Volume 7 2023 ISSN No.: 2455-8680

NLUALR

NLUA LAW REVIEW

Articles

NATIONAL LAW UNIVERSITY AND JUDICIAL ACADEMY, ASSAM

NLUA LAW REVIEW

Volume 7 **2023**

MESSAGE FROM THE EDITOR-IN-CHIEF

The National Law University Assam Law Review (NLUALR) is a testimony to the inclination shows by the students of NLUJA, Assam, towards a high quality of research. The University represents the diversity of India with meritorious students from all over the country pursuing studies in a variety of disciplines, with an inter-disciplinary approach focused on issues affecting the country as a whole. As students endeavouring to scale the heights of academic excellence, acquiring and disseminating knowledge in different shades of life, the contributors to NLUALR are acting in pursuance to having a social aspiration to the right to gain more knowledge and to provide the latest updates on current socio-legal problems and an innovative approach to their solutions.

This seventh volume of the journal includes within its ambit, broad areas of research containing sufficient and pertinent data, relevant analysis, thought provoking ideas, a fresh perspective coupled with a profound 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 includes writings on current issues, with a multidisciplinary perspective pertaining to the diverse areas of Arbitration, International Laws, Intellectual Property Rights, Personal Laws, Criminal Laws, Environmental laws etc. NLUALR is the outcome of indefatigable and unrelenting

efforts of the Editorial Board consisting of talented students devoting their precious time, without impairing their academic pursuit of excellence, under the guidance of the Faculty Advisory Board. The students involved in publication of this Review deserve special appreciation for their sincerity and diligence. 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.

Hon'ble Mr. Justice (Retd.) Mir Alfaz Ali

Vice-Chancellor (Incharge), NLUJA, Assam
Editor-in-Chief, NLUA Law Review

MESSAGE FROM THE FACULTY EDITORIAL BOARD

The National Law University and Judicial Academy, Assam is proud to 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 a platform for the publication of high quality and informative research by the esteemed legal fraternity. This journal displays a diversity of quality research having an inter-disciplinary approach.

Research, *inter alia*, should endeavour to improve the standard of our society and of its resident individuals. This journal endeavours to establish discussion on legal topics and other multidisciplinary fields ultimately leading to an invaluable addition in legal scholarship and policy formulation. The current issue of this journal is an assortment of thoroughly 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 (Incharge), 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 gratitude to the esteemed authors for their immeasurable contributions to our journal and hope to enjoy their support and contributor in the future. We trust that our readers will discover the articles to be both informative and engaging. We extend our heartfelt wishes to all our readers for a pleasant and enriching reading journey.

Faculty Editorial Board

NLUA Law Review

EDITORIAL

As we step into a new academic year, the National Law University Assam Law Review (NLUALR) proudly continues its journey as a beacon of legal scholarship and discourse. Since its inception in 2015, NLUALR has remained steadfast in its commitment to fostering intellectual inquiry and enriching legal academia. As we embark on Volume VII of the NLUALR for the year 2023-2024, we reflect on the foundation laid by our predecessors and look forward to the contributions that will shape the discourse in the legal arena.

Under the leadership of our Vice-Chancellor (Incharge), Hon'ble Mr. Justice (Retd.) Mir Alfaz Ali, our esteemed faculty and with the support of the National Law University and Judicial Academy, Assam, NLUA Law Review remains dedicated to excellence in legal scholarship. We are committed to maintaining the highest standards of editorial integrity and academic rigour, ensuring that each publication contributes meaningfully to the advancement of legal knowledge.

The NLUA Law Review stands as a testament to the dedication of the faculty, students, and contributors who have tirelessly worked to uphold its mission. Our primary objective remains to provide a platform for rigorous academic debate and exchange of ideas. Through scholarly articles, commentary on recent legal developments, legislative analysis, and book reviews,

we aim to stimulate critical thinking and promote a deeper understanding of the law.

In this age of complexity and rapid change, the importance of informed legal scholarship cannot be overstated. The articles selected for this volume cover a wide array of topics, ranging from Constitutional Law to Business Law to Public International Law, reflecting the diverse interests and expertise of our contributors. It is our hope that these contributions will not only advance our understanding of legal principles but also inspire further inquiry and dialogue.

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. Gitanjali Ghosh and Mr Shishir Tiwari in their article titled "REALIZING MARRIAGE EQUALITY IN INDIA VIS-À-VIS MIZO CUSTOMARY MARRIAGE LAWS", discuss the aftermath of the Supreme Court's ruling on the criminalization of homosexual relations, highlighting the potential for discussions on marriage equality. The analysis navigates through the complexities posed by regional legislation like the Mizo Marriage Act, which deems such marriages void, potentially hindering progress towards nationwide marriage equality. The author scrutinizes the clash between fundamental rights and

constitutional protections afforded to personal and customary laws.

Dr. Kasturi Gakul in her article titled "INTER-COUNTRY ADOPTION OF CHILDREN VIS-À-VIS HUMAN RIGHTS LAW – A CRITICAL ANALYSIS", analyzes the provisions of international human rights law concerning inter-country adoption, highlighting concerns about child vulnerability and exploitation. The author discusses historical and contemporary perspectives on adoption, emphasizing the need for legal frameworks to protect children in the adoption process from exploitation and trafficking.

Mr. Saheb Choudhury in his article titled "MAKING MEDICINES ACCESSIBLE IN INDIA: A CRITICAL ANALYSIS OF THE LAWS AND POLICIES", addresses the issue of exorbitant drug costs contributing to healthcare inaccessibility and poverty in India, particularly affecting those living in low and middle-income brackets. Despite existing laws and policies regulating drug prices, accessibility remains a challenge. The author critically analyzes these regulations and proposes strategies to ensure medicine availability for all, regardless of financial capacity, thereby fulfilling the government's legal and moral responsibility to safeguard public health and prevent the economic consequences of diseases.

Ms. Sukanya Singha and Ms. Shakshi Goyal in their article titled "COMPENSATION FOR SEXUAL ASSAULT

VICTIMS: NECESSITY OF A ROBUST LEGAL FRAMEWORK" examine the urgent need for distinct rights tailored to sexual assault victims in India, emphasizing the lack of explicit compensation provisions in the Indian Constitution. Despite this, the Supreme Court has provided compensation in various cases. The authors analyze the existing legal framework for compensating victims of sexual assault, particularly in crimes like rape and acid attacks. The authors further underscore the necessity of comprehensive compensation rights to support survivors in their recovery and rebuilding process, acknowledging the harm they've endured and restoring a sense of justice. Finally, they advocate for a specialized legal framework to ensure compensatory justice for victims of sexual assault.

Mr. Priyadarshi Jha in his article titled "SERIOUSNESS OF INJURY AND RESULTANT DEATH VS. INTENTION TO INFLICT INJURY - AN EXEGESIS FOR AN EFFECTUAL COMPREHENSION OF SECTION 299 AND 300 OF INDIAN PENAL CODE, 1860", discusses the intricate complexities involved in determining culpability in murder trials, particularly concerning Sections 299 and 300 of the Indian Penal Code, 1860. The author argues that while judicial interpretations provide guidance, understanding the accused's mental state remains challenging. The author advocates for a nuanced approach, asserting that the severity of injury or death alone is not indicative of intent or knowledge. The author emphasizes the importance of

assessing the accused's mental state rather than solely focusing on the consequences of the act.

Mr. Anurag Sharma in his article titled "IDEOLOGY OF GOOD GOVERNANCE AND THE ROLE OF THE SUPREME COURT IN THE IMPLEMENTATION OF GOOD GOVERNANCE", explores the principles of good governance, emphasizing transparency, accountability, and inclusivity in government operations. The author discusses the role of governments in promoting societal progress, ensuring fundamental rights, and driving economic development. Transparency is highlighted as crucial for public participation and informed decision-making, despite challenges in accessing accurate information.

Ms. Akanksha Pathak and Mr. Prateek Tripathi in their article titled "DIGITAL VICTIMIZATION OF WOMEN IN CYBERSPACE: AN ANALYSIS OF EFFECTIVENESS OF INDIAN CYBER LAWS" delve into the prevalence of cybercrimes targeting vulnerable groups like women, children, and senior citizens, citing an increase in reported cases of cybercrimes against women. The authors discuss the challenges of proving such offences and the resulting impact on victims. The authors also analyze the legal discourse and the effectiveness of current solutions in combating cybercrimes against women.

Ms. Samreena Bashir and Ms. Inshah Yasin in their article titled "RIGHTS OF DISABLED PERSONS WITH SPECIAL

REFERENCE TO JAMMU & KASHMIR: A CASE STUDY", examine the implementation and monitoring of laws concerning disabled individuals, highlighting the gap between legislation and actual practice. The authors emphasize the importance of ensuring rights regardless of disability and discusse initiatives at national and international levels, referencing United Nations efforts to promote understanding and support for disabled people's dignity and well-being.

Mr. Shubham Kashyap Kalita in his article titled "ACCESS TO LEGAL PROFESSION: A CASE ANALYSIS OF BAR COUNCIL OF INDIA V. BONNIE FOI LAW COLLEGE & ORS. AND THE ADVOCATES ACT, 1961", emphasizes the pivotal role of the legal profession in administering justice and promoting a representative legal system. The author highlights challenges faced by aspiring advocates, particularly those from disadvantaged backgrounds, due to exorbitant registration fees mandated by State Bar Councils. The author underscores the need to balance the integrity of the legal profession with ensuring accessibility and equality for aspiring advocates.

Ms. Tarali Neog in his article titled "BALANCING ACT: NAVIGATING NATIONAL SECURITY AND CIVIL LIBERTIES IN ANTI-TERRORISM LEGISLATION UNDER THE INDIAN CONSTITUTION", examines the intricate balance between national security imperatives and civil liberties, focusing on anti-terrorism legislation in the context of the Indian Constitution. The

author discusses the challenge of harmonizing national security concerns with the protection of fundamental rights. The author emphasizes the need to ensure that counterterrorism measures are proportionate and operate within constitutional parameters, empowering law enforcement while safeguarding individual liberties.

Mr. Tejbeer Singh and Mr. Ali Asghar in their article titled "REFUGEE RIGHTS BEYOND THE REFUGEE CONVENTION: A COMPARATIVE ANALYSIS OF INDIAN AND INDONESIAN LAWS, CHALLENGES, AND SOLUTIONS", xamine the rights of refugees within Indian and Indonesian law, analyzing challenges faced by the international community in safeguarding refugee rights. The authors discuss contemporary crises such as the Poland-Belarus refugee crisis and the Rohingya crisis, offering suggestions to balance national interests with refugee rights.

Mr. Rohit Gora in his article titled "DENOTIFIED TRIBES AND CRIMINAL LAW: UNVEILING DISCRIMINATION WITHIN INDIA'S JUSTICE SYSTEM" examines the ongoing challenges encountered by Denotified Tribes (DNT) within India's criminal justice system, revealing persistent discrimination despite decades of independence. The author scrutinizes the historical branding of DNT tribes as criminals and evaluates the impact of legal frameworks on their identity and societal perception. Additionally, the author addresses socio-economic

vulnerabilities contributing to higher crime rates among DNT communities and highlights instances of police brutality. Ultimately, the author calls for a comprehensive approach to bridge the gap between theoretical equality and the lived experiences of DNT tribes, advocating for a more just and equitable society.

We would like to thank the offices of the Vice-Chancellor (In charge) 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 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.*

Editorial Board

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CONTENT

REALIZING MARRIAGE EQUALITY IN INDIA VIS-À-VIS MIZO CUSTOMARY MARRIAGE LAWS

Dr. Gitanjali Ghosh[1]

Mr. Shishir Tiwari[2]

ABSTRACT

After a long drawn legal battle against the criminalization of homosexual relations, the Supreme Court declared the same as unconstitutional as far as it was concerned with consenting adults in private. However, it has now opened the doors for several other topics to be discussed including marriage equality in pursuance of which several petitions are currently pending in several High Courts as well as the Supreme Court. What makes this a need of the hour is the inherent heteronormativity of Indian marriage laws although the same do not contain an express prohibition on homosexual marriages. The Mizo Marriage, Divorce and Inheritance of Property Act, 2014 however marks a departure from the usual marriage laws in India in that it specifically terms same sex marriages as void. Given the special constitutional status enjoyed by Mizoram, there is a possibility that marriage equality may not be realized there even if there is a statute made by the Indian Parliament to that effect. This paper shall specifically analyze the right to marry as an internationally recognized

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human right as well as its constitutional status as a fundamental right, roadblocks to achieving marriage equality in India in the light of the Mizo customary laws, and the tussle between fundamental rights and the constitutional protection accorded to personal and customary laws vis-à-vis the same.

Keywords: *Right to Marry, Same Sex Marriage, Customary Law, Fundamental Rights, Mizo tribe.*

INTRODUCTION

While India has uniform criminal laws, the same is not true on the civil side. Amid a growing clamour for a uniform civil code, India continues to host a plethora of personal laws based either on one's religious identity or tribal status, as the case may be. Thus, India has statutory as well as customary laws governing people on the basis of religion while the people classified as Scheduled Tribes fall under the ambit of uncodified customary laws. Owing to their antiquity, it is not a forgone conclusion that several facets of such personal and customary laws may not resonate with contemporary sensibilities and even be incompatible with our constitutionally guaranteed fundamental rights.

India is precariously placed between two categories of countries, one which not only consider homosexuality to not be a crime but have also recognized same sex marriages and the other where homosexuality has been criminalized and is punishable, by death, *inter alia*.

2018 was a watershed year for the LGBTQIA+ movement in India as consensual sexual activities between adults in private was

decriminalized. It provided a closure to the long-drawn battle fought against section 377 of the Indian Penal Code by spirited individuals and organizations in India. While it drew the curtain on a significant woe tormenting people in same sex relationships i.e., criminal prosecutions, it finally opened the doors for discussion on several other germane topics, primarily in the realm of family law, more specifically, marriage. The discussion is imperative due to the heteronormativity of Indian family laws given their stress on heterosexuality. While a cursory look at the different marriage laws in force in India brings to fore its recognition of only heterosexual couples, there is no express bar on homosexual marriages except for the Mizo Marriage, Divorce and Inheritance of Property Act, 2014 which specifically terms such marriages as void.

In this background, this paper delves into the right to marry as an internationally recognized human right as well as its possible interpretation as a constitutionally guaranteed fundamental right, possible issues cropping up with the idea of achieving marriage equality in India pursuant to the legalization of same sex marriages in India in the context of the Mizo customary laws, and the tussle between fundamental rights and the constitutional protection accorded to personal and customary laws vis-à-vis the same.

CONCEPTUALIZING RIGHT TO MARRY AS AN INTERNATIONAL HUMAN RIGHT

Several international human rights treaties recognize right to marry as a human right such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural

Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *inter alia*.

CEDAW calls upon States to eliminate marriage related discriminations against women and to "ensure that men and women enjoy the right to enter into marriage; to have the freedom to choose their spouse and that too, with their free and full consent."[3] In the same vein, the UDHR[4], the ICCPR[5] and the ICESCR[6] obligate the State to ensure that marriages are contracted pursuant to "free consent of the intending spouses." Further, the UDHR and the ICCPR recognize "the right of men and women of marriageable age to marry and to found a family." In addition to this, the UDHR, ICCPR and ICESCR call upon the States to "provide widest possible protection and assistance to the family." The European Convention on Human Rights[7] also recognizes "the right of men and women of marriageable age to marry and to found a family within the contours of municipal laws."

However, international human rights instruments are also heteronormative in nature. The same is evident in the views adopted by the treaty body established under the ICCPR i.e. the Human Rights

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[3] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 16.
[4] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 16.
[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 23.
[6] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 10.
[7] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS 005 (ECHR) art 12.

Committee (HRC) in respect of communications received by it pertaining Article 23 of the ICCPR. In Ms. Juliet Joslin et al. Communication No. 902/1999, the authors, *inter alia*, made a complaint against New Zealand for violation of Article 23 of the ICCPR as being a lesbian couple they were refused a marriage license to marry under the Marriage Act, 1955 which New Zealand maintained only allows for heterosexual marriages. Having exhausted all domestic remedies, they approached the HRC and claimed that the said provision of the ICCPR obligates its States Parties to bestow upon homosexual couples the right to marry and New Zealand has violated its international obligations by denying them.

The HRC noted that Article 23 defines the right by in terms of "men and women" as opposed to "everyone", "every human being", and "all persons". In its words,

> "Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other."

Thus, the HRC found in favour of New Zealand that its mere refusal to allow homosexual couples to marry did not amount to violation of its obligations under the ICCPR. There are several other communications handled by the HRC where they have interpreted Article 23 of the ICCPR as envisaging only heterosexual unions.

INTERPRETING RIGHT TO MARRY AS A CONSTITUTIONALLY GUARANTEED FUNDAMENTAL RIGHT

The Law Commission of India[8] highlighted the importance of autonomy of choices and liberty. The Law Commission made it abundantly clear that the autonomy of every individual in matters concerning their self is constitutionally protected.

In *Shakti Vahini v Union of India*,[9] the matter involved the spate of cases involving honour killing and the NGO called upon the Supreme Court to criminalize the same and urge the State to undertake necessary steps in this regard. The Court observed that the consensual choice made by two adults to get married to each other is accepted under Articles 19 and 21 of the Indian Constitution. It stressed on the elements of choice and dignity of the individual within the framework of right to liberty and observed that the enjoyment of right to life and liberty sans dignity and choice adversely affects the constitutionally recognized identity of a person. Choice is an inseparable part of dignity in that a dignified existence is not possible in the absence of one's ability to make choices. The Court decided that two adults

[8] Law Commission of India, Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework (Law Com No 242, 2012).
[9] (2018) 7 SCC 192.

have the right to marry out of their volition and that any encroachment upon the said right amounts to a constitutional violation. To be able to assert one's choices is a *sine qua non* for enjoyment of life with liberty and dignity. Similarly, in *Lata Singh's case*,[10] the Court held that on attaining the age of majority, a person can marry whosoever he or she likes.

Further, taking *suo motu* cognizance based on a news report,[11] the Court opined that "the freedom to marry a person of one's own choice is an inherent feature of Article 21 of the Constitution of India." A natural corollary of the same lies in that the State is obligated to zealously guard the fundamental rights of its citizens and any violation of these protected rights basically evidences the incapacity or inability of the State to safeguard the fundamental rights of its citizens.

While arguing that same sex marriages should be allowed as fundamental rights under the Constitution, a three pronged approach could be taken to interpret the fundamental rights as such. To begin with, as Indian Courts have already recognized right to marry as integral to right to life and liberty under Article 21 of the Constitution, it could be interpreted as being free from the clutches of heteronormativity. Apart from that, the right of homosexual couples to marry has also been recognized as being protected under the right to privacy. Lastly, the right of same sex couples to marry could also be an extension of the right to

[10] *Lata Singh v State of Uttar Pradesh* AIR 2006 SC 2522.
[11] *Re: India Woman says Gang-raped on Orders of Village Court published in Business & Financial News dated 23-1-2014* (2014) 4 SCC 786.

equality without discrimination on the ground of sex under Articles 14 and 15.

In *Indra Sarma v V.K.V. Sarma,*[12] while dealing with the concept of "relationship in the nature of marriage" in the context of the Protection of Women from Domestic Violence Act, 2005, the Supreme Court decided that domestic relationship between same sex partners is not recognized as "relationship in the nature of marriage" under Section 2(f) the said law while simultaneously acknowledging many countries whose laws have brought same sex relationships within the ambit of domestic relationship.

In *Shafin Jahan v Asokan K.M.*,[13] Shafin Jahan filed an appeal against a decision given by the Kerala High Court nullifying his marriage with his wife Hadiya in pursuance of Hadiya's father's habeas corpus petition that she had been forcefully converted and was likely to be sent to Syria. While providing relief to the petitioner, Chandrachud, D.Y., J. in his concurring opinion maintained that it is integral to Article 21 that one gets to marry of their choice and that society has no role in who one's partner should be, whether within or outside the domain of marriage. He placed the intimate relationship of marriage within the inviolable contours of privacy and personal liberty stating that the State and law cannot dictate the choice of partners. He further stated that it is incumbent upon Courts to uphold these constitutional

In the same vein, in the *Puttaswamy* case,[14] the Supreme Court while upholding the right to privacy held that "when the guarantee of

[12] (2013) 15 SCC 755.
[13] (2018) 16 SCC 368.
[14] *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

privacy intersects with gender, they create a private space which endows elements crucial to gender identity with constitutional protection. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual." While rejecting the contention of the Attorney General that the right to privacy cannot be held to be fundamental right as it is a vague and an amorphous concept, Nariman, R.F., J. held that privacy rights have been extended to protect several interests of an individual including the right to marry of same sex couples. Kaul, S.K., J. maintained that it us up to an individual to choose who and how lives in his house and within the contours of what relationship. He stressed that the privacy of one's home must safeguard his family, marriage, reproduction and sexual orientation as these are integral aspects of dignity. Similarly, in *Common Cause v Union of India*,[15] the Supreme Court observed that a person's autonomy is based on his ability to decide on who he wishes to love and who he seeks to partner, to freely decide on numerous facets privy to his daily life.

While deciding on the constitutionality of Section 377 of the Indian Penal Code, 1860 in *Naz Foundation* case,[16] A.P. Shah, C.J. held that "sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15."

In *NALSA v Union of India*,[17] while examining a petition of members of the transgender community that not recognizing their gender identity as being different from the one attributed to them at

[15] (2018) 5 SCC 1.
[16] *Naz Foundation v Government of the NCT of Delhi* 2010 Cri LJ 94.
[17] (2014) 5 SCC 438.

birth is violative of their rights under Articles 14 and 21 of the Constitution, the Supreme Court held that since a perusal of international law and municipal laws and judicial decisions worldwide has evidenced growing acceptance of equality and non-discrimination guarantees on the ground of gender identity or expression the same ought to be applied in the Indian context as well.

Indu Malhotra, J., in *Navtej Singh Johar v Union of India*[18] rightly held that "the word sex is not merely restricted to one's biological attributes but also their sexual identity and character and sexual orientation."

This decision was relied upon in *S. Sushma v Commissioner of Police*[19] wherein a lesbian couple sans parental approval of their relationship approached the Madras High Court praying for issuance of directions to the police to not harass them as well as to ensure their safety and security from any threat or danger posed by their parents. The Court held that the Constitution guarantees people full autonomy over decisions pertaining their personal life, including who they choose as their partner as the right to life and liberty as well as privacy under Article 21 encompasses the right to sexual autonomy.

After the Supreme Court's decision in *Shafin Jahan v Asokan K.M.*[20] that the right to marry a person of one's choice is inherent in

[18] (2018) 10 SCC 1.
[19] (2021) SCC OnLine Mad 2096.
[20] (2018) 16 SCC 368.

Article 21, a slew of similar judgments have followed from high courts all across India.

HETERONORMATIVE MARRIAGE LAWS IN INDIA

Indian laws are a mixed bag in the sense that while a uniform law governs individuals on the criminal side, family law matters are largely subject to personal and customary laws based on religion, tribe etc. of an individual. Thus, when it comes to marriage, individuals are governed by diverse laws depending on which religion, community, or tribe they belong to. The following are provisions from various legislations governing marriage in India. A brief perusal of these provisions evidences a commonality in terms of the heteronormative concept of marriage being envisaged as between men and women of marriageable age.

The Hindu Marriage Act, 1955 while lying down the conditions of a valid Hindu Marriage clearly stipulates that "the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage."[21] In the same vein, the Indian Christian Marriage Act, 1872 while stipulating requisites for certification of marriages of Indian Christians provides that "the age of the man intending to be a married shall not be under twenty-one years, and the age of the woman intending to be married shall not be under eighteen

[21] The Hindu Marriage Act 1955, s 5(iii).

years."[22] Similarly, the secular law of marriage, i.e., the Special Marriage Act, 1954 requires that "the male has completed the age of twenty-one years and the female the age of eighteen years."[23] as a necessary condition for solemnization of special marriages. The Parsi Marriage and Divorce Act, 1936, as a requisite for a valid Parsi marriage requires "the male to have completed twenty-one years of age and the female eighteen years of age."[24] Further, the Foreign Marriage Act, 1969 requires that "the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage"[25] for solemnization of foreign marriages. The Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986 also perceive of marriage as "a relationship between a man and a woman." Although the Adoption Regulations, 2017 in some places use language that seems to include homosexual marriages such as prospective adoptive parents, spouses, married couple; a look at other provisions which talk about prospective adoptive father and mother and the requirement of a marriage certificate while registering makes it evident that it recognizes only heterosexual unions.

In 2021, the Delhi High Court had clubbed together several writ petitions filed by homosexual couples seeking registration of marriages under laws such as the Hindu Marriage Act, Special Marriage Act and

[22] The Indian Christian Marriage Act 1872, s 60(1).
[23] The Special Marriage Act 1954, s 4(c).
[24] The Parsi Marriage and Divorce Act 1936, s 3(1)(c).
[25] The Foreign Marriage Act 1969, s 4(c).

Foreign Marriage Act.[26] Similar petition was also filed by a gay couple in the Kerala High Court seeking registration of their marriage under the Special Marriage Act. In 2022, several couples approached the Supreme Court for registration of their marriage under the said marriage laws.[27] In addition to the petitions in the Supreme Court, several petitions are pending in the High Courts of Delhi and Kerala as of today wherein provisions from all matrimonial laws have been challenged.[28] The Supreme Court began hearing the petitions filed before it in April, 2023 and after continuously hearing the same for ten days, reserved its verdict in May, 2023 which is still awaited. What is noticeable is that the respondents comprising the Central Government, NCPCR etc. have all opposed the petition seeking the registration of same sex marriages under the Special Marriage Act.

MIZO CUSTOMARY LAW ON MARRIAGE

The Mizo customary law on marriage has been codified under the Mizo Marriage, Divorce and Inheritance of Property Act, 2014. The

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[26] 2021 SCC OnLine Del 965, *Udit Sood and ors v Union of India and anr* W.P.(C) 6371/2020; *Abhijit Iyer Mitra and ors v Union of India and anr* W.P.(C) 7657/2020; *Vaibhav Jain and anr v Union of India and anr* W.P.(C) 7692/2020; *Dr. Kavita Arora and anr v Union of India and anr* W.P.(C) 2574/2021.

[27] *Supriyo @ Supriya Chakraborty v Union of India* W.P. (C) No. 1011/2022; *Sameer Samudra v Union of India* W.P.(C) No. 1105/2022.

[28] *Nikesh PP v Union of India* W.P.(C) 2186/2020; *Abhijit Iyer Mitra and ors v Union of India* W.P.(C) 6371/2020; *Vaibhav Jain and anr v Union of India* W.P.(C) 7657/2020; *Dr. Kavita Arora and anr v Union of India* W.P.(C) 7692/2020; *Udit Sood v Union of India* W.P.(C) 2574/2021; *Joydeep Sengupta v Ministry of Home Affairs* W.P.(C) 6150/2021; *Nibedita Dutta v Union of India* W.P.(C) 13528/2021; *Zainab Patel v Union of India* W.P.(C) 13535/2021; *Mellissa Ferrier v Union of India* W.P.(C) 13206/2021.

Act not only applies when both the spouses are Mizos but also if the male involved is a Mizo.[29]

A male through *palai*[30] conveys a proposal for marriage to the head of the woman's family he wishes to marry. Pursuant to her consent, if her family accepts the proposal, the marriage price (*man*)[31] to be paid by the bridegroom is settled by the head of her family in addition to the venue and date for payment of the said marriage price and solemnization of marriage. The marriage price is paid by the man through *palai*. Upon solemnization of marriage, the bride is escorted by *lawichal* from her home to live her bridegroom's home wherein she lives thereafter.

Marriage price (*man*) to be paid by the bridegroom to the bride's family is a characteristic feature of Mizo marriage. The Act classifies *man* into two, *man pui*[32] and *man ang*[33]. In other words, they can also be termed as the main marriage price and subsidiary marriage, respectively. *Man pui* is the main marriage price while *man ang* is the share of the marriage price distributed by the head of family among the near relatives of the bride. It is also a given that *man pui* shall not be less that 420 rupees.[34]

[29] The Mizo Marriage, Divorce and Inheritance of Property Act 2014, s 2.
[30] ibid at s 3(s). '*Palai*' is a person who negotiates the bride price with the bride's family on behalf of the bridegroom's family.
[31] ibid s 3(o). '*Man*' means marriage price paid to the head of the bride's family by the bridegroom.
[32] ibid s 3(p).
[33] ibid s 3(q).
[34] ibid s 4.

The recipients of *man ang* and the quantum of it are as follows:[35]

1. *Sumhmahruai*: It is a share for bride's father or brother and normally amounts to 60 rupees.
2. *Sumfang*: It is also a share for the bride's father or brother and normally amounts to 50 rupees.
3. *Pusum*: It is a share given to the bride's maternal grandfather and if he has pre-deceased, it is given to the bride's maternal uncle and amounts to 40 rupees.
4. *Palal*: It is a share for a person chosen by the bride as her father in the area where she has been married to and who takes care of her as his own daughter. It amounts to 30 rupees.
5. *Niar*: It is a share for the bride's paternal aunt. However, in her absence, it is given to a female relative of the bride who acts as an aunt. It amounts to 20 rupees.
6. *Naupuakpuan*: It is a share for the bride's elder sister of the bride. In her absence, it is given to a female relative of the bride who acts as her sister. It amounts to 20 rupees.
7. *Nu man*: It is paid to the birth mother of the bride. It is given only is such circumstances where the bride's father and mother are either not married to each other or have divorced. It normally amounts to 20 rupees.

[35] ibid Schedule II.

In addition to the *man pui* and *man ang*, there are other optional marriage prices which are given to persons outside the family circle. These are non-refundable in the event of separation or divorce of the married couple. Such marriage prices are as follows:[36]

1. *Thian Man* or *Mo Thian Man*: It is paid to the bridesmaid and ranges between 2 to 3 rupees.
2. *Lawichal*: It is paid to the one who leads the bride's procession to the bridegroom's house and amounts to 2 rupees.
3. *Khualkai*: It is paid to the family who the bride lived with at their house in case when the groom is from another place.
4. *Chhuatkil Kaiman*: It is paid to the one in whose house the marriage takes place in case the marriage is not solemnized at the bride's house.
5. *Chharsutphawi*: It is paid to the bride's elder sister as compensation if the bride i.e., the younger sister gets married before her.

A perusal of the definitions of 'marriage' and 'couple' evidence that the Mizo law perceives of it as involving a man and a woman. The definition of marriage[37] clearly shows that it is deemed to mean "union of a man and a woman who are both major as husband and wife". Further, the procedure of marriage laid down under the Act also

[36] Mercei Gangte, 'Gender and Customary Law: A Case Study of Mizo Tribe in North East India' (2016) 46(1) Indian Anthropologist 22.
[37] (n 24) s 3(r).

solidifies the same. In the same vein, 'couple' is defined as "a husband and wife who are married under the Act or any other law for the time being in force".[38]

However, unlike the other marriage laws discussed above, Section 10 of the said Act expressly declares the "living together as husband and wife of two persons of the same sex as void *ab initio*". In other words, the Mizo law is the only existing law in India which expressly prohibits same sex marriage.

MIZO CUSTOMARY LAWS ON MARRIAGE VIS-À-VIS FUNDAMENTAL RIGHTS

Assuming that same sex marriage is recognized as a constitutionally guaranteed fundamental right by the Supreme Court or the Parliament of India enacts a legislation to that effect, it is important to understand that owing to certain constitutional nuances, the Mizos may not instantly get to enjoy the same.

Ahead of delving into the complexities, the expressions 'law' and 'law in force' as used in Article 13(3) of the Constitution need to be deciphered.[39] Article 13(3)(a) embraces a wide definition consequently encompassing custom or usage having the force of law thereby not

[38] ibid s. 3(c).
[39] "In this article, unless the context otherwise requires, —
(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

restricting it to legislature made law alone. At this juncture, it is pertinent to note that Constitutional amendments lay beyond its purview.[40] Article 13 clearly stipulates that "any 'law' which is contrary to fundamental rights is void thereby permitting the its testing vis-à-vis the standard of fundamental rights.[41]

Before attempting to respond to whether such customary laws which are contrary to fundamental rights should be declared void, a far more important questions takes precedence i.e. whether personal laws are 'law' under Article 13? Courts in India have dealt with this question time and again in terms of whether 'law' under Article 13 includes personal laws governing Hindus or other communities. Courts have decided cases where personal laws have been contested for being contrary to fundamental rights. However, these judgements can be divided into two distinct categories viz. those wherein personal laws were adjudged as being beyond the scope of Part III of the Constitution of India, and those wherein they were as being within its purview.

A thorough scrutiny of the judgements where personal laws were adjudged as being beyond the scope of Part III of the Constitution of India clearly indicate that the courts have taken an evasive approach while deciding such cases by not wanting to interfere so as not to hurt the feelings of the communities governed by such laws. To put it succinctly, the courts have adopted two approaches.[42] Apropos the first one, the courts have taken the stance that the contested personal laws were not in contravention of fundamental rights. Apropos the second

[40] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, AIR 1973 SC 1461.
[41] ibid.
[42] M.P. Jain, *Indian Constitutional Law* (7th edn, Lexis Nexis 2014) 676.

one, the courts have ruled that personal laws are outside the ambit of Article 13 consequently rendering them incapable of being contested on the ground of being violative of fundamental rights.[43]

In *State of Bombay v Narasu Appa Mali*,[44] the Bombay Prevention of Hindu Bigamous Marriages Act 1946 was challenged as being contrary to fundamental rights under Articles 14, 15 and 25 of the Constitution. It was held that "personal law was not included in the 'law' referred to in Article 13(3)(a) and was not the 'law in force' saved by Article 373(2) and defined in Article 13(3)(b)." It was further held that "the expression 'laws in force' in Articles 372(1) and (2) does not include personal law as they cannot be interpreted as authorizing the President to interfere with the personal law of any community."

Chagla C.J. opined that since the legislature is responsible for the welfare of the State, it is their prerogative to determine the law required to achieve social reform. Gajendragadkar J. supported the stance taken by Chagla C.J. and observed that since the personal law topics are contained in the Concurrent List, therefore, it falls under the domain of the legislature. He further states that personal law was deliberately kept out of Article 13 as the Constitution framers did not want them to fall under the ambit of Part III thereby exposing them to challenge for being contrary to fundamental rights.

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[43] ibid.
[44] *State of Bombay v Narasu Appa Mali* (1951) SCC OnLine Bom 72, AIR 1952 Bom 84.

The Bombay High Court's approach has been emulated by High Courts across the country as well as the Supreme Court in similar matters.

In *Shri Krishna Singh v Mathura Ahir*,[45] while deciding on the question of appointment of mahant in a math, the Supreme Court held that the Part III of the Constitution does not interfere with personal laws. In *Maharishi Avadhesh v Union of India,*[46] the Supreme Court while faced with a challenge against the Muslim Women (Protection of Right on Divorce) Act 1986 for being in contravention of several fundamental rights and directive principles rejected it while stating that these matters fall within the domain of the legislature."

In *Madhu Kishwar v State of Bihar*,[47] the Court while refusing to declare tribal customary inheritance laws as being in contravention of fundamental rights held that each case was to be decided upon its merit. K. Ramaswamy lamented the Court's inability to allow its platform to be used to bring changes in customary laws. He pointed out that doing so would open a Pandora's box as similar claims would incessantly continue to bring a plethora of laws in consonance with the Hindu Succession Act and the Indian Succession Act as models. He stressed that amendments to legislative provisions through judicial decisions should ideally be avoided.

[45] (1981) 3 SCC 689.
[46] 1994 (supp) 1 SCC 18.
[47] (1992) 1 SCC 102, AIR 1996 SC 1864.

In *Ahmedabad Women Action Group* case,[48] while dealing with a Public Interest Litigation to declare polygamy and unilateral Talaq by Muslim husbands to their wives sans their consent and resorting to judicial process be declared as void on the grounds of being violative of Articles 13, 14 and 15 of the Constitution of India, the Supreme Court observed that it does not concern itself with issues involving state policy. They held that the remedy was not to be found by knocking on its doors but elsewhere.

In *P.E. Mathew v Union of India*,[49] a challenge was posed to Section 17 of Indian Divorce Act, 1869 was for being violative of fundamental rights. Although the Kerala High Court found that Article 17 adversely affected the parties and merited an amendment, they fell short of adjudging it *ultra vires* saying that they would not decide contrary to the Supreme Court's decision in the *Ahmedabad Women Action Group* case.[50] They observed that since the subject matter of the case came within the ambit of the Concurrent List, it was unto the State to make amendments if felt necessary and that the remedy, therefore, lay with the Legislature and not with the Courts.

An opposing trend is evident in several other decisions where personal laws were found to be within the ambit of Part III of the Constitution. The same have been discussed hereafter.

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[48] *Ahmedabad Women Action Group and ors v Union of India* (1997) 3 SCC 573, AIR 1997 SC 3614.
[49] AIR 1999 Ker 345.
[50] (n 43).

In *Srinivasa Iyer v Saraswathi Ammal*,[51] a challenge was posed to the Madras Hindu (Bigamy Prevention and Divorce) Act 1949 for being in contravention of fundamental rights. The Court held that personal law is 'law' and is 'law in force' or 'existing law', as defined in the Constitution. They premised this upon the fact that customs, usages and statutory laws are intermingled with personal law in such manner that it is literally impossible to tell them apart.

In *Gazula Dasaratha Rama Rao v State of Andhra Pradesh*,[52] the Supreme Court dealt with a petition to declare the Madras Hereditary Village-Offices Act 1895 void to the extent of its inconsistency with fundamental rights. The Constitution Bench observed that 'law' under Article 13 includes custom or usage therefore customs must succumb to fundamental rights. In *Sant Ram v Labh Singh*,[53] while holding a customary right of pre-emption violative of fundamental rights, the Supreme Court observed that customs and usages must be held to be within the purview of 'all laws in force'.

In *Madhu Kishwar* case,[54] provisions of the Chhota Nagpur Tenancy Act, 1908 were challenged for being violative of Articles 14, 15 and 21 of the Constitution as they denied tribal women inheritance rights on the basis of their sex. The Court did not declare tribal customary laws as violative of fundamental rights stating that doing so would lead to chaos but they observed that the essentiality of customs

[51] (1951) SCC OnLine Mad 272, AIR 1953 Mad 78.
[52] (1961) 2 SCR 931, AIR 1961 SC 564.
[53] (1964) 7 SCR 756, AIR 1965 SC 314.
[54] (n 42).

inconsistent with or repugnant to constitutional scheme yielding to fundamental rights.

In the *Sabarimala* case,[55] the Supreme Court held that the exclusionary practice of not allowing women of menstruating age i.e. 10 to 50 years to enter the Sabarimala temple based on custom and usage must yield to fundamental rights. The Court specifically overruled the *Narasu Appa Mali* decision saying that it provided immunity to customs and usages by keeping them out of the purview of Part III.

This discussion evidences ambiguity in the stance adopted by the judiciary. In order to steer clear of repercussions in the light of the delicate issues involved and feelings of concerned communities, the Courts have pushed the ball in the court of the Legislature.[56] To put it succinctly, the Courts have failed to take a uniform stand in finding an answer to whether fundamental rights prevail in the event of conflict with personal and customary laws or vice versa. The *Shayara Bano* case[57] is possibly the best example of this. On the question of whether personal law is law under Article 13, while Nariman, J. and Lalit J. opined that it may be necessary to have a relook at the Narasu Appa judgement; Khehar, C.J. and Nazeer, J. held that it should be taken as the declared legal position as it has been emulated in several Supreme Court judgements including two Constitution Benches.[58]

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[55] *Indian Young Lawyers Association and ors (Sabarimala Temple, In Re) v State of Kerala and ors* (2019) 11 SCC 1, 2018 SCC OnLine SC 1690.
[56] (n 37) 919.
[57] *Shayara Bano v Union of India* (2017) 9 SCC 1, 2017 SCC OnLine SC 963.
[58] *Shri Krishna Singh v Mathura Ahir* (1981) 3 SCC 689; *Maharishi Avadhesh v Union of India* 1994 (supp) 1 SCC 18; *Mohd. Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556; *Danial Latifi v Union of India* (2001) 7 SCC 740; *John Vallamattom v Union of India* (2003) 6 SCC 611.

Apropos Mizo customary laws of marriage being in consonance with the fundamental right to equality as well as life and liberty as guaranteed under the Constitution of India, the discussion in the preceding paragraphs evidences the lack of clarity or rather the existence of ambiguity in terms of the fate of a customary personal law which is in contravention of the constitutionally guaranteed fundamental rights. Although there are several decisions which have rightly declared the challenged provisions as being contrary to the fundamental rights, it has been abundantly made clear by the courts that they have espoused a policy of non-interreference to not ruffle the feathers of different communities governed by these laws. This is, however, only one side of the coin of the relationship between Mizo customary laws and the Constitution. The other side of the coin merits discussion as well due to its far-reaching ramifications on changes sought to be made in the Mizo customary laws.

Pursuant to Article 244(2) of the Constitution of India, several States have been accorded special status under the Sixth Schedule to the Constitution. One such state is Mizoram. This special status is not just limited to Mizoram's inclusion in the Sixth Schedule but extends to those special provisions as well which have been accorded to Mizoram under Article 371G of the Constitution.

Article 371G(a)(ii) of the Constitution states that "any law enacted by the Parliament of India pertaining Mizo customary law and procedure shall be applicable to Mizoram only subject to a resolution being adopted by the Legislative Assembly of Mizoram to that effect."

It is worth noting that "Marriage and Divorce" are listed in the Seventh Schedule to the Constitution of India under Entry 5 of the

Concurrent List. In other words, as per Article 246(2) of the Constitution, both the Parliament and State Legislatures are empowered to legislate on these subjects.

Hence, assuming that the Indian Parliament enacts a legislation legalizing same sex marriages, until the Mizoram State Legislature adopts a resolution accepting the same, marriage equality would be out of the reach of the Mizo people. While not denying the possibility, it would be an uphill task for the Mizoram State Legislature to remove a provision consciously put in the law by them in the first place. Considering that the Mizo customary law is applicable to marriages where only the male is a Mizo, the operation of this law would deny marriage equality to people belonging to every other community who happens to be the partner of the Mizo male. However, the only silver lining appears to be that the law is silent about the fate of marriages where only the female is a Mizo, thereby arguably making it permissible for a Mizo female to enter into same sex marriages with females from other communities.

