaken. On the other hand, empirical data collected through RTI application, information available in the public domain, etc are used to study and evaluate the composition and constitution of the tribunal, the funding of the tribunal, and the efficacy of the tribunal in delivering judgments. The findings of the article show that the tribunal faces various challenges such as limited jurisdiction, low appointments, lack of funds, and over-reliance on bureaucrats. The empirical findings reveal a grim picture of the appointment and the constitution members of the tribunal which is irregular, low, biased, and not at all diverse. These findings attack the very independence of the institution and hence, the authors in the following section of the paper suggest changes that need to be adopted to overcome such problems. Foreign jurisdictions have been referred to for recognizing possible best practices that might be adopted in India to overcome these problems. The authors conclude by stating that the structural framework of the

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NGT needs to be reworked to protect and bolster the institution's autonomy, independence, and authority.

***Keywords**: National Green Tribunal, Independence, Funding, Membership, Environment*

INTRODUCTION

The National Green Tribunal (NGT), established under The National Green Tribunal Act, 2010, was branded as "a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues." Now, more than a decade later, it is safe to say that NGT has lived up to its billing. Since its inception, it has emerged as the flag bearer for numerous environmental reforms and has garnered praise from all corners of the world for its time-bound disposal of cases. However, there are aspects that need evaluation concerning the functioning of the NGT. At the forefront is its inability to reach even the minimum threshold of members required to function. At this rate, having a full tribunal with maximum possible members seems nothing more than a pipe dream. Moreover, the critics of NGT have regularly brought up arbitrary dismissal of appeals and excessive delegation through committees and other issues.

AIMS AND OBJECTIVES OF THE PAPER

In recent years, numerous Environmental Courts/Tribunals have been instituted by governments across countries. Apart from having exclusive jurisdiction to deal with environmental issues, the institutions possess other powers too. These courts/tribunals are supposed to be the champions of environmental protection. The institutions are bestowed with powers to adjudicate, overlook, regulate, recommend policies, and perform other such functions as may be necessary. However, in a developing country like India, the courts are often vulnerable to political, bureaucratic, corporate, or other similar influences on account of being a possible hindrance for the different stakeholders. In such a scenario, the powers of the institution

might be compromised. Hence, at this time the authors believe it becomes necessary to perform an overall assessment of the institution. The National Green Tribunal (hereinafter referred to as *'NGT'*) is the sentinel for environmental protection in India. The Tribunal was set up through the Act of the Parliament in 2010 to dispose of environmental issues expeditiously. Therefore, in this paper, the objective is to assess the working of the NGT for the past decade since it came into existence in 2010. The question that this paper attempts to answer is whether the NGT has autonomy, independence and authority as an institution?

Ahead of aims and objectives and the reasons for this study in the introduction (Part I), the paper is divided into six more parts (II-VII). In Part II, the history of environmental laws in India is traced with a specific focus on the evolution of the NGT. The authors have performed an empirical analysis in Part III concerning constitution and appointment, funding, and judgments delivered by the court. In Part IV and V, the achievements of the tribunals and the challenges before the Tribunal are discussed in detail respectively. Moving ahead, in Part VI, the foreign approaches to environmental courts are looked into to find best practices that may be adopted in India. Finally, Part VII ends with recommendations that are aimed at improving the status quo, followed by a conclusion.

REASONS FOR THIS STUDY

The status of India's environment today is alarming, terrifying, and in need of urgent attention. According to the *Environment Performance Index 2020*, India was ranked 168 out of 180 countries.[1] This index includes various indicators such as environmental health, climate change, pollution, sanitation, drinking water, biodiversity, etc. In the Environment Health Category, which determines a countries' adeptness to protect its

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[1] Environmental Perfomance Index, '2020 EPI Results', (*Yale Edu.*) <https://epi.yale.edu/epi-results/2020/component/epi> accessed on January 22, 2022.

citizen from environmental health risks, India was ranked 172.[2] This report which is a result of collaboration between Yale University and the World Economic Forum, reveals a suffocating and devastating state of India's environment on a global platform. And interestingly, this is not just one bad report. The concerns in the report have resonated well with the findings of the *State of India's Environment Report 2021*.[3]

Apart from these, it is also important to mention that India is home to 21 of the world's most polluted cities[4], and also that some 16.7 lakh people died in India in 2019 due to air pollution.[5] These annual rankings are like timely alarms that intend to wake our institutions up from a deep slumber of wilful ignorance, but it seems like we carelessly hit the snooze button almost every time.

Though, India ranks much better in the corresponding Climate Change index. The *Climate Change Performance Index* (India was ranked 10th out of 61 countries in 2021[6]) gives a sense of hope. Still, recent studies suggest that there is a growing threat of devastating climate change in the coming future in India which will result in the worsening state of some current issues such as extreme climates, killer heat waves, floods, disrupting rainfall patterns, droughts, melting of the glacier, increased frequency of

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[2] *Id.*

[3] Centre for Science and Environemnt, *State of India's Environment* 2021, (25th February, 2021) <https://www.cseindia.org/state-of-india-s-environment-2021-10694> accessed on January 22, 2022.

[4] IQAir, *World's most polluted cities 2020 (PM2.5)*, (*IQAir 2021)* <https://www.iqair.com/world-most-polluted-cities> accessed on January 22, 2022.

[5] The Econmic Times, 'Environment Day: Climate change, toxic air remain issues of deep concern for India, say experts' Economic Times (India June 05, 2021) <https://economictimes.indiatimes.com/news/india/environment-day-climate-change-toxic-air-remain-issues-of-deep-concern-for-india-say-experts/articleshow/83262213.cms?from=mdr> accessed on January 22, 2022, Sunita Narain, Richard Mahapatra & Snigdha Das, *State of India's Environment 2020,* A DOWN TO EARTH ANNUAL, 2020.

[6] JAN BURCK, et al., CLIMATE CHANGE PERFORMANCE INDEX 2021, (2020), available at https://ccpi.org/.

storms, etc.[7] According to a study conducted by the Indian Institute of Tropical Meteorology (Assessment of Climate Change over the Indian region by MoES), India's average temperature has increased by around 0.7 Degree Celsius during 1901-2018.[8] Moreover, the study forecasted that this temperature will rise by about 4.4 Degree Celsius between 2070 to 2099.[9] This devastating climate change, it is said, will lead to severe economic and health challenges such as adverse health complications in the population, stress on natural resources and biodiversity, lack of clean water, etc.[10]

At such times, it becomes imperative for India to inspect, analyze and overhaul the working of the NGT and similar state-level institutions apart from coming up with policy solutions to deal with the issues discussed above. The institution cannot be held solely responsible for all the environmental ills in India, but it is the sentinel that can help overcome these severe issues. And hence, this assessment is warranted.

EVOLUTION OF NGT

A cursory look at the environmental law regime in India makes it quite evident that India has extensive laws that focus on varied environmental issues. The diverse acts mentioned above cover quite specific and niche areas. These acts that would collectively fall under the *umbrella of environmental laws* were enacted over some time and normal courts enjoyed jurisdiction to

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[7] World Health Organization, *Climate Change and Health*, (*World Health Organization*) <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> accessed on January 22, 2022.

[8] R. KRISHNAN, et al., ASSESSMENT OF CLIMATE CHANGE OVER THE INDIAN REGION (2020).

[9] *Id.*

[10] Centres for Disease Control and Prevention, *Climate and Health – Regional Health Effects*, (*World Economic Forum*), <https://www.weforum.org/agenda/2021/06/impact-climate-change-global-gdp/#:~:text=The%20largest%20impact%20of%20climate,the%20Swiss%20Re%20Institute%20warns.> & <https://www.cdc.gov/climateandhealth/effects/default.htm> accessed on January 22, 2022.

deal with these matters. But over a while, a need was felt by the Supreme Court for the establishment of a specialized environmental court that could cover matters under the statutes mentioned above.

The Supreme Court of India, which, in a catena of cases including M.C Mehta vs. Union of India case in 1986[11], Indian Council for Enviro-Legal Action vs. Union of India[12], 1996 and A.P. Pollution Control Board vs. M.V. Nayudu: 1999[13] had time and again suggested and stressed upon the formation of environmental tribunals in India. Then in 2003, in the 183rd Law Commission Report, the commission drew attention to the abysmal condition of the existing Environmental Appellate Authority or Tribunal (because they existed only on paper), thereby recommending the institution of a proper court with judicial and expert members.[14]

Owing to the reasons referred to above and the recommendations by numerous institutions National Green Tribunal Act was enacted in 2010 with the objective of expedited and effective disposal of cases dealing with issues concerning environmental protection, conservation of forests, enforcing related legal rights, or proceeding for compensation or damages.[15] NGT since it is a tribunal has various features that make it different when compared to normal courts. The procedural law followed also differs and the institution is not strictly bound by the Code of Civil Procedure. The Tribunal has the authority to deal with civil cases under the seven related laws which are as follows The Water (Prevention and Control of Pollution) Act, 1974[16], The

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[11] *M.C Mehta vs. Union of India*, (1987) 1 SCC 395.
[12] *Indian Council for Enviro-Legal Action vs. Union of India*, (1996) 5 SCC 281.
[13] *A.P. Pollution Control Board vs. M.V. Nayudu*, (1999) 2 SCC 718.
[14] Law Commission of India, *A continuum on the General Clauses Act, 1897 with special reference to the admissibility and codification of external aids to interpretation of statutes*, Report No.183.
[15] Ministry of Environment and Forests (MoEF), Government of India, Notification, 5 May 2011, SO 1003 E.
[16] The Water (Prevention and Control of Pollution) Act, 1974 (Act 6 of 1974).

Water (Prevention and Control of Pollution) Cess Act, 1977[17], The Forest (Conservation) Act, 1980[18], The Air (Prevention and Control of Pollution) Act, 1981[19], The Environment (Protection) Act, 1986[20], The Public Liability Insurance Act, 1991[21] and The Biological Diversity Act, 2002[22]. It has both original and appellate jurisdiction. The Act mandates the Tribunal to uphold the principles of natural justice, sustainable development, the precautionary principle, and the polluter pays principle.[23] NGT can provide for relief, compensation, or restitution.[24] Moreover, it also has the authority to penalize in the form of imprisonment (extending to 3 years) or fine (up to Rs. 10 crores) or both.[25]

A very special feature of the NGT benches is that it comprises Expert Members in addition to Judicial Members.[26] The reason behind the same is that most of the environmental issues arising under these acts are quite interdisciplinary and some even involve the assessment of scientific data. Hence, the appointment of experts who can better evaluate, assess and understand technical and scientific issues involved in environmental law cases in traditional courts is indeed very necessary.

The Act lays down detailed criteria for appointment and the terms of service as an expert member or a judicial member in the Tribunal.[27] It also affixes the minimum number of members that should constitute the tribunal body. But never since its establishment, the Tribunal has had the required minimum

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[17] The Water (Prevention and Control of Pollution) Cess Act, 1977 (Act 36 of 1977).
[18] The Forest (Conservation) Act, 1980 (Act 69 of 1980).
[19] The Air (Prevention and Control of Pollution) Act, 1981 (Act 14 of 1981).
[20] The Environment (Protection) Act, 1986 (Act 29 of 1986).
[21] The Public Liability Insurance Act, 1991 (Act 6 of 1991).
[22] The Biological Diversity Act, 2002 (Act 18 of 2003).
[23] Editorial Board National Green Tribunal, "National Green Tribunal International Journal on Environment" [2014] Vol. 2.
[24] The National Green Tribunal Act, 2010 (Act 19 of 2010) at §15 [hereinafter as '*NGT*'].
[25] *Id.* at §26.
[26] *Id.* at §4.
[27] *Id.* at §6.

number of members in office. Apart from this, there are various other problems worthy of notice. These problems raise questions concerning the smooth and effective functioning of the Tribunal.

EMPIRICAL STUDY ON PARAMETERS CONCERNING THE TRIBUNAL

MEMBERSHIP OF THE TRIBUNAL

The NGT Act, under Section 4(1) dictates the constitution of the Tribunal.[28] It mandates that the Tribunal should consist of a full-time Chairperson, along with full-time experts and judicial members, the number of which should not be less than 10 and subject to a maximum of 20 for each category. Moreover, the provisions also state that each bench should consist of at least one Judicial and one Expert member. In this regard, there are two visible concerns that the Ministry should clear as soon as possible. Firstly, the low number of appointments and secondly the diversity in these appointments. Recently, the SC of India in the case of NGT Bar Association v. Union of India had also expressed its concern on the issue;

> *"Para 3. The Tribunal is presently functioning with the strength of only seven judges (one chairman, three judicial members, and three technical members) despite the mandate of the Act to ensure that the minimum number of members shall not be less than 10 (ten). This is an appalling situation concerning the premier institution such as National Green Tribunal, which is required to deal with environmental issues. That cannot be countenanced."*[29]

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[28] *Id.*

[29] *NGT Bar Association v. Union of India*, (2020) SCC OnLine SC 591.

i. Methodology For the Empirical Research

To analyze the membership in the Tribunal, the joining and retirement dates of all members *(from its inception till January 14th, 2022)* were noted from the official NGT website and other sources.[30] Moreover, the nature of their membership (expert or judicial) along with their previous occupation was also noted. Following this, the total membership for each month of the year has been ascertained. The methodology followed for this exercise is such that any member who occupies the position after the 15th of any month has not been counted as a member for that month. Likewise, any member who retires before the 15th of any month is not counted as a member for that month. Finally, the counting of the number of all members in office for a month signifies the strength for that month.

On collating the data for the total membership of NGT, it can be seen that from its inception in 2010 till the present, it paints quite an interesting picture. From the year 2010 to 2013, there was a gradual increase in the total membership, the number reaching a respectable 14. Between 2013 and 2017, NGT had its *'golden era'* if you may, where they consistently had members in the 14-19 bracket. Since 2018 the members have dwindled to be somewhat between 6 to 10. The highest number of members in NGT to date has been a measly 19, which occurred twice, once in late 2013 and then in early 2016.

Here, it needs to be pointed out that the minimum number of total members required, according to the NGT Act, is 20. It's a concern that not once during the 10+ years that the NGT has been around, has it touched the minimum threshold, let alone surpass it. Currently (as of January 2022), the strength lies at 11, which is slightly better than the 5 which was at the start of 2021. That number is the lowest membership NGT has ever had, previously

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[30] *National Green Tribunal*, <https://greentribunal.gov.in/> accessed on January 22, 2022.

early 2012 and early 2018 being the other noteworthy years to achieve the same feat.

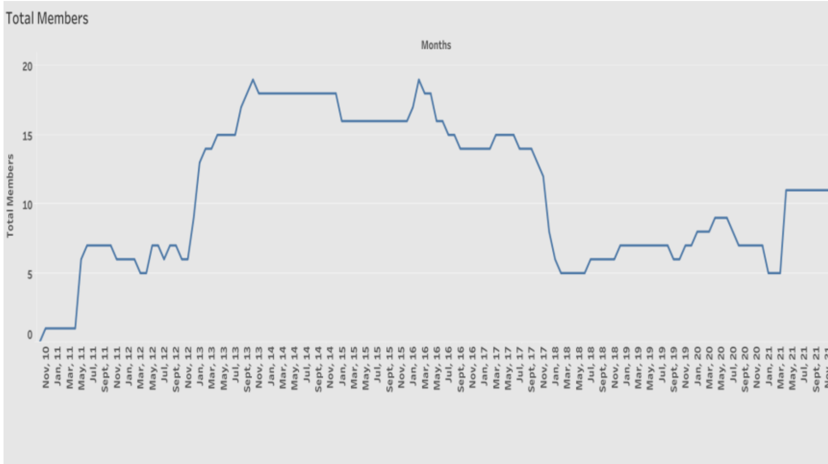

Fig 1: Total membership *(Chairperson included)* across years

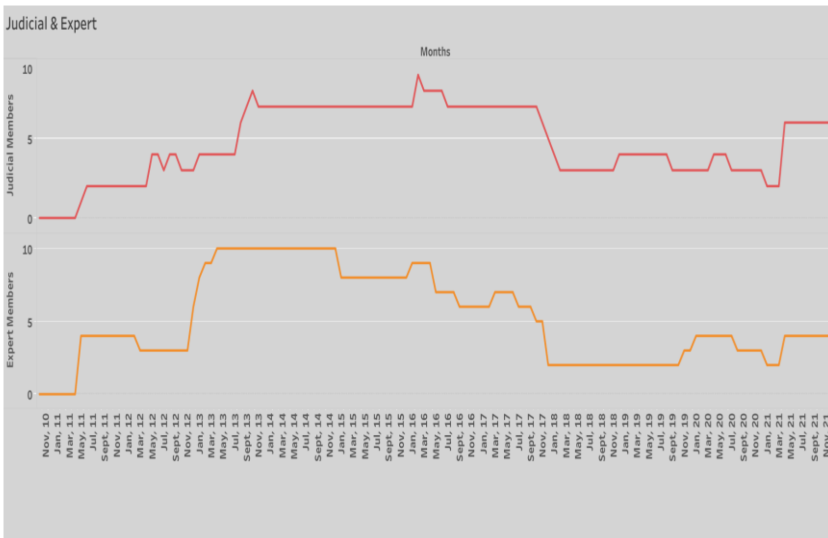

Fig 2: Number of Expert and Judicial *(Chairperson excluded)* Members across years

Getting a little specific with the data, let's take a look at the appointment of expert and judicial members separately. One thing that is to be kept in mind is the fact that the NGT Act clearly

states that there needs to be a minimum of 10 and a maximum of 20 members of both judicial and expert members each.[31]

Talking about judicial members, the first thing that strikes us is the fact that in 2016, there were 10 members, which is the highest it's ever been since 2010, but still, it barely manages to equal the minimum members as mentioned in the NGT Act. In this regard, utter negligence of the government can be seen towards the NGT. One such blot is the resignation of Justice CV Ramulu and Amit Talukdar in 2012-2013 citing reasons such as the absence of basic infrastructural facilities and human resources.[32] Hence, the high attrition rate due to neglect and the overpowering nature of the Executive is another reason that can be attributed to low memberships.[33] Some of the members are appointed for a term of 3 years or 'until further orders' even though Section 7 of the NGT act specifies that *"the chairperson, judicial members, and expert members shall be appointed for a term of five years and shall not be reappointed."*[34] The fear is that such appointments with reduced tenure which do not conform with the tenure as prescribed in the NGT Act attack the very authority of the institution and also endangers and compromises its independence.[35]

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[31] NGT, *supra* note 24, at §4.

[32] The Economic Times, 'Near-paralysed National Green Tribunal halts Posco's mega project in 2012' Economic Times (India, December 29, 2012) <https://economictimes.indiatimes.com/news/politics-and-nation/near-paralysed-national-green-tribunal-halts-poscos-mega-project-in-2012/articleshow/17805746.cms?from=mdr> accessed on January 22, 2022. [hereinafter as 'ET']

[33] Maya Ramesh, 'Nearly a Decade Old, Is the National Green Tribunal Losing its Bite', The Wire (India May 11, 2019) <https://thewire.in/environment/nearly-a-decade-old-is-the-national-green-tribunal-losing-its-bite> accessed on January 22, 2022.

[34] The Wire, 'Govt's Latest NGT Appointments Raise Conflict of Interest Question', The Wire (India September 5, 2019) <https://thewire.in/environment/govts-latest-ngt-appointments-raise-conflict-of-interest-question> accessed on January 22, 2022. [hereinafter as 'WIRE']

[35] Dheeraj Mishra, 'Against 'Strategic Interests' to Share Details on NGT Expert Members Appointment Under RTI', The Wire (India October 28, 2019) <https://science.thewire.in/politics/government/centre-refuses-to-share-

The lowest number of judicial members was present in 2012, with the number being 2, courtesy of NGT still being in its infancy. Again, during the 2014-2018 period, the number of judicial members was around the eight-figure mark, but since then it has fluctuated between 4 and 5. Presently, the number of judicial members is 7, which is the highest it's been since 2018, and hopefully this is a sign of good things to come.

Now coming to the expert members, the peak here is again 10, but what's different is the fact that from the second half of 2013 till 2015, for about one and a half years, this figure remained constant. After that, there was a gradual decline, from 2015 to 2018, where the number of members went from a solid 10 to feeble 2. For the next 2 years, this figure remained constant, and this was the lowest point as far as the expert members are concerned. Since then, the situation has barely improved. The current number lies at 4 but what needs to be seen is whether any new members are added soon or not. The major reason for these huge vacancies is the delay in appointment by the government owing to unnecessary procedural bottlenecks.[36] Even the SC has questioned the lack of Expert members in the panel of the Tribunal in the case of Hanuman Laxman Aroskar v. Union of India.[37]

Apart from the vacancies in the Tribunal, the other problem that needs to be addressed urgently is the need for diversity in these appointments. Especially for the appointments of Expert members. The very reason why the NGT Act has a provision for the position of an Expert member on each bench is that the idea was to set up a court wherein environmental

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documents-on-appointment-of-ngt-expert-members-under-rti/> accessed on January 22, 2022.

[36] Debayan Roy, 'NGT working with just 6 members instead of at least 21, zonal benches vacant for 2 yrs now' The Print (Delhi November 4, 2019) <https://theprint.in/environment/ngt-working-with-6-members-instead-of-at-least-21-zonal-benches-vacant-for-2-yrs-now/314616/> accessed on January 22, 2022. [hereinafter as 'ROY']

[37] *Hanuman Laxman Aroskar v. Union of India,* Supreme Court of India, Civil Appeal No 12251 of 2018.

questions could be handled with help of domain-specific experts.[38] But all the Expert members holding the office currently are from the Indian Foreign Service.[39] Such wasn't a practice in the past. Previous Expert members have been from different domains including academia, for instance, Prof. PC Mishra, Prof. A.R. Yousuf among others, and also individuals from the administrative services.[40] Moreover, another problem that needs to be addressed is that there is a good chance of a conflict of interest when officials from the IFS are appointed.[41] Concern was raised regarding the same when appointments of Additional Director General of Forest in the Ministry of Environment, Forests and Climate Change, Saibal Dasgupta, and Director General of Forests, Siddhanta Das were being made.[42] The issue is that most of the tasks that the latter officials would have performed in their previous roles could be challenged before the NGT. And hence, if they would be adjudicating any such matter, it would ideally be a violation of the principles of natural justice. Nevertheless, both these appointments were made. These are some of the pressing issues that undermine and threaten the autonomy of the NGT. Another unfortunate fact regarding the diversity aspect is that not even one woman has been appointed under the NGT as a member, judicial, or expert.

FUNDING OF THE NGT

The authors had filed an RTI concerning the funding of the NGT. The reply to the same has been attached as **Annexure I** in this paper. While the budget for the years 2010-2011 and 2011-

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[38] Drescher, M. et al., 'Towards Rigorous Use of Expert Knowledge in Ecological Research' (2013) 4(7) Ecosphere, pp. 1–26CrossRefGoogle Scholar, at 2.

[39] Business Line, 'The emasculation of NGT', Business Line (Delhi, March 8, 2021) <https://www.thehindubusinessline.com/business-laws/the-emasculation-of-ngt/article34016771.ece> accessed on January 22, 2022.

[40] *Id.*

[41] Ritwick Dutta, 'Woes of the National Green Tribunal: Are the recent appointments unconstitutional?', Bar and Bench (India, October 9, 2019) <https://www.barandbench.com/columns/new-appointments-national-green-tribunal-unconstitutional-judicial-independence> accessed on January 22, 2022.

[42] WIRE, *supra* note 34.

2012 were not answered in the RTI reply, the budget for the rest of the year was provided. Given below is a graphical representation of the same. From the graph, it can be seen that the budget of the body increased significantly in the initial years of its formation after which it remained the same from 2014 to 2016. After 2016, there was a gradual increase again till 2019 but in the year 2020, the budget can be seen to have been reduced significantly.[43]

It is to be noted that NGT is funded through its nodal ministry i.e., Ministry of Environment, Forest and Climate Change (hereinafter as MoEF&CC).[44] Now the circumstances are such that the MoEF&CC had itself got a reduced budget from 31 bn Rupees in 2020-2021 to 28.7 bn Rupees in 2021-2022.[45] Eventually, all of this leads to a negative-sum game. Moreover, there is also a risk as this budget might be misappropriated for business as usual and environment protection hence takes a backseat.[46]

In the opinion of the author, it is to be understood that the funding of the Tribunal needs to be in a regular fashion so that members feel respected and do not resign as has been the case in the past.[47] Increased funding will lead to less vacancy and better infrastructure. Moreover, the same will help in strengthening the confidence, authority, autonomy, and powers of the body to make

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[43] Annexure I.
[44] Arijeet Ghosh and Reshma Sekhar, 'What We Can Do to Reform the Tribunals Framework in India' The Wire (India, July 24, 2018) <https://thewire.in/law/india-national-tribunals-commission> accessed on January 22, 2022.
[45] Labanya Prakash Jena and Vijay Nirmal Gavarraju, 'Is India's national budget green enough?' Climate Policy Initiative (India, March 16, 2021) <https://www.climatepolicyinitiative.org/is-indias-national-budget-green-enough/> accessed on January 22, 2022.
[46] Amita Bhaduri and Ritika Gupta, 'Budget 2021: Environmental conservation or business as usual', India Water Portal (India, February 13, 2021) <https://www.indiawaterportal.org/articles/budget-2021-environmental-conservation-or-business-usual> accessed on January 22, 2022.
[47] ET, *supra* note 32.

the members perform their functions effectively, efficiently, and with transparency.

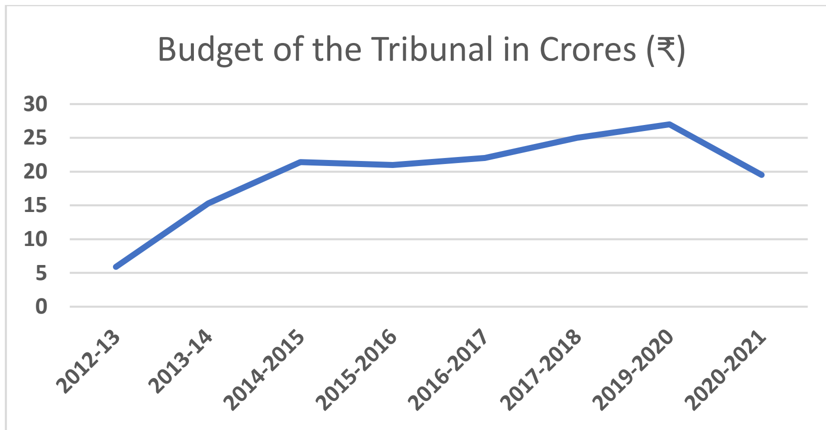

Fig 3: Budget of the Tribunal across years

CASES HANDLED/JUDGEMENT DELIVERED

NGT primarily has Original and Appellate jurisdiction. Original Jurisdiction of the NGT involves matters on the *'substantial questions'* of law. These questions include issues that affect the public at large relating to environmental matters. On the other hand, the appellate jurisdiction is exercised in the government's decision on environment and forest clearance for infrastructure projects.

The National Green Tribunal claims on its website that it has disposed of about 90% of the cases that came before it between 2010-2019, but the lawyers and other stakeholders dispute the same.[48] The allegation is also that the cases often do not even come up for hearing.[49] As per the collected by the authors shown below, the pending cases seem to be less but the total number of cases that the NGT website claims the Tribunal has

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[48] NATIONAL GREEN TRIBUNAL, *supra* note 24.
[49] DEBAYAN ROY, *supra* note 36.

dealt and disposed of do not match with the numbers that we have arrived at below.

In this segment, the authors have collected information to ascertain the number of judgments given by each bench for 10 years. This data has been collated with the help of the Judgement/Order *'Advance Search'* option available on the NGT's website. A different search was performed for each Zonal Bench from the date of inception of the Tribunal till the 19th of August 2021.[50] After this, the retrieved data is delineated to make new findings such as the type of cases before zonal benches, the number of cases that came every year, and the total number of report-awaited, pending, or disposed cases.

Given below is a graph representing the number of cases that have come up before different benches of the Tribunal. The graph depicts that the Principal Bench with 2807 cases is the most active one followed by the Southern Bench which has dealt with more than 2062 cases according to the case counting exercise with the help of retrieved data from the NGT website. Other than these two benches, the other benches fall in the same category having dealt with cases in the range of about 300-600 cases. Of these, the lowest number of cases came before the Eastern Bench with 362 cases.

[50] NGT, *supra* note 24.

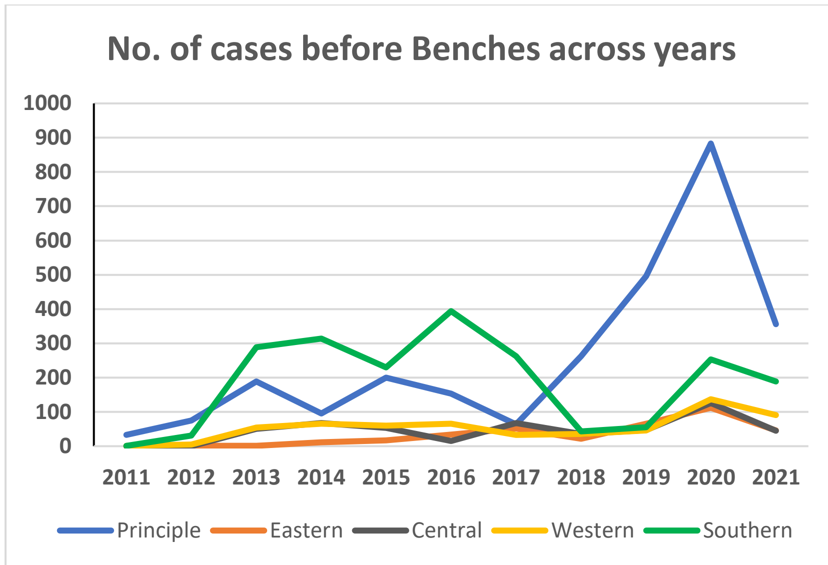

Fig 4: Number of cases before benches across years

The data analysis also revealed that the majority of the cases filed before the Tribunal are either Original Applications or Interlocutory Applications. At this point, it becomes necessary to note that these cases belong to different areas of environmental law including Environmental issues, Pollution, Coastal, Waste Management, and Mining among others.

ACHIEVEMENTS OF THE TRIBUNAL

Since the inception of the NGT, environmental regulatory authorities have become much more active, which is quite surprising as this was not the case before NGT sprung onto the scene. The industrial groups have started putting in extra efforts while preparing and submitting environmental impact assessment reports.[51] Apart from that, even environmental lawyers have found NGT easier to approach while still being cost-effective in addressing the complexities around the environment

[51] Brara, Rita, "Courting resilience: The national green tribunal, India" (2018) UNRISD Working Paper, No. 2018-4, United Nations Research Institute for Social Development (UNRISD), Geneva.

and its safeguard thereby giving birth to a culture of Environmental PIL.[52]

Because of NGT, environmental jurisprudence has been interpreted like never before.[53] Environmental law has been able to evolve past various procedural hurdles as the *'locus standi'* principle was liberalized and the liberal interpretation of laws of limitation has also been given effect so that no one is denied justice.[54] NGT has made it clear that any person can approach it and put forth their grievance for safeguarding the natural environment. NGT even allowed environmental issues to be raised by a foreign national, as it held that the nationality of the individual raising an environmental concern is not an issue.[55]

The NGT over the years has set aside approvals granted to infrastructure projects based on the violation of law and faulty studies.[56] This progressive approach towards the environmental

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[52] Sathe, S.P., "Judicial Activism in India: Transgressing Borders and Enforcing Limits" (Oxford University Press, 2002), p. 210.;
Faure, M.G. & Raja, A.V., "Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variable" (2010) Fordham Environmental Law Review 21(2) pp. 239–294.
[53] Sahu, G., "Implications of Indian Supreme Courts Innovation for Environmental Jurisprudence" (2008) 4(1) Law, Environment and Development Journal, pp. 3–19;
Vellore Citizen Welfare Forum v. *Union of India*, AIR 1996 SC 2715;
A.P. Pollution Control Board v. *Professor M.V. Nayudu*, AIR 1999 SC 812;
Narmada Bachao Andolan v. *Union of India*, AIR 2000 SC 3751.
[54] Peiris, G.L., "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" (1991) International and Comparative Law Quarterly 40(1) pp. 66–90;
M.R., "Individual Rights to Environmental Protection in India", in A.E. Boyle & M.R. Anderson (eds), Human Rights Approaches to Environmental Protection (Oxford University Press, 1998), pp. 1–23.
[55] Shalaka Shinde, 'India's 'go green' mission: National Green Tribunal, Pune sows landmark judgments' Hindustan Times (India, June 20, 2020) <https://www.hindustantimes.com/pune-news/india-s-go-green-mission-national-green-tribunal-pune-sows-landmark-judgments/story-ax1DJE9cwc34pSIMVwgjPJ.html> accessed on January 22, 2022;
Ms Betty C Alvares v. State of Goa, HC of Bombay Goa Bench, Misc. Application No. 32/2014(WZ).
[56] Susan Chacko, 'NGT refuses to allow commercial construction on Shimla railway land' Down To Earth (Delhi, September 3, 2021) <https://www.downtoearth.org.in/news/environment/ngt-refuses-to-allow-

litigations challenging irregularities in the clearance of huge investment cases has led to changes in the environmental policy resulting in improvements in the functioning of the environmental regulatory authorities.[57]

Nonetheless, despite these achievements the future of NGT today has become a worrisome question on account of what seems like a deliberate attempt on the part of the Executive to dilute the independence of the institution.

CHALLENGES BEFORE THE TRIBUNAL

LIMITED JURISDICTION

The Wildlife (Protection) Act, 1972[58] and Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006[59] are two of the most important acts to have been left out of the jurisdiction of NGT. This is a major issue as forest rights and the environment are intertwined more often than not.

Now and then we see decisions by NGT being challenged in various High Courts under Article 226 where the power of High Courts to issue certain writs is discussed. It's been widely claimed that the High Court is a constitutional body while NGT is a statutory body hence asserting the superiority of a High Court over the NGT. This comes across as one of the weaknesses of the NGT Act as there seems to be a lack of clarity about the kind of decisions that can be challenged; even though according to the

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commercial-construction-on-shimla-railway-land-78830 > accessed on January 22, 2022.

[57] Geetanjoy Sahu and Ritwick Dutta, "The Green Tribunal in India After 10 Years, From Ascendancy to Crisis" (2021) EPW Vol. 56, Issue No. 52. [hereinafter as 'GEETANJOY']

[58] The Wildlife (Protection) Act, 1972 (Act 53 of 1972).

[59] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act 2 of 2007).

NGT Act, its decision can be challenged before the Supreme Court.[60]

CRITICISM REGARDING DECISIONS OF NGT

Decisions by NGT have been challenged a lot in the past, mainly because of the consequences faced on the economic and development front. The absence of a common mechanism to determine the sort of compensation to be given has always attracted widespread criticism.[61] Additionally, decisions laid down by the NGT are not always followed by the stakeholders or the government.[62] There are instances when the decisions don't seem to be feasible to implement within a given timeframe.[63]

VACANCIES AND STRUCTURAL FRAMEWORK

As of today, NGT has just five judicial and four expert members, which is way less than the required strength of ten each. This factor coupled with limited financial resources can lead to a huge pile of pending cases, which in turn goes against the most important goals of NGT – disposal of appeals within six months.

As of right now, NGT is located only in the bigger cities of the country. Nevertheless, environmental exploitation is taking place a lot around the tribal parts of the nation.[64] Therefore, more

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[60] NGT *supra* note 24 at §22.

[61] Ravinder Singh, 'Why National Green Tribunal is not as powerful as UK Environment Agency Down to Earth (Delhi, January 20, 2021) <https://www.downtoearth.org.in/blog/environment/why-national-green-tribunal-is-not-as-powerful-as-uk-environment-agency-75130> accessed on January 22, 2022. [hereinafter as 'RAVINDER']

[62] Geetanjoy Sahu, 'Whither the National Green Tribunal' Down to Earth (India, September 23, 2019) <https://www.downtoearth.org.in/blog/environment/whither-the-national-green-tribunal--66879> accessed on January 22, 2022.

[63] Rahi Gaikwad, 'Challenges to NGT orders in courts a growing concern', The Hindu (India March 23, 2016) <https://www.thehindu.com/news/cities/mumbai/news/challenges-to-ngt-orders-in-courts-a-growing-concern/article8387736.ece> accessed on January 22, 2022.

[64] Bikash Singh, 'Opposition grows on National Green Tribunal's rat hole mining ban in Meghalaya' The Economic Times (Delhi, May 3, 2014)

branches of NGT are required to make sure that justice is delivered, with the formation of more regional branches all across the country.