While the legislative path is bedecked with several obstacles, the judicial path is also not bereft of the same. In case, one decides to challenge the validity of Section 10 of the Mizo Marriage, Divorce and Inheritance of Property Act, 2014 on the round that it is in contravention of fundamental rights guaranteed under the Constitution, there is a possibility that the courts would adopt an evasive attitude as was done in several cases already discussed above thereby pushing the ball into the court of the legislature saying that the remedy lies with the legislature and not with the courts.

CONCLUSION

A perusal of the Indian judgments de-criminalizing homosexuality evidence that criminalization of sexual relations between consenting adults in private was found to be violative of fundamental rights to life and equality, *inter alia*, as guaranteed by the Constitution of India. More importantly, right to sexual identity has been decided as part of right to life and right to equality without any discrimination on the basis of sex. A natural corollary from these constitutional guarantees will hopefully culminate into the eventual legalization of same sex marriages or civil unions. With the recent de-criminalization of homosexuality in India, it is time to venture towards the other facets that a relationship generally veers towards, viz. marriage, divorce, inheritance, adoption etc. in the case of same sex couples governed by Mizo customary laws as well.

INTER-COUNTRY ADOPTION OF CHILDREN VIS-À-VIS HUMAN RIGHTS LAW – A CRITICAL ANALYSIS

Dr. Kasturi Gakul[1]

The adoption process has been prevalent in different forms and throughout the ages, the motive behind adoption has undergone radical change. In ancient societies, adoption was not confined to only children but also adults. With the initiation of international human rights law, efforts have been made by the world community towards ensuring that children deprived of family environments are growing up with parental care and assistance through the process of adoption. However, there are cases where children of one nationality are adopted by foreigners and these children are no longer within the protective umbrella of their birth country. In such a scenario adopted children are susceptible to numerous vulnerabilities. Inadequacy in domestic laws to prevent child exploitation in matters of inter-country adoptions together with instances of trafficking and selling of children in the name of inter-country adoption had raised serious concern both at the international and regional level. How law addresses the need for the protection of such children through the inter-country adoption process is pertinent

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and hence, the author in this paper has endeavoured to critically analyse the provisions of international human rights law vis-à-vis inter-country adoption of children.

***Keywords**: Adoption, Best Interest, Children, Human Rights, Inter-country.*

INTRODUCTION

Adoption practices have been in vogue since ancient times. Instances of adoption practices in ancient societies are replete in various literary and legal sources. The adoption process was prevalent in different forms and throughout the ages, the motive behind adoption has undergone radical change. In ancient societies, adoption was not confined to only children but also adults. Adoption practices in Western tradition during the ancient and medieval periods were religious-centric and meant for the continuation of the family line. The welfare of adoptive parents was the object behind adoption.

However, with the formulation of various international and regional instruments on child adoption, a revolutionary change has been brought about in the system of child adoption around the world which is based on the principle of "best interest of the child". The welfare of the adopted child is the paramount consideration in the adoption process. The present paper endeavours to comprehensively divulge the human rights legal framework governing inter-country adoption of children.

HUMAN RIGHTS LAW AND INTER-COUNTRY ADOPTION OF CHILDREN

In the international scenario the promotion and respect for human rights and fundamental freedoms have been strongly advocated in the United Nations Charter 1945.[2] Elaboration of human rights of all persons including children has been enshrined in the Universal Declaration of Human Rights (UDHR) 1948. Article 1 of the UDHR proclaims that "all human beings are born free and equal in dignity and rights".[3] This provision applies to all children. However, the dignity and rights of many children are inhumanely violated and this is especially true for children who are deprived of parental care and assistance. Many children "deprived of the family environment"[4] are rendered destitute, abandoned, and orphaned. To ensure that these children are accorded an opportunity to grow up with parental care and exercise their rights, it is important that they are given protection.

Children's need for protection against vulnerabilities has been acknowledged by the UDHR which under article 26 has emphasized that "childhood is entitled to special care and assistance and social protection should be made available to all

[2] Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 14.
[3] Ian Brownlie and Guy S Goodwin Gill (eds), *Basic Documents on Human Rights* (Oxford University Press 2006).
[4] Convention on the Rights of the Child art 20 <https://www.ohchr.org/en/instrumentsmechanisms /instruments /convention-rights-child> assessed on 20 October 2023.

children irrespective of being born in or out of wedlock".[5] A way through which special care and assistance can be provided to children deprived of parental care is through adoption. A few international instruments have stipulated principles and laws which at present govern the inter-country adoption of children. Inter-country adoption is also regarded as international or transnational adoption in which children that are residents and citizens of one country are adopted by parents who are resident citizens of another country.[6] Adoption across borders is viewed by the advocates of international adoption as a practice where children without parents and issueless parents come together and form a family tie which goes beyond nationality, race, and culture.[7]

The issue of inter-country child adoptions has been addressed by the world community through the formulation and establishment of internationally recognized legal standards. The aim and object behind each of the international instruments relating to child adoption varies. Adoption of a child within his or her country is governed by the domestic law of that country. But when a child of one nationality is adopted by foreigners and taken

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[5] Michael Goodhart, *Human Rights Politics and Practice* (2nd edn, Oxford University Press 2013) 400.

[6] Johanna Oreskovic; Trish Maskew, Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption (2008) 14 Buffalo Human Rights Law Review 71 <https://heinonline.org> accessed 20 October 2023.

[7] Laura McKinney, International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children (2007) 6 Whittier Journal of Child and Family Advocacy 361 <https://heinonline.org> accessed 20 October 2023.

to the country of the adoptive parents, the child adopted no longer is under the protective umbrella of his or her birth country and such a child is likely to be exposed to socio-economic, cultural and psychological vulnerabilities. Inadequacy in domestic laws to prevent child exploitation in matters of inter-country adoptions together with instances of trafficking and selling of children in the name of inter-country adoption had raised serious concern both at the international and regional level. To render protection to children during inter-country adoptions, countries around the world have come together to determine international standards relating to inter-country adoptions through various multilateral and bilateral initiatives.

An examination of the international human rights legal instruments is pertinent to understand the implications of the relevant conventions on inter-country adoption of children.

Convention on the Reduction of Statelessness 1961

The United Nations Conference on the Elimination or Reduction of Future Statelessness adopted the Convention on the Reduction of Statelessness (CRS) which entered into force on 13th December 1975.[8] CRS 1961 is a comprehensive international legal instrument which provides detailed guidance on the implementation of the right to a nationality which can be readily

[8] UN Convention on the Reduction of Statelessness – UNTC <https://treaties.un.org/doc/Publication /MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf > assessed 20 October 2023.

transposed into domestic legislation of the States.[9] The CRS mandates that States must "grant its nationality to a person born in its territory who would otherwise be stateless".[10] States may exercise discretion in determination of its nationals but being party to the CRS they are obligated for the acquisition of nationality by a child born within its territory who would have been otherwise stateless.[11] This safeguard has been considered as the cornerstone of efforts to reduce statelessness over time.[12] For addressing statelessness which may occur at birth or later in life States are required by the CRS to establish safeguards in their national legislation.[13] Different measures are prescribed under CRS to reduce statelessness. Inter-country adoptions may cause difficulty in the enjoyment of the children's right to nationality. Adoption of a child across an international border by adoptive parents of different nationalities usually entails that child, and the nationality of his or her adopters. However, where the nationality laws of a child's country of origin provide for automatic

[9] Institute on Statelessness and Inclusion, *The World's Stateless Children* (Wolf Legal Publishers 2017) 345.
[10] art 1.
[11] Sebastian Kohn, Why the 1961 Convention on Statelessness Matters (European Network on Statelessness, 30 August 2011) <https://www.statelessness.eu/blog/why-1961-convention-statelessness-matters> assessed 20 October 2023.
[12] UNHCR 'UNHCR Global Action Plan to End Statelessness 2014-24' (Division of International Protection 2014) 10 <http://www.unhcr.org/statelesscampaign2014/Global-Action-Plan-eng.pdf> assessed 20 October 2023.
[13] UNHCR 'UNHCR Action to Address Statelessness: A Strategy Note' (Division of International Protection 2010). <https://www.unhcr.org/.../statelessness/.../unhcr-action-address-statelessness-strategy-n> assessed 20 October 2023.

deprivation of nationality on adoption of the child by foreign nationals and the nationality laws of the adopters do not permit for immediate acquisition of nationality by the adopted child then statelessness ensues placing the adopted child in a vulnerable situation.[14] CRS has addressed this serious problem and aims at protecting persons including children from being rendered statelessness on account of change in personal status due to marriage, termination of marriage or adoption etc. CRS clearly stipulates that "if the law of a contracting State entails the loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality".[15] This provision is an imperative step in protecting the children from losing their nationality because of inter-country adoption.

No children of one country adopted by persons of another nationality will lose the nationality of their birth country provided they have acquired the nationality of another country or country of their adoptive parents. If any State that is a party to the CRS has a law that entails the loss of nationality of a child through adoption, then such loss will be conditional upon acquiring another nationality by that child. Thus, CRS prevents automatic

[14] European Network on Statelessness, 'No Child Should be Stateless' (2015) <https://www.statelessness .eu/resources/no-child-should-be-stateless> assessed 20 October 2023.
[15] art 5 (1).

loss of nationality. CRS aims at safeguarding the welfare and interest of children adopted through inter-country processes so that they do not become stateless. As of 20th October 2023, CRS has 79 Parties and 5 signatories to it.[16] Significantly none of the 79 Contracting parties to the CRS have made any declaration or reservation regarding the application of a provision of inter-country adoption laid down in Article 5(1) which indicates their commitment to work towards the reduction of statelessness which might arise as a result of change in status of persons including children owing to adoption.

Convention on the Rights of the Child 1989

The human rights of children were given official recognition through the adoption of the Declaration of the Rights of the Child (DRC) in 1959. DRC emphasizes the right of a child to name and nationality from birth without any exceptions irrespective of the status of the child. DRC was not binding on any country or government.[17]

Realizing the need to provide a binding international instrument for the protection of children, the General Assembly by Resolution 44/25 without a vote on 20th November 1989 adopted the Convention on the Rights of the Child (UNCRC)

[16] UN Convention on the Reduction of Statelessness (n 8).
[17] Asha Bajpai, *Adoption Law and Justice to the Child* (Centre for Child and the Law NLSIU 1996) 136.

1989.[18] UNCRC is an elaboration of the human rights standards relating to children which focuses on the survival, protection, development and participation of children. UNCRC stipulates that the best interest of the child should be the primary consideration in regard to all actions concerning children.[19]

UNCRC recognises the right of the child to be cared for by his or her parents.[20] UNCRC has contemplated situations where a child may be deprived of family environment and parental care. In order to provide care and protection to such children certain alternate measures which include inter alia foster placement, kafalah, adoption, or the placing of children, if needed in suitable child care institutions have been prescribed under UNCRC.[21] Continuity of upbringing and the ethnic, religious, cultural and linguistic background of the child must be given due consideration in deciding solutions for children.[22] State Parties through their national laws are required to ensure alternative care for a child[23] who has been deprived of his or her family environment either temporarily or permanently or where it is not in the child's best interest to be permitted to stay in that environment.[24] Special

[18] Ian Brownlie & Gill (eds), *Basic Documents on Human Rights* (Oxford University Press 2006) 241.
[19] art 3 (1).
[20] art 7 (1).
[21] art 20 (3).
[22] ibid.
[23] art 20 (2).
[24] art 20 (1)

protection and assistance to which a child is entitled to, has to be provided by the State.[25]

The child's best interest must be the paramount consideration for the States in which the system of adoption is recognized or permitted.[26] It has to be ensured by the State Parties that only competent authorities authorize the adoption of the child. Prior to such authorization competent authorities on the basis of applicable law, procedure and pertinent information are to determine that the adoption of the child is permissible having regard to the status of child in relation to parents, relatives and legal guardians.[27] Where required competent authorities are to make sure that the informed consent to adoption, based on necessary counselling has been given by concerned persons.[28] Inter-country adoption as an alternative means for care of the child may be considered by the State Parties where the child neither finds placement with a foster or an adoptive family nor can be suitably cared for in his or her country of origin.[29] It has to be ensured by the State Parties that the safeguards and standards which are in existence with respect to adoption at the national level are accessible for enjoyment of the same by a child in case of inter-country adoption.[30] In inter-country adoption all appropriate measures are to be taken by the State Parties for

[25] ibid.
[26] art 21.
[27] art 21(a).
[28] ibid.
[29] art 21(b).
[30] art 21(c).

ensuring improper financial gain does not occur for those who are involved in such placement.[31] UNCRC does not claim to be a comprehensive international law on inter-country adoption as it requires the promotion of the objectives of article 21 by State Parties through conclusion of agreements –bilateral or multilateral and emphasizes that State Parties within such framework are required to endeavour for ensuring that it is the competent authorities or organs which are to carry out the child's placement in another country.[32]

UNCRC requires the State Parties to review their legislations relating to children so as to ensure that laws are in consonance with the provisions of the Convention.[33]

The Convention has proved to be a major source of inspiration for several countries including India in regard to formulating and reviewing of legislation on child adoption. The enactment of the JJ (C& PC) Act 2015 in India which has replaced the JJ Act 2000 draws support from the Constitution of India and the UNCRC in addition to other sources.

[31] art 21(d).
[32] art 21(e).
[33] art 4.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000[34]

United Nations General Assembly at its fifty-fourth session adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC) 2000 on 20th May 2000 by resolution 54/263.[35] OP-CRC-SC entered into force on 18th January 2002.[36] Exploitation of children in the name of adoption can take place domestically and trans-nationally. If child adoption laws do not provide penal provisions for violators of such law then there is the possibility that children given in adoption may be sold or forced into prostitution or child pornography. OP-CRC-SC has under article 3(1) (a)(ii) stressed that State Parties should ensure that their criminal or penal law deals with coercive adoptions irrespective of whether such criminal act has been committed by an individual or organised group either domestically or trans-nationally.[37] Anyone acting as an intermediary indulging in improperly inducing consent for adoption of a child should be

[34] OHCHR Optional Protocol to the Convention on the Rights of the Child <https://www.ohchr.org/en/professionalinterest/pages/opsccrc.aspx> assessed 20 October 2023.

[35] Optional Protocol - UNTC <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11..> assessed 20 October 2023.

[36] Optional Protocol - UNTC <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11..> assessed 20 October 2023.

[37] United Nations Department of Economic and Social Affairs (Population Division), 'Child Adoption: Trend and Policies' (2009) 56.

punished under the criminal law.[38] Though this provision is applicable only with regard to the acts of intermediaries yet it has been recommended by the Committee on the Rights of Child (CRC) that the activities of all those which are involved in the sale of children for the purpose of adoption be criminalized by the State Parties.[39] CRC's interpretation is justified as the OP-CRC-SC has emphasized that appropriate administrative and legal measures should be taken up by the State Parties so as to ensure compliance of the international legal instruments by all persons involved in the adoption process[40] . State Parties in accordance with their national laws are to criminalize also the attempt to commit, complicity or participation in acts specified under article 3(1) of OP-CRC-SC[41] and these offences are to be punished by the State Parties with penalties taking into account their grave nature[42]. Measures are to be taken up by the State Parties as per the law of their country for establishing the civil, criminal or administrative liability of legal persons for such offences.[43] State parties have been conferred with wide amplitude of power to take measures subject to their national laws in dealing with offences such sale of children, sexual exploitation, forced child labour and adoption of children in violation of international legal

[38] OP CRC-SC art 3 (a)(ii).
[39] The United Nations Children's Fund, *Handbook on The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (*UNICEF Innocenti Research Centre2009*)* 11.
[40] art 3(5).
[41] art 3(2).
[42] art 3(3).
[43] art 3(4).

instruments. OP-CRC-SC requires State Parties to incorporate within their criminal laws the acts, activities and offences stipulated under article 3(1) as a 'minimum' without specifying and defining as to what is 'minimum'. For implementing the provisions of OP-CRC-SC in preventing the offences against children, laws, administrative measures and social policies are to be adopted, implemented, and disseminated by the State Parties.[44] OP-CRC-SC emphasizes upon the awareness, education, and training of public and children about the measure to prevent the offences[45] and also is obligated to encourage the participation of community and children in the education and training programmes at domestic and international level[46]. Strengthening of international co-operation by State Parties through the conclusion of multilateral and bilateral arrangements is encouraged.[47]

ANALYSIS

Statelessness is a shifting global phenomenon[48] adversely affecting large portion of the world population who are susceptible to multi-dimensional vulnerabilities. International co-operation through application and adherence to common rules for

[44] art 9(1).
[45] art 9(2).
[46] art 9(2).
[47] art 10(1).
[48]Jay Milbrandt 'Adopting the Stateless' (2014) 39(2) Brooklyn Journal of International Law <http://brooklynworks.brooklaw.edu/bjil/vol39/iss2/4> assessed 20 October 2023.

preventing and reducing statelessness is vital to ensure that every human being enjoys the right to nationality. CRS 1961 is a universal instrument which has responded to the threat of statelessness through incorporation of clear, elaborate and concrete safeguards for reduction of statelessness. By providing common rules CRS has equipped States in resolving the disputes relating to nationality and has enabled them in mobilising international support for effectively dealing with the prevention and reduction of statelessness.[49] However it is to be noted that out of the total 193 Members of the United Nations[50] only 79 countries have ratified/acceded the CRS 1961. Non-accession to CRS by large of States has hindered the global consolidation and stabilisation required for prevention and reduction of statelessness. Lack of uniformity and coherence in the nationality laws of different States continue to render some individuals stateless.[51] In the absence of any prescribed formal reporting obligations for State Parties under CRS 1961[52] it becomes difficult for ensuring that safeguards for reducing statelessness are being properly implemented by the State Parties. Detailed safeguards stipulated under CRS are required to be implemented by the States through their respective nationality laws. But since no

[49] UNHCR 'Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness' (2010) 2 <https://www.refworld.org/docid/4cad866e2.html>accessed 20 October 2023.
[50] Member States United Nations <https://www.un.org/en/member-states/> assessed 20 October 2023.
[51] UNHCR Preventing and Reducing Statelessness (n 8).
[52] ibid 10.

specific parameters of nationality laws have been demarcated by the CRS, States are provided with a wide leeway to determine and elaborate the content of their nationality laws.[53] For instance under the Romanian nationality law where the adoption of an under-aged Romanian child residing abroad is cancelled or annulled, such child will not be considered to have been a Romanian citizen even though such a step might result in statelessness. Such a legal provision clearly depicts a wide departure in Romania's nationality law from its international obligation under the CRS 1961.[54]

UNCRC defines a child as a person who has not completed the age of eighteen years until as per the national law which is applicable to that child adulthood is attained earlier. UNCRC has lessened its impact by recognising the power of each of the States to determine who a child is.[55] There is a fear that States may deny their rights to children by declaring them as adults in accordance with their national laws.[56] The confusion and variance in the

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[53] ibid 3.

[54] European Network on Statelessness, 'No Child Should be Stateless' (2015) <https://www.statelessness .eu/resources/no-child-should-be-stateless> assessed 20 October 2023.

[55] Sherilyn C Baxter, 'The Suggestions on the Rights of the Child: Why the United Nations' Convention on the Rights of the Child Is a Twenty-Five Year Failure' (2015) 2 Journal of Global Justice and Public Policy 89 <https://heinonline.org> assessed 20 October 2023.

[56] Osifunke Ekundayo, 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC' (2015) 5 (7) (1) International Journal of Humanities and Social Science 149 <www.ijhssnet.com/journals/Vol_5_No_7_1_July_2015/_17.pdf> assessed 20 October 2023.

definition of 'child' in different States has limited the applicability of UNCRC. It has been advocated that adopted persons have the human right to identifying information about their biological parents. However, article 21 has failed to acknowledge and address the right relating to disclosure of identifying information.[57]

UNCRC is legal document which purports to set binding standards for the ratifying or acceding States and it is laudable that international commitment in rendering protection to the rights of children within the mandate of UNCRC has received overwhelming support through ratification or accession by 196 countries (as on 20 October 2023)[58]. Unfortunately, UNCRC does not provide a strong mechanism for enforcement of its standards by the State Parties. UNCRC is monitored by the Committee on the Rights of the Child (CRC) comprising of eighteen experts. CRC has been established with the object of examining the extent of progress achieved by the State Parties in realizing their obligations under UNCRC. State Parties to UNCRC are required to submit reports on the measures that they have adopted for giving effect to the rights of children and the progress that they have achieved in enjoyment of the rights stipulated under UNCRC. Initial report

[57] D Marianne Blair, 'The Influence of International Conventions on Municipal Adoption Law: The Disclosure Debate' (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) < http://www.jstor.org/stable/25659772 > assessed 20 October 2023.
[58]United Nations Convention on the Rights of the Child - UNTC<https://treaties.un.org/Pages/View Details .aspx?src=IND&mtdsg_no=IV-11> assessed 20 October 2023.

must be submitted by the State Party within 2 years and subsequently periodic report must be submitted every five years. Sufficient information must be given by the State Parties in their reports to enable the CRC to comprehensively understand the efforts made by concerned States in implementing the UNCRC. Additional information relevant UNCRC's implementation by State Parties may be sought by the CRC. CRC reviews the reports submitted by the State Parties. On the basis of these reports and information provided by NGOs, the CRC may make concluding observations and general recommendations to the reporting States.[59] Most of the State Parties do not qualify CRC recommendations as mandatory or necessary.[60] Reporting requirement puts very minimal pressure upon State Parties to fulfil obligations mandated under UNCRC.[61] Utilization of the reporting process in a strategic manner is undermined due to the delay in the submission of reports by the government of the State Parties and the protracted time interval between the submission of the report and session of the CRC.[62] If there is delay in submission of reports by more than one year then the concluding observations of CRC could be perceived as being irrelevant.[63] On

[59] David A Balton, 'The Convention on the Rights of the Child: Prospects for International Enforcement' (1990) 12 Human Rights Quarterly 120 <https://heinonline.org> assessed 20 October 2023.
[60] Baxter (n 55) 90.
[61] Balton (n 59) 128.
[62] Lisa Woll, 'Reporting to the UN Committee on the Rights of the Child: A Catalyst for Domestic Debate and Policy Change' (2000) 8 The International Journal of Children's Rights 71 <https://heinonline.org> assessed 20 October 2023.
[63] ibid 81.

31st January 2019, CRC Chairperson Renate Winter had stated that 27 reports had been reviewed by CRC and that the backlog stood at 35 reports, with 17 new reports being received since January 2018.[64] As CRC is only advisory and non-disciplinary it is ineffective in ensuring the enforcement of its standards by the respective State Parties. UNCRC has not laid down any established rules for treaty non-compliance.[65] UNCRC enforcement mechanism is weak because of its reliance on diplomacy rather than legal sanctions.[66]

UNCRC though laid down principles of good adoption practices, the provision in article 21 which stipulates that "States Parties that recognize and/or permit the system of adoption" provides an escape clause to the Islamic countries that do not recognise the institution of adoption. This has resulted in lodging of reservations and therefore, unfortunately several ratifying States such as Egypt, Jordan, Kuwait and the United Arab Emirates which do not recognize adoption as a means to care and protect children have ratified or acceded to the UNCRC with reservations to the provision of adoption.[67] Reservations to article

[64] OHCHR Committee on the Rights of the Child holds on informal meeting with States <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24129> assessed 20 October 2023.

[65] Luisa Blanchfield, The United Nations Convention on the Rights of the Child (*Congressional Research Service* 1 April 2013) 9 <https://fas.org/sgp/crs/misc/R40484.pdf> assessed 20 October 2023.

[66] Baxter (n 55) 100.

[67] Trevor Buck, *International Child Law* (Cavendish Publishing Limited 2005) 155.

21 of UNCRC has been for a number of reasons such as by Canada due to inconsistency with customary forms of care among the aboriginals; by Argentine on the ground that prior to application of article 21 strict mechanisms are to exist for legal protection of children with regard to inter-country adoption; by Maldives on the point that under Islamic Shariah, system of adoption is not one of means for the protection and care of children; in Bangladesh article 21 is subject to its existing laws and practices; by Brunei Darussalam as article 21 is contrary to its Constitution and principles of Islam. UNCRC's reservation provision limits its applicability upon the reserving states. The effect of reservation makes it difficult for the other State Parties to the UNCRC to grasp and determine the extent of commitment on the part of the reserving State Parties to be bound by the obligation of realizing the provisions of UNCRC.[68] UNCRC does not permit reservations which are incompatible with the objects and purpose of UNCRC.[69] State Parties can individually judge such matters. Neither any particular body has been designated nor has CRC been authorized for determining which reservations can be considered to be incompatible within the ambit of article 51(2). No dispute resolution clause has been prescribed under UNCRC.[70]

[68] Lawrence J Leblanc, 'Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice' (1996) 4 The International Journal of Children's Rights 357 < https://heinonline.org> assessed 20 October 2023.
[69] art 51(2).
[70] Leblanc (n 68) 373.

UNCRC has specified minimum standards to be achieved by the State Parties with regard to the rights of children and it is neither intended to set highest possible standards nor cover exhaustively the entire universe of child rights.[71] This is evident from the fact that State Parties to UNCRC for the realization of the rights of the child are invited to apply provisions of their national laws or applicable international instruments which are more conducive[72]. UNCRC does not specify or define what is 'more conducive' thereby giving rise to vague interpretation by the State Parties. State Parties which are fundamental actors in implementing the provisions of UNCRC by virtue of art 41 are provided with a wide leeway to disregard their obligations under UNCRC in the guise of their subjective parameter of what amounts to 'more conducive' as per their domestic laws.

Though UNCRC under article 35 requires State parties to take measures for preventing the abduction, sale or trafficking in children for any purpose or form yet such provision lacks significant force due to reliance upon national laws for providing specific legal measures.[73] Such purpose may also be for adoption.

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[71] Marta Santos Pais, 'The Convention on the Rights of the Child and the Work of the Committee' (1992) 26 (1) Israel Law Review 16 <https://heinonline.org> assessed 20 October 2023.

[72] art 41.

[73] Priya Sharma, 'Towards a Better Approach for Inter-Country Adoption' in Lakshmi Jambholkar (ed), *Select Essays on Private International Law* (Universal Law Publishing Co Pvt Ltd 2011) 166.

Moreover, UNCRC has not specified the exact nature of what constitutes trafficking.[74]

Advocates favouring the policies which facilitate international adoption for unparented children have criticized that article 21 gives strong preference to placement of children in domestic adoption or institution rather than allowing foreign adoption. The Domestic Placement Preference Principle (DPP Principle) of UNCRC thereby accords inter-country adoptions the last alternative position. This tends to reduce the practice of inter-country adoptions and provides wide scope to certain State Parties to defend in the name of the DPP principle their extra-ordinarily restrictive policies on foreign adoption. Inestimable number of children who were capable of being adopted because of the prevalence of DPP Principle either had to languish in orphanages or survive in the streets due to lack of domestic alternative care.[75] Elizabeth Bartholet while alluding about the reports relating to orphanages after the imposition of moratoria on international adoptions by Vietnam, Guatemala and Romania had viewed that

[74] Michael D Aune, 'Unregulated Custody Transfers: Why the Practice of Rehoming Should Be Considered a Form of Illegal Adoption and Human Trafficking' (2017) 46 Georgia Journal of International and Comparative Law185 (2017) <https://heinonline.org> assessed 20 October 2023.

[75] James G Dwyer, 'Inter-Country Adoption and the Special Rights Fallacy' (2013) 35 University of Pennsylvania Journal of International Law 189 <https://heinonline.org> assessed 20 October 2023.

around the world there were 8 million children in orphanages and 100 million were lining on the streets.[76]

The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP-CRC-CP) adopted by UNGA Resolution 66/138 of 19th December 2011 entered into force on 14th April 2014.[77] OP-CRC-CP empowers individuals including children to submit communications to CRC by claiming to be victims of violation by the State Party to OP-CRC-CP of any of rights stipulated under UNCRC, OP-CRC-AC and OP-CRC-SC.[78] As per the admissibility requirements specified in article 7 the communication has to be in writing and submitted after exhaustion of domestic remedies. However, where the application of remedies is unreasonably prolonged such exhaustion is not required.[79] Written requirement of communication may not promote effective utilization of the communication procedure as children may not be able to adequately express their feelings in writing. OP-CRC-CP has not specified any yardstick as to how it can be determined that the application of domestic remedies is unreasonably prolonged.[80] Inter-State communication system

[76] Elizabeth Bartholet, 'International Adoption: The Human Rights Position' (2010) 1(1) Global Policy 91 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1758-5899.2009.00001.x> assessed 20 October 2023.

[77] OHCHR Optional Protocol to the Convention on a communications procedure<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx> assessed 20 October 2023.

[78] art 5.

[79] art 7(5).

[80] Zelalem Shiferaw Woldemichael, Communications Procedure under the 3rd Optional Protocol to the Convention on the Rights of the Child: A Critical

though enables children to enforce their rights through a powerful entity- State yet due to the opt-in option inter-state procedure is applicable only to those States which recognize the competence of the CRC to receive inter-state complaints through declaration.[81] As on 20th October 2023 only 51 States have ratified or acceded to OP-CRC-CP[82] and this has definitely undermined its potential as an effective international complaints mechanism for enforcement of children rights.

A huge responsibility is entrusted upon the State Parties to the OP-CRC-SC for preventing offences such as sale of children, illicit transfer and illegal adoption of children etc. However, this responsibility is only upon States which are party to OP-CRC-SC. Out of total 193 Members of the United Nations as on 20th October 2023 OP-CRC-SC has been ratified or acceded by 178 State Parties[83]. As compared to OP-CRC-SC, CRC has been ratified or acceded by 196 State Parties[84]. OP-CRC-SC supplements UNCRC by providing detailed provisions to State Parties in ending sexual abuse and exploitation of children and renders protection against

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Assessment (2015) 7 Jimma University Journal of Law 78 <https://heinonline.org> assessed 20 October 2023.

[81] ibid 108.

[82] Optional Protocol on a communications procedure - UNTC <https://treaties.un.org/Pages /ViewDetails.aspx ?src=IND&mtdsg_no=IV> assessed 20 October 2023.

[83]Optional Protocol – UNTC <https://treaties.un.org/Pages/ViewDetails .aspx?src=TREATY &mtdsg_no=IV-11-c&chapter=4&clang=_en> assessed 20 October 2023.

[84]CRC-UNTC<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no =IV-11..> assessed 20 October 2023.

sale of children for non-sexual purposes such as illegal adoption, forced labour etc.[85] Therefore the applicability of OP-CRC-SC has been limited as universal ratification or accession to OP-CRC-SC has not been achieved. Declarations and reservations at the time of ratification or accession have been made by some of the State Parties with regard to provisions relevant to adoptions under article 3 of OP-CRC-SC. Argentine Republic had stated that neither international instruments on the international adoption of minors have been signed by it nor international adoption of children who are domiciled or resident in its jurisdiction is permitted.[86] Kuwait and United Arab Emirates have made reservation with respect to art 3(5). In relation to adoption Syrian Arab Republic has made reservation to art 3(1)(a)(ii) and art 3(5). Declaration has been made by Malaysia and Republic of Korea to the effect that art 3(1)(a)(ii) is applicable only to State Parties to the Hague Adoption Convention 1993.[87] Through such declarations and reservations, some State Parties have the limited the extent of OP-CRC-SC applicability upon them. Moreover, measures to be taken by the State Parties with regard to acts and offences relating to adoption of children under their penal laws are only required to be 'minimum' subject to the respective national laws. OP-CRC-SC has limited its applicability among its State Parties by stipulating that where provisions embodied in a state

[85]Advancing the CRC Convention on the Rights of the Child UNICEF <https://www.unicef. org/crc/index_protocols.html > assessed 20 October 2023.
[86] Optional Protocol - UNTC (n 83)
[87] Optional Protocol - UNTC (n 83)

party law or international law in force in a State are more conducive for realization of the child's right then OP-CRC-SC cannot affect such provisions[88]. What amounts to 'more conducive' has not been defined. CRC monitors the implementation of OP-CRC-SC through the Reporting System as per which State Parties are required to submit their initial reports within two years and thereafter periodic reports every five years.[89] In the reports State Parties must provide information comprehensively about the measures undertaken by them for implementing OP-CRC-SC. By 25th May 2015 sixty-five State Parties had not submitted their first reports and a third of them were more than 10 years overdue.[90] Timely submission of reports and its evaluation by CRC are pertinent for monitoring the action taken by States in implementing OP-CRC-SC in their respective countries. Delay in submission of reports hinders the CRC monitoring. No sanction or mechanism has been provided under OP-CRC-SC for ensuring the enforcement and compliance on the part of the State Parties for timely submission of initial and periodic reports.

[88] art 11.
[89] art 12.
[90] UN experts urge final push for universal ratification of Optional Protocols to Convention on the Rights of the Child <https://reliefweb.int/.../un-experts-urge-final-push-universal-ratification-optional-proto..> assessed 20 October 2023.

CONCLUSION

International instruments have laid down provisions relating to inter-country adoptions. These provisions have tried to resolve the differences arising out of inter-country adoptions among States which are parties to the international instruments. The human rights of children to be protected against trafficking in the name of adoption has been acknowledgment in UNCRC. To mitigate the possibility of exploitation of children through inter-country adoptions, international instruments on child adoption have stressed the need to establish Central Authorities for regulating adoptions who are responsible for ensuring that inter-country adoptions are in accordance with law and no improper financial gains result from adoption. These instruments have tried to harmonize the divergence in national laws governing inter-country and emphasized upon international and regional co-operation for the welfare of the child. Respect has been accorded to national laws regulating child adoption. Inter-country adoptions are taken recourse to only when adoption of a child within his or her country of origin has failed.

Ratification or accession to international human rights instruments on inter-country adoptions other than UNCRC has been slow and not universal. As such only State Parties to international instruments are obligated to implement the provisions. However, even among the ratifying or acceding States there have been reservations to certain child adoption provisions

which have obstructed the protection of the best interest of the adopted child. Supplementary nature of the international human rights instruments on inter-country adoption enabling State Parties to adhere and apply their national laws in governing adoption concomitant with the vagueness of certain provisions, admissibility of reservation, unclear public policy principle and lack of legal sanctions have limited the applicability and enforceability of the international human rights instruments on inter-country adoption of children.

Children are precious treasures of the future and they are the most valuable assets of a nation and society. It is the duty of State to look after them with a view to ensure the complete development of their personalities. Since society expects them to grow as responsible citizens of the future, they need special care, protection, affection and facilities because of their tender age, physique and underdevelopment mental faculties. There is no exaggeration if it is said that future well-being of a particular nation depends upon how the children grow and develop.[91] Hence, there should be universal ratification of international instruments on inter-country adoptions without reservation by the States around the world for protection and welfare of children. Clarity on the definition and application of the principle of public policy by the States ratifying international human rights instruments along with imposition of legal sanctions for violation of the rights of

[91] *Lakshmi Kant Panday v Union of India*, 1984(2) SCC 244

adoptee is imperative for affording protection to children from subjective interpretation of States.

MAKING MEDICINES ACCESSIBLE IN INDIA: A CRITICAL ANALYSIS OF THE LAWS AND POLICIES

Mr. Saheb Chowdhury[92]

ABSTRACT

The exorbitant costs of drugs and medicines is one of the biggest reasons behind unaffordability and inaccessibility of healthcare and poverty in India. India being a Low and Middle Income Country (LMIC), where majority of the people still live in poverty, people who are sick and are in need of medicines have the choice to either suffer from its debilitating and painful consequences and die or use whatever little means they have to purchase outrageously expensive medicines, which are considered unaffordable even for the well off people in the country, thereby pushing millions into abject poverty. The government has the responsibility, both legal and moral, to make medicines available and accessible to people and to protect them by preventing both the health and economic consequences of diseases. While in India various laws and policies have been put

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in place to regulate the prices of drugs and medicines, the effects of the cost of medicines are still felt by the people as many studies have revealed. Therefore, in the light of this there is a requirement to critically analyse the laws and policies regulating the prices of medicines in India and to suggest a better way to make medicines available and accessible to everyone in need irrespective of their capacity to pay. This work is an attempt in that direction.

Keywords: *Healthcare, Poverty, Access to Medicines, Right to Health, Affordability and Price Regulation*

INTRODUCTION

In India more than 94% of the population seek outpatient care and 70% of such expenditure in outpatient care is made towards drugs and diagnostics.[93] Furthermore, as per the study conducted by Public Health Foundation of India, New Delhi, 55 million had been pushed into poverty in 2011-12 due to out of pocket payments, out of which 38 million became poor due to out of pocket payments only towards medicines.[94] This catastrophic financial impact on people leading to poverty needs to be

[93] 'Change in Medical Expenditure Patterns' (*Press Information Bureau*) <https://pib.gov.in/PressReleasePage.aspx?PRID=1602758> accessed 2 July 2023.

[94] Selvaraj S, Farooqui HH and Karan A, 'Quantifying the Financial Burden of Households' out-of-Pocket Payments on Medicines in India: A Repeated Cross-Sectional Analysis of National Sample Survey Data, 1994–2014' (*BMJ Open*, 1 May 2018) <https://bmjopen.bmj.com/content/8/5/e018020#DC1> accessed 3 July 2023.

controlled and checked. One of the ways to check this is by regulating and controlling the prices of drugs and medicines. This potentially keeps the medicines within the reach of the people who can't afford costly medicines and also reduces financial impact on people. The recent 12.2 per cent hike in the price of essential medicines as approved by the Central Government[95] due to a rise in the wholesale price index[96] comes as a big disappointment in India's attempts at making drugs and medicines affordable and accessible to poor and vulnerable masses. Such a sharp increase in the price of essential medicines will have severe economic consequences for the poor and vulnerable sections of the society who are already overburdened with exorbitantly high cost of healthcare. Therefore, it is necessary to look into the existing laws and policies in India regulating the price of drugs and medicines. The most important institution responsible for keeping prices of drugs and medicines within check in order to keep them within the reach of the common people is the National Pharmaceutical Pricing Authority (NPPA). We shall therefore start with understanding the role of the NPPA in controlling the prices of medicines.

[95] 'NPPA Allows Drug Firms to Raise Prices of Essential Medicines from April 1' (*Business Standard*, 3 April 2023) <https://www.business-standard.com/india-news/nppa-allows-drug-firms-to-raise-prices-of-essential-medicines-from-april-1-123040300882_1.html> accessed 3 July 2023.

[96] (*National Pharmaceutical Pricing Authority*) <https://www.nppaindia.nic.in/wp-content/uploads/2023/03/WPI-Om.pdf> accessed 15 July 2023.

ROLE OF NATIONAL PHARMACEUTICAL PRICING AUTHORITY (NPPA) IN ENSURING AFFORDABILITY OF MEDICINES

The National Pharmaceutical Pricing Authority (NPPA) was created in the year 1997, through a government resolution, in order to control prices of medicines to ensure availability, affordability or economic accessibility of medicines.[97] It is now an attached office of the Department of Pharmaceuticals (created on first of July, 2008[98]) in the Ministry of Chemicals and Fertilisers.[99] The purpose for which it was created was to function as an expert body to fix prices and to notify changes in the prices of bulk drugs and formulations in the Scheduled category under the Drugs (Prices Control) Order.[100] It is also authorised to monitor the prices of the decontrolled drugs and formulations.[101] Broadly, it enforces and implements the provisions of the Drug Prices

[97] (*National Pharmaceutical Pricing Authority*) <https://www.nppaindia.nic.in/wp-content/uploads/2020/07/Resolution.pdf> accessed 15 July 2023.
[98] 'About the Department department of Pharmaceuticals' (*Department of Pharmaceuticals*) <https://pharmaceuticals.gov.in/about-department> accessed 15 July 2023.
[99] 'About National Pharmaceutical Pricing Authority: Official Website of National Pharmaceutical Pricing Authority, Ministry of Chemicals and Fertilizers, Government of India' (*About National Pharmaceutical Pricing Authority | Official Website of National Pharmaceutical Pricing Authority, Ministry of Chemicals and Fertilizers, Government of India*) <https://www.nppaindia.nic.in/en/about-us/about-national-pharmaceutical-pricing-authority/> accessed 15 July 2023.
[100] Supra Note 5.
[101] ibid.

Control Order 1995/2013 as per the powers delegated.[102] The Drug Prices Control Orders are issued by the Central Government under the power conferred by Section 3 of the Essential Commodities Act 1955.[103] Scheduled bulk drug and Scheduled formulation are specified in the First Schedule with Schedule Formulation either individually or in combination of other drugs.[104] [105]

National List of Essential Medicines (NLEM)

The National Pharmaceutical Pricing Authority comes out with the National List of Essential Medicines. The preamble to the NLEM of India 2011 defines essential medicines as the country specific list of medicines based on its peculiar disease burden that "*satisfy the priority healthcare needs of the majority of the population*".[106] The ceiling price of all scheduled formulations that appear in the NLEM is fixed by the NPPA.[107] The DPCO 2013 includes it in the first schedule of the order.[108] Such medicines have to be of assured quality and are to be available at affordable

[102] Supra Note 6.
[103] (*Part II ministry of chemicals and fertilizers department of chemicals …*) <https://nppaindia.nic.in/wp-content/uploads/2020/07/DRUG-PRICE-CONTROL-ORDER-1995.pdf> accessed 15 July 2023.
[104] ibid.
[105] (*The drugs (prices control) order, 2013*) <https://www.nppaindia.nic.in/wp-content/uploads/2018/12/DPCO2013_03082016.pdf> accessed 15 July 2023.
[106] (*National List of Essential Medicines of India - Pharmaceuticals*) <https://pharmaceuticals.gov.in/sites/default/files/NLEM.pdf> accessed 15 July 2023.
[107] Supra Note 13.
[108] ibid.

prices at primary, secondary and tertiary level.[109] Its primary targets are cost, safety and efficacy.[110] It also intends to include all medicines included in national health programmes and emerging and reemerging infections.[111] The NLEM is not a direct adoption of the WHO list of Essential Medicines but one specific to the country based on the disease prevalence and cost effectiveness of such medicines in the country. The NLEM 2011 has a total of 348 medicines out of which 181 are for primary, secondary and tertiary level, 106 medicines for secondary and tertiary level and 61 are for only tertiary level.[112] The NLEM 2015 after revision of the 2011 list has a total of 376 drugs.[113] The new NLEM 2022 has a total of 384 medicines.[114] A total of 26 drugs have been deleted from the 2015 list including, among others, three anti-tuberculosis medicines, two used in HIV management, one anti-cancer medicine and one anti-infective medicine.[115] It has also included 34 new drugs including new anti-cancer medicines, new anti-tuberculosis medicines, new anti-diabetic medicines, medicines for COVID-19 management, medicines to treat respiratory diseases have been

[109] ibid.
[110] ibid.
[111] ibid.
[112] ibid.
[113](*National Pharmaceutical Pricing Authority*) <https://www.nppaindia.nic.in/wp-content/uploads/2020/08/NLEM-2015.pdf> accessed 15 July 2023.
[114] (*CDSCO*) <https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=OTAxMw> accessed 16 July 2023.
[115] ibid.

included.[116] However, the NLEM 2022 has been criticised for not including certain important medicines, especially new cancer treatment medicines, that the patients could have benefitted from inclusion.[117] The patients are still affected by the extremely high cost of treatment. The financial impact of cancer, whether direct or indirect, remains extremely high and debilitating, particularly for the poor, as suggested by many studies and the high cost of care also leads to unaffordability of cancer treatment.[118] [119] A recent study on out of pocket expenditure, catastrophic health expenditure and distress health financing shows that the mean out of pocket expenditure in India is 19,210 Indian Rupees and that cancer treatment has the highest cost reaching 57,232 Indian Rupees.[120] Furthermore, cancer treatment also led to the highest catastrophic health expenditure (at 79 percent) and also highest distress financing (at 43 percent).[121] Another more recent study

[116] ibid.

[117] 'Cancer Treatment Costs: Little Respite from New List of Essential Drugs' (*Moneycontrol*, 16 September 2022) <https://www.moneycontrol.com/news/trends/health-trends/cancer-treatment-costs-little-respite-from-new-list-of-essential-drugs-9187461.html> accessed 16 July 2023.

[118] (*Financial toxicity in cancer care in India: A systematic review*) <https://www.thelancet.com/pdfs/journals/lanonc/PIIS1470-2045(21)00468-X.pdf> accessed 15 July 2023.

[119] Dinesh TA and others, 'Economics of Cancer Care: A Community-Based Cross-Sectional Study in Kerala, India' (*South Asian journal of cancer*, 2020). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6956579/#:~:text=%5B15%5D%20The%20cost%20of%20treatment,36%2C812.> accessed 16 July 2023.

[120] Kastor A and Mohanty SK, 'Disease-Specific out-of-Pocket and Catastrophic Health Expenditure on Hospitalization in India: Do Indian Households Face Distress Health Financing?' (2018) 13 PLOS ONE.

[121] ibid.

based on a systematic review with meta-analysis showed that the direct out of pocket expenditure on inpatient and outpatient care for cancer were 83,396.07 Indian Rupees and 2653.12 Indian Rupees respectively.[122] Moreover, it shows that total direct and indirect out of pocket expenditure were 47,138.95 Indian Rupees and 11,908.50 Indian Rupees respectively.[123] The study also showed that 62.7 percent of individuals faced catastrophic health expenditure, which is extremely high and has mostly been financed by borrowing money or selling assets.[124] It is in light of this that the criticism of non-inclusion of many new and effective anti-cancer medicines in the list of essential medicines leading to these useful and life saving medicines being beyond the reach of the majority of people becomes relevant.[125] The magnitude of this problem becomes clearer when we see that the projected number of cancer patients in India to be at 29.8 million by the year 2025.[126] Therefore, although inclusion of four new anticancer medicines is

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[122] YA; DAR, 'Out-of-Pocket, Catastrophic Health Expenditure and Distress Financing on Non-Communicable Diseases in India: A Systematic Review with Meta-Analysis' (*Asian Pacific journal of cancer prevention : APJCP*) <https://pubmed.ncbi.nlm.nih.gov/33773528/> accessed 16 July 2023.

[123] ibid.

[124] ibid.

[125] Chandna H, 'Health Matters: Govt's Revised List of Essential Medicines Is a Mixed Bag with More Misses, Fewer Hits' (*News18*, 19 September 2022) <https://www.news18.com/news/india/health-matters-govts-revised-list-of-essential-medicines-is-a-mixed-bag-with-more-misses-fewer-hits-5986417.html> accessed 16 July 2023.

[126] Kulothungan V;Sathishkumar K;Leburu S;Ramamoorthy T;Stephen S;Basavarajappa D;Tomy N;Mohan R;Menon GR;Mathur P;, 'Burden of Cancers in India - Estimates of Cancer Crude Incidence, Ylls, Ylds and Dalys for 2021 and 2025 Based on National Cancer Registry Program' (*BMC cancer*) <https://pubmed.ncbi.nlm.nih.gov/35546232/> accessed 17 July 2023.

appreciated, it is clear that much more could have been done by including newer and useful medicines in the list given that the anticancer medicines included in NLEM 2022 is less comprehensive than WHO Essential Medicines List 2021.[127] Besides this, there are many important life saving drugs required in the treatment of many non-communicable diseases like cancer, diabetes, HIV etc. the non-inclusion of which in the list has led to their prices being high and therefore out of reach of the people.

MAJOR OBJECTIONS AGAINST PRICE CONTROL OF MEDICINES

It is clear that regulating the price of essential medicines is an important step in ensuring accessibility and affordability of care. Otherwise, many important drugs will be beyond the reach of the general masses.[128] [129] Fixing ceiling price or maximum retail price of medicines has had the effect of great amounts of savings for the people.[130] Similarly, the Ministry of Chemicals and

[127](*Home*) <https://cdsco.gov.in/opencms/opencms/en/Home> accessed 2 September 2023.
[128] 'Cancer Drug Price Goes up from Rs 8,000 to Rs 1.08 Lakh' (*DNA India*) <https://www.dnaindia.com/india/report-cancer-drug-price-goes-up-fromrs-8000-to-rs-108-lakh-2022667> accessed 17 July 2023.
[129] 'NPPA's U-Turn on Capping Prices of 108 Drugs for Cardiac, Diabetes' (*Moneylife NEWS & VIEWS*) <https://www.moneylife.in/article/nppas-u-turn-on-capping-prices-of-108-drugs-for-cardiac-diabetes/38932/68482.html> accessed 17 July 2023.
[130] (*Fixation of ceiling prices/MRP of medicines resulted in total savings of Rs. 11,463 crores to public: Shri Mansukh L. Mandaviya*) <https://pib.gov.in/newsite/PrintRelease.aspx?relid=180915> accessed 17 July 2023.

Fertilisers has also claimed that price rationalisation by the NPPA initiated in February, 2019 had the effect of a great reduction in the price of anticancer medicines.[131] However, there are various criticisms of such regulation of price as well. Prices of medicines are controlled by putting them in the list of essential medicines, regulating the price by imposing a ceiling price and sometimes even restricting intellectual property rights. It is argued that such price control measures make voters happy but adversely affect the healthcare system and innovation in healthcare.[132] That due to absence of strict quality control the reduction of price has led to a fall in the quality of medicines.[133] Furthermore, reduced profit margin due to controlled price of medicines has also led to less expenditure in research and development and also reduced investment in this sector.[134] Besides this, manufacturers of drugs have also moved from producing and promoting price controlled drugs in the national list of essential medicines to those that are not on the list or have adopted other strategies like promoting

[131] (*NPPA plays crucial role in making cancer drugs affordable*) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1670707>accessed 17 July 2023.
[132] Khan AU, 'India's Drug Price Fix Is Hurting Healthcare' (*mint*, 29 October 2019) <https://www.livemint.com/politics/policy/india-s-drug-price-fix-is-hurting-healthcare-11572334594083.html> accessed 17 July 2023.
[133] Pradhan S, 'India's Price Control Policy Has Destroyed Drug Manufacturers. This Is How They Can Be Saved' (*ThePrint*, 20 December 2019) <https://theprint.in/opinion/indias-price-control-policy-has-destroyed-drug-manufacturers-this-is-how-they-can-be-saved/338095/> accessed 17 July 2023.
[134] ibid.

Fixed Dose Combinations,[135] something peculiar to India, of medicines not on the list and also non-standard doses.[136]

MECHANISM FOR REGULATION OF DRUG PRICES

For a clearer understanding of how the prices of drugs are regulated let's look at the mechanism provided in the DPCO 2013 for the said purpose.

How ceiling price of scheduled formulation is calculated

This applies to scheduled formulations under the first schedule of the order with strengths as provided therein. It is a market based approach to pricing of medicines. This is done by first calculating the average price to the retailer of the scheduled formulation. The average price to retailer P(s) is calculated by summing up the prices to retailers of all brands and generic versions of the medicine with a market share of one percent or more of the total market turnover which is then divided by the total number of such brands or generic versions as specified

[135] Gautam CS and Saha L, 'Fixed Dose Drug Combinations (Fdcs): Rational or Irrational: A View Point' (2008) 65 British Journal of Clinical Pharmacology 795.
[136] ibid.

above.[137] Thereafter the ceiling price of the scheduled formulation P(c) is calculated by the formula,

$$P(c)=P(s).(1+M/100),$$

Where, M is the "*% of margin to the retailer and its value = 16*".[138]

The said ceiling applies to imported formulations too.[139] Furthermore, the margin to the retailer as provided in para 7 is sixteen percent of the price to the retailer.[140] The maximum retail price of such scheduled formulation is determined by adding the ceiling price with local taxes wherever it is applicable.[141]

As can be seen this approach is a market based approach that sets the ceiling price based on the average price to the retailer. This means that when such price caps are set some small producers of drugs may be at a disadvantage due to small returns compared to large producers who have the advantage of volume of sales. Furthermore, under this approach the essential medicines are still left for the patients to buy for themselves. In the absence of appropriate information relating to drugs and medicines and the overall information asymmetry working against patients, the

[137] (*The drugs (prices control) order, 2013*) <https://www.nppaindia.nic.in/wp-content/uploads/2018/12/DPCO2013_03082016.pdf> accessed 19 July 2023.
[138] ibid.
[139] ibid.
[140] ibid. at Para 7.
[141] ibid. at Para 8.

patients still end up spending a huge amount on purchasing medicines among other healthcare expenditures.

Trade Margin Rationalisation and Non-scheduled Medicines

A big contributor to the increased price of medicines is the trade margin allowed on such medicines. Trade margin is the difference between actual price at which the retailer sells the goods and the price at which the retailer has purchased from the manufacturer. Trade margin in medicine is then the percentage of the price that is allowed to the distribution chain including wholesalers and retailers by the pharmaceutical companies. For formulations in the first schedule of the DPCO 2013, whose ceiling price is limited by the NPPA, the margin to the retailer is capped at sixteen percent. However, for drugs in the non-scheduled category there is no mechanism under the existing law that allows the control of price of such drugs by regulating the trade margins. This is why pharmaceutical companies allow huge trade margins to retailers to promote the sale of the drugs manufactured by them leading to customers paying exorbitant higher prices for such drugs. There is therefore a necessity to regulate the price of drugs in the non-scheduled category by regulating the trade margin. The existing control over the pricing of non-scheduled formulations that the government has is under para 20 of the DPCO 2013 that empowers the government to monitor the price of all drugs

including non-scheduled drugs.[142] The only power under this provision is to ensure that the maximum retail price of a drug is not increased by more than ten percent of the price of the drug in the preceding twelve months.[143] The capping of the trade margin is however necessary to ensure affordability and accessibility of drugs. Para 19 of the DPCO 2013, however, allows the government in extraordinary circumstances to fix the ceiling price or retail price of certain drugs for a certain period if the government considers it necessary in the public interest.[144] In exercise of the power conferred under this para the government has, after being satisfied of the extraordinary circumstances, recently put a cap of thirty percent on trade margins and directed the manufacturers to fix the retail price based on the price to the stockist of non-scheduled formulations that contain forty two anticancer drugs in the public interest.[145] This was done, among others, for reasons that include poverty caused by extraordinary out of pocket expenditure on medicines and therefore the need to ensure affordability, lack of substantial control over pricing of non-scheduled drugs especially due to high trade margin, the fact that out of pocket expenditure from hospitalisation due to cancer is 2.5 times the overall average of hospitalisation expenditure and catastrophic expenditure in cancer being the highest among all

[142] ibid. at Para 20.
[143] ibid.
[144] ibid. at Para 19.
[145] Para 15, (*Order - National Pharmaceutical Pricing Authority*) <http://nppaindia.nic.in/wp-content/uploads/2019/03/Notification-25.02.2019-Final.pdf> accessed 19 July 2023.

noncommunicable diseases, the requirement of universal access to healthcare at affordable prices and more specifically the need to make cancer drug affordable to ensure treatment at the earliest for greater curability.[146]

The NPPA has also by an order issued on 3rd June, 2021 exercising its power under Para 19 of the DPCO 2013 put a cap of seventy percent on the trade margin of Oxygen Concentrator on the price to the distributor for, among others, the reason that medical oxygen is an essential life saving drug in COVID care which had the effect of rising demand for oxygen concentrators leading to higher price.[147]

Very recently, there has also been reports of rationalisation on trade margins on drugs that are priced at rupees hundred or above that include drugs for the treatment of chronic kidney diseases, antibiotics, antivirals and some anticancer drugs.[148]

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[146] Paras 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 (*Order - National Pharmaceutical Pricing Authority*) <http://nppaindia.nic.in/wp-content/uploads/2019/03/Notification-25.02.2019-Final.pdf> accessed 19 July 2023.

[147] (*II - National Pharmaceutical Pricing Authority*) <https://nppaindia.nic.in/wp-content/uploads/2021/06/227375.pdf> accessed 19 July 2023.

[148] Standard B, 'Streamlining Trade Margins on Drugs Priced RS 100 and above Likely' (*Business Standard*, 30 August 2022) <https://www.business-standard.com/article/economy-policy/trade-margin-rationalisation-likely-on-drugs-priced-rs-100-and-above-122083000993_1.html> accessed 19 July 2023.

Price Control of Patented Drugs

While the prices of the scheduled formulations as are in the NLEM are regulated as discussed above and trade margins have been rationalised for some of the non-scheduled drugs by the NPPA by exercising powers conferred by the DPCO 2013, there are many other patented drugs, that are extremely important life saving drugs, required for treatment of people in need. Controlling the prices of such drugs raises many concerns including that it may negatively affect and dis-incentivise innovation and affect availability and accessibility of lifesaving drugs. Before doing a deeper analysis of price control of drugs under patent and its effects, let's look at how DPCO 2013 deals with patented drugs. Para 32 of the DPCO 2013 talks about cases in which provisions of this order are not applicable. Subpara (i) of para 32 says that these provisions shall not be applicable for a period of five years from the day that commercial production has been started within the country to a manufacturer who is producing a new patented drug that have been patented under the Indian Patent Act of 1970 as a product patent, which is not produced anywhere else and if such medicine has been developed through indigenous research.[149] This provision has however been amended and the non-applicability is now for a period of five years from the date that the manufacturer or importer has started commercial marketing in

[149] Para 32 (*The drugs (prices control) order, 2013*) <https://www.nppaindia.nic.in/wp-content/uploads/2018/12/DPCO2013_03082016.pdf> accessed 19 July 2023.

the country.[150] This means that the protection will also be available to drugs that are not developed in India. Subpara (iii) of Para 32 extends this protection to a new drug that involves a new delivery system that has been developed through indigenous research and is for a period of five years from the date of receiving market approval in the country.[151] The Amendment of 2019 provides the protection for an unlimited duration also to drugs that are used for treatment of orphan diseases as decided by the Ministry of Health and Family Welfare of the Government of India.[152] This protection is available even when the drug is not under patent or is not a new drug. The reason why this protection is provided is because the number of individuals who are suffering from such rare diseases is small, which means that the market for manufacturers of medicines to treat such diseases is also small.[153] Without such protection these manufacturers will not have much incentive to innovate and invest in the production of medicines for treatment of such rare diseases. However, it has the effect of making the cost of treatment of such diseases very high, since the drug manufacturers have to recover the costs involved in research

[150] Drug (Price Control) Amendment Order, 2019. <https://www.nppaindia.nic.in/wp-content/uploads/2021/01/6th-DPCO-2013-Amentment-dt-03.01.2019.pdf> accessed 19 July 2023.
[151] Supra note 57.
[152] Drug (Price Control) Amendment Order, 2019. <https://www.nppaindia.nic.in/wp-content/uploads/2021/01/6th-DPCO-2013-Amentment-dt-03.01.2019.pdf> accessed 19 July 2023.
[153] National Policy for Treatment of Rare Diseases, Ministry of Health and Family Welfare, Government of India. <https://main.mohfw.gov.in/sites/default/files/Rare%20Diseases%20Policy%20FINAL.pdf> accessed 19 July 2023.

and development.[154] At the same time due to the extremely high cost of such medicines the government is incapable of providing such medicines for free.[155] Moreover, there are also macro allocative concerns about optimal use of limited resources to help a larger number of people with smaller amounts of resources.[156] The government's policy seems therefore to be to incentivise the market to invest more into treatment of rare diseases, by providing these exclusive marketing rights, so that these treatments are available in the market, albeit at a high cost. However, the costs of such medicine remain so high that they are beyond the reach of most patients in a country like India. Therefore, the government needs to put in place strategies to keep the prices in check to ensure accessibility and affordability of such medicines.

Based on the above legal analysis it can be seen that the overall position is that patented drugs of the kind as discussed above are not subjected to price control under the DPCO 2013 for a period of five years. However, patented drugs can otherwise be subjected to price control under the DPCO 2013.

[154] ibid.
[155] ibid.
[156] ibid.

PRICE CONTROL OF DRUGS AND ITS EFFECTS

One very important question that now remains to be addressed is whether price control of drugs is the right way to ensure availability and affordability of drugs or it should be left to the market forces. The usual criticism of price control of any sort is that it has a negative effect on innovation since the profit margin of the drug manufacturers go down leading to less money used in research and development. This then means that fewer new medicines are available for treatment of diseases affecting availability and accessibility of drugs. Furthermore, it is said that price control may also make manufacturing of low cost medicines unviable for small and new entrants in the business and thus negatively affecting availability and accessibility of medicines. However, on the other hand, we have seen that lack of any price control, at least on the essential medicines, has the effect that many lifesaving drugs are beyond the reach of many and remain unaffordable for many. I shall not here be doing any in depth analysis of the impact of price control measures on innovation as that is beyond the scope of this work and much work on this has already been done. I shall analyse the question based on the existing studies and suggest possible options for India to adopt in order to ensure healthcare for all and fulfil its goal of achieving Universal Health Coverage.

One of the often heard arguments against price control of drugs is that regulations involving control of drug prices can have

serious impacts in the pharmaceutical industry. This argument suggests that if the government were to try, by such price control measures, to make drugs more affordable then it will also negatively affect innovation in the pharmaceutical industry ultimately affecting availability of drugs. Since pharmaceutical innovation is in particular a highly complex, risky and time-consuming process, a decrease in innovation can be directly attributed to strict price control measures. Furthermore, it is said that having more such regulations will also mean that pharmaceutical companies have to dedicate more resources into complying with such regulations and that will have the effect that less resources will be available for research and development activities. When it comes to the international market, it is said that such measures could also have the effect of delaying such products' entry in countries that are not willing to pay higher prices. Besides the above, it is also generally understood that if the money available to a pharmaceutical company is reduced due to control of prices of drugs, then they will have less resources available to spend on research and development.

Among others, two important studies can be referred to in regard to the arguments above. One titled "An Economic Assessment of the Relationship between Price Regulation and Incentives to Innovate in the Pharmaceutical Industry"[157], is a study sponsored by Novartis, a Swiss Pharmaceutical Company,

[157] (*ESMT White Paper - E.ca*) <https://www.e-ca.com/wp-content/uploads/2009_wp-109-03.107655.pdf> accessed 19 July 2023.

that explores how pricing and reimbursement regulations may possibly impact innovation in pharmaceuticals.[158] More specifically, the study involves a qualitative investigation into the "*likely strategic response of pharmaceutical companies*" due to such regulation with respect to their research and development activities.[159] Secondly, the study involves "*quantitative evaluation of such effects in the context of a calibrated decision-theoretic model of drug development*" wherein pharmaceutical firms look to the future in considering how they'll price their drugs in the future in making their current decisions about development.[160] Essentially their study is to identify the adverse effects of pricing and reimbursement regulations on innovations by pharmaceutical companies.[161] Moreover, they also look into how such adverse effects of these regulations of the present happen in the future in terms of the number and characteristics of drugs that will be launched in the future, since the drug discovery and development is a long term process. They conclude that designing an optimal pricing and reimbursement regulation requires trading the benefits of more affordable and cost-effective drugs against the cost of less pharmaceutical innovation, with fewer projects developed and more so in low-margin therapeutic areas that are not considered innovative when launched.[162] Broadly, it means

[158] ibid.
[159] ibid.
[160] ibid.
[161] ibid. at page 9
[162] ibid. at page 19

that if the drugs are made more affordable and cost-effective through price regulations there will be fewer innovations. Moreover the adverse effects of pricing and reimbursement regulations introduced in the present is seen in the number and characteristics of drugs to be launched in the future market.[163] The policy makers then have to make a balanced choice between innovation and future availability of new drugs and affordability of drugs now.

A second study in the Indian context titled "Who Benefits from Pharmaceutical Price Controls? Evidence from India[164]" is a study of price control in the Indian market and its effect on access to medicines in rural and urban areas.[165] It is essentially a study of the effects of price control measures in India, which is a market based price ceiling imposed both on patent and generic medicines.[166] The study also looks into the impact of such measures on medicine quality. It is in light of the price ceiling on medicines in the NLEM the price of which is regulated by the NPPA under the DPCO 2013.[167] The results of this study show an 11.6 percent drop in the price of controlled products when

[163] ibid.

[164] Dean EB, 'Who Benefits from Pharmaceutical Price Controls? Evidence from India - Working Paper 509' (*Center For Global Development | Ideas to Action*) <https://www.cgdev.org/publication/who-benefits-pharmaceutical-price-controls-evidence-india> accessed 19 July 2023.

[165] ibid.

[166] ibid. at page 1 & 2.

[167] ibid. at page 7.

compared with non-controlled products.[168] The price decrease has been noticed in all firms including multinational firms, exporter firms and local firms with multinational firms showing the highest decrease.[169] The study further shows a 4.3 percent decrease in sales at the SKU level with more drop for local and exporting firms at 5.3 and 4.7 percent respectively and at the same time there was not any significant drop for multinational firms.[170] The study also showed that multinational firms gained significant market share and local firms lost market share.[171] The results further show more local firms exiting the market after the price control and no significant impact on firm exit for exporter and multinational firms.[172] Therefore the study suggests that since the local producers produce low cost medicines, their exit would affect price sensitive customers i.e. those who are poor or live in rural areas.[173] It also shows that local firms are only exiting from price controlled formulations but not the non-price controlled ones.[174] Based on the results, the study concludes that while such price control has been beneficial to consumers due declining price and higher quality drugs, they have also adversely affected some consumers due to the exit of low cost and low quality producers

[168] ibid. at page 22 and 23.
[169] ibid.
[170] ibid. at 23.
[171] ibid. at 27.
[172] ibid.
[173] ibid.
[174] ibid. at 28.

and thus negatively affecting the price sensitive consumers and beneficially the quality sensitive consumers.[175]

THE ROLE OF PUBLIC EXPENDITURE IN HEALTHCARE RESEARCH TO MAKE MEDICINES ACCESSIBLE

A great amount of credit is generally given to pharmaceutical companies for their efforts in healthcare research and development. However, the public sector also contributes greatly to fundamental research in healthcare. A research titled, "Contribution of NIH funding to new drug approvals 2010-16" shows that funding by the National Institute of Health (NIH) of the United States of America had contributed to published research with every one of the 210 new drugs that were approved by the Food and Drug Administration during the period of 2010-16.[176] It also shows that more than ninety percent of the funding is for basic research involving biological targets of drugs and not drugs themselves.[177] The study thus shows the significance of

[175] ibid. at 29.
[176] Galkina Cleary E and others, 'Contribution of NIH Funding to New Drug Approvals 2010–2016' (2018) 115 Proceedings of the National Academy of Sciences 2329.
[177] ibid.

public expenditure in basic research is important and greatly helpful for applied research by the pharmaceutical industry to be possible. The public sector has a great role in the discovery and development of new drugs and it is the NIH funding of basic research that greatly contributes to bringing new products to market.[178] Therefore, the public and the private sector have to work together in both basic and applied research for innovations in healthcare and great deal of benefits derived by the private sector in further development of medicines can be credited to the fundamental research and the initial development of drugs funded by the state. Furthermore, these fundamental researches also happen in the universities and other places which are possible due to governmental funding. Therefore, it seems reasonable to expect that private companies also make the drugs and medicines available to the public at reasonably affordable prices thereby justifying many of these price control measures. However, since price control also affects innovation the policy makers have to find a sweet spot between the requirement of innovation and making drugs affordable and accessible to all by bringing down the price of medicines. This apart affordability of medicine and innovation in healthcare will also be improved by increased government expenditure on basic and fundamental research in healthcare.

[178] ibid.

CONCLUSION AND SUGGESTIONS

Based on the above discussion on different issues relating to regulation of price of drugs and medicines, certain observations can be made here. Despite disagreements it can be agreed that limiting drug prices is a tricky and complicated issue. However, this isn't the reason for not having any regulation of prices. Affordability and availability of drugs and medicines are urgent issues that can make a difference between life and death in many cases. Keeping that in mind the government has to ensure availability and affordability in medicines using policies that not only ensure availability and affordability but also facilitate and encourage research and development in medicine so that more effective, path breaking and innovative treatments are available in the future ensuring availability in medicines. It is with this idea in mind certain important suggestions can be made.

While it is important that prices of medicines are controlled to ensure availability and affordability of drugs and medicines, innovation is also important for the treatment of critical diseases and for more effective and path breaking treatments in the future. Therefore, while controlling the price such factors have to be kept in mind. However, it is also worth mentioning that a large amount of expenditure incurred by the healthcare industry is spent on marketing that barely contributes

anything to innovation in medicine.[179] This means that before healthcare industry clamours about how price control affects innovation, they also need to be more transparent, or be required legally to be transparent, about how the money is actually spent on research and development. If the figures about how much is actually spent on research and development and how much on marketing is clear then there could be a more rational approach to regulating the price of medicines. This can be done while policy makers also take seriously and are conscious of the fact that drug development is a complex, lengthy and an uncertain process that involves taking lots of risks in terms of investment of money and resources without any outcome and therefore such costs are included in decisions relating to limiting prices.

However, since the government has the responsibility to realise healthcare for all and also of realising Universal Healthcare Coverage, the more effective approach would be one where all such drugs and medicines are procured by the state to be provided to the people. This would mean that individuals do not suffer, overspend or get poor quality medicines, when the state plays a major role in ensuring appropriate medicines of the adequate

[179] It has been found that the healthcare industry in the United States spends 30 billion dollars on marketing which may also have the effect of overdiagnosis and overtreatment apart from the fact that the money is not spent on research and development.
Rapaport L, 'U.S. Health Care Industry Spends $30 Billion a Year on Marketing' (*Reuters*, 8 January 2019) <https://www.reuters.com/article/us-health-medical-marketing-idUSKCN1P22GG> accessed 2 September 2023.

quality are available and prescribed when necessary. State playing such a major role would ensure that medicines of appropriate quality are available in adequate quantity as per the need of the people. Since the state is the major procurer of medicines, this would also ensure that its position is used to negotiate prices and ensure drugs and medicines of adequate quality are procured from competing manufacturers. Since information asymmetry, as discussed earlier, is one of the major factors behind higher expenditure by individuals on medicine, state providing medicines will have the effect of preventing such avoidable expenditures. Moreover, at the same time the state can also promote local manufacturers of quality medicines. This would also mean that the state will have the power to promote healthy and beneficial competition among manufacturers to produce cost-effective and quality medicines at affordable prices which are necessary for the population.

The state must provide all individuals essential medicines as are in the National List of Essential Medicines for free of cost. This would also be in fulfilment of the Universal Healthcare

Coverage[180] and the Right to Health under International Law[181] [182] that requires the state to provide everyone with such essential medicines.[183] Instead of the market approach to controlling prices of essential medicines and leaving it up to individuals to buy them, the state should procure such medicines at competitive prices and provide them free of cost to all who need them. This way the government can ensure innovation in healthcare even when essential medicines are made available to all of adequate quality and quantity. Furthermore, the state providing essential medicines for free would also mean that other strategies by drug companies like promoting fixed dose combinations and non-standard doses would also be averted.

Besides the above, all other medicines could be provided by the state at reasonable prices to the population. For life saving

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[180] 'SDG Target 3.8 | Achieve Universal Health Coverage, Including Financial Risk Protection, Access to Quality Essential Health-Care Services and Access to Safe, Effective, Quality and Affordable Essential Medicines and Vaccines for All' (*World Health Organization*). <https://www.who.int/data/gho/data/themes/topics/indicator-groups/indicator-group-details/GHO/sdg-target-3.8-achieve-universal-health-coverage-(uhc)-including-financial-risk-protection> accessed 1 August 2023.

[181] 'Access to Medicines - a Fundamental Element of the Right to Health' (*OHCHR*) <https://www.ohchr.org/en/development/access-medicines-fundamental-element-right-health#:~:text=From%20a%20human%20rights%20perspective,strengthen%20their%20national%20health%20systems.> accessed 1 August 2023.

[182] 'Access to Medicines and the Right to Health' (*OHCHR*) <https://www.ohchr.org/en/special-procedures/sr-health/access-medicines-and-right-health> accessed 1 August 2023 .

[183] 'Essential Medicines' (*World Health Organization*) <https://www.who.int/southeastasia/health-topics/essential-medicines> accessed 1 August 2023.

drugs in the non-scheduled category apart from Trade Margin Rationalisation (TMR), the government should also make efforts at procuring them and distributing them at affordable prices to patients in need. Moreover, the governmental role in procuring and providing medicines would also mean that medicines of adequate quality at affordable prices are also procured from generic manufacturers. In all cases of such medicine procurement the government can also adhere to strict standards to maintain quality of medicines.

All the above are still being referred to in the context of outpatient care and all inpatient care and the requisite medicines and drugs are to be provided by the state in fulfilment of the Universal Health Coverage and the Right to Health under the International Law. All of this will however be possible only if government expenditure and investment in healthcare is substantially increased. Such expenditure has to be increased in order to improve the healthcare infrastructure, goods, services and facilities and also increase governmental funding of research and development in healthcare and allied sciences apart from encouraging such research in private sectors. This approach to ensuring affordability in healthcare of medicines and drugs fits perfectly into a model of healthcare that maximises the benefits to be derived from the limited resources available to the government and therefore requires the government to provide, among others, all essential drugs free of cost to patients besides inpatient drugs. Furthermore, it also fulfils the requirement of providing patients

and care seekers appropriate and correct information relating to health and healthcare services and the requirement of maintaining transparency at every stage with a patient centric approach. This will ultimately have the effect of improving efficiency, quality and cost-effectiveness in providing healthcare services to all as is the legal and moral responsibility of the states.

COMPENSATION FOR SEXUAL ASSAULT VICTIMS: NECESSITY OF A ROBUST LEGAL FRAMEWORK

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ABSTRACT

The requirement for distinct rights for sexual assault victims in India is a pressing issue. To ensure the protection, justice, and support of survivors, it is essential to establish and reinforce specific rights tailored to their needs. The right to compensation to victims is not explicitly provided by the Indian Constitution and has always escaped attention. However, the Hon'ble Supreme Court of India has time and again provided compensation to victims. The article analyses the existing general legal framework relating to the compensation to victims of sexual assault in India. This preliminary inquiry will enable us to evaluate the tenets of laws for victim compensation in gruesome sexual assault crimes like rape/acid attacks. In India, there is a significant need for the establishment and strengthening of legal rights related to compensation for victims of sexual assault. Establishing comprehensive compensation

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legal rights for victims of sexual assault in India is essential to provide survivors with the financial support they need to recover and rebuild their lives. It not only acknowledges the harm suffered but also helps survivors regain a sense of justice and control over their futures. The article aims to analyse the status of victims of sexual assault crimes, the theory of victimology, victim compensation schemes, and the role of a victim in relation to Indian law. Further, the article suggests a need for a specialized and stringent legal framework for compensatory justice to the victims of sexual assault.

***Keywords**: Victims, support, justice, compensation, rights.*

INTRODUCTION

It is very rightly said that violators cannot live with the truth and the survivors cannot live without it. The intensity of pain and agony that survivors go through cannot be expressed in words in most cases. In the present-day era, ensuring rights of the victims has become an utmost necessity.

Justice is frequently associated with a mental attitude and a resolve to be fair and acknowledge the rights of aggrieved persons. However, the experiences of rape/acid assault victims seeking justice have generally been very unpleasant. The goal of justice is not just to punish the criminal, but it is also to give direction for restoring the life of the aggrieved persons.

Based on considerations of sex alone, violence against women is widespread around the world. Sexual assault crimes such as rape and acid attacks are examples of crimes which are becoming a common occurrence in India. Although India has adopted laws to protect such rights and to create a deterrent effect in combating such heinous crimes, it is unfortunate that there is no law or policy for rehabilitative measures for victims in the strategies framed by the States. The victims are treated as forgotten men during the judgement because there is a lack of substantive law to award compensation and restorative justice.[3]

The most valued, sacred, inalienable right is the right to life and personal liberty. The state has a legal obligation to protect citizens' rights, as well as a social obligation to compensate for violations of fundamental rights.

Providing justice by punishing the offender may satisfy the sentiment of the victim to some extent but it may not always serve it. And in a way it leads to the violation of the rights of the victims for the second time, proving the failure of the justice system. Since India follows the adversarial system for criminal justice, the victim's role is kept to the least though it is the victim who suffers the most.

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[3] G.S. Bajpai, *Victim in the Criminal Justice Process: Perspectives on Police and Judiciary* (Uppal Publishing House, New Delhi 1997); Randy E. Barnett, 'Restitution: A New Paradigm of Criminal Justice' (1977) 87 Ethics 279; David L. Roland, *Progress in the Victim Reform Movement: No Longer the Forgotten Victim* [1989] 17 *PEPP. L. REV.*

It is indeed strange that the entire mind of human rights as well as the system of justice has persisted on the rehabilitation and reformation of the offender[4] when it is the victim that plays the most important role by providing information as an eyewitness and helps the police in arresting the suspect.[5] The testimony of the victim is also relied on by the prosecutors and judges in court.[6] The Hon'ble Supreme Court observed the ignored status of the victims in the case of *Rattan Singh v. State of Punjab*[7], as follows: -

> *"It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system which must be rectified by the legislature."*

The above-mentioned observation by Justice Krishnan Iyer has also been taken into consideration in the Criminal Procedure (Amendment) Act, 2008.

Victim-orientation mainly includes an arrangement of reparation or compensation especially for victims who have suffered from violent crimes, provisions for better choices in trial

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[4] Ahmad Siddique, *Criminology and Penology* 587 (6th edition, Eastern Book Company, Lucknow, 2011).
[5] Indian Evidence Act 1872, s 60.
[6] Susan E. Gegan & Nicholas Ernesto Rodriguez, '*Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*' (1992) 8 *JCRED* 225.
[7] [1979] 4 SCC 719.

and victim rights in the investigation process and the prosecution process.

INDIAN LEGAL APPROACH

The courts at the subordinate level have ignored the right to compensation for victims despite there being some provisions under the Code of Criminal Procedure, 1973 and the Indian Constitution to safeguard victims' rights and provide compensation. The presence of an adversarial system for justice and criminal administrations can be seen as the genesis of the issue. Merely punishing an offender cannot restore the victim's life. The Criminal Justice System of the State should prioritize the restoration of the victims' lives. This should be one of their primary concerns.

It is crucial to offer victims a major role - they should not be left alone to feel dejected.[8] This point has been made in several Supreme Court decisions where the situation of the victims has been described to be very significant, and if not taken care of properly, they may resort to unlawful methods which will result in an increase in the rate of crime. [9]

According to the Indian Constitution, the fundamental obligation of the state is to preserve law and order. As a result, when a crime is reported, it is the State's responsibility to get the

[8] Dr. Subhash Singh, 'Justice for Victims of Crime' [2008] *Criminal Law Journal.*
[9] A.S. Anand, 'Victims of Crime-The Unseen Side' (1998) 1 S.C.C. (Jour) 13.

crime investigated, to initiate the process of trial, and to prosecute him. The adversarial system of common law is employed in India and the presumption of innocence is in favour of the accused where the prosecution bears the burden of establishing guilt beyond reasonable doubt. [10] The accused also has the privilege of "the right of silence."

The Indian Constitutional Jurisprudence serves as the foundation of the doctrine of victimology. The Directive Principles of State Policy and the provision of Fundamental Rights form the bulwark of a contemporary social order, wherein the national soul of the country would blossom with economic and social justice (Article 38). In Article 41, it is the mandate of the State, inter alia, to ensure that effective provisions are made for "securing the right to public assistance in cases of disablement and in other cases of undeserved want". These provisions, if imaginatively expanded and emphatically intercepted, can be used to establish a constitutional framework for victimology.[11]

Under Article 32, the Hon'ble Supreme Court has been conferred with the power to devise such tools, as it deems fit and proper, for the purpose of ensuring the enforcement of fundamental rights and seeing that justice is done. This makes certain that in cases where redressal can be made available only

[10] K.I. Vibhute, *Criminal Justice: A Human Rights Perspective of the Criminal Justice Process in India*, (6th edition, Eastern Book Company 2004).
[11] Law Commission of India, *1154th Report on The Code of Criminal Procedure, 1973* (Law Com No 1154, 1996).

through bestowing monetary compensation, the same is duly allowed and awarded to the victim. [12]

Since, a right without a remedy is meaningless, the right to approach the Apex Court has been provided under Article 32(1) of the Indian Constitution in case of infringement of a fundamental right wherein the Apex Court has the right to pass orders, writs or instructions for the implementation of such rights. Article 226 also gives the High Courts a parallel power to enforce Fundamental Rights or any other legal rights.[13]

Criminal Procedure Code, 1973

A review of Indian laws reveals that the compensation provided to victims under Indian laws is pitiful. Under the Criminal Procedure Law, compensation to victims is covered by sections 357, 357A, 358, 359, and 250. The term 'victim' is defined under section 2(wa) of the Criminal Procedure Code Amendment Act, 2008 as follows:

> *'Victim' means "a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir."*

[12] G. Yethirajulu, 'Article 32 and the remedy of Compensation' (2004) 7 *SCC J* 49.
[13] Subhradipta Sarkar 'Ascertaining Civil Liability and Ensuring Victims' 'Right to Compensation' in Human Disasters: An Elusive Judicial Proposition' (2013) 3 GJLDP 101.

What we can explicitly understand from the above definition is that compensation is a right of the victim, which arises at the initiation of the trial. The accused has always been given the benefit of doubt in criminal jurisprudence and he may also escape conviction for lack of adequate evidence. [14] However, when the commission of such a crime has actually taken place and the victim along with her dependents endured sufferings - it is the state's liability that the loss incurred by the victim is compensated. Further, the inability of the state to protect its citizens from each other is also a dilapidation of its legal structures in safeguarding the interests of its people. When, as a result of international pressure, human rights are being provided to the offender by the state and its organs, it is pertinent that being citizens of the same state, victims' rights and interests are protected as well. Within this frame of reference, it is fascinating to see that the word 'charged' has been incorporated as part of the recent amendment in criminal law. What this entails is that irrespective of whether the accused is acquitted or convicted, protection by the state is a victim's right.

The psychological and economic aspects of the victim are not elaborately dealt with in the Criminal Procedure Code of India. Though India has initiated efforts in this regard, in line with international declarations however, the recent amendment fails to deal with victims of power abuse, contrary to international

[14] A.S. Anand, 'Victims of Crime-The Unseen Side', (1998) 1 S.C.C. Journal 13.

declarations, in which it is an embedded concept. Victims of power abuse refer to such individuals, who either personally, or as part of a collective, have had suffering and harm inflicted upon them. This encompasses both physical as well as mental injuries, emotional anguish and any economic loss suffered, in addition to substantial infringements of their Fundamental Rights through either actions or omissions which are not considered violations under the umbrella of criminal laws in our nation, contrary to internally prevalent human rights norms.

What is the current role assigned to the victim under the present criminal law structure? When information regarding a cognizable offence is provided to the police by the victim of such offence, it is imperative that the police have it written down and subsequently orally communicate the same to the victim. It is required to be signed by the informant, who is then entitled to receive a copy of the same, i.e. the FIR (Section 154(1) & (2) of CrPC). In a situation wherein the recording of such information is refused by the police, the right to dispatch a written post, addressed to the concerned S.P. is promulgated in Section 154(3) of the CrPC. Additionally, for whatever reason, if the investigation of the case is refused by the police, Section 157 (2) of the Act entails that the informant be notified of the same by the concerned police office.

On the other hand, the Code of Criminal Procedure under section 190 allows victims to forgo going to the Police Station for

remedy and instead contact the Magistrate with their complaint. Complainants claim that when they go to the police with their complaints, the treatment is apathetic and complainants are occasionally harassed. There have been concerns that information is not recorded accurately by the police, who instead manipulate facts to suit their purposes. Cases that are cognizable are rendered non-cognizable, and the other way around.

The process of investigation is solely the function of the police, and victims of a crime are only involved if the police believe it to be essential. Certain states' police departments have administrative orders requiring them to provide victims with information on the status of their investigations when requested. Otherwise, the victim's position is pitiful until a charge sheet is submitted under Section 173 of the Criminal Procedure Code. This is the most critical moment for victims to receive aid because the law is mute on the subject. If the Magistrate decides to dismiss the proceedings after taking cognizance of the police report, the informant-victim is issued a notice and is thereafter heard. The Court appears to have identified a gap in the legislative provision and ruled accordingly. [15]

It is an alarming situation when we consider victim witnesses who come from vulnerable sections of society. Cross-examination of witnesses, around which the adversarial trial is

[15] N.V Paranjape, *Criminology and Penology* (12th edition, Central Law Publishing 2005).

built, often adds insult to injury. Many a time, for several offences, the entire experience is no less than a nightmare for the victims. The Government, in acknowledging such plight, has recently adopted an amendment which would prevent assassination of the victim's character during trials of cases relating to sexual offences. Interrogation by the police should be done in a dignified manner and proper procedural law must be followed, with particular care being taken when victims of sexual offences are concerned. Sufficient funds should be disbursed by the Government to the courts and police to reimburse travel expenses, regular everyday allowance should be provided. Additionally, any professional loss being inflicted upon victims, who either in a court or police station, are appearing as witnesses, should be taken into consideration. The Government should supplement the overburdened judicial system by setting up additional courts in order to facilitate swift disposal of pending criminal cases. As is rightly said, "Justice delayed, is justice denied." Court management is an art, involving the ability to reject irrelevant questions and thereby controlling lengthy cross-examinations. Judges and magistrates should be trained so as to effectively master the art of Court management.