DISMISSAL OF APPEALS

The past decade has shown us that the approach employed by NGT as far as appeals are concerned has been very poor.[65] NGT has been nothing but insensitive towards appeals that have been filed against arbitrary environmental clearances given by relevant authorities. NGT has rejected the need to review the authority's decision to approve infrastructure projects having severe environmental consequences.[66]

It has been a habit of NGT to dismiss appeals on the ground of limitation. This manner of dismissal of appeals drew criticism from the Supreme Court which chided NGT for this very practice without going into the merit of the case.[67]

OVER-RELIANCE ON BUREAUCRATS

Since the inception of NGT itself, the expert members have almost always been dominated by bureaucrats. This results in a lack of diversity which is of the utmost importance while dealing with complex environmental matters. Rather than having a majority of the members from the administrative services or the

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<https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/opposition-grows-on-national-green-tribunals-rat-hole-mining-ban-in-meghalaya/articleshow/34550344.cms?from=mdr> accessed on January 22, 2022.

[65] The Wire, 'In 2020, NGT Dismissed Half of All Appeals Before It Because of Delays' The Wire (India, March 2, 2021) <https://science.thewire.in/environment/ngt-dismissed-appeals-2020-technical-grounds-delay/> accessed on January 22, 2022.

[66] GEETANJOY, *supra* note 57.

[67] The Indian Express, 'Narrow reading of law: SC sets aside NGT dismissal of appeal on time bar' Indian Express (India, March 3, 2021) <https://indianexpress.com/article/cities/narrow-reading-of-law-sc-sets-aside-ngt-dismissal-of-appeal-on-time-bar-7211766/> accessed on January 22, 2022;
Sridevi Datla vs Union Of India, (2021) 5 SCC 321.

forest services, the focus should be to have more environment experts in the panel. Another problem plaguing NGT is how the expert members usually resign way before their tenure is supposed to end, in turn hampering the overall working of NGT[68].

DELEGATION THROUGH COMMITTEES

Over the years, NGT has created many external committees to look into different facets of cases, to keep an eye on the proper following of various environmental laws and rules, and to submit a report on their findings.[69] This method of delegation of the Tribunal's most important powers to committees makes it look like the NGT is revoking its jurisdiction on cases relating to the safety of the environment. The apex court of the country has repeatedly criticized the practice of Tribunals in delegating their important role to executive authorities for their examination on merits, and therefore, such excessive delegation by the NGT needs to be brought in check.[70]

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[68] GEETANJOY, *supra* note 57.

[69] Business Standard, 'NGT asks joint committee to look into illegal construction in Greater Noida' Business Standard (India, January 8, 2022) <https://www.business-standard.com/article/current-affairs/ngt-asks-joint-committee-to-look-into-illegal-construction-in-greater-noida-122010800384_1.html> accessed on January 22, 2022.

[70] Live Law, 'Adjudicatory Function Of National Green Tribunal Cannot Be Assigned To Expert Committees: Supreme Court' Live Law (Delhi, September 7, 2021) <https://www.livelaw.in/top-stories/supreme-court-national-green-tribunal-adjudicatory-function-committees-181079#:~:text=Login-,The%20Supreme%20Court%20observed%20that%20adjudicatory%20function%20of%20the%20National,Shah%20and%20Hima%20Kohli%20observed> accessed on January 22, 2022;
Sanghar Zuber Ismail v. Ministry of Environment, Forests and Climate Change and Another, 2021 SCC OnLine SC 669.

ENVIRONAMTAL COURTS ACROSS THE WORLD

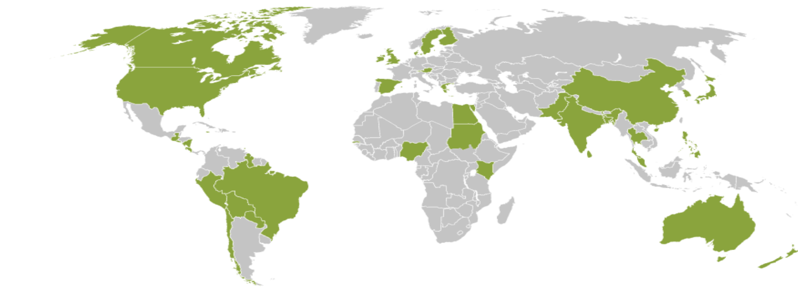

Fig 5: Countries with specialized environment tribunals

Around the world, with the growing number of cases against the environment, and people, in general, being much more aware regarding climate change, more than 40 countries are having specialized courts exclusively dealing with cases related to the environment.[71] There are an estimated more than 1200 such courts across all nations.[72] In this day and age, the reasons environmental courts are on the rise are the growing awareness regarding climate change and sustainable development, better understanding of the overlapping nature of human rights and environmental law, as well as the growing frustration with the existing judicial systems across the globe.

Taking this into account, exclusive environmental justice institutions are now functioning in several countries having their own rules and regulations to abide by. The goal of these institutions is to provide an alternate platform for cases specifically about the environment, to be brought up and be

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[71] Anna-Catherine Brigida, 'From Australia to El Salvador to Vietnam, the environment is finally getting its day in court' Down to Earth (India May 7, 2018) <https://www.downtoearth.org.in/news/environment/from-australia-to-el-salvador-to-vietnam-the-environment-is-finally-getting-its-day-in-court-60437 > accessed on January 22, 2022.

[72] Vikas Kumar, "Establishment of Green Courts in India and Their Role in Discharging Climate Justice—A Jurisprudential Analysis" (2020) US-China Law Review Vol. 17 No. 7, 300-316.

decided quickly as well as be cheaper than the prevalent justice systems.

The world's first specialized environmental court was established in Australia, named The Land and Environment Court of New South Wales. The main aim of the said court is to solve problems of sustainable development, to fight against the effects of climate change, and to protect the coastline as well as national parks.[73] Similarly in Brazil, the Court of Environment and Agrarian Issues is renowned across the world for having a various ground-breaking range of remedies which is unheard of in most environmental statutes. These include, but are not limited to – community service, restoration of environmental harm, and similar innovative sanctions as ordering big businesses to pay for environmental awareness to the general public.[74] In Japan, Environmental Dispute Coordination Commission (EDCC), stresses a settlement system based on inquiries and ADR conducted by its members rather than adversary proceedings. Conventionally their main role has been to award compensation to entities for harm done by industry pollution and development.[75]

Environment Agency (EA) of the United Kingdom was established to defend and improve the country's environment. EA is empowered to indict as set in law and moreover its decisions are insulated from government or any third-party influence.[76]

When compared to India, specialized environmental courts and tribunals in countries like New Zealand and Australia follow a model based on the principles of cost-efficiency. The idea is to regularly monitor any administrative challenges and try to

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[73] Mahendra Pal Singh, *The Indian Yearbook of Comparative Law* (Ed. 2016 (2018)).
[74] George (Rock) Pring & Catherine (Kitty) Pring, *A Guide for Policy Makers* (2016). [hereinafter as 'PRING']
[75] Shigeru Matsumoto, "A duration analysis of environmental alternative dispute resolution in Japan" (2011) Ecological Economics Volume 70 Issue 4 Pages 659-666.
[76] RAVINDER, *supra* note 61.

resolve them through effective budget allocation or increased monetary assistance as the case may be to reduce costs and increase efficiency.[77] In contrast, efforts in India have been directed towards diluting the role and function of the NGT.[78] The NGT in India today needs to adopt best practices from these courts across the world. Ideas such as the creative range of remedies as practiced in Brazil, the focus on ADR in Japan, the independent and autonomous nature of EA in the UK, the true cost efficiency aim of Environmental courts in New Zealand and Australia are of the concept that should be urgently adopted by the NGT.

RECOMMENDATIONS AND CONCLUSION

In India, there is no dearth of statutory laws, policies, guidelines, rules, notifications, etc for environmental protection, and climate change. But the lack of independence in institutions, arbitrary Executive control, minimal funding for such causes, ineffective implementation, outdated laws, etc, makes the pressing environmental challenges take a back seat.

As discussed above, the NGT is facing innumerable challenges that need urgent attention. These include the need for better infrastructure, lack of manpower, lack of autonomy and independence, arbitrary Executive control, low funding, etc. These issues need to be addressed urgently unless the institution becomes a total puppet at the hands of the governments. Given the present state of affairs, it can be evidently seen that the tribunal is failing in achieving numerous objectives it sought to achieve such as environmental justice, timely disposal of cases, and the creation of an independent body for environment protection. Though there appear a few silver linings in the NGT, such as extremely low pendency of cases, and the atmosphere of environmental litigation that it has given birth to, the low pendency of cases is something that has been disputed even

[77] PRING, *supra* note 74.
[78] GEETANJOY, *supra* note 57.

though the website of the Tribunal claims to have disposed of about 90% of the cases it has received.

To overcome such a state of affairs, a complete overhaul concerning certain practices is needed to curb the Executive influence in the NGT.[79] There is a need to have a comprehensive framework designed after giving due consideration to all the existing environment-related laws in India. Strict adherence to the Act is also the need of the hour. Moreover, best practices from across the world should be adopted. Budget allocation and cost efficiency should be two key takeaways when going through the foreign environmental tribunals that need to be taken into account. The main focus should be always to award compensation to the aggrieved and to make sure that the industries harming the environment are obligated to go out of their way to balance the scales and pay for their actions.

Going through environmental courts of different countries, there are more than a few practices that can be followed by NGT. Administrative ADR, followed in multiple countries, is an effective way in addressing environmental conflicts and to act as a different option to encourage public participation in crucial environmental decisions while avoiding expensive and lengthy processes of litigation. Innovative remedies like community service, restoration of environmental harm, and unique sanctions like big enterprises being asked to pay for environmental advertisements should be incorporated. Moreover, several environmental courts have law-trained judges as well as technically trained judges who decide cases together. This combined approach helps deliver fair and balanced judgments, which in turn helps towards the universal goal of sustainable development and environmental protection. Additionally, environmental law training can be provided at the lower judiciary

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[79] Ritwick Dutta, 'Ministerial panel questioning NGT mandate, but forgets the body is always on Centre's side' The Print (India, December 22, 2022) <https://theprint.in/opinion/ministerial-panel-questioning-ngt-mandate-but-forgets-the-body-is-always-on-centres-side/571184/> accessed on January 22, 2022.

level to make them better equipped to handle matters of the NGT. Specialized environmental prosecutors should be appointed for environmental laws and cases.

The authors believe that the suggestions made above can go a long way in curing all the problems facing the NGT. The authors here would like to assert that there is a need to give increased autonomy to NGT if we as a nation want a better future for ourselves. The worsening state of India's environment, the authors believe is be attributed to various reasons such as the lack of power in institutions responsible for such problems, the disinterest of subsequent governments in tackling these issues, a sole focus on economic development without any comprehensive strategy, etc. [80] But these issues need to be worked upon owing to the intergenerational equity principle and the public trust doctrine hanging over us. Finally, in response to the governments' utter lack of apathy regarding such institutional reforms, the author would like to conclude this paper by quoting environmental activist Wangarĩ Muta Maathai who had once opined, *"In a few decades, the relationship between the environment, resources, and conflict may seem almost as obvious as the connection we see today between human rights, democracy, and peace."*

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[80] TS Panwar, 'Earth Hour 2021: India should embrace clean tech that minimises environmental damage', Down to Earth (India March 26, 2021) <https://www.downtoearth.org.in/blog/pollution/earth-hour-2021-india-should-embrace-clean-tech-that-minimises-environmental-damage-76178> accessed on March 22, 2022.

MICROSCOPIC ANALYSIS OF IMPEDIMENTS TO THE EXERCISE OF THE RIGHT TO VOTE

*Srushti S Kekre**

ABSTRACT

The preamble recognizes that the Constitution derives its authority from the people of India. It implies that the will of the people is of supreme importance in a democratic nation like India. The vote of each citizen reflects the will of the people. Whereby, each vote is essential to elect a responsible and accountable government. Equal representation and inclusivity are quintessential for a free and fair election. However, due to multiple barriers viz. internal and external migration due to employment or educational purpose, political violence, physical disability, illness etc. it is not possible for voters to exercise their right to vote. Wherefore, it is essential to provide citizens with alternate methods of voting so that they can effectively cast vote without being physically present in their respective constituencies.

It is imperative to promote participative and inclusive elections as it indirectly determines the future of the nation. This article makes an attempt to analyze various impediments to exercise the right to vote. Further, the author will comprehensively examine the lacunae in the existing electoral framework. Lastly, the article will conclude with plausible solutions which can be adopted in the best interest of all the stakeholders.

Keywords: *Right to vote, Article 326, Inclusive Election, Democracy.*

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SUFFRAGE: A SINE QUA NON FOR DEMOCRACY

John Lewis a member of United States House of Representatives, once said that "The vote is precious. It is the most powerful non-violent tool we have in a democratic society, and we must use it."[1]Right to vote is an indispensable asset available to people in a democracy. Equal representation and indiscriminate inclusion of all communities in the electoral process helps in realizing objectives of equality, justice and liberty as enshrined in the Preamble of the Indian Constitution.[2] The right to vote has been recognized as a basic human right under Article 21 of the Universal Declaration of Human Rights[3] and Article 25 of the International Covenant on Civil and Political Rights.[4] It is an integral facet of democracy that results in the formation of an accountable government.

India is considered to be a country of diversity. It has a combination of various cultures, religions, traditions and ethnicity. Further, the complexity of gender disparity, caste system, illiteracy, poverty etc., creates a large socio-economic divide in the society. Hence, the constitution-makers realized the importance of universal adult franchise to eradicate the barriers of gender, caste, education and income from the electoral process. The Constitution adopted the principle of adult suffrage under Article 326 which makes India the largest democracy in the world.[5] However, voting is restricted for persons who are disqualified because of unsound mind, non-residence and involvement in any crime or corrupt practices.

The right to vote is a statutory right in India provided under Section 62 of the Representation of the People Act, 1951.[6]

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[1] Lynnette Nicholas, '22 Inspiring John Lewis Quotes on Voting, Education and Social Justice' (*Reader's Digest*, 1 November 2021) <https://www.rd.com/article/john-lewis-quotes/> accessed 21 May 2022.

[2] V.N. Shukla, *Constitution of India* (13th edn, Eastern Book Company 2017) 993.

[3] Universal Declaration of Human Rights 1948, art 21.

[4] International Covenant on Civil and Political Rights 1966, art 25.

[5] Constitution of India 1950, art 326.

[6] Representation of the People Act 1951, s 62.

Nevertheless, the Supreme Court in ***People's Union for Civil Liberties v. Union of India*** held that *"Even though the right to vote itself may not be a fundamental right, the expression of opinion through the final act of casting a vote is part of the fundamental right of freedom of speech and expression under Article 19(1)(a)."*[7] Free and fair election is cardinal for the effective functioning of a democratic nation. It indirectly influences the decision-making of the government which determines the growth and development of the country. Hence, it is imperative to ensure that each citizen effectively exercises his or her right to vote.

BARRIERS TO THE EXERCISE OF THE RIGHT TO VOTE

The preamble recognizes that the Constitution derives its authority from the people of India.[8] It implies that the will of the people is of supreme importance in a democratic nation like India. In the landmark judgement of ***People's Union for Civil Liberties v. Union of India****,* Justice Venkatarama Reddi observed that *"the votes reflect the will of the people."*[9] India being the largest democracy has conducted large scale elections at regular intervals. However, it has been observed over a period of years that there are many impediments in the exercise of the right to vote. Barriers to voting rights are enumerated as under:

A, MIGRATION LEADING TO EXCLUSION FROM ELECTORAL PROCESS:

Prior to 2011, Section 1910 and Section 20 of Representation of the People Act, 1950 mandated that a voter needs to be an ordinary resident of India.11 This was a major roadblock for the Non-Resident Indians (NRI) and for people who are away from their constituency for the reason of education, employment etc. Subsequently, Section 20A was incorporated by

[7] *People's Union for Civil Liberties v Union of India* [2003] 4 SCC 399.
[8] M Laxmikanth, Indian Polity (6th edn, Mc Graw Hill 2020).
[9] *People's Union for Civil Liberties v Union of India* [2003] 4 SCC 399.
[10] Representation of the People Act 1950, s 19.
[11] Representation of the People Act 1950, s 20.

the 2010 Amendment to the Representation of People Act which allowed the NRI to vote in elections. The Registration of Electoral Rules, 1960 were also amended in 2011 which provided that the address included in the Passport must be considered as the place of residence.

However, Section 20A resulted in an unreasonable and unjust limitation on the NRI's as their physical presence was needed in their respective constituencies for exercising their right to vote. There was no provision for proxy voting or postal ballot for them to exercise their right to vote. Thus, the amended provision i.e., Section 20A of the act granting the right to vote for NRI's was a toothless tiger.[12] Moreover, it violated Article 14[13] of the constitution by creating an unreasonable bias on the basis of the economic capacity of an individual. For instance, a migrant worker in abroad will not be able to spend money to come and cast vote in India, however, an affluent NRI can afford to spend the requisite money and cast his or her vote in India.

As per the report of the United Nations Population Division of the UN Department of Economic and Social Affairs titled 'International Migration 2020 Highlights' 18 million Indians are living outside India.[14] In the 2019 general elections about one lakh NRI's registered for voting out of which only about twenty-five thousand went to cast vote in their respective constituencies.[15] This indicates that the limitation on the NRI is unreasonable which is preventing them from casting vote even after the inclusion of Section 20A in the Act.

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[12] Representation of the People Act 1950, s 20A.
[13] Constitution of India 1950, art 14.
[14] R. Krishnakumar, 'U.N. migration report 2020: 18 million Indians living outside their homeland; women now comprise nearly half of all international migrants' (*Frontline*, 20 January 2021) <https://frontline.thehindu.com/dispatches/un-migration-report-2020-18-million-indians-living-outside-their-homeland-women-now-comprise-nearly-half-of-all-international-migrants/article33618390.ece> accessed 22 May 2022.
[15] Akshay Shrivastava, '25,000 of 1 lakh overseas Indians registered in e-rolls voted in LS polls: EC' *The Economic Times* (New Delhi, 20 October 2019) 3.

In Nagender Chindan and Ors. v. Union of India and Ors,16 the petitioners have highlighted the importance of exercise of the voting rights by NRI's. Subsequently, the Apex court issued notice to the Election Commission of India (ECI) to come up with alternative methods like e-voting, proxy voting etc. for greater inclusion of the population in the forthcoming elections. The ECI informed the court that the voting rights can be extended to NRI via the Electronically Transmitted Postal Ballot System (ETPBS), however, the same has not been implemented as of yet.

Furthermore, in the case of Dr. Shamsheer V.P. v. Union of India & ors17 and Naresh Kumar Hanchate & Ors. v. Union of India & Anr18 the petitioners contended that India should adopt alternate methods of voting like other jurisdictions viz. United States of America and Canada where the alternate methods of voting like proxy voting are prevalent in order to ensure that the migrated population gets the adequate opportunity to cast votes.

A similar issue arises in relation to the people who migrate to a different place within India for the purpose of education, employment etc. Thus, it is important to ensure that there is greater inclusion of the migrated population as the government elected without them is not reflecting the will of the majority.

B. DISABILITY, ILLNESS OR OLD AGE - A ROADBLOCK IN THE EXERCISE OF FRANCHISE:

Voting is a significant step in a democratic country as it mirrors the will of the people. It also indirectly influences the decision-making of the government. However, a significant part of the population fails to exercise this owing to physical disability, illness, pregnancy, hospitalization, infirmity due to age etc. The ECI has taken significant measures under the campaign *'No Voter*

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[16] *Nagender Chindam v Union of India & Election Commission of India* W.P.(C) No. 80 of [2013].
[17] *Dr. Shamsheer V.P. v Union of India & Others* W.P.(C) No. 265 of [2014].
[18] *Naresh Kumar Hanchate & Ors. v Union of India & Another* W.P.(C) No. 1010 of [2013].

to be Left Behind' aimed at ensuring greater inclusivity in elections.[19] Under this initiative, the polling booth should be curated carefully in order to cater to the needs of the aforementioned class of people. It is to be ensured that the polling booth has wheelchairs, instructions in braille language are provided for blind people, a separate ramp is provided for their convenience and the workers are trained in order to facilitate an efficient voting experience to the physically challenged people.[20] Albeit the measures under SVEEP are voter-friendly and progressive in nature but they are not implemented uniformly across the nation which is a major impediment for PWD, old citizens etc.

C. DENIAL OF VOTING TO UNDERTRIAL PRISONERS IS INIMICAL TO DEMOCRACY:

Section 62 (5) of the Representation of Peoples Act, 1951 puts restrictions on right to vote of the prisoners.[21] Further, the constitution under article 326 deters the persons involved in crime or corrupt practices from exercising their right to vote. However, this creates an obstacle for the undertrial prisoners who have not been adjudged as convicts by the court.[22] Further, the restriction does not prevent the prisoners alleged for committing grave offenses who are out on bail. In furtherance of this the National Human Rights Commission has recommended an amendment in the provision to extend voting rights to undertrial prisoners.[23] It is necessary to extend voting rights to a citizen who

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[19] Election Commission of India, 'Breaking the Barriers: Making Elections Accessible' (*SVEEP: Systematic Voters Education and Electoral Participation*, 9 August 2018) <https://ecisveep.nic.in/files/file/534-breaking-the-barriers-making-elections-accessible/> accessed 13 May 2022.

[20] ibid.

[21] Representation of Peoples Act 1951, s 62 (5).

[22] Baljeet Kaur, 'Prisoner's Right to Vote: Citizen Without a Vote in a Democracy Has No Existence' (*EPW Engage*, 25 June 2019) <https://www.epw.in/engage/article/prisoners-right-vote-citizen-without-vote> accessed 13 May 2022.

[23] National Human Rights Commission, 'Recommendations of NHRC on Detention' (*NHRC: National Human Rights Commission*, 1 December 2014) <https://nhrc.nic.in/press-release/recommendations-nhrc-detention> accessed 13 May 2022.

is not been declared guilty as not allowing such a person to cast vote is against the principle of democracy.

D. EXPLOITATION OF TRIBAL POPULATION- A COMPLEX VOTE BANK POLITICS:

There are around 705 scheduled tribes recognised in India. As per the 2011 census they account for 8.6 % of the total population.[24] Due to various issues like low literacy, less economic stability, exploitation, gender disparity etc. they are one of the most vulnerable sections of society. They fail to exercise their voting rights because of geographical isolation, illiteracy, large distance from home to the polling booth, lack of transportation facility, massive digital divide and lack of awareness.[25] Sometimes political parties lure them to increase their vote bank. This is against the spirit of free and fair election as the vote fails to reflect the choice of the people. Hence, the authorities need to create awareness amongst the tribals about the importance of elections.

E. POLITICAL VIOLENCE – SENDING SHOCKWAVES IN THE VOTERS MIND THERBY ENSUING TRAVESTY OF DEMOCRACY:

The political parties use violence to realize their political objectives. Political violence has a negative influence on the voting behaviour of people. They cease to exercise their free will in elections. There have been many instances of political violence in West Bengal since independence. Recently, there were large-scale murders and rape in Bengal as an aftermath of the election

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[24] Dr. C. Chandramouli, 'Scheduled Tribes in India: As revealed in Census 2011' (*People's Archive of Rural India*, 3 May 2013) <https://ruralindiaonline.org/en/library/resource/scheduled-tribes-in-india-as-revealed-in-census-2011/> accessed 20 May 2022.

[25] Dr. James Thomas Tucker, Jacqueline De Leon and Dr. Dan Mc Cool, 'Obstacles at Every Turn: Barriers to Political Participation Faced by Native Americans' (*Native American Rights Fund*, 3 June 2020) <https://vote.narf.org/obstacles-at-every-turn/> accessed 20 May 2022.

results.[26] It is a matter of grave concern that needs immediate attention from the authorities.

F. INSTITUTIONAL AND TECHNICAL BARRIERS:

It is necessary to ensure that the election process is conducted smoothly. There have been few instances whereby citizens could not vote because of the absence of their name in the electoral roll. The electoral roll of each constituency should be curated carefully to ensure that it contains the names of all the eligible voters. It must be ensured that the counting of votes is done accurately. Further, it should be ensured that the Electronic Voting Machines are properly functioning to avoid malfunction during elections. Hence, the officers should be vigilant during the election and technical faults should be avoided which might hinder the exercise of the right to vote of the citizens.

G. MULTIFARIOUS SOCIAL CHALLENGES CONTRIBUTING TO LESS VOTER TURNOUT:

Votes of the people are a major contributor to nation-building. In Kihoto Hollohan v. Zachillhu and Others, the Supreme Court held that "Democracy is a part of basic structure of the constitution. And free and fair elections are essential tenets of democracy."27 Hence, high voter participation and inclusion of all sections of society are of paramount importance.28 However, various factors like gender gap, illiteracy, lack of access to polling booth due to large distance and absence of transportation facility, lack of awareness etc. are major obstacles to exercise of voting rights.

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[26] Subhashish Ray and Suman Nath, 'Before CBI probe into West Bengal violence, let's define the 'post-poll' period' (*The Print*, 28 September 2021) <https://theprint.in/opinion/before-cbi-probe-into-west-bengal-violence-lets-define-the-post-poll-period/741507/> accessed 20 May 2022.

[27] *Kihoto Hollohan v Zachillhu and Ors* AIR [1993] SC 412.

[28] Sumeeta Banerjee, '**Promoting Inclusive and Participative Elections**' (*Voice.net*, 12 October 2016) <http://voicenet.in/ArticleUNDP.htm> accessed 20 May 2022.

Equal representation of all communities is the cornerstone of democracy. Elections are an effective way for citizens to exercise their will. But because of the aforementioned barriers, the participation is considerably low. Therefore, requisite electoral reforms should be introduced to ensure greater inclusivity and accountability in the electoral process.

MAKING FRANCHISE INCLUSIVE: MULTI-PRONGED APPROACH TO OVERCOME THE BARRIERS

Greater inclusion of eligible voters is necessary to ensure that the chosen government is the choice of the majority of Indian citizens. The welfare of the citizens can be ensured only if they make a rational and informed choice in the election. Few plausible solutions to eradicate barriers to right to vote includes unconventional/secondary methods of voting viz.

Proxy voting, Postal voting, Electronically Transmitted Postal Ballot System (ETPBS), etc. are a few viable alternatives that can extend the right to vote to people who don't have access to the polling booth of their constituency. As per Section 60 of the Representation of people act 1951[29] and Section 20 (8) of The Representation of the People Act, 1950 the aforementioned options can be exercised exclusively by the members of the armed forces, state police services, and other government employees who are posted abroad.[30]

Recently, the Election Commission has proposed extension of ETPBS to NRI voters. Embassies of Australia, France and America are effectively providing one of the alternatives to their citizens residing abroad. A lackadaisical approach has been observed with respect to introduction and implementation of inclusive electoral reforms in India. The ambit of these alternatives should be widened to include persons with disability, elderly population, migrants, undertrials etc. The various

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[29] **Representation of people act 1951, s 60.**

[30] Representation of the People Act 1950, s 20 (8).

alternative voting options or unconventional methods that can be extended to voters are as under:

i. Proxy Voting: It is prevalent in the United States of America and Canada. In India, an attempt was made to incorporate proxy voting in the electoral framework. However, many critics consider it to be a futile attempt at making elections inclusive as it goes against the principle of secret ballot. Moreover, there is a possibility of the proxy casting vote in favour of a candidate that he or she prefers rather than voting for the candidate chosen by the NRI.31 This shall be violative of the principle of one person one vote and will taint the democratic and transparent election procedure.

ii. Postal Ballot: Voting through the postal ballot was earlier available to the members of armed forces however, it was recent state elections it was extended to the voters belonging to the electricity department, postal department, railway, aviation etc. It is one of the viable options to promote inclusivity in elections, however, it is logistically difficult to implement postal ballot on a large scale. There is also a possibility of delay and electoral fraud in this process. India has a huge population of NRI's and internally migrant population. In addition to this, there are people who fail to vote owing to their commitments in professional space. Thus, it is a herculean task to conduct postal ballots on a large scale.32

iii. Electronically Transmitted Postal Ballot System (ETPBS): The election Commission proposed the ETPBS system of voting for the NRI's.33 As per this process the voter shall

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[31] Andrew Ellis, Carlos Navarro, Isabel Morales, Maria Gratschew and Nadja Braun, 'Voting from Abroad: The International IDEA Handbook' (*Institute of Democracy and Electoral Assistance*, 21 June 2007) <https://www.idea.int/sites/default/files/publications/voting-from-abroad-the-international-idea-handbook.pdf> accessed 24 May 2022.

[32] Robert Krimmer and Melanie Volkamer 'Challenges Posed by Distance Voting in General: Postal Voting, and in Particular eVoting' (2008) <https://www.researchgate.net/publication/262933801_Challenges_Posed_by_Distance_Voting_in_General_Postal_Voting_and_in_Particular_eVoting> accessed 6 April 2022.

[33] Deeksha Bhardwaj, 'Electronic ballot for NRI voters under consideration: CEC Sushil Chandra' *Hindustan Times* (New Delhi, 22 April 2022).

receive e-postal ballot from the Returning Officer of the respective constituency. The voter has to download it and mark his or her preference. Subsequently, it has to be sent to the Indian diplomatic mission in that country or it has to be directly sent to the Returning Officer via post. The rules regarding ETPBS are not yet certain and Election Commission is expected to soon introduce ETPBS for the NRI's. It is a double-layered secured system in which One Time Password is used to maintain secrecy and the ETPB cannot be duplicated due to the presence of unique and individual QR code on each of them. Whereby, it is one of the most viable solutions to ensure inclusivity in the elections with minimal risk of fraud or delay. In addition to NRI's the ECI should extend the benefits of ETPBS to others who are deprived of their right to vote viz. PWD, senior citizens, people suffering from illness etc.

iv. Voting via Diplomatic Missions: Voting at embassies and consulates is analogous to voting in polling stations in one's own home district or constituency. More than Fifty jurisdictions across the globe provide an option to their overseas citizen to cast vote in the diplomatic missions or embassies present in their country of residence.34 The ECI did not consider it as a viable option for extending right to vote for NRI's. The primary reason for not incorporating it in the electoral framework is that conducting elections in a foreign land needs huge administrative and financial assistance. Further, doubts may be raised on the transparency and accountability of the voting procedure. The dispute resolution after any allegation of electoral fraud will be difficult to resolve in case the elections are conducted outside the territory of India.35 Therefore, currently voting in a diplomatic mission is not suitable for India as it lacks adequate ground-level preparation, staff and financial resources for its successful implementation.

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[34] Andrew Ellis, Carlos Navarro, Isabel Morales, Maria Gratschew and Nadja Braun, 'Voting from Abroad: The International IDEA Handbook' (*Institute of Democracy and Electoral Assistance*, 21 June 2007) <https://www.idea.int/sites/default/files/publications/voting-from-abroad-the-international-idea-handbook.pdf> accessed 24 May 2022.

[35] ibid.

v. E-Voting: In today's era of information and technology, e-voting is another method of ensuring right to vote. Estonia has used the national identity card with an electrotonic chip to ensure free and fair election since 2005.36 Since then, many countries like the USA, Russia, South Korea have made elections inclusive by using blockchain technology to mitigate the possibility of any cyber threat to the integrity of the electoral process. Recently, Telangana conducted a successful voting drive through e-voting its Khannam Municipal Corporation elections.37 The ECI is exploring the viability of blockchain technology with IIT Madras to increase voter participation in the forthcoming elections.38

E-voting is one of most viable, easy and quick ways of voting. However, the authorities have been skeptical to implement it due to cyber security, issues of privacy and hacking.39 Furthermore, there is a significant threat to the secrecy and security of the votes since it is susceptible to external computer crimes such as viruses, ransomware, spyware, hacking, theft, and information stealing all of which may ruin the computer and destroy data.

Nevertheless, the various drawbacks of e-voting if addressed efficiently would result in an appropriate method for increasing voter participation. Primarily in an online voting platform, it is imperative that a voter must be properly recognized and authorized before his vote is recorded.40 This can

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[36] Kalev Aasmae, 'Online Voting: Now Estonia Teaches the World a Lesson in Electronics Election' (*ZA Net*, 8 March 2018) <https://www.zdnet.com/article/online-voting-now-estonia-teaches-the-world-a-lesson-in-electronic-elections/> accessed 20 May 2022.

[37] Koride Mahesh, 'Telangana's Dry Run of India's First Mobile E-Voting a Success' *The Times of India* (Hyderabad, 21 October 2021).

[38] Atanu Biswas, 'From EVM to Blockchain Based E-Voting?' *The New Indian Express* (New Delhi, 26 April 2021).

[39] Yash Dalvi, Shivam Jaiswal and Pawan Sharma, 'E-Voting Using Blockchain' (2021) 10 (3) IJERT <https://www.ijert.org/research/e-voting-using-blockchain-IJERTV10IS030138.pdf> accessed 20 May 2022.

[40] Andrew Ellis, Carlos Navarro, Isabel Morales, Maria Gratschew and Nadja Braun, 'Voting from Abroad: The International IDEA Handbook' (*Institute of Democracy and Electoral Assistance*, 21 June 2007)

be ensured by assuring that there is an individual code for accessing the particular website or application. Wherefore, the indication of the date of birth or birthplace or the biometrics (iris scan, fingerprint, facial recognition) of an individual can be used as a validation of identity whereby systematic fraud can be prevented. Further, the use of a digital signature may be promoted. In order to ensure that citizens are voting on a valid voting platform, they should be allowed to inspect the server certificate. Likewise, a code or sign, or symbol that may be used as an identification for validation of an authentic source should be made known to the voters.[41]

Additionally, to protect the secrecy of the ballot separate and split storage of personal data and votes should be ensured. Consequently, there should be a random blending of votes in the digital voting database thus making it difficult to identify the vote of an individual by comparing the order of casting votes and timestamp in the electronic voter list. To prevent the online voting system from virus and malware attacks it is necessary to prevent the server by way of virus scanning, firewall protection techniques and by way of code voting.

Therefore, it can be concluded that there exists is no ideal alternative method to vote, as all systems have flaws and limitations that must be rectified before those methods of voting may be lawfully implemented. Nevertheless, the government should maximize the voter turnout by providing the voter's multiple ways of casting vote by minimizing the risks associated with each of the alternatives.

VOTER-FRIENDLY AND VOTER CENTRIC ELECTORAL FRAMEWORK:

It is necessary to make the electoral ecosystem comfortable and voter-friendly. The ECI propagated this in its

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<https://www.idea.int/sites/default/files/publications/voting-from-abroad-the-international-idea-handbook.pdf> accessed 24 May 2022.

[41] ibid.

SVEEP (Systematic Voters' Education and Electoral Participation) initiative. One of the most effective ways is to collect and categorize the names of voters in the electoral roll as per their physical disability, issues of transportation etc. This is will give the officers an approximate idea of the arrangements to be made before the election.

Over the years ECI has strived to equip the polling booths with wheelchairs, separate ramp, use of braille for PWD and elderly population. The officers are sensitized to provide assistance to illiterate, PWD and elderly people.[42] Further, adequate transport facilities should be provided to those who fail to vote due to infirmity or lack of assistance. In the 2019 Lok Sabha elections, a physically challenged woman at Patan could exercise her right to vote as transportation was provided by the nodal officer. Similarly, a centenarian voter could effectively vote due to various initiatives of ECI at Odisha.[43] Therefore, all the polling booths of the country both in a rural and urban areas should adopt the aforementioned measures to make voting comfortable for the citizens.

SENSITIZATION OF MASSES AND CAPACITY BUILDING OF ALL THE STAKEHOLDERS:

Sensitization of the masses is imperative to ensure higher voter turnout. Regional language should be used to promote voting through various print and digital media to target a wider population. Special audio material should be prepared for encouraging visually impaired citizens to cast vote.[44] Local folk songs, skits, slogans and other methods should be practiced to

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[42] Election Commission of India, 'Breaking the Barriers: Making Elections Accessible' (*SVEEP: Systematic Voters Education and Electoral Participation*, 9 August 2018) <https://ecisveep.nic.in/files/file/534-breaking-the-barriers-making-elections-accessible/> accessed 20 May 2022.

[43] ibid.

[44] Election Commission of India, 'Breaking the Barriers: Making Elections Accessible' (*SVEEP: Systematic Voters Education and Electoral Participation*, 9 August 2018) <https://ecisveep.nic.in/files/file/534-breaking-the-barriers-making-elections-accessible/> accessed 20 May 2022.

encourage illiterate, women, physically challenged and the elderly to exercise the right to vote. Furthermore, capacity-building workshops and training of the officers should be organized on regular basis for holistic improvement of the election process. It will help citizens to make an informed decision.

Election indirectly determines the destiny of the nation. The leaders reflect the will of the people and are responsible for framing various laws and policies. Wherefore, mass-scale participation is the incessant need for a collaborative and inclusive election. In order to make elections more participative, multiple alternatives of voting should be provided to the citizens namely ETPBS, proxy voting, e-voting etc. Moreover, it is imperative to spread awareness and focus on capacity building to foster a voter-friendly ecosystem in India.

ANALYSIS AND CONCLUSION

Abraham Lincoln, the former American President said that "Democracy is a government of the people, by the people and for the people." This concept of democracy which establishes that government is formed by the people, remains unfulfilled in most cases as we do not have a proper and efficient system in place to facilitate inclusive voting in elections. Equal representation and inclusivity are the cornerstones of a healthy democratic institution which can only be achieved by formulating inclusive reforms and ensuring that effective implementation strategies are in place for promoting increased participation in the election.