It is also pertinent to note here that there is a fair distinction between international declaration and Indian legal provisions in matters relating to remedial measures available to the victim, including victim compensation. The newly introduced Section 367-A of the CrPC brings to the fore a certain mechanism

wherein a separate fund is to be set up exclusively for the purpose of providing victim compensation by the Legal Services Authority.

In India, antecedent to this Act's amendment, the provision dealing with victim compensation was ambiguous at best. There wasn't any provision defining the concept of a 'victim'. As per the original Act, compensation was to be provided only to the person on whom such loss or injury was inflicted. Further, the benefit of compensation was only to be awarded either after the appeal, so preferred before the Appellate Court had elapsed or post decision of the appeal. Subsequent to its amendment, entitlement to receive the compensation was extended to include legal heirs and their dependents as well. Additionally, a new provision augmenting a separate mechanism for establishing the compensation to be awarded to the victim of the crime also found prominence in Section 357A of the new Act.

Section 357A has been inserted in the Code of Criminal Procedure, 1973 for the compensation and assistance to the victims of crime. The new provision directs each State Government to coordinate with the Central Government and develop a compensation plan with the goal of compensating the aggrieved or his relatives or dependents who have incurred loss or harm as a consequence of the crime and require rehabilitation. Under Section 357A, the Court must suggest to the District Legal Service or State Legal Service Authority the amount of compensation to be granted to the victims.

After getting the application form of the victims, the District Legal Service or State Legal Service Authority has to prepare a report within two months and submit it to the concerned Court. After being satisfied with the recommendation, the court may award compensation to the victims of the crime.

Other changes made in the Criminal Procedure Code and Evidence Act by the Criminal Law (Amendment) Act of 2013 include considering the character of the victim as irrelevant, presumption of no consent where the victim states that there was no consent, recording of the statement made by the victim and so on. [16]

The new law restricts judicial authority in determining compensation. It creates an additional remedy in circumstances covered by S. 357, as well as a new remedy if the offender is acquitted or if the offender is not recognised at all. In matters before the court, the court has the option to suggest further compensation if the compensation given under S. 357 is insufficient. In appropriate instances, the court may even make a recommendation to pay compensation even if the defendant is acquitted or discharged. However, the Legal Services Authority will determine the amount of compensation. In the absence of a legal process, i.e., where the accused cannot be identified, the entire discretion vests with the Legal Service Authority.

[16] Criminal Law (Amendment) Act 2013.

The victim has no right to file a claim with the Legal Services Authority for compensation or compensation enhancement. However, if the criminal is not recognised, the victim/dependent has the right to approach the authorities without the involvement of the court. This appears to be a legal anomaly that needs to be addressed because making such a distinction is irrational and illogical. There must be a centralised authority to rule on all compensation matters. They also do not provide for any effective participation of the victim in the Criminal Justice Process as envisaged by the restorative justice movement, thus making it an incomplete code. The new correction likewise accommodates no uniform plan of remuneration throughout India. Each individual state has been empowered to use their own discretion in formulating a scheme thereby making it a disparate one if implemented. Therefore, it may be reasonable to claim that the new law does not create clarity. It is merely a patchwork of legislation.

The interpretation of the Apex Court with regards to the real intention of Section 357 of the Code of Criminal Procedure which empowers the Court to award compensation to the victims of crimes, is elucidated in *Sarwan Singh v. State of Punjab*[17]. In this case, the Hon'ble Supreme Court has explained that-

> *"While awarding compensation under Section 357, the Court must consider the gravity of the crime and injury of*

[17] [1978] 4 SCC 111.

the victims and justness of the claim for the monetary compensation to the aggrieved".

Furthermore, in *Hari Singh v. Sukhbir Singh*, the Apex Court stated that compensation awarded under provision 357 of CrPC is in addition to the punishment, thereby not being ancillary in nature. [18] However, in situations where the victim cannot find the desired compensation, Section 482 can be exhausted by the aggrieved party for an alternative remedy.[19]

Furthermore, even the definition of victims as provided by the UN Declaration, 1985 is clearer and more comprehensive than this definition provided by the amendment. The definition of victim under CrPC is silent regarding situations where the perpetrator is not apprehended, convicted, identified or prosecuted. It falls short in taking cognizance of individuals who suffer whilst trying to aid victims in distress or help stave off victimization. The amendment has provided victims with a right to engage an advocate of their own choice and the right to appeal against any order but then it does not talk about indigent victims who are unable to exercise their own discretion in engaging advocates. Audio-video electrical means to record the testimony and statement of victims and witnesses have been provided for in this amendment. Also, the amendment has provided a

[18] [1988] 4 SCC 551.
[19] *Palanippa Gounder v. State of Tamil Nadu* [1977] 2 SCC 634.

comprehensive provision for enabling compensation to the victims of a crime.

From the analysis above, it is thus ascertained that a law has been enacted by the Indian Parliament for the victims of crime to serve and protect their interests. It affirms international standards and declarations. Nonetheless, any resemblance between the incorporated provisions of the Act with international declarations are few and far between, with the former being very narrow in scope as compared to the latter. Additionally, any compensation made available to the victims along with other effective remedies, depends primarily on the effective functioning of the Legal Services Authority.

Probation of Offenders Act, 1958

Section 5 of the Probation of Offenders Act, 1958 is another arrangement which accommodates victim remuneration in Indian regulation. It provides as follows:

> *"5. Power of court to require released offenders to pay compensation and costs. —*
>
> *(1) The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay—*

(a) such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) such costs of the proceedings as the court thinks reasonable.

(2) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of sections 386 and 387 of the Code.

(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section (1) in awarding damages."

By stating that the court may order payment of reasonable compensation to victims if it thinks fit gives the court the discretion to provide compensation.

Appointment of lawyer: Section 301(2) of CrPC allows a victim to instruct a pleader by providing as follows:

"If in any such case, any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution…"

Legal assistance to victims: Free legal aid has been provided under Section 12 of The National Legal Service Authority

Act, 1987 for members of Scheduled Caste and Scheduled Tribe, women or children, those mentally unwell, victims of trafficking and industrial workman among others specified in the provision.

Setting the law in motion: By lodging an F.I.R. under Section 154 of CrPC regarding the alleged offence, the criminal law is set in motion.

RESTORATIVE JUSTICE IN INDIA THROUGH LEGAL PRECEDENTS

Though the right to compensation is not expressly stated in the Indian Constitution. However, it has been acknowledged as an unlisted right through numerous judicial rulings. The courts in the country have acknowledged that the state is liable for the hardships caused to the victims on humanitarian and social welfare grounds, as well as on equitable justice grounds.[20]

Rudal Sah v. State of Bihar[21] was the first case in which the Supreme Court granted compensation for illegal detention, laying the groundwork for compensatory jurisprudence in Indian history[22], which was further refined in *Sebastian M. Hongray*[23], *Bhim Singh*[24], and many other instances.

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[20] Thilagaraj, R. and Liu J, *Restorative Justice in India: Traditional Practice and Contemporary Applications* (Springer, 2017) ISBN: 978-3-319-47658-2.
[21] [1983] 4 SCC 141.
[22] Vikram Raghavan 'Compensation through Writ Petitions: An Analysis of Case Law' (1994) 6 *Stud Adv* 97.
[23] *Sebastian M. Hongray v Union of India* 1984 SCR (3) 544.
[24] *Bhim Singh v State of J&K* [1985] 4 SCC 677.

The Court in *Saheli v. Commissioner of Police, Delhi*[25], held that compensation exists for corporal injury, which includes assault or battery, physical injuries, death and so on.

The Court declared in Saheli's *case* that an action for compensation arises for bodily damage, which includes battery, physical injuries, death, assault, false imprisonment, and so on.

In the early rulings, compensation as a remedy was analysed and the courts concluded that compensation would be granted only in relevant situations, which principally involve the right of life and liberty and cases involving wrongful imprisonment and unlawful killings.

Compensation in cases of violence against women, particularly serious crimes like rape, might, nevertheless, be considered apart from the rest, because not only basic rights, but fundamental obligations and directive principles, are at stake. [26] Victims of such crimes endure persecution from society for the rest of their lives, and they become lonely. They are humiliated by what others might think of them, and they may be afraid of leaving their homes for fear of a negative reaction from the outside world.

Nonetheless, it became obvious in later cases that the possibility had significantly expanded. It was because the Supreme Court frequently started considering social and

[25] [1989] SCR 488.
[26] Vikram Raghavan 'Compensation through Writ Petitions: An Analysis of Case Law' (1994) 6 *Stud Adv* 97.

economic rights under the purview of Article 21 of the Indian Constitution.

Because the Supreme Court has regularly included social and economic rights under the ambit of Article 21 of the Indian Constitution, compensation may be granted as a constitutional remedy for infringement of these rights.

The Indian Supreme Court is well-known for its judicial activism. The Hon'ble Court has also granted compensation to victims under writ authority in Compensatory jurisprudence. In another case, *Railway Board v. Chandrima Das*[27], the Apex Court awarded compensation to the victim of a rape crime.

In the case of *Suresh Balkrishna Nakhava v. State of Maharashtra*[28] a girl aged 15 was raped by the accused numerous times who never informed about the incident to anyone for a long time due to the threats she received from the accused. The trial court convicted the accused and an appeal was filed against the judgement of the trial court. The accused's wife filed an affidavit while the appeal was pending before the Hon'ble High Court citing her indigent background and pleaded that if the accused were imprisoned, her children and elderly parents would go hungry. In order to balance the interests of the victim and the accused's dependents, the court imposed a sub-minimum punishment

[27] [2000] 2 SCC 465.
[28] [1998] Cri LJ 284 (Bom).

under Section 376 of the IPC and ordered the accused's wife to deposit Rs. 4 lakhs for the victim's future upkeep. Here also it is incredulous that the philosophy of the proviso under S. 376 of IPC is protected or not. It is doubtful whether the court can take into consideration the amount deposited by the wife of the accused a wealthy family are ample reasons for awarding a sub-minimum sentence. This kind of reduction in sentence has been widely disapproved by the victim rights movement. Jeremy D. Andersen states:

> *"Although the victims' rights movement generally stresses retribution, and such notions do appear throughout criminal law sentencing, it is unclear why its use requires the reduction of criminal sanctions, as is seen in practice."*[29]

Even today, courts do not usually provide compensation to victims, and the subject of victimology is still in its infancy. Yet the Hon'ble Madras High Court in *In re Boya Chinnappa*[30] that came in 1950, awarded compensation to a victim of rape who was a girl of ten years. The Court acknowledged the importance of compensating jurisprudence even before the period of judicial activism. However, it is disheartening to observe how frequently our Courts in various regions of our country have forgotten this,

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[29] Jeremy D. Andersen, 'Victim Offender Settlements, General Deterrence, and Social Welfare", The Harvard John M. Olin Discussion Paper Series; Alan T. Harland, "Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts' (1982) 30 *UCLA L. REV*. 52.
[30] (1950) 2 MLJ 766 b.

resulting in the complainant getting doubly victimised during the trial.

In 1931 the Madras High Court said that a woman's modesty was not a matter to be taken lightly. In *A.D. Narayan Sah v. Kannamma Bai*,[31] the Madras High Court granted compensation to a lady who claimed she had been defamed for being unchaste. Following the decision in *P Parvathi v. Mannar*[32], it was determined that a claim for damages based on such accusations was viable even in the absence of proof of exceptional damage.

The Supreme Court observed the State's responsibility to pay victims and defined boundaries for assisting rape victims in *Delhi Domestic Working Women's Forum v. Union of India*[33], wherein the Hon'ble Court ordered the formation of a Board for compensation to rape victims for criminal injuries. The Supreme Court stated that the board should pay compensation whether or not the accused is convicted. The Supreme Court outlined the rationale behind this suggestion as follows:

> *"It is necessary, having regard to the directive principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incurred substantial financial loss.*

[31] (1932) 62 MLJ 608.
[32] (1884) I.L.R. 8 M. 175.
[33] [1995] 1 SCC 14.

Some, for example were too traumatized to continue in employment. Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of the child but if it is occurred as a result of rape."

The Supreme Court of India, in *State of Gujarat v. High Court*[34] of Gujarat observed that legislation should be enacted by the State for the purpose of setting aside a certain fraction of prisoners' wages to financially compensate the deserving victims. This can be done either directly, by establishing a common fund or in any other manner deemed feasible by the State. The victim is unquestionably entitled to reparation, restitution, and the protection of his rights. If the victim of a crime is not given justice, criminal justice is rendered hollow. The Court went on to say that while an honour or a life cannot be repaid, monetary compensation can bring some satisfaction. However, the right to victim compensation and victim orientation is practised hardly in a few cases across the country. In a very recent judgement of the trial court at Kottayam, *State of Kerala v. Bishop Franco Mulakkal*[35] it seemed like the court had put the rape survivor on trial instead of the accused, and has gone about nitpicking and

[34] [1998] 7 SCC 392.
[35] C.P. No. 15/2019 of J.F.C.M. Court – I, Pala.

disbelieving her. The judgement was a travesty since it put the victim on trial instead of the accused. It overturned the criminal jurisprudence and completely disregarded the law of the land in the words of renowned criminal law practitioner Rebecca M John, Senior Advocate at the Supreme Court of India.

This shows that the sentencing policies of the Indian Judiciary are insufficient in providing justice to victims of sexual assault.

CONCLUSION AND RECOMMENDATIONS

The discussions carried out in this article justify the hypotheses made by the author i.e., adequate compensation and support services to the victims are imperative for an integrated and effective criminal justice administration. This article takes an in-depth objective, analytical and comparative study of the aforementioned issues concerning the concept of victim compensation and the role of a victim in various stages that encompass the process of investigation, inquiry, trial, and witness examination in the Code of Criminal Procedure, 1973 to the extent necessary in relation to the subject matter along with other provisions in different statutes as well as precedents that have dealt with victim compensation. In the modern criminal justice system, increased awareness and understanding of the victims and the role they play have been observed. However, it can be simultaneously observed that the laws are still very feeble in India as compared to other jurisdictions and therefore, watertight laws

concerning compensation are a pressing priority / urgent necessity, especially in cases of atrocities against women.

Although there are some encouraging signs in the amendments and provisions included/integrated into the Code of Criminal Procedure, 1973 along with some judicial precedents which promote compensation to victims of heinous crimes, they are insufficient and must be revised with a new perspective in the criminal justice system in accordance with a new set of international norms. It would be incorrect to believe that the Apex Court is wholly unconcerned about victims' rights, for there have been cases where the Court has provided victims justice and paid them for the pain and suffering that they have had to undergo. In India, the introduction of the Victim Compensation Scheme, guidelines for the Central Victim Compensation Fund Scheme (CVCF), and revisions to the CrPC in 2008 and 2013 demonstrate that victims of crime cannot be overlooked and providing compensation and support services is one way to make amends for the injustices done to them. Nonetheless, victims' rights must be preserved by closing gaps and loopholes in the legal system in order to make it more responsive and just for everybody.

For gang rape survivors in India, the proposal of The National Legal Services Authority's (NALSA) scheme is to pay a uniform compensation of a minimum of five lakh rupees and a maximum of ten lakh rupees. Whereas, for victims of unnatural sex assault and rape, the said scheme awards a minimum

compensation of four lakh rupees and a maximum of rupees 7 lakh. It is also seen that in the case of an acid attack victim whose face has been disfigured, the minimum compensation awarded is seven lakh rupees and the upper limit goes till 8 lakh rupees. In acid attack cases, if the injury is more than 50%, a minimum compensation of rupees 5 lakh and a maximum of rupees eight lakh is to be awarded. However, a uniform compensation for rape survivors should be present and the scheme should be a source of financial solace for victims of sex crimes and acid attacks during trial proceedings as well. Also, it is absolutely necessary to make a child victims of sexual assault inclusive scheme.

Furthermore, there is an urgent need to rewrite and clearly identify the rights of crime victims in the provisions of the criminal justice delivery system. Despite the fact that the Indian government has taken significant steps to combat violence against women, these heinous crimes have not ceased completely and continue to ruin the lives of the victims. Furthermore, in comparison to European countries, the Indian government's initiatives are less focused on the rehabilitation of victims of these heinous acts. The victims' situation worsens because there is no clear rule governing compensation and rehabilitation. The Central Government's compensation program for financial aid to victims has various flaws, such as the sum supplied under the compensation scheme being insufficient and not based on any scientific methodology to restore the victims' lives. Also, there is a lack of uniformity in the laws for compensation across the country

for the same crime, which should not be the case. Furthermore, the delay in providing compensation makes it difficult for the victims of such crimes to rebuild their lives. As a result, the current scenario necessitates specific legislation to offer victims restorative justice.

Taking cues from other foreign countries, model legislation should be drafted by establishing an independent Board. Additionally, separate funds should be created for compensating the victims of crime. As previously stated, it is the State's responsibility to offer justice to the victims, which includes equitably compensating them. In addition to monetary settlements, "fair recompense" should include non-pecuniary damages and related support. Another important idea is to use the Restorative Justice system and a victim-centred criminal justice system. Victims of crime should not be left in tears in the current context of the worldwide growth of the Human Rights movement, and it is important that justice should be served. It is important that the victim does not lose faith in the justice system. There is a need for strict compensation regulations in order to make up for the trouble that the victim had to go through. It is the need of the hour to take the concept of reparative justice a step further and create a parallel and effective remedy through separate legislation where a victim can seek compensation regardless of whether the accused is convicted or not.

SERIOUSNESS OF INJURY AND RESULTANT DEATH VS. INTENTION TO INFLICT INJURY- AN EXEGESIS FOR AN EFFECTUAL COMPREHENSION OF SECTION 299 AND 300 OF INDIAN PENAL CODE, 1860.

Mr. Priyadarshi Jha[1]

ABSTRACT

"Law's finest hour is not in meditating on abstractions but in being the delivery agent of full fairness."

- Just. V.R Krishna Iyer,
in his judgement in *Jasraj Inder Singh v. Hemraj Multanchand*[2].

Complexities in understanding human mind manifests itself in a remarkable fashion in a murder trial where a judge is required to traverse the human mind of an accused via his conduct/action in order to ascertain whether or not the case falls within the ken of Section 299 or 300 IPC, 1860. Albeit, the gamut of the said provisions and how one should approach in a given case has been

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[2] (1977) 2 SCC 155.

explained beautifully in various judgements, but it still boggles the mind of lawyers and practitioners. The thrust of the arguments advanced here is that seriousness of the injury and the resultant death are not always conclusive of the intention or knowledge of the accused. There is a pressing need to decouple both the ideas. Punishment is to be inflicted based on the mental setup of the accused, which could be intention or knowledge, and not by solely focussing on consequence of the act. Indubitably, seriousness of the injury and the resultant death helps in ascertaining the mental element of the offence but that may not be the case always.

Keywords- *Intention, Knowledge, Murder Trial, Resultant Death, Seriousness of the injury, etc.*

INTRODUCTION

Interpretation of law falls in the jurisdictional realm of the Judiciary. However, especially in the case of Criminal Trials, along with it comes the onerous burden of understanding the human nature and mind. These rudimentary inquiries could be aptly labelled as questions of fact, that a judge needs to answer in order to inflict punishment, correctly. These questions when sought to be answered by a judge, who indubitably is learned in law, the concerned judge would be required to grapple with some knotty questions relating to human nature and conduct. Therein he may be, left off guard to deal with some questions related to human actions, having no guidance. Seldom precedents would come to

his rescue as each case, subject matter of a Criminal Trial, hinges on its own peculiar facts and factoids.

These questions would require patient examination from a judge of the human conduct, mostly relating to the ascertainment of certain basic questions on which the penal liability hinges such as whether the accused was rash or negligent, whether he had the requisite intention or knowledge, whether the act done by the accused was executed in due pursuance of a sudden and grave provocation effected from the other side etc. In other words, a proper study of the human mind is required to be undertaken, by the study conduct which is nothing but the manifestation of such mental set up. Any failure, while engaging in appreciation of such facts and consequently, the question of facts, might result in rendering the accused person vulnerable to higher punishment. Naturally, a heavy duty befalls even on the Counsel of the accused to detect the true nature of the case and thus present every possible aspect of defence that could be taken. Thus even the Counsel is under a duty to have sound understanding of human mind which willy-nilly could be understood only by its conduct and surrounding circumstances.

THE THRUST OF THE ARGUMENT

Recently the judgement rendered in the case of *Anbazhagan v. State*[3] wherein Justice Pardiwala, beautifully

[3] 2023 LiveLaw (SC) 550.

enunciated the distinction between 1) Section 299 and 300 of the Indian Penal Code, 1860 and 2) the distinction between Section 304 Part I and Part II. These distinctions, as struck by the court, assume importance for the fact that, these core nuances of the provisions relating to the penal liability still seem to boggle minds of the judges and practitioners.

This study is not going to undertake the survey of the all the important decisions pertaining to the discourse of Culpable Homicide and Murder rather it tries to bring to attention of the readers, a nuanced point which is mostly ignored by the legal practitioners and students.

It must be made clear that seriousness of an injury, which resultantly causes death, may in certain circumstances be helpful for the court to ascertain the mental element, be it intention or knowledge, of the offence. In other words they tend to coincide some time. But that may not be the case always and there exists a perceptible difference between the intention or knowledge of the accused and the seriousness of the injury that results in death. Just because by dint an act death has taken place, that by itself may not be conclusive of the intention of the accused to cause death or knowledge of the accused that he knew that his action was likely to cause death. The liability is to be fastened based on the mental set up of the accused. The inquiry that must be undertaken is whether or not in the given circumstance can it be said, beyond reasonable doubt, that the accused intended to kill or whether the

accused could be attributed with the knowledge that he knew his act was likely to cause death?

Upshot of the said argument is that, the liability is to be fastened on the basis of mental frame of the accused while committing the offence and not by focussing on the seriousness of the injury and the resultant death. It is stated at the cost of repetition that intention or knowledge could be inferred from the seriousness of the injury or the resultant death, but that may not be the case always and conflation of both would result in miscarriage of justice.

Unerringly, the argument raised above could have confounded some of our readers, if not all of them. The later part of this paper would unpack some of these ideas with vivid illustration in order to effectually convey the arguments.

SCIENTIFICITY OF THE INDIAN PENAL CODE, 1860 AND ITS IMPORTANCE

The allegation of Indian Penal Code, 1860 (hereinafter the IPC) being an archaic legislation is made at the drop of a hat. But the argument that IPC is old and archaic has to be accepted with a pinch of salt. This would be clear once a careful perusal of the IPC is done and for that the devil, Lord Macaulay, must be given his due.

Gradation in the Scheme With Respect To Offences

Once the survey of all the provisions is conducted it is clear that framers of the IPC envisaged a gradation in the seriousness of the offences. This could be understood with this flowchart.

1. Assault- Section 351 of the IPC, which denotes the *apprehension of use* of *criminal force* which would occupy the lowest position in the list of seriousness.

2. Criminal Force- Section 350 of IPC which defines *intentional use of force* to commit an offence or to cause annoyance, fear or injury.

3. Hurt- Section 319 IPC. Herein one should not forget that within the category of hurt, there would be various aggravated variations of hurt like Section(s) 328 which defines causing hurt by means of poison; Section 330, which defines voluntarily causing hurt to extort confession; and Section 332, which defines voluntarily causing hurt to deter public servant.

4. Grievous Hurt- Section 320, IPC. As mentioned above, likewise even in the category of grievous hurt, we would have variegated aggravated forms of grievous hurt such as Section 331, 332, 338 etc.

5. Culpable Homicide-Section 299, IPC.

6. Murder- Section 300, IPC.

The aforementioned scheme fleshed out would evince that there exists a conspicuous gradation in the seriousness of offence, which closely hinges on the *actus reus* and *mens rea* of the accused. From 1 to 6 it is clear that seriousness of offence increases. This is done to bring home the point that while adjudging a case, a judge has to be careful in understanding the nature of the act so as to cautiously gauge the *mens rea*, for there exist a gradation at every step.

Gradation in the Scheme With Respect To Mental Element

Bare perusal of Section 299 and Section 300 would show that what distinguishes a murder from culpable homicide, apart from the mental element, is the degree of certainty of death which is evinced by usage of certain terms and phrases. For example limb 2 of Section 299 uses *'intention of causing such bodily injury as is likely to cause death"* and limb 3 of Section 300 uses '*intention of causing such bodily injury to any person and that such intended bodily injury is sufficient in the ordinary course of nature to cause death".*

Another example could be limb 3 of Section 299 which uses *'with the knowledge that he is likely to cause death'* and Section 300 fourthly adds that *'act….is so imminently dangerous, that it must in all probability cause death'*

Dealing with the term '*likely' and 'sufficient in the ordinary course of nature'* Supreme Court in the case of *Prasad Pradhan v. State of Chattisgarh*[4] held that-

> *"The word "likely" in clause (b) of Section 299 conveys the sense of "probable" as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature."*

Thus the upshot of the said discussion is that there exists a gradation in the IPC with respect to the seriousness of the offence and mental element in Section 299 and 300 differs in terms certainty of causing death and one has to be cautious in order to place the act safely either within the ken of Section 299 and Section 300. The Judge is under a bounden duty to ascertain the mental element behind the act in order to properly inflict punishment in consonance with the scheme of the IPC.

Thus here in it would be proper to summarise the difference between Section 299 and 300 by referring to *R. Punnayya v. State of Andhra Pradesh*[5]-

[4] 2023 SCC OnLine SC 81.
[5] 1977 SCR (1) 601.

"Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300..... In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if

overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree.....

For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature."

It is here that we may refer as to Rajwant Singh v. State of Kerela,[6] which lays down the process as to how one should approach a case of death, to see whether it is murder or culpable homicide. The initial inquiry to be contemplated pertains to whether the accused has engaged in an act that has resulted in the death of another individual. The presence of a causal link between the accused's actions and the resulting death gives rise to a subsequent stage of analysis, wherein the determination is made as to whether the accused's actions can be classified as culpable homicide as outlined in section 299. If the response to this inquiry is negative, the offence would be categorised as culpable homicide not

[6] AIR 1966 SC 1874.

amounting to murder. It would be subject to punishment under either the First or Second part of Section 304, depending on whether the second or third clause of Section 299 is deemed applicable. If the question is answered affirmatively, but the cases fall under any of the exceptions listed in Section 300, the offence would still be considered culpable homicide not amounting to murder, which is punishable under the first part of Section 304 of the Code.

Seriousness of Injury and Resultant Death v. Intention of the accused

This part of the paper apparently could be brushed aside for the simple fact that this pertains to the hackneyed discussion of the difference between intention and knowledge. Admittedly so, but its value is in great proportion. Hari Singh Gour in his 3rd volume, while discussing the nature of intention and knowledge opined that-

> *"Intention and knowledge are the internal and invisible acts of the mind, and their actual existence cannot be demonstrated except by their external and visible manifestations. Observation and experience enable us to judge of the connection between men's conduct and their intention. And this has led the judges to formulate the rule that every sane person of the age of discretion is presumed to*

intend the natural and probable consequences of his own act"[7]

However what must be stated at this juncture is that the said rule of presumption is not a substantive principle of law. It is a maxim of great evidentiary value. Glanville Willaims adverting to the said doctrine opined that-

"It is now generally agreed in conformity with this opinion that the maxim does not represent a fixed principle of law, and that there is no equipartition between probability and intent. This was pointed out by Stephen, although his words for some time had little effect upon the language used by judges. Recently Denning, L.J., said: "there is no "must" about it; it is only "may". The presumption of intention is not a proposition of law but a proposition of ordinary good sense."

Further it was opined that-

"Foster stated that every killing was presumed to be murder until the contrary was shown and this statement was unintelligently copied from one text book to another although it was contrary to the funda- mental presumption of innocence. The

[7] HS Gaur, *Penal Law of India* (7th Edn , Law Publisher India pvt ltd, Delhi 2009) 2391-92

> *heresay was extirpated by the House of Lords in Woolmington, which decided that there is no persuasive presumption of murderous malice and that when a defence to a charge of murder is accident or provocation the burden of satisfying the jury still rests on the prosecution. Lord Sankey said: 'if the jury are left in reasonable doubt whether the act was unintentional or provoked, the prisoner is entitled to be acquitted, i.e. of murder".*[8]

Thus Supreme Court in *K. M Nanavati v State of Maharashtra*[9] held that-

> *"As in England so in India, the prosecution must prove the guilt of the accused, Le. it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt"*

Thus from the reading of the aforementioned cited paragraph it is clear that intention/knowledge has to be inferred from the

[8] G.L Williams, *Criminal Law: The General Part*, (Stevens and Sons, London, 1953) 81.
[9] AIR 1964 SC 1563.

conduct of the accused and as pointed out by Glanville William the rule of presumption as to the inference of intention from the consequence is a rule of prudence not a rule of law . Further it is clear that the idea expatiated in CJ Ellenborough could not be considered to be apposite in all the fact situations. In other words, just because a *'highly injurious consequence'* has ensued, it does not mean, invariably, that the act was intended. The prosecution is under a bounden duty to prove the ingredients of the offence. Intention/knowledge, being a subjective phenomenon, has to be proved positively by the prosecution beyond reasonable doubt. If in case there doubt is there, the benefit of the same has to go to the accused.

Difference Between Intention And Knowledge And The Final Argument

For here it becomes important for us to once again focus on the definition of intention and knowledge. The framers of the Indian Penal Code have decidedly used two terms *'intention' and 'knowledge'* as both of these words connote different ideas. Intention is simpler terms could be defined as a mental set up where once person wants to positively bring about a consequence and takes action in pursuance of such mental setup. However knowledge is nothing but the awareness of the consequences.

Kenny in his book *Outlines of Criminal Law* opines that-

"To intend is to have mind a fixed purpose to reach a desired objective: the noun 'intention' in the present connexion is used to denote the state of mind of a man who not only foresees but also desires the possible consequence of his conduct..... It will be noted that there cannot be intention unless there is also foresight, since a man must decide to his own satisfaction, and accordingly must foresee, that to which his express purpose is directed. Again, a man cannot intend to do a thing unless he desires to do it."[10]

Further Russel is of the view-

"In the present analysis of the mental element in crime the word 'intention' is used to denote the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so. He shapes his line of conduct so as to achieve a particular end at which he aims..."[11]

In other words an act done with the knowledge that certain consequences would ensue is not the same thing that such consequence should happen. Mere foresight of the consequence is not something that will result in attribution of intention to bring

[10] J.W.C Turner, *Kenny's Outlines of Criminal Law* (17th Edn, Cambridge University Press, 1962) 31.
[11] J. W.C Turner, *Russell on Crime* (Vol 1, 12th edn., Stevens & Sons Ltd, 1964) 40.

about such consequence. Thus intention is a positive mindset which actively churns to bring about a particular consequence.

What is sought to be accentuated here is that the degree of offence and subsequently the degree of punishment depends upon the intention or knowledge. This could be understood with the help of an example. Suppose a person kicks another in the stomach and subsequently that person dies. Indubitably, death is caused but that may not be the sole factor which is be taken into consideration to afflict penal liability. Here it cannot be stated that he intended death of the deceased. But if the accused had the knowledge about the enlarged spleen of the deceased and knowing that the kick is given, this would increase the penal liability as he had some extra knowledge about the medical condition of the deceased.

The Final Argument

Indubitably the degree of offence, that is, whether the offence committed is culpable homicide amounting to murder punishable under Section 302 IPC, or Culpable homicide not amounting to murder punishable under first part of Section 304, or Second part of Section 304, hinges on the degree of knowledge or intention.

First limb of Section 299 and *Firstly* of Section 300 shows that whoever causes death with the intention of causing death. Seldom

cases would fall under this head and they are easier to prove. For example, indiscriminate fire on a mob.

The argument advanced above basically deals with the cases of limb 2 of Section 299 and *thirdly of* Section 300.

Intention is used at two places in Section 299 IPC A) Intention to cause death (limb 1) and B) Intention to cause such bodily injury as is likely to cause death (limb 2). Part B could be referred *thirdly* of Section 300. The distinction with respect to (between part b of Section 299 and *thirdly* of Section 300) certainty of death is highlighted above. However in both B and *thirdly, the intention is not to cause death, but to cause bodily injury*[12]. If it is showed that the person concerned, keeping in mind the surrounding circumstances, had no intention then the case would not even cross the field of Section 299. Then, the next inquiry that should be made is to check whether the accused could be attributed with knowledge. If answer to this inquiry is a 'yes', then this case would fall within the third limb of Section 299, that is, *'with the knowledge that he is likely to cause death'* and consequently he would be punished under part 2 of Section 304.

On this count it was observed by Justice Pardiwala, in *Anbazghan Case(supra)-*

[12] R. Jethmalani and D.S Chopra, *The Indian Penal Code, A Concise Commentary*, (Vol. 1, 1st Edn, Thomson Reuters, 2017) 1081.

"The question is, was there any need for the Court to take recourse to Exception 4 to Section 300 of the IPC for the purpose of altering the conviction from Section 302 to Section 304 Part II of the IPC. We say so because there is fine difference between the two parts of Section 304 of the IPC. Under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC."

Thus according to Section 300 thirdly, it is clear if it is done with the *intention of causing bodily injury to any person* and the bodily *injury intended* to be inflicted is sufficient in the ordinary course of nature to cause death, then it would be murder.

Thus herein it could be stated with utmost certitude that as a judge in such cases what is required to be done is to see whether the injury was *intended*. If the defence can demonstrate that the accused, as a result of an intervening circumstance, either unintentionally (or accidentally) or due to some mitigating factor, such as being subjected to verbal abuse, caused harm to the victim, it would not be appropriate to conclude that the accused is guilty of the offence of murder. In either scenario, it is evident that the accused cannot be ascribed with the intention to inflict such injury

or the intention to cause death. At least, what could be attributed is the knowledge.

We may here profitably refer to the case of Jagrup Singh v State of Haryana[13]-

> "The whole thing depends upon the intention to cause death, and the case may be covered by either clause 1stly or clause 3rdly (of section 300). The nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant upon the death"

Now we may here refer to the *locus classicus* on the said issue, that is, the case of Virsa Singh v. State of Punjab[14]. Justice Vivian Bose pithily opined that-

> *"23. … With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap."*

What essentially was held in the case was the inquiry pertains not to the accused's intention to cause a serious or trivial injury, but

[13] 1981 3 SCC 616.
[14] 1958 SCR 1495.

rather to their *intention* to cause the specific injury that has been established. If the individual is able to provide evidence that he did not commit the act in question, or if the overall circumstances support such a conclusion, then it can be argued that the required intent specified in the section has not been proven. The primary focus of inquiry is not centred on the accused's intention to cause death or a specific level of harm, but rather on whether the intention was to cause the specific injury in question. However, the presence of intention is a question of fact not a question of law.

The determination of the severity of a wound, regardless of whether it is serious or not, is an entirely separate matter from the question of whether the accused had the intention to cause the specific injury.

To buttress the argument we may refer to a few decided cases of the Supreme Court of India, to show that the inquiry should relate to the mental setup of the accused and not the severity of injury or consequence of death. In cases where a single blow or even multiple blows with not so deadly weapon, is given due to provocation or on abuses being hurled or on sudden fight, it could not be said that the accused could have the mental balance to consciously want to bring about a consequence. At most what could be attributed to such person is knowledge. Supreme Court of India, after doing a survey of several cases of the similar nature

as highlighted above where the blows are given due to some provocation held that[15]-

> *"The Supreme Court took into consideration the circumstances such as sudden quarrel, grappling etc. as mentioned above only to assess the state of mind namely whether the accused had the necessary intention to cause that particular injury i.e. to say that he desired expressly that such injury only should be the result. It is held in all these cases that there was no such intention to cause that particular injury as in those circumstances, the accused could have been barely aware i.e. only had knowledge of the consequences. These circumstances under which the appellant happened to inflict the injury it is felt or at least a doubt arose that all his mental faculties could not have been roused as to form an intention to achieve the particular result. We may point out that we are not concerned with the intention to cause death in which case it will be a murder simplicitor....."*

In another case[16] the accused swore people outside the deceased's residence. The deceased walked out of his house and

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[15] *Jai Prakash v. State (Delhi Admin.)*, (1991) 2 SCC 32; *Chamru v. State of Madhya Pradesh*, AIR 1954 SC 652; *Kulwant Rai v. State of Punjab*, (1981) 4 SCC 245; *In Hem Raj v. State (Delhi Admn.)*, 1990 Supp SCC 29.
[16] *Tholan v. State of Tamil Nadu*, AIR 1984 SC 759.

told the accused to go and not use foul words around women. The accused questioned the deceased's right to order him out. The accused fatally stabbed the dead in the right chest during the fight. The accused was found guilty under Section 304 Part II but not Section 302.

The factors considered by the Court in this case were as follows: (i) There was no established connection between the accused and the deceased, and the presence of the deceased at the time of the incident was purely accidental. (ii) The altercation between the accused and the deceased occurred spontaneously, and the accused struck a single blow out of anger after the deceased asked him to leave the location. (iii) The necessary intention to cause harm could not be attributed to the accused, as there was no evidence suggesting that the accused intended for the blow to land specifically on the right side of the chest, which ultimately resulted in a fatal injury.

In the case of *Willie (William) Slaney v. The State of Madhya Pradesh*[17], a similar situation occurred where a sudden quarrel resulted in an exchange of verbal insults, and in the heat of the moment, a single blow with a hockey stick was inflicted on the head. The Court determined that this act constituted culpable homicide falling short of murder, as defined in Section 304, Part II of the law, and was therefore subject to punishment.

[17] AIR 1956 SC 116.

All these cases would go on to demonstrate the point that, the surrounding circumstances within which such event of death took plays a pivotal role in ascertaining whether or not the accused carried the mental element of intention or knowledge. The circumstances surrounding the appellant's actions raise doubts regarding their mental capacity to develop an intention to attain the specific outcome of inflicting the injury.

At last before parting, we may refer to a recent Supreme Court judgement rendered on 1st of August, 2023, just eleven days after the judgement of *Anbazaghan(supra)* was rendered, which failed to follow the settled law. Interestingly enough the author of the Anbazaghan (supra) was also a part of the bench.

In this case[18], the assailant-mother had a strained relationship with the deceased-husband. Bickering(s) were a commonplace and thus they used to live separately. One day when the assailant went to the deceased to ask for some money for their daughter as she wanted to go for NCC camp. Arguments ensued, as usual, and during the course of the altercation the assailant picked up a stick lying nearby and gave blows (The judgement does not specify the number of blows. It simply uses the term 'blows'. Indubitably it is clear that, insofar the attribution of knowledge is concerned, some serious doubt could have been raised by the defence. Thus if two interpretation are possible from

[18] *Nirmala Devi v. State of Himachal Pradesh*, 2023 LiveLaw (SC) 585.

the evidence, such interpretation be chosen, which benefits the accused) on the head of the accused.

In this case, inexplicably, the learned judges attributed intention to convict and extended the benefit of exception 1, that is sudden and grave provocation, which is nothing but a distortion of the line of legal reasoning of the Supreme Court. Even in this it could be said that, due to the fight and altercation, convict intended to bring about a consequence, that is death of the accused.

Further it is argued that, in this case keeping in mind the nature of the weapon, which is a stick and number of blows (which is unclear) even though on a vital part of the body, it cannot said or proved beyond reasonable doubt that the offender knew that by those strokes of stick, that death was the likely result. In other words, even no knowledge could be attributed. Thus this case was fit for conviction under Section 323 of the IPC, that is, voluntarily cauisng hurt.

CONCLUSION

The primary contention put out in this discourse is that the severity of the harm inflicted and the subsequent loss of life do not always serve as definitive evidence of the accused's purpose or awareness. The imposition of punishment should be determined by the mental state of the accused, such as their intention or knowledge, rather than just focusing on the outcome of the action.

The Supreme Court considered circumstances, such as sudden quarrel and grappling, solely for the purpose of evaluating the accused's mental state. Specifically, the court sought to determine whether the accused possessed the requisite intention to cause the specific injury in question, indicating a clear and deliberate desire for such injury to be the outcome. In all of these instances, it was established that there was no explicit intention to cause the specific injury in question. Rather, it can be argued that the accused had only a limited awareness or understanding of the potential repercussions in that particular circumstance. The circumstances surrounding the appellant's actions raise doubts regarding their mental capacity to develop an intention to attain the specific outcome, suggesting that their mental faculties may not have been fully engaged.

IDEOLOGY OF GOOD GOVERNANCE AND THE ROLE OF THE SUPREME COURT IN THE IMPLEMENTATION OF GOOD GOVERNANCE

Mr. Anurag Sharma [1]

ABSTRACT

Good governance, often synonymous with efficient government operations, encompasses several key principles essential for societal progress. It embodies the notion of a legitimate and authentic government, fostering a society where fundamental rights and the rule of law are paramount, alongside socio-economic fairness. The foundation of good governance rests upon various factors, including the fulfillment of constitutional duties by the government. It must possess the capability to promote proper human development, leveraging its authority effectively. Central to this concept is the creation of a responsible, participatory, and democratic government, ensuring transparency and accountability in its operations. A good government exemplifies stability and reflects the diverse voices of its populace. It is tasked with driving economic development and ensuring the well-being of all segments of society. Transparency is a cornerstone of good governance, facilitating open public participation in policy formulation.

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While this inclusivity carries the risk of distortion by certain interest groups, it remains a universally acknowledged principle for effective governance. However, accessibility to accurate information poses a challenge for many citizens, limiting their ability to engage meaningfully in the decision-making process. Transparency addresses this by providing free and direct access to government decisions and their implications. Ultimately, good governance entails an effective, efficient, transparent, and accountable government, committed to serving the interests of its citizens. By adhering to these principles, governments can minimize inconsistencies and foster a compassionate and responsive state, thus advancing the collective welfare of society.

Keywords: *Governance, Law, Equality, Government, Legislature*

INTRODUCTION

The term 'Governance' was first used in the 1989 World Bank study 'Sub-Saharan Africa - from Crisis to Sustainable Growth' with an aim to describe the importance and necessity of institutional reforms and an improvised and effective public sector in sub-Saharan countries. The study described governance as "the exercise of political power to manage a Nation's affairs".[2]

[2]World Bank 1989, p. 55.