Migrants, differently abled, sick people, undertrials and tribals are often underrepresented in the elections owing to a lack of electoral framework taking into consideration the specific needs and conditions of the diverse population of our country. In extension to this, political violence, technical and institutional faults, illiteracy, poverty etc. are other contributing factors causing systematic exclusion of the will of the people. The right to vote if exercised by the majority of the population will boost the

democratic ecosystem. It shall instil a feeling of belongingness with their country and promote a sense of national duty in them.

In today's era of technological advancement, there are multiple options for ensuring exponential growth in the voting turnout of all the elections in the country. The election commission is taking active steps to expand the right to vote to all eligible voters. The measures taken under Systematic Voters' Education and Electoral Participation is a remarkable initiative by the ECI to spread awareness and create a voter-friendly atmosphere. However, concerted efforts need to be made by introducing innovative and advanced alternative methods of voting to ensure that every eligible citizen has an access to vote irrespective of his or her physical presence in the polling booth. This can be achieved by providing alternatives like postal voting, ETPBS, proxy voting, e-voting or voting in diplomatic missions. Additionally, it should be ensured that the new methods uphold the integrity and fairness of the electoral process.

The preamble of the constitution states that every citizen shall enjoy political justice. In furthering the object of the preamble, different measures like widespread sensitization, voter education, building a voter-friendly ecosystem etc. should also be encouraged. Wherefore, to accomplish the Sustainable Development Goal 16 i.e., developing inclusive political processes to enhance the participation of citizens in the election, there needs to be effective policies and practices to eradicate various barriers to the exercise of the right to vote.

The universal adult franchise was one of the most welcoming and unprecedented features of the Indian constitution. It reflects the intention of the constitution makers who envisioned equal participation of all citizens in the electoral process. However, independent India in 75 years has failed to make the electoral process truly accessible and inclusive. Thus, a holistic approach targeting mitigation of poverty, widespread awareness, education along with electoral reforms can be an effective way to eliminate barriers to exercise of right to vote.

The Supreme Court of India is recognized as the sentinel qui vie that protects and safeguards the rights of citizens. By declaring the right to vote as a part of the basic structure, the hon'ble court has underlined the significance of free and fair elections in determining the success of democracy. The above can be achieved through the different methods contemplated in this article. Thus, it becomes incumbent on part of the government to take necessary actions towards the elimination of barriers to voting rights of various categories of citizens who are differently placed, resulting in maximum voting, thereby contributing in strengthening of the Indian democracy.

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AN EMERGENCY CALL TO PAD INDIA'S RELUCTANCE TO & THE LACUNAS OF THE HAGUE CONVENTION, 1980

*Ankita Kalita**

ABSTRACT

This research piece is based on a significant unseen contemporary issue: the transnational parental abduction of children. The entire piece is built on a theoretical research methodology that takes both verified relevant legal and non-legal materials into account. The paper moves forward chronologically in order to draw the reader's attention to the Hague Convention on the Civil Aspects of International Child Abduction, 1980, and its inclusion in the context of public international law. The article also discusses the country states' adherence to the 1980 Hague Convention, as well as the main causes of their compliance and non-compliance, and the 1980 Hague Convention's gap regions. Significantly the article gives regard to India's reluctance of being a non-signatory to the Hague Convention,1980 despite the boost in the graph of NRIs throughout the globe. India's reluctance to ratify the convention is studied via scrupulous examination of the evolution of the issue of transnational child abduction. Major emphasis is given on the possibilities to create flexible conditions for the states to comply with the Hague Convention, 1980 in a customized manner within their domestic legislation to escalate the validity of the objectivity of the Hague Convention, 1980. Conclusively through intensive research upon the major issues and hypothesis the author puts forward the suggestions for padding the lacunas of the Hague Convention, 1980 due to the realization of the

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transnational interaction leading to ever-increasing transnational child abduction.

Keywords: Transnational Migration, Domestic Violence, Customization, Grave Risk, Best Interest, Habitual Residence, Hierarchy of the Procedure of Judgement.

INTRODUCTION

International law has been evolving in various directions since the middle of the twentieth century, as the complexities of modern life have grown. The fundamental state-oriented character of world politics is reflected in international law first and foremost.[1] Conflict of laws (sometimes known as private international law) and public international law are two types of international law (usually just termed international law).[2]

The former is concerned with situations in which foreign elements intrude into specific legal systems, generating problems about the implementation of foreign laws or the function of foreign courts. Public international law oversees the operations of the many international institutions and encompasses all sorts of contacts between governments, from war to satellites. It can be universal or general, in which case the defined rules apply to all states (or almost all, depending on the nature of the regulation), or regional, in which case a group of states linked geographically or ideologically recognizes unique rules that apply only to them.[3]

The following research study analyses public international law (*hereinafter International Law*). It looks at whether states

[1] Martti Koskenniemi, *From Apology to Utopia The Structure of International Legal Argument,* Cambridge University Press. (2009)
[2] Jeremy Bentham, *An Introduction to the Principles of morals and legislation,* vol. 2, London. (1823)
[3] Fernando Lusa Bordin, *General international law in the relations between international organizations and their members,* (2019) 32, Leiden Journal of International Law, 653-673.

abide by it, and if they do, it illuminates the underlying factors that contribute to their compliance.

The research paper also focuses on how well each state complies with the 1980 Hague Convention on the Civil Aspects of International Child Abduction (*hereinafter Hague Convention*), with a specific focus on India's resistance to becoming a signatory to it. The author attempts to draw readers' attention to a current issue—international parental abduction—as the world increasingly becomes a global village and globalisation continues to advance unabatedly across the globe.[4] Due to the globalisation of the job market, there is an increase in the migration of people from diverse cultures and origins.

As a result, families made up of people from various nations and cultural backgrounds have been optimistically formed. Children (and occasionally infants) suffer when such a diversified family unit disintegrates because they are thrust into a global legal dispute between their parents. Inter-spousal child removal can be described as the most horrible situation since the children are taken by their own parents to India or another foreign country in defiance of interim or final court rulings or the aggrieved parent's parental rights. The child is transferred to a State with a different legal system, culture, and language in such a situation. The child stops communicating with the other parent and is raised in a completely new society with new customs and values.[5]

Furthermore, the Hague Convention of 1980 is witnessed with significant gap areas whose filling up would legitimately increment the validity of the very objectivity of the convention.

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[4] *Democratic Republic of the Congo v. Uganda*, [2005] ICJ Rep 168
5 Report no. 263, Law Commission of India

WHY DO STATES COMPLY WITH INTERNATIONAL LAW

The source of international law that best exemplifies the concept of consent as an agreement or dispute[6] reduced to writing is the international treaty. As a result, national consent in international law-making amounts to the source of international law, which is used as a criterion for international law's *qua* law validity.[7]

The term consent in international law demonstrates that it refers to states' free will as well as their adoption of international law.[8] The country states' permission might be expressed, as in signing or ratifying a treaty, or it can be implied, as in the absence of objection to a reservation or a developing custom. Consent can be expressed in a variety of ways, including but not limited to signature, ratification, accession, acceptance, and approval. Their exact meaning is rather ambiguous.[9] (Vienna Convention of the Law of Treaties).

The ***common-problem-solving goal*** determines whether or not nation states comply with international law.[10] Furthermore, in practise, ***compliance with international law is frequently seen through domestic legislation.***[11] When it comes to change, international law is particularly challenged. Formal mechanisms for legal change are few and far between in the international domain, and where they do exist—as in treaty amendment procedures—they often impose such high barriers that timely adaptation becomes all but impossible.[12] This is largely due to international law's consensual framework, which necessitates state permission not only for the creation but also for

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[6] J. Klabbers, The Concept of Treaty in International Law, (1996)
[7] H.L.A Hart, The Concept of Law, 226-228. (1994)
[8] France v. Turkey, 1927, PCIJ; Nicaragua v. United States, 1986 ICJ
[9] D.B. Hollis, The Oxford Guide to Treaties. (2012)
[10] S. J. Shapiro, Outcasting: Enforcement in Domestic and International Law, [2011] 121 The Yale Law Journal 252.
[11] *Id*
[12] Nico Krisch, The Dynamics of International Law Redux, [2021] 74 Current Legal Problems 269-297.

the modification of international treaty obligations, creating a significant force for the status quo once the treaty is in place.

When states pick between distinct sorts of legal responsibilities, such as *soft vs. harsh laws*, or *modify the degree of vagueness, unwritten or written*, they are choosing between different types of binding obligations.[13]

Reciprocity is one of the most important instruments for international law compliance.[14] States decide whether or not to comply using this strategy based on whether the benefits of future cooperation outweigh the costs of reciprocal non-compliance by others.[15]

Furthermore, *reputation* has long been regarded as the most discussed yet poorly understood strategic factor in international relations.[16] Violations of international law result in a bad reputation for a nation state, hence reputation is vital for compliance with international law. As a result, states must comply with international law, at least in part, in order to reap the benefits of future cooperative engagement. It's possible that a state's reputation as a law-abiding state is crucial since it signifies membership in a group of like-minded actors.[17]

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[13] A. Von Bogdandy and I. Venzke, International Judicial Lawmaking, [2012] 236 Springer Berlin Heidelberg.
[14] Andrew Guzman, How International Law Works: A Rational Choice Theory, (2008) 42-45.
[15] Anne van Aaken, Experimental Insights for International Legal Theory, [2019] 30 EUR.J. INT'L., 1252-1253.
[16] Dustin H. Tingley & Barbara F. Walter, The Effect of Repeated Play on Reputation Building: An Experimental Approach, [2011] 65 INT'L ORG., 343.
[17] Jana von Stein, The Engines of Compliance, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL RELATIONS AND INTERNATIONAL LAW: THE STATE OF THE Art. 477, 481, Jeffrey L. Dunoff and Mark A. Pollack eds., 2013)

BLUEPRINT OF THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 1980 FALLING WITHIN THE AMBIT OF INTERNATIONAL LAW

The element that binds community members together in their commitment to established ideals and standards is law. There are numerous differences between the law that governs a country (municipal law) and the law that governs states, international organisations, and, in some situations, people.[18] When international organisations interact with the outside world, that is, when they maintain relationships with third parties on an international level that are not governed by constituent instruments or other internal norms, general international law applies.[19] Again, there are no norms in international law that require the exercise of jurisdiction. This must be qualified in light of international treaties requiring a contracting party to extradite or prosecute the alleged criminal, for example.[20]

The main topics of international law are country states and other entities that are recognised as having international personality at any particular time. An entity with international personality is a subject of international law, capable of owning international rights and obligations, and capable of defending its rights through international claims.[21] There is no legislature in international law.[22] Although the United Nations General Assembly (UNGA) exists and includes delegates from all member countries, its resolutions are not legally enforceable, with the

18 J. Crawford, Brownlie's Principles of Public International Law, Oxford University Press. (9th Ed. 2019)
19 Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order of 17 October 2008, I.C.J. Reports 2008, p. 409
[20] Cindy Galway Buys, [2012], Belgium v. Senegal: The International Court of Justice Affirms that Obligation to Prosecute or Extradite Hissene Habre Under the Convention Against Torture, 16 (29), American Society of International Law.
[21] *Id*
[22] Charter of the United Nations and Statute of the International Court of Justice, 1945

exception of a few UN agencies for special reasons.[23] The International Court of Justice (ICJ) is based in The Hague, but it can only decide cases if all parties agree, and it cannot guarantee that its judgements are followed.[24] Above all, no executive or ruling body exists.[25] There is no identifiable entity in charge of establishing norms, clarifying them, or enforcing them against those who break them. It is quite difficult to arrive at a watertight definition of international law in such a situation.

There is, however, a large collection of international norms that are based on the entire unity of states' interests. Thousands of these rules are implemented every day without anyone noticing. Violations are also related to them, but they occur infrequently.[26] The provision in Article 103 of the UN Charter that, in the event of a dispute between the members' responsibilities under the present charter and their commitments under any other international agreement, the members' obligations under the present charter will take precedence.[27]

A variety of daily instances are used to catch the reader's attention. When there is an outbreak in a country, only those who have been vaccinated with the yellow WHO certificate are allowed to enter.[28] International law, on the other hand, might be global or regional. There are conventions in the sphere of Human Rights Law that are difficult to classify as universally applicable international law.[29] Therefore, it is unblemished to conclude that

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[23]Gabriella Rosner Lande, The Effect of the Resolutions of the United Nations General Assembly, [1996] 19 (1) World Politics, 83-105.
[24] Statute of the International Court of Justice
[25] P. Sands and P. Klein, Bowett's Law of International Institutions, London. (5th Ed. 2001)
[26] Peter Kovacs, Professor Emeritus Hanna Brokor-Szego on Everyday International Law, [2006] 3 Miskolc J. INT'l L. 56.
[27] Hans Corell, Towards an Effective United Nations, [2006] 3 Miskolc J. INT'l L. 38.
[28] Republic v. Ministry of Health and Others, 2017 SCC OnLine Ken 3739
[29] Lovish Garg, The Legality of Right to be Forgotten as a Fundamental Human Right in International Law, [2016] 48, PL.

international conventions like that of the Hague Convention, 1980 is blanketed within the ambit of international law.

RATIONALITY BEHIND A FEW SIGNATORIES TO THE HAGUE CONVENTION, 1980

When a parent takes his or her child over international borders to a jurisdiction other than his or her own, this is known as international parental child abduction. *The Hague Convention, 1980* is a key endeavour to avoid the possibility of a protracted lawsuit for custody-related decisions due to the fact that private international law norms differ from country to country[30] having various jurisdictions, and ensuring that the children are returned to their usual household. Transnational families have emerged as a result of globalization and increased transnational interaction, and they are more subject to jurisdictions outside of their ethnicity for reasons such as judicial separation and divorce, maintenance, and child custody, among others.[31] The making of custody orders in respect to children in foreign courts under a law that is not necessarily understood by the parties, when there are issues about enforcement of such judgments in a different jurisdiction, is an undesirable result of litigation involving transnational families.[32] When there are difficulties with enforcement of such judgments in a different jurisdiction, making custody orders in foreign courts under a statute that is not necessarily understood by the parties is an undesired result of litigation involving transnational families.[33]

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[30] Convention on the Civil Aspects of International Child Abduction, 25the October, 1980

[31] Ranbir Singh v. Satinder Kaur Mann, (2006) 3 PLR 571

[32] *In re* C another (children) [2017] EWCA Civ 980

[33] Stellina Jolly and Sai Ramani Garimella, [2018], International Parental Child Abduction and India-Attempting Engagement with the Hague Convention, Vol 19 (1), Australian Journal of Asian Law.

The Hague Convention has been signed by 92 countries and one regional economic integration organisation; India, on the other hand, has not ratified the Convention.[34]

This is due to the lack of comprehensive law that is updated to meet the needs of modern global families, as well as non-accession to the convention, international parental child abduction cases are decided in a haphazard and inconsistent manner.[35]

India's reluctance stems from a variety of issues, but one of the most significant is that they prefer to focus on the rights of Indian women rather than looking at the issue from a child's standpoint.[36]

The Indian government attempted, but failed, to rectify this legal void by passing the *Protection of Children (Inter-country Removal and Retention) Bill, 2016*, which has since expired.[37] The Indian government believes that making child removal a crime will cause more harm than good and that there is no practical need for it in the Indian legal system.

Furthermore, the parent convention provides little direction on how to show that a kid opposes to return, as well as how children should be heard in such processes in general. These critical problems are left to each state parties' policies and practises, resulting in significant global variety in how, when, and by whom children's objections and ideas are heard.[38]

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[34] Hague Conference on Private International Law, 'Members and Parties', <https://www.hcch.net/en/home> accessed 12th July, 2022

[35] *Supra* note 35

[36] S. Jolly, International parental child abduction: an explorative analysis of legal standards and judicial interpretation in India, [2017] 31, International Journal of Law, Policy and The Family, 20–40.

[37] *Supra* note 6; The Protection of Children (Inter-Country Removal and Retention) Bill, 2016. (Government of India)

[38] N.V. Lowe and V. Stephens, Global trends in the operation of the 1980 Hague Abduction Convention: the 2015 statistics, [2018] 52 (2), Family Law Quarterly, 349-384.

MYSTERY BEHIND INDIA'S RELUCTANCE TO RATIFY THE HAGUE CONVENTION, 1980

Before answering the aforementioned question, the author would like to take a moment to briefly discuss how the problem of inter-parental child abduction in India has evolved through time.

In the case of *Seema Kapoor & Anr. v. Deepak Kapoor & Ors., 2017*[39], the high court of Punjab and Haryana referred the case to the Law Commission of India, which will investigate the various problems associated with inter-country, inter-parental child removal among families and then determine whether recommendations should be made for enacting an appropriate law in order to sign the Hague Convention on child abduction. This case witnessed the failure the Punjab and Haryana High Court for the restoration of the custody of the minor to the court, compelling to forward the dispute to the Law Commission of India and the Ministry of Women and Child Development, pointing out the ease with which a child ca be removed from India for the want of any law on 'child removal'.

The Hague Convention, which went into effect on 1st December 1983, was examined by the Law Commission of India, which discovered that it had already done so. On March 30, 2009, the Commission submitted its 218th report, titled *Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction, 1980*, recommending that India sign it.[40] *The Civil Aspects of International Child Abduction Bill, 2016,* which tried to bring the Bill into compliance with the Hague Convention, 1980, was discovered by the Law Commission while investigating

[39] Seema Kapoor And Anr. v. Deepak Kapoor & Ors., 2016 SCC ONLINE P&H 1225.

[40] *Supra* note 46

these concerns. This draught was posted on the Ministry of Women and Child Development's website.[41]

However, the Bill was not passed into law, and despite repeated encouragement, it currently appears that India is unlikely to join the Convention as a party due to its reservations about how domestic violence victims will be treated there.[42]

Commentators have always been concerned about ***domestic violence*** and how the Convention treats it. The shift in the profile of abductors from non-custodial father abductors to primary and joint primary caregiver mothers has been an important factor in this[43] Some of whom abduct to get away from spousal abuse or violence. The Convention makes no mention of domestic violence as a specific "defence" or exclusion from the requirement to relinquish the child.[44] It was believed that signing the 1980 Convention would make it more difficult to protect Indian women and children from difficult living conditions, and the vast majority of abductors have been mothers who have experienced domestic violence in NRI (non-resident Indian) marriages. This main concern, along with a number of other factors, prevented India from becoming a signatory to the 1980 Convention.[45]

However, it is debatable if delaying the child's return to the state where they normally dwell encourages abduction or whether women who experience domestic violence will still go to any lengths to protect their families even if they believe their

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[41] Ministry of Women and Child Development, Information regarding International Child Abduction Bill 2016, <https://wcd.nic.in/node/758860> accessed 12th July, 2022

[42] Dr. Marilyn Freeman, [2020], Domestic Violence and Child Participation: Contemporary Challenges for the 1980 Hague Child Abduction Convention, Vol. 42, Journal of Social Welfare and Family Law, 154-175.

[43] *Id*

[44] M.H. Weiner, [2000], International child abduction and the escape from domestic violence, Vol. 69, Fordham law review, 593-706.

[45] S. Jolly, International parental child abduction: an explorative analysis of legal standards and judicial interpretation in India, [2017] 31, International Journal of Law, Policy and The Family, 20–40.

children will eventually be returned. Accordingly, women who are worried about protecting their lives are more concerned with maintaining their physical safety than with the legal ramifications of the abduction. If, by chance, women choose to stay in an abusive relationship due to the Convention, the Convention's primary goal of protecting children will be compromised.[46]

Unfortunately, neither the Convention nor the Bill addressed scenarios where a parent is exposed to 'grave risk,' and the provisions could only be used to protect women by defining 'domestic violence' and other violence against a parent as exposing the child to 'grave risk.'[47]

Therefore, it is abundantly evident that if nothing was done, there was a very serious chance that certain countries would completely withdraw from the Convention. In some states, there was and is still a very real risk that primary caregiver nationals were being forced to decide between taking the child back to an environment where they would face a real risk of abuse or violence and refusing to take the child back so that they would have to move to a new environment alone. There was a genuine risk of injury to the child in both scenarios.[48]

AUTHOR'S ANALYSIS OF THE MYSTERY BEHIND INDIA'S RELUCTANCE TO SIGN THE HAGUE CONVENTION, 1980 AND A WAY-FORWARD

Everybody has the right to live their lives as they see fit. *Every person*, as used by the author, plainly denotes that everyone's life involves personal decisions, from infancy to old age. Children are no-exception to the afore-mentioned statement.

The Hague Convention's primary goal is to ensure a swift process for the return of a child who has been wrongfully

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[46] *Supra* note 44
[47] *Supra* note 45
[48] B. Hale, Taking flight - domestic violence and child abduction. [2017] 70 (1), Current Legal Problems, 3-16

transferred to or retained in a contracting state to that child's country of habitual residence.[49]

The treaty does not, however, identify the conditions that must be met for a child to be wrongfully taken from one of the parents and placed in the custody of another country, nor does it mention the specifications for determining a person's habitual residence in terms of location.

Despite the grounds for the improper removal of a child being included in Articles 3, Article 4, and Article 5 of the convention, it is exclusively centered on the interests and rights of the legal parents or the person with custody of the child. The author wants to emphasize that if there is a convention with an objectivity for the child's best interests, each and every clause in the article must adhere to all necessary requirements on the child's behalf.

Additionally, the convention uses the term 'habitual residence' to support each sentence. Any convention that aims a desirable mental and physical growth of one particular age group must include language like 'safe and secured residence of an individual' in its articles. The inclusion of such sentences is in everyone's best interest.

Despite the convention being written to protect the interests of the abducted child, it is divided into chapters that indicate the convention's scope, the process for returning the abducted child, the functions of the central authorities, and the process for filing applications related to abduction in the contracting states. None of the articles emphasises on taking into account the child's personal interests, nor does the convention mention any clause in which the child has the right to retain counsel to help them make decisions that would promote their

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[49] *Supra* note 31

long-term desired physical and mental development.[50] (*Refer Articles 7, 25 and 26 of the Hague Convention*)

Due to the general shortcoming of the Hague Convention of 1980, countries like India, where the youth and child population are among the best human resources for genuine development, have a very good reason for their reluctance.

Amendments to the parent legislation are the best solution for addressing the gaps in international conventions and treaties like the Hague convention, whose adoption by every country is crucial in the era of rapid development and unabating globalization.

The major goal of each article must be adopted in light of the nations' interests and needs before the newly contracting nations can become parties to the convention. The child's best interests must, nevertheless, be the main consideration when putting the nation's unique parent legislation drafting into practice.

Despite the fact that the *Convention on the Rights of the Child, 1989*, and *The Juvenile Justice (Care and Protection of Children) Act, 2000*, both mention the definition of best interests of a child, the fundamental index of the measurement of the best interests of a child must be based on the balance between the historical facts of a child's growth, the upcoming desired future, which is ultimately the outcome of a pleasant balance of the past and the present facts and circumstances of a child's lifetime.

SUGGESTIONS TO RECTIFY THE ISSUES WITH THE HAGUE CONVENTION, 1980

Therefore, the hierarchical flowchart that India and the other non-signatories to the Hague Convention that can be

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[50] *Id*

followed to receive the call of exigency to resolve the dilemmatic issue on child abduction is as follows:

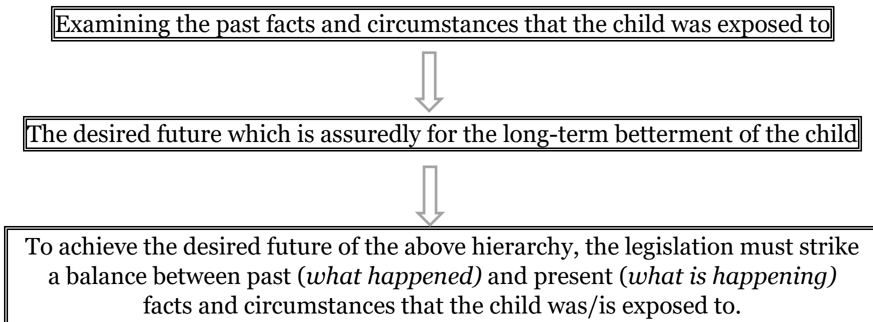

Fig. 1

As a result, the hierarchy ultimately agrees to pay attention to the circumstances and facts that the child was or is subject to as well as the desirable future that the law intends to create.

The following example will help to illustrate this:

> *A daughter named "A" who is 8 years old is regularly exposed to domestic violence that her mother "B" experiences from her father "C." (father and mother being a permanent resident of a contracting state of the Hague Convention). Her father, however, never denied her any of the comforts necessary for a child of her age to have a comfortable and opulent existence. She is given a decent education and is allowed to participate in other extracurricular activities. Without mutually agreeing with her father, the girl's mother abducted her one day and transported her to another Hague Convention contracting state. As a result, the mother was facing child abduction charges on a suit charged by her husband. The case was decided in the father's favour*

of the return of the child's custody and the mother on her unfortunate return, she becomes a prey to severe domestic violence that she was already subjected to as it is a common impact where a woman being earlier subjected to domestic violence flee away for her protection and the protection of the child's future interest. Therefore, in the instance mentioned above, daughter "A," who is a frequent observer, may grow up as a youngster accepting a woman's submissive status to her husband as a target of routine domestic violence or an extreme hater of men.

The 1980 Hague Convention's articles must therefore be studied in conjunction with the stated hierarchy of the above (Fig. 1) and the draughts of the customized provisions of the Hague Convention's contracting states, rather than being examined clause by clause and used to decide a case. As a result, the Hague Convention's goal of promoting the best interests of children is achieved.

CONCLUSION

Despite the shortcomings of international conventions, countries such as Switzerland and Japan have tailored specific elements of the parent treaty into their own legislation.[51] There is no specific defence or exception to the need to return a child who has been subjected to domestic violence in the convention.[52] To provide better protection against unjust treatment of domestic-violence victims, the Hague Convention has applauded the trend toward more favourable treatment of such victims, when Hague Abduction Convention Contracting States have modified parental

[51] M.H. Weiner, Intolerable situations and counsel for children: following Switzerland's example in Hague Abduction cases, [2008] 58 (2), American University Law Review, 335-403.
[52] M.H. Weiner, Navigating the road between uniformity and progress: the need for purposive analysis of the Hague Convention on the Civil Aspects of International Child Abduction, [2002] XXXIII, Columbia Human Rights Law Review, 275.

provisions within their laws.[53] An abducting mother must seek to rely on Article 13 (1) (b) of the Convention to prevent repatriation of the child to the State of habitual residence based on the danger of harm to the child created by the violence done against her, which is the more usual method.[54] If the grave risk element is not met, the child will be ordered to return to his or her normal abode, and the mother will be forced to choose between returning with her child and risking more harm, or accepting that the child will return without her. These excruciating decisions are necessitated by the increased risk that domestic violence victims confront following separation, as simply physical proximity between an abuser and his victim raises the possibility of violence.

With respect to the case cited-above on the failure of Indian courts to resolve the dispute of 'child removal'[55] and the absence of any law on 'child removal' despite India's capability of legislating law on 'child removal' in compliance with the Hague Convetion,1980 if not sign it,[56] signifies India's disregard for the needs of the present and future generations, including the children of today.

Moreover, the Hague Convention, 1980, for example, needs to be amended in order to strike a balance between nations' situations and the Convention's goals while also giving the country a flexible legal framework. As a result, the author concludes the research paper with this statement: 'As the world witnesses unstoppable transboundary migration of family units due to the globalization of the job market and several other fields, the International Conventions like the Hague Convention of 1980 must be amended with a motive to strike a balance between nation's scenario and the objective behind the Convention.

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[53] S. Yamaguchi and T. Lindhorst, Domestic Violence and the implementation of the Hague Convention on the Civil Aspects of International Child Abduction: Japan and U.S. Policy, [2016] 17(4), Journal of International Women's Studies, 16-31.
[54] *Supra* note 31
[55] *Supra* note 40
[56] *Supra* note 42

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BALANCING THE RELATIONSHIP BETWEEN INDIAN DEMOCRACY AND FREEDOM OF INTERNET: COMPARATIVE STUDY OF LAWS WITHIN AND BEYOND INDIAN JURISDICTION

Pravertna Sulakshya[*]

ABSTRACT

In both domestic and overseas legal systems, there is an ambiguity on the matter of internet rights. Due to the obvious advancement of technology and the critical impact of the internet in present era, a firm decision must be made to produce a framework for regulatory oversight, administration, and restraint. Unless identified, the Internet remains an unspecified space where the government has unrestricted authority to impose limitations. Indian democracy is the largest global democracy, and it also has a rapidly developing IT sector. It is critical for India to strike a balance between the two, and there have been incidences where the judiciary has been questioned such concerns. As a result, determining legal character is vital in order to avoid ambiguity and restrictions on what might otherwise be shielded under the constitution. Even if there is a shielded blanket, it is still hidden and must be revealed.

The internet as a mode of interaction, representation, and a means of revenue does seem to plunge well within the purview of fundamental freedoms, but how far the claim to represent can be enlarged to include it, and what the requirements of such recognition might be, is a point of contention. This paper attempts to offer a prudent approach to reconciling principles of democracy and the right to internet freedom through a lawful analysis of the right to free expression

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and the internet, as well as a comparative evaluation of multiple jurisdictions.

Keywords: *technology, internet, restraint, freedoms, restrictions, etc.*

UNDERSTANDING THE ROLE AND NECESSITY OF FREEDOM OF SPEECH AND EXPRESSION IN DEMOCRACY

Human rights and dignity are naturally endowed to every human being.[1] They are established and recognised regardless of race, language, caste, sex, region, or religion.[2] When a socio-political framework is created to preserve and promote these rights by the people's will being the source of its legitimacy, democracy is born. Democracy functions as a governance system where the government's authority comes from practical realisation of human rights.[3] It allows citizens to participate in political processes, elect and bring their representatives to power, and check on the exercise of the power.[4] The rule of law is established through the legislature, executive, and the judiciary,[5] Empowering individuals and communities to engage in decisions that affect their fundamental human, civil, social, economic, cultural, and political rights.

Democracy thus signifies freedom: the freedom to participate, choose, and rule. It acts like a vast sky, under which a self-ruling society functions. However, this democratic sky shall only be brightened with the sun— a source of light and hopes— which is often considered the “freedom of thought, speech, and

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[1] Universal Declaration of Human Rights [1948] art 1.
[2] ibid art 2.
[3] Massimo Tommasoli, ‘Rule of Law and Democracy: Addressing the Gap Between Policies and Practices’ (*United Nations*, 31 December 2012) <https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices> accessed 14 April 2022.
[4] Randall G. Holcombe, ‘Constitutions and Democracy’ (2001) 7 Économie Publique 43, 45-48.
[5] ibid.

expression."[6] The sky becomes dark when the clouds prevent the sun to shine; similarly, democracy begins to lose its vigour and purpose, when freedom of speech is suppressed.

Freedom of speech and expression is pivotal for a person's ability to convey beliefs, convictions, and opinions. It requires healthy representation and opportunity for persuasion amid conflicting views of others.[7] Such liberty is necessary for self-fulfilment of an individual, contribution to existing debates and knowledge, political discourse and scholarly endeavours — all of which are essential in a democratic society. Through a long history of Athens and Sparta,[8] leading to the formation of Magna Carta[9] in the thirteenth century, further passing through renaissance, the French Revolution, American independence, and the Indian Satyagraha movement[10]— it has been judiciously recognised as an unfettered right. Even in the present-day laws, it is enshrined as a cornerstone in the ECHR,[11] ACHPR,[12] ICCPR,[13] and the ACHR.[14] Even from a domestic standpoint, Article 19(1)(a) of the Indian Constitution[15] provides freedom of speech and expression as a fundamental right to the Indian citizens. A democratic way of life is thus derived from the freedom of speech

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[6] IACHR, 'Annual Report of the Inter-American Commission on Human Rights' (30 December 2009) <http://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%20Anual%202009%202%20ENG.pdf> accessed 14 April 2022.

[7] Dr. Sreenivasulu, Somashekarappa, 'Freedom of Speech & Expression and the Issues of Intellectual Property and Copyright' (*Manupatra*, 2009) <http://manupatra.com/roundup/370/articles/freedom%20of%20speech.pdf > accessed 14 April 2022.

[8] Sears Matthew, 'Thucydides, Rousseau, and Forced Freedom: Brasidas' Speech at Acanthus' (2015) 69 Pheonix 242.

[9] Nazir Afzal, 'Magna Carta and the Universal Declaration of Human Rights' (*Good of All*, 2014) <http://goodofall.org/2014/06/magna-carta-and-udhr/#.YZJpHL1Bw1s> accessed 14 April 2022.

[10] *Matthew* (n 9).

[11] European Convention on Human Rights 1953, art 10.

[12] The African Charter on Human and People's Rights 1986, art 9.

[13] International Covenant on Civil and Political Rights 1976, art 19.

[14] American Convention on Human Rights 1978, art 13.

[15] The Constitution of India 1950, art 19, cl 1(a).

and expression, and requires continuous efforts to preserve its demeanour.

ANALYSING THE FREEDOM OF INTERNET VIS-À-VIS FREEDOM OF SPEECH AND EXPRESSION

The world is not homogeneous; on the contrary, it comprises many countries, bringing together all of their histories, cultures, and individuals who have shaped their communities under one cover. Even though many of them have similar political systems, religions, and languages, no two countries are identical in every way.[16]

Across the span of years, preservation of cultural, ethnic, and linguistic diversity has been a paramount goal for different communities. People have the opportunity to express their thoughts, but more significantly, to compare, because of this diversity. Countries were also allowed to enhance their systems and perhaps cause beneficial changes in other countries due to this diversity. Therefore, any nation that supports or functions under democratic principles is likely to find tools for opening a passage of debates and conversations unbound by territorial borders.

Sociological theories suggest that for the sharing the material or non-material culture, technology serves as a crucial tool.[17] Internet has rose as one of the most essential platform to reach masses, allowing convergence in the shape of smart mobile phone instruments, where we can read newspapers, watch news broadcasts, listen to podcasts, create our web portal to share news or opinions, communicate audios and videos, and so on.

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[16] Nevena Ružić, 'Freedom of Expression on the Internet' (*L-Università tà Malta*, 2007) <https://www.diplomacy.edu/resource/freedom-of-expression-on-the-internet/> accessed 14 April 2022.
[17] James M. Henslin, *Essentials of Sociology: A Down-to-Earth Approach* (11th edn, Pearson 2015) 38-63.

ARPANET 7, a US military initiative launched in 1969, gave birth to the Internet.[18] The second stage of development occurred in the 1970s, when universities and research centres across the country were granted access. Over the previous ten years, the introduction of the World Wide Web revolutionized Internet access for the general public[19]. India was one of the last countries to join the Internet revolution. The first "dial-up e-mail network" was established in 1987.[20] "Commercial Internet connections" became available in 1995.[21] Following it, India saw a technological revolution.

Currently, India is a home to more than 1.3 billion people,[22] spread across 28 States with diverse percentage distributed in rural and urban areas. Its demography is rich in flavours of different cultures, religions, and languages. Known to be one of the largest democracies in the world,[23] India has successfully established the sociological theory by being home to the second-highest internet users[24] in the world.

Professor Acharyulu attributes this inclination towards Internet and electronic media due to the vast majority being illiterate,[25] thereby finding the audio-visual interface more easy

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[18] Giovanni Navarria, 'How the Internet was born: from the ARPANET to the Internet' (*The Conversation*, 3 November 2016) <https://theconversation.com/how-the-internet-was-born-from-the-arpanet-to-the-internet-68072> accessed 14 April 2022.
[19] ibid.
[20] Farzad Damania, 'The Internet: Equalizer of Freedom of Speech? A Discussion on Freedom of Speech on The Internet in The United States And India' (2002) 12 Ind. Int'l & Comp. L. Rev. 243, 245-246.
[21] ibid.
[22] 'Population, total - India | Data' (*Worldbank.org*, 2019) <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=IN> accessed 14 April 2022.
[23] 'India: the biggest democracy in the world' (*European Parliament*, 2014) <https://www.europarl.europa.eu/RegData/etudes/ATAG/2014/538956/EPRS_ATA(2014)538956_REV1_EN.pdf> accessed 14 April 2022.
[24] Joseph Johnson, 'Countries with the highest number of internet users Q1 2021' (*Statista*, 19 July 2021) <https://www.statista.com/statistics/262966/number-of-internet-users-in-selected-countries/> accessed 15 April 2022.
[25] Prof. Madabhushi Sridhar Acharyulu, 'Electronic Media and Regulatory Law' (*NALSAR*, 2019)

and customisable to use. Unlike any other mode of communication before it, the Internet has enabled people to interact immediately and at a low cost and has had a significant impact on journalism and the way we exchange and acquire ideas and information. American writer Walter Lippman claimed that the mass media contributes substantially in forming public opinion, in his book Public Opinion (1922). *"There must be a barrier between the audience and the event,"*[26] Lippman says, for debates to develop. The Internet eliminates many of these barriers by providing exceptional horizontal communication, creating more objective public viewpoints, more accessible public conversation, and a less pliable electorate.[27] It makes it easier for messages to get out, acts as a new means for suppressed media, allows minority to participate, and provides access to wide array of public information to new laws and decision making. In recent decades, an irrefutable relation between democracy and the Internet has resurfaced, making it clear that *"the entire edifice of democracy rests on people, its they who wield power and not the State, it only serves their interests."*[28]

CONTEMPORARY BARRIERS TO FREEDOM OF INTERNET

The Internet was initially designed for research,[29] Moreover, the topologies were designed for openness. However, social media arrived on the scene, the government regulation entered into the frame.