This definition did not speak about the connotation of "good". BarbrConable (1986- 1991), former World Bank president, mentioned the term 'Good Governance' in the foreword, indicating "a public service that is effective, an administration that is accountable and a judicial system that can be relied upon by the citizens" In World Bank's 1992 publication 'governance and development' the concept of governance developed even more. This publication defines governance as the way in which power is utilized in handling a country's social and economic resources for the betterment and development of the country. Further, in 1994, the World Bank enunciated the definition," governance is incorporated by open, predictable and uplifted policy making, which is transparent. Good governance demonstrates the values of recognition of the rule of law, transparency and accountability, legitimacy of the government, freedom of association and expression, etc. all these can be achieved only when the right to information is properly enforced. Right to information can be said to be the hallmark of good governance.[3]

Therefore, it can be concluded that good governance depicts a co-operative way of governing those affairs in a see-through, competent, and efficient way, on the basis of the capability, validity, and unanimity to promote the individual rights of the citizens and the interest of the public at large. Therefore, this appears a political agreement in order to ensure

[3] B. PramelaKumari, Right to Information and Good Governance in India: A Critical Analysis, (Andhra University, Visakhapatnam) (OUP 2006).

the material betterment of society and social justice with sustainable development.[4]

IMPORTANT ELEMENTS OF GOOD GOVERNANCE

Advancing National Outlook: Improving and sustaining a national outlook is the precondition in promoting good governance. It includes, as in civil and political service, the enthusiasm to accept and tolerate different opinions, cultures, work styles, the highest level of mannerism and performance of judgment and limitations in all the communication of views (public or private), any expression which can be inferred as intolerant, filled with prejudice or discriminatory (regarding religion, culture, regional or political interest) which the organization has met with, should be meticulously avoided. Need to reduce the rift between theory and practice: The Union and State governments promise many essentials of constitutional provisions, and administrative and enactment orders, but any of it is rarely gained in practice. Indiscrimination between politico-administrative authority: For good governance the first important characteristics needed and essential for the civil servants or fairness and perseverance in the public business transactions. Civil servants should be absolutely fair and unbiased in order to avoid corrupt activities; and should maintain the prestige and

[4]Surendra, Munshi, Good Governance, Democratic Societies and Globalization, Sage Publications, New Delhi, 2000.

responsibility of the public office. They should scrupulously carry out the policies and programmers as given in the rules regulations and laws. Importance of politico-administrative authority in management: Good Governance is the important key factor for maintaining the balance and improvement of the country and the welfare of the people. Gathering from the history of many countries, it clearly appears that immense moral deterioration creates disputes, hardships, and even dissolution of the country. The rules of civil service need the servants to preserve purity and sincerity while discharging their duties. These are humans and not pieces of furniture, and they have problems and the servants are appointed to solve those problems. That authority is not given to sit back in comfort but rather to bear the burden of those responsibilities and to increase the awareness of the responsibilities of the chair. Necessity of protecting the people's interest: If the government is run keeping in mind the betterment of the people, then good governance can facilitate the welfare of the people. The main elements of good management for good governance are as follows:

a. Frankness and wide contacts with people administered;
b. Following the path of justice, parity, and nonpartisan while dealing with disputes.
c. Sympathy and kindness to the feelings, aspirations, and urges of the commoners.

d. Protecting the honor and morality of the humans, however humble they might be.
e. Humbleness, humility, and modesty in the people manning the administrative machinery and their convenience.
f. Making and maintaining an environment suitable for growth, development, and change in a social manner.
g. Being integral and honest in their actions and thoughts.

1) Necessity of injecting reformations and injections in the administrative system: Everyone should keep in mind the following aspects while promoting any administrative changes:
    a. A clear focus on the outcomes in terms of competence and capability and the quality of service.
    b. Substituting highly centralized hierarchical organizational structures with decentralized management environments, wherein the selections on resource allotment and service delivery are considered closely from where feedback is easier to gain from the clients and other groups.

c. There is a free and relaxed system that may give alternatives to public provisions, which may prove to be more cost-effective.
d. New organizational administrative policies to facilitate more flexible employment of staff.
e. Usage of various mechanisms for the betterment of performance such as performance contracting and invention of marketplaces that are competitive in and among the public sector associations.
f. Motivation to enhance the performance by empowering organizations to maintain and preserve a part of the savings from the enhanced performance.
g. Upholding vital capacities at the center to force the Government to react to external variations and various interests faster, with relaxation and at minimum cost but with more responsive and transparent features according to the requirements to give the results.[5]

[5] "Department of Administrative Reforms and Public Grievances, Ministry of personnel Public Grievances, New Delhi, GOI, Document I, Action plan for an Effective and Responsiveness Government, IJPA, p. 628".

THE CONCEPT OF GOOD GOVERNANCE

Governance and good governance are frequently used nowadays in development literature. The increase in the evils in our society is the result of bad governance. International financial institutions and major donors like the International Monetary Fund (IMF) and World Bank have been aiding countries mainly to ensure good governance.

Governance and good governance are briefly explained in the following study. In recent times, the concept of good governance has gained much popularity in the fields of administration reforms and polity mainly due to the attention and priority given by the international community. Governance is somewhat synonymous with 'sound development management.' With the adherence to the rule of law, good governance emerged in the mid-1980s. After the breakdown of the Soviet Union and the resolution of the Cold War, governance came to be used as a reinvention of public administration in developing countries in order to make them more responsive and sensitive towards globalization and its needs. The concept of good governance is as old as the government itself. Those words have very similar meanings and have been derived from governance and government, French words that refer to the manner and acts of the government until the mid of 16th century, Government meant a system through which something is governed' but it evolved in the early 18th century as a 'governing authority'. As a result, the term

governance diminished by the 19th century, when it came to be known as 'an incipient archaism'. It is assumed that in the coming 100 years it will rarely be used in terms of politics. Dictionaries would probably define government as an agency and method of governing or archaic or in terms of governing authority taking into account its institutional framework and its political order.

In the 1980s, after the economic reforms and globalization, the term governance became famous for its importance in the manner and process of governing under the concept of sustainable development. The international media, World Bank, NGOs, IMF, and the UN with its agencies started using the term 'governance' in various ways. Good Governance with its root word governance has become a trending word in the administrative reforms and polity in developing countries that rely on international developmental agencies.

CONCEPT OF GOOD GOVERNANCE IN INDIA

The concept of good governance is as ancient as the Indian civilization. The rulers of the ancient times were restrained by the Dharma or more particularly the Raj Dharma, which aimed at ensuring good governance to and for the people. Although monarchy was followed at that time, there was no such theory that gave the kings any divine rights or power to rule arbitrarily. Raj Dharma means the code of conduct or the rule of law that was above the will of the ruler and controlled the entire king's action. The ancient Indian Scriptures like the Jataka tales,

AitreyaBrahmana, Shukracharyas'sNitisar, Panini's Ashtadhyayi, Shanti Parva-Anushasanparva of Mahabharat, Valmiki's Ramayana as well as the Kautilya'sArthashastra describe good governance. Arthashastra states the principles of good governance, along with that it states "if the people are happy, then the king will be happy, and therefore, the king should do and accept those things that please his people and not alone himself".[6]

EQUALITY BEFORE LAW AS A MEANS OF GOOD GOVERNANCE

The maxim *Rex Non-PotestPeccare* was never recognized in the Law of Antique India (Raj Dharma). The Dharma was deliberated as the Highest and the Base. The law had to be obeyed by the King. Brihdranyak Upanishadha is a principle that states that the Law is supreme and it is the King of the Kings[7] No man is above the law including the king. The weak become more powerful as compared to the strong when the supremacy of the king is combined with the Law. By stating that the law (Dharma) is the king of kings, it has been given a dignified position. It was also stated that the Dharma had control over the kings and that the kings had to perform their duties staying inside the structure of the Law (Raj dharma) and Legal Procedure (Vyavahar Dharma).

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[6]Arthashastra, Book I, Chapter XIX, p. 39

[7] *Swami Sivananda. (1985). The Brihadaranyaka Upanishad : Sanskrit text, English translation, and commentary. Shivanandanagar, Distt. Tehri-Garhwal, U.P., India :Divine Life Society,*

- No man is above the law (Dharma).
- Law and Government combined, make the weak persons stronger than the strong persons.

The concept behind this is the fact that all are equal in the eyes of the law and that the law will protect everyone whose rights have been infringed irrespective of their social strength. It is known that law alone cannot be of any use, it should be supported by the Government to be effective. As a result, as seen from our ancient history rulers were under the Dharma, but according to Western jurisprudence, law is deliberated as an order passed according to the rules to the persons in lower position by the persons in the higher position. But our jurisprudence does not accept that the superior is free from the clutches of the law. Contradictory to that, our principle states that the person who is politically superior is also controlled by the law which is supreme. It also states that it is the Government's duty to preserve the law's supremacy. In respect of this Atrismriti states that duties that are to be performed by the king include praising and respecting the noble persons, punishing the ones who have done wrong, tackling the litigants impartially, defending the nation, and increasing the funds of the government hence, it can be seen that all the basic rights and duties entrusted in the government have been stated by the shloka.

In Kautilya'sArthashastra it was recognized that the happiness of the king must lie in the welfare of his subjects and

that the king should do what is beneficial to the public at large rather than him alone.'[8]

GOVERNMENT AND GOOD GOVERNANCE

Government refers to the actions taking place inside a formal legal system, whereas, governance includes the activities of a government together with the activities that are informal even beyond a formal government system that are formed to achieve ordinary goals. James Rosenau described the government as, 'all those activities that are supported by formal authority, by the police to make sure that the constituted policies are duly implemented,' while governance according to him means, 'activities supported by the goals that are shared which may or may not be originated from legal and formally recommended duties and those not always depend on the police to survive defiance and obtain compliance'.

METHODS TO PROMOTE GOOD GOVERNANCE IN LEGISLATURE RESPONSIBILITIES

Methods to promote Good Governance in Legislature responsibilities have two aspects, different and correlated at the same time. First is essentially political but in a parliamentary form of government like India, where the executive is obliged to give a report of its actions and duties performed to the parliament, and

[8] *Kauṭalya. (1992). The Arthashastra. New Delhi ; New York, N.Y., USA :Penguin Books India.*

they have various contributions and devices to this goal. The second aspect is mainly majorly based on the administration wherein the executive holds the administrators responsible for various departments and public agencies for their actions in carrying out their obligations. Both these are interdependent on each other and together form the base of a responsible and accountable government.[9]

Thus, the parliament controls and keeps a check on the executive. It also has a whole bunch of activities and to that goal, it also has a set of immediate tools and opportunities, like the parliamentary questions, half-an-hour discussion, adjournment motions, zero-hour discussion, discussion on demands for grant, vote of no confidence, calling attention notice, etc. The different mechanisms and tools of implementation of the rules of responsibility fall into two different categories: the first category involves strategies that are converging and contemporary, and thus have everyday applications. Various opportunities related to the parliament such as discussion on demands for grants, 'zero hour' discussion, calling attention notice, interpellations, adjournment motions, vote of no confidence, half-an-hour discussion, etc. all fit into this category. Strictly speaking, this category of responsibility is under the nature of control.

[9] S. R. Maheshwari, Accountability in Administration: A Conceptual Framework, July-Sep, 1988, IJPA, p. 460.

The second category of responsibility is post-facto in nature, i.e. it stimulates after some action is done. This can be said to be a post-mortem done by way of evaluation of the work under scrutiny. After the event has occurred and the core of this type of investigation is to know why and how a certain item of work has been carried out, an audit and the many committees of Parliament take control. It is more related to accountability and responsibility than control.[10] There is no alternative in the hands of the executive but to follow the policies laid down by the legislature to set up good governance for the citizens if these exercises are taken seriously. The effectiveness and efficiency of administration and good governance are dependent on the quality and adequacy of the control that the legislature enjoys over the administration. To maintain a consistent and systematic hold over the administration is the duty of the representatives in the legislature. It should be remembered that the executive needs to abide by the policies stated by the legislature. The legislature by way of many constitutional agencies keeps checking the operations of the administrative operations so that the executive might not deviate from the policies. These are as follows: 1) Public Service Commission's at the Union and State Levels. 2) Comptroller and Auditor-General of India 3) Election Commission.[11]

[10] Ibid.
[11] S.L. Goel, Good Governance an Integral Approach, Deep & Deep Publications Pvt. Ltd., New Delhi, (2007), pp.61-62.

NECESSITIES TO PROMOTE GOOD GOVERNANCE AMONGST THE EXECUTIVE

Belief and perseverance of the esteemed personnel in Good Governance- the essential ingredient of an organization to achieve success is its leadership in administrative as well as political aspects. In order to convert the inputs of a program to its outputs (goods and services), leadership is very important. It is said that if it places a good man in a bad situation, the person will find a way to make it better, but on the contrary it places a bad man in a good situation, the person will make matters worse. No methodology can enable administrators who have lost faith in their work and in its performance. Facilitating Good Governance by way of ensuring responsibility, accountability, and responsiveness to the citizens. Facilitating Good Governance by Integrating the Nation. Facilitating Good Governance by ending the corrupt activities in politics and infusing basic ethics. Facilitating Good Governance by putting in more hard work than just paper planning by the Executive. Facilitating Good Governance by encouraging the people's participation. Facilitating Good Governance by sustaining an alert and alive administrative system. Facilitating Good Governance, especially in Police personnel to preserve law and order which is very important for peace and prosperity.

INDIAN JUDICIARY AND GOOD GOVERNANCE

The word 'judicial governance' by itself is controversial as the judiciary in no way can be associated with governance. Although, the effort of the judiciary of India to inculcate accountability in the working of the government institutions, and the development and growth of jurisprudence of human rights has depicted the fundamental importance the judicial governance. Also, the judiciary is enriched with the added responsibility of preserving the rule of law, as and when the organs fail to act in accordance with the judiciary, through the spirit of the Constitution. It only states that fast and cheap dispensed justice is the key ingredient of good governance along with a successful civil society.

GOOD GOVERNANCE AND JUDICIAL CONTROL

George Washington said that the first pillar of good governance is the administration of justice. People should have faith in the judiciary on the basis of its functioning for good governance. According to Lord Denning justice finds its base in confidence and when people with the right mind go away thinking that the judge is partial, the confidence is destroyed. The judges should not be deflected from their applications by any external influence by any threat of penalties, or by any expectation of bonus, by congratulatory compliment, or by indecent disgrace.

People gain confidence in the judges only on the sure knowledge of all of these.[12]

The laws must safeguard domestic technologies and trade to such a limit that they influence the citizen's welfare, National interest, and living. Experts are needed in the judiciary as well as the bar to efficiently manage the legal system of various Nations and safeguard the interests of companies carrying out trade and business with those countries. The welfare and betterment of the people largely depend on impartial, timely, and speedy justice. Lord James Bryce says that the efficiency of a judicial system is the best test of the excellence of a government and the rights of the man are guarded by the judiciary and it safeguards these rights from all potential individual and public encroachments. It is said that it has lost its favour, if it fitfully and weakly enforced the intensity of punishment that the lawbreakers are repressed. The darkness would become greater if the lamp of justice goes out in the darkness.[13]

PROPOSITIONS TO SET UP GOOD GOVERNANCE IN THE JUDICIARY

The right to a speedy trial is a constitutional right yet there are no guidelines for the same. Although such a right is nowhere directly present in the Constitution citing various cases of the

[12] "Nigro, Felix, Public Administration-Readings and documents, Rinehart and Co. Inc. New York, 1951, p. 439".
[13] Bryce, J., Modern Democracies, Valli, p.284.

Supreme Court it can be held the right of the accused to a speedy trial is implicit and flows out from Article 21 of the Constitution. Justice K. Venkatapathy, the Minister of State for Law and Justice said that each case needs to be examined based on its own facts and circumstances and that no fixed guidelines can be set by any court. Strict supervision is needed over the palace and lower courts and actions should be taken against corrupt policemen, judges, forensic experts, etc. Action needs to be taken against persons giving false witness. There is a need for laws that restrict witnesses from changing their statements and stories from time to time. Some of the people who died in the meanwhile case should be put behind bars so that in future cases people know that society will not tolerate murderers or liars. If middle-class anger is channeled in a systematic way, society can achieve a lasting and truly significant change in the society. Also changes in the system that make the police and courts more responsible will also prove beneficial to India as a whole. Changes in law are needed: K. N. Bhat's Article, “Manu’s Crime and punishment-change the Law and save lives in the Tribune"[14] explicitly stated that the right people will at the right place and at the right time bring about the right changes which will further bring right results, even in the presence of an imperfect operating system. Although these miracles generally do not take place in real life. Murderers cannot be stopped, but how many of them are required to bring the concern into action, by amending the laws and making an efficient

[14] “K. N. Bhat's Article, dated Dec. 23, 2006”.

and meaningful justice system? In the guest column of the Times group under the Article, “Indian judiciary: Delay is thy name” by V. Ranganathan,[15] it was suggested that to take up only those many cases that the judge could hear.

Good Administration and the role of the apex court in India, are doing an in-depth study in examining the governance and approaches towards the management to demonstrate how it becomes unsuccessful. A good and better administration makes sure that there is transparency, accountability, responsibility, efficiency, rule of law, decency, participation of citizens, and efficiency in the system. The main objective is to provide a standard public service so that it can be an advisor so that whoever is bothered with the governance of civil services with a framework not only for apprehending but also for applying for ordinary postulates. It also makes sure that it assesses the austerity and deficiency of ongoing governance and makes desirable changes.

The Interim applications which have been filed which include Misc./ Applications in the Interim year 2016 turn out to be 91. The total no. of pending appeals in the year 2016 turned out to be 889. Thus all in all it showed that organs of the government have performed well. Policies are made for the public and the law-making power which has to be governed under the overall operations. The conclusion of the research is it gives or highlights

[15] “In the guest column of Times group under the Article, “Indian judiciary: Delay is thy name” by V. Ranganathan 108”.

key points that have to be reviewed over a period of time to address issues such as e-governance, corporate governance etc. It also reflects on how effectively an organization will redress the issue; it will also add on how the further management of governance will take place. Hence the study will be focused on Good Administration and the role of the apex court in India. For the purpose of the study, need certain laws/Acts/ Regulation/ Reports etc.

- The Constitution of India 1950
- The International Covenant on Economic, Social, and Culture Rights. Jan, 3, 1976
- The Protection of Human Rights Act, 1993
- Rights to Information Act 2005
- World Development Report 2017
- World Bank Report 2017
- Annual report 2017-18
- Ministry of Power, Government of India 2017-18 Annual Report
- Business Report 2018
- United Nations Development Program
- Ministry of Law and Justice, Government of India, annual report 2014-15, 2016-17

On the 25th day of December 2014 in the remembrance of Atal Bihari Vajpayee who was the former Prime Minister of India

Good Governance Day is observed by enlightening masses to all sections of the society.

Another welcome move by the authorities is by e-governance. Such a welcome move was appreciated by all the administrative authorities, but later it had involved fundamental capacity. The move was such a hit in the era that administrative authorities in which they evolved various recommendations and other inputs were also added.

The main objective of Good Governance is for citizens to become aware of the administration becoming more and more transparent and bring in more accountability in the system. Needless to say, good governance also works on the enrichment of common citizens and to systemize the proper framework of the government. It also works on making effective policies in the system.

CONCLUSION

In preceding chapters, an analysis has been conducted on diverse facets encompassing Good Governance, the stipulations delineated within the Indian Constitution, and pertinent case precedents. Similarly, an exploration has been undertaken regarding the principle of the Rule of Law alongside an examination of power distribution, checks, and balances. A thorough investigation has been conducted into the significance of the Judiciary and its role in fostering Judicial Activism. Presently,

the landscape of Good Governance is confronted with an array of challenges necessitating strategic resolution.

As per the mentioned in previous chapters and material collected during research work, I have arrived on certain conclusions basis which I would like to make Good Governance as necessary for the development and progress of a nation vis-avis its citizens. In democratic countries like India, the public plays a vital role in the law-making process. It has been seen that society changes the law and law changes the society. For example, the Atrocities Act, Anti-Dowry Legislation, Anti-Sati Practice Legislation, etc. Therefore, it is necessary to give legitimate power to people to some extent in the process of law-making.

Indian Constitution provides for the separation of powers between the Legislature, Executive, and Judiciary. It is expected that every organ shall function within its sphere and would not encroach upon the sphere of other organs. At the same time, it is expected that there must be some kind of cooperation between the organs within the ambit of Constitutional provisions. In other words, it can be stated that every organ should adhere to the concept of the Rule of Law in the Indian context. They should not work in a bias-based or whimsical manner. For the successful functioning of Democracy and Good Governance, it is necessary that citizens should know the actions or acts of Government by which they are being ruled. People have the right to acquire essential information from the Government. In my opinion, the

Right to Information Act is a welcome step in this direction. Under this Act, people can acquire essential data from the Government. At the same time, e-governance should be encouraged. For good governance, transparency is a must. Similarly, the media i.e. press should be given independence. Under Article 21 of the Indian Constitution, every citizen has right the to live a life with dignity. It is the duty of the nation to make legislation that provides opportunities for citizens to lead a life with dignity. It is the duty of the state to see that no citizen dies of hunger. They should be provided with sufficient food. To achieve this objective, it is the right of a citizen to get employment with proper wages for purchasing necessities of life, i.e., food, clothing, and shelter. In my opinion, the National Rural Employment Guarantee Act, of 2005, now named as Mahatma Gandhi National Rural Employment Guarantee Act is a good step towards the right to work and food. However, there needs to be more such schemes to uplift the standard of living, which would help in avoiding malnutrition and deaths due to starvation. Law-making power lies with the legislature; but the Indian experience shows that there is a nexus between politicians, police, and criminals. Therefore, it is said that lawmakers have become lawbreakers. Hence, it is the need of the hour that legislatures should make such legislation providing for transparency of government and its accountability to its citizens. People should feel that the era of good governance has begun in India. For the good health of people, a healthy environment is necessary. Hence, it is essential to control air and

water pollution. For this, measures should be made for sustainable transportation and legitimate controls should be imposed on factories.

India is a democracy with a written constitution, which provides for the supremacy of the constitution. Therefore, it is necessary to maintain the supremacy of the Constitution. It provides that administrative or legislative acts may be void if is violative of provisions of constitutions, especially Art 13, 14, 19, 29, 30 i.e. Articles of Part III of the Indian Constitution. It can be achieved mainly under Articles 32 and 226. It would not be out of place to mention that when Dr. Ambedkar was asked to name any one Article of the Indian Constitution which is of more importance, he replied with Article 32. It appears the importance of Judicial Interpretation and Judicial Review. The adoption of Public Interest Litigation is a welcome step in the direction of good governance as public vigilance. At the same time, it is necessary to see that it is not misused for self-gain or benefit. It is necessary to keep control of the misdeeds of Government machinery i.e. Government organs and its officials. To achieve this objective, Judicial Review is of utmost importance. As far as written constitutions are concerned, the concept of Judicial Review finds its roots in the American Judiciary, especially in the case of Marbury V Madison decided by Chief Justice Marshal in 1803, which thereafter followed by other nations by incorporating the concept of Judicial Review in their respective Constitutions. Judicial activism is a very essential part of good governance for a

successful democracy. The public looks to the Judiciary as a last resort to redress their grievances. Hence, it is expected that the courts need to work within its limits. They should not exceed their boundaries which would destroy the structure of the democracy built by the Constitution. Chief Justice Coke in 1607 rightly said that legal issues were to be chosen by Judgement, experience, and investigation of law and not by the regular brain of a man. Parliament has legislative powers to legislate and it is the duty of the court to interpret the laws made by the Legislatures. Article 368 of the Indian Constitution provides that parliament can amend any part of the constitution by following the procedure provided under the same. However, experience appears that sometimes there is a tussle between the parliament and the judiciary. It has been seen from the case of Sajjan Singh, Golakhnath, KesavanandBharati, Minerva Mills, SR Bomai, etc. Besides constituent powers under Article 368, parliament also has a weapon of parliamentary privileges. As far as checks and balances and self-restraints are concerned existence of the upper House i.e. Rajya Sabha plays a very important role. A similar role is played by Upper Houses i.e. VidhanParishads in states. However, in some states, there is no upper house i.e. VidhanParishads. In some states where Vidhan Parishads were in existence, they have abolished their upper house. I am of the opinion that to keep check on the lower house there has to be an upper house in the states. In small states, due to its size, the upper house is not possible. Some kind of other machinery should be

formed to control the lower house. Sometimes, the legislature misuses its power of legislative privileges and courts also misuse their power of contempt of court. Hence, it is necessary to provide certain modifications in these provisions so that common people will not get frightened in challenging the authorities of the legislative and courts in the public interest by legitimate means. Children and women are weaker sections of society and hence they need special care and protection. Many times, women are sexually exploited even at the workplace. To protect women from sexual harassment in the workplace, the Supreme Court of India in the famous case of Vishaka issued certain directions to the government due to which the Protection of Women from Sexual Harassment at Workplace Act has been enacted. Every citizen of India, as per the Preamble has been given public, financial, and political equity, Liberty of thought articulation, conviction and confidence, fairness of chance and status alongside affirmation of poise to the individual and clique, solidarity and trustworthiness of the Nation. Part III which is Fundamental Rights and Part IV which is Directive Principles of State Policy guarantee these Rights. These rights realize central changes in the financial arrangement in the Public, Democratic, Sovereign, Secular, and Republic of India.

SUGGESTIONS

On the basis of the present study of 'Constitutional Philosophy of Good Governance and the Role of Supreme Court of

India' from the perspectives of analytical and Comparative study, and On the basis of studies in the foregoing chapters and material collected during research works and study of various case laws, I have arrived on certain conclusion on the basis of which I would like to make following suggestions –

a) Government is of the people, by the people, and for the people. Hence, people must have a voice in running the government and making laws. Their participation, especially in case of specialization in a particular field, is to be encouraged.

b) For successful democracy and good governance, the state should adhere to the concept of the rule of law.

c) To control maladministration and corruption, it is necessary to maintain transparency. To encourage transparency, the right to information of citizens must be protected and encouraged. Similarly, there should be judicial activism to maintain the supremacy of parliament and the rule of law.

d) The concept of public interest litigation should be strengthened. At the same time, it is necessary to see that it is not misused for one's personal benefit or as revenge against a particular agency or individual.

e) In law-making and decision-making, the views of people must be taken into consideration to enable them to move towards a welfare state and good governance.

f) The people must have faith and confidence in their government, hence it is necessary for the government to create a climate of trust and confidence.

g) It is the right of people to know about the actions of the government hence it is necessary to create independent and impartial media. It should not be measured straight or circuitously by the administration or its agents.

h) It is also noticed that sometimes the media tries some cases by publishing certain news items, which is commonly known as media trials. It has to be avoided.

i) If the people of the country are divided on the basis of religion, caste, and culture and are governed by different laws, it is certainly not good for a healthy democracy. Hence it is necessary and time has ripped that the state should endeavour to secure for the citizens a uniform civil code throughout the territory of India, which has been dreamed of by our constitution makers.

j) It is the right of the citizens to elect a government of their choice. It is done through the general election. However, it is noticed that the voters are bribed. Therefore, it is necessary to make stringent legislation providing punishments for both - the bribe giver and taker.

k) Every organ and agency of the government should be taught to observe self-restraints while performing public duties and functions.

l) While activating judicial activism the judiciary should not exceed its limits and do certain things which are favourable to the government or an individual for personal gains such as getting some posts after retirement such as Governor, President, seat at International Court, Chairman of certain Boards, or bodies of Government or appointment to Parliament i.eRajya Sabha, etc.

m)The institution of Lokpal is expected to work within the limits of the Constitution and function without fear and favour. Otherwise, it will lose its importance for which the people of India struggled for a long time.

n) It is utmost necessary to promote better participation of people in decision-making and law-making process o) All efforts are required to be made to achieve good governance in the country to make India a Welfare State.

DIGITAL VICTIMIZATION OF WOMEN IN CYBERSPACE: AN ANALYSIS OF EFFECTIVENESS OF INDIAN CYBER LAWS

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ABSTRACT

A considerable part of cyberspace is full of unexpected outcomes. This is the result of misfeasance, malfeasance as well as nonfeasance. The target group of such activities are the vulnerable sections of the society which includes women, children and senior citizens. Cybercrime has an intrinsic changing pattern, which targets distinctive groups differently. Women are more prone to being digital victims of sexual offences. Technology like deep fake morphing can be used in various sexually explicit materials to victimize women for different cybercrimes. Such crimes have affected women of every strata of society. According to a government report, around 11,000 cases have been registered in 2021 which categorically falls under cybercrimes against women. This figure was around 6,000 in 2018. However, the increment in reported cases does not necessarily result in conviction. The intricacies of proving such

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offences becomes a daunting task for professionals. The ramification of such inefficiency results in a breakdown of women victims to fight their cases. This leads to psychological, physical as well as societal degradation of women's position. The government has introduced the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 to make cyberspace safer for each group. In addition, the Ministry of Home Affairs operates a National Cyber Crime Reporting Portal to enable citizens to report complaints pertaining to all types of cybercrimes, with a special focus on cybercrimes against women. Such positive steps would require close scrutiny to secure cyberspace and to reduce the digital victimization of women. This paper analyses the cybercrimes and their effect on women by highlighting the causes. Moreover, the other part of the paper delves into the legal discourse and the effectiveness of contemporary solutions.

Keywords: *Digital Victimization, Cybercrime, Information and Technology Act, 2000, Sexual Harassment, Cyber Space.*

INTRODUCTION

The internet is one of the greatest sources of information and support one can have in the present era of modernization and technological advancement. The internet has made the world a global village and it's bound to do more in future. It has given so many avenues of growth to human beings from online businesses, jobs, websites, advocacy, political campaigning and even

socialization. The internet and its community have offered many places for people to engage with their thoughts without any hesitation. It has led to many types of activism and debates. It has led to people coming out of their boxes and engaging in meaningful conversation. Social networking sites such as Twitter, Facebook, Instagram and other dating apps at present have given netizens a wide variety of activities to engage in. These social networking sites have provided a participatory and all-inclusive, open public environment with which many can have all-around inclusive development.

But the internet and these social networking sites have a dark side too. Online platforms often tend to be hostile places where people's voices are shunned if they speak anything against the crowd. Many are shut down from further participation with online abuses and different types of cybercrimes.

Our social structures and legal environment have failed to handle the situation and lack the technological advancement to catch the perpetrators of crime which often leads to victimization of the person who has been abused. The anonymity of data is one of the important tools applied by many developed countries to hide the identity of the person and secure their data even at the time of data leaks, but the same anonymity becomes evil when it

is used by the perpetrators of crime to hide their identity online once the crime has taken place.[3]

Digital Victimization is not a new phenomenon - wherever there have been cybercrimes, victimization has existed but for a long time. We have only been concerned with defining and understanding crimes and their types and what technology to employ to catch the perpetrators and not focused on digital victimization and its causes and how that can be tackled.

Digital Victimization has taken men and women both into its hands but women often tend to be more vulnerable than men. Recent studies have shown an alarming increase in the number of women who have faced online abuses such as bullying, morphing images, deep fakes, stalking, voyeurism etc. Often social media and its open access provide a great opportunity for such crimes with abuses focusing towards sex/gender stereotyping.

Many incidents have taken place in the world including India which have led to digital victimization and often technological advancement of perpetrators of crime developing at much faster speed than any legal framework of a nation which provides benefits to them.

[3] Kim Barker and Olga Jurasz, 'Online Misogyny' [2019] JoIA, 95, 114.

TYPES OF CYBERCRIME LEADING TO DIGITAL VICTIMIZATION

Cyberbullying, cyberstalking, cyber hacking and phishing are the most common types of cybercrimes happening all over the world. With new social networking sites and public profiles, perpetrators or hackers can't get happier. There are other types of crime that have developed due to these social networking websites like trolling, making fake profiles, morphing images, cyber abuse, defamation and others.

Let us first understand these crimes and their meaning.

Cyberbullying has been defined as bullying a person on different mediums such as social media, dating platforms, and gaming using digital technologies which aims at threatening or shaming any person who is being targeted. Examples of it can be sending and spreading wrong messages and images about a person which tends to lower his reputation and makes him a laughing stock.[4] Cyberbullying is often a gender neutral offence which can take place against men and women both and teenage children are the most targeted groups. A targeted person is often harassed about his looks, body, family, race, religion, dressing sense, attitude, financial condition etc.[5]

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[4] 'Cyberbullying: What is it and how to stop it' <https://www.unicef.org/end-violence/how-to-stop-cyberbullying> accessed 14 March 2023.

[5] Andrew M. Henderson, 'High-tech words do hurt: A Modern Makeover Expands Missouri's Harassment Law to Include Electronic Communications'

Stalking simply means to look or search for a specific person. It can be done physically also and when it is done online it becomes cyberstalking and when a person is harassed while stalking or some fear of harm is asserted as the result of such stalking it becomes a crime. In some jurisdictions, cyberstalking is committed when some overt act or conduct takes place against the victim otherwise it's not considered as a crime and in some jurisdictions, mere fear in the mind of the victim due to stalking is a substantive crime.[6]

Cyber Harassment means sending threatening messages or emails or creating impersonating profiles and websites targeted at harassing a particular individual.[7] In many jurisdictions and in India, cyber harassment also includes sexual harassment of victims which includes physical contact and advances, making sexual remarks and asking for sexual favours.[8]

Social Media or Digital Impersonation means creating a fake profile, email ID or website of a person without his or her consent with the intention to harm the reputation of a

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[2009] 74 MoLR 379, 3; See also K. Jaishankar, 'Cyber Bullying in India: A Research Report on developing Profile' [2008] Legal Reviews and Policy Guidelines. Tirunelveli, India.

[6] Naomi Harlin Goodno, 'Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws' [2007] 72 MoLR 125, 126.

[7]Telecommunications & Information Technology, 'State Cyberstalking and Cyber harassment Laws', (*NCSL* 16 November 2012) <http://www.ncsl.org/issues-research/telecom/cyberstalking-and-cyberharassment-law s.aspx> accessed 15 March 2023.

[8] The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013, s 2(n).

person. Perpetrators often make a 'fake avatar'[9] of the individual and we see this in our everyday life as fanmade pages of celebrities often with their names. But the problem arises when these fake profile pages are used to blackmail by making untrue statements about them or asking for financial gains from the followers or connections of those accounts in the name of such persons.[10] In 2020, Karnataka recorded the highest number of digital impersonation cases than the rest of the country. In total, India recorded 11 thousand cases in which 6 thousand alone were recorded in Karnataka.[11]

Cyberbullying and cyber harassment are not very similar to cyberstalking as one is concerned with communicating fear by words written or spoken on any platform while stalking requires credible threat or some commission of such threat to arrest the predators.[12]

Trolling means when a person tries to deliberately stir up any disagreement, animosity, or argument in an online social

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[9] Debarati Halder, 'Examining the Scope of Indecent Representation of Women (Prevention) Act, 1986 in the Light of Cyber Victimization of Women in India' [2013] 11 NLSJ 188.

[10] Trends and Transitions, 'Internet Imposters' (*NCSL*, May 2010) <http://www.ncsl.org/magazine/trends-and-transitions-may-2010> accessed 15 March 2023.

[11] Tanushree Basuroy, 'Number of online impersonation offenses reported all over India' (*Satista* 14 Oct 2022)<https://www.statista.com/statistics/1097572/india-number-of-online-impersonation-offences-by-leading-state/> accessed 15 March 2023.

[12] Cassie Cox, 'Protecting Victims of Cyber stalking, Cyber Harassment, and Online Impersonation through Prosecutions and Effective Laws' [2014] 54 Jurimetrics 277.

network. Trolls may target websites like YouTube's comment sections, forums, or chat rooms.[13]

Trolls frequently utilize emotionally charged statements to elicit replies from individuals, disturbing normal civil discourse. Anywhere there is an open forum where people are free to publish their ideas and opinions, trolling can happen.[14] Trollers use their advantage of freedom of speech and expression to disrupt normal communication with their own set of offensive comments. Trollers nowadays have started using pictures, movie images, songs, taglines of ads, movies and songs to create a different meaning of the same image and it has become so popular that even many businesses are using it to grab the attention of the public instantly and even few government agencies have also started using it. Many times these trolls get so offensive that they tend to hurt the sentiments of public or religious groups. Trolling and cyberbullying often can be turned into mob lynching either virtually or physically through various forums like Whatsapp and Facebook where a large group can bully another person or group for their religious, racial, political and national beliefs.

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[13] The Now, 'What is trolling?' (*GCF Global)* <https://edu.gcfglobal.org/en/thenow/what-is-trolling/1/> accessed 15 March 2023.

[14] 'Jade Goody Website troll from Manchester jailed' (*BBC* 29 October 2010)<http://www.bbc.co.uk/news/uk-england-manchester-11650593> accessed 15 March 2023.

Phishing is the most common of cyber-crimes at present time and anyone even the most educated can be easily lured into this. Phishing is a fraudulent act of obtaining personal information such as ATM password, OTP, bank account details, debit card details and personal account password over mail, telephonic communication and online websites.[15]

Firstly, the hackers create a deceptively similar website of the desired institution like your bank or an online shopping site then when you open such a site and enter your details on the pretext of considering it the original website the hackers save the data and password entered and use it further to your disadvantage.[16] This type of crime often depends on the knowledge and awareness of the victim and not only the illiterate persons are a bait to such crimes but also the most educated youngsters as well as retired senior citizens. India has seen a steep rise in such number of crimes especially in bank frauds which has led all banks to issue advisories to its citizens and customers. All banks suffered a loss of 160 crore in the 2020 financial year and 128 crore in the financial year of 2021.[17] According to Lynch "phishing" comes from the word fishing as email, telephonic

[15] Alice Hutchings & Henessey Hayes, 'Routine Activity Theory and Phishing Victimisation: Who Gets Caught in the Net' [2009] 20 CRIM.Just 433.
[16] Ibid.
[17] 'Govt shares data on online banking fraud and how many cases solved' (*livemint,* 9 August 2022*)*
<https://www.livemint.com/news/india/govt-shares-data-on-online-banking-fraud-and-how-many-cases-solved-11660007363092.html> accessed 15 March 2023.

conversations and online websites are used as a bait to attract "fish" from the "sea" of online users of internet.[18]

Morphing means to change something or someone from one thing to another.[19] Morphing images has the same meaning. When an image is said to be morphed, it signifies one has tampered with the original image without that person's consent. The case of actor Ranveer Singh's images which he complained had been morphed is an example of how easily it can be done.[20] In the world of influencers and bloggers, one can easily get a picture of anyone and if they have a public profile, it all becomes so easy. Morphing an image has also been so easy with specific apps coming for the needful job. All over the world, women become easy prey to it as they are more vulnerable due to easy character assassination and stigmatization. If such an image is circulated over the internet in minutes, the reputation of such persons is shattered in seconds and such person is often seen disgracefully by society itself which leaves a permanent scar of victimization on the persons. Perpetrators often ask for money and other valuable property on the promise of not circulating such images on the internet which leads to harassment of the women. India has alone

[18] J Lynch, 'Identity theft in cyberspace: Crime control methods and their effectiveness in combating phishing attacks' [2005] 20 Berkeley Technology Law Journal 259.

[19] 'Morphing' <https://dictionary.cambridge.org/dictionary/english/morphing> accessed 15 March 2023.

[20] 'Photo Morphing Cases', (*Times of India)* <https://timesofindia.indiatimes.com/topic/photo-morphing-case/news> accessed 16 March 2023.

recorded 37% of cases related to harassment of women due to morphed images.[21] Images are morphed with sexual content generally which is also known as deep fake technology. This leaves a tragic fear in the mind of the person whose image is morphed and such person is victimized for many years.

These are a few, most popular cyber-crimes happening in the present world. As we know, year by year, the world is growing and innovations are taking place in all the fields. Thus, technology grows at much faster speed than our laws which could supplement such technological advancement. Laws of a country are formed over deep discussion and research and it's not so easy to change and alter law every other year which allow these predators to take advantage of lacunas in law and commit crimes. However, this is not the sole reason which offers bait to these perpetrators. There are further reasons why these crimes are happening and how one chooses his fish in the sea of online users. In the next section of this article, we will study different causes leading to digital victimization.

[21] '37% of harassment cases is by morphing photos of women', (*The Hindu,* 28 July 2021)<https://www.thehindu.com/news/cities/Hyderabad/37-of-harassment-cases-is-by-morphing-photos-of-women/article35591294.ece> accessed 16 March 2023.

DIGITAL VICTIMIZATION: CAUSES AND FACTORS

There can be many causes of victimization like digital illiteracy, psychological, social and legislative gaps. The advent of the internet has benefited human civilization. The internet has united people together globally. Human nature demands that we always want to know more about the unknown. The drive to find the untrodden road has been exacerbated by a curiosity about the inhabitants of the planet. This has caused the digital universe to be discovered.

Theory of Routine Activity

According to routine activity theory,[22] crime generally occurs when one is busy in their routine lives and a target is set whenever such a suitable person comes in front of an offender who is motivated to commit such a crime. Lack of a guardian, less knowledge of computers and internet experience and high banking transactions can give an offender an easy target for attacking such person's bank account through phishing attacks. Such attackers hide their identity through various anonymity technologies and commit crimes by sitting anywhere in the world. An attacker may sit in any corner of the world and commit an attack in India and vice-versa. Such international phishing attacks often give offenders the leverage to not get punished due to lack of

[22] Hutchings (n 15).

legislative laws regarding such cross-border attacks. Often when the crime is reported money is given back by the financial institutions but the offender is not punished which acts as motivation to such offenders.[23] Most of the phishing sites are hosted by the US, China and Russia because there exist a high number of internet users compared to least developed countries. India and Thailand also come under the top ten countries hosting such sites.[24] Absence of a guardian means lack of proper guidance and expertise and awareness of these financial institutions, banks, legislative departments and security departments of the government, and other such agencies and individual forums to deter such attacks and offenders. According to an Australian survey by AusCERT, it was found that 98% of online companies, banks use security software but their employees lack the knowledge of know-how of such software.[25]

Psychological and Emotional Causes: Identity Crisis

With the advent of globalization and modernization, the family structure of all the countries has changed. Particularly in India where the joint family status is most prominent, it was hampered due to the migration of rural people into urban cities in the search for work. This migration has led to the establishment of a single family system due to which privacy and security of their

[23] Duffield & Grabosky, 'The psychology of fraud' [2001] 199 Trends and Issues in Crime and Criminal Justice 1.
[24] Lynch (n 18).
[25]'Australian Computer Crime and Security Survey', (*AusCERT Brisbane* 2004) <http://www.auscert.org.au/crimesurvey>accessed 16 March 2023.

members have become the prime focus. Traditionally, there was a sharing and caring system which has been undone due to nuclear family and work commitments which in turn has led to superficial and insubstantial relationships between their own family members and their neighbours.