The term "social media" is not a neophyte in 2021. On the contrary, it is ingrained in our society ever since Mark Zuckerberg

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<http://nalsarpro.org/Portals/23/4_%20Media%20Law%20Module%204.pdf > accessed 15 April 2022.

[26] Walter Lippmann, *Public Opinion* (Harcourt, Brace & Co. 1922) 73.

[27] ibid.

[28] Tasneem Kawoos, 'Right to Internet and Internet Shutdowns: The Indian Case' (2021) 4 IJLMH 545, 546.

[29] Rikki Frank Jørgensen, 'Internet and Freedom of expression' (*Raoul Wallenberg Institute*, 2001) <https://www.ifla.org/wp-content/uploads/2019/05/assets/faife/publications/ife03.pdf> accessed 15 April 2022.

opened the gates of online communication with Facebook in 2004.[30] In simpler terms, the "social" refers to interacting and communicating with people utilising information exchange.[31] The "media" part signifies an instrument of communication, such as the internet.[32] Despite this, the definition seeks more room for elaboration with two unanswered confusions. Firstly, are traditional means such as newspapers and radio also a part of media? Secondly, is social media similar to social networking? The answer comes out simple. Newspaper, television, and radio are also types of media. However, these means are limited to information sharing and thus, lack interaction. Likewise, social networking is also a part of social media. However, networking is a consequence of media sharing and not social media itself. If we think of social media as a fruit, then oranges, berries, melons, and apples are part of the broader fruit category; wikis, blogs, social news, and networking are part of the broader social media category. This further gets clarified by a recent 2015 research paper that identified four standard features unique to the current social media services: internet-based applications, personal user account, user-generated content, and the development of social networks by community connection.[33] Therefore, the "social media" usage in the current situation resonates more with platforms such as Facebook, Twitter, Whatsapp, Snapchat, Instagram, Tiktok, and Youtube, etc., where the users are not just information receivers, but personal account holders on the web, sharing their own content and connecting with other people through mutual interaction around the world. With being able to decide which image and video to post, which website to surf through, and with whom to communicate, social media expands a

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[30] Ricky Singh, 'The History of Social Media. In the world, there are 7.7 billion...' (*Medium*) <https://medium.com/the-startup-growth/the-history-of-social-media-3a8e67ead780> accessed 15 April 2022.

[31] Aengus Bridgman, 'The causes and consequences of COVID-19 misperceptions: Understanding the role of news and social media' (2020) 1 HKSMR 2.

[32] ibid.

[33] Jonathan A. Obar & Steve Wildman, 'Social media definition and the governance challenge: An introduction to the special issue' (2015) 39 SPECIAL ISSUE ON THE GOVERNANCE OF SOCIAL MEDIA 745–750.

person's life and choices.[34] ; allowing exchange of expression to be endless, and making it difficult for the government to govern the way they wish.

In recent response, the Union and State governments in India have increased the number of time mobile internet access stops for extended periods of time. The State's Home Department halted mobile internet access for almost 30 hours in five Haryana districts, citing a perceived threat to peace and order ahead of a projected farmers' congregation in Karnal.[35] Following the execution of a former militant by administration and police, mobile internet connections in portions of Meghalaya were blocked for 48 hours.[36]

According to the Software Freedom Law, 540 incidents of internet shutdowns have been witnessed in India since 2012, with the number of shutdowns increasing from three in 2012 to 129 in 2020.[37] According to the Centre, this duration of Internet and communications blockades on an average has also increased over time, an organization dedicated to defending digital freedom.[38] The state of Jammu and Kashmir has been subjected to such events continuously, with the authorities suspending internet service 315 times.[39] Recently, the Information Technology

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[34] Daniel A. González-Padilla & Leonardo Tortolero-Blanco, 'Social media influence in the COVID-19 Pandemic' (2020) 46 IBJU 120–124.
[35] Mobile Internet to be suspended in Karnal on Sept. 7 ahead of farmers' protest, *The Hindu* (India, 6 September 2021) <https://www.thehindu.com/news/national/section-144-imposed-in-karnal-ahead-of-farmers-protest-call-over-lathicharge/article36319646.ece?homepage=true> accessed 15 April 2022.
[36] Tora Agarwala, 'Meghalaya Home Minister quits amid unrest over ex-militant's death' (*The Indian Express*, 16 August 2021) <https://indianexpress.com/article/north-east-india/meghalaya/shillong-curfew-meghalaya-internet-shut-down-ex-militant-death-7455230/> accessed 15 April 2022.
[37] Internet Shutdowns (*SFLC*, 2021) <https://internetshutdowns.in> accessed 15 April 2022.
[38] Ishita Chigilli Palli, 'Why the Indian State's increasing reliance on internet shutdowns is problematic' (*The Leaflet*, 17 September 2021) <https://www.theleaflet.in/why-is-the-indian-state-increasingly-relying-on-internet-shutdowns/> accessed 15 April 2022.
[39] ibid.

(Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 are intended to strengthen the state further and give the government significant authority over public discourse. On the one hand, the state now seeks access to all information on the content and provenance of all digital communications, a step that will erode the right to privacy.[40] Digital material, on the other hand, is now subject to both self-regulation and intensive surveillance and regulation aimed to give the executive significant influence over content.

EXPLORING THE JURISDICTION AND GOVERNING LEGISLATIONS

The Internet is, by definition, multi-jurisdictional.[41] Traditional jurisdiction ideas would have to be adapted to Internet-based activities, since standard geographical limits are inapplicable.[42] The Internet enables people from geographically disparate jurisdictions to transact with one another, with little or no regard for the potential implications of their activities in the country in which they are functioning.

Owing to India's unitary solid government form, interstate conflicts seldom reach the level of private international law. Social media is the medium through which information spreads like wildfire without being verified. This leads to the spread of rumours and incorrect information, which is exacerbated in the event of a disturbance in the country or any section of it. With this goal in mind, the internet is shut down, however the commonly cited reason is not always accurate, and the real cause is actual information blocking, as well as the suppression of any

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[40] Namrata Maheshwari, Emma Llansó, 'Part 1: New Intermediary Rules in India Imperil Free Expression, Privacy and Security' (*Center for Democracy and Technology*, 2021) <https://cdt.org/insights/part-1-new-intermediary-rules-in-india-imperil-free-expression-privacy-and-security/> accessed 15 April 2022.

[41] Marc L. Caden & Stephanie E. Lucas, 'Accidents on the Information Superhighway: On-Line Liability and Regulation'(1996) 2 RJLT 3.

[42] Laurence H. Tribe, 'The Constitution in Cyberspac*e*' <http://www.sjgames.con/SS/tribe.html> accessed 15 April 2022.

mobilization and hence public opinion manipulation.[43] These shutdowns are generally enforced in India under section 5(2) of the Indian Telegraph Act of 1885, section 144 of the Criminal Procedure Code of 1973, and the Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017.

These internet shutdowns in India are not like a specific or particular restriction, but there are two crucial elements to be aware of— first, the government imposes internet shutdowns by issuing orders to Internet Service Providers (ISPs).[44] Second, they are "blanket bans," which means they do not restrict access to the internet in any way. As a result, the term "shutdown" was coined.[45] It is important to remember that internet restrictions have varying definitions worldwide, but they are all described as the inability to access particular websites or apps. However, evidence suggests that internet bans in India are "blanket bans" that prevent access entirely. The increasing emphasis on Internet regulation, whether through the application of existing laws, the development of Internet-specific laws, the application of content-based license terms to ISPs, or the encouragement of self-regulation by private parties by governments, are all examples of the system gaining control over even more areas of the initially free public sphere of cyberspace. The increasing commercialisation of the Internet, as well as the concentration of access and content providers, lead to a commercial cyber domain in which civil society's founding lifeworld promise is severely strained. If current trends continue, cyberspace governance and access will be controlled by a powerful group of media/IT/telecom business firms in a short span of time, leaving stringent room for access to open information and variety of material.

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[43] Dipa Kurup, 'After Rumours,Northeast People flee Bangalore' *The Hindu* (India, 16 August 2012) <http://www.thehindu.com/news/natioanl/karnataka/after-rumours-northeast-people-flee-bangalore/article377654 9.ec3> accessed 15 April 2022.
[44] *Kawoos* (n 29).
[45] ibid.

INTERNET SHUTDOWN AND INFRINGEMENT OF THE FUNDAMENTAL RIGHTS

"Freedom of speech, though guaranteed, is not absolute in India."[46] The text of Indian Constitution clearly lays down "reasonable restrictions"[47] on free speech. In 2019, Kerala High Court[48] became the first to recognize that *"the right to Internet access is part of the right to privacy and the right to education under Article 21 of the Constitution."*[49] Following in the footsteps of the Faheema Shirin case, India's Supreme Court issued its second major decision. The government mandated a blanket prohibition on all telecommunications services, including the internet, before trying to withdraw the former state of Jammu and Kashmir's special status. A journalist, Anuradha Bhasin, filed a petition challenging the legality of the orders enforcing the embargo. In its ruling,[50] the Court took a step back from proclaiming the Right to the Internet an individual fundamental right, instead holding that "the internet is a vehicle through which other fundamental rights are exercised."[51] It stated:

> *"The right to free speech and expression under Article 19(1)(a), as well as the right to carry on any trade or activity under 19(1)(g), is constitutionally protected through the medium of the internet."*[52]

The government reacted swiftly after the Anuradha Bhasin ruling to reestablish internet access in Jammu and Kashmir; notwithstanding, the speed was severely restricted to 2G. This limitation was later challenged before the Supreme Court of India, where the petitioners claimed that the restriction caused a great deal of trouble to the inhabitants of the region, particularly physicians and students. The administration of the University of

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[46] *Damania* (n 21).
[47] The Constitution of India 1950, art 19, cl 2.
[48] Fahima Shrin v. State of Kerala, 2019 SCC OnLine Ker 4728.
[49] ibid.
[50] Anuradha Bhasin v. Union of India, 2019 SCC OnLine SC 1728.
[51] ibid.
[52] ibid.

Kashmir once again invoked national security as a reason for blocking internet connectivity.[53] While acknowledging the need of balancing national security and citizens' fundamental rights, the Supreme Court provided no immediate relief to the people. However, the Court ultimately decided that the orders limiting internet speed were not unlawful. Other significant cases also reflect the importance of right to freedom of internet;[54] however, no solidified stance has yet been adopted.

KEY TAKEAWAYS FROM COMPARATIVE JURISDICTION

The Internet is among the most potent tools of the twenty-first century for improving openness in information availability and promoting active citizen engagement in the construction of democratic societies. As a result, enabling access to the internet for all citizens while imposing as few restrictions on online information as feasible should be a top goal for all states. There are several key takeaways that may be derived from policies and legislations of global sources.

INTERNATIONAL CONVENTIONS

The right to freedom of expression covers all forms of communication, whether oral or written, journalistic freedoms in print or online, and all forms of art. Article 19 paragraph 2 of the ICCPR,[55] which expresses the right to freedom of speech in the same way that Article 19 of the UDHR[56] does, reminds us of its vast scope. Although the phrase, "freedom of internet"[57] could not

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[53] Foundation for Media Professionals v. Union Territory of Jammu and Kashmir & Anr., WP (C) Diary No. 10817 of 2020.

[54] Ramlila Maidan Incident v. Home Secretary, Union of India & Ors., (2012) 5 SCC 1, ¶ 10-12; Gaurav Sureshbhai Vyas v. State of Gujarat, W.P (PIL) No.191 of 2015; Prajwala, v. Union Of India, PIL 138 of 2015; Antony Clement Rubin v. Union of India, T.C. Civil No.189 of 2020; Modern Dental College And Research Centre And Others v. State Of Madhya Pradesh, Civil Appeal No. 4060 of 2009.

[55] Rights (n 14) art 2.

[56] Rights (n 2) art 19.

[57] ibid.

have been anticipated at the time of the Convention's or other human rights treaties' development, the Universal Declaration's phrase "through whatever means"[58] renders the right dynamic: a right that is not restricted to technologies known at the time of drafting or adoption. It makes little difference that this language is not in the ECHR, because the lack of a reference to any specific media suggests that all types of media are included. As a result, the rule applies to all media. International courts frequently refer to its interpretation of Article 10 "in light of current circumstances."[59] It thus becomes evident because the Internet has a significant impact on today's "conditions" of communication. As a result, incidents involving the Internet plainly fall under the purview of Article 10. Freedom of speech has been therefore been dubbed the "oxygen of democracy,"[60] particularly freedom of expression practiced through new media in emerging democracies. If freedom of expression is democracy's oxygen, the Internet is the environment in which individuals live, breathe, and use their right to free expression.

It must also be noted that Article 19 of the ICCPR allows for the restriction of freedom of expression but not freedom of opinion.[61] Any limitations to freedom of expression would be incompatible with the goal and objective of this freedom for this reason. This distinction does not exist in the case of the European Convention, but it is doubtful that such limits would also impact freedom of expression, for as long as the ideas in issue are not expressed, the possibilities of running into problems with authorities are minimal.[62] In a similar vein, the Internet as a medium is irrelevant as long as no opinions are communicated. As a result, freedom of thought on the Internet is primarily relevant in the context of freedom of expression.

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[58] ibid.
[59] Stoll v. Switzerland, Application No. 69698/01 (2007).
[60] Fuentes Bobo v. Spain, Application No. 39293/98, ¶ 38 (2000).
[61] Mouvement Raëlien Suisse v. Switzerland, Application No. 16354/06, ¶ 54 (2011).
[62] ibid [40].

In *Yildirim v. Turkey,*[63] the Court went even farther, stating that the creation and distribution of webpages in a Google Sites group represents a manner of exercising freedom of expression, and that Article 10 provides freedom of speech to "everyone."[64] These guidelines apply not only to the content of the information, but also to how it is delivered. The Court further underlined that Article 10 protects both the right to disseminate information and the right of the public to receive it.[65]

Journalistic activities are likewise adequately protected under the freedom of expression provisions. In *Editorial Board of Pravoye Delo and Shtekel v. Ukraine,*[66] the Court stated that the lack of a suitable domestic legislative framework on how to utilize material gained through the Internet seriously impedes the press's capacity to perform its crucial job as a public watchdog. The exclusion of such material from the statutory safeguards of journalistic freedom to be an unreasonable interference with press freedom.[67] The affirmative responsibility to build an appropriate regulatory framework to guarantee journalists' freedom of online expression properly may be drawn from this ruling.

The Court further recognized the importance of the Internet for freedom of information when it held in *Times Newspapers Limited v. United Kingdom*[68] that:

> *"[in] light of its accessibility and capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access*

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[63] Yildirim v. Turkey, Application No. 3111/10, ¶ 49 (2012).
[64] ibid.
[65] ibid.
[66] Editorial Board of Pravoye Delo and Shtekel v. Ukraine, Application no. 33014/05 (2011).
[67] ibid.
[68] Times Newspapers Limited v. the United Kingdom, Application Nos. 3002/03 and 23676/03 (2009).

to news and facilitating the dissemination of information generally."[69]

A UN Human Rights Council resolution on journalist safety has been reaffirmed in light of regular assaults and persecution of journalists, particularly in conflict zones. In this regard, the Council refers to previous decisions on the right to freedom of expression, including the resolution from July 2012 on the preservation and promotion of human rights on the Internet, including freedom of expression.[70]

GLOBAL INTERGOVERNMENTAL ORGANISATIONS

UNESCO focuses on the Internet for two reasons: first, it is a medium through which these ideas may be quickly and readily disseminated, and second, there is always the risk/possibility of such sharing being blocked by national governments.[71] As a result, UNESCO is always present throughout negotiations, pushing for the protection of freedom of speech in conformity with its objectives. WTO laws may indirectly impact media freedom and hence freedom of speech, as globalisation and demands for free trade policies are handled in most topics, including media sectors. On the other side, certain governments' efforts to postpone or even prevent a free market in the media sectors, as well as the Internet, are examples of how freedom of speech can be harmed.[72]

DEMOCRATIC NATIONS

The United Nations General Assembly ratified and declared the Universal Declaration of Human Rights on December 10, 1948, in the United States. According to Article 19 of the Declaration, freedom of expression is not limited by borders. It is not only one of the top political writings, but also a

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[69] ibid [29].
[70] Wolfgang Benedek, *Freedom of Expression and the Internet,* COUNCIL OF EUROPE (Dec. 2013), https://book.coe.int/en/human-rights-and-democracy/5810-freedom-of-expression-and-the-internet.html.
[71] Ružić (n 17) 19.
[72] ibid 20.

source of law, since it is approved by all member nations and used in diverse manners in domestic legal systems.[73] In contrast, the Universal Declarations provide no guidance in a number of situations where a compromise must be struck between freedom of speech and its constraints. It simply promotes freedom as a basic human right that everyone enjoys. Nonetheless, because Article states directly that this right exists "by any means and without respect to borders," it can be applied to freedom of expression on the Internet.[74] The ECHR, particularly Article 10, is the cornerstone of the Council of Europe and the introductory language that authorizes the European Court of Human Rights to rule on individual cases of alleged human rights violations.[75] Article 28E (3) of Indonesia's constitution reflects the country's commitment to promoting and protecting freedom of expression, which provides that—

> *"every individual shall have the right to communicate and get information for the development of his or her personal life and social environment, and shall have the right to seek, acquire, retain, preserve, process, and impart information through all accessible channels, according to article 28(f)."*[76]

CONCLUSION: BALANCING THE SCALES OF DEMOCRACY AND RIGHT TO FREEDOM

The development of a directed, inclusive, and innovation information society requires strong safeguard of online freedom of speech, which is both a facilitator for other human rights and a fundamental human right in and of itself. Online freedom of expression is protected under Article 19 of the UDHR and the

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[73] Myrna El Fakhry Tuttle, 'When Can the Right to Freedom of Expression be Curtailed?' (*LawNow,* 4 July 2019) <https://www.lawnow.org/when-can-the-right-to-freedom-of-expression-be-curtailed/> accessed 16 April 2022.
[74] Rights (n 2) art 19.
[75] Rights (n 12).
[76] M. Lutfi Chakim, 'Freedom Of Speech And The Role Of Constitutional Courts: The Cases Of Indonesia And South Korea' (2020) 10 Indo. Law Rev. 191, 194.

ICCPR, as well as Article 10 of the ECHR for the Council of Europe region. This includes the ability to write, transmit, search for, and gather data, as well as the opportunity to intervene in social networks. Journalists who use the Internet, both traditional and citizen, must maintain a high level of protection while complying to ethics and professional standards.

The fundamental premise for defending online freedom of expression must be that what is allowed offline must also be allowed online. However, the Internet's unique characteristics must be considered, such as its amplifying impact, the ubiquity of the material uploaded, and the inability to delete information after it has been placed on the Internet. Online restrictions on freedom of expression are only permitted when they comply with the ECHR's standards on interference. In light of the online setting, the three-part criteria of legality, need in the achievement of a legitimate aim, and proportionality must be used.

Even though the Anuradha Bhasin decision is a ray of hope, it is important to remember that the Supreme Court did not decisively determine the legal status of Internet rights in India after making a decision on internet access within the scope of freedom of speech and expression. Internet shutdowns are still being carried out, with little regard for human rights violations or proportionality. The Court must regard due consideration to two aspects, as discussed before. *First*, law must lead towards the changing time and adapt to the present needs of the community. Deriving from the Stoll judgement, the impact of internet must be given due weightage and restrictions must be served only in situations of grave injustice, rather than mere inconveniences to the administration. *Second*, both, the right to disseminate and receive, must be equally balanced, as upheld by the Yildirim case. To cater modern technological advancements, it is essential to explore the interpretive canvas and create a powerful internet stroke. All nations, along with all relevant parties, have a responsibility to obey, preserve, and encourage online freedom of expression. They must do so while avoiding the emergence of new

hurdles and adhering to current standards, which include online freedom of speech.

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CRIMINAL APPEAL BASED ON ABUSE OF DISCRETION: A COMPARATIVE STUDY OF INDIA AND USA

Tanisha Saini[*]

ABSTRACT

An independent judiciary is the basic structure of the Indian Constitution. One inherent aspect of an independent judiciary is the exercise of discretion by judges. Where there is exercise of discretion, there is an option to choose from various alternatives; thereby paving way for abuse of discretion. Abuse of discretion is a clear departure from established laws and precedents. It is an arbitrary or unreasonable exercise of power. There is discretion at every stage of the criminal justice system. For example, the police officer may orally examine any person acquainted with the commission of the crime or may require the attendance of witnesses in the police station; the accused may choose to plead guilty or not guilty; or the judge may exercise discretion in sentencing. Therefore, there are always choices to be made and discretion to be exercised; and when matters are left to discretion, there are bound to be disagreements on whether discretion was exceeded, abused or reasonably exercised. Many instances of abuse of discretion are witnessed at the trial courts. Hence, review of the trial court's decision for abuse of discretion is the domain of the appellate courts. In this paper, the primary focus is on examining the abuse of discretion by judges with the assistance of some case laws and analysing the criminal appeals arising from it in the jurisdictions of India and the United States of America (USA). Followed by this is a comparative study of appeals based on abuse of discretion in India and the USA, and of the procedure applicable to appeals in the two diverse countries. After undertaking a comparative

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analysis of the appeal procedures, the question of whether India should adopt an appeal procedure that is similar to the 'Standard of Review' procedure applicable to the USA has been deliberated upon.

Keywords: *discretion, criminal appeal, judicial discretion, abuse of discretion, standard of review.*

DISCRETION: A TERM OF WIDE CONNOTATION

The term 'discretion' is connected to choice and independent thought. It is a choice about what action would be most fruitful in a particular set of circumstances where law does not govern the situation. Yet, it is not a free choice or action based on whims. Even when restricted to judicial settings, discretion opens several doorways for debate upon innumerable outcomes. Hence, discretion is a pervasive concept with a link to both power and responsibility.[1]

For judges, discretion is based on much more than free choice, it is extracted from prevailing legal principles and doctrines.[2] When a statute gives discretionary power, it is left to the appropriate authority to exercise its discretion and choose between competing alternatives that are equally suitable to the situation. For instance, in the Indian Penal Code (IPC), the punishment for voluntarily causing grievous hurt 'may extend to seven years'. 'May' indicates discretion given to the judges and they can sentence the accused for a term below seven years if the act of the accused and the facts and circumstances of the particular case warrant it.

When left with discretion, judges have to apply legal reasoning and logic to reach a conclusion and consider equity and

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[1] Maurice Rosenberg, 'Judicial Discretion of the Trial Court, Viewed from Above' (1971) 22 Syracuse L. Rev. 635, 635.
[2] *Gudikanti Narasimhulu v Public Prosecutor, High Court of AP*, (1978) 1 SCC 240.

justice.[3] Discretion cannot be arbitrary and must be exercised honestly while keeping the spirit of law and justice in mind.[4] Professor Maurice Rosenberg helps identify discretion with assistance from a graphic representation of pastures.[5] For instance, judges can freely roam in the pasture and walk in any direction until the higher judiciary or the legislature announces a rule of law for the particular situation and fences the corner of the pasture.[6] Until the fencing is done, judges wield discretionary power to decide the best course of action. Therefore, if the discretion is properly and lawfully exercised, then there are minimal chances of the trial court's decision being altered, modified, reversed, quashed or otherwise by the appellate court.

The reasons behind bestowing discretionary powers to the judiciary are simple. For it is impossible for the legislature to make laws on all matters and to see every eventuality[7], and as the application of law demands flexibility and novelty as time passes, some general aspects have to be left to the discretion of the appropriate authorities. Leaving some facets to the discretion of the judges acts as a breather for the justice system since the courts can then make flexible decisions based on the facts and circumstances of each case. Gradually, with several decisions on cases with similar facts and circumstances, a few general rules and patterns emerge that are affirmed by the Supreme Court, and the trial courts are then to make decisions within the sphere of those rules, thereby limiting their discretionary powers. If the trial court overlooks these rules set by the precedent laying judgement of the apex court, they commit a legal error and their decision becomes *per incuriam* even though their decision-making power is continued to be labelled as discretionary.[8] For example, the

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[3] Rashmi Goyal and others, 'Judicial Discretion' Uttarakhand Legal and Judicial Review 58, 68 <https://ujala.uk.gov.in/files/Ch8.pdf> accessed 21 February 2022.
[4] *Sunil Mehdiratta v Union of India*, 2001 SCC OnLine Del 1079.
[5] Rosenberg (n 2) 650.
[6] ibid.
[7] Goyal (n 3) 58.
[8] Martha S Davis, 'Standards of Review: Judicial Review of Discretionary Decisionmaking' (2000) 2(1) J. APP. PRAC. & PROCESS 47, 56

judges had discretionary power to award capital sentences for murder and other heinous crimes. However, the Supreme Court soon gave the doctrine of the 'Rarest of the Rare Cases'[9] thereby restricting death sentences to exceptional cases and making life imprisonment the rule. This signifies that standards of legal conduct develop gradually and guide the discretionary powers of judges. Therefore, the powers of the judges are not wholly unregulated.

Yet, the debate around what constitutes discretion and what not has become lively over the years as contours of discretionary powers have been subjected to heated debates over the improper or illegal exercise of discretion by those who wield it now and then. In this paper, the focus is on criminal appeals based on abuse of discretion.

ABUSE OF DISCRETION AND APPEALS FOR CORRECTION: HOW THE APPELLATE COURTS IN INDIA IDENTIFY ABUSE OF DISCRETIONARY POWER

There is always a domain within which the statutes are meant to operate. Statutes have specific purposes and objectives and any discretionary decision in departure from the statute's purpose will face objection. For example, if the punishment of one year is awarded for any offence that is punishable with imprisonment up to ten years, doubt is cast upon the reasonableness of the sentencing discretion exercised by the judge unless logical reasons are given for it. Thus, abuse of discretion transpires when the trial court gives an order that is so unreasonable, erroneous, arbitrary or unjustified by the facts and laws applicable to it that it is considered as an abuse of discretionary power.[10]

<https://lawrepository.ualr.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1189&context=appellatepracticeprocess> accessed 21 February 2022.

[9] *Bachan Singh v State of Punjab*, AIR 1980 SC 898.

[10] 'Abuse of discretion' (*Merriam-Webster*) <www.merriam-webster.com/legal/abuse%20of%20discretion> accessed 21 February 2022.

When discretionary power is put to a use other than that for which it is intended, or while exercising it matters which were not to be taken into account were taken into account, or matters which were to be taken into account were not taken into account[11], or when it is used improperly or excessively, there is said to be abuse. Abuse of discretion is much more than a difference of judicial opinion between courts.[12] On appeal, the trial court's decision is overturned, wholly or partly, not because the decision itself is wrong, but because the manner or process of making it is unreasonable, improper or unacceptable. Yet, the appellate court will not reverse the decision hastily without assessing the decision of the trial court because trial courts are the courts of facts. It is where all the evidence, witnesses and facts of the case are thoroughly analysed whereas on appeal the findings and rulings of the trial court are reviewed.

Therefore, abuse occurs when the trial court acts outside the legal framework or the statutory limitations[13], or when it fails to take into consideration the precedent set by the Supreme Court for the exercise of discretion in a particular matter. What amounts to abuse of discretion is often difficult to determine because there are no set standards or guidelines with assistance of which the reasonableness or the propriety of the discretion exercised can be determined. There is no straight-jacket formula. Rather, some formulations can be identified that the courts in India make use of to identify abuse of discretion. Since the appellate courts in India do not expressly use the term 'abuse of discretion' while identifying the wrong committed by the trial court, one has to rely on certain terms the appellate courts use time and again to identify and rectify abuse of discretion. These formulations can be studied with the assistance of a few case laws.

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[11] *Smt. S R Venkataraman v Union of India & Anr*, AIR 1979 SC 49.
[12] Andrew M Mead, 'Abuse of Discretion: Maine's Application of a Malleable Appellate Standard' (2005) 57 Me. L. Rev. 519, 525 <https://digitalcommons.mainelaw.maine.edu/mlr/vol57/iss2/8> accessed 21 February 2022.
[13] Davis (n 7) 59.

FIRST: RELEVANT CONSIDERATIONS NOT CONSIDERED

1. *Jai Lal Pandey v State of Jharkhand*[14]

As per the prosecution's case, the victim was going to her father's house alone when she saw the accused Jai Lal Pandey coming from the opposite direction. The accused went to the victim, suddenly grabbed hold of her, forcibly took her into the bushes and raped her. The victim called for help but she was assaulted and threatened that she would be killed. Later, the victim returned home and told everything to her husband. A panchayat was organized and the accused was expelled from the village but the accused refused to leave. Thereafter, a First Information Report (FIR) was lodged after thirteen days from the incident. The investigation was completed and a charge sheet was submitted. The accused was convicted by the Additional Sessions Judge under Section 376 of IPC and was sentenced to undergo rigorous imprisonment of seven years and to pay a fine of Rs. 10,000.

On appeal to the Jharkhand High Court, the accused contested that there was a discrepancy in the evidence given by the prosecution witnesses. The doctor stated that the age of the victim was seventeen years old. However, the age of the victim as assessed by the trial court was forty years. This was a very wide gap. Moreover, the doctor after doing a medical examination of the victim found some marks of violence on the body but in cross-examination and as per the written report the doctor stated that the hymen of the victim was ruptured but no injury was found on the private parts of the victim. Therefore, reliance could not be placed on the doctor's evidence. Further, the FIR was filed thirteen days after the incident and no explanation for the delay in lodging of FIR was given. The investigating officer found no incriminating evidence at the place of the alleged crime or of any panchayat being held. Moreover, there was enmity between both

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[14] 2016 SCC OnLine Jhar 1839.

parties due to trouble between their political parties. This angle was not investigated by the police. Thus, there were discrepancies in evidence, there was a breach of professional standards in the investigation and the guilt of the accused could not be said to be proved beyond a reasonable doubt. Hence, the judgement of the trial court could not be sustained.

The High Court agreed with the contentions raised by the accused and observed that the doctor's report was not reliable and there was no data in the report as to how the doctor reached the conclusion that rape was committed on the victim. There was no explanation for why the lodging of the FIR was delayed and there was no convincing material on record to establish that rape had been committed. Therefore, the High Court set aside the judgement of the Additional Sessions Judge as there was no evidence and the prosecution had failed to establish beyond a reasonable doubt that the offence had been committed.

- **Second: Non-Application of Mind**

1. *State of MP v Phool Chand*[15]

The trial court had convicted the accused under Sections 393 and 397 of IPC and sentenced him to undergo rigorous imprisonment for seven years. An appeal was filed before the High Court of Madhya Pradesh under Section 374 of the Code of Criminal Procedure (CrPC) against the conviction. The High Court, while maintaining the conviction, reduced the sentence of imprisonment to that already undergone in custody, that is, four months and twenty-four days. The State was aggrieved by the High Court's reduction in the sentence and by special leave to appeal it approached the Supreme Court. The State contended that the High Court was not justified in reducing the sentence to one already undergone as it was below the minimum sentence prescribed by IPC for the offence. The Supreme Court concurred with the State's contentions and observed that there was a

[15] (2005) 12 SCC 199.

complete non-application of mind on the part of the High Court while passing the order. The sentence was not even the bare minimum. Therefore, the order of the High Court was set aside and the trial court's conviction and sentence were restored.

2. *State of MP v Bhura Kunjda*[16]

The trial court had convicted and sentenced the accused under Section 8 read with Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act of 1985 to undergo a sentence of rigorous imprisonment of ten years. The accused filed an appeal to the High Court under Section 374 of CrPC. The High Court retained his conviction but reduced his sentence to the period already undergone, that is, four years and a fine of Rs. 10,000. Aggrieved, the State through special leave to appeal approached the Supreme Court and argued that after looking at the nature of the offence the sentence imposed by the High Court was unjustified. Therefore, unfortunately, the judgement of the High Court suffered from non-application of mind since no satisfactory reason had been given for reducing the sentence. The State further contended that the judgement was cryptic and did not consider any evidence given by the parties. The Supreme Court observed that it was very clear from Sections 385 and 386 of CrPC that the appellate court had to call for the records of the case, hear the parties and then decide the appeal. Consequently, it was mandatory to peruse the record of the case and the testimony of the witnesses. If this was not done, then it would amount to a miscarriage of justice. Hence, the judgement of the High Court was not in accordance with the law and was set aside by the apex court. The matter was sent back to the High Court for a fresh consideration of the appeal.

- **Third: Extraneous Consideration**

Considering extraneous considerations while exercising discretion has been said to be invalid as it is bound to be

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[16] (2009) 17 SCC 346.

unreasonable.[17] Hence, when the decision is unreasonable, the appellate court will interfere to rectify the situation.

1. *Vasanthi v State*[18]

In a village, the practice of using Madar (Calotropis) poison for carrying out female infanticide was prevalent. The prosecution's case was that the accused had delivered a female child on 31 July, 2003. The nurse at the hospital had assisted in the delivery and noticed that the accused was not happy after giving birth to a female child as she already had one daughter. On the same day, the accused and her husband took the child home. Thereafter the nurse visited the house of the accused on 1 and 2 August, 2003 and found the child alive. However, on 4 August information was received that the said girl child was killed by administering Madar poison. The doctors from the hospital visited the village to ascertain the truth of the information and were informed that the child was killed by poisoning and the body had been buried. Subsequently, the nurse filed a complaint with the police and an FIR was registered.

The police recorded the statements of the witnesses; the body of the child was exhumed and an inquest report was made and all the evidence along with the body was taken by the forensics and sent for autopsy. On examination by a chemical analyst, evidence of Madar poison was found in the stomach, the intestines, the liver and the kidney of the child. Soon the accused was arrested and sent to judicial remand and a charge sheet was filed under Sections 302 and 201 of IPC. The Sessions Judge found the accused guilty and convicted her under both charges. Under Section 201 she was sentenced to one year of imprisonment, but surprisingly under Section 302, she was sentenced to undergo three years of imprisonment, whereas the minimum punishment to be awarded under the Section is life imprisonment. Thus, the State was aggrieved by the same and

[17] *PR Prasad v Union of India*, 1990 SCC OnLine AP 202.
[18] 2012 SCC OnLine Mad 4391.

filed an appeal to the Madras High Court under Section 377 of CrPC to contest the inadequacy of the sentence. Further, the accused filed an appeal to the High Court under Section 389 of CrPC praying for suspension of her sentence pending the appeal and for being released on bail. The High Court clubbed the two appeals together and gave a common judgement.

The High Court heard both parties at length and perused the case records carefully and observed that it was a case based on circumstantial evidence. The chemical analyst's report showed that death was caused by administering Madar poison but the defence submitted that there was no evidence to prove that the poison was administered by the accused. The infant could not have drunk the poison and it was only possible that someone else administered the poison to the infant. There was no eyewitness to suggest that the accused administered the poison. It was not that the accused was the only one aggrieved by the birth of the girl child. Other members of the family were aggrieved too. Moreover, the other family members also lived in the house and any one of them could have administered the poison. Hence, the prosecution had failed to establish that the accused was the only person who could have administered the poison and she should be acquitted.

The High Court acquitted the accused as her guilt was not proved beyond a reasonable doubt. Further, solely for academic purposes, the High Court expressed its displeasure that under Section 302, the accused was sentenced to three years of imprisonment whereas the punishment that could be awarded under the Section was only life imprisonment or the death penalty. The Sessions Judge on extraneous considerations like sympathy for the accused should not have passed a sentence that was not warranted by the statute. Thus, the High Court remarked that the sentence imposed by the Sessions Judge was illegal.

- **Fourth: Erroneous or Unreasonable**

The principle of reasonableness is inherent in the jurisprudence of justice. Any exercise of discretion by judges in its

disregard would result in an abuse of discretion. Unreasonableness is thus a term that has come to cover a wide number of errors, including abuse of discretion.

1. *Annasaheb Kalidas Dadhe v State of Maharashtra*[19]

Some fifty-eight accused were charged with misappropriating money given by the Social Welfare Department for the scholarship of backward students. The accused were in charge of disbursing the money to the bank accounts of the students. However, the money was never credited to the students' accounts. The total money misappropriated was around Rs. 4,81,99,595. Hence, the accused were charged under both IPC and the Prevention of Corruption Act of 1988 as they were public servants and also under Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act of 1989 as the students belonged to the backward class.

Before the Sessions Court, one of the accused sought bail and after hearing the parties, the learned judge allowed the bail application on the condition that the accused pay Rs. 52,12,614 within one month. The order was appealed to the Additional Sessions Judge for modification of the condition as the accused was poor and the sole earning member of the family and could not deposit such a huge amount. This application was rejected and the accused then appealed to the High Court.

The High Court observed that while granting bail the court was influenced by the FIR and observations of the Sessions Judge on the matter. The State argued that considering the amount misappropriated, the bail condition was fair and reasonable and should not be modified. The defence brought an earlier order of the High Court to the notice of the bench showing that the High Court had deleted similar onerous conditions in the bail order of other accused who were a part of the same crime. The High Court observed that the deposit of an amount as a condition precedent

[19] 2018 SCC OnLine Bom 6280.

for bail was not warranted as per the precedent set by the Supreme Court and moreover the amount imposed was *ex-facie* unreasonable, onerous and excessive given the financial condition of the accused. Therefore, the High Court deleted the bail condition imposed by the Sessions Court.

2. *State v Tukaram Khandu*[20]

The accused was charged under sub-section (1) and (2) of Section 85 of the Bombay Prohibition Act for being found drunk and behaving in a disorderly manner in a public place. The accused was acquitted by the Magistrate stating that it was not shown that the accused had taken prohibited liquor. The State filed an appeal to the High Court. The High Court observed that in light of a recent decision passed by it, and by Section 88(2) of the Bombay Prohibition Act, the question of whether the accused had taken prohibited liquor or permitted liquor was irrelevant if the accused was drunk and behaved in a disorderly manner in a public place. Hence, the Magistrate proceeded on an erroneous view of law and the order of acquittal was set aside and the accused was convicted under Section 85(1) and sentenced to simple imprisonment of seven days and a fine of Rs. 25.

- **Fifth: Miscarriage of Justice**

1. *Syed Iqbal v State of Maharashtra*[21]

There were four accused who had been charged under Section 307 of IPC for an attempt to murder and Section 333 of IPC for voluntarily causing grievous hurt to a public servant to deter them from their duty. Since one of the accused was absconding, his trial was separated from the other three accused. Out of the three accused, the Sessions Judge acquitted two and convicted one under Section 307 and Section 333 read with Section 34 of IPC. Later, when the absconding accused (the appellant) was apprehended. He was also tried under the same

[20] AIR 1956 Bom 279.
[21] 2017 SCC OnLine Bom 8400.

Sections and convicted by the Sessions Judge. The appellant then appealed to the High Court under Section 374 of CrPC and contended that his conviction under Section 307 with the aid of Section 34 of IPC was a grave error committed by the Sessions Judge.

It was urged by the appellant that there was no direct or circumstantial evidence to suggest that the appellant shared common intention with the other accused under Section 307. One of the accused had in the spur of the moment taken out a knife and stabbed the victim. There was no premeditated plan or intention to stab the victim. Hence, it could not be said that the appellant and the other accused shared the common intention to inflict the stab injury. Moreover, it was not the case of the prosecution that the appellant was armed with a weapon.

On the other hand, the prosecution argued that the fact that the appellant was one of the accused along with the other three accused and was involved in the act was sufficient to attribute common intention and knowledge.

The High Court evaluated the evidence on record and agreed with the defence counsel that there was nothing on record to suggest that the appellant shared common intention with the accused who inflicted the stab wound and were ultimately convicted for the offence. The attack was not premeditated and there was no common intention to cause the injury. Thus, the conviction of the appellant with the aid of Section 34 of IPC was a serious error and a miscarriage of justice. Therefore, the conviction of the appellant was unsustainable and was set aside.

ABUSE OF DISCRETION AND APPEALS ARISING THUS: HOW USA DOES IT DIFFERENT FROM INDIA

From the above discussion, it is clear that in India there is no single category of criminal appeal based on abuse of discretion, rather there are certain formulations or grounds which are used time and again to rectify the abuse of discretion by the judiciary.

The preceding grounds are not an exhaustive list of all the grounds under which abuse of discretion can be claimed and there can be more of them.

Now, if one takes a look at the appeal procedure in the United States of America (USA), one comes across a process known as the *'Standard of Review'* (given in the Federal Administrative Procedure Act). Once a trial court's decision is appealed to the appellate court, the appellate court will see under which one of the standard of review is the case brought to it. A standard of review is of immense significance in appellate hearings because it can either make the appellants' case or break it. What standard of review applies to the case has to be decided by the appellant prior to any discussion on the issues raised in the appeal.[22]

Appellate courts are courts that review the decision or findings given by the trial courts.[23] As courts of review, the appellate courts, while reviewing the findings, accord different degrees of deference to the trial court's decision. This is known as a standard of review. The appellate court can modify, alter, or vacate a trial court's decision only in certain circumstances and in very specific contexts. Therefore, while dissecting the trial court's findings it is necessary that the appellate court applies the appropriate standard of review.[24]

The appellate courts widely invoke three kinds of standard of review (clear error [question of fact], *de novo* [question of law] and abuse of discretion [question of discretion])[25] and which one of them is to be used is dependent upon the facts and circumstances of each case. Under the question of fact, the appellate court reviews whether the judge or jury made a proper finding of facts based on the evidence of the case or if there was a clear error. It checks whether the judge or jury took a rational view

[22] Mead (n 10) 523.
[23] ibid 522.
[24] ibid.
[25] Davis (n 7) 48.

of the evidence and found credibility in the evidence before establishing the fact.[26] While doing so, the appellate court accords higher deference to the trial court's decision because the trial court is the court that analyses the evidence and examines the witnesses in-depth and then establishes the facts. Thus, under this review, the appellate court will sustain the finding of the trial court if it was reasonably reached from the evidence and facts of the case.[27] Hence, it is only when the findings are clearly erroneous, and this happens rarely, that the appellate court will disturb the decision.

Under the question of law and the mixed question of fact and law, the appellate court accords the lowest degree of deference to the trial court's decision.[28] In *de novo* (from the beginning or anew) review, the appellate court gives no weight to the trial court's findings and proceeds with the case as if it was looking at the case for the first time and gives a fresh decision on the matter independent of whatever the trial court did. This is because appellate courts are considered as courts that develop the law. However, this does not mean that the appellate court retries the case altogether. It only takes the authority to reach a different decision from that of the trial court on the same case.[29]

Under the question of discretion, the appellate court adopts a very tolerant and generous attitude towards the findings of the trial court thereby limiting their review powers.[30] This standard is generally applied when the trial court has exercised discretion in any matter. For instance, if the court relied on clearly erroneous findings of fact, improperly applied the law, or employed an erroneous standard of law, it would amount to an abuse of discretion.[31] The review here is of the process applied to

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[26] Mead (n 10) 523.
[27] Davis (n 7) 48.
[28] Mead (n 10) 524.
[29] Louis C Lacour, JR and Raymond P Ward, 'Standards of Review' in *A Defence Lawyer's Guide to Appellate Practice* (Defence Research Institute 2004) 100.
[30] Mead (n 10) 523.
[31] *United States of America v Talman Harris*, 2018 SCC OnLine US CA 6C 17.

reach the decision rather than of the decision itself.[32] Findings of the trial court are accorded special deference under this standard because the trial court has first-hand exposure to evidence and the witnesses and can better understand the facts and circumstances of the case.[33]

From the above, it can be concluded that the standard of review is a limitation that the appellate courts have placed on their power to alter the trial court's decision. The appellate court often upholds the judgement of the trial court despite the fact that it would have decided the matter differently.[34] This indicates that unless and until the trial court's decisions are based on rational deductions and reasonable application of the law the appellate court will not disturb them.

Since the paper focuses on criminal appeals based on abuse of discretion, the application of the abuse of discretion standard of review will be understood with the assistance of some appellate court decisions from the USA.

1. *United States of America v Talman Harris*[35]

Talman Harris, the accused, and one co-conspirator Durand were stockbrokers who had agreed to recommend shares of one Zirk de Maison's companies to clients in exchange for a commission. When the financial authority began investigating their activities in relation to de Maison's companies, the accused and the co-conspirator lied that they had earned the money by selling expensive watches and stated that they did not deal with Zirk Engelbrecht. Afterwards, they were arrested for fraud and obstruction of justice. The co-conspirator later became a government witness and admitted that the story of selling watches was false. The district court convicted the accused.

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[32] Davis (n 7) 49.
[33] *United States of America v Monta Groce*, 2018 SCC OnLine US CA 7C 72.
[34] Mead (n 10) 524.
[35] *United States of America v Talman Harris*, 2018 SCC OnLine US CA 6C 17.

On appeal, the accused challenged his conviction *inter-alia* for obstruction of justice. The accused argued that the trial court denied his request to impeach the co-conspirator (the government witness) who had supported the government's case for the obstruction of justice charge. The co-conspirator had testified that the accused had told him to make a false statement to the FBI about selling watches. Whereas, the accused's counsel assailed the testimony by stating that when the private investigator had asked whether the accused had told the co-conspirator that when anybody asks just tell them the truth and leave it at that, the co-conspirator had stated that it was more of that nature. On being questioned by the defence counsel whether he had made that statement, the co-conspirator stated that he did not remember. Hence, the defence counsel asked permission from the district court to present the recordings of the said statement. However, the district court denied the request to impeach the witness stating that it was unauthentic extrinsic evidence that was being attempted to be used as character evidence.

It was contended by the accused that by presenting the evidence he only wanted to contradict the witness's testimony and not attack the witness's character for truthfulness. Hence, by refusing to admit the evidence, the district court committed an abuse of discretion.

The appellate court observed that extrinsic evidence could be allowed to be produced before the court to contradict the witness's prior inconsistent statement which was at odds with the witness's testimony. The witness's testimony was not corroborated and the government had not produced the text messages which the accused purportedly sent to the co-conspirator to lie to the authorities. Therefore, under these circumstances, it was only the co-conspirator's testimony on which the accused had been convicted for obstruction of justice. Consequently, the district court's refusal to allow the accused to present the evidence resulted in a grave error as the co-conspirator's testimony went unchallenged. Hence, the district court committed an abuse of discretion and the appellate court

directed that a new trial should be held on the charge of obstruction of justice.

INDIA AND USA: A COMPARISON OF DISCRETION, ITS ABUSE AND RESULTING APPEALS

In the USA, it is essential for counsels to tailor their arguments based on the specific standard of review they have chosen for appeal. This ensures that the argument is more effective and gives the party a better chance at winning. However, if the standard of review has been identified wrongly, then the party undermines their own contentions and may lose the appeal. Hence, winning an appeal in the USA is squarely dependent upon the standard of review raised by the defence counsel.

After observing criminal appeals based on abuse of discretion in both India and the USA, it can be discerned that India has a malleable and flexible procedure of appeal as compared to the USA. While the defence counsel in the USA would have to identify the issue being raised based upon the standard of review that is best suitable to the case and incur a risk of losing the appeal solely for wrongful identification of the standard; in India, there is no such hard and fast rule. Nevertheless, this does not mean that the appellate courts in India will accept any contention that the defence raises as a contention worth scrutinising. For the courts to consider it, there would have to be a reasonable argument that *prima facie* points out that the trial court committed an error by abusing its discretionary powers.

Abuse of discretion is a malleable concept and it cannot be certainly said that one action or another would no matter what amount to abuse since the facts and circumstances (which are an indispensable part of the criminal justice system) may warrant the exercise of discretion in that situation in that manner. Abuse of discretion has to be determined in accordance with the principles (just, fair and reasonable, and not arbitrary) which govern judicial

discretion.[36] In the USA, if the trial judge has abused their discretionary powers, the appeal would have to be brought under the standard of review of abuse of discretion. In India, there is no particular standard of review and the appellate courts review the trial court's decision in conformity with the spirit of the law and the duty to do justice.[37] If there is no *prima facie* error, the appellate court will proceed on the assumption that the trial court acted within the boundaries of law and justice. Only when it is found that the trial court reached the decision by vague, erroneous or unjustified reasoning or by ignoring relevant materials would the appellate court consider it as an abuse of discretion and overturn the decision. There has to be clear abuse. The appellate court will not disturb the findings of the trial court if it does not think that it would result in a miscarriage of justice. Substantial and compelling reasons are required to vacate the trial court's judgement.[38]

Coming to the question of deference, the appellate courts in India do give consideration to the trial court's reasoning and decision unless and until it is so improbable, repugnant, unreasonable or unjustified that it amounts to an abuse of discretion and gives a conclusion that no prudent person could have reached.

Thus, where the USA has a streamlined procedure of appeal based on the standard of review, Indian courts do not follow any such specific procedure. The procedure in India is rather flexible, allowing the defence to raise contentions freely and affording them an opportunity of being heard on an issue that they might feel has been overlooked or wrongly decided by the trial court. Whether the contention is based on a question of law, fact or discretion, in India there is no bar on approaching the appellate court. Whereas, in USA, if the standard of review is not correctly identified, the case of the defence is harmed due to

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[36] *Sacher v Association of the Bar of City of New York*, 1954 SCC OnLine US SC 37.
[37] *Bipan Lal Kuthiala v Commissioner of Income-Tax*, AIR 1957 P&H 312.
[38] *Syed Peda Aowlia v Public Prosecutor*, (2008) 11 SCC 394.

procedural default. This is so because the appellate court is guided by the standard of review which defines the limitation on the course that the appellate court has to follow. From the defence's side, the *de novo* review would be most favourable because the appellate court will pay the lowest deference to the trial court's decision and proceed anew; whereas in the abuse of discretion standard the appellate court will pay reasonable deference to the trial court's decision and not vacate its findings unless there is a grave error (harmless error can be tolerated since it does not affect the outcome in the case[39]) leading to a clear abuse of discretion. Hence, convincing the appellate court in the latter becomes harder. However, there are no such considerations in India and the only thing required is to raise a question of law or fact based on abuse of discretion and if the issue raised is justified and reasonable then the appellate court will consider it.

CONCLUSION

As Justice Benjamin Cardozo has rightly said, *'We must not sacrifice the general to the particular.'*[40] The streamlined appeal procedure of standard of review applicable to the USA seems attractive on first impression. Yet it cannot be right away said that it would be beneficial if India adopted the same. The standard of review comes with caveats and applying the same to India would be of assistance in reducing the burden of pending appeals (since if the standard of review is not correctly identified then the court of appeal may dismiss the appeal for incorrect identification of standard of review). However, it is felt that somewhere it would be an injustice to the appealing parties as the courts may not consider the merits of the case solely because the party in appeal misidentified the standard of review applicable. Hence, this may end up making the procedure cumbersome leading to the filing of multiple appeals and delaying justice.

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[39] *United States of America v Jeremy Brown*, 2018 SCC OnLine US CA 6C 52.
[40] Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 103.

Nonetheless, the standard of review procedure also has its advantages as it streamlines the procedure of appeal and works as a self-imposed restraint on the appellate court on the question of the deference which it will accord to the trial court's decision while deciding the appeal. Thus, the procedure is very particular and brings a peculiar certainty to the case being appealed.

Still, the procedure of appeals applicable in India has its own benefits as it is flexible and durable to suit Indian conditions. The centuries of common law practice have set some indefatigable standards of scrutinising trial court decisions based on concepts like 'unreasonable' and 'unjustified' decision, 'miscarriage of justice' or 'non-application of mind' among others. These concepts work as fair guiding principles for the appellate courts. These 'judgemade innovations'[41] have been successful in identifying and rectifying abuse of discretion. Whereas, somewhere to an extent the standard of review procedure constrains the appeal process thereby making it cumbersome, complicated and hard for the appellants notwithstanding whether they are the accused or the victim. On the other hand, an elastic and flexible procedure gives the appellate courts a better chance to stretch it to cover the prevalent conditions.

While exercising judicial discretion, the judge must keep aside their emotions and disengage from any personal influences and decide in an objective manner. It is the duty of the judge, to maintain a relation between law, reason and the decision reached while exercising the innovative discretion given to them. Giving a statement simpliciter that the court abused its discretion without giving any reasons for the same will not accomplish the desired result. Refined reasoning and rationale behind reaching the conclusion have to be given. Thus, the judge while exercising discretion, to put it in the words of Justice Benjamin Cardozo, is free and yet not wholly free.[42] They cannot decide on their pleasure and on the pursuit of their own will. They have to

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[41] ibid.
[42] Cardozo (n 41) 141.

consider the principles of common law and not yield to extraneous considerations. Even though discretion is wide, it has to be exercised based on principles of law, based on traditions of common law[43], based on analogy and reason, based on justice and lastly based on facts and circumstances of the case. Therefore, the exercise of discretion is fettered by principles of law and justice and when a decision is given by ignoring all these principles, it falls upon the appellate court to undo the wrong and restore justice.

For instance, in *Vasanthi v State*[44], the Madras High Court, on the facts of the case and the evidence tendered had appropriately appreciated the arguments of the defence counsel and reached the conclusion that the accused could not have been the only person likely to administer the poison to the infant. This conclusion absolved the accused of her guilt. Further, the High Court also made certain observations for academic purposes on the sentence awarded by the Sessions Court under Section 302 of the IPC, holding that the minimum sentence to be awarded under the Section was life imprisonment and no sentence lower than that could have been awarded. Thus, there was a clear abuse of discretion identified by the appellate court and rectified. Likewise in *USA v Talman Harris*[45], though the appellate court did exercise its powers under the abuse of discretion standard of review, the possibility that the accused could have brought such a claim under any other standard of review due to wrongful identification of the standard of review would have directly harmed the legal standing of their case. From this, it can be concluded that the appeal procedure applicable in India is more flexible and assimilating as compared to that of the USA. In India, thus, the parties have a better chance of bringing an appeal and arguing their claims as compared to the USA thereby ensuring that justice is dispensed rightly.

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[43] Rosenberg (n 2) 667.
[44] 2012 SCC OnLine Mad 4391.
[45] *United States of America v Talman Harris*, 2018 SCC OnLine US CA 6C 17.

One can only discuss the merits and demerits of the procedure of criminal appeal applicable in India and the USA. The question of whether India should adopt an appellate procedure based on the standard of review process is a question that would require extensive debate and the correct platform for debating the question of whether India should adopt such an appeal procedure is the legislature. Presently, the appeal procedure applicable in the USA and in India both have its advantages and disadvantages. Discovering which one of the procedures is better or more beneficial will require immense debate, discourse and discussion on the matter, and the present paper can only do the same to an extent. However, it is felt that it is unnecessary to make the Indian law complicated by adding the standard of review procedure and rather a more detailed and descriptive analysis of the issues up for discussion in the appeal would be more fruitful. The existing procedure of appeal in India is efficient enough to consider the claims of the party. Infusing the standard of review procedure of the USA in India would only make the appeal procedure more cumbersome and may prove unsuitable for the Indian judicial conditions where justice, equity and fairness are kept on a highly revered pedestal.

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AN ANALYSIS OF THE DEFICIENCIES OF PRODUCT LIABILITY AND PRODUCT LIABILITY ACTION IN INDIA

*Deep Basak**

ABSTRACT

The Consumer Protection Act, 2019 replaced the earlier Consumer Protection Act of 1986 and brought with it many reforms. Two of the most significant reforms brought are the introduction of product liability and the inclusion of online e-commerce websites within the realm of consumer laws. The introduction of product liability created a different class of 'wrongs' that the manufacturers and sellers could commit. However much celebrated the introduction of product liability be, the drafting of product liability and product liability action is so deficient that it raises many questions ranging from the status of service providers to who could file a product liability action. This paper aims to delve into the legislation and critically analyse and find out the flaws in the drafting of the same.

***Keywords**: Consumer, Product liability, Product liability action, Manufacturer, Seller, Service provider*

INTRODUCTION

The concept of product liability came to be codified for the first time in India through the enactment of the Consumer Protection Act, 2019 ("the Act")[1]. This Act repealed the previous

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[1] The Consumer Protection Act, 2019 (India)

act[2] and brought with it, for the first time, mechanisms against online e-commerce websites. Earlier, the concept of "caveat emptor" (let the buyer beware) was the practice propounded by the English courts. Over time, the courts started to take cognizance of the rights of the consumers.[3] One of the landmark cases of England, the Donoghue case[4], which ushered in the concept of strict liability, was also a contributing factor to this concept. The origin of product liability can be traced back to the MacPherson[5] case in the United States, where the same was acknowledged for the first time. Through various case laws like Vandermark[6] and Elmore[7], the manufacturers and retailers were made strictly liable for defects in products.

In India, before the enactment of the Act, even though the concept of product liability did not exist explicitly, there were still laws to protect the consumers. There were provisions under tort law, and derivations of the same were found in Indian Contract Act[8], Sale of Goods Act[9] , and Consumer Protection Act[10].[11] These provisions helped the consumers to file cases against defective or hazardous goods, adulteration, overpricing, etc.

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[2] The Consumer Protection Act, 1986 (India)
[3] 'What is Product Liability?' (*Findlaw*, 3 July 2019) <https://www.findlaw.com/injury/product-liability/product-liability > accessed 29 April 2022
[4] Donoghue v. Stevenson, (1932) AC 562
[5] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916)
[6] Vandermark v. Ford Motor Co., 391 P 2d. 164 (1964)
[7] Elmore v. American Motors Corporation, 70 Cal. 2d 578 (1969)
[8] The Indian Contract Act, 1872 (India)
[9] The Sale of Goods Act, 1930 (India)
[10] The Consumer Protection Act, 1986 (India)
[11] Raghav Sethi, 'Product Liability: Let The Manufacturer/Seller Beware?' (*LawBeat*, 4 April 2022) <https://lawbeat.in/articles/product-liability-let-manufacturerseller-beware > accessed 29 April 2022

ANALYSIS

(I) DEFINITIONS OF ELEMENTS

Product liability means the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.[12] The Act defines product manufacturer ("manufacturer), product seller ("seller"), product service provider ("service provider") and has made provisions to make them liable for defects or deficiency in services. In essence, section 2(34) makes the manufacturer, seller and/or service provider liable for (a) defects in products or (b) deficiency in services that has caused harm to a consumer.

To understand product liability and the instances where it will be applicable, it would be imperative to understand the constituent terms first.

A consumer defined under the Act would refer to any person who buys any goods or services for any purpose other than resale and commercial purposes and users of such goods or services.[13] Therefore, it includes buyers as well as users of goods and/or services.

Harm in relation to product liability refers to damage any property other than the product, illness, death, personal injury, mental agony arising out of such damage or injury or loss in any consortium or services or loss arising out of the aforementioned factors.[14]

Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being

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[12] Consumer Protection Act, 2019, (India), s. 2(34).
[13] Consumer Protection Act, 2019, (India), s. 2(7).
[14] Consumer Protection Act, 2019, (India), s. 2(22).

in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" shall be construed accordingly.[15]

Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes any act of negligence or omission or commission by such person which causes loss or injury to the consumer and deliberate withholding of relevant information by such person to the consumer.[16]

(II) CRITICAL ANALYSIS OF DEFINITION IN SECTION 2(34)

Having defined the constituent elements, the analysis of section 2(34) can now be made. Upon a bare reading of the section, it becomes clear that the manufacturer or seller has the liability for any defective product or deficiency in service. However, the section is silent on a lot of questions that may arise out of a strict interpretation of the section. The section is silent on the issue of time, existence of warranty and cases where there is no “harm” amongst other things. A drawback of this section is that although it mentions that deficiency of service would amount to product liability, but does not mention service providers at all.

On the issue of time, there are many products that lose out on their utility with the passage of time. Although food products have a date of expiry mentioned, other products like electronics which don’t have an expiry date stop being useful after a certain point of time. In case of electronics especially, where the product starts getting slower and/or shows other signs of aging, the person

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[15] Consumer Protection Act, 2019, (India), s. 2(10).
[16] Consumer Protection Act, 2019, (India), s. 2(11).

using the product suffers due to the loss in utility and efficiency. Therefore, for example, an electronic product “A”, after two years of usage, might start to hang and/or start getting slow causing agony to the person using it. It is universally accepted that electronic products would get slow with the passage of time. However, if, in any case, such an aged product causes any harm, as defined in the Act, the manufacturer/seller would become liable. This places an unfair liability on the manufacturers /sellers of such products.

On the issue of warranty, the section falls silent on the treatment of presence/absence of the same. Many products come with warranty, recognized in the Act as “express warranty”, which means any material statement, affirmation of fact, promise or description relating to a product or service warranting that it conforms to such material statement, affirmation, promise or description and includes any sample or model of a product warranting that the whole of such product conforms to such sample or model.[17] So, if product comes with a warranty, then it is established that the manufacturer or seller confirms that the product conforms to certain conditions. However, if it is the case that in spite of coming with a warranty, the product is defective, then the manufacturer will be liable.[18] Even if the manufacturer proves that he was not negligent or fraudulent in making the express warranty, i.e., the express warranty was made bona fide by the manufacturer, even then he would be liable under a product liability action.[19] Therefore, the manufacturer becomes liable for product liability under the conditions mentioned in section 84(1) of the Act, even if the making of the express warranty was proved to be bona fide.

Although section 2(34) is silent on the issue of warranty, the manufacturer can take the defence of having an express warranty, but it would be his duty to prove the same.[20] This

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[17] Consumer Protection Act, 2019, (India), s. 2(20).
[18] Consumer Protection Act, 2019, (India), s. 84(1)(d).
[19] Consumer Protection Act, 2019, (India), s. 84(2).
[20] Consumer Protection Act, 2019, (India), s. 2(47)(i)(g).

creates a situation where the manufacturer would have to prove that not only the warranty exists but also that it is genuine and based on test results or as the case may be.[21] If, however, it is proved that the product was defective, or that it did not conform to the express warranty provided, the manufacturer would then be held liable under product liability.[22]

On the issue of absence of "harm", there arises an interesting question that, what happens in cases where the product is defective, but the consumer does not suffer any harm, as defined under section 2(22) of the Act? Harm, as per the Act, is very inclusive but not exhaustive.[23] Although it envisages a lot of situations that a consumer may face due to the product bought or service hired, but it still cannot be said to be all encompassing in protecting the rights of consumers. For example, a student "X" buys a mobile phone "Y" for the purpose for studying. Let there be an express warranty against manufacturing defects for two years made by the manufacturer. Now, in case, within the first year itself, the mobile phone stops working due to manufacturing defects, then the student would suffer certain harm, i.e., the loss of the instrument through which he would study. This example shows how the student would suffer from harm, but that harm would not be considered as "harm" as per the Act. Although a clear case can be made out against the manufacturer in relation to product liability, but upon a strict interpretation of the section, the student would not have any locus standi to sue the manufacturer for product liability.

The section clearly states that for product liability to exist, there has to be either of the two- a defective product or a deficiency in service. In the definition provided in section 2(34), it is mentioned that manufacturers or sellers would be responsible for any harm caused due to defective products or deficiency in

[21] ibid
[22] Consumer Protection Act, 2019, (India), s. 84(1)(d).
[23] Ashutosh V Panchbhai, Vivek V Nemane, Vaibhav B Sonule, 'PRODUCT LIABILITY LAW IN INDIA – A CRITIQUE' (2022) 6(4) Journal of Positive School of Psychology 561, 563

service. For deficiency in service to be there, a service must be there. However, the party that provides the service, i.e., the service providers, has not been mentioned in the section itself. Therefore, it can happen that a consumer has been harmed by some deficient service and would have a valid claim for it under product liability, but would not be able to hold the service provider responsible as the service provider would fall outside the ambit of product liability as per section 2(34).

(III) DEFINITION OF PRODUCT LIABILITY ACTION IN SECTIONS 2(35) AND 83

The term "product liability action" means a complaint filed by a person before a District Commission or State Commission or National Commission, as the case may be, for claiming compensation for the harm caused to him.[24]

A complaint, in essence, is an allegation made against the product or the seller/manufacturer/service provider alleging of something that is prohibited under the law in force.[25]

Although defined in section 2(35), product liability action is once again mentioned in section 83 of the Act, in Chapter VI, which deals with the subject of product liability. Section 83 also seems to provide an alternate definition.

As per section 83, a product liability action may be brought by a complainant against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm caused to him on account of a defective product. The two definitions provided in sections 2(35) and 83, give different meanings or interpretations to the single term of product liability action. Not only do two different meanings arise out of the same, but there also arises a few questions given the meanings of product liability and product liability action.

[24] Consumer Protection Act, 2019, (India), s. 2(35).
[25] Consumer Protection Act, 2019, (India), s. 2(6).

There also exists a small yet important drawback in the definition/meaning provided in both the sections. Both the sections make it clear through their wording that a product liability action can only be brought forward by a person who has suffered some harm by the product or service. This means that unlike other claims which can be brought forward in the Consumer Forums where even the person who has not suffered any harm can bring a claim, product liability action can only be brought forward exclusively by a person who has suffered some harm.

(IV) CRITICAL ANALYSIS OF PRODUCT LIABILITY ACTION

(a) Product Liability vs. Product Liability Action

As per the definition of product liability given in section 2(34), it is understood that the manufacturer or seller owes a responsibility to the consumer that he would compensate for any harm caused by any defective product manufactured/sold or in any deficiency of service. Thus, the following important points can be made out –

(i) The manufacturer or seller owes a responsibility to the consumer.

(ii) The responsibility is that the manufacturer/seller would compensate for any harm.

(iii) Such harm must arise out of defective product manufactured/sold or in deficiency of service.

When the definition of product liability action, as per section 2(35) is looked at, two important discrepancies come out when it is to be looked at with section 2(34). These discrepancies are as follows -

(i) Consumer in Product Liability vs. Person in Product Liability Action

The definition of product liability mentions that the manufacturer/seller owes a responsibility to the consumer. A consumer, by definition as per the

Act, is a person who can be said to have certain qualities as mentioned in section 2(7). The essence of such qualities is the fact that a consumer is a person who is a buyer or a user of such goods/services save for certain exceptions. Therefore, the manufacturer/seller would owe a responsibility only to that person who is a buyer or user of such goods or services. This creates a contractual obligation on part of the manufacturer or seller.

The definition of product liability action as per section 2(35), however, mentions that a person can file a complaint for any harm caused to him. Here, instead of the term "consumer", the term "person" is present. The term "person", by its definition in the Act, is wider than that of a "consumer".[26]Also present in the definition is the phrase "harm caused to him". The "him" here refers to the person. Therefore, it is understood that as per section 2(35), a product liability action can be brought by any person, who need not be a consumer, who has suffered harm. Although the question of how has he suffered harm ,i.e., whether the harm was caused by defective product or something else remains unanswered, there still exists this lacuna where any person, with the qualifying eligibility to have suffered some harm, can bring a product liability action against a manufacturer or seller, even though the very definition of product liability in section 2(34) provides that the manufacturer or seller have a responsibility towards consumers who have suffered harm and not any person.

[26] Consumer Protection Act, 2019, (India), s. 2(31).

(ii) The presence/absence of defective product/deficiency of service

As mentioned above, the definition in section 2(34) provides that the harm caused to a consumer must be due to defective product or deficiency in service. However, definition in section 2(35) provides for compensation for harm caused to a person. There is silence on the question of the cause of the harm caused to the person. Such harm, hypothetically, as per a strict interpretation of section 2(35), may be caused due to anything in relation or not in relation to the product/service but in relation to the manufacturer or seller and yet the person would still have a certain claim. There would arise another question, that against whom would the claim lie, as section 2(35) is silent on that, but section 83 answers that. Therefore, a person would only have to suffer certain harm, which may or may not even be in relation to the product or service, to gain the locus standi to file a product liability action. The manufacturers or sellers, who owed a responsibility to consumers, and not persons, that too only for harm caused due to defective product or deficiency in service, would now be vulnerable against getting sued for product liability actions in cases where the definition of product liability in section 2(34) shielded them. This would open up a Pandora's box against the manufacturers and sellers against a multitude of litigations

(b) Difference in Definitions given in Section 2(35) and Section 83

Section 2 of the Act clearly provides the definition of the terms in the Act.[27] Therefore, the definitions provided in that section would be the meaning of the terms used in

[27] Consumer Protection Act, 2019, (India), s. 2.

relation to the Act and all the disputes and litigations arising out of it or in relation to it. The definition of product liability action provided in section 2(35) suffers from drawbacks as mentioned above. Section 2 states that the definitions provided there have the meaning provided there unless otherwise mentioned. Section 83 also talks about product liability action but the Act is silent on whether it is a definition or not of the same. As such, it can be said that there are two definitions provided for product liability action, or that both sections 2(35) and 83 are read together. However, there are still certain discrepancies between the meanings of the two sections. These discrepancies are as follows –

(i) Person in Section 2(35) vs. complainant in section 83

The first and foremost discrepancy that would arise after reading the two sections would the usage of the term "person" in section 2(35) and that of "complainant" in section 83. The term "complainant" has been defined in section 2(5) and has a wider ambit. However, it has the same properties as a consumer vis-à-vis person, as a complainant is once again a person/authority that has a certain relationship the manufacturer/seller/service provider. The use of two different terms, which have two different meanings would give rise to confusion when any dispute arises.

(ii) The position of service provider

The definition provided in section 2(35) does not mention against whom the complaint would lie. As such, it would be prudent to look at what the definition of product liability, as provided in section 2(34) would provide. It provides that it is only the manufacturer and seller that have a responsibility, and therefore, it can be concluded

that service providers are outside the ambit of product liability. However, when section 83 is read, it becomes clear that a product liability action can be brought against not only the manufacturer and seller, but also the service provider. If only sections 2(35) and 83 are looked at, then it can be said that they are complementary to each other and that the parties which can be made liable or against whom product liability action can be filed can be made clear. However, when product liability and product liability action are looked at, then it puts the service providers at a disadvantage. The definition of product liability, as mentioned in section 2(34), makes only the manufacturer and seller responsible to the consumers. However, the presence of the term "service provider" in section 83 makes it unfair and for service providers as being absent in the definition of product liability, they are open to product liability action.

(iii) The cause of harm

As mentioned earlier, the cause of harm is not mentioned in section 2(35). Therefore, a person only needs to suffer some harm in order to initiate a product liability action. However, in section 83, it is mentioned that a complainant needs to suffer harm which is caused due to a defective product in order to initiate a product liability action. This once again puts the two sections dealing with the same subject at odds with each other. While the person trying to initiate a product liability action would gain from the liberal definition in section 2(35), the same person would stand to lose due to the restriction provided in section 83. For the manufacturer, seller and service provider, it would be section 83 that would put them in a favourable

position as the person would have to prove that the harm arose out of a defective product instead of just proving that there was any harm.

(c)Absence of deficiency of service in section 83

The definition provided in section 83 aids and hinders the meaning and operation of section 2(35) and 2(34) at the same time. In section 83, there is an interesting observation that shows the deficiency in drafting of the legislation.[28] The observation is that while section 2(34) talks about both defective product and deficiency in service, section 83 only talks about defective product. It does not mention anything about deficiency in service. The section mentions that a complainant can bring a product liability action against a manufacturer, seller or service provider for any harm caused to him by a defective product. This creates at least two problems.

The first problem that arises out of such drafting is that, although section 2(34), which defines product liability explicitly states that manufacturers and sellers would be liable for defective product or deficiency in service, section 83, which adds to product liability action if not defines it, only mentions about defective product. Thus, this creates a confusion that although deficiency in service is a part of product liability, but it is not a part of product liability action.

The second problem that arises is although section 83 itself mentions service provider, but doesn't mention deficiency in service at all. Thus, if the definition of section 83 is to be followed, then the inference that is made is that a service provider can have a product liability action against him, but not for deficiency of services. The definition of service provider in the Act makes it clear that service providers cannot provide goods or products, and

[28] Ashutosh (n 23) 564.

only provide services.[29] Therefore, to have a product liability action against a service provider, but not for deficiency of service, would be absurd. This is so because the service provider can be made liable only in relation to the services provided.[30] So, to have the very grounds on which one can be sued negated, and having the door open to be sued becomes illogical.

SUGGESTIONS

The Act, at least when dealing with the concept of product liability, suffers from deficiency in drafting of the legislation causing much confusion. There are many problems associated with the drafting of the Act as mentioned above. Therefore, a few suggestions have been made to address the issues that would arise –

(I) USAGE OF THE TERM "CONSUMER" THROUGHOUT

The first and foremost issue that the concepts of product and product liability face is the usage of three different terms, "consumer" in product liability[31], "person"[32] and "complainant"[33] in product the two sections that deal with product liability action. Therefore, to address that, it is suggested that only the term "consumer" be used in all sections and for all purposes related to product liability and product liability action.

This is because the manufacturers, sellers and service providers owe a responsibility to a consumer, which includes any buyer or user[34] creating a contractual obligation and therefore, cannot be made liable to any other third party, i.e., a "person", or a "complainant". Therefore, for any suits relating to product

[29] Consumer Protection Act, 2019, (India), s. 2(38).
[30] Consumer Protection Act, 2019, (India), s. 85.
[31] Consumer Protection Act, 2019, (India), s. 2(34).
[32] Consumer Protection Act, 2019, (India), s. 2(35).
[33] Consumer Protection Act, 2019, (India), s. 83.
[34] Consumer Protection Act, 2019, (India), s. 2(7).

liability action, the usage of the term "consumer" would be more appropriate and less confusing.