Due to work pressure no one has time for anyone even though they may live together. This loneliness of people has led them to socialize and talk on different social networking and dating sites which makes such people more prone to becoming victims of cyber-crimes.[26] In India the ratio of working women is very low compared to men, only 33% of women are engaged in workforce participation in the country whereas men stand at 67%.[27] Thus, this data indicates that women particularly the home makers are more prone to loneliness, they become aloof because most family members are busy in their professional pursuit and thus chances of women being depressed are higher. Women who stay at home, in particular, have a tendency to look for help outside of their homes to get over despair and loneliness. This is

[26] Ravi Krishnani, 'Indian Women: No Friends Online' [2015] 32 World Policy Journal 85.
[27]Manya Rathore, 'Share of participation at work across India from 2014 to 2023 by gender' (*Statista,* 5 March 2023) <https://www.statista.com/statistics/1043300/india-work-participation-by-gender/> accessed 16 March 2023.

the cause of their propensity to confide in and rely on total strangers.[28]

With technology in their hands and such social networking sites, interaction with strangers becomes easy. To get over this loneliness and fear of missing out, they indulge in chatting, messaging and video calls with not only their known friends but even strangers which releases their catharsis. In such an emotional state, women often become the victim and spell out their secrets and personal information regarding their home, members, property and bank details etc. After receiving such information, miscreants can use such information not only to do cyber-crimes listed above but also heinous sexual crimes.[29]

Illiteracy Vis-À-Vis Digital Illiteracy

India's literacy rate has been improving year by year, though there still exists a gender gap between the literacy rate of men which was 82.4 percent compared to women which was 65.8 percent in 2018.[30] However, out of this proportion of literate people, how many are digitally literate cannot be said. Digital literacy cannot be confined to only using of internet and chatting

[28] D. Halder & K. Jaishankar, *Cyber Crime and the Victimization of Women: Laws, Rights, and Regulations* (Information Science Reference, IGI Global 2011).
[29] Ibid.
[30] '75 years, 75% literacy: India's long fight against illiteracy' (*Times of India,* 14 August 2022)
<https://timesofindia.indiatimes.com/india/75-years-75-literacy-indias-long-fight-against-illiteracy/articleshow/93555770.cms> accessed 16 March 2023.

on Whatsapp , watching videos on YouTube or using Facebook and Instagram but also knowing about terms and condition of the these apps, their privacy policy, data protection norms and protection from virus likes tracing, bugging, hacking, cookies etc. There is a rapid increase in the number of internet and mobile users but severe lack of digital literacy.[31]

There have been many researches done to investigate the impact of gender on computer knowledge and literacy, to the extent that results have shown that males have more computer knowledge than females. An author studied the effect of gender variations in computer mindset and self-efficacy[32]. According to this research, gender inequalities were more pronounced when it came to difficult computer tasks. Regarding elementary computer tasks, there were no discernible differences identified.[33] Males had substantially larger expectations about their own productivity than females did and in comparison to female students, male students indicated less technology fear and more computer confidence.[34] Cultural connotations like patriarchy, misogyny and manhandling could be reasons to explain such results. However, victimization of both men and women on social media platforms is due to their own negligence and lack of interest in knowing and

[31] D. Halder & K. Jaishankar, 'Cyber victimization in India: A Baseline Survey Report' [2010] Center for Cyber Victim Counseling.
[32] T. Busch, 'Gender Difference in Self-Efficacy and Attitude towards Computers' [1995] 12 Journal of Educational Computing Research 147.
[33] Ibid.
[34] Ibid.

adapting to the latest technology to protect themselves. One can have many options to protect herself or himself from online harassment, trolling, hacking and bullying just by adopting security measures like locking their profile pictures, blocking offenders and reporting them, going for private accounts, and not interacting with unknown persons.[35]

Knowledge of legal rights and awareness to go to the required forum whenever such crimes occur is also lacking. In a research conducted many were found to be not aware about their rights and laws in such cases. Out of 73 respondents, only 80.8% were found to know that hacking, producing and disseminating pornography, disseminating obscene documents, etc. are crimes and 19.2% did not know. Only 19.2% of respondents are aware that their legal right to privacy in cyberspace is subject to penalties, whereas 78.1% are aware that cyberbullying, cyberstalking, and sending obtrusive, defamatory texts are all prohibited.[36]

Social roles in the social order cannot be disregarded, notwithstanding the variations in tactics, as they significantly contribute to women's victimization. The connection between gender and digital literacy is influenced by status, traditions, and customs, as well as by age, identity, edification, internet knowledge, income, and race because men predominate because they are skilled computer users and members of global

[35] D. Halder & K. Jaishankar, 'Cyber socializing and victimization of women' [2009] 12(3) Temida 5.
[36] Ibid.

communication networks.[37] They often enforce sexist gender notions in many different ways and anonymity tools act like icing on the cake for such men.

Sociological Reasons: Family Honor, Patriarchal Society

Over the decades, family honour and respectability have lied in the female members of the family. If rape happens, the woman and her family is more victimized by the society than the offender. Society of most nations has been patriarchal in nature. It must have evolved over time but still traces of it can be seen in many different ways. Society's patriarchal nature is a predominant reason for women being victimized by digital crime.[38]

Gender disparities have a significant impact on nurturing behaviours in India. A girl child is supposed to be timid and obedient, whereas a male youngster is taught to be strong and tough. For fear of stigma, women are trained to suppress their voices. Due to such nature and behavioural practices, whenever such crime occurs to them they try to hide such things from the family members and often family members also try to shun their voices.

In a research, Jaishankar and Halder talk about secondary victimization of women which is caused by gender stereotype

[37] N. Döring, 'Feminist views of cybersex: Victimization, liberation, and empowerment' [2000] 3(5) Cyber Psychology & Behavior 863.
[38] Halder (n 28).

cyber harassment.[39] The authors describe the process which begins "after the victim begins interacting with reporting agencies, her family and friends and society as a whole".[40] Often the victim shies away from going to the police to preserve her family honour which gives the offender more chances to commit the same crime again and again even to the same person.

According to a report on reporting of cyber-crimes by an NGO Center for Cyber Victim Counseling under which 73 people were taken out of which 60 were women and 13 men. These respondents, who come from various regions of India, are technologically adept, have had some computer expertise, and even utilize social networking websites to hang out in the digital world. They have experienced many forms of victimisation, like receiving threatening emails with sexually explicit attachments, having their profiles hacked, etc. However, not every one of the 60 female respondents has responded. According to the poll, just 35% of the women claimed to be victims, 46.7% did not report, and 18.3% were oblivious to the fact that they had been assaulted. This study demonstrates that, due to social difficulties, women prefer not to report their victimization.

[39] D. Halder & K. Jaishankar, 'Cyber Gender Harassment and Secondary Victimization: A Comparative Analysis of US, UK and India' [2011a] 6(4) Victims and Offenders 386.
[40] Ibid.

Cyber Addiction and Outlooking Behaviour

The Internet has become a part of our life. Our lives and our routine are motivated by the internet and its behaviour. We have become addicted to it. It may be termed as internet addiction or social networking addiction. The Internet has made so many vloggers and bloggers all over the world. It has given fuel to many lives out there, that it starts dominating their mind, feelings, thoughts etc. Why do we post and share on social networking sites? When we don't like others prying into our life and its privacy then what drives us to post and show everyone, this guided behaviour can be called "internet guided behaviour".

According to an internet critic there are basically five type of internet addiction - web surfing, online shopping, sexual addiction like online relationships, watching porn sites and playing computer games.[41] For many, the internet offers what they can't do in real life - as an escape due to fake accounts and anonymity tools. They make their own identity and act in ways that are not real.

Reasons behind internet addiction is firstly due to its easy availability which gives users a way to either use as boon or bane. Second, is its importance in every task that we do. For example, we are now addicted to WhatsApp and even if we want to leave it

[41] K.S. Young, 'Internet addiction: evaluation and treatment' [1999] 7 Student British Medical Journal 394

we don't see any options because most offices and social groups send their documents, work and updates on it. The third reason for internet addiction can be its availability and affordability - the more the users the cheaper it gets.[42] In India, the whole dynamics of internet affordability was changed by Reliance Jio Telecommunications. Fourthly, the freedom to choose any username and the accompanying anonymity, hides one's real identity due to which whenever communication takes place between online persons and users, it's quite open and frank which builds online relationships more easily. Messenger apps and other dating apps are the creation of this phenomenon.[43]

People initially engage in online communication in an effort to alleviate social isolation, as we have seen earlier in this paper, but eventually they develop an obsession with the virtual realm of the net. The Internet gives addicts a chance to escape the pressures and stresses of daily life. Some people find it difficult to communicate their thoughts in front of others, but they speak more freely about their emotions to his online buddies.[44] Additionally, online interactions have evolved into socially acceptable practices over time. People are now addicted to the

[42] M. Temmel, M. Theuermann, E. Ukowitz & T. Vogrin, 'The Impact of the Internet on our daily life' [2001] <https://www.tru.ca/cpj/essay.html> accessed 16 March 2023.
[43] M. D. Griffiths, 'Internet abuse and internet addiction in the workplace' [2010] 22(7) Journal of Workplace Learning 463.
[44]Tanaya Saha & Akancha Srivastava, 'Indian Women at Risk in the Cyber Space: A Conceptual Model of Reasons of Victimization' [2014] 8 International Journal of Cyber Criminology.

internet due to a combination of these elements, and this addiction motivates them to abuse technology.

Due to easy availability of internet and its frank open communication and no real identity, it offers open sexual communication. Also, there are so many dating apps where one can drive their sexual satisfaction through many ways. Griffith explains such relationships in three different types: the first kind of relationship is typically between strangers who enjoy having sex via the Internet.[45] The duration of this type of relationship is typically brief, and the online lovers may already be married in the real world. Many times, they do not view their online sexual relationships as betraying their marriages. The second category consists of individuals who initially connect online but ultimately decide to continue their connection offline through in-person encounters, letter and gift exchanges, etc.[46] The final type of online relationship involves people who meet online but choose to keep their connection private for years because they may be geographically separated from one another and only occasionally cross paths. Because both parties need to be able to support their relationship financially, this kind of relationship is the hardest to keep up.[47]

[45]M.D. Griffiths, 'All but connected (Online relationships)' [1999] 17 Psychology Post 6.
[46]Ibid.
[47]Ibid.

Miscreants' outlook towards many apps and their causes show that they choose to outlook for the consequences of what might happen to them. We know of how different apps are sharing data with other companies but even then, as a user choose to use and even depend heavily on it. When we know the consequences of an online public profile, then also we choose to do it and post regularly on it. So many times we overlook the consequences because our behaviour are determined by the internet and its resources which are virtual and we face the consequences of it in the real world.

Social Media Platforms an Easy Getaway to Victimization

We all live in the world of the internet and we use the internet and social media platforms like Facebook, Instagram, Twitter and others in our daily routine. We have become addicted to these sites without which our day cannot pass. Even if we click a picture, that is posted online on different media platforms which not only take data for improvisation of their app but also for other purposes. These platforms and dating sites offer many options to their users to protect their own privacy and account and block users and report them, but many times victims rarely report about such offenders due to many reasons as we have seen above[48]. These sites offer protection to their user but there are many ways

[48] Tom van Laer, 'The Means to Justify the End: Combating Cyber Harassment in Social Media Source' [2014] 123 Journal of Business Ethics 85.

in which it itself cannot control what is shared, said and other fake accounts that have been created for crimes like bullying, trolling and cyber misogyny etc.[49] until such accounts and crime are reported. Sites do not have any way to find out such crimes happening on their platforms.

Influencers and bloggers often post their daily life routine in pictures and stories and make videos that are shared via public profile on such social media platforms that can be viewed by the world at large. Such pictures are easily available and can be used for morphing images and can be shared on media platforms and victims can be harassed for such crimes and even extortion can take place.[50] Victims, to save their reputation, often do not complain and are caught in this web of crimes. Many a time due to stories of these bloggers the offender can know all the things and when such a person is available and what time is perfect to commit any crime against him.

INDIAN CYBER LAWS: A PROSPECTIVE ANALYSIS

After the World War was over, many people became victimized by the grave crimes that occurred during those years.

[49] Kim Barker & Olga Jurasz, 'Dynamics of Global Feminism' [2019] 72 Journal of International Affairs 95.
[50] Mary Banach, 'Victimization Online: The down Side of Seeking Human Services for Women on the Internet' [2000] Cyber psychology & behavior: The Impact of the Internet, multimedia and virtual reality on behavior and society.

In earlier days crimes were only physical in nature like terrorism, human rights crimes, war crimes etc. Later, in the era of 70s and 80s, with the emergence of computer and telecommunication technologies, crimes started taking place in society which were not physical and limited to a geographical and sovereign region of one country. All over the world, academicians, scholars and computer specialists were engaged in defining cyber-crimes, how computer attacks can be done and how it can be limited. No bill, regulation and laws of any country had cyber-crime listed in it, and there was no uniformity in anyone's thoughts on how to provide a uniform definition of it.[51] Computer crimes were defined by the Department of Justice, US as those crimes where "knowledge of a computer system is essential to commit the crime."[52] In the initial period "cyber-crime" was categorized in two parts, firstly was attack on machines and second category was computer assisted crimes done through different mediums.[53]

Cybercrime can occur in the first scenario when computer files and programs are accessed or disturbed without authorization, or when a user's digital identification is stolen.[54] The second instance of cyber-attacks is when a technology is used to carry out more conventional crimes, such as the production or

[51] D. S. Wall, 'The Internet as a conduit for criminals' [2005] Information Technology and the Criminal Justice System 77.
[52] D. B. Parker, 'Computer crime: Criminal justice resource manual' [1989] Department of Justice, National Institute of Justice.
[53] N. K. Katyal, 'Criminal law in cyberspace' [2001] University of Pennsylvania Law Review 149.
[54] Ibid.

distribution of child pornography, the commission of economic crime, the reproduction of well-known music that are protected by copyrights, etc.[55] Nevertheless, these definitions demonstrate that the phrase "cyber-crime" refers to any crime committed with the use of the internet.

In the Convention of Prevention of Crime and Treatment of Offenders which was held in Vienna by the United Nations in the year 2000, the need to have a definite law and universal preventive measures for cyber-crime was felt. The idea of this convention was further strengthened by the creation of the "Convention of Cybercrime" by the European Council held in Hungary in the year 2001. This convention gave cybercrime five dimensions which are firstly crimes against the secrecy, integrity of computer data and its systems; secondly computer-related crimes; thirdly content related crime; fourthly crime relating to infringement of copyright and the fifth dimension was abetment and aiding of such crimes.[56] In this convention, individual attack by cyber-crime was not recognised - the definitions only mentioned the machine attacks by or through computer operated machine but now as we see the computer and vast internet are just tools of cyber-crime which offers motive to the offender to ruin the reputation of the victim through different types of crime against any person. Earlier conventions and laws of nations were merely

[55] Ibid.
[56] Council of Europe, 'Convention on cybercrime', Budapest (2001) <https://www.coe.int/en/web/cybercrime/the-budapest-convention> accessed 16 March 2023.

drafted for the protection of e-commerce sites and not to protect an individual person and his privacy in the realm of the internet world.

Lacuna and the Effectiveness

India has the Information and Technology Act, 2000. India's law had been made only to protect e-commerce and financial institutions from the attacks of cyber-crimes. It doesn't talk about the individual effect of protection of women, men and children from personal attacks that could occur to them in the digital world. In India, "Internet crime against women" is a problem that few discussed or attempted to address which left countless victims suffering in silence. According to the Information Technology Act of 2000, the term "cyber-crime against women" is most commonly used to refer to sexual offences and online sex abuse, such as altering images for pornographic purposes, harassing women through sexually explicit emails or texts, or cyberstalking.[57] That is why the Indian IT act did contain one section which covered pornography and obscenity in the internet which is section 67 of the act in which most of the earlier cases were booked in. However, India did have a central law like the Indecent Representation of Women (Prohibition) Act, 1986 and Indian Penal Code sections like 509, 292 and others which were invoked from time to time to protect women from such

[57] K.G.Balakrishnan, *'Speech at seminar on cyber-crimes against women - Public awareness meeting'*, Maharaja College, Ernakulam [2009].

indecent crimes but in today's era such sections have become outdated. The Indecent Representation of Women (Prohibition) Act, 1986 was made especially for women and it prohibited publications and advertisements which contained indecent representations of women. But it has to be noted that the Indian concept of obscenity is way different from western concept.[58] Thus, any sexual portrayal of women, or sexual dressing of women in any manner could be considered as obscene by the Indian society.[59]

Feminists insisted upon their protection but they criticised such a law because it mentions crime against women only from the angle of obscenity which attaches a moral standard to it and not mere derogatory aspects of crimes that can be done against women.[60] Thus, this act failed to achieve what it was intended for because the law was a very Indian concept of gendered morality. The Act was to be amended to be on par with the punishment prescribed in the information and technology act and was made to be applied to digital media. If the proposed amendment could have taken place then India could have a law specifically

[58] Halder, Debarati, 'Examining the Scope of Indecent Representation of Women (Prevention) Act,
1986, in the Light of Cyber Victimisation of Women in India' [2013] 11 National Law School Journal.
[59] Geetanjali Gangoli, *Indian feminisms: Law Patriarchies and violence in India* (Ashgate Publishing, Ltd. 2012).
[60] Vedkumari, 'Gender Analysis of the Indian Penal Code' in Archana Parashar & Amita Dhanda (eds), *Engendering law: Essays in honor of Lotika Sarkar* (EBC 1999).

addressing the victimization of women through indecent portrayal is undoubtedly a positive development.

The Indian IT Act was amended in the year 2008 which added section 67A[61] and 67B[62] which is gender neutral and which made the production, creation and distribution of obscene and sexually explicit material in digital form. Section 67 and 67A together are helping in defending the cybercrimes against women that are happening, but these provisions only provide for a charge and monetary damages and punishes "whoever" commits the crime which means even if any indecent picture is produced by the creator himself he can also be held guilty of crime.[63]

The present Indian IT law still has lacunae in it which are ***firstly,*** that the act does not mention about the "removing or deleting of the derogatory matter". When any crime like morphing of pictures has been done by the offender and that image has been circulated on various sites, the traumatic effect which such crimes and that morphed photo can leave on the victim is indispensable. Thus the act should mention the protection of the victims and other means by deleting such pictures, blocking accounts etc. from all over the internet.

Secondly, the IT act does not mention women investigating officers or reporting cyber cells exclusively for

[61] The Information Technology Act, 2000.
[62] Ibid.
[63] Haldar (n 60).

women. It is regrettable to see that the current Act makes no mention of gender-specific victim assistance cells. In some circumstances, neither Section 78 of the I.T. Act, 2000 nor Section 80(1) clearly state whether a male or female officer is qualified to conduct an investigation, conduct a search, or make an arrest.[64] The low reporting of crime is a sign that female victims are facing social stigma and they fear the dreadful police station and men police officers out of their fear of social reputation. Thus, women police officers specially equipped with knowledge to deal with cyber-attacks must be appointed.

Thirdly, Indian IT act mentions the term "whoever commits" which means that if the original profile creators themselves create, publish, or transmit images that reveal too much skin or conduct that is considered "sexually explicit" or "obscene" in orthodox societies like India. Thus, the language of this section could be interpreted to apply to even the original profile creators. Because of this, authorities frequently accuse victims of being 'too attractive' in their attire, which would have encouraged the offender to perpetrate the crime while wearing a similar appearance.

Fourthly, the internet service provider companies and the other intermediaries need to be more accountable. All the crimes are committed on the internet are hosted by different sites like Google, Yahoo, Facebook etc. We observe that many Indians sign

[64] Cox (n 10),

up for social media platforms based in the US, create accounts with US-based ISPs, or participate in online chat rooms that follow US laws and regulations. The victims of victimization on these sites frequently witness "odd responses" from the ISPs in addition to the legal and judicial systems.[65] This is due to the fact that either such victimization does not meet the criteria for crimes under the ISPs' policy guidelines or it is not considered illegal under Indian law. The accountability of such sites needs to be more rigid whenever such crimes occur. Privacy of data is also one of the major concerns these days which all the apps and sites are taking from the individuals itself, and when such data is shared with other companies without permission from the individual it creates an environment where crime can be done and specific persons and institutions can be targeted with it. As India does not have any Data Privacy Law such provision needs to be valued from a future perspective.

Fifthly, there is no uniformity in laws of all the countries and no universal international cyber law to protect all the victims and punish the offenders. As we know that in the global world email, sites, apps can be operated from anywhere in the world, as does the crime which takes place on such sites and the offender could be anywhere in the world and commit a crime in India and roam freely because there is no legislation to bring such criminals from different countries and make them accountable for what they

[65] Halder (n 28),

did. Cyber-attacks cannot be confined to regional laws thus it needs international cyber laws when such a situation occurs. When foreign websites are contributing to crimes against not only women but all persons and institutions, companies in India, problems about the proper application of the law also come up.[66]

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021: A step towards more inclusive, safe and accountable cyberspace

To help make cyberspace safe, trusted and accountable, the Central Government, in exercise of powers conferred by the IT Act, has made the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which require intermediaries, including social media intermediaries, to observe, among others, diligence as under:[67]

- To publish on their website and app, their rules and regulations, privacy policy and user agreement;
- To inform the said rules to their users and to make reasonable efforts to cause the users not to host, display, upload, modify, publish, transmit, store, update or share, among others, information which belongs to another person, or is obscene, or is invasive of another's privacy, or

[66] Ibid.
[67] Cybercrime Against Women, <https://pib.gov.in/PressReleseDetailm.aspx?PRID=1881404> accessed 10 July 2023.

is insulting or harassing on the basis of gender, or is racially or ethnically objectionable, or encourages money laundering, or promotes enmity between different groups on the grounds of religion or caste with the intent to incite violence, or is harmful to child, or infringes intellectual property rights, or impersonates another person, or threatens the unity, integrity, defence, security or sovereignty of India or public order, or prevents investigation, or violates any law;

- Upon receipt of an order from a lawfully authorised government agency, to provide information or assistance for prevention, detection, investigation or prosecution under law, or for cyber security incidents;
- To have in place a grievance redressal machinery, and resolve complaints of violation of the rules within 72 hours of being reported;
- In case an intermediary is a significant social media intermediary (i.e., an intermediary having more than 50 lakh registered users in India), to additionally observe due diligence in terms of appointing a Chief Compliance Officer, a nodal contact person for 24x7 coordination with law enforcement agencies and a Resident Grievance Officer, publishing monthly compliance reports, etc.

Further, it has notified amendments to these rules on 28.10.2022 to provide for the establishment of one or more Grievance Appellate Committee(s) to allow users to appeal against decisions

taken by Grievance Officers on such complaints. In addition, the Ministry of Home Affairs operates a National Cyber Crime Reporting Portal to enable citizens to report complaints pertaining to all types of cybercrimes, with special focus on cybercrimes against women.[68]

CONCLUSION

The Internet has the ability to empower everyone at the start of the new millennium by providing them with access to knowledge and social support regarding their concerns about their physical and mental health as well as by promoting digital advocacy for shifts in societal and organizational policy. However, there are dangers and potential dangers that must be addressed. Online victimization can be brought on by incomplete information, invasion of privacy, restricted communication, online harassment, and cyberstalking. If the potential of the Internet to deliver services is to be realized, users both individuals and other institutions and e-commerce sites must comprehend and protect against these risks. Taking precaution and education about online safety and privacy issues are important but not the end. Laws of a nation often reflect its social and moral values and have social conduct rules. Over the years technological advancement has taken up with a rapid speed and has increased

[68] Ibid.

the number of users of the internet, computer and mobile phones, it has changed faster than the laws governing them. It has created a wave of opportunities for many people, but it's often a curse for many who have been victimized by it in any form.

Cyber-crimes are immoral and can harm the reputation of victims to a great extent but many countries only recognise the sexual aspect of such cyber-crimes against women particularly and do not value cyber-crimes of non-sexual types. Countries still need to move away from the social aspect of laws that are framed to combat such crimes and give proper protection. Due to fear of reputation and other social stigma attached to their family such crimes are often less recognised and reported out in the public. There is a lack of awareness on the part of the public as well as investigating officers and cyber cells. They often don't know how to react and act when such incidents have taken place and victim comes for help. We recognise that the primary cause of the low reporting rates and nearly nonexistent use of the laws intended to address offences other than obscenity and pornography is a lack of understanding among the general public, particularly among female victims.

Laws often just prescribe punishment like imprisonment, fine or damages to the victim. The law should look beyond this. They should be looking out for victim welfare and how to resynthesize them back in society if they have been suffering from the trauma of cyber-crimes. The police officer or the cyber cell or

trial judge could do much more by ordering the removal of the online material posted or shared by anyone without such person's consent. Police officers should be given training to handle such cases and there should be cyber cell officers in every police station. There should be cyber hotlines for sharing such grievances. Reputation management techniques and modal conduct should be taught which can help victims overcome his fear.

Furthermore, it must be kept in mind that cyber victimization cannot be stopped by simply imposing fines or jail terms as penalties. When it comes to tracking subscriber usage by generating new identities and using social media or other web platforms to further harass the victims. Online service providers like Whatsapp, Google, Yahoo, Facebook, Instagram and Twitter, which are actually based in the US, are almost completely irresponsible when it comes to tracking subscribers' online activity through the creation of false identities and the use of social media or other websites to harass victims even more. People and students must be given general training and know how to use such apps and software for protecting them from such crimes and reporting them to the requisite authorities.

Thus the internet is a boon or bane that depends on how one uses it. It may offer endless opportunity and attraction but one must always be aware of their rights and privacy and know how to use such apps and technologies in the greatest positive manner.

RIGHTS OF DISABLED PERSONS WITH SPECIAL REFERENCE TO JAMMU & KASHMIR: A CASE STUDY

Samreena Bashir[1]

Inshah Yasin[2]

ABSTRACT

"My disability exists not because I use a wheelchair, but because the broader environment isn't accessible"[3]

Every individual, regardless of gender, creed, or color, has the right to live and exercise all the rights to which they are entitled as human beings, and no disability may negate such rights. In any case, impairment does not indicate a lack of ability to achieve any goal or exercise any right. Being disabled is not a barrier; instead, it is the responsibility of the national and international realms to ensure that no one is excluded due to any disability. Many initiatives have been taken nationally and internationally to safeguard and improve the rights of disabled people. According to

[1] Research scholar, Central University of Kashmir

[2] Research scholar, University of Kashmir

[3]Stella Young, Australian comedian, Journalist and Disability Rights Activist.

the United Nations, this day aims to promote an understanding of disability issues and mobilize support for the dignity, rights, and well-being of people with disabilities"[4]. Various legislations have been adopted at the national level to safeguard and enhance the rights of disabled people. However, it is worth noting that rules without implementation are like a toothless tiger. Laws are only effective when followed in letter and spirit; otherwise, the purpose of enacting them gets defeated. Various sociological researches conducted by scholars and organizations have proven that disabled people are the most discriminated-against group in society. Disabled people have been neglected on the basis of many grounds like lack of proper documentation, illiteracy of disabled people, gender issues and also socio-economic grounds[5]. In the present study, the researchers performed an in-depth analysis to determine how far the laws related to disabled persons have been applied and monitored in order to evaluate their real implementation. For the present study the primary and secondary data sources and other pertinent literature were used as a basis.

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[4]'Disabled population- Facts, findings and challenges' (*Kashmir Images,* 3 Dec 2021) available at <https://thekashmirimages.com/2021/12/03/disabled-population-facts-findings-and-challenges/> accessed on 13 August 2023.

[5] Firdous Ahmad Malik and others, 'An analysis of Persons with Disabilities Act 1995, Awareness among disable people in district Doda', (2018) 8 International Journal of Research In Social Sciences.

Keywords: Disability, Discrimination, Laws, Implementation, Protection, rights, safeguard

INTRODUCTION

Disability can be determined from numerous social, anthropological, medical, and psychological perspectives. According to Merriam Webster dictionary, "Disability is the physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions"[6].

According to the World Health Organization, disability has three dimensions : a) impairment in a person's body structure or function, or mental functioning; for example loss of a limb, loss of vision or memory loss,

(b) activity limitation, such as difficulty in seeing, hearing, walking, or problem solving, and

(c) restrictions on participating in normal daily activities, such as working, engaging in social

[6]< https://www.merriam-webster.com/dictionary/disability> accessed on 13 August 2023.

and recreational activities, and obtaining health care and preventive services[7].

Disability does not imply an inability to compete with others; instead, it is a medical condition that cannot be used to justify being disadvantaged. The rate of disability among people is increasing daily and has become a reason for concern regarding their protection from discrimination. Earlier, disabled people were seen as a liability to others and were frequently discriminated against. However, it was recognized around the 1980s that disabled persons must be permitted to participate in society's growth; otherwise, having a disability would become a social stigma and a form of discrimination against their rights and interests.

With ever increasing trend in, the number of persons with one or more types of disabilities as reflected in data, it necessitates formulation of strong laws and regulations to ensure that no one's progress is hampered by any health issue[8]. There are about 1 billion disabled individuals globally, representing around 15% of the global population, or nearly one in every seven people. There are 253 million visually impaired (blind), 200 million

[7] 'Disability and Health Overview' (*Centre for Disease Control and Prevention*) <https://www.cdc.gov/ncbddd/disabilityandhealth/disability> accessed on 13 August 2023.

[8] 'World Report on Disability (*World Health Organization*, 2011) <hhttps://www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability#:~:text =About%2015%25%20of%20the%20world's,a%20figure%20of%20around%2010%25 > accessed on 5th June 2023.

Intellectually disabled, 466 million hearing & speech impaired (deaf & mute), and 200 million people who use wheelchairs[9].

"In India, 2.68 million people are disabled, accounting for 2.21% of the total population of 121 million people. Out of the 70.22 crore male Indian population, 1.5 crore are disabled, the most significant number being 46.2 lacs between the ages of 10 and 19. In India, there are 1.18 crore disabled women out of a total female population of 65.46 crore. 20.3% of Indians with disabilities have mobility impairments, 18.9% have hearing disabilities, 18.8% are visually impaired, and 8% have various disabilities" [10]. Disabilities in children are also a significant source of concern. In India, 20.42 lac children aged 0-6 years are impaired. This indicates that one out of every 1000 children aged 0-6 years have a disability. Literacy rates among disabled people in cities are higher than in rural areas. In rural regions, 45% of disabled people are literate, whereas 67% are in urban area[11]. In the state of Jammu & Kashmir(undivided- including the UT of Ladakh), there are "2 04,834 male disabled people, 1,03,730 of whom are literate, 1, 56,319 female disabled people, 47,239 of whom are literate, and 27,939 impaired children"[12].

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[9] ibid.

[10] 'Census, 2011' (*Government of India*) <https://censusindia.gov.in/> accessed on 5th June 2023.

[11] ibid.

[12] ibid.

The individuals with disabilities may belong to multiple different racial, ethnic, gender or socioeconomic backgrounds and such intersecting identities can influence their experiences and types of barriers they encounter[13]. People with disabilities often face discrimination, a lack of accessibility, and societal stigmas, however, the challenges they encounter may be compounded when they intersect with other aspects of their identity[14]. For example, a disabled person who is also a person of color may face both racial discrimination and ableism simultaneously. The growing number of persons with disabilities necessitates a great deal of care and attention. Governments, NGOs, and society at large has realized that disability is not only a medical condition but a social condition as well, that could be addressed through appropriate rehabilitative measures and human-rights based laws [15].

LEGAL INTROSPECTION ON THE RIGHTS OF DISABLED PERSONS

[13] Trish Robichaud, 'Intersectionality in disability inclusion: Breaking barriers and embracing diversity' (*Linkedin,* 27 November 2023) <https://www.linkedin.com/pulse/intersectionality-disability-inclusion-breaking-trish-robichaud-wbnyf/> accessed on 20 Dec 2023.

[14] ibid.

[15]Renu Addlakha and Saptarshi Mandal, 'Disability law in India: A paradigm shift or evolving discourse' (2009) 44 EPW 62.

The United Nations has always tried to elevate the status of disabled people and improve their lives. The United Nations concern for the well-being and rights of disabled people is founded in its foundational principles, which are based on human rights, fundamental freedoms, and equality. The United Nations has made an essential contribution to improve the lives of disabled people and has made the efforts to safeguard and promote the rights of disabled people. United Nations General Assembly made a Declaration on 9th December 1975[16]. Pursuant to the Declaration, disabled people were granted intrinsic rights to human dignity, regardless of the origin, type, or severity of their impairments, along with the basic fundamental rights. Though this resolution of the assembly has no binding force but establishes a framework that may be used for international and domestic law purposes.[17]

With the United Nations designating the 1982-1992 period as the Decade of Disabled Persons, the rehabilitation movement gained momentum[18]. In 1986, the Indian government established the Rehabilitation Council of India to assist the rehabilitation of

[16]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

[17] Declaration on the Rights of Disabled Persons Rights (adopted 09 December 1975 UNGA Res A/RES/61/106 .

[18]UNGA Res 37/52 (03 December 1982).

impaired individual's. The Persons with Disabilities Act (Equal Opportunity, Protection of Rights, and Full Participation),1995 was enacted. It was a big step towards ensuring equal opportunity and full involvement in nation-building of individuals with disabilities.

Later a significant step was adopted by United Nations General Assembly on 12th December, 2006[19] in the form of a Convention, to protect the rights and dignity of persons with disabilities. Pertinent to the Convention, parties are required to promote, protect and ensure the full enjoyment of human rights by persons with disabilities and ensure full equality under the law. India, a signatory, ratified the Convention in 2007. The treaty obliged governments, private citizens, and civil society to protect the rights of people with disabilities.[20]

Owing to the international obligations under the United Nations Convention on the Rights of persons with Disabilities to which India was a signatory, the Rights of Persons with Disabilities Act, 2016 was enacted replacing the Act of 1995. As per the Convention the signatory states were mandated to enact new laws or amend the existing laws to remove obstacles to the development and growth of disabled people. The new Act widened the definition of

[19] UNGA Res A/RES/61/106 (24 January 2007).

[20]United Nations Convention on the Rights of Persons with Disabilities, art. 4.

disability by incorporating 21 types of disabilities and is more inclusionary, as compared to 7 types of disabilities included in the previous Act which was narrower without any elucidation[21].

In the 1995 Act, a person with disability meant, "a person suffering from not less than 40% of any disability as certified by a medical authority"[22] while as in the 2016 Act, a person with disability means "a person with long term physical, mental, intellectual or sensory impairment which in, interaction with barriers, hinders his full and effective participation in society equally with others"[23]. This is broader and a more inclusive understanding of disability. The approach in the old Act was charity based whereas the new Act provides for a rights-based approach addressing disability as a human rights issue and not only a medical condition. The new Act stresses the principles of non-discrimination, full and effective participation and inclusion in society, equality of opportunity, accessibility and respect for evolving capacities of children with disabilities.

The PWD Act of 1995 was repealed in 2016 and was replaced with the Rights of Persons with Disabilities Act, 2016. The revised Act of 2016 expanded the category of disability to include 21 forms of

[21] Abhilash Balakrishnan, Karishma Kukarni, 'The Rights of Persons with Disabilities Act 2016: Mental Health Implications' (2019) 41 Indian Journal of Psychological Medicine 65.

[22] The Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, ch 1.

[23] ibid.

disabilities, up from seven in the previous Act. The Act's schedule addresses physical, mental, and intellectual impairment and disability caused by chronic neurological illnesses and blood disorders. For the first time, acid attack survivors and those with speech and language difficulties have been included in the list[24]. The Act emphasizes the need to ensure accessibility in private and government public buildings within the specified time range.[25] The Act also emphasized the formation of national and state funds to give financial assistance to people with disabilities.[26] This Act seeks to endorse the concept of *"inclusive society"* to prevent the discrimination against disabled people so that their individuality and dignity may be protected. The Act is apparently a welcome step so far as the rights of disabled persons are concerned, however it demands proper monitoring and evaluation so far as its implementation is concerned.

DISABLED PERSONS IN KASHMIR: A CASE STUDY

The Union Territory of Jammu and Kashmir has a high number of disabled persons as compared to the other administrative units accounting for nearly 3% of its total population[27]. The Department

[24]The Rights of Persons with Disabilities Act 2016, s 2.

[25] ibid. s 40,41,42.

[26] ibid. s 86,87,88.

[27] Census, 2011' (*Government of India*) <https://censusindia.gov.in/> accessed on 12 July 2023.

of Social Welfare, Government of Jammu & Kashmir has registered under the persons with Disabilities Act, 2016 over 7.5 lakh disabled people in 21 categories, most of which reside in the Kashmir valley. In the ten districts of Kashmir Valley, 31,085 persons were recognized as disabled[28]. As the Union Territory of Jammu and Kashmir is now directly governed by federal laws due to the abrogation of Article 370 of the Indian Constitution, the Central Act of 2016 superseded the Jammu & Kashmir Protection of Rights with Disabilities Act, 1998, to safeguard the rights of people with disabilities. Additionally, in 2021, Jammu and Kashmir's government issued regulations to guarantee the correct implementation of Central Law, which aims to advance and preserve the rights and dignity of individuals with disabilities in a variety of aspects of life. Nevertheless, persons with disabilities still confront many difficulties.

In order to determine the extent to which the Rights of Persons with Disabilities Act, 2016, is being implemented in Kashmir, the researchers performed a case study in the District of Baramulla. The researchers chose Baramulla since it is the third most populated district in Kashmir and ranks third in terms of registered disabled people[29]. A case study involves a detailed study

[28] QaziWasif, 'In Kashmir Valley, 74% more people certified disabled during PDP- BJP Rule' (*Indiaspend*, 03 July 2018) < https://www.indiaspend.com/in-kashmir-valley-74-more-people-certified-disabled> accessed on 11th July 2023.

[29]Data obtained through right to information requests.

of the concerned unit of analysis within its natural setting and that unit of analysis can be an individual, a family, a household, a community, an organization, an event or even a decision[30]. When a person wishes to gather tangible, contextual, in-depth knowledge about a specific real-world issue, a case study is a practical research approach[31].

CASE STUDY 1

Abdul Rashid (name changed), the eldest of his parents' four children, is a resident of the Botingoo area, about 10.8 km from Sopore town of Baramulla of Jammu & Kashmir. His father is a laborer, and his mother a housewife. He suffered polio in both of his legs when he was only a few months old and became wheelchair-bound for the rest of his life. He studied till 12th grade in his village in the local school. But the real test of his disability started when he was admitted to the government college at Sopore to pursue a Bachelor of Arts degree. Due to his financial conditions, Rashid's father cannot arrange a personal vehicle for him to travel to his college and back. Rashid has to use the public transport, creating difficulties for hum, as public transport, be it

[30]Arya Priya, 'Case study methodology of qualitative research: Key attributes and navigating the conundrums in its application, (*Sagepub* 19 November 2020) <https;//journals.sagepub.com> accessed on 10 July 2023.

[31] Sarah Crowe and others 'The Case Study Approach' (2011) 11 BMC Medical Research Methodology <bmcmedresmethodol.biomedcentral.com> accessed on 11 July 2023.

buses or other vehicles, lack a ramp system and have high steps, which is a physical barrier for a person who uses a wheelchair. Attending classes is also an uphill task for Rashid, as the Sopore Degree College, neither has any ramp system nor any lift services available. He can only enter the classroom with the help of his friends and other mates. Sometimes he has to wait for hours until someone could come and help him enter the classroom; otherwise, he is forced to miss the classes.

The major problem that Rashid encounters in this case is the structure of the building, which is unfriendly, for people with physical disabilities. Even though significant emphasis has been laid on accessibility in the Persons with Disabilities Act, of 2016 on the ground level, nothing much has been done to implement the provisions of the Act. Let alone Rashid's college not even a single installation has taken place in Baramulla at any public place till date. The Government of India launched a campaign called as Accessible India Campaign in the year 2015. Under this campaign, funds were released to remove architectural barriers in government buildings to make them disabled-friendly[32]. But

[32]Javed Iqbal, 'Centre releases funds to J&K for making govt. buildings disabled friendly' (*Greater Kashmir* 09 January 2019) < https://www.greaterkashmir.com/?s=Centre+releases+fu nds+to+J%26K +for+making+gov t.+buildings+disabled+friendly > accessed on 13 August 2023.

surprisingly, nothing has been done on the grass root level in this regard.

CASE STUDY 2

Tuba Reyaz (name changed) is a 12-year-old girl who resides in the village Warapora Sopore, district Baramulla of Jammu & Kashmir. Her father is a professional driver, and her mother a housewife. She has cerebral palsy by birth, a disability resulting from damage to the brain before, during, or shortly after birth and outwardly manifested by muscular in-coordination and speech disturbances[33]. She has two younger brothers with whom she shares a good bond. They help her move around as her mother is busy doing household chores and her father is engaged in earning a living. When Tuba's younger brothers started going to school, she felt very alone at home and demanded to go to school. Even though Tuba is 12 years old, she was never sent to school by her parents, who are of the belief that she cannot attend the regular schools, as they lack the infrastructure which is disabled person-friendly and have absence of specially trained teachers. But on Tuba's constant demand, she was taken to a nearby Government primary school by her mother, which she is enjoying to the full. But the primary school is not the place meant for her as it lacks everything which a disabled person requires. There is no particular school in the village or in its adjoining areas where Tuba

[33] <https://www.merriam-webster.com/dictionary/disability> accessed on 13 August 2023.

could be admitted. The only school for specially-abled in the district of Baramulla, named Parivaar, is located in Baramulla town, and can accommodate 150 children with disabilities. Currently, only 75 are on a roll as most disabled children belong to far-off places and are from the lower income group.

The provision under the Act of 2016 provides for the establishment of special schools for children with disabilities, but it seems a distant dream as there are only eight schools with special needs in the entire Jammu & Kashmir and only one in district Baramulla; all are privately run and are unaided. Furthermore, there are only two higher secondary institutions one in Kashmir and the other in Jammu[34]. "In Kashmir, private educational institutions usually refuse to admit children with disability, saying that they don't have specially qualified teachers and infrastructure, especially the top schools, thus denying them inclusive education", as informed by Zaheer Jan, a child rights activist in Kashmir.[35]

This study reveals that one of the reasons behind lower literacy ratio among disabled children in Kashmir is the lack of special schools, specially trained teachers and disabled-friendly

[34]Naseer Ganai, 'Children with disabilities struggle to get admissions in schools' *(Outlook* 23 June 2023) < https://www.outlookindia.com/national/in-j-k-children-with-disabilities-struggle-to-get-admission-in-schools-news-297082 > accessed on 11 November 2023.