(II) INCLUSION OF "SERVICE PROVIDER" IN SECTION 2(34)

The definition of product liability, in section 2(34), provides that the manufacturer or seller shall be responsible for any harm caused due to a defective product or deficiency in service. Here, although deficiency in service is mentioned, which relates to service, and would be provided by a service provider, no mention of service provider is made. This would mean that in case a consumer finds his service to be deficient, he won't have an avenue to file a product liability action against the service provider as service providers as a whole have been left out of the definition of product liability. However, section 83, which deals with product liability action, mentions service provider. Therefore, it would be imperative that service providers be included in the definition of product liability mentioned in section 2(34) so as to make the entire concept inclusive and clear.

(III) HAVING A SINGLE AND CLEAR DEFINITION OF PRODUCT LIABILITY ACTION

The two sections that deal with product liability action, i.e., sections 2(35) and 83, provide different meanings and thereby raise many questions on the subject. Their conflicting and ambiguous meanings also make it difficult to have a clear meaning of product liability action. Therefore, in order to provide a single and clear definition of product liability action, along with having a single definition in section 2(35), the following terms/phrases are suggested to be included –

(a) Inclusion of "consumer"

The two definitions of product liability action provided in sections 2(35) and 83 provide different terms on whom can bring a product liability action against the responsible party. It is therefore suggested that the term "consumer"

be used in the definition of product liability action so that the contractual obligation that arises from the definition of product liability provided in section 2(34) is followed in product liability action and no other third party can bring any product liability action against the responsible parties.

(b) *Inclusion of "Harm caused by defective product or deficiency in service"*

The definition provided in section 2(35) only mentions "harm caused". This raises a question that what would be the cause of the harm? In the definition of product liability, it is mentioned that the harm must be caused by defective product or deficiency in service. Therefore, it is suggested that this phrase be added in the definition of product liability action to make the meaning clearer and make the strict interpretation same as that of product liability.

(c) *Inclusion of "product manufacturer, product seller and product service provider"*

The definition of product liability action provided in section 2(35) does not mention against whom the product liability action can be brought. In section 83, it is mentioned that it can be brought against product manufacturer, product seller and product service provider**.** However, the definition of product liability does not mention product service provider. It has been suggested above that product service provider be included in the definition of product liability in section 2(34). Along with that, it is suggested that "product manufacturer, product seller and product service provider" be included in the definition of product liability action as to make the meaning and interpretation clearer.

(d) *Inclusion of "brought by a consumer or a person on behalf of a consumer"*

The definition of product liability action in section 2(35) provides that a person can bring a product liability action. However, that would be incorrect as no other party other than the consumer should bring a product liability action against the responsible parties owing to the contractual relationship that arises from the definition of product liability provided in section 2(34). Section 83 uses the term "complainant" for product liability action. However, even the use of that tern would be incorrect as product liability in itself is a different classification of the wrongs committed by the manufacturers, sellers and service providers wherein there exists a contractual relationship between the manufacturers, sellers and service providers and the consumer and the former owe a responsibility to compensate the consumer in case the consumer suffers some harm owing to defects in the product or deficiency in service.[35] Therefore, in order to solve this confusion, it would be suggested that either a consumer(who has suffered the harm due to defective product or deficiency in service) be eligible to bring a product liability action or a person bring a product liability action on behalf for that consumer. Therefore, it is suggested that the phrase "brought by a consumer or a person on behalf of a consumer" be included in the definition of product liability action

CONCLUSION

The aforementioned analysis provides an insight into how the definitions provided in three principal sections, sections 2(34), 2(35) and 83 are different, due to the deficiency in drafting of the statute, which cause many a question to arise in the mind of person. Fundamentally, four deficiencies arise from a bare reading and strict interpretation from the aforementioned sections and their constituent and allied provisions –

[35] Consumer Protection Act, 2019, (India), s. 2(34).

Firstly, to whom does the responsibility lie? A person or a consumer?

Secondly, how can a product seller be liable if he has no liability in the definition of product liability?

Thirdly, who has the right to complain? A person or a complainant, who, as per the aforementioned analysis, is a person with certain characteristics?

Fourthly, when does a person or a complainant get the right to file a complaint? Whether on harm caused due to product or due to defectiveness of the product?

These were fundamental questions that arise in the mind of a reader who would read such provisions. These questions bring up issues that are cardinal to the functioning and execution of the Act as per the legislature's intention. The situations that arise from these issues have been dealt with showing clearly, how, the deficiency in drafting of these provisions may break the very foundation of the concept of product liability and the suits/complaints that would lie under it.

Further, to correct such irrationality that arise from the deficiency in drafting of the legislation, suggestions have been made in order to correct the same.

The Act brought with it a lot of reforms in the area of consumer law with the two most celebrated reforms being the introduction of the domain of internet bringing online e-commerce under the garb of the Act and the introduction of the concept of product liability bringing India at par with other countries in the world. Although the laws relating to product liability in the Act are different than that of other countries like the US[36], the reforms are still important as they increase the rights of the consumers. The framework of the laws is also such that they

[36] Vagish Kumar Singh, "Introduction of product liability actions in India under the Consumer Protection Act, 2019 – A way forward" [2021] 7 RSRR 40

provide a balance between the rights of the consumers and that of the manufacturers or sellers, but owing to the deficiency in drafting of the legislation, there is a possibility that the manufacturers and sellers would be vulnerable against a huge a number of litigations. The contractual relationship and obligations that product liability creates a different class of wrongs where only the consumers who have suffered harm because of the defective products or deficiency in services can bring claims against the responsible parties. Although any other third party can bring a similar claim, but they cannot do so under the provisions of the Act. The reforms brought forward, if implemented in their letter and spirit, would be a welcome change in the area of consumer law.

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THE UP-POPULATION BILL: IMPACT ON THE POOR

*Chetan R**

ABSTRACT

With an aim of combating the over-population problem in the country, the Uttar Pradesh government has come out with a Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021, which aims to control and regulate the population in the state. While the broad aim of this bill appears to be beneficial, there are various concerns with the provisions of this bill, which not just disregards the concerns of the poor in the state, but also poses great adverse consequences on them especially when the bill comes into force. The author has attempted to critically analyse this bill from the perspective of law and poverty and has suggested alternative routes through which this much needed aim of the bill can be achieved with much lesser oppression of the poor.

Keywords: *over-population, control, stabilisation, welfare, poverty, oppression*

INTRODUCTION

With the world's inhabitants almost reaching 8 billion,[1] the overpopulation issue has grown to an extent where it underlies every other major problem in the world, ranging from environmental change, pollution, ozone layer degradation, food, water and resource scarcity, inflation, crimes, etc.[2] As can be seen

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[1] 'World Population' (*worldometers*) <https://www.worldometers.info/world-population/> accessed 05 December 2021.

[2] Robin McKie, 'Stephen Emmott: overpopulation is at the root of all the planet's troubles' (*The Guardian*, 15 July 2012)

from the nature of problems, overpopulation affects every sphere of the society, be it economic, sociological or political. While major impacts of overpopulation are being seen in the 21st century, various theorists over the centuries have theorised about this issue.[3]

History on scholarship on overpopulation and its subsequent control can be traced to Reverend Thomas Malthus (18th century) who was one of the first scholars to theorise on the problem of humans outgrowing the finite amount of resources on earth and the need to regulate population by the state.[4] This concern has become all the more important in the current age, particularly in a country like India, which is on its way to surpass China with the highest populated country by 2027.[5]

The problems of overpopulation have prompted the Indian government to opt for different avenues to regulate the population. The most prominent among these is the two-child policy, which has been brought up and tabled before the Parliament over 35 times since our independence in 1947.[6] However, since "population control and family planning" is present in the Concurrent List of the Seventh Schedule of the

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<https://www.theguardian.com/technology/2012/jul/15/overpopulation-root-planet-problems-emmott> accessed 05 December 2021.

[3] Kelsey Piper, 'We've worried about overpopulation for centuries. And we've always been wrong.' (*Vox*, 20 August 2019) <https://www.vox.com/future-perfect/2019/8/20/20802413/overpopulation-demographic-transition-population-explained> accessed 05 December 2021.

[4] Donald Gunn MacRae, 'Thomas Malthus' (*britannica*) <https://www.britannica.com/biography/Thomas-Malthus> accessed 05 December 2021.

[5] Press Trust of India, 'India may overtake China as most populous country even before 2027: Report' (*Business Standard*, 12 May 2021) < https://www.business-standard.com/article/current-affairs/india-may-overtake-china-as-most-populous-country-even-before-2027-report-121051201219_1.html#:~:text=India%20is%20expected%20to%20add,current%20century%2C%20the%20report%20said.> accessed 05 December 2021.

[6] Shivansh Saxena, 'Why Two-Child Policy is Futile for Population Control' (*The Leaflet*, 10 March 2021) <https://www.theleaflet.in/why-two-child-policy-is-futile-for-population-control/> accessed 05 December 2021.

Constitution of India,[7] the state government is also within its jurisdiction to pass laws on matters concerning the population.

This leeway has resulted in various states across India to come out with their population regulations laws and policies, which either still exist or have been revoked. The states include, Madhya Pradesh, Chhattisgarh, Haryana, Himachal Pradesh (states which have revoked their two-child policy), Rajasthan, Gujarat, Andhra Pradesh, Telangana, Maharashtra, Odisha and Assam.[8] The most recent state to come out with such a law is Uttar Pradesh ("UP"), which is also the focus of this article.

In furtherance of the same, this paper has viewed the Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021 ("UP-Population Bill"), from the perspective of its relation and impact on the poor. To that effect, this paper has been divided into four sections. *Firstly*, it will highlight the important provisions of the UP-Population Bill which will be under scrutiny in this article. *Secondly*, it will analyse the bill through its effects by identifying the poor who will be affected by the bill. *Thirdly*, it will critically examine this bill by highlighting the system of oppression being perpetuated by it. *Lastly*, it will suggest alternatives to this model of forced regulation of reproduction of the people of UP.

PROVISIONS OF THE UP-POPULATION BILL

As a part of its Population Policy 2021-2030, the UP government, with an aim to reduce the Total Fertility Rate ("TFR") in the state from the present 2.8 to 2.1 per thousand by 2026 and to 1.9 per thousand 2030. The bill aims to regulate the population through two ways, one, through incentivising

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[7] The Constitution of India 1950, Schedule VII.

[8] Bansari Kamdar, 'The Gendered Impact of Uttar Pradesh's Population Control Bill' (*The Diplomat*, 30 July 2021) <https://thediplomat.com/2021/07/the-gendered-impact-of-uttar-pradeshs-population-control-bill/> accessed 05 December 2021.

sterilisation, and two, through disincentivising having more children.

The incentivisation process applies to two different sets of persons. *Firstly*, there are the public servants. If a public servant undergoes sterilisation after having two children, they shall be given incentives, such as additional increments, subsidies, soft loans, paid maternity leave, increase in pension, free health care, etc.[9] Moreover, if the public servant underwent sterilisation after having one child, along with the previously mentioned incentives, the public servant will also be entitled to get free healthcare for their child, free education, preference in government jobs, scholarships, etc.[10] *Secondly*, there are common citizens, wherein certain parts of these incentives (which don't deal with a government job) – such as soft loans, rebates, paid maternity leave, free healthcare and education, preference in government jobs, etc. – are also available to the citizens if they undergo sterilisation.[11] Additionally, for couples living below the poverty line, undergoing sterilisation after one child. would result in them getting a one-time lump-sum amount of Rs.1 lakh if the child is a girl, and Rs.80,000 if the child is a boy.[12]

The disincentivisation process appears to almost penalise the couple who have more than two children in the state of UP. Public officials who have more than two children will not be given any promotions/increments and may even be dismissed from service in certain cases.[13] In addition to this, if any couple violates this two-child policy, they will lose access to all government sponsored subsidy schemes, ration service, and they will also be

[9] The Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021, s.4.

[10] The Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021, s.5.

[11] The Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021, s.6.

[12] The Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021, s.7.

[13] The Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021, s.10.

debarred from taking up government jobs or standing for public elections.[14]

Furthermore, this law does not take into account exceptions caused by adopting more than two children as well. It groups adoption into the same category as giving birth, in a law which aims to reduce the fertility rate of the state.[15]

IDENTIFYING THE IMPACTED SECTIONS

PARTIES INVOLVED IN THE BILL

The main point to be considered while analysing this bill, is who has deliberated over and drafted this bill, and who will be the most affected by this bill. While the aim of the bill, from its preamble, is to provide welfare to the people of UP by implementing the two-child policy, in reality, the impact of the bill would be far away from this objective and would be much more harmful and disastrous. To better understand the ramifications of this bill, it is pertinent to identify the section of the society which will be most gravely impacted by this law.

According to the National Family Health Survey 2015-2016 (NFHS-4), those who tend to have more than two children belong to the poorer section of the society many of whom fall below the poverty line.[16] So, the ones on whom the disincentives and liabilities are being imposed, are the scheduled castes, scheduled tribes, Adivasis and Muslims in the state.[17] On the other hand, the middle and upper class of the society, who do not belong to these oppressed groups, would be the closest to receive the incentives from this draft bill, because as per the statistics, they

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[14] The Uttar Pradesh Population (Control, Stabilisation and Welfare) Bill, 2021, s.12.
[15] Subhashini Ali, 'Why UP's Population Control Bill Can Prove Disastrous for Women, Poor Families' (*The Wire*, 24 July 2021) <https://thewire.in/health/uttar-pradesh-population-control-bill-disaster-women-poor-families> accessed 05 December 2021.
[16] The National Family Health Survey 2015-2016.
[17] Ali (n 15).

majorly tend to have one or two children.[18] So, getting a safe sterilisation would be more amenable to them than the former group of people and they would easily be able to avoid the penalisation due to violating the two-child policy.

CREATING A CLASS-BASED BELL JAR

In essence, the draft bill is creating a form of bell jar, wherein the ones inside the jar, consisting of the middle and upper-class individuals not belonging to any of the oppressed groups, are creating the population laws which suit their preferences and status quo.[19] At the same time, they are imposing this law on the people outside the bell jar, consisting of the socially and economically oppressed groups. The effect of the bill on these two groups are drastically different considering the demographics in UP.

Not only UP, but most states which impose population control laws and policies, are in reality targeting a poorer section of the society, which in India, and particularly UP, would also extend to cover Muslims. The rich and privileged group (insiders), with no experience of living in the shoes of the poor, draft such laws, by deeming such stringent measures to be 'necessary' to stop reduce population in the state without being cognizant of who and why do people tend to have more kids.[20] In this way, knowingly or unknowingly, they tend to go about punishing and imposing disincentives on the poor, due to their poverty and helplessness.

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[18] Rema Nagarajan, 'UP population policy may put the poor at a disadvantage' (*The Times of India*, 14 July 2021) <https://timesofindia.indiatimes.com/india/up-population-policy-may-put-the-poor-at-a-disadvantage/articleshow/84394141.cms> accessed 06 December 2021.

[19] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan, 2001).

[20] Sanjica Kumar & Vedica Nigam, 'Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021: A Critical Analysis' (*The Jurist*, 01 September 2021) <https://www.jurist.org/commentary/2021/09/kumar-nigam-analysis-uttar-pradesh-population-bill-2021/#> accessed 06 December 2021.

What the drafters do not understand is that for the poorer section of the society, the only resource which they can offer to earn a livelihood is labour. And the only capital they can invest in, in their economical state, is their children. It is these children who will provide more hands to work and provide labour in order to earn for the family. They have no other option or even knowledge about any possible alternatives. So, in essence, the legal domination is being done by the certain upper section of the society, in the form of the UP-Population Bill which is just benefitting them through incentives, for just being how they have always been and punishing the poor for how they have always been.[21]

Moreover, this poor section of the society, which largely depends on government subsidies and schemes for their survival, especially after the COVID pandemic, will greatly suffer in case they lose access to the same.[22] In this way, this bill excludes the poor section and leads to undercapitalisation of the state's population. This will lead to further condemnation of the poor to remain poor, malnourished, and hungry, which in turn will lead to them producing more children, which would give the atleast some form of security.[23] So, the law is essentially perpetuating what it allegedly seeks to prevent and hence, reinforces the bell jar division.

ASKING THE WHY QUESTION

As previously mentioned, the one point which the UP-Population Bill and its drafters failed to realise is the reason why the poor tend to have more children than others. To effectively criticise the bill, it is pertinent to take into account the various qualitative factors as to why they tend to have more children. The

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[21] Ali (n 15).
[22] 'Uttar Pradesh's population control bill detrimental for marginalised communities and women' (*Gaon Connection*, 17 July 2021) <https://en.gaonconnection.com/uttar-pradesh-population-control-bill-yogi-adityanath-elections-sex-ration-sterilisation-poverty/> accessed 06 December 2021.
[23] Ali (n 15).

law be able to properly address this issue and bring about changes only if it doesn't take steps based on generalisation.[24]

As Hernando De Soto also mentions in his book, *The Mystery of Capital Why Capitalism Triumphs in the West and Fails Everywhere Else*, the reason why capitalism has failed in third world countries and has not been able to alleviate the poor is not due to them being lazy, not smart or not knowing where to invest. There is a much more real and deep-seated reason for this.[25] In the same way, when that reasoning is extended to the population question in this article, the reason for the poor having more children is not due them being poor or lazy or having too much time on their hands.

The reason for this can be understood in the nature in which the poor lead their lives. As Abhijeet Banerjee and Esther Duflo have mentioned in their article, the poor experience risks all throughout their lives, by virtue of just being poor. To cope up with this, they adopt various different methods and routes.[26] Most of these methods aim at countering any drop in wages which they might face. In UP, which is the most populated state in India, there is an excess supply of labour, due to which the price of labour has gone low.

As a result, the poor try to work more than average to earn and provide for their family, both in terms of the number of hours they put into work and the number of family members working.[27] Hence, this drives them to have more children, as more children would mean more hands to work and earn for the family. *Secondly*, having more children would also enable the family to send such children, with either of the parents to other states where they can work for better wages, because it is uncommon for an entire family to more to another unknown state or city.[28]

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[24] Amartya Sen, *The Idea of Justice* (The Belknap Press 2009).
[25] Soto (n 19).
[26] Abhijeet V. Banerjee and Esther Duflo, *Poor Economics: Rethinking Poverty & the Ways to End it* (Penguin Books, 2013).
[27] ibid.
[28] ibid.

Thirdly, even if any one of the many children fail or are unemployed, there are still others who will continue to provide for the family. So, the entire family's earnings will not be the responsibility of one child.

Fourthly, even those employed in farming tend to bring their own children to work, so that they can save the costs of employing more individuals in the farm work, while also at the same time earning for the family. *Fifthly*, having more children and getting them married in different households will also create a link between the house where they were born and where they are married to, so that the two families can call and rely on each other when either is in trouble.[29] *Sixthly*, due to the high infant mortality rate prevalent in UP, poor couples who cannot afford expensive medical treatments and healthcare for their children opt to have more children, in case any of their existing children succumb to any disease.[30]

CREATING A GENDER-BASED BELL JAR

In addition to this class-based bell jar, there is also a gender-based bell jar which would be imposed by this bill, across all classes. According to the NFHS-4 statistics, 17.3% of women and only 0.1% of the males in UP undergo sterilisation. So, the draft bill is essentially double oppressing these women belonging to the lower class.[31] They are not only being oppressed from the upper-class members for belonging to the lower rung of the society but also for being women within their own class groups.[32] This is particularly true with respect to the voluntary sterilisation because, similar to the 1975 sterilisation drive, it will be women

[29] ibid.
[30] Ali (n 13).
[31] J Devika, Kalpana Kannabiran, Mary E John, Padmini Swaminathan, Samita Sen & Sharmila Rege, 'Intersections of Gender and Caste', (2013) 48(18) EPW.
[32] Jane Coaston, 'The intersectionality wars' (*Vox*, 28 May 2019) < https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> accessed 06 December 2021.

who will be 'voluntarily' undergoing the highly complicated, unsafe, irreversible, sterilisation process.[33]

Moreover, such women have greater chances of being divorced or deserted, in case they give birth to two female children. Along with these women, there are chances of greater female infanticide, abandonment, and unsafe sex-selective abortions in the state.[34] This was actually seen in other Indian states – such as Haryana, Andhra Pradesh, Odisha – where the mandatory two-child policy was imposed.[35] Therefore, the law will not be regulating the population growth in the state, but in reality, it will be controlling women's fertility and their body. So, this bill, drafted by upper class and upper caste man, can become binding law through the proper procedure of enactment. So, there is another bell jar consisting of upper-caste men in the inside and all other females on the outside.

THE BILL AS A SYSTEM OF OPPRESSION

In the previous section, I identified the section of the society which will be most adversely affected by the UP-Population Bill, i.e., the poorer section and women. In continuance of critically analysing this bill, in This section, I will portray how the legal system arising from this bill behaves like a system of oppression.

Obedience to the law is not something which is always guaranteed, irrespective of its legitimacy, rationality and formality.[36] If the legal system is designed by the insiders in such a manner as to necessitate obedience from the outsiders, without considering their views, needs and opinions, then the system is perpetuating oppression. Such a form of oppression is inherent in the UP-Population Bill. According to Iris Marion Young,

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[33] Kamdar (n 8).
[34] Kumar & Nigam (n 20).
[35] Kamdar (n 8).
[36] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

obedience to the legal system turns into oppression when the person being forced to obey does not have the choice to disobey. When obedience is the norm at all times, irrespective of the context then that obedience to the law, becomes oppression.[37]

In the case of the UP-Population Bill, the three criteria in which obedience becomes oppression, as mentioned by Iris Young, are being met. *Firstly*, there should be an absence of choice. *Secondly*, the law must be aiming for maximum benefit for the maximum number, without considering the minority who might not be benefitting. *Thirdly*, the society being very duty conscious, and not rights-based.[38] When seen in the present context, the individuals do not have the choice of not having more than three kids. It is the law that is forcing them to limit the number of children they have.

It is also aiming for the long-term welfare of the state by reducing the population, while completely disregarding the present scenario and the state of the poor and women who would be adversely affected by the law. But since there is maximum benefit for the maximum number, in the long run, it is being pushed to become a law. Lastly, inspite of the right to procreation being recognised under Article 21,[39] this law is aiming to make it more like a duty being imposed on the population to have less children, by giving incentives and disincentives.

In this way, the state and the law are becoming like a monstrous impersonation, which looks at the poor as not understanding the ramification of their actions, and who are in need for the state's interference for their own good. That is how this bill gets the justification that the state can come and limit the liberty of those living outside the bell jar. Thus, this domination of the population bill perpetuates a political system that endangers the rights and liberties of the vulnerable section of the

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[37] ibid.
[38] ibid.
[39] *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

society, while entrenching and benefitting those within the bell jar.

COMPARISON WITH CHINA

Moreover, such a law can have deep ramifications for the state as well, as can be seen from the Chinese experiment of having a one-child, and then two-child policy. While the Chinese state also had the same aspirations as the UP government while implementing this policy, over the years, it backfired such that there was a dramatic decrease in the number of births and a sharp increase in the senior population in the country. This resulted in a decreased young workforce and increased aging workforce, thus, straining the economy.[40]

Hence, the Chinese state withdrew its two-child policy in May 2021, and instead vouched to focus on empowering women, and enhancing their capabilities through government programmes, instead of coercive policies.[41] India, and particularly UP, is also looking down the same barrel if it goes ahead with such laws because, much like China in 1971, the state's TRF is already in decline. So, such exaggerated measures will only worsen the situation for the populous of the state.

ALTERNATIVES

After identifying the poor who will be affected by this bill and the reasons for their apparent increase in population, this section of the article focusses on potential alternatives to the UP-Population Bill. I will be employing the theories of Hernando de Soto, Amartya Sen and Martha C. Nussbaum on alleviating poverty.

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[40] Stephen McDonell, 'China allows three children in major policy shift' (*BBC News*, 31 May 2021) <https://www.bbc.com/news/world-asia-china-57303592> accessed 06 December 2021.

[41] Mike Gallager, 'Population control: Is it a tool of the rich?' (*BBC News*, 28 October 2011) <https://www.bbc.com/news/magazine-15449959> accessed 06 December 2021.

Firstly, according to the NFHS-4, the TFR in the state of UP has actually been decreasing since the past decades. From being 4.82 in 1993, it has reduced to 2.7 in 2016. And this figure was expected to reach 2.1 by 2025, on its own.[42] Therefore, there was actually no need for this oppressive two-child mandate law to even be considered for UP.

Secondly, an alternative to this top-down approach of imposing the law, would be a more bottom-up approach whereby the individuals are more involved in the process of lowering the TFR. Similar to the US model, choice of the couple should be given the most importance in deciding the number of children and not the opinion of the state. The UP-Population Bill is a law affecting the entire states populous. In such a case, the state, instead of generalising individuals, should identify the poor people falling outside the bell jar. Value in separateness is the most important. Through this, such people can be accepted and accommodated into the bell jar. There would no longer be discrepancies in how the law is being formulated and how it will be affecting the population.[43]

The state should also make profiles of the poor by asking them questions about why they tend to have more children, and what they would do if the law prescribes to have only two children. In this way, lawmakers will have the perspective of the poor and would stand in a better position to understand their concerns about having more children. Once this is done and the profiles of the poor are analysed, the state should go about framing institutional designs and systems.[44] Along with the differences, similarities among the various people living outside the bell jar should also be considered. The impact of any law or policy on these people should be kept in mind while drafting the laws. As

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[42] The National Family Health Survey 2015-2016.
[43] Soto (n 19).
[44] Sen (n 24).

stated by Soto, the poor living outside the bell jar have to be integrated and adapted into the current legal system.[45]

The most effective alternatives would be educating women, raising awareness about safe sex, contraception, government programmes, upward mobility of women and urbanisation. Educating people about the costs of living and costs of a larger family, would also go a long way in reducing the fertility rate as is evidenced in states like Kerala, Karnataka and Tamil Nadu, which have high literacy rates and remarkably low fertility rates.[46] It ultimately comes down to including women (who are the outsiders in the gender-based bell jar) in the process and giving them control over fertility and reproduction decisions.[47] Greater empowerment of women through education and awareness would actually be giving the choice to them to choose to have lesser children. Such an enabling and inclusive process would not only have acceptability, longevity and legitimacy, but also ensure the state's vision of reducing the fertility rate is met without any coercive measures.

CONCLUSION

While the end result of the government's action is acceptable, the means adopted by the UP government is far from being fair and just to its population, particularly the ones living outside the bell jar. Different aspects of the UP-Population Bill perpetuate various kinds of state coercion, sexist and disablist outlooks. This is mainly caused due to the myopic view of those drafting the bill, who belong within the bell jar, and hence haven't had the lived experience of those living outside. Without considering the ramifications of this bill, they go about disincentivising and, in a way, penalising the poor, all for

[45] Soto (n 19).
[46] Ismat Ara, 'Why UP's Population Control Bill May Be Dangerous' (*Science The Wire*, 17 July 2021) <https://science.thewire.in/health/why-ups-population-control-bill-may-be-dangerous/> accessed 06 December 2021.
[47] 'India Should Learn From China, Coercive Population Policies Don't Work: NGO' (*The Wire*, 01 June 2021) <https://thewire.in/rights/india-china-population-control-policies-pfi-two-child> accessed 06 December 2021.

achieving a goal, which has already been substantially achieved over the past few decades, without this coercive law.

So, instead of this population bill, the lawmakers should try understanding why the poor tend to have more kids, and what makes them think that having more kids would result in better future for themselves. They have to go outside their bell jar and create profiles of the poor to understand their understanding of reproduction and having children. It is only when the state does this that it will understand that the poor tend to have more children, not because they are poor or not smart, but because more hands would mean more labour, and more labour would mean more income to the household. There can be various other reasons as well, which the state will come to understand if it involves the outsiders in the process of regulation.

Subsequently, it can also be seen that there is no need for this coercive law to even be passed in the state. The state's TFR has already been reducing, and to achieve that last milestone, the state would instead invest int better healthcare, education, awareness of sex, contraception, costs of living, costs of raising a child, etc., so that the state doesn't force the individuals to not reproduce, but instead facilitate them such that they use these resources and convert them, and choose to not have more children.

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DISSENTING WITH HINDSIGHT: AVOIDABLE TRANSACTIONS UNDER THE INSOLVENCY & BANKRUPTCY CODE, 2016

Diksha Sharma[*]

ABSTRACT

*Previously, the legal system was burdened with inefficient dealing of insolvency applications which led to immense disarray with respect to insolvency proceedings. With the advent of amended legislation of Insolvency and Bankruptcy Code (Amendment) Act, 2021 (hereinafter referred to as "**the Code**"), the concept of avoidable transactions has proved to be impactful and come to the rescue for all the creditors who are duped. The concept of avoidable transactions in the Code has come into play and emanated to close down any way which allows offenders, engaged in fraudulent transactions, to escape from prolonged liability. However, the role of any resolution professional is extremely crucial to ascertain the avoidance application before the resolution plan gets approved, failing which the avoidance application for determining any malicious intent to defraud creditors would be vitiated by the Adjudicating Authority. This will certainly not leave the creditors in lurch but with hopeful recovery prospects, hence the laborious procedure will come to a stay. The parameters laid down under the code specify 'look-back period' or the relevant period to discover related party transactions that can be only understood under the code. To elucidate the Insolvency and Bankruptcy Code, which is the linchpin of the corporate insolvency resolution process (CIRP) underlines the necessity of avoidable transaction has been explained in this paper seeking revival of debtor's company without subduing the rights of the creditors. Contemporary jurisdiction finds its origin in Roman law, referred to as 'Actio Pauliana'. This step would aid the Insolvency and Bankruptcy*

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*Board of India (hereinafter referred to as "**the IBBI**") for effective monitoring, thereby enhancing accountability of IP while furnishing value maximisation for stakeholders. Therefore, these principles if adhered to will enable that legal activities practiced in the course of business are not invalidated that could risk a creditors' position.*

Keywords: *Avoidable transactions, insolvency, creditor, IP, NCLT etc.*

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (the 'IBC') is an evolving and a latent regime, which emerges with a new set of issues to be addressed in order to relieve the plight of the stakeholders. As the legislation is based on the paradigm of pushing asset value, enhancing easy availability of credit, ensuring a time bound resolution process and with a view to balance the interests of the stakeholders, certain situations pose encumbrance to creditors for recovery during the insolvency proceedings, such as avoidance transactions. Correspondingly, to protect the interests of the creditors, the National Company Law Tribunal ('NCLT') is authorized to do away with such transactions in accordance with IBC, 2016.[1] The financial transactions which deviate from the prime purpose of the IBC legislation are called avoidable / vulnerable transactions and have to be avoided by the corporate debtor during the relevant time period. The concept of such transactions has been previously introduced in the Companies Act, 2013 and are similar.[2] Sections 43-51 of the IBC, 2016 deals with voidable transactions and imposes a duty on the Insolvency Professional ('IP') to file an application for avoidance of these transactions under Section 25 (j) of the code, and form an opinion on (or before 75th day of the commencement of the

[1] Shahezad Kazi and Misha Chandna, 'Avoidable Transactions Under The Insolvency And Bankruptcy Code: Key Considerations' (S&R Associates, 19 May, 2020) <https://www.snrlaw.in/avoidable-transactions-under-the-insolvency-and-bankruptcy-code-key-considerations/> accessed 24 May, 2022

[2] The Companies Act, 2013, s328-331.

insolvency process) whether any transaction carried out by the former board of directors is detrimental to the interest of the stakeholders.[3] Once the IP identifies the avoidable transaction, it should be classified as either preferential, undervalued, fraudulent/ defrauding or, extortionate as laid down by the code and fill the form CIRP 8.

PREFERENTIAL TRANSACTIONS

Preferential transactions have been defined under Section 43 of the IBC, 2016 and is deemed to be the one wherein, the corporate debtor makes transfer of a property for the benefit of the creditor, surety, or guarantor on account of any pending financial or operational debt; and to give effect to a preference given by the corporate debtor to the creditor or a surety in a beneficial position in case of distribution of assets than to what would have been adopted in the event of liquidation process done in consonance with Section 53 of the IBC, 2016. As mentioned before, for any transaction to be avoidable it is said to be invoked during a relevant time when it has occurred with a related party during a period of two years from the institution of insolvency proceedings; and a period of one year if it is anyone other than a related party. However, any transfer that has been made during the normal course of business shall not be covered or counted as a preference.[4]

The aspect of distinguishing a 'financial creditor' from a 'financial debt' was laid down in the judgement of *Anuj Jain (RP)*

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[3] Dinesh Arora, 'IBC reform helps insolvency professional assess avoidance transactions' *Business Standard* (Delhi, 19 August, 2021) <https://www.business-standard.com/article/economy-policy/ibc-reform-helps-insolvency-professional-assess-avoidance-transactions-121081900337_1.html> accessed 18 June, 2022

[4] Shubham Nahata, 'Preferential Transactions Under IBC: A Much-Needed Course Correction' (2019) Legal Service India < https://www.legalserviceindia.com/legal/article-2070-preferential-transactions-under-ibc-a-much-needed-course-correction.html > accessed 18 June, 2022

v. Axis Bank Limited & Ors.,('Jaypee Infratech')[5] and the major issue before the Hon'ble Supreme Court was to ascertain if the mortgages created by Jaypee Infratech Limited ('JIL') in favour of its parent company Jaiprakash Associates Limited ('JAL') constituted a preferential transaction. The court answered in negative, adopting the *principle of noscitur a sociis*, and held that under section 43(3)(b), any transaction made to facilitate value enhancement or securing new value to the corporate debtor shall not be regarded as a preferential transaction. Although, JAL stood as an operational debtor to JIL, the court recognised JAL to be one of the related parties (with a look back period of two years) and not an unrelated party (look back period of one year) after scrutinizing the nature of transaction, because it gave JAL a highly significant amount of priority over other creditors.

As per sub-clause (a) of sub-section (3), transfer that has been made during ordinary operation of business of the corporate debtor *or* transferee company shall not fall within the ambit of preferential one. However, in this clause the word '*or*' shall be meant as '*and*', making it applicable to the corporate debtor and transferee company both, provided that in order to validate a preferential transaction of a transferee company, it would have to ensure that it is not executed in the ordinary course of business of the corporate debtor. The court elaborated further saying that it should not arise out of "*any special or particular situation*" rather be part of an "*undistinguished common flow of business done*".[6]

In the light of the above context, deeming function came into play, where the court emphasised its meaning - provision should be treated in its true sense irrespective of whether the transaction was anticipated to be a preferential one. The court should verify from all angles whether the transaction falls within the ambit of Section 43(2) and 43(4), then come to a conclusion

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[5] (2020) 8 SCC 401

[6] Margaret D'souza, 'The Insolvency Review: India' (The Law Reviews, 17 October, 2021) <https://thelawreviews.co.uk/title/the-insolvency-review/india> accessed 20 June, 2022

excluding the need to prove the intent. The view was extensively described in *Hindustan Cooperative Housing Building Society Ltd. v. Registrar, Cooperative Societies and Anr.*[7]

UNDERVALUED TRANSACTIONS

A gift made by a corporate debtor to a person, or any transaction made with another person which comprises a transfer of one or multiple assets, the ascertained value of which is less in comparison to the consideration value provided by the corporate debtor is an undervalued transaction. The relevant time period of these transactions is the same as preferential transactions and may require an expert to evaluate the value of such transactions. Under Section 47(1) of the IBC, 2016, if the liquidator or IP has not reported of any undervalued transaction before the Adjudicating Authority, a creditor, member or partner of a corporate debtor may file for one and request the court to restore their original position in conformity with Section 45 and 48.

The transaction would be assessed by determining the cost of the asset invested in by the corporate debtor. However, neglecting the depreciation value and calculating the original value of the asset from the time of transfer would be irrational and inappropriate. The purpose is to ensure that the value of the asset is not undermined while interpreting the transaction. The Allahabad Bench of NCLT while holding the transactions of preferential in nature in the *Jaypee Infratech*, the court declared them as undervalued and fraudulent as well, it also mentioned that once the transaction has been identified as preferential then it doesn't necessarily imply that it would be undervalued and fraudulent under Section 45 and Section 66 of the code respectively.

Undervalued transactions like preferential transactions should not be detected as done during the ordinary course of the business. The burden of proving the transaction as undervalued

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[7] (2009) 14 SCC 302

rests on the party claiming for a speculation.[8] The court should also delve into the company's circumstances which would mean to understand the state of mind of the company while entering into the transaction.

The intent of the company shouldn't be taken into account but instead whether a prudent person would not have taken such a step in the initial stage. A crucial effort in determining the company's need for liquid funds might have an impact on the asset value to the corporate debtor.[9] The object of the legislation as clearly highlighted in the 2015 Bill is – to prevent the siphoning off of the corporate assets of the corporate debtor by the management, which has prior knowledge of the financial status and state of the corporate debtor and might effectuate such transaction with the propinquity to insolvency proceedings.[10]

In Mann Aviation Group (Engineering) Limited (in Administration) v. Longmint Aviation Limited and Gama Support Services (Fair Oaks) Limited[11], the court was of the opinion that once the transaction has been deduced to be in the relevant period, and the property value of which is less than what has been furnished by the corporate debtor is liable to be set aside. The test put down in Demondrille[12], was adopted by Lord Young J in McDonald v Hanselmann[13] and came to the conclusion that while the transaction is estimated at an undervalue, the magnitude of bargain should be such that it possibly could not be expected in a usual commercial practice. His Honour further contemplated the courts to infer the provision in a manner, which approves the model to draw utility towards unsecured creditors, whom the liquidator acts in favour of. Also, when the buyer of the asset is a related party, the court should dive into the intricacies of the transaction and avoid excusing the sale at an undervalue owing to

[8] Phillips and Another v. Brewin Dolphin Bell Lawrie, [2001] 1 All ER 673
[9] Demondrille Nominees Pty Ltd v. Shirlaw, (1997) 25 ACSR 535
[10] Insolvency and Bankrupty Code Bill (2015)
[11] [2011] EWHC 2238 (Ch)
[12] Ibid at 9.
[13] (1998) 28 ACSR 49

commercial factors. Nonetheless, there can be certain defences pulled off by a related party against liquidator's attack to an unreasonable transaction and might add essence to the argument, if it is proved:

i. the party entered into the transaction in good belief;

ii. at the time of entering into transaction, the party couldn't have possibly foreseen any reason or grounds of presuming company being insolvent or about to become insolvent; and

iii. provided the consideration changed his/her position in the transaction.

iv. Similarly, to pose a general defence by an *unrelated party* for the same cause would be, if it is proved that:

v. the party hasn't accrued any benefit out of the transaction; and

vi. if the party did receive a benefit from the transaction, then only on account of good faith.

In *IDBI Bank vs. Jaypee Infratech Ltd*,[14] the NCLT declared Jaypee Infratech's transaction of securing a loan by mortgaging 758 acres of land from its parent holding company as illegal and fraudulent. Homebuyers of the possession were financial creditors according to the promulgated ordinance with a 59% of voting share, but it didn't make the stance clear whether they are secured or unsecured creditors. The NCLAT allowed for a fresh bidding process, which barred the Jaypee Group from participating in the auction. Consequently, the court undid the transaction directing the security interest to be released generated through the mortgage.[15]

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[14] [2019] 151 CLA 194

[15] Tanisha Khanna, Arjun Gupta & Sahil Kanuga, 'Vulnerable Transactions Under Bankruptcy Code: Promoters And Lenders Both Beware' (Nishith Desai Associates, 25 October, 2018) <https://www.nishithdesai.com/SectionCategory/33/Research-and-Articles/12/31/RegulatoryHotline/4260/20.html > accessed 29 May, 2022

TRANSACTIONS DEFRAUDING CREDITORS

The IBC, 2016 gives Adjudicating Authority the power under Section 49 to make an order to protect the interests of the person, who has been affected by a transaction, which is undervalued and entered into by the corporate debtor for keeping his assets out of reach from any person who is about to make a claim against him; which also adversely prejudice the interests of such person. This section aims at restoring the position of the party, who have become a victim to the transaction. The essential facet of this section is that there's no time bar for claiming the transaction before the tribunal and a deliberate intent on the part of the corporate debtor is the key requirement to attract this provision. If the IP is satisfied, he may file a complaint before the required authority. Having said that, it doesn't apply to a party who has obtained the asset from any other person apart from the corporate debtor in good faith without having knowledge of the relevant circumstances.

Section 49 is in parallel with Section 45 with a minor distinction of being carried out with a malicious intent alongside an illegitimate purpose. The element of fraud is the reason behind the rationale of not having a stipulated look back period since, malice cannot be invoked as a justification. Section 69 of the code, prescribes a punishment for committing the offence of defrauding or colluding to execute a transaction against the asset of the corporate debtor. The offenders be it corporate debtor or the officer of the corporate debtor, whichever the case may be, shall be punishable with up to five years of imprisonment and not less than a year, or with fine of up to one crore rupees and shall not be less than one lakh rupees, or both. Although, the person would be not held liable in case of concealing or chiselling away a part of the property within two months of any aggrieved order for remittance of money obtained against the corporate debtor, if it

has been committed for more than five years before the commencement of the insolvency proceedings.[16]

The UNCITRAL Guide on Insolvency law also affirms on examining transactions entered into by the corporate debtor with an objective of identifying avoidable transactions made with related and unrelated parties with a suggestion of a longer look back period for related parties. In determining if a transaction is fraudulent is completely dependent on the facts and circumstances of the case, which is subject to an analytical assessment to demonstrate whether the transaction has been entered into to defraud the creditors deliberately. It is mostly assumed from the management of the corporate debtor to initiate and arrange such conduct to defraud the creditors and get away hassle free.[17]

EXTORTIONATE TRANSACTIONS

The IP or liquidator has to file an application before the Adjudicating Authority for avoidance of a transaction that involves a receipt of a financial or an operational debt within the timeframe of 2 years preceding the date commencement of insolvency proceedings regardless of the type of counterparty, where the corporate debtor has been one of the parties; and where the transaction demands an exorbitant payment from the corporate debtor is said to be an extortionate transaction under Section 50 of the IBC, 2016. As opposed to other avoidable transactions, this transaction deals with the credit obtained by the corporate debtor and not with the transfer of assets.[18]

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[16] 'Adjudicating, Appeals and Penalties for Corporate Persons | IBC' (Taxmann, 14 July, 2021) <https://www.taxmann.com/post/blog/adjudicating-authority-for-corporate-persons > accessed 29 May, 2022

[17] Rajeev Vidhani, Vishnu Shriram & Ashwij Ramaiah, 'Related Party Transaction under IBC: Concept and Evolution', 2020 9(1) The Chamber's Journal <https://www.khaitanco.com/sites/default/files/2020-11/TheChamberJournal-October2020.pdf> accessed 30 May, 2022

[18] Ibid at 1.

The legislation, therefore, focuses on adjusting the transactions that are extortionate credit based. For instance, any person engaged in rendering financial services extends a debt in adherence to the law for the time when it is relevant shall not be deemed to be an extortionate credit transaction. In *Shinhan Bank v. Sugnil India Private Limited and others*[19], the applicant challenged the status of the Committee of Creditors (CoC) and posed a question before the court of law to decide whether the members are financial creditors as defined under IBC, 2016. The NCLT after comprehending the Companies Act, 2013 stated that the money lent to the corporate debtor was in the form of a loan and reliance was placed on the case of *Sanjay Kewalramani vs. Sunil Parmanand Kewalramani and others*[20], which cleared that the component of interest payment paid by the corporate debtor does not establish 'debt' as 'financial debt'.

The NCLT after observing that the applicant was charged at an interest rate of 65% p.a., made it evident that it was higher than the maximum rate of interest of 24% p.a. by private lending and was exorbitant in nature. This kind of transaction was nowhere close to the business standard pursued in the market; hence the transaction fell in the category of extortionate avoidable transaction. In pursuit of the above, the court declared that the respondents could not be considered as financial debtors, on the contrary they would have to avail other remedies to claim their debt because they are unsecured creditors. The IP was ordered to reconstitute the CoC as the previous meetings were declared *non-est* along with nullification of all the resolutions passed before.

Potentially, a debtor with financial difficulties would resort to a higher credit risk but that does not justify the act as it puts them in a disadvantaged position. The lender receives an excessive amount of what he would have originally obtained if agreed at the prevailing market rate of interest due to which it is completely unfair on the part of the creditors who would have

[19] Company Petition No. IB- 492/ND/2018 and Company Application No. 184/2018.

[20] Company Appeal (AT) (Insolvency No. 57 of 2018)

entered into reasonable dealings with the corporate debtor. Under Section 51 of the code, if the Adjudicating Authority is of the opinion that a part of the transaction is extortionate, it can set aside or even amend the terms of the transaction, whichever suits the best.

In addition to this, it can order any person to repay if he has received anything out of the transaction.[21] Another provision imposes a liability on the persons outside the company, who are not a member of the internal board if it is found that they conspired to defraud the creditors deliberately having a probable knowledge that there is no prospect to repay the debt. Eventually, when the IP submits a complaint before the tribunal, the person alleged with the act would have to contribute to the assets of the corporate debtor under Section 66(1) of the code.

Directors and Partners of the company cannot plead ignorance as it would clearly demonstrate that they have failed to exercise due diligence while handling the internal affairs of the company and in minimizing the loss to be borne by the creditors.[22] Impliedly, absence of the intention on the part of the directors will not mitigate the problem since, it is their duty to preserve the interests of the stakeholders whilst ensuring that the loss of the corporate debtor does not increase during the insolvency process.[23] It is, thus, advised that directors and partners exercise due care to avoid delay in the commencement of the resolution of the company. Any act should be done keeping in view the value of the asset which might get depreciated. Section 66(1) attracts civil and criminal penalty whereas, Section 66(2) involves only civil action.

[21] Insolvency and Bankruptcy Code, 2016, s. 51(d)
[22] Insolvency and Bankruptcy Code, 2016, s. 66(b)
[23] Sindhuja Kashyap and Mohana Roy, 'Corporate Insolvency - Extension Of Liability On Directors And Parent Company' (King Stubb and Kasiva, 18 November 2018) < https://ksandk.com/corporate-commercial/extension-of-liability/ > accessed 31 May, 2022

CONCLUSION

This legislation has facilitated ease in doing business by streamlining the recovery process, accelerating the entrepreneurial growth in India without hindering the chain of credit market. One of the biggest merits is that there is less judicial intervention and has granted more control in the hands of the creditors. Moreover, it has given an immense push to the Merger and Acquisitions drive in India allowing effective monitoring to aid the IBBI. Corporate debtor's needs should not be exploited to an extent which stands inequitable in comparison to the remaining creditors. Before the acknowledgement of any claims against the corporate debtor, he should be given a fair chance to respond against those and untangle through cooperation.

The IPs have been endowed with an effective platform to enhance their accountability and minimise the burden of the judiciary. Contrarily, it is critical to infer the original financial position of a company for creditors, lenders or contracting parties, especially if they are parties to a transaction involving transfer of asset or value from that company. During the stage of financial distress, weighing the risk of such a transaction becomes extremely pertinent in insolvency procedures with appropriate measures and protocols. Prior to signing of a transaction, a checklist should be introduced for better evaluative interpretation of the company's status.

Overall, as mentioned above the motto of PUFE (Preferential, Undervalued, Fraudulent and Extortionate) transactions extend to achieving the purpose of IBC- increasing accountability apart from maximising value of the assets so that the resolution can be completed in an ideal time without any delay.

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THE CHILD STARS OF SOCIAL MEDIA – WHAT THE PHENOMENON REVEALS ABOUT INDIAN LABOUR LAWS

*Aditya Pattanayak**

ABSTRACT

With social media becoming an increasingly powerful medium of communication in the global scenario, a new category of celebrities has emerged. In today's world, social media stars grab thousands of eyeballs and influence the actions of millions of consumers. Many of these social media stars happen to be children below the age of 14. While parents are beginning to comprehend the true potential of using their children to generate large amounts of revenue on social media, it is disconcerting to see that the legal frameworks that govern the labour of these children maintain a dangerous silence on their financial entitlements.

This paper through using the case study of child social media stars will illustrate the various lacunae in the Indian labour law frameworks' attitude towards child labour and will primarily focus on how ambiguity surrounding the classification of child social media stars under Rule 2B and 2C of the Child Labour (Prohibition and Regulation) Amendment Rules 2017 may potentially lead to their financial exploitation. The paper will conclude by suggesting changes in the drafting of the current provisions and shall make an argument to classify child influencers under one of the two rules to protect the rights of child social media stars and child workers in general.

***Keywords**: Child Social Media Stars, Child Labour, The Code on Wages, Minimum Wages Act, Financial Exploitation*

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INTRODUCTION

THE RISE OF THE CHILD INFLUENCER

As of 2019, 3.48 billion individuals were using social media platforms across the world. In 2020, the number increased to 3.69 billion.[1] This marked a 10.9% increase in the number of consumers in just one year. Gauging these statistics, it is safe to conclude that the social media craze is here to stay and is only set to grow in the years to come. The steady rise in the popularity of several social media platforms like Facebook, YouTube and Instagram has given rise to a new category of celebrities known as social media influencers.[2] Children are among the most powerful influencers online.[3] A case in point would be Ryan Kaji. In 2020, 9-year-old Ryan's channel Ryan Toysreview earned a whopping 29.5 million dollars making him the highest-paid Youtuber of the year.[4] The phenomenon of the child influencer is not just restricted to the West anymore. Back home in India, the phenomenon of the 'kid influencer' has slowly begun taking shape with a few children already having amassed audiences in the millions.[5]

Child influencers, like any other social media influencers, can affect the behaviour of the audiences that they cultivate

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[1] Brian Dean, Social Network Usage & Growth Statistics: How Many People Use Social Media in 2021?, BACKLINKO (last accessed August 31, 2021) <https://backlinko.com/social-media-users>.
[2] *The Rise of Internet Celebrities Promoting Emerging Technology Industries*, CHINA SEO (last accessed August 31, 2021) <www.chinaseo.com/the-rise-of-internet-celebrities-promoting-emerging-technology-industries>.
[3] Karuna Sharma, *How kids influencers in the age group of 6-12 are wooing brands*, BUSINESS INSIDER INDIA (last accessed August 31, 2021) <https://www.businessinsider.in/advertising/ad-tech/article/no-kidding-how-kids-influencers-in-the-age-group-of-6-12-are-wooing-brands/articleshow/73560858.cms>.
[4] *Ryan Kaji, 9, earns $29.5m as this year's highest-paid YouTuber* , THE GUARDIAN (last accessed August 31, 2021) <https://www.theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber>.
[5] Sharma, *supra note* 3.

online.[6] This capacity is the mainstay of the influencer, as it is through this ability that they affect the purchasing behaviour of their audience; thereby earning an income through endorsements and advertisement space bought by brands who want to tap into their audience.[7]

They cultivate these audiences by creating content that they disseminate through outlets known as 'social media channels' on online public platforms like Youtube and Facebook. Much like film and television production houses, social media channels seek to garner audiences through the entertainment value of the content that they release on social media platforms. However, the difference between these two mediums of entertainment is the accessibility afforded to content creators. For instance, a complete You Tube setup for a beginner would range somewhere between 300 – 500 American Dollars[8] as compared to an average short film which can cost somewhere between 700 - 1500 American Dollars[9] per minute of screen time. In addition to this, producers of film and TV shows need to secure deals for the distribution of their content i.e. they need to secure deals with the cinema or online streaming platforms such as Netflix and Amazon Prime to get returns on their investment.[10] On the contrary, social media channels are usually free for all, and anyone can upload anything as long as it complies with the community guidelines of the platform in question (case in point

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[6] Simone van der Hof et al., *Child labour and online protection in a world of influencers*, Social Science Research Network Electronic Journal, 2019, page 1.
[7] Id, page 1.
[8] Balakumaran, *How Much Does it Cost to Start a YouTube Channel in 2021*, STRANGER SHOW (last accessed 31 August 2021) <www.strangershow.com/how-much-does-it-cost-to-start-a-youtube-channel>.
[9] *How Much does it Cost to make a Short Film?*, NEWBIE FILM SCHOOL (last accessed 31 August 2021), <www.newbiefilmschool.com/how-much-does-it-cost-to-make-a-short-film>.
[10] *The 7 stages of film making (development, pre-production, production, photography, wrap, post-production, distribution)*, WWI VIRTUAL ACADEMY (last accessed 31 August 2021) <https://wwivirtualacademy.com/the-7-stages-of-film-making-development-pre-production-production-photography-wrap-post-production-distribution/>.

being the Youtube Community Guidelines).[11] While this means that content creation has become more accessible with the boom of social media, it also means that content creation as an activity is now taking place in new setups whose intricacies were not taken into account by lawmakers at the time of passing child labour laws.

The child influencers of social media operate under one of two setups. Firstly, they may be employed by independent social media channels that contract with their parents to make them undertake activities for content. These entities have to adhere to local laws and the labour of these children is generally regulated by the law of the land depending on the location of the entity.[12] An example of this setup would be React Media[13] which has contributed to the growth of several child social media stars by starring them in videos where they are made to react to different videos online.[14] These are akin to production houses that hire child actors on a contractual basis to act in TV shows, movies and theatre productions.

Alternatively, and more commonly due to the affordability of this form of media, these children are part of setups where they produce content 'independently' i.e. have their own social media channels. These channels are usually operated by the parents of the child. The growing popularity of children in the influencer market has resulted in many parents using it as a way to earn money.[15] An example of this would be the above mentioned Ryan Kaji.

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[11] *Community Guidelines*, YOUTUBE (last accessed 31 August 2021), <www.youtube.com/intl/ALL_in/howyoutubeworks/policies/community-guidelines/>.

[12] *Best Practices for Content with Children*, YOUTUBE (last accessed 31 August 2021), <https://support.google.com/youtube/answer/9229229?hl=en>.

[13] REACT MEDIA <https://www.reactmedia.com/>(last accessed 31 August 2021)

[14] *Kids React to Epic Meal Time (Video)*, HUFFPOST (last accessed 31 August 2021), <www.huffpost.com/entry/kids-react-to-epic-meal-time-video_n_894449>.

[15] Suzanne Bearne, *Would you let your child become a 'kid influencer'?*, BBC NEWS (last accessed 31 August 2021) <www.bbc.com/news/business-49333712>.

This paper will primarily focus on the second setup and the position it occupies in the Indian labour law framework. In India, the legal framework that regulates the labour of these children leaves many issues unaddressed. However, before exploring the grey area that child social media influencers occupy in the Indian labour law framework, it becomes imperative to determine whether the participation of these children in social media content amounts to work in the first place or not.

DOES THE CHILD INFLUENCER 'WORK'?

While it is important to understand what constitutes 'work' before delving into the question of whether the activities undertaken by child influencers amount to 'work', this piece deliberately avoids defining the term and restricting its scope to only certain types of activities. As asserted by sociologist Miriam Glucksmann, defining work should not be "an argument about words, but about how to conceptualize labour [equivalently, work] in a useful and coherent manner".[16] Therefore, instead of defining work and explaining how child influencers manage to satisfy each of the conditions under such a definition, the paper will focus on the more pointed question of why some individuals argue that the participation of child influencers does not constitute work and seek to analyse and deconstruct these lines of thought.

There are many who claim that the participation of children in social media does not amount to work and use this as the basis to assert that child influencers are not entitled to pay. One of the claims is that certain forms of social media content like 'vlogging' involve videotaping the child performing their regular activities as opposed to making them act or behave in accordance with the instructions of the content producer.[17] Proponents of this line of thought often compare the participation of children in

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[16] John W. Budd, *The Thought of Work* (Cornell University Press 2011), page 2.
[17] Neyza Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, *Child and Family Law Journal:* Vol. 8 : Issue 1 , Article 4, page 97, 98.

vlogs to the sort of work done by child actors on a movie set and reason that unlike child actors who have to speak and act as per the directions of producers and directors, child influencers do not put in any 'active input'.[18] The argument heavily implies that, in order for an activity to be considered work, there must be some type of 'active input' by way of physical or mental exertion on part of the subject.

However, this argument does not take into account certain ground realities. From a realistic standpoint, in most cases, vlogging is not just the mere documentation of the daily life of a child. Most family vlogs have staged elements and often blur the lines between fiction and reality with a view to increase viewership.[19] This means that more often than not, the children involved in vlogs are directed to act in a particular manner or are required to undertake activities that they would not have undertaken in the absence of the vlogs. Therefore, in most real-life setups, there is an 'active input' on part of the child influencer in question.

Nevertheless, even if one was to buy into the idea that social media vlogging channels do not rely on the child to behave in a scripted fashion and merely document their regular life, the contribution of the child should still amount to 'work'. This is because the idea that an activity cannot amount to work unless and until there is physical or mental exertion, is one that is largely myopic in its understanding of work. This becomes clearer when one delves further into the concept of paying individuals for their work.

Sometimes, the primary consideration behind paying people is not the effort that they put in. A perfect example of this is performance-based pay, often practiced in the world of sales.[20]

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[18] Id, page 107.

[19] tiffanyferg, *Family Vloggers are Ridiculous*, YOUTUBE (Nov. 7, 2018), <www.youtube.com/watch?v=29tgGEXbHYo>.

[20] Sean Peek, *Performance-Based Pay Won't Motivate Employees as Much as You Think*, BUSINESS NEWS DAILY (last accessed 9 January 2022) <www.businessnewsdaily.com/9712-performance-based-pay.html>.

Salespersons often work on a commission basis and only get paid when they are successfully able to sell their company's products. Here the company does not pay them for their physical or mental exertion. Had that been the case, these salespersons would have been paid on all the days they tried to convince consumers to buy products. In this case, the company is not concerned with way in which the sale is made, how much effort is put in or whether any effort has been put in at all; its primary consideration is whether or not the sale has been made. This clearly indicates that in some cases, work is measured not in terms of exertion or effort, but in terms of what is being facilitated by the worker.

The world of social media influencing can be considered to be one such industry where the primary consideration is the output. The appearance of influencers in the videos/media posted by their social media channels is what draws crowds and it is this social capital that the advertisements of different brands want to capitalize on. Thus, when brands pay for advertisement space on the social media page of influencers or approach influencers for endorsements, they basically pay for the ability to connect with the social media channel's consumer base; the way in which these consumers are accumulated by the channel is immaterial. With regards to activities such as 'family vlogging', research suggests that the presence of child influencers is the primary draw for sponsorship and advertisement revenue as their popularity among content consumers makes them serve as the face of the sponsored campaign.[21] Thus, if the mere participation of certain child influencers results in traffic on the social media channel and in turn, publicity for the brands that buy ad space or endorsements, the child should be considered to be 'working' for all intents and purposes and should be entitled to pay.

Another line of argumentation that is used to sideline the contribution of the child influencer is the claim that the work behind the social media presence of the child influencer is done

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[21] Amanda G. Riggio, *The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. Rev. 493 (2021), page 510.

by the parents and as a result they are the ones who are entitled to the revenue earned through endorsements and advertisements.[22] There is some truth to this claim given that the nuanced aspects of social media such as scripting videos, editing, camera work and negotiation for brand deals are usually managed by the parents of the children in question.[23] However, this argument still cannot mitigate the contribution of the child. As stated earlier, research suggests that child-centric social media channels rely heavily on the appearance of the child to cultivate audiences and depend on them to be the 'face of the channel'.[24] At best, the work put in by the parents may be used as an argument to underline the fact that the parents behind the social media presence of their children are entitled to a share of the revenue generated through endorsements and advertisements.

Thus, firstly, the idea that a child influencer's participation in vlogs cannot amount to work due to a lack physical or mental exertion largely stands vitiated in light of the broader perception of work as an output-driven activity. Secondly, it can be concluded that the efforts of the parents of the child influencer can in no way be used to claim that the contribution of the child influencer is not integral to the act of influencing.

THE LEGAL DILEMMA

From a legal standpoint, the broad nature of both the provisions to be discussed in the paper i.e. Rule 2B and Rule 2C of the Child Labour (Prohibition and Regulation) Amendment Rules 2017[25] (hereinafter "**Amendment Rules**") account for such participation. At present, no child below the age of 14 can be

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[22] Deborah Linton, *When I'm 16, my baby brother will take over: the rise of the kidfluencer*, THE GUARDIAN (last accessed 31 August 2019) <www.theguardian.com/media/2019/mar/23/rise-of-the-kidfluencer-tekkerz-kid-mcclure-twins>.

[23] Id.

[24] Riggio, *supra note 23* page 510.

[25] Child Labour (Prohibition and Regulation) Amendment Rules 2017.

employed in any capacity in India.[26] Section 3(2) (a)[27] and (b)[28] of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 are the two exceptions to this rule and allow children below the age of 14 to help in family enterprises and work in audio-visual productions respectively. Rule 2B and Rule 2C of the Child Labour (Prohibition and Regulation) Amendment Rules 2017[29] provide for the criteria that must be met for a child to legally work in a family enterprise and an audio-visual production activity respectively.

However, since, social media channels that star children and are run by their parents have characteristics of both family enterprises and audio-visual production houses, there is a lack of certainty as to whether they are afforded protection under Rule 2B or Rule 2C. Additionally, there exist numerous problems with classifying child social media influencers under both of these categories.

This paper will explore how child social media stars working with their parents could be classified under these rules, analyse the lacunae under each of these classifications and conclude by suggesting a method to rectify these faults and move forward with a labour law regime that protects these child influencers from exploitation.

[26] The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, s 3(1).

[27] The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, s 3(2)(a).

[28] The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, s 3(2)(b).

[29] Child Labour (Prohibition and Regulation) Amendment Rules 2017.

SOCIAL MEDIA CHANNELS AS FAMILY ENTERPRISES

As mentioned above, section 3(2)(a)[30] of the Child and Adolescent Labour (Prohibition and Regulation) Act (hereinafter "**Child Labour Prohibition Act**") allows children to help their family in family enterprises as long as it does not involve a hazardous process or a profession defined in the Schedule[31] of the Act. The definition of family enterprises may be found in explanation (b) of the section 3(2) of the Child Labour Prohibition Act[32] which states it to be "any work, profession, manufacture or business which is performed by the members of the family with the engagement of other persons". Social media content creation does not find a mention in the Schedule of the Child Labour Prohibition Act. Therefore, any social media channels starring children, run by their parents and involving a third party in an aspect of camera work, editing, production etc. can technically be classified as a 'family enterprise'.

The employment of these children however is subject to the restrictions enumerated in Rules 2B (a) and (b) of the Amendment Rules.[33] These rules, to a certain degree, ensure the welfare of the children working in family enterprises. Provisions, *inter alia*, include requiring the enterprises to only employ children before and after school hours[34] and in such a manner that their right to education is not hampered[35]. While these rules secure the welfare of the child in some regards, they are far from complete in the protection they give the child employees. One of the avenues where the rules are inadequate, is with regards to the

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[30] The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, s 3(2)(a).
[31] The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, Schedule.
[32] The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, s 3(2), Explanation (b).
[33] Child Labour (Prohibition and Regulation) Amendment Rules 2017.
[34] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2B(a)(iv).
[35] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2B(a)(v).

financial entitlements of the children for their contribution in the form of labour.

CHILDREN'S FINANCIAL ENTITLEMENT IN FAMILY ENTERPRISES

At present, the Amendment Rules have no provision that ensures that the children employed in family enterprises are given a share of the revenue generated as a result of their labour. Therefore, while the child adds value to the worth of the channel through his participation and acts as a fundamental reason behind the channel's traction, the categorization of social media channels under family enterprises turns a blind eye to the child's contribution and allows the parent to have total control over the revenue generated.

The Amendment Rules' silence on the financial entitlement of the children working in family enterprises is part of a larger problem with regards to how the concept of family enterprises had been envisaged at the time of its passing. In 2016, the Union Labour Minister of the time, Bandaru Dattatreya in a press conference had stated that there was no 'employer-employee' equation in a family enterprise and that as a result of this, children being allowed to work under family enterprise setups was acceptable. [36] However, this understanding of family enterprises is overly optimistic and not based on ground realities; it basically implies that the parents would always have the best interest of the child in mind unlike in the case of an employer-employee relationship where the guiding principle would be benefitting oneself.

This point of view has been historically proved to be false, with a famous case in point being that of Jackie Coogan[37], a child

[36] *Amendments to Act will totally prohibit Child Labour: Dattatreya*, THE HINDU (last accessed 31 August 2021), www.thehindu.com/news/cities/Hyderabad/Amendments-to-Act-will-totally-prohibit-child-labour-Dattatreya/article14505679.ece.

[37] *Jackie Coogan Productions v Industrial Accident Commission* [Civ. No. 1857. Fourth Appellate District. May 28, 1937].

actor who upon attaining majority found that the fortune he had amassed as a child had been squandered away by his mother and step-father. Moreover, by mandating family enterprises to adhere to rules that *inter alia* safeguard the children's right to education[38], restrict their work hours[39] and prohibit their employment in hazardous industries[40], the Amendment Rules themselves seem to indicate that the family being the occupier of the business does not always translate into the rights of the child being protected. In fact, if the children in family enterprises are susceptible to work that causes them physical harm and endangers their right to education, it would be reasonable to conclude that there is also a probability of financial ill-treatment as it is arguably a less extreme form of exploitation.

The problem of non-entitlement to financial remuneration is not just limited to child social media stars and extends to virtually all the family members employed in a family enterprise setup. A reading of section 26(3)[41] of the Minimum Wages Act, 1948 in conjunction with its explanation[42] makes it clear that none of the provisions of the Act apply to employees who are working under, living with and dependent on an employer who is their sibling, spouse, parent or child. Since all children live with and are dependent on their parents, in most family enterprises, they are susceptible to be used as 'free labour' while the financial entitlement of non-dependent family members and non-family member adults working in the same enterprises are secured either through the Minimum Wages Act, 1948 or through the salary/wage rates agreed to in the contracts of employment (in case of wages higher than the minimum wage). The International Covenant on Economic, Social and Cultural Rights, of which India is a signatory, clearly states that "The States

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[38] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2B(a)(v).
[39] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2B(a)(iv).
[40] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2B(a)(i).
[41] The Minimum Wages Act 1948, s 26(3).
[42] The Minimum Wages Act 1948, s 26(3), Explanation.

Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work".[43] The word 'everyone' here clearly alludes to all those who work and there seems to be no clear reason to differentiate between children family member employees and other employees in this regard.

However, it may be argued that the situation is not all that bad with the Code on Wages, 2019 all set to repeal the provisions of the Minimum Wages Act, 1948 upon notification.[44] Unlike the Minimum Wages Act, the Code on Wages does not carve out an exception to exempt employers of dependent family members from giving them a minimum wage. Section 5 of the Code on Wages[45] prohibits employers from paying 'any employee' less than the minimum wages fixed by the government. Thus, in theory, upon the notification of the relevant provisions of the Code, all family member employees (irrespective of whether they are dependent or not) would be entitled to a minimum wage. This would mean that children would fall under the definition of employees under Section 5 of the Code on Wages and would therefore be entitled to a minimum wage too. While this bodes well for dependent adult family members employed in family enterprises, it may not be the best form of securing the financial entitlements of the children in these setups (especially child social media stars).

WHY MINIMUM WAGE IS NOT THE ANSWER FOR CHILD INFLUENCERS

The International Labour Organization defines minimum wage as "the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or

[43] The International Covenant on Economic, Social and Cultural Rights, Article 7.
[44] The Code on Wages, s 69(1).
[45] The Code on Wages, s 5.

an individual contract".[46] Simply put, the minimum wage, by fixing a lower wage limit, ensures that no employee is subject to unduly low pay.[47] Presently, in Indian law, the minimum wages apply only to workers working in scheduled employments.[48] However, this will change with the notification of the relevant provisions of the Code on Wages which is broader and applies to all employers with respect to all employees (not just workers in scheduled employments) unless exempted as per the provisions of the Code.[49] While this limit will apply to all employers, all workers are free to seek employment which offer wages higher than the minimum wage.

Usually, when the supply of individuals with a required skill set/ability to contribute is scarce with respect to the market demand for such individuals, there ends up being market competition within the employers. This usually results in each employer offering better wages than the other, with the hope of attracting the best individuals to their enterprise. This is why highly skilled individuals and individuals who have an ability to contribute more than the average employee receive wages much higher than the minimum wage.

Thus, by fixing a lower limit that all employers need to match, the minimum wage rate serves an ideal model as it prevents the financial exploitation of the most marginalized individuals seeking employment while also allowing more skilled individuals the freedom to pursue job opportunities that pay them higher than the lower limit. The presumption here is that the individual seeking employment has the agency to observe the market and choose an employer which is most suited to their needs.

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[46] *Chapter 1: What is a minimum wage*, INTERNATIONAL LABOUR ORGANIZATION (last accessed 31 August 2021), https://www.ilo.org/global/topics/wages/minimum-wages/definition/WCMS_439072/lang--en/index.htm#1 .
[47] Id.
[48] The Minimum Wages Act, s 2(e).
[49] The Code on Wages, s 2(k).

On that account, this model is perfectly functional for adults who have the capacity and agency to understand the value of their labour and demand financial remuneration accordingly. However, when it comes to children, this model has clear flaws as children lack agency and even if granted it, are susceptible to making bad decisions due to their immaturity. This viewpoint has been supported in the Indian Contract Act[50] which holds that only those who have attained majority (i.e. attained 18 years of age or above[51]) are competent of entering into a contract.[52] This is why it is usually a parent that enters into contracts of employment with third parties on behalf of the minor (in fields such as the film and TV industry). However, in family enterprises where the parent is themselves the employer and has a vested interest in the business in which the child is working, the dynamics are quite different.

Once the Code on Wages is notified, family enterprises would theoretically be required to pay children employees the basic minimum wage fixed by the government. Though an improvement from the past where the child employee was not entitled to any remuneration at all, this still leads to a great possibility of financial exploitation. This is because the child may be contributing a lot more to the enterprise than the minimum wage may be giving them credit for. An adult in the same position as the child would have had the ability to seek employment at other places which offer them financial remuneration more in tune with their contribution. However, as elucidated above, unlike an adult, a child has no agency of their own and is incapable of becoming aware of better opportunities, understanding the value of their labour, comprehending the value of money, evaluating business intricacies and even contracting with separate entities. While in a traditional setup, the parent would have helped the child by negotiating the terms of employment on behalf of the child, in the family enterprise setup where the parent is the employer, helping the child would result in a conflict of

[50] Indian Contract Act, s 11.
[51] Indian Majority Act.
[52] AVTAR SINGH, CONTRACT AND SPECIFIC RELIEF 154 (Eastern Book Company 2017).

interest. Therefore, there is a great possibility that the child may be forced to work and generate mass amounts of revenue for the family enterprise (and as a result for the occupier of the family enterprise i.e. the parents) while earning a pittance for themselves through the minimum wage.

This predicament is especially true for child social media influencers. Unlike in traditional family enterprise setups where the children's work may easily be taken up by an adult and is usually not a sizeable factor in the revenue generated (owing to their inability to work at the rate of adults and also the restriction of their labour to only three hours a day[53]), the work of a child influencer is a lot more essential to the revenue generated by a social media channel. As explained at the beginning of the paper, these children are essential to the social traction behind the channel which is what results in revenue by way of brands buying advertisement space and endorsements. They are not easily replaceable as consumers of the social media channel often develop a 'human connection' and a sense of 'loyalty' to the influencer in question.[54] In other words, more often than not, the child influencer is the mainstay of the social media channel. Despite this, upon the notification of the Code on Wages, the parents of child social media stars would legally be entitled to enjoy all the revenue generated through the labour of their children by merely giving them a minimum wage fixed by the government.

Therefore, in the context of child social media stars, it may be seen that classifying social media channels as 'family enterprises' deprives the children at the centre of the commercial activity, of their rightful financial entitlements and allows for their financial exploitation. Thus, categorizing social media

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[53] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2B(a)(iv).

[54] Klyn Elsbury, *Are Social Media Influencers Worth the Investment?*, FORBES (last accessed 31 August 2021), https://www.forbes.com/sites/theyec/2019/10/10/are-social-media-influencers-worth-the-investment/?sh=53c94a74240f.

channels that star children and are run by their parents, as 'family enterprises' has its set of demerits.

CHILD INTERNET CELEBRITIES AS CHILD ARTISTS

CHILD SOCIAL MEDIA STARS AS CHILD ARTISTS

Child internet stars could also fall under the category of 'child artists' under Rule 2C of the Child Labour (Prohibition and Regulation) Amendment Rules 2017.[55] As per Rule 2C(1)(b)[56], the provision covers the participation of children in any 'audio-visual production' or 'commercial event'. Therefore, any social media channels starring children and run by their parents seem to fall squarely into this category. However, despite this, the way that the rule is drafted causes certain problems with reference to social media child celebrities given the different nature of internet content as compared to other forms of media.

FINANCIAL ENTITLEMENTS OF CHILD ARTISTS

In order to understand how the financial entitlement of child social media stars is not secure when they are categorized under Rule 2C, it is best to begin by revisiting the Jackie Coogan case[57]. As mentioned in Part I, Jackie was a child actor who earned a fortune by acting in films at a young age. As he was a minor, it was his mother and stepfather who received the money on his behalf. Upon attaining majority, Coogan realized that the fortune he had amassed had been squandered away by his mother and stepfather. The plight of Jackie Coogan eventually led to the passing of the California Child Actor's Bill, which now mandates a certain amount of the revenue earnt by a child actor to be kept in a blocked trust account which may be accessed by the actor

[55] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2C.
[56] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2C(1)(b).
[57] *Jackie Coogan, supra note* 39.

upon majority.[58] In a nod to the rationale adopted by the Bill, Rule 2C (1)(f)[59] provides for 20% of the revenue earned by a child artist to be kept in a fixed deposit in the name of the child, only to be accessed by the child upon attaining majority. This prevents the parents of the child artist from squandering away their hard earned wealth and acts as a provision that safeguards the child artist's revenue.

However, the provision falters with respect to child social media stars. This is because the provision only safeguards the interests of child artists who have already 'earned' their revenue. This means that there is adequate protection for child artists whose entitlement to revenue is secure; as in the TV and Film industry, where actors are hired on the basis of contracts and are paid according to the terms specified in their contracts. In these industries, if the child is not paid their dues, their parents can sue the producer with whom the contract was concluded.