[35] ibid.

infrastructure in regular schools. Education is one of the fundamental rights of a person under Article 21A of the Constitution of India, and the lack of special schools for disabled children violates their fundamental right. This violation leads to discrimination and exclusion and creates inequality between the abled and disabled classes of society. The Right to Education Act, 2009 stands for inclusive education which supports equal education to each and every child without any sort of discrimination with respect to their gender, caste, creed, race, color, ability or disability[36]. Section 3(2) of the Act lays impetus on the elementary education of children with disabilities. Further, as per the Amendment of 2012, it also mandates that a child with multiple and/or severe disabilities has the right to opt for home-based education[37]. Education is pivotal in bringing equilibrium between medical and vocational rehabilitation and societal changes to people with disabilities. Through education, a revolution may occur by which social uplift and the life scenario would get changed.

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[36] Mandira Saha Sikdar, 'Role of RTE Act in inclusive Education' (*Academia*) < https://www.academia.edu/43157502/ROLE_OF_RTE_ACT_IN_INCLUSIVE_EDUCATION#:~:text=ROLE%20OF%20RTE%20ACT%20IN%20INCLUSIVE%20EDUCATION%20MANDIRA%20SAHA%20SIKDAR,%2C%20creed%2C%20race%2C%20color%2C > accessed on 10 Nov 2023.

[37] The Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, s 3(2).

CONCLUSION

Inclusive growth in society necessitates total growth and development of everyone, regardless of any impairment. Without inclusive growth, society would stay static. There is no doubt that disabled people cannot undertake daily activities like other people do, due to their medical conditions, but this should not be a barrier to their overall development. A person born with numerous inherent human rights cannot be denied their right to exercise those rights simply because of any disability they are suffering from. However, the irony is that people with disabilities have become one of society's most marginalized groups because their fundamental rights, such as right to education, access, life, liberty and, equality are denied in a variety of ways, as evidenced by factors such as the lack of special schools, inaccessibility to regular schools, shortage of specially trained teachers, accessibility in buildings, transportation, and access to other services. There are a number of regulations in place to empower and protect people with disabilities, but their execution is nevertheless fraught with difficulties. The inclusion of people with disabilities is hampered by poor execution of law, as it is evident from the above study that laws related to the disabled people in Union territory of Jammu and Kashmir are not being properly implemented and that in a way paved the way towards exclusion rather than inclusion.

ACCESS TO LEGAL PROFESSION: A CASE ANALYSIS OF BAR COUNCIL OF INDIA V. BONNIE FOI LAW COLLEGE & ORS. AND THE ADVOCATES ACT, 1961

Mr. Shubham Kashyap Kalita[1]

ABSTRACT

The legal profession is a quintessential part of the system of administration of justice. Without a well-organized legal profession, the courts would not be able to effectively administer justice because the best legal arguments for or against the parties could not be presented to the court, nor could the evidence in their favour or against be marshalled or the facts properly stated. A properly outfitted and effective Bar is predicated on a well-organized system of judicial administration. A more representative and equitable legal system is promoted by allowing talented and qualified applicants, regardless of their background, to enter the legal profession. However, individuals from disadvantaged backgrounds who want to become advocates face significant obstacles due to the exorbitant registration fees mandated by State Bar Councils. Many bright law graduates are discouraged from following their goals of

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becoming lawyers due to the expense of entering the legal profession. The contentious issue of excessive enrolment fees levied by State Bar Councils from aspiring advocates seeking admission to the legal profession is at the centre of the case Bar Council of India v. Bonnie Foi Law College & Ors. The basis for the enrolment and regulation of advocates is governed by the Advocates Act, 1961, which oversees the legal profession in India. However, the State Bar Councils' imposition of exorbitant registration fees has prompted questions about how well it complies with the requirements of the Act and how it would affect both the legal profession and access to justice. In the light of the same, the case comment examines the potential effects of exorbitant enrolment fees on access to justice, diversity in the legal profession, and the financial burden on aspiring advocates. The comment also highlights how crucial it is to strike a balance between upholding the integrity of the legal profession and guaranteeing accessibility and equality for aspirant advocates.

Keywords: - *Legal Profession, Exorbitant Fees, Enrolment, Advocates Act 1961, Advocates*

INTRODUCTION

The legal profession plays a vital role in maintaining the rule of law, defending individual rights, and making sure that everyone has access to justice. Access to Legal Profession is crucial in order to promote a varied and inclusive legal community that represents the nation's diverse social, economic, and cultural

backgrounds. A major barrier to becoming an advocate for those from disadvantaged backgrounds is the exorbitant registration fees charged by State Bar Councils, which goes against the idea of access to justice. There are two ways in which access to justice is denied. Firstly, it limits the type of legal counsel that is available to individuals from the disadvantaged background who might require the assistance of such counsel. Similar-background advocates are more likely to comprehend the difficulties and problems experienced by marginalised people and can offer greater representation. Second, it prevents the emergence of a diverse and compassionate legal community when brilliant individuals from disadvantaged backgrounds are discouraged from entering the legal profession as a result of high enrolment fees. In the case of *Bar Council of India v. Bonnie Foi Law College & Ors.*[2], the question of charging exorbitant fees for the registration of law graduates as advocates in accordance with the mandate of the Advocates Act 1961 is being highlighted by the Court, while dealing with the issue of BCI's authority to conduct a pre-enrolment examination for the enrolment of advocates.

In the meantime, a writ petition was filed by a law graduate named Gaurav Kumar against Government of India, Bar Council of India, & State Bar Councils for charging high fees and sought to declare the amount taken as arbitrary, unreasonable, &

[2] *Bar Council of India v. Bonnie Foi Law College & Ors.,* [2023] SCC Online SC 130.

illegal.[3] It is important to comprehend and examine the critical aspects of the issue of charging excessive fees for the enrolment of advocates even if the Supreme Court has not yet passed a judgment on the issue. It is also significant to note that the Bar Council of Kerala has been ordered by the Kerala High Court in the case of *Bar Council of Kerala v. Akshai M Sivan*[4] to only collect Rs. 750 as enrolment fees from law graduates who wish to enrol, while the Bar Council of India is taking the Supreme Court's directive to consider a uniform fee structure into consideration.

BAR COUNCIL OF INDIA V. BONNIE FOI LAW COLLEGE & ORS: BACKGROUND & THE FACTS OF THE CASE

This matter first came to light in 2009 when Bonnie Foi Law College submitted an affiliation request to run a legal study course in their college. The deficiencies in the institution's architecture and operation brought up a bigger issue regarding the declining standards of legal education offered at numerous law colleges in India when an inspection team visited the college in question on June 29, 2009.[5] Solicitor General of India at the time Mr. Gopal Subramanium, President of the Supreme Court Bar Association, Mr. M.N. Krishnamani, and Chairman of the Bar Council of India Mr. S.N.P. Sinha were appointed as members of

[3] *Gaurav Kumar v. Union of India*, [2023] SCC Online SC 391.
[4] *Bar Council of Kerala v. Akshai M Sivan,* W.P. {C) No. 3068 OF 2023(G).
[5] *Bonnie Foi Law College & Ors*. (n 1) ¶ 5.

the committee by the Supreme Court. The aforementioned Committee was tasked with looking into matters pertaining to the affiliation and recognition of law institutions, identifying problems that needed to be fixed, and addressing obstacles to the application of current regulations.[6] The Report acknowledged two important elements as essential for raising the bar for the legal profession: first, the establishment of a bar examination; and second, the requirement that all applicants for admission to the Bar serve an apprenticeship under a senior lawyer.[7]As a result of the report submitted by the Committee as appointed by the Court, the first All India Bar Examination was held in 2010 by a specifically established independent body made up of recognised specialists from a variety of fields.[8]

In response to this, the Bar Council of India (BCI) established the All-India Bar Exam (AIBE) in April 2010 with the aim of raising the bar for the Indian legal profession. The Bar Council of India issues candidates who pass the test a "Certificate of Practise (CoP)" to denote their qualification as an advocate. The BCI framed 'Certificate of Practise and Renewal Rules, 2014' in October 2014, which provides that advocates who joined in State Bar Councils after June 2010 had to appear for AIBE in order to acquire their CoP, whereas those who enrolled before June 2010 had to obtain their CoP within 6 months. Two kinds of advocates

[6] ibid, ¶ 6.
[7] ibid, ¶ 7.
[8] ibid, ¶ 8.

- practicing advocates and non-practicing advocates - were established by the BCI's "BCI Certificate and Place of Practise (Verification) Rules, 2015" that were released in January 2015. Both enrolled and newly admitted advocates have challenged these 2014 and 2015 Rules imposed by the Bar Council of India.[9]

ISSUES AT HAND

A three-judge bench of the Court stated on March 18, 2016, that a Constitution Bench should provide authoritative guidance on the issues at hand since they are of great significance and would have a significant impact on the legal profession as a whole. Consequently, the following three questions were framed which were referred to the Constitution Bench:

(1) Whether the Bar Council of India could validly prescribe pre-enrolment training in accordance with the Bar Council of India Training Rules, 1995, drafted under Section 24(3)(d) of the Advocates Act, 1961, and (2) if so, whether the decision of this Court in *V. Sudeer v. Bar Council of India* calls for reconsideration?

(2) Whether the Advocates Act of 1961 permits the Bar Council of India to establish a pre-enrolment test?

[9] Constitutional Bench Update: Bar Council of India v. Bonnie Voi Law College & Ors., (*Manupatra*) < https://www.manupatra.com/corporate/Blog/pdf/Bar-Council-of-India-vs-Bonnie-FOI-Law-College.pdf> accessed 25th July 2023.

(3) If the answers to questions 1 and 2 are in negative, then the subsequent question is whether the Bar Council of India can legitimately prescribe a post-enrolment examination in accordance with Section 49(1) (ah) of the Advocates Act, 1961?[10]

While these were the issues raised in the current case for the court to decide, another issue that was brought up by the court during the judgement in this case was the excessive fees charged by the State Bar Councils for enrolling advocates in the respective State Bar Councils and the need for a uniform fee structure, to be established by the Bar Council of India.

DECISION OF THE COURT: LAYING THE GROUND FOR FURTHER CHALLENGE

The authority of Bar Council of India to hold the All-India Bar test (AIBE), a pre-enrolment test, has been affirmed by the five-judge Constitution Bench, which is composed of JJ. Sanjay Kishan Kaul, Sanjiv Khanna, Abhay S. Oka, Vikram Nath, and JK Maheshwari. The Court stated that the Bar Council of India is directly concerned with the standard of individuals who wish to obtain a licence to practise law as a profession, and that neither the provisions under the Advocates Act, 1961, nor the role of the universities to impart legal education, in any way, prohibit the Council from conducting pre-enrolment examinations.[11] After

[10] *Bonnie Foi Law College & Ors*. (n 1) ¶ 9.
[11] ibid, ¶ 20.

noting that there are consequences, particularly with regard to the interregnum period, which would arise from holding the All-India Bar Examination in either scenario, it would be appropriate to leave it to the Bar Council of India to look to the finer points of both situations, the Court left it to the Bar Council of India to decide as to when the All-India Bar Examination has to be held- pre or post enrolment.[12]

The Court emphasized on the importance and role of the Advocate's Act 1961. which was passed by Parliament with the intention of harmonising the legislation governing legal professionals. The duties listed in Section 7 of the aforementioned Act for the Bar Council of India, the apex body governing legal profession, make clear its significant importance. The Bar Council of India is not given direct control over legal education by the rules, since this authority predominantly rests with institutions. However, as the supreme professional organisation for lawyers in India, the Bar Council of India, is concerned with the standards of the legal profession and the tools used by individuals who wish to enter it. It was determined that because the Bar Council of India is directly concerned with the standard of individuals who want to obtain a licence to practise law as a profession, neither these provisions nor the responsibility of the universities to provide legal education in any way prevent the Council from conducting pre-enrolment examination. The Court disagreed with the

[12] ibid, ¶ 35

argument in the *V. Sudeer*[13] case that because the ability of the State Bar Councils to conduct training sessions or examinations was removed by the 1973 Amendment, it *ipso facto* amounted to removing those abilities if they so belonged to the Bar Council of India. The Court argued that the Bar Council of India has much greater powers and authority.[14]

The Court also cited Section 49(1) (ag) of the Act, which, while addressing the Bar Council of India's general rule-making authority, specifically states that the Bar Council of India has been granted full authority over all matters pertaining to the class or category of individuals eligible to be enrolled as advocates. Therefore, it is difficult to question the Bar Council of India's need of an exam for enrolling of advocates.[15] The Court concluded that the *V. Sudeer* case establishes an improper legal stance. Along with that, the Court emphasised in its ruling that there are no transperancy and accountability in the collection of fees by the Bar Council of India. The cost of enrollment varies amongst State Bar Councils. The Bar Council of India, which has the authority to ensure that a standard pattern is followed and the cost does not

[13] *V. Sudeer v. Bar Council of India* (1999) 3 SCC 176
[14] Prachi Bharadwaj, 'AIBE valid; BCI must ensure quality of lawyers entering the profession': Read 8 suggestions by Supreme Court Constitution Bench' (*SCC Online Blog,* 11 February 2023) <https://www.scconline.com/blog/post/2023/02/11/aibe-all-india-bar-exam-bar-council-india-pre-enrolment-advocates-act-supremec-ourt-constitution-bench-legal-updates-knowledge-research-news/> accessed July 30th, 2023.
[15] ibid.

become prohibitive as soon as young students are about to enter the Bar, should pay attention to this.[16]

PAVING THE WAY FOR AN UNIFORM FEE STRUCTURE: ENSURING EQUALITY & INCLUSIVITY

As was already mentioned at the start of this article, the legal profession plays a crucial function in the pursuit of justice and the upholding the rule of law. It is a fundamental component of the Indian judicial system. The legal industry is not sparred from the concerns of injustice and prejudice that are present in our society, despite its significance. Members of historically marginalised groups, notably Dalits and Adivasis, women, and those from minority and economically disadvantaged sectors encounter significant obstacles in their attempts to enter, advance, and achieve in this field.

The unnecessarily high enrollment fees set by State Bar Councils are one of these primary barriers. For instance, it is Rs. 17,350 in Assam and Rs. 15,300 in Delhi. This places a heavy financial burden on families and recent law graduates from the aforementioned underprivileged background, who already struggle financially and have fewer job opportunities. The Bar Council has a responsibility to advance diversity by encouraging students from the aforementioned underprivileged groups to

[16] *Bonnie Foi Law College & Ors*. (n 1) ¶ 44.

pursue a legal education and career. This includes, but is not limited to, significantly lowering the high enrolment fees and providing other forms of assistance to ensure that all students have an equal chance to succeed.

SL. No.	Name of the State Bar Council	Total Enrolment Fees	Enrolment Fees
1.	Bar Council of Delhi	15,300	600
2.	Bar Council of Maharashtra & Goa	`15,500	600
3.	Bar Council of Punjab & Haryana	19,200	9200
4.	Bar Council of Assam, Mizoram, Nagaland, Arunachal Pradesh, & Sikkim	17,350	6000
5.	Bar Council of Rajasthan	16200	4800
6.	Bar Council of Madhya Pradesh	20,300	6000

7.	Bar Council of Karnataka	15500	5500
8.	Bar Council of Uttar Pradesh	16,665	-

Table 1: Enrolment Fees of different State Bar Councils[17]

The above table reflects the discrepancies in the fee structure of different State Bar Councils for the enrolment of candidates as advocates. It is important to highlight that the Kerala High Court recently ordered the Bar Council of Kerala to only collect Rs. 750 as an enrolment fee from law graduates who desire to enrol in the separate State Bar Councils in the case of *Bar Council of Kerala v. Akshai M Sivam*.[18] The Bar Council of Kerala appealed the single judge's decision limiting the enrolment fee to Rs. 750[19], and the case was heard by a division bench consisting of Chief Justice S.V.N. Bhatti and Justice Basant Balaji. In light of the interim order issued by the single bench of Justice Shaji P Chaly in *Koshy T. v. Bar Council of Kerala, Ernakulam & Anr.*[20], which held that the Bar Council lacks the required authority under

[17] Table showing enrolment fees of all state bar councils in India with respective fee structure (2021) (*Live Law*) < https://www.livelaw.in/pdf_upload/enrolment-fee-chart-430318.pdf> accessed July 30th, 2023.
[18] *Bar Council of Kerala v. Akshai M Sivam* W.P. {C) No. 3068 OF 2023(G).
[19] *Koshy T. v. Bar Council of Kerala, Ernakulam and Another* (2017) KHC 553.
[20] ibid.

the Statute, and is not permitted to collect fees beyond Rs. 750/- prescribed by law.

There are similar petitions pending before the Odisha High Court[21] and Bombay High Court.[22] The Supreme Court has admitted an PIL challenging the various enrolling fees being levied by several State Bar Councils as being too high, and as a result, the Supreme Court has given notice in the matter of *Gaurav Kumar v. Union of India*[23]. The issue was then raised on May 12, 2023, and the Supreme Court ordered the State Bar Councils that have not yet submitted their replies to do so within four weeks. If they fail to do so, their right to reply will be forfeited, and the petition will move forward assuming they have nothing more to say. The Supreme Court made an important oral observation during the hearing that the BCI must intervene because the State Bar Councils are charging exorbitant fees for enrolment as advocates.[24] The Supreme Court also expressed

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[21] 'Plea in Orissa High Court over 'exorbitant fees' for aspiring lawyers' (*Times of India*, Aug. 6, 2022) < https://timesofindia.indiatimes.com/city/cuttack/plea-in-orissa-high-court-over-exorbitant-fees-for-aspiring-lawyers/articleshow/93385223.cms> accessed August 1st, 2023.

[22] Greeva Garg, 'Bombay HC: Plea challenges increased Enrolment Fees of BCMG' (The Law Insider, Aug. 13, 2021) < https://www.lawinsider.in/news/bombay-hc-plea-challenges-increased-enrolment-fees-of-bcmg> accessed August 1st, 2023.

[23] *Gaurav Kumar v. Union of India*, 2023 SCC Online SC 391.

[24] Apoorva, '[Enrolment fees] Supreme Court issues notices to Union Government, Bar Council of India and State Bar Councils' (SCC Online Blog, April 10, 2023) <https://www.scconline.com/blog/post/2023/04/10/supreme-court-to-examine-validity-of-exorbitant-enrolment-fees-charged-by-sbc-legal-research-legal-news-updates/> accessed August 1st, 2023.

concern about how a Dalit student or a student from a rural background can afford such exorbitant fees for enrolment as advocates.

It is important to note that Sections 16 to 28 of Chapter III of the Advocate's Act of 1961 include the law governing "Admission and Enrolment of Advocates". The mandatory enrollment fee is Rs. 750/- as per Section 24(1)(f). It follows that since the amount of the enrolment fee is specified in the Act itself at section 24(1)(f), it is unnecessary to add that it can only be changed by amending the Act, which is not the case. In the case of *Bar Council of Maharashtra v. Union of India*[25], the State Bar Council was allowed to charge the annual fee that the Bar Council of India may from time to time determine after consulting with the other State Bar Councils. The State Bar Council of Maharashtra challenged the constitutional validity of Section 24(1)(f) of the Advocates Act, 1961 through a writ petition. The petitioners argued that Section 24(1)(f) is otiose, out-of-date, and generally tends to impede and restrict the fundamental right to form association and freedom of carrying out profession. The Bar Council claims that Section 24(1)(f), which grants it the right to charge enrolment fee, is the sole source of funding that is accessible to it. There is just one enrollment fee that must be paid, and after that, there is no provision that allows the Bar Council to demand further fees or donations from the Advocates. The Bar

[25] *Bar Council of Maharashtra v. Union of India* AIR 2002 Bom 220.

Council also attempted to argue that Article 19(1)(g) and Article 14 of the Constitution are violated by the restriction on the Bar Council's ability to collect only a one-time enrolment fee from an advocate at the time of enrollment. Instead, the Bar Council argued that it should be permitted to collect an annual renewal fee or a similar fee from advocates, as the Institute of Chartered Accountants does for chartered accountants.[26] The Bombay High Court held that –

"The enrolment fee payable by those seeking admission to the Bar Council was initially set at Rs. 250 under clause (f) of sub-section (1) of section 24, but by way of an amendment made by Act No. 70 of 1993, it has now increased to Rs. 600. Thus, it would appear that Parliament was aware of the issue because the enrolment cost nearly doubled as a result of Act No. 70 of 1993. We are worried that if the Bar Council's argument that Section 24(1)(f) is unlawful is accepted, the end outcome will be that the Bar Council will not be able to collect any registration fees at all. As things are, we do not perceive any constitutional error in the extent to which Parliament has set the enrolment cost. If the Bar Council determines that the amount of Rs. 600/- now set forth in Clause (f) of sub-Section (1) of Section 24 is insufficient, further remedies are available. The Bar Council may raise the issue with the Central Government in order to have the necessary action taken to alter the relevant legislation. It cannot

[26] ibid, ¶ 2.

be argued that bringing a Writ Petition is the appropriate route of action for the Bar Council's complaint. This Court while sitting in Writ Jurisdiction under Article 226 of the Constitution cannot make legislation and enact laws. Even with regard to Bar Council's grievance that it should be allowed to periodically recover renewal fee from the Advocates, such legislation cannot be made and the Bar Council cannot be permitted to do so."[27]

The question that remains, then, is whether the Bar Council has the right to include the fixing of special fees in the regulations it makes in light of sections 24(1)(e) and 28(2)(d). As we've previously seen, the Legislature itself has determined the enrolment fee that a candidate must pay when seeking for enrolment with a State's Bar Council under section 24(1)(f) of the Advocates Act, 1961. Once the legislature has established an enrolment fee, a State Bar Council or any other body may only validly set another cost- whether it be referred to as a special fee or something else- if there is an express legislative justification for doing so. It is a well-established principle that when the law specifies how an act must be carried out, it must be carried out that way or not at all. Therefore, the State Bar Councils lack the legal authority to impose exhorbitant enrolment fees when the statute specifies fees of Rs. 750. Any rules adopted by the State Bar Councils that grant them the right to establish enrollment fees

[27] ibid, ¶ 3.

other than those specified in Section 24(1)(f) are beyond the purview of their rule-making jurisdiction.

It goes without saying that the State Bar Councils' requirement of enrolment fees outside of those allowed by section 24(1)(f) blatantly violates the right to equality and equal treatment under the law given to law students and recent graduates as envisaged in Article 14. This creates a significant financial barrier for many aspiring Advocates, which is discriminatory against law students from historically oppressed and other underprivileged backgrounds of society.

CONCLUSION

The legal profession serves as an essential thread in the intricate web of justice administration, tying the arguments, facts, and evidence together to provide fair results. The discourse surrounding the *Bar Council of India v. Bonnie Foi Law College & Ors.* case made clear that the outrageous fees demanded by State Bar Councils for enrolment of advocates present a significant barrier to the overarching principles of fairness, equity, and accessibility that form the basis of our legal system. The Advocates Act, 1961, a piece of legal architecture, aims to maintain the health of the Indian legal community. However, the burgeoning issue of high enrolment fees has raised concerns about the effectiveness of the Act and its consistency with the values it purports to maintain. The tension between preserving the integrity of the legal profession and promoting diversity calls for a sophisticated

understanding - a delicate balance measured on the scales of justice.

The fundamental goal of the legal system is to deliver justice without discrimination, and it recognises that a diverse and diversified legal profession contributes to the lively nature of legal discourse. It is the responsibility of the legal profession as a whole to remove the obstacles that prevent people from disadvantaged backgrounds from participating in society. The legal community can raise the resonance of justice while ensuring that future luminaries are not constrained by financial restrictions by lobbying for affordable enrolment fees. Every citizen has a right to access justice; it is not only a privilege of the wealthy. Aspiring advocates are prevented from exercising this birthright by the high fees, upsetting the equilibrium that our legal system is designed to preserve. When every voice, regardless of origin or condition, vibrates within the holy halls of justice, the objectives of a nation are best accomplished, as we consider the consequences of the Bar Council case, we are reminded of this.

Last but not the least, legal institutions have a serious responsibility to work towards a legal profession that is fair, equitable, and open to all. It encourages us to follow a road of harmony where the integrity of the legal profession peacefully coexists with the ideas of equality and opportunity, ultimately pointing the way to a more just and equitable legal system.

BALANCING ACT: NAVIGATING NATIONAL SECURITY AND CIVIL LIBERTIES IN ANTI-TERRORISM LEGISLATION UNDER THE INDIAN CONSTITUTION

- Tarali Neog[1]

ABSTRACT

In the modern era, the delicate balance between national security imperatives and safeguarding civil liberties has become increasingly significant. This paper delves into the intricate interplay between these two crucial aspects by examining anti-terrorism legislation within the framework of the Indian Constitution. In an age marked by transnational threats and evolving security dynamics, nations grapple with the challenge of upholding national security while respecting the fundamental rights of their citizens. This piece sheds light on the Indian context, where the delicate task of harmonizing national security concerns and civil liberties is navigated through the lens of anti-terrorism legislation.

The term 'harmonizing' encapsulates the essence of this study, as it encapsulates the aspiration to strike an equilibrium

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between safeguarding national security interests and upholding the cherished civil liberties enshrined in the Indian Constitution. Inherent in this balance is the need to ensure that counterterrorism measures are not disproportionately restrictive and that they operate within the parameters of the Constitution. The concept of 'national security' signifies the safeguarding of a nation's sovereignty, territorial integrity, and the protection of its citizens from threats posed by terrorism.

Striking a balance between anti-terrorism efforts and civil liberties involves crafting legislation that empowers law enforcement agencies to act decisively against terror elements without infringing upon the rights of innocent individuals.

Keywords: *Harmonizing, National Security, Civil Liberties, Anti-Terrorism Legislation, Indian Constitution.*

INTRODUCTION

In an increasingly interconnected and complex world, the pursuit of national security and the protection of civil liberties often find themselves at odds. The quest to maintain a safe and secure environment must be balanced against the imperative of upholding the fundamental rights and freedoms of individuals. This delicate equilibrium becomes particularly pronounced in the context of anti-terrorism legislation, where states seek to counteract threats to their security while ensuring the preservation of the democratic values they hold dear. Nowhere is

this intricate balance more evident than in the Indian legal landscape, where anti-terrorism measures are intricately interwoven with the principles enshrined in the nation's Constitution.

The term 'harmonizing' aptly captures the essence of this discourse – the aspiration to synchronize the imperatives of safeguarding national security and preserving civil liberties. The postulate that these two objectives are not mutually exclusive, but rather mutually reinforcing, lies at the heart of a democratic society. Striking the right equilibrium is not only a legal necessity but a moral imperative, for an excess of either, could compromise the very essence of a just and free society. The modern concept of 'national security' extends beyond the traditional realms of territorial defence to encompass protection against a spectrum of threats. Among these, terrorism looms large as a transnational menace that transcends borders, ideologies, and cultures. The very nature of terrorism challenges the foundations of civil society, targeting innocent lives and the values that underpin democratic governance. Consequently, nations have sought to respond with legal frameworks that empower law enforcement agencies to prevent, investigate, and prosecute acts of terror. However, this pursuit of security cannot come at the cost of the very rights and liberties that such acts seek to undermine.

The 'civil liberties' discourse, deeply embedded within the fabric of democratic governance, highlights the inviolable rights

that every individual is entitled to. These rights include personal freedom, equality, privacy, and protection against arbitrary actions. The hallmark of a just society is its commitment to upholding these rights, even in the face of adversity. Therefore, the question arises: How can anti-terrorism legislation be crafted to address the grave threat of terrorism without infringing upon the rights and freedoms that define the essence of democracy?

The Indian Constitution, a living document that reflects the collective will of the people, stands as a sentinel guarding against the erosion of civil liberties, even in times of crisis. As a vibrant democracy, India has faced multifaceted challenges to its security. The Constitution, adopted in 1950, not only guarantees a range of civil liberties but also outlines the mechanisms through which these rights can be protected and enforced. Thus, any anti-terrorism legislation must be subjected to the constitutional litmus test to ensure that it respects the letter and spirit of the foundational document.

This article embarks on a journey through the intricate interplay between national security imperatives and civil liberties protections within the context of anti-terrorism legislation in India. By delving into the nuances of harmonizing these seemingly opposing forces, the article seeks to uncover how the Indian Constitution provides the framework for this endeavour. Through an exploration of legal provisions, judicial interpretations, and case studies, this article aims to shed light on the delicate balance

that India strives to achieve – one that respects its security concerns while safeguarding the democratic values that define its identity. In doing so, it contributes to the broader discourse on reconciling security and liberty in an increasingly complex world.

BACKGROUND OF ANTI-TERRORISM LEGISLATION

Since terrorism causes legitimate security concerns, the state takes a variety of steps to address them. One such measure is the deployment of anti-terrorism laws. Anti-terrorism laws are passed to combat terrorism. Many nations have passed suitable and strict anti-terrorist laws in response to the increase in terrorism over the past few years. India has also passed several anti-terrorism laws, some of which stem from the country's colonial background and others of which were passed in, especially after 1980. However, several of these laws were abandoned or overturned because they had been applied improperly. These laws were intended to be passed and implemented until the situation got better. Making these extremely harsh actions a permanent part of the law of the land was not the objective. However, the statutes have been reintroduced with the required amendments due to ongoing terrorist activity. Since terrorism has long been an issue in our nation, the Indian government has implemented a number of legal measures to combat terrorist and separatist activities.

These legislative measures may be divided into two categories –

I. Preventive Detention Laws and

II. Punitive Laws to Control Terrorism

PREVENTIVE DETENTION LAWS

Essentially the term "Preventive Detention" appeared in the legislative lists of the Government of India Act, 1935, and has been used in Entry 9 of List I and Entry 3 of List III in the Seventh Schedule to the constitution[2], there is no authoritative definition of the term in Indian law. It is a preventative action and has nothing to do with a crime. When compared to the word punitive, the word "preventive" is employed. Instead of punishing a man for what he has done, the goal is to stop him in his tracks before he even starts. Therefore, the primary goal of preventive detention is to stop him from harming society in any way and to defend the state against sabotage, and violent operations planned in secret to cause public commotion.

The East India Company Act, passed in 1780, contains the earliest known case of preventative detention of a person by presidential order, but an Act with the same name passed in 1784 was more thorough. The Governor-General was authorized to

[2]Priti Saxena, *Preventive Detention and Human Rights* (Deep & Deep Publications, 2007).

secure and detain any person or persons suspected of carrying on correspondence or activities prejudicial to or dangerous to the peace and safety of the British settlements or possessions in India, in addition to using preventive detention for those whose activities endangered the security of the state Nevertheless, the aforementioned Act gave the detenue the chance to learn what was being charged against him within five days[3].

Several later Acts, including the Bengal Regulation of 1812, the Bengal State Prisoners' Regulation of 1818, the Madras State Prisoners' Regulation II of 1819, the Bombay State Prisoners' Regulation XXV of 1827, and the State Prisoners' Act of 1850, included provisions for the right to be detained and arrested without a warrant. According to these rules, a prisoner was not permitted to ask the court for a writ of habeas corpus. Despite this, the detenue had the right to present evidence in his defence and section 491 of the Criminal Procedure Code also recognized the right to habeas corpus[4].

The current Article 22 of the Constitution, which addresses the protections afforded to those who have been arrested and those who have been imprisoned under rules governing preventive detention, was the subject of extensive dispute at the time the Constitution was being drafted. Preventive

[3] Chatterjee, Dr. S. S. (2003). Control of Political Offences in India Through Laws (p. 226). Kolkata: Kamal Law House.
[4] Ghosh, S.K. (2005). Terrorism: World Under Siege (pp. 397-398). New Delhi: Ashish Publishing House.

detention laws can be passed in India under the pretexts of "national security" and "maintenance of public order," according to the constitution.

However, the central and provincial governments were given the authority to create laws for preventive detention once the Government of India Act, of 1935, was adopted as the temporary constitution. To ensure the defence of British India, the public safety, the maintenance of public order, the effective conduct of war, or the maintenance of supplies and services essential to the community's life, a second Defence of India Act was passed in 1939, at the start of the Second World War.

Shortly after the Constitution took effect, Parliament passed the Preventive Detention Act of 1950, which established detention as a means of preventing anyone including foreigners from acting in a way that would be detrimental to India's defence, its relations with other countries, its security, the maintenance of public order, and the upkeep of supplies and services that are vital to the community. The Maintenance of Internal Security Act, which was passed in 1971 and effectively reinstated the PDA's powers after it expired in 1969, replaced the Preventive Detention Act. On December 4, 1971, Parliament passed the Defence of India Act, 1971. This Act granted the superpowers of indefinite "preventive" detention of individuals, search and seizure of property without warrants, and wiretapping in the quelling of civil and political disorder in India, as well as countering foreign-

inspired sabotage, terrorism, subterfuge, and threats to national security. The Act was passed in light of the serious emergency that had been declared by the President at the time, and it included provisions for exceptional measures to guarantee public safety and interest, the defence of India and civil defence, the prosecution of certain offences, and issues related thereto.

The National Security Act of 1980 was passed by the Parliament in 1980 after Congress regained control, and it is still in force today. Numerous PDA and MISA provisions were reinstated by this Act. It gives security forces the right to detain someone without a warrant if they're suspected of doing something that threatens public safety, economic vitality, or national security. The procedural criteria are virtually the same as those under the PDA and MISA, and it also permits preventative detention for a maximum of 12 months. The Act also grants immunity to the security personnel who participated in putting an end to the violence. The only statute allowing for preventive detention to combat terrorism in India is this one. The Act gives the Central Government or the State Government the authority to detain a person to prevent him or her from acting in any manner detrimental to the security of the State, detrimental to the maintenance of Public Order, detrimental to the maintenance of supplies and services essential to the community, or in any other manner for which it is necessary to do so. The length of any

detention order issued under this act must not exceed 12 days[5], and it may be carried out anywhere in India. Twelve months[6] is the maximum detention time. A detention order can be changed or removed at any moment[7].

Punitive Laws to Control Terrorism

There are various anti-terrorism laws in India, which are punitive, but some of them were already repealed at different points of time. At present, the legislation in force to check terrorism in India are the National Security Act, 1980, National Investigation Agency Act, 2008, Unlawful Activities (Prevention) Act, 2012, Unlawful Activities (Prevention) Act, 2008, Unlawful Activities (Prevention) Act 2004 and the Unlawful Activities (Prevention) Act, 1967, Armed Forces Special Powers Act 1958.

A few of the anti-terrorism acts along with their provisions include:

Unlawful Activities Prevention Act, 1967 (UAPA)

India adopted its Constitution on November 26, 1949, and on January 26, 1950, it went into effect. The Constitution gave its citizens a wide range of rights, and it was quickly apparent that if these rights were not governed, the state's functioning would become seriously unbalanced. As a result of this exigency, the

[5] National Security Act 1980, s 3.
[6] Ibid s 13.
[7] ibid s 14.

Indian Constitution underwent its first revision in 1951, replacing clause (2) in Article 19, which set appropriate limitations on the exercise of such rights. On the recommendation of the Committee on National Integration and Regionalism, which was appointed by the National Integration Council to impose reasonable restrictions in the interest of India's sovereignty and integrity, Article 19(2) was further amended in 1963 by the Constitution (Sixteenth Amendment) Act, 1963. Additionally, the Unlawful Activities (Prevention) Bill was introduced in the Parliament in order to carry out the provisions of the aforementioned Constitutional Amendment. It was approved by both Houses of Parliament and received the President of India's assent on December 30, 1967, after which it became the Unlawful Activities (Prevention) Act, 1967[8]. The original statute was intended to establish a process for gathering information, and the accused were to be tried in accordance with the guidelines set forth in the Criminal Procedure Code, 1973[9]. According to the original act's declaration of goals and justifications, it aims to stop any illegal activity that might be carried out by both people and groups.

After the 9/11 attack[10], there was a marked increase in the severity of anti-terrorism laws in all liberal democracies.

[8] Unlawful Activities (Prevention) Act 1967.

[9]Anjana Prakash, 'It's Time for the Government to Redeem Itself and Repeal the UAPA' (2023) <https://thewire.in/law/its-time-for-the-government-to-redeem-itself-and-repeal-uapa> accessed 10 June 2023.

[10] Mark Pearson & Naomi Busst, 'Anti-terror laws and the media after 9/11: Three models in Australia, NZ and the Pacific' (2006) 12(2) Pacific Journalism Review <https://www.researchgate.net/publication/27826847 Antiterror laws

Countries that were worried by terrorist activity in one of the most industrialized nations saw this as a chance to enact punitive legislation. As nations were appalled by this tragedy, there wasn't much opposition to it at the time. Similar was the case after September 26, 2001, in India[11]. While the State must defend its residents from those who could infringe upon their rights, it should not do so at the expense of the rights of the nation's minority. Older anti-terrorism laws were removed because they granted the executive branch enormous power without offering any effective safeguards[12]. The UAPA still reflects the same, and as a result, public disgust with this law grows with each amendment. Parliamentarians debated the need for and potential abuse of UAPA at the time of its first formation, during which the opposition parties raised concerns[13]. The government responded that the Act's requirement that it bear the burden of proof in order to establish an organization's prohibition[14] would prevent an arbitrary ban on the association from occurring at that time.

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and the media after 911 Three models in Australia NZ and the Pacific accessed 23 June 2023.>.

[11] Maeen Mavara Mahmood, 'The Conundrum of the Unlawful Activities (Prevention) Act, 1967: A Comparative Analysis with Analogous Legislations' (2021) 26 Supremo Amicus 214.

[12] Bhamati Sivapalan & Vidyun Sabhaney, 'In Illustrations: A Brief History of India's National Security Laws' (The Wire, 27 July, 2019) <https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws>accessed 25 June, 2023.

[13] Maeen Mavara Mahmood(n 15).

[14] Ibid.

Thus, while the original Act contained constitutional protections[15], its modifications and ongoing restrictions on specific minority organizations made it the subject of public and academic inquiry. The UAPA has undergone a number of revisions, and in 2004 anti-terror clauses were included. It was revised again in the years 2008, 2012, and 2019, which was the mostrecent and contentious as it designated individuals as terrorists.

National Investigation Agency Act, 2008

The National Investigation Agency Act of 2008 was passed to investigate and prosecute individuals for offences affecting the sovereignty, security, and integrity of India, as well as offences relating to state security, friendly relations with foreign states, and offences under laws enacted to carry out international treaties, agreements, conventions, and resolutions of the United Nations, its agencies, and other international organizations[16].

The National Investigation Agency (NIA) Act, 2008 was passed by the Parliament in the wake of the recent spike in terrorist attacks, including the attack on the British Parliament and the Mumbai attacks, with the aim of increasing

[15] Sneha Mahawar, 'Terror of Unlawful Activities Prevention Act, 1967 (UAPA)' (2020) 21 Supremo Amicus 103.

[16] "Amendment to the National Investigation Agency Act, 2008: An Act of Violation" (Amendment to the National Investigation Agency Act, 2008: An act of violation - Frontline, August 5, 2019) <https://frontline.thehindu.com/the-nation/article28758410.ece> accessed on 27 April 2023.

professionalism in the investigation of terrorist acts for the first time, a national investigation agency with the authority to look into matters over the entirety of India's territory has been envisioned by the NIA Act. It is the shared obligation of the federal, state, and local governments to combat terrorism. It is crucial to develop tactics, precise intelligence, and current databases on terrorists to counter terrorist actions.

Only an empowered central organization with regional and local field offices and quick communication can complete this multi-agency coordination and time-bound action. Similar to this, a committed group of officers who are highly motivated, trained, and totally professional may move quickly to confront terrorism when given the necessary power, resources, and equipment. For this reason, the National Agency Act was passed. Centre-state collaboration is envisioned in the investigation of terrorism situations. It restricts the new agency's authority to a select list of scheduled offences covered by seven Central Acts that address nuclear energy, illegal activities, anti-hijacking, civil aviation safety, marine safety, weapons of mass destruction, and commitments under the SAARC Terrorism Convention. Offences against the State[17] and offences involving money and bank notes[18] are included in the scheduled offences under the jurisdiction of the National Investigation Agency in the Indian Penal Code.

[17] Indian Penal Code 1860, s 121-130.
[18] Ibid s 489A-489E.

The important aspect of The National Investigation Agency Act of 2008 is that it applies to the whole of India, Indian citizens living outside of India, and passengers on ships and aircraft with Indian registry. During the investigation of a crime, the NIA personnel is attributed with the same rights as that of a police officer. The NIA investigates a crime only when the central government believes the crime is related to terrorism and requests that the NIA look into it. It can look into additional offences related to terrorism. The State Government provides the NIA with full support in conducting criminal investigations. The Act's investigation-related provisions have no bearing on the State Government's authority to look into and prosecute any terrorism-related crimes or other offences. For the trial of offences related to terrorism, special courts established by the centre may meet anywhere. The High Court may transfer such matters to any other special court within the state, and the Supreme Court of India may transfer any case that is ongoing with the Special Court to another Special Court in the same State or any other State. For the trial of any offence under the Act, the Special Courts would have all the authority granted to the court of sessions under the Criminal Procedure Code (CrPC).

Such cases' trials would take precedence over those for other offences. One or more special courts may be established at the discretion of the State Governments. After the first 90 days have passed, no appeal will be considered in such situations. Terror-related acts have been specifically referred to and

addressed in the NIA Act. Terrorist acts include using bombs, dynamite, poisons, different gases, biological, radioactive, and nuclear substances. One very distinct distinction between the National Investigation Agency and the Central Bureau of Investigation is that the NIA Act of 2008 makes no mention of bail. If an accused person is in custody, he cannot under any circumstances be given bail. Additionally, there is no possibility for bail if the accused is not an Indian citizen and entered the country unlawfully.

When looking into specific offences, the NIA disregards the Police Act of 1861's requirements. Although the states have been informed since the NIA Act of 2008 gives them the authority to alert the NIA when they discover such offences, such as offences related to terrorism, being committed, the NIA can also act Suo Motto to deal with any of the scheduled crimes. This is a departure from the CBI's practice, which called for the State's consent before the agency could take over the case. The Federal Bureau of Investigation in the United States served as a model for the NIA. The NIA's goal is to make the judicial system stronger so that the Central Government can successfully combat terrorism. The NIA is also intended to combat cybercrime and insurgency.

The National Investigation Agency (hence referred to as NIA) was formed under the NIA Act. The Central Government established, ran, and oversaw the NIA to look into and prosecute

scheduled offences[19]. Any FIR or information pertaining to a crime on the list must be sent by the state to the central government[20]. Within fifteen days of receiving the report, the Central Government will decide whether the offence is related to a scheduled offence or not based on reports from State governments or other sources. If the findings are positive, it will then be decided if the case is appropriate for NIA investigation by taking into account the seriousness of the offence[21]. Without awaiting a State Government's report, the Central Government may order the NIA to conduct the scheduled offence inquiry on its own initiative[22]. The State Government must offer all cooperation and hand over all papers and evidence to the NIA once the NIA assumes control of the inquiry.