In contrast, most social media channels that have children as the focal point of attention are operated by the parents of the child instead of professional third parties that contract with the parent of the child to create content. In such family run social media channels, there can be no contractual agreement between the adults in the family and the child performer as children are not capable of contracting by themselves.[60] As stated earlier, the Minimum Wages Act does not apply to wages payable to dependent family members and thus finds no application here.[61] Therefore, since there is no basis for entitlement to revenue in the case of child internet stars, often times they do not 'earn' anything at all. The financial interests of the child artists of social media,

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[58] *Coogan Law*, SAG. AFTRA (last accessed 31 August 2021), www.sagaftra.org/membership-benefits/young-performers/coogan-law.
[59] Child Labour (Prohibition and Regulation) Amendment Rules 2017, Rule 2C(1)(f).
[60] Indian Contract Act, s 11.
[61] The Minimum Wages Act 1948, § 26(3); The Minimum Wages Act 1948, s 26(3), Explanation.

therefore, are not protected under Rule 2 C(1)(f) which only protects 20% of the revenue 'earned'.

Moreover, while it may be argued that in social media channels, the parents act as employers and would thus, upon the notification of the Code on Wages, be compelled to provide the child with at least a minimum wage, two problems arise:

i. As explained in Part I, minimum wage is not the best method to adopt with respect to children employees in enterprises run by their parents due to the vested interests of their parents, and;

ii. Rule 2C(1)(f) is redundant when applied in the context of minimum wage. This is because in social media channels run by the parents of the child social media star, the Code on Wages would compel the parents (who are also the employers) to provide the child with a minimum wage. In this case, the revenue 'earned' by the child would be the minimum wage. Applying Rule 2C(1)(f) would then mean that only 20% of the minimum wage would be secured in a fixed deposit for the child; thereby defeating the entire purpose of mandating the parents to pay their child a minimum wage.

ISSUES WITH CATEGORIZATION

Even beyond this, Rule 2C(1)(b) requires the producer of the production or event in which the child is participating to obtain the consent of the parents of the child in question, clearly implying that the producer and the parent are different individuals. A social media channel where the parent is the producer, was clearly not envisaged by the rulemakers while framing the rules and therefore raises doubts as to whether Rule 2C actually covers the child influencers of social media, most of whom work in productions owned by their parents.

Thus, categorizing child influencers under Rule 2C is problematic due to the provision's inability to secure the financial

entitlements of the child and its legislators' clear lack of foresight in terms of drafting.

CONCLUSION

As was clearly elucidated under both the preceding parts, the categorization of child social media stars remains a contentious issue. While rules concerning the 'family enterprise' seem to err by discounting the value of a child's labour, the rules concerning 'child artists' fail to provide a wide frame of protection for the children they seek to address.

In the opinion of the author, the rules concerning child artists are more cognizant of the threats that may be posed to the interest of a child employee. For instance, by mandating that 20% of the child's revenue be secured in a fixed deposit, Rule 2C(1)(f) clearly acknowledges that parents may operate in ways that are counter-productive to the financial entitlements of their children. This is in stark contrast to the rules dealing with 'family enterprises' which fail to even acknowledge the concept of the child's financial entitlement. However, despite this, the classification of child social media stars as child artists is not ideal.

As explained in part II, a closer scrutiny of Rule 2C reveals that the real reason behind the rules not being able to account for the financial entitlements of the child social media stars, is the inability of the rule makers to identify the unique nature of the social media industry. It is quite likely that the rule makers failed to even consider the social media industry while framing these rules, as the use of social media as an entertainment platform is somewhat of a more recent phenomenon.

It may thus be concluded that neither of the classifications are suitable in their present state.

In the opinion of the author, this predicament may be rectified if child social media stars working under their parents are categorized under a refurbished version of Rule 2B of the

Amendment Rules. The refurbished Rule 2B would contain a separate sub-rule to provide for the preservation of a percentage of the revenue 'generated' instead of 'earned', in the case of children working under their parents. This would mean that the financial entitlement of the child would be protected from the minute the business has received the revenue, as opposed to it being protected only once the funds have been transferred from the parent to child. This sub-rule would cast a wider net of protection over children employees by explicitly acknowledging their financial entitlements. For a child social media star, the child's involvement in the social media channel's revenue generation would result in them being entitled to a percentage of the revenue (only to be accessed by them upon attaining majority).

Additionally, if such a sub-rule is introduced, the parents would no longer be able to enjoy the vast amounts of revenue generated by simply giving their child a minimum wage and would instead be forced to allow the child to have a percentage of the revenue. This would mean that the money being received by the child would be proportional to the contribution made by them. It would therefore solve the problem of minimum wage not being an adequate safeguard for the financial interests of the child social media stars working under their parents.

It is also pertinent to note that this amendment would not only solve the problems of financial entitlement faced by child social media stars but would also extend to cover the financial entitlements of every child working in a family enterprise setup. While the same sub-rule may be introduced to Rule 2C, it would apply only to 'child artists' thereby covering a much smaller ambit and leaving the larger problem faced by children in family enterprises unaddressed. As a result, if the suggested change is implemented, Rule 2C would continue to operate and protect the interests of the child artist with respect to third parties that seek to utilise them for profits (with the exception of Rule 2C(1)(f) which safeguards the child against exploitation by their parents but with respect to the revenue generated from a third party) and

Rule 2B would operate with a view to protect the interests of the child when their employer is their parent.

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ON THE BASIS OF SEX(UAL ORIENTATION): CASE COMMENT ON HIVELY V. IVY TECH COMMUNITY COLLEGE OF INDIANA

Tanisha Choudhary[*]

INTRODUCTION

The decision of *Hively v. Ivy Tech Community College of Indiana*[1] ("***Hively***") was a momentous legal victory for the LGBTQIA+ community of the United States. The Court of Appeals for the Seventh Circuit ("**Seventh Circuit**"), for the first time, recognized "sexual orientation" as a ground for workplace discrimination through a more liberal reading of "sex" in Title VII[2] of the Civil Rights Act, 1964[3] ("**Act**"). *Hively* was a welcome departure from long-standing precedents which read the term "sex" in Title VII narrowly[4] and did little to alleviate the workplace discrimination concerns of the LGBTQIA+ community. Subsequently, the Court of Appeals for the Second Circuit followed suit in *Altitude Express, Inc. et al. v. Zarda*[5]. This issue eventually made its way to the Supreme Court and was settled in *Bostock v. Clayton County*[6] ("***Bostock***"). In a historic move, the Supreme Court affirmed the position taken by the Seventh and Second Circuits pertaining to sexual orientation claims and extended the Title VII protection to gender identity discrimination claims.

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[1] 853 F.3d 339 (7th Cir. 2017) (en banc).

[2] Title VII of the Civil Rights Act makes it unlawful for an employer to refuse employment, discharge or otherwise discriminate against an individual because of their race, colour, religion, ***sex***, or national origin. It lists out five broad heads of protected characteristics. If a discriminatory action is motivated (even in part) by any of these protected characteristics, the aggrieved individual can bring legal action against the employer. Notably, sexual orientation is not specified as a separate protected characteristic in Title VII.

[3] 42 U.S.C. § 2000e-2(a).

[4] *Hively* (n 1) 343.

[5] 883 F. 3d 100 (2d. Cir. 2018).

[6] 140 S. Ct. 1731 (2020).

Hively is a precursor to *Bostock*. It undoubtedly holds paramount significance in advancing the rights of the LGBTQIA+ community. It is also an important decision from a theoretical perspective because it is rich in interpretive methodologies that enabled the Seventh Circuit to reach its conclusion. This Comment will primarily examine the decision in *Hively* from the viewpoint of statutory interpretation, as other aspects have been discussed extensively in the existing literature. Judge Posner's concurring opinion, particularly his use of a method called 'judicial interpretive updating' to revitalize the meaning of "sex" in Title VII, will be the central focus of this Comment.

Hively holds contemporary relevance as it demonstrates how the judiciary safeguards the rights of the LGBTQIA+ community through a creative interpretation of older statutes, which, at the time of their enactment, may not have been explicitly applicable to the community. In the current socio-political climate, legislative protection for the LGBTQIA+ community has been slow due to the divisive nature of the issues. Judicial recourse has become the oft-opted route. Therefore, landmark decisions such as *Hively* contribute significantly in developing the jurisprudence of LGBTQIA+ rights.

THE DECISION IN *HIVELY*

A. Factual Matrix

Kimberly Hively, the plaintiff, was an openly lesbian professor who taught part-time at the defendant Ivy Tech Community College ("**Ivy Tech**"). Between 2009 and 2014, she applied for six full-time positions at Ivy Tech, but her efforts were unsuccessful. Furthermore, her part-time contract was also not renewed in 2014. Believing her contract to be terminated because of her sexual orientation, she pursued a legal challenge against Ivy Tech. Before the District Court, Ivy Tech argued to dismiss the case because "sexual orientation" was not a distinct protected

characteristic under Title VII. Existing precedent[7] further substantiated Ivy Tech's stance, and consequently, the District Court dismissed the case.

Hively appealed to the Seventh Circuit. A panel of the Seventh Circuit judges, too, affirmed the District Court's decision. Eventually, the Seventh Circuit, realizing the importance of the case and the power of the full court to do away with older precedent, reheard the case *en banc*.[8]

B. Issue

The issue in *Hively* was premised on the interpretation of the term "sex" in Title VII and whether "sex" would include "sexual orientation". Simply put, the issue was whether Title VII could be interpreted to allow claims of sexual orientation discrimination. Chief Judge Wood described it as a "*pure question of statutory interpretation*"[9].

C. The Opinions

a) The majority opinion

The majority opinion was built upon two threads of reasoning. Firstly, the opinion used the comparative method by placing substantial emphasis on Hively's sex. Hively was a *woman* who was in a relationship with another *woman*. Isolating and changing the variable factor, namely sex, the majority asked that if a comparator *man* was put in her position, that is, if a *man* was in a relationship with a *woman* would he have been treated similarly? The answer was in the negative as such a relationship would be a heterosexual relationship. Additionally, the majority discussed the angle of non-conformity to gender stereotypes and tied it to sexual orientation discrimination. Relying on *Price*

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[7] *Hammer v. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000).
[8] *Hively*, (n 1) 344.
[9] *Hively* (n 1) 344.

Waterhouse v. Hopkins[10], which held that discrimination on the basis of non-conformity to gender stereotypes would qualify as discrimination on the basis of sex, the majority held that because Hively did not conform to the ultimate female stereotype of being heterosexual, she was discriminated on the basis of her sex.

The second reasoning offered by the majority was rooted in the associational theory of discrimination. Relying on *Loving v, Virginia*[11], the majority affirmed the proposition that a person who gets discriminated against because of the protected characteristic of the one with whom they associate, is also being discriminated against. *Loving v. Virginia* struck down laws that prohibited interracial marriages. The majority thus extrapolated the associational theory of discrimination (which was primarily applied to race-based discrimination), to sex-based discrimination. In other words, a discrimination based on who an individual associated with would also be included within the ambit of Title VII. This is how the majority reasoned that discrimination on the basis of sex encompasses discrimination on the basis of sexual orientation as well.

b) Judge Flaum's textualist approach

Judge Flaum's approach was much simpler. In his opinion perused the literal meaning and definition of "*homosexuality*" and observed that one cannot consider a person's *homosexuality* without accounting *for their own sex*. This meant that discriminating against an employee because of their sexual orientation essentially constituted discrimination because of: (a) the employee's *sex,* and (b) their sexual attraction to a person of the *same sex*. Because Hively was a *woman* who was attracted to other *women,* she was, at least in part, being discriminated on the basis of her sex. This form of textualism was utilized by the majority reasoning in *Bostock* as well.

[10] 490 U.S. 228 (1989).
[11] 338 U.S. 1 (1967).

c) The dissent's originalist approach

The dissenting opinion adopted the originalist line of reasoning, i.e., it looked at the meaning and understanding of the term "sex" in 1964. The dissenting opinion emphasized that courts ought to look at the *original public meaning of the statutory text* or the meaning that is *contemporaneous with the statute's enactment,* and not at its present meaning. The ordinary public meaning of "sex" in 1964, would normally have been synonymous with the biological gender of the person and not their sexual orientation. Further, relying on a host of dictionary definitions, common usage of the word "sex", and what "sex" would mean to a fluent speaker of English, the opinion concluded that "sex" and "sexual orientation" were two distinct attributes and could not be used interchangeably. To further augment this reasoning, it cited a long list of federal and state anti-discrimination statues that specified "sex" and "sexual orientation" as two separate protected characteristics. To highlight the differences between the two, the opinion also discussed the difference between sexism and homophobia and reasoned that in cases of sexual orientation discrimination, the discriminatory motivation is the latter and not the former.

The dissenting opinion did agree with the majority that the scope of Title VII should not be limited by the subjective intent of the enacting legislators and just because the original enactors did not envision sexual orientation discrimination claims under Title VII does not mean that they should be excluded. However, it emphasized that the it was the legislature and not the judiciary that was tasked with amending the statute to include sexual orientation and criticized the majority for effectively carrying out a statutory amendment.

d) The judicial interpretive updating approach

Firstly, Judge Posner emphasized on the need to update the meaning of the term "sex" because Title VII continued to apply to a time which was significantly different from the time of its

enactment. In order to do so, he placed reliance on a method called 'judicial interpretive updating'. He stated that judicial interpretive updating "*presupposes a lengthy interval between enactment and (re) interpretation*"[12]. His opinion acknowledged that when the Act was passed, the meaning of "sex" was restricted to "man or woman". So, at that time, people could not have imagined discrimination based on "sex" would include a woman being fired for being a lesbian. Charting the history of the Act, he observed that homosexuality gained prominence only in the 1980s during the AIDS epidemic. Naturally, granting protection to the LGBTQIA+ community would not have figured in the minds of the legislators who passed the Act in 1964. Consequently, "sex" in Title VII had no *immediate* reference to homosexuality.

Next, he observed that circumstances had changed and "sex" had eventually come to mean something much broader than an individual's genitalia. Judge Posner also recognized the compelling social interest in granting protection to the rights of homosexuals in the workplace through a loose interpretation of "sex". Lastly, he opined that while in 1964, sex discrimination meant discrimination against men and women because of their gender, the concept of "sex" had since evolved and that discrimination against homosexuals had come to form a part of sex-based discrimination. Effectively, Judge Posner updated the meaning of "sex" under Title VII to include "sexual orientation" without a formal amendment to Title VII.

ANALYSIS OF JUDGE POSNER'S OPINION

Judge Posner's opinion conceptualized a way to bring sexual orientation claims under Title VII. This approach was in line with the ultimate purpose and objective of Title VII, which was to prohibit workplace discrimination. The fundamental feature of judicial interpretive updating is that if a statute was enacted a substantial number of years ago, and over time the

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[12] *Hively* (n 1) 365.

meaning of its language has changed, it can be interpreted according to its current meaning to better suit the needs of the present. Perhaps the only flaw in Judge Posner's opinion is that he did not explain *how* today "sex" has come to include "sexual orientation". There is an ocean of scholarship that demonstrates how sex and sexual orientation are intrinsically tied, but it was not relied upon in the opinion.[13] This might undermine the overall comprehensibility of Judge Posner's reasoning, as a layperson who is not well versed with the finer nuances of gender studies, might not be able to make this connection and view sex and sexual orientation as two distinct attributes. Be that as it may, Judge Posner's 'judicial interpretive updating' of generally phrased terms whose meaning has changed over the years is highly efficacious.

A. Reconciling legislative and judicial functions

Judicial interpretive updating is situated within the broader subset of judicial activism. It is a settled position that a judge's "legislative" role is limited to filling up any gaps in the law. Therefore, this approach of "updating" an existing statute through the judicial process intuitively invokes the argument of separation of powers and raises questions about the constitutional authority of judges to do so. This has been identified by legal process thinkers as the "countermajoritarian difficulty"[14]. It has been argued that unelected judges should not carry out what is essentially a legislative function.[15] Moreover, when judges do so for issues which are subject to ongoing public deliberation, they put an end to these debates altogether, which is detrimental to the democratic process. The dissenting opinions in *Hively* and *Bostock* have also criticized judicial interpretive updating by

[13] Brian Soucek, 'Hively's Self-Induced Blindness", (2017), The Yale Law Journal Forum 115, 126.
[14] William N. Eskridge, Jr., 'Dynamic Statutory Interpretation' (1987) 135 University of Pennsylvania Law Review 1479, 1498, 1523.
[15] *Bostock* (Kavanaugh J., dissenting) (n 6) 25.

reasoning that slow legislative action should not become a ground for the judiciary to solve policy problems.[16]

However, it can be argued that judicial interpretive updating reconciles legislative and judicial functions. The political background in which *Hively* was decided is relevant here. In the United States, there was a shift in the attitude toward homosexuality after *Obergefell v. Hodges*[17] ("***Obergefell***"), in which the Supreme Court had recognized the right of same-sex couples to marry. The time between *Obergefell* and *Hively*, unfortunately, presented a situation where in effect, "*a person could be married on Saturday and then be fired on Monday for just that act*"[18]. *Hively* was decided during the Trump era when a slew of executive orders was passed by the Trump Administration, which either rescinded the protection granted to the members of the community by the Obama administration or created new hindrances for them.[19] The nation, overall, was divided on the issue of LGBTQIA+ rights. The United States Congress had, on numerous occasions, proposed to amend Title VII to add "sexual orientation" as a separate protected class, but it never went through with the amendment.[20]

In the wake of these circumstances, Judge Posner's approach offered a middle ground in the tussle between the branches of the government by reading Title VII in a contemporary manner and providing relief to members of the LGBTQIA+ community. Such an approach provides recourse to a minority community in a majoritarian setup where legislative action is sometimes slow to come or thwarted altogether. Judge Posner also explained in his opinion that judges often resort to this method to avoid placing the burden of reviving older statures

[16] *Hively* (Sykes J., dissenting) (n 1) 398; *Bostock* (Kavanaugh J., dissenting) (n 6) 25.
[17] 576 U.S. 644 (2015).
[18] *Hively* (n 1) 343.
[19] Eric M Clarkson, 'Judicial Ecology: Reconciling a Normative Critique of Hively v. Ivy Tech Community College with the Current Sociopolitical Context' (2018) 33 Wisconsin Journal of Law Gender, & Society 1, 10-11.
[20] *Hively* (n 1) 346; *Bostock* (Kavanaugh J., dissenting) (n 6) 2.

entirely on the legislature and avoiding statutory obsolescence and anachronism.

B. Pragmatic Adjudication

Judge Posner is famous for his use of pragmatic adjudication in cases. Pragmatic adjudication is a method that involves weighing the present needs and future benefits of a particular interpretation to society.[21] It is a method where a judge takes into account the consequences of the adjudication before passing a decision. Judicial interpretive updating in *Hively* too reflects this pragmatic approach. Reading the word "sex" in a manner that would include "sexual orientation" would yield positive consequences for the LGBTQIA+ community. Resort to the dissent's narrow and restrictive reasoning would effectively preclude sexual orientation discrimination claims under Title VII.

C. Dynamic Statutory Interpretation

The phrase "judicial interpretive updating" is a play on semantics. It broadly represents a subset of a model of dynamic statutory interpretation[22] proposed by Professor William Eskridge, Jr.[23] This model stipulates that a statute must be interpreted dynamically and in light of present and prevailing circumstances[24] and that the original legislative expectations and meanings should not be the only factors that control the meaning of a statute[25]. Professor Eskridge, Jr.'s model also provides a guide to using dynamic interpretation and its limitations by suggesting that dynamic interpretation would be most purposeful when used to:

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[21] Richard A. Posner, 'Pragmatic Adjudication' (1996) 18(1) Cardozo Law Review 1, 4.
[22] Eskridge, Jr. (n 14) 1479.
[23] Charles J Urena, 'Reading Sexual Orientation Protections into Title VII: A Moral Revitalization Theory of Statutory Interpretation' (2018) 2018 Wisconsin Law Review 1031, 1042; Richard A, Posner, 'The Problematics of Moral and Legal Theory' (1998) 111 Harvard Law Review 1637.
[24] Eskridge, Jr. (n 14) 1479.
[25] Eskridge, Jr. (n 14) 1481.

i) read an older statute, which

ii) does not explicitly address the issue, and

iii) when there has been a decisive shift in both societal/policy context and public values on the subject-matter.[26]

Title VII of the Act fits this model squarely. The Act is an older statute, and Title VII does not specifically address the issue of sexual orientation discrimination in the workplace. Furthermore, there has been a decisive shift in the societal/policy context of LGBTQIA+ rights since the time of its enactment. The right of same-sex couples to marry has been recognized, and the community has received much more acceptance in society. Thus, the judicial interpretive updating of "sex" Title VII was justified under Professor Eskridge, Jr.'s model.

CONCLUSION

By using judicial interpretive updating, Judge Posner rejuvenated the meaning of "sex" within Title VII and filled it with contemporary flavour. He justified this judicial updating on the ground that the meaning of "sex" has changed since 1964 and has now come to include "sexual orientation" and therefore the text of Title VII should also be interpreted in accordance with its present meaning. In the cases leading up to *Hively*, the courts had resorted to a restricted interpretation of the term "sex" which had the effect of excluding the LGBTQIA+ community from Title VII's protection and leaving them remediless. Thus, judicial interpretive updating aligned the provisions of Title VII with the current circumstances to enable members of the LGBTQIA+ community to claim protection from sexual orientation discrimination at the workplace. Judicial interpretive updating becomes especially necessary when the provision in question is a beneficial provision, such as Title VII. Judge Posner's method of interpretation also has the effect of reconciling judicial and

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[26] Eskridge, Jr. (n 14) 1497.

legislative functions to achieve the ultimate objective of a statute. That is not to say that judges must resort to this method of judicial updating frequently. The aforementioned parameters of dynamic statutory interpretation provide a useful guide in determining when adopting such an approach to interpretation would be essential and necessary. When attempting to resolve issues having significant social impact, the first course of action should, naturally, be to wait for a legislative amendment. However, as the circumstances surrounding *Hively* have shown, the formal process of updating and amending an older statute by the legislature is lengthy, and there are a variety of reasons why it might not be carried out promptly. An amendment may not be pursued vigorously or may be delayed for years, for a variety of reasons. Judges then have to wave their judicial wands and conjure up devices like judicial interpretive updating that infuse the provisions of the law with a meaning better suited to fit the needs of the present.

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CASE ANALYSIS: CHENNAI PROPERTIES AND INVESTMENT LTD V. COMMISSIONER OF INCOME TAX

Vidhi Krishali and Yadu Krishnan Muraleedharan***

ABSTRACT

Treatment of rental income has been a point of contention between the taxpayers and the Income Tax department. The root issue was that rental income can either be treated as an Income from House Property or Profit or Gains from Business or Profession. Taxpayers would prefer to treat rent as business income as it allows them to deduct expenses that occurred that are not capped. In contrast, when treating rent as Income from House Property, deductions are capped at 30% of the income, including interest paid for capital borrowed for acquisition, construction, etc. Taxpayers exercising the option to treat rent as Business Income means the Government loses out on revenue, which has led the IT department to scrutinize such cases to deter the taxpayers from doing so. This situation is further unclear since the IT Act does not provide clear instructions for these scenarios. The landmark judgment in Chennai Properties and Investment Ltd v. Commissioner of Income Tax (2015) set out guidelines based on which the rental income can be characterized as Profit or Gains from a Business or Profession. The judgment from the landmark case prompted the IT Department to release a circular in 2017 clarifying the rental income is to be taxed under PGBP and that the department is not to appeal this subject and withdraw the appeals that have already been lodged. The paper aims to analyse the landmark judgment intricately to understand its reasoning. The paper

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provides a detailed summary of the previous landmark judgments and elucidates upon how the judgment in Chennai Properties and Investment Ltd case deterred them. The authors have also examined the judgment by keeping the current laws in mind.

Keywords: *Income Tax, Business, Revenue, Household, Rent*

IDENTIFICATION OF FACTS

Where rental income is charged under the heading "Household income" and where "Business gains and profits" were a question of disagreement and the many cases have been considered frequently by different courts. The SC concluded in one judgment, through "***Chennai Properties and Investment Ltd. v. Commissioner of Income Tax",***[1] that revenue comes under the ambit of the "*business income*" and, thus, does not fall under the heading "*Income from house property*" for firms where the Memorandum of Association lays forth the business of leasing.' In this Article an effort is being made to examine the impact on the dispute rulings in this topic. The case concerned both Section 22 and Section 28 of "*the Income Tax Act, 1961*".[2]

ISSUE OF THE CASE

- *"Whether the income received from leasing out the property is to be assessed as "Income from Business" or as rental "Income from House Property"?*

[1] Chennai Properties and Investment Ltd. v. Commissioner of Income Tax (2015) 373 ITR 673 (SC)
[2] Income Tax Act 1962 (IND)

REASONING BEHIND THE VERDICT

RATIO

The ratio of this case was derived from the decision of the Apex Court in the case of "***Karanpura Development Co. Ltd. vs CIT***"[3] held that property lease was really the key business of the assessee and hence sensibly revealed the rental revenue of the assessee under the category of business income. In this instance, the Supreme Court issued a clear statement that, if the major aim of the corporation is for the acquisition and ownership of property and the laying-off of such properties, the rental revenue should be recognised as business income and not as housing income.

DICTA

After bearing in mind, all aforementioned verdicts of the Apex Court including dicta of the judgments of SC in the case of "*East India Housing and Land Development Trust Ltd. vs CIT*"[4] decision of Hon'ble statutory bench to Supreme Court in the case of "*Sultan Brothers (P) Ltd. vs CIT*"[5] the SC ruled out judgment for this case.

JUDGMENT

The Supreme Court had to determine whether property leases might be considered as "business benefits and profits" or as "household income" and the criteria to be taken. The Supreme Court's HELD:

(i) The only fact to conclude whether revenue is to be recognised as revenue from business and the issue depends on the conditions of each instance, that is to say whether or not a specific company should be

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[3] Karanpura Development Co. Ltd. v. CIT (1962) 44 ITR 362 (SC)
[4] East India Housing and Land Development Trust Ltd. v. CIT (1961) 42 ITR 49(SC)
[5] Sultan Brothers (P) Ltd. v. CIT (1964) 51 ITR 353 (SC)

allowing in, wouldn't be a simple inscription to the object clause displaying a particular object.

(ii) Each instance must be considered by an enterprising person to determine whether the leasing was done by an enterprise or whether its property was being exploited by an owner. We don't believe anything can be a commercial asset by its fundamental nature. Only an asset employed in a business is a commercial asset and nothing else and a company may do almost anything. It cannot thus be said that a given firm is an enterprise because it deals with an asset with which commerce is generally conducted. The idea that certain assets are commercial assets by their very nature is not supported;

(iii) The property assessment may be valid when there is a leaving of premises and a rental collection, but not if it is a fragment of a business activity. The separating Factor is difficult to discover; nonetheless, in a business with its proclaimed aims and the way it operates and its nature, it is feasible to state on which sides the operations fall and on which head the revenue should be allocated.

EVALUATION OF THE CASE WITH THE PRESENT LAW

Regardless of the countless legal decisions on the field, some basic tax issues never seem to be dull. One such question is the taxability of rental revenue for real estate (Land and Buildings). The following two income headings may be generally determined under the Revenue Tax Act:

1. House property revenue. (HP)

2. Business income and occupation income (PGBP)

Taxability as granted by HP (or limit) allows for a basic 30 percent deduction of income and an interest payment deduction

on borrowed capital for purchase, building, repair, reclamation, etc (subject to limitations provided under the Act).

In the case of PGBP, on the other hand, any expenditure, as a deduction for tax reasons, set out or spent entirely and solely for a leasing company. Because deductions under heading PGBP are neither limited or restricted, taxpayers go on to declare rental earnings from leasing properties as PGBP. This obviously needs factual backing in all cases. On the other hand, the taxation authorities contend that rent income should be tax-deductible as HP income, which might possibly facilitate (and restrict) HP deductions.

This is the root of the confrontation between taxpayers and the taxation department over leases of property. Thanks to the court, however, several essential concepts have formed over time and in many situations as pillars or templates for rental income characterization under PGBP.

Some of the most important are:

1. The purpose of the taxpayer - the intention may be derived from the leasing agreement, the Memorandum and the behaviour of the parties afterwards.

2. Active property ownership—It would be classed as passive property and may thus be regarded as HP if a property generates leasehold income due to its own legal existence.

3. The taxpayer's constitutional papers state that the main aim is to hold property, presumably not for profits, and allow them to produce rental income - the taxpayer's actions should be in accordance with constitutional documents.

The tendency towards the legal precedents and guidelines issued by the Central Board of Direct taxes (CBDT) indicate that presently, apart from being a simple owner, the authorities recognise ownership and lease of the property as a component of

an 'enterprise.' The following are some of these legal precedents and guidelines:

The Court of Apex in *Chennai Properties & Investments Limited v. CIT* found that the decision was made on the nature of the taxpayer's activity and the type of operations in connection, not ownership of the property or leases. The decision was made. In addition, the Court of Apex stressed that the activities really carried out by the taxpayer must be in conformity with its primary purpose in accordance with the constitutional articles of the revenue characterised as "business income."

Further, the CBDT has issued circular no. 16/ 2017 dated 25 April, 2017[6], in which it was clarified that, along with other installations in an industrial park/SEZ, the revenue generated by the renting out of premises / space created is to be taxed under head PGBP and advised the department not to appeal this subject and not to withdraw / withdraw appeals already lodged.

Therefore, we expect that taxpayers will see decreased dispute on this topic if they can provide factual information to demonstrate that they operate business in accordance with their constitutional papers. Judicial precedents also seem to examine the content of transactions in terms of form. Litigation risk and subsequent outflows of cash tax might affect real estate transaction prices.

SYNTHESIS

The Apex Court gave a landmark ruling in the case of "***East India Housing and Land Development Trust Ltd. v. Commissioner of Income Tax*"[7].** The corporation was included in the aforesaid lawsuit for the aim of building a market

[6] "Lease rent from letting out buildings/developed space along with other amenities in an Industrial park/SEZ- to be treated as business income, circular16_2017.pdf", (25 April, 2017) <https://www.incometaxindia.gov.in/communications/circular/circular16_2017.pdf> accessed 11 June, 2022.

[7] Supra note 7.

on the property bought for that reason. Therefore, on the bought site stores and stalls were built. Some stores were distributed to several tenants and the assessee firm earned rental money. The question arises, then, whether or whether the income was deemed taxable under the heading "Revenues from household property," as the business revenue claimed by the assessee was charged. The Supreme Court of Hon'ble proceeded principally on the premise that the income head is separately headed for taxable household property income provided for under "the Income-Tax Act" and, as such, income is charged under the heading mentioned above. Separate heads, including sources, as defined in section 6 were mutually exclusive and revenue obtained from diverse sources from particular headings had been calculated in the manner given in the relevant section for the purposes of taxes. If the revenue from a source is under the section heading, the notion that it may be shielded indirectly by alternative head does not render the revenue taxable under that heading. Owing to this, Special mention has been made to decision of SC in the case of ***"United Commercial Bank Ltd. v. Commissioner of Income Tax"***[8]**,** where following a thorough examination of the authorities by the SC, the heads of revenue, income, profit and gains listed on section differences are mutually exclusive under the scheme of "Income Tax Act, 1922". Each heading covers revenue items derived from a single source. Thus, the money from the shops is considered to be valid under the heading of "Earnings from other sources" and not as a business income despite the fact that it was built in accordance with the goal of the firm.

After referral to the SC, the issue arose frequently before the SC and many High Tribunals in the matter of "*East India Housing and Land Development Trust*". In several situations after the aforesaid ruling by the SC, the income was collected under the heading "Household income." In certain circumstances,

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[8] United Commercial Bank Ltd. v. Commissioner of Income Tax (1957) 32 ITR 688

however, an opinion has been formed of revenue as business income on the basis of evidence.

In the case of "***Karanpura Development Co. Ltd. v. Commissioner of Income Tax"***[9]**.** The information that revenue was collected under the lease of coal mining rights was given to the Supreme Court. The company of assessees was established, inter alia, to acquire and disposal the mining rights of "underground coal mining" in specific coal fields and limited its happenings to acquires leases in large areas of coal mining. The SC observed that, for the above-case purpose and not from house property, the subject matter and manner of its activities, and the nature of its relations with its properties had to be considered and accordingly considered to be income in the nature of the business revenue.

In the matter of Chennai Properties and Investment Ltd, the SC recently reviewed the issue (supra). In this instance the assessee was mainly concerned with acquiring land in the town of Madras (now Chennai) under the Memorandum of Association and distributing such holdings. The rental revenues from such properties were represented in the assessee's return of income as revenue from the company. In the heading "Income from household property" the department deemed the income chargeable. In the appeal the assessee held to be revenue from the company was permitted by a "Commissioner of Income Tax". The Revenue Tax Appeal Court also confirmed the ruling of the Income Tax Commissioner (Appeals). The Hon'ble High Court found that, in the appeal brought by the Department before the Chennai HC, income was liable under the heading 'Household income.' In the issue of East "India Housing Land Development Trust", the Madras High Court essentially rejected its ruling on the Apex Court. The assessee filed an appeal before the Hon'ble Supreme Court contrary to the judgement of the High Court. In the matter of the "East India Housing and Land Development

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[9] Karanpura Development Co. Ltd. v. Commissioner of Income Tax (1961) 44 ITR 362 (SC)

Trust Ltd." as well as the "Sultan Brothers (P) Ltd." and "Karanpura Development Co. Ltd." The SC has evaluated its earlier judgments. In the circumstances of the case, the Court further noted that the assessee's income was completely paid from two properties, i.e., "Chennai home" and "Firhavin Estate" and the assessee had no other revenue. Furthermore, the SC found that the company's major purpose is the acquisition, maintenance and disposal of assets. Having given a precise note, in the case of "Sultan Brothers(P) Ltd"., of the Constitutional Bench of the Supreme Court, the Court observed that every case should be examined from the point of view of businessmen and held that, in fact, the income of the case is to be considered as business income.

In these cases, the Department considered that, since the assessee's income was shown as revenue from the property in previous years, it would not be able to modify its position this year and would not be able to claim the income as business revenue. After studying the memorandum and observing that 85 per cent of its revenue was from rental, the Commission authorised the assessee firm to make its claim. However, the Tribunal found that income under the heading "household property income" was taxable. The assessee filed an appeal to the High Court of Calcutta accordingly. In the" Calcutta High Court", in the case of *"Chennai Properties and Investment Ltd.",* a ruling from the Hon'ble Supreme Court was also mentioned by the assessee's lawyer on behalf. The judgement does not, however, include a particular debate about the above-mentioned judgement of the SC.

The HC, however, shall take note of the Memorandum's subject clause, allowing the evaluator to do business by leaving property. In addition, 85% of the appellant's revenue was obtained from renting and rental leases. The High Court thus decided that rental revenue was the assessee's business revenue.

On the basis of different previous judgments of the Court it may be seen that the Apex Court proceeded on the assumption that the income from home property should be assessed under the aforesaid head, since there is a distinct head of income for

taxation of property income. Following the above-mentioned position of the SC, in other instances it was subsequently decided that the rent was subject to the charge "housing income."

CONCLUSION

As the Business owns the property and as a result of proprietorship of the property, it was generally thought by the Courts that the property was received under the heading "Income from the domestic property" despite the possibility that the property might be held as an owner, or that the rental income would be received in connection with its business activities. While the courts also take the view from time to time that property income is in the nature of business income.

For the “Chennai Properties and Investment Ltd.” and “Calcutta High Court” in the “Shyam Burlap Co. Ltd. Case”, the income would be in the nature of the business income, where the income from rental income is collected as a result of carrying out an outlet, notwithstanding that the income head in the income tax Act is separate, in other words income from home property. Accordingly, it is argued that rentals, given the nature of the business revenue, should be recognised as business income rather than as income from home property, with a view to the actions of the assessee. In the same way, no income should be taxed on the grounds of proprietary value for developers since builders/developers etc. are owned as inventories and are not retained for purposes of disposal, solely because they cannot sell the same thing. A parallel should be panned “*whether the property is held as business asset or an investment*.” [10]

[10] “Whether Rental Income is Chargeable Under The Head “Income From House Property” or “Business Income”, AIFTP", (October, 2015) <https://aiftponline.org/journal/2015/october/whether-rental-income-is-chargeable-under-the-head-income-from-house-property-or-business-income/> accessed 11 June, 2022.

In this instance, the assessee company was established with the primary goal of acquiring and leasing properties in the city, as stated in the Memorandum of Association.

The Hon’ble Supreme Court ruled that because owning properties and making money from renting them out is the company's primary goal, as stated in the Memorandum of Association, the income derived in this way is business income and should be disclosed under the heading "Income from Business or Profession" rather than "Income from House Property".

It is wise to examine the rental income that Businesses declare under PGBP as the rental income from the business should be in accordance with the primary or secondary objective of the Business.

They must also have strong justifications and supporting documentation to show that the rental revenue is consistent with the secondary or primary goal of their business activity if they want to count it as business income.

For the purposes of classifying rental revenue, the aforementioned treatment is applicable to both residential and commercial properties.

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