Armed Forces Special Powers Act, 1958

One of the harshest pieces of legislation ever approved by the Indian Parliament is the Armed Forces (Special Powers) Act of 1958 (AFSPA). The statute gives the military forces unique authority in what it refers to as "disturbed areas" and only has six provisions. In 1972, it was revised to include all seven states in India's north-eastern area. Originally, it only applied to the north-eastern states of Assam and Manipur[23]. The Armed Forces

[19] National Investigation Agency Act 2008, s 3-4.
[20] Ibid s 6(1) 6(2).
[21] ibid s 6(3) 6(4).
[22] ibid s 6(5).
[23] 'Explained: What Is AFSPA, and Why Are States in Northeast against It?' (The Indian Express, December 7,

(Special Powers) Act of 1948 is where the Armed Forces (Special Powers) Act of 1958 got its start. The Indian government passed four ordinances in response to the situation that developed in some areas of the country because of the country's 1947 division.

In order to put an end to the Quit India Movement started by M. K. Gandhi during the colonial era, Lord Linlithgow, the viceroy of India, enacted the Armed Forces Special Powers (Ordinance) on August 15, 1942. Police shootings at Indian protesters resulted in thousands of deaths and many more arrests. The Naga insurgency, however, started in the modern era in 1954, following independence. The Armed Forces (Special Powers) Act was passed in 1958 by Nehru's administration to stifle this movement. As vicious as the British troops in India were the atrocities committed by Indian soldiers in Nagaland. Since then, AFSPA has been implemented in all the North Eastern states, as well as in Punjab and Jammu & Kashmir.

The major purpose of the act is to make it possible for military personnel to be granted special authority in troubled areas of the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, and Tripura. According to the

2021)<https://indianexpress.com/article/explained/nagaland-civilian-killings-indian-army-repeal-of-afspa-northeast-7661460/>accessed on 29 May 2023.

Act, the Governor must declare a certain area to be a disturbed area before AFSPA can be implemented there[24].

Definitions pertaining to this Act are provided under Section 2 of the Act. The statute specifies that the phrase "armed forces" refers to both armed forces and air forces, which are regarded as armed forces on land[25]. Any other Union armed forces could also be included in it. A "disturbed area"[26] is further defined as a region that has been identified as a disturbed area under Section 3 of the Act.

Accordingly, the Governor must declare a certain area to be a disturbed area before AFSPA can be implemented there. The Hon'ble Supreme Court of India, however, ruled that section 3 cannot be read to give the authority to make a declaration at any time. Before the term of six months has passed, the declaration should be periodically reviewed[27].

The provision of the act that has generated the most debate is Section 4, which establishes some specific authorities for the military services. The Act's Section 4 gives the armed forces the authority to forbid groups of five or more people from congregating in a given location. If they believe that someone or

[24] Armed Forces Special Powers Act 1958, s 3.
[25] Ibid s 2(a).
[26] ibid s 2(b).
[27] Naga People's Movement of Human Rights v. Union of India [1998] SC 413.

several persons are breaking the law, they have the right to start shooting after issuing a proper warning. If the authorities have a good faith suspicion that a vehicle may be carrying weapons of any type, they have the authority to stop and search the vehicle. If a cognizable offence has been committed, the army may arrest the suspect(s) without a warrant if there is reasonable doubt. The Act provides the military with a right to enter a location without a search warrant and conduct a search there[28].

"The Naga People's Movement for Human Rights v. Union of India"[29] case, where the Act's legality was contested through a writ petition, was decided by the Supreme Court of India in 1997. It was claimed that the Act had created a sort of imbalance between military personnel and civilians, as well as between the Union and State authorities and that it had breached constitutional rules governing the procedure for issuing proclamations of emergency. These arguments were dismissed by the court. It determined that the Act's various sections were being complied with the pertinent provisions of the Indian Constitution and that the Parliament had the authority to adopt the Act.

Maharashtra Control of Organized Crime Act, 1999 (MCOCA)

In an effort to overthrow both organized crime and terrorism, the Maharashtra Control of Organized Crime Act, 1999

[28] Armed Forces Special Powers Act 1958, s 4.
[29] Ibid n 68.

(MCOCA), was passed by the state of Maharashtra in 1999. The threat of organized crime was growing, as stated in the declaration of object and reasons, and the Maharashtra State lacked any effective legislation to effectively control organized crimes. It was necessary to pass laws along the lines of the current law to deal with them. The Act itself contains provisions to prevent the misuse of the law. The passage of this law is expected to significantly reduce the propagation of fear in society and allow for significant control of the criminal groups supporting terrorism[30]. The present legal framework, which includes the penal and procedural legislation and the adjudicatory system, seems rather to be inadequate to curb or control the menace of organized crime, according to the preamble of MCOCA. In order to combat the threat of organized crime, the government has decided to enact a special law with strict and dissuasive provisions, including the ability to intercept wire, electronic, or oral communication under certain conditions.

Only the Special Court whose local jurisdiction the offence was committed to or, as the case may be, the Special Court established for trying offences may trial any offence under the MCOCA[31]. In MCOCA cases, the police have the ability to file a charge sheet within 180 days as opposed to the usual 90 days. In MCOCA proceedings, an apprehended person may be held in

[30] 'Maharashtra Control of Organized Crime Act, 1999 Explained by Adv. Ravi Drall, Delhi High Court' (Lawstreet.co) <https://lawstreet.co/vantage-points/maharashtra-control-organized-crime-ravi-drall> accessed on 29 March 2023.
[31] Maharashtra Control of Organized Crime Act 1999, s 9(1).

police custody for 30 days rather than the usual 15 days after the accused is produced in court within 24 hours, as opposed to regular criminal cases[32].

The Act permits the interception of wire, electronic, or oral communications[33], makes the intercepted information admissible as evidence against the accused in court, mandates that every order issued by the authority with the necessary authority to authorise the interception[34]be reviewed by a review committee, and places certain restrictions on the interception[35].

If the Special Court requests it, the proceedings under this Act may be conducted behind closed doors[36]. On a request made by a witness in any process before it, by the Public Prosecutor in connection to that witness, or on its own initiative, a Special Court may take whatever steps are necessary to protect a witness's identity and address. Without limiting the generality of the requirements of subsection (2), a Special Court may take the following actions under that subsection:

1. Proceedings to be held at such location as determined by the Special Court;

[32] The Code of Criminal Procedure 1973, s 167(2).
[33] Maharashtra Control of Organized Crime Act 1999, s 14.
[34] Ibid s 15.
[35] ibid s 16.
[36] Ibid s 19-.

2. Names and addresses of the witnesses in its orders or judgments or in any records of the case available to the public need to remain anonymous

3. the issuing of any directives to ensure that the identification of the witnesses are not disclosed; and

4. All proceedings pending before the court shall not be made public.

Anyone who disobeys a direction given under subsection (3) faces a period of imprisonment that may last up to a year and a fine that may amount to one thousand rupees.

For the safety of the witness, it is stipulated that the witness need not be produced in court if they are not willing. There is no danger of victimization under such a judicial system. It is recommended that a Deputy Commissioner or higher rank officials supervise the case, especially in MCOCA instances. Only in MCOCA cases can a Deputy Commissioner of Police or an officer of higher rank record the voice of an apprehended gang member who wishes to confess, and the confession will be admissible in court[37]. However, the case shouldn't be under investigation or supervised by the Deputy Commissioner of Police or any higher-ranking official who would record the confession.

[37] ibid s 23 (1)(b).

Karnataka Control of Organized Crime Act, 2000 (KCOCA)

The Karnataka Control of Organized Crime Act, 2000 (KCOCA) is a law that was passed by the state of Karnataka and received presidential approval on the 22nd day of December 2000. This Act included special provisions for dealing with organized crime syndicate or gang criminal activity, as well as matters related to or incidental to such activity, prevention, control, and management. It is a duplicate of the Maharashtra Control of Organized Crime Act (MCOCA), which was passed in 1999. The act defines "organized crime" as any ongoing illegal activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, using violence or the threat of violence, intimidation or coercion, or other unlawful means, with the aim of obtaining financial benefits, obtaining an unauthorized advantage in the economy or in any other way, or promoting insurgency"[38]. "The statute also outlines the establishment of one or more special courts for the trial of the listed offences[39]. A judge to be chosen by the State Government would preside over the special court, with the approval of the Chief Justice of the High Court of Karnataka.

The KCOCA also permits the police to listen in on electronic communications like phone calls. Evidence that is on tape has always been accepted as evidence. Sections 14, 15, 16, 17

[38] Karnataka Control of Organized Crime Act 2000, s 2(e).
[39] ibid s 5.

and 28 of the KCOCA offer comprehensive provisions to stop unauthorized invasions of privacy.

In accordance with the Indian Evidence Act, the accused's police confessions are typically not admissible as evidence against them. However, if the confessions are voluntary and made in front of a police officer with at least the rank of superintendent of police (equivalent to deputy commissioner of police in cities), they are admissible under the KCOCA and can be used against both the confessing offender and the other accused parties in the same cases[40]. According to Section 22, anyone accused of committing a KCOCA offence is not eligible for anticipatory bail. The sole conditions under which a court may give bail to an accused person are that "the court is satisfied that there are no reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. If the Court learns that the defendant was out on bail for an offence under this Act or another Act on the day of the alleged offence, it should not grant bail to the accused.

A person can be prosecuted for presumption as to an offence for an organized crime offence punishable by Section 3 if it is proven that unlawful weapons and other materials, including documents or papers, were recovered from the accused's possession or by expert testimony, that the accused's fingerprints were discovered at the scene of the offence or on anything,

[40] Ibid s 19.

including unlawful weapons and other materials, including documents, or if the accused's fingerprints were found on anything, including unlawful arms and other materials, including documents[41].

Indian Penal Code, 1860

Crimes against the state are covered in Chapter VI of the Indian Penal Code, 1860. The next two sections deal with conspiracy and preparation to conduct such an offence by gathering arms, etc., while Section 121 specifies the punishment for those involved in waging war against the Government of India. Disguising with the intent to aid acts intended to wage war is prohibited under Section 123. An expansion of section 121A, section 124 provides a deterrent penalty for assault, wrongful restraint, etc. intended to intimidate or prevent the President or the Governor of any state from acting within the scope of their constitutionally granted authority. Sedition is defined by Section 124A as the commission of certain acts that will incite hatred, contempt, or strong feelings against the legal government of India. Such deeds may be carried out by the use of spoken or written words, signs, or other audible or visual representations.

Criminal Procedure Code, 1973

[41] ibid s 23.

Any Executive Magistrate or official in charge of a police station (not below the rank of a sub-inspector) has the authority to issue a directive to disperse any unlawful assembly or any assembly of five or more people that is likely to disturb the public peace[42]. The aforementioned magistrate or police officer may employ whatever amount of force is required to disperse the unlawful assembly or to apprehend and confine its participants[43]. If the Executive Magistrate is unable to disperse the unlawful assembly using ordinary means, he is further authorized to utilize armed forces to do so[44]. Any commissioned officer of the armed forces may disperse such a gathering with the assistance of the armed forces under his command when public security is obviously threatened by such an assembly and no Magistrate can be reached[45]. Additionally, under section 144 of the Criminal Procedure Code, 1973, the District Magistrate, Sub Divisional Magistrate, or any other Executive Magistrate, specially empowered by the State Government, may order a specific person or the public at large to cease doing something or to refrain from congregating in a public place in order to prevent immediate harm or danger to human life, health, or safety, a disturbance of the public tranquillity, a riot, or an affray. Although the aforementioned clause is not specifically directed against terrorism, it may nonetheless serve to indirectly restrain terrorist

[42] The Code of Criminal Procedure 1973, s 129(1).
[43] Ibid s 129 (2).
[44] ibid s 130 (1).
[45] Ibid s 131.

activities in certain areas where it is forbidden for any citizens to leave their homes. If a terrorist chooses to emerge in such an area, he will be easily recognized if police are effectively patrolling the area.

CONSTITUTIONAL VALIDITY OF ANTI-TERRORISM LEGISLATIONS

Anti-terrorism laws are special laws that have occasionally been passed to address unique circumstances. The judiciary has consistently maintained the legitimacy of these legislations. Through a number of cases, the legislative authority of the Parliament to pass various anti-terrorism laws has been contested.

Since anti-terrorism laws are special laws, they are consistent with the jurisprudential history of other special laws that have occasionally been passed to address unique circumstances. India is not an exception to this rule. The British only intended to arrest those who were seen as a threat to the British settlement in India when they passed the first preventive detention law in 1793. The Bengal State Prisoner's Regulation was afterwards passed by the East India Company in Bengal, and it survived for a long time as Regulation III of 1818. Regulation III, an extra-constitutional regulation contradicting all fundamental liberties, allowed for the indefinite detention of anyone against whom no legal action would be taken for lack of sufficient grounds.

The British's most effective weapon for putting an end to political violence was Regulation III. Regulation III of 1818, which was gradually extended to other regions of British India, was heavily employed during the first two decades of the 20th century to quell revolutionary terrorist operations in Bengal. The Regulation permitted the "personal restraint" of people against whom there might not be sufficient grounds to initiate any legal proceedings for the prevention of tranquillity in the territories of native princes entitled to its protection and the security of British dominions from external hostility and internal commotion. The beginning of the 20th century saw the emergence of numerous covert organizations seeking independence through violent means, which led to the observation of the revolutionary movement in India. During this time, various laws were passed to halt the rising tide.

The judiciary has played a variety of roles in relation to anti-terrorism laws. On the one hand, the courts have typically upheld the legality of security, emergency, and special laws. Even when a person's human rights are being infringed, courts have a tendency to recognize the existence of particular circumstances and settings as justifications for a less strict interpretation and implementation of the law.

Before the Indian Constitution of 1950, India was administered by the Government of India, and the distribution of legislative power between the Federation and the Provinces

followed a similar pattern. In accordance with Entry 1 of List II of the seventh schedule to the Government of India Act, 1935, those subject to such custody are those who are subject to preventive detention related to the maintenance of public order. The creators of our Constitution believed that the need for drafting such preventative detention legislation would be seldom and should only be applied sparingly and cautiously in a free India with a democratic and representative government. However, the Preventive Detention Act, which was passed by the Parliament in 1950 to stop the "violent and terrorist" activities of the communists in the states of Madras, West Bengal, and Hyderabad, was a wise decision. A.K. Gopalan v. State of Madras[46] was the first case to be heard by the Indian judiciary after the Indian Constitution was enacted. The Preventive Detention Act is not subject to the declaration of an emergency under Part XVIII of the Constitution or to the occurrence of any war with a foreign power. Therefore, Preventive Detention was accepted by our Constitution as separate from emergency laws. Preventive detention being included in the Constitution is a novel element.

The Armed Forces (Special Powers) Act of 1958 (AFSPA) was challenged through a writ petition before the Supreme Court of India in Naga People's Movement for Human Rights v. Union of India[47]. The petitioner claimed that the Act had upset the balance between military and civilian, as well as the Union and

[46]A.K. Gopalan v. State of Madras [1950] SC 27.
[47] Naga People 's Movement for Human Rights v. Union of India [1998] SC 431.

State authorities and that it had breached constitutional rules governing the procedure for issuing proclamations of emergency. These arguments were dismissed by the court. It determined that the Act's various sections were compliant with the relevant provisions of the Indian Constitution and decided that the Parliament had the authority to adopt the Act.

The petitioner argued that the AFSPA was unconstitutional because it gave the armed forces complete control over preserving public order in a volatile area, even though the Constitution only allows Parliament to enact laws relating to the use of the Armed Forces in aid of civil power. The Court specifically rejected this argument. However, the Supreme Court decided that the "in aid of civil power" phrase required the continuous existence and significance of the authority to be assisted in rejecting this claim. Therefore, the AFSPA prohibits the military forces from "supplanting or acting as a substitute" for a state's civilian authority in maintaining public order and mandates that they work in close coordination with them.

An important MISA case is ADM Jabalpur v. Shivakant Shukla[48]. In this case, the interpretation of MISA's Section 16A (9) was in question. The declared emergency from 1975 is a topic of the case. This case involved more than 100,000 persons who were detained during the emergency under the MISA, including journalists, activists, intellectuals, and politicians. The

[48]ADM Jabalpur v. Shivakant Shukla [1976] AIR 1207.

constitutionality of such arbitrary detentions was under question. The Supreme Court's majority decision upheld MISA as legally valid and ruled that petitions for habeas corpus to challenge unlawful detention during an emergency cannot be filed in any High Court or the Supreme Court. The Indian judiciary had one of its worst periods during this time. Justice HR Khanna, in a fair dissent, opined that no citizen's right to life and personal liberty under Article 21 of the Indian Constitution can be violated, not even in times of emergency[49].

The Supreme Court has heard appeals regarding the laws of TADA and POTA. In Kartar Singh v. State of Punjab (referred to as "Kartar Singh"), the petitioners argued that TADA was unlawful on two grounds: first, the Central Legislature lacked the authority to enact the laws, and second, some of the provisions (particularly 15, which permitted the admission of confessions made to police officers as evidence) were in violation of the fundamental freedoms outlined in Part III of the Constitution. Furthermore, it claimed that TADA violated humanitarian law and universal human rights, lacking impartiality, and woefully failing the fundamental justice and fairness test, which is the cornerstone of law. The Supreme Court heard the petition and noted that the petitioners made a bitterly severe attack seriously asserting that the police are engaging in a 'witch-hunt' against

[49] 'Revisiting the Emergency: A Primer – the Leaflet' (theleaflet.in25 June 2020). <https://theleaflet.in/revisiting-the-emergency-a-primer/> accessed 15 June 2023.

innocent people and suspects by misusing their arbitrary and un analysed power under the impugned Acts and branding them as potential criminals and hunting them constantly and overreacting thereby unleashing a reign of terror as an institutionalized terror perpetrated by Nazis on Jews. The Peoples' Union for Civil Liberties (PUCL) objected to POTA with nearly identical concerns.

However, the claim that these laws had "the voice of unconstitutionality" was rejected in favour of constitutionality because none of their provisions violated the fundamental right to a fair trial by violating established evidentiary rules and allowing the admission of confessions, secret witnesses, extended detention, etc. TADA's constitutionality was confirmed by the Kartar Singh decision, whilst POTA's was defended by the Supreme Court in PUCL. Since terrorism, in the court's opinion, dealt neither with "law and order" nor "public order," but rather with the "defence of India," the Supreme Court supported the legislative competence of the Parliament to adopt these legislations in both instances. In both rulings, the court overruled concerns about civil liberties by invoking the threat of terrorism. In Kartar Singh, the Supreme Court supported the constitutional soundness of TADA by recommending a quarterly review of cases and adding certain safeguards to the recording of confessions.

The Court noted that terrorism affects the security and sovereignty of nations and should not be equated with the law and order or public order problem that is confined to the State alone

when responding to the question of the legislative competence of the Parliament to enact anti-terrorism legislation. The Court maintained the Parliament's authority to establish and implement this Act because it recognized the need for collective worldwide action. The court even went so far as to suggest that a statute cannot be declared unconstitutional based only on misuse of the law.

It has also been questioned in the past whether the National Investigation Agency (NIA) is constitutionally valid in this regard and whether it is able to conduct investigations under the National Investigation Agency Act, of 2008. It is possible to use Entry 8 of List I (the Union List) as proof that the Central Government established the NIA, but there is no connection between Entry 8 of List I and Entry 2 of List II. The phrase Central Bureau of Intelligence and Investigation appeared in Entry 8 of List I (Union List) of the Seventh Schedule. This phrase effectively prohibited the Central Government from conducting an investigation into a crime because it would only be constitutionally possible for a police officer to conduct an investigation under the CrPC because police are solely a state subject. Although this power is subject to the limitations under Articles 249 and 252 of the Constitution, Entry 2 of List II is about "police," which is a state topic. The centre has no authority to legislate on this subject other than as stated in Entry 2A of List I. A matter on the state list that is in the national interest may be the subject of legislation by the Parliament for a year only, as stated in

Article 249 of the Constitution. By agreement and the approval of such legislation by any other state, Article 252 allows for the creation of laws that apply to two or more states. In addition, Entry 93 of List I list legal violations related to any of the items on this list. Therefore, by establishing NIA, the centre may also pass the NIA Act.

Entry 1 of List I, which deals with the defence of India, and Article 355 of our constitution give the centre the authority to pass laws in this area. This pertains to the defence of India and every part of it, including preparation for defence, as well as all acts that may be conducive in times of war to its prosecution and after it ends to effective demobilization, as well as the obligation of the Union to protect states against external aggression and internal disturbance.

CONCLUSION

The confluence of national security imperatives and the preservation of civil liberties remains an ongoing challenge for democratic societies worldwide. Within the framework of anti-terrorism legislation, this challenge becomes particularly pronounced, as states endeavour to safeguard their citizens from threats while upholding the democratic values they hold dear. The exploration of India's approach to harmonizing national security and civil liberties through its constitutional lens reveals insights that resonate beyond its borders. The journey through

the gradation of Indian anti-terrorism legislation and its constitutional underpinnings underscores the delicate equilibrium that must be struck. The Indian Constitution stands as a steadfast guardian of civil liberties, enshrining the principles of equality, freedom, and justice. It is precisely during times of security crises that the true mettle of a democracy is tested, as it must navigate the treacherous waters of countering terrorism while staying true to its core values.

The lessons drawn from India's experience provide valuable takeaways for the global community. The need for precision in defining 'terrorism' within legislation, avoiding broad and vague terminology that could lead to abuse, is a paramount consideration. Any counterterrorism measures must be proportionate, necessary, and subject to judicial oversight, ensuring that they do not infringe upon the rights they are meant to protect. The role of the judiciary emerges as a cornerstone in the endeavour to harmonize national security and civil liberties. Courts serve as the ultimate arbiters, interpreting the Constitution's provisions and ensuring that anti-terrorism legislation adheres to its principles. The principle of 'constitutionalism' underscores that even in the face of adversity, the fundamental rights of individuals must be upheld.

Striking a delicate balance between national security imperatives and the protection of civil rights remains a formidable challenge within the framework of the Unlawful Activities

(Prevention) Act (UAPA). While acknowledging the imperative of safeguarding the nation from potential threats, it is crucial for lawmakers and policymakers to continually reassess and refine the legislation to ensure that it upholds constitutional values and respects individual liberties. Stricter oversight mechanisms, periodic reviews, and transparent accountability measures must be implemented to prevent the misuse of UAPA provisions and to safeguard citizens from unwarranted infringement on their civil rights. Ultimately, fostering an environment where national security and civil rights coexist harmoniously necessitates a nuanced and adaptive approach, recognizing the evolving nature of threats and the enduring importance of upholding the principles of justice and democracy.

In conclusion, the endeavour to harmonize national security and civil liberties is a complex and evolving process. It requires a delicate touch – one that respects the necessity of safeguarding citizens from terrorism while upholding the democratic values that define the essence of a nation. The Indian Constitution, with its emphasis on fundamental rights, separation of powers, and the rule of law, provides a framework that navigates this balance.

REFUGEE RIGHTS BEYOND THE REFUGEE CONVENTION: A COMPARATIVE ANALYSIS OF INDIAN AND INDONESIAN LAWS, CHALLENGES, AND SOLUTIONS

Mr. Tejbeer Singh[1]

Mr. Ali Asghar[2]

ABSTRACT

In the 21st century, technological and contemporary global progress is marked by the increase in the economic wellbeing of nations around the world -- though characterized by wide regional differences. The development has come at the cost of increasing power struggles among the nations all around the world leading to the violation of human rights of a large number of humans. Even though democratic principles are widely supported and recognised by a large number of countries, the on-ground application of these principles is still a far-fetched dream. Pursuant to the problems faced by large numbers of refugees, the Refugee Convention was signed in 1951 and a consequent protocol was signed by some member countries of the United Nations in 1967 of which some of the major countries like India and other Southeast Asian countries like Indonesia, which house a large number of refugees, are not a member. This paper

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analyses the rights of the refugees in Indian law with respect to the Refugee Convention in detail and also discusses in brief the rights of refugees in the light of the Indonesian law. The paper further discusses the contemporary challenges facing the international community regarding securing the human rights of the refugees through the contemporary Poland-Belarus refugee crisis as well as the Rohingya crisis across the Bangladesh-India border. The conclusion is marked by the suggestions that could be helpful in combating the modern-day refugee crisis that could help balance the legitimate concerns of the nations with the human rights of the refugees.

KEYWORDS: *Refugee rights, Refugee convention, Refugee crisis, Indian refugee law, Indonesian refugee law.*

INTRODUCTION

According to UNHCR, more than 108 million people worldwide have been displaced forcibly from their places over a period of 70 years due to fear of persecution, conflict, violence, human rights violations, or events seriously disturbing public order. The figures have always shown an upward trend since the 1950s, and the COVID-19 Crisis made the situation across the globe even worse. These statistics clearly show the magnitude of the global refugee crisis.

To address the problems of the refugee crisis and to aid and protect the refugees, forcibly displaced communities, and stateless people, the United Nations established the United Nations High Commissioner for Refugees (UNHCR) in 1950. The international standards for the treatment of refugees in different countries were laid down in the 1951 Refugee Convention and its 1967 Protocol. Not every country across the globe has signed the Refugee Convention, but as mentioned above, the refugee crisis is a global phenomenon, and even the non-signatory countries are bound by international humanitarian laws to protect the rights of the refugees. The absence of any refugee-related law can create various challenges in ensuring adequate protection for refugees.

The focus of the paper will be on two non-signatory countries, i.e., India and Indonesia. Although they haven't signed the 1951 Convention, they still have to face complex refugee problems. We want to shed light on the special challenges faced by refugees in non-Convention countries and investigate how these nations handle the protection of refugee rights in the absence of a legally enforceable international framework by analysing the situations in both countries.

Ultimately, the comprehensive analysis will contribute to a greater understanding of the difficulties and potential solutions to the refugee crisis in non-Convention nations by delving into the specifics of the legal systems, policy concerns, and humanitarian responses in India and Indonesia.

The paper will also analyse two of the major refugee crises that happened in the past few years, one being the Poland Belarus migrant crisis and the other being the Rohingya refugee crisis, which will help develop a better understanding of the impact of a refugee crisis on a country hosting the refugees, from crimes to shortage of basic necessities like food and water.

Finally, the paper concludes by giving suggestions on how the situation of refugees can be improved and what are the possible solutions to address the concerns related to the rights of refugees, such as copyrights, employment, acquisition of property, education, food, housing, etc.

ANALYSIS OF RIGHTS OF REFUGEES IN INDIA WITH REFERENCE TO THE REFUGEE CONVENTION

The Refugee Convention places certain obligations on the contracting states and grants certain rights to the refugees. Most of the articles of the Refugee Convention place an obligation upon the signatory state to grant the refugees the same rights as would be accorded to foreign nationals, or in certain articles, aliens, under the same circumstances. Some of the provisions, like those relating to copyright rights[3] or rationing rights[4] are to be accorded

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (1951) (The 1951 Refugee Convention) art 14.
[4] ibid art 20.

to refugees on par with the nationals of the country. As a result, refugees in signatory countries are dealt with through specific legislation as opposed to general laws applicable to foreign citizens.

In India, refugees are generally dealt with on a case-by-case basis and are occasionally governed by specific regulations and guidelines issued by the Central Government. This is due to the lack of any particular legislation on this particular matter. However, certain rights are guaranteed to the refugees by the Constitution as well, and certain general laws applicable to foreign citizens are also applicable to refugees. In this portion, the Indian laws regarding the rights that are guaranteed to refugees as per the Refugee Convention will be analysed.

Rights available to Refugees regarding Acquisition of Property

Article 13 of the Refugee Convention obligates the state to guarantee the same treatment to refugees as given to aliens under the same circumstances[5]. In major signatory countries to the convention, ownership rights related to property are equally granted to refugees and nationals and are generally not very restrictive in approach. However, the refugees are granted ownership rights in India by the respective State Governments or

[5] ibid art 13.

the Central Government on a case-by-case basis.[6] The Indian law does not give the same ownership rights related to property to refugees as it does to citizens, and prior approval from the respective state governments is needed to be fulfilled even for foreign nationals residing in India.[7] This is evident from the fact that certain refugees in Maharashtra were granted ownership rights after 70 years, and the Mizoram government directed Rohingya refugees not to purchase property without government approval.[8]

Rights available to Refugees regarding Copyrights

As per section 2(1)(ii)[9] of the Copyright Act, 1957, works that are first published in India will be deemed to be Indian works. This means that in order to avail protection under the Indian Copyright law, it is not necessary for the author to be a citizen of India, as protection for the same has been provided under Sections 2(l)(i)[10] and 2(l)(iii)[11] of the Copyright Act. However,

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[6] Rina Chandran, 'India grants land ownership rights to refugees who fled Pakistan 70 years ago' (*Reuters,* 27 April 2018) <https://www.reuters.com/article/us-india-landrights-refugees-idUSKBN1HY14O> accessed 15 May 2023.
[7] 'Acquisition and Transfer of Immovable Property in India' (*Ministry of External Affairs*) <https://www.mea.gov.in/images/pdf/acquisition-and-transfer-of-immovable-property-in-india.pdf> accessed 15 May 2023.
[8] Press Trust of India, 'Mizoram instructs Myanmar refugees not to purchase land or house without govt permission' (*The Print*, 18 September 2013) <https://theprint.in/india/mizoram-instructs-myanmar-refugees-not-to-purchase-land-or-house-without-govt-permission/1133723/> accessed 16 May 2023.
[9] The Copyright Act, 1954 (14 of 1957) s 2 (1) (ii).
[10] ibid s 2 (1) (i).
[11] ibid s 2 (1) (iii).

generally, the work of refugees may not receive protection due to a lack of awareness of legal provisions and safeguards and exploitative practises prevalent in this domain. To address this issue, specific legal provisions can be inserted in the Copyright Act so as to accord protection to the works of refugees in India. The works of foreign nationals can be accorded protection, as can be logically read from the protection granted to foreign works in India by certain countries as mentioned in the International Copyright Order, 1999. [12]

Rights regarding Wage Earning Employment and Self-Employment

The right to work is not available to refugees in India under any formal legislation. The MGNREGA Act was enacted with the aim of providing 100 days of guaranteed employment to people residing in rural areas and willing to do unskilled work, and in case of unavailability of work, people who have applied are entitled to wages for that duration of work.[13] Though no provision of the Act limits its application to Indian Citizens, refugees residing in rural areas face difficulties in having access to work. This is due to the difficulties in providing the identity proof needed to secure a job card in certain states. In most cases, these identity proofs involve the Aadhaar card or the ration card.[14] The payment done under

[12] The International Copyright Order, 1999, S.O. 228(E).
[13] The National Rural Employment Guarantee Act, 2005 (42 of 2005) s 4 (1).
[14] Preeti Motiani, 'Who can apply for Aadhaar card? Know the eligibility rules' (*The Economic Times,* 15 October 2018) <

this scheme is also now done through an Aadhaar based payment system, making the implementation of the Act highly dependent on the Aadhaar verification of workers.

This is a very big challenge for the refugees, as they cannot attain an Aadhaar card or ration card without government approval on a case-by-case basis. This is due to the fact that foreign citizens residing in the country for 182 days are eligible for the issuance of an Aadhaar card. However, in the case of refugees, it is very difficult to establish the legality of their residency, as the same requires specific sanction on the part of the government. This is also supported by the fact that, as per MHA, even UNHCR card holders are not entitled to Aadhaar cards.[15] There is no legislation for extending the Aadhaar card facilities to refugees specifically for work related purposes under MGNREGA or even for claiming certain social security benefits associated with them.[16]

Refugees can work in the country subject to the regulatory conditions imposed by the government and having received

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https://economictimes.indiatimes.com/wealth/personal-finance-news/who-are-eligible-to-apply-for-aadhaar-find-out/articleshow/59998036.cms> accessed 16 May 2023.

[15] Rajesh Kumar, 'UNHCR card holders not entitled for Aadhaar: MHA' (*The Pioneer,* 09 October 2018) <https://www.dailypioneer.com:443/2018/india/unhcr-card-holders-not-entitled-for-aadhaar--mha.html> accessed 17 May 2023.

[16] Jean Drèze, 'Making Aadhaar-Based Payments Compulsory for NREGA Wages Is a Recipe for Disaster' (*The Wire,* 16 February 2023) < https://thewire.in/rights/aadhaar-payments-compulsory-nrega> accessed 17 May 2023.

proper legal sanction for residence and property rights from the government. However, refugees do not have the fundamental right to practise any trade, occupation, or business as granted to citizens as per Article 19(1)(g)[17] of the Constitution. Though the right for citizens is limited by Article 19(6)[18], refugees have a more limited right to practise any trade or profession. A government issued advisory in 2016 prohibited refugees from engaging in 'sensitive businesses' like selling SIM cards, etc[19]. This does not act contrary to the position of the 1951 Refugee Convention, as Article 18[20] provides for the same rights to the refugee to engage in self-employment as are accorded to the aliens under the same circumstances, which is done by the Indian Government largely in cases where refugees are granted some sort of property right by the government.

In the case of liberal professions, refugees lack access to the same and also face big challenges related to identity verification and valid documents necessary for seeking admission to higher institutions. Moreover, in most cases, the refugees lack proper education due to differences in the education systems and curricula. To address this, programmes like bridge courses can be

[17] The Constitution of India, 1950 art 19 (1) (g).
[18] ibid art 19 (6).
[19] Aloke Tikku, 'Refugees can work but can't be in 'sensitive businesses', Centre asks states' (*Hindustan Times,* 25 August 2016) < https://www.hindustantimes.com/india-news/refugees-can-work-but-can-t-be-in-sensitive-businesses-centre-asks-states/story-24ppzEm8Byj3v0LcQG5pPM.html > accessed 18 May 2023.
[20] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (1951) (The 1951 Refugee Convention) art 18.

conducted, and some special provisions providing for higher education can be incorporated through legislative means so as to accord them a reasonable chance of self-development.

Rights regarding Food and Ration

Food security is the most essential aspect of human rights, as proper nutrition is the only way of ensuring that the people get basic nutrition and health, which enables them to realise the opportunity that the formal legal system guarantees them for securing the goal of socio-economic justice based on the cornerstone of humanitarian principles in modern democracies. The right to food is a basic human right that flows from reading Article 21[21] of the Constitution of India.

To achieve this objective, the NFSA Act[22] was enacted by the Parliament in 2013 in order to meet the basic nutrition requirements of people who belong to low-income groups of society. The primary requirement for availing benefits under the PDS scheme is that the beneficiary must hold a ration card issued by the competent authority. The refugees are not entitled to ration cards as many states have different eligibility criteria and verification processes that refugees are not able to meet.

[21] The Constitution of India, 1950 art 21.
[22] The National Food Security Act, 2013 (20 of 2013).

This non-entitlement to ration cards can also be verified by the fact that Tibetan refugees were 'issued' ration cards by Odisha's State government[23], which verifies the fact that most refugees are granted ration cards on a case-by-case basis by the respective state government or are ineligible for the same as they cannot fit the eligibility criteria fixed by various state governments. Though international organisations like UNHCR and WFP are working in close coordination with their respective governments to secure the refugees' right to food, comprehensive legislation addressing the rights of refugees as a whole can play a great role in supplementing their efforts.

Housing related Rights

Under the Pradhan Mantri Awas Yojana (PMAY) scheme, all eligible beneficiaries must hold a valid Aadhaar Card for verification purposes, which invariably restricts refugees from getting benefits under this scheme.[24] The Convention requires no distinction between the treatment accorded to aliens and refugees under the same circumstances. Going by that, the scheme is not in conflict with the provisions of the Convention, but a legislative provision providing for some residency benefits so as to not violate

[23] Subhashish Mohanty, 'Tibetan refugees get ration cards' (*The Telegraph Online*, 26 February 2023) <https://www.telegraphindia.com/india/tibetan-refugees-get-ration-cards/cid/1918948> accessed 18 May 2023.
[24] Ministry of Housing & Urban Poverty Alleviation, Government of India, 'Pradhan Mantri Awas Yojana (Housing for All - Urban)' (*Vikaspedia*, 11 January 2022) < https://vikaspedia.in/social-welfare/urban-poverty-alleviation-1/schemes-urban-poverty-alleviation/pradhan-mantri-awas-yojana-housing-for-all-urban> accessed 19 May 2023.

the basic human rights and dignity of the refugees can be incorporated.

Rights related to Public Education

Though there is no requirement of being a citizen of India so as to get elementary education in India, the same is a fundamental right under Article 21-A [25] of the Constitution and the Right to Education Act, 2005, which secures the right to elementary education for every child till the age of 14 years by virtue of Section 3[26]. However, the refugees or illegal immigrants are not able to avail themselves of these basic education rights for their children due to a lack of access to the schools or a lack of awareness of the appropriate legal rights that are available to their children.

However, the verification process for the children and their parents, as mandated by different states, tends to exclude the refugees. This is due to the requirement of Aadhaar based verification of the child's parents and the child itself for securing admission. The MP government had mandated the completion of the verification process of documents like residence proof and Aadhaar cards in order to complete the admission process[27]. The

[25] The Constitution of India, 1950 art 21 (A).
[26] Right to Education Act, 2005 (35 of 2009) s 3.
[27] TNN, 'Madhya Pradesh: July 1 last date to file for RTE admission' (*The Times of India,* 28 June 2021)
<https://timesofindia.indiatimes.com/city/bhopal/madhya-pradesh-july-1-

UP government has also mandated Aadhaar-based verification of students and their parents for admission to primary schools.[28]

The same problems of the verification process, lack of awareness, and low levels of development restrict the refugees from getting access to higher education in the country.

Rights related to Public Relief and Social Security Provisions

The majority of public relief schemes of the Government of India, even the most basic schemes like PDS schemes, involve complex verification processes requiring Aadhaar cards or other supporting documents, due to which refugees are left at the discretion of the state or central governments for availing benefits under public relief schemes or social security schemes. The benefits are either extended on a case-by-case basis or valid documents are issued by the competent authority. Though the intention of the government can be readily questioned as the verification processes are employed to make sure that the benefits reach the genuine seekers, a lack of legislation on refugees and their verification process exacerbates the problem by depriving

last-date-to-file-for-rte-admission/articleshow/83910939.cms> accessed 19 May 2023.

[28] Rajeev Mullick, 'Now, Aadhaar card mandatory for all U.P. govt primary, upper primary students' (*The Hindustan Times*, 27 June 2022) < https://www.hindustantimes.com/cities/lucknow-news/now-aadhaar-card-mandatory-for-all-u-p-govt-primary-upper-primary-students-101656349303567.html> accessed 19 May 2023.

them of the basic human rights they are entitled to as per Article 21 of the Indian Constitution.

Article 24 of the Refugee Convention mandates that we not differentiate between nationals and refugees in matters of public relief and social security[29]. Though the benefit under this article is limited to certain matters under the control of administrative authorities or subject to laws and regulations, social security provisions like pensions can also be limited by the state parties to the Convention. Nonetheless, legislative clarity on this particular issue will enable the government to better identify the beneficiaries and accord them protection.

The exhaustive study of the existing public literature showcases that the lack of refugee laws in India has led to the treatment of refugees at the sole discretion of government policies depending on socio-political reasons.[30]

NON-REFOULEMENT POLICY IN INDIAN LAW

India is a signatory to the International Covenant for Civil and Political Rights (ICCPR) and the Universal Declaration of

[29] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (1951) (The 1951 Refugee Convention) art 24.
[30] Arushi Dhawan and Dr. K. Parameswaran, 'Rights of Refugees in India: The Legal Perspective with Special
Reference to Their Educational Rights' (2022) 6(4) Journal of Positive School Psychology < https://journalppw.com/index.php/jpsp/article/view/4320/2859> accessed 19 May 2023.

Human Rights (UDHR). It follows from the reading of Article 7 of the ICCPR [31]and the combined reading of Articles 3[32], 4[33], and 14[34] of the UDHR that the principle of non-refoulement forms an integral part of these conventions, and India, being a signatory of both, should actively follow the principle of non-refoulement. Moreover, the principle today forms part of customary international law due to widespread acceptance and respect of human rights and also due to a number of conventions signed in this regard.

Also, the Manipur High Court recently held that the principle of non-refoulement flows from the reading of Article 21 of the Indian Constitution. [35] Though the view of the Supreme Court in a recent judgement upholding the expulsion of Rohingya refugees and holding that the principle of non-refoulement was not a part of Indian law because India was not a signatory to the 1951 Refugee Convention. However, the Supreme Court, in framing sexual harassment guidelines in the Vishakha case, considered international conventions and treaties, including CEDAW, to which India was a signatory. The court held that

[31] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.
[32] UN General Assembly, 'Universal Declaration of Human Rights' UNGA Res 217A (III) (10 December 1948) UN Doc A/810 at 71 art 3.
[33] ibid art 4.
[34] ibid art 14.
[35] The Leaflet, 'Non-refoulement' is part of Indian Constitution, says Manipur HC; grants Art 21 cover to 7 Myanmarese for safe passage to Delhi' (*The Leaflet,* 03 May 2021) < https://theleaflet.in/non-refoulement-is-part-of-indian-constitution-says-manipur-hc-grants-art-21-cover-to-7-myanmarese-for-safe-passage-to-delhi/> accessed 20 May 2023.

Article 51[36], read with Article 253[37] and Entry 14 of the Union List, implies that principles not opposed to Part 3 of the Constitution and upholding constitutional guarantees of fundamental rights to individuals can be considered and incorporated into the body of Indian jurisprudence. Therefore, the wider interpretation of Article 21 as done by the Manipur High Court is in concordance with the principle of non-refoulement, which is a part of customary international law, and hence, despite the absence of legislation declaring this principle to be part of Indian law, courts can consider and apply it in order to grant relief to refugees in cases where it would not be detrimental to national security concerns.

PROCESS OF NATURALIZATION OF REFUGEES IN INDIAN CONTEXT

In India, certain communities belonging to certain religions from certain countries are not regarded as illegal migrants for the purposes of the Foreigners Act and Passport Act and hence will not be deported and will be granted citizenship by naturalisation after fulfilling certain conditions as provided in the Citizenship Amendment Act, 2019.[38]

[36] The Constitution of India, 1950 art 51.
[37] ibid art 253.
[38] The Citizenship (Amendment) Act, 2019 (47 of 2019) s 2.

Pursuant to the proviso to clause (b) of s. 2(1) of the CAA Act, 2019, the Central Government or an authority specified on its behalf may grant a certificate of registration or a certificate of naturalisation on fulfilment of certain conditions after an application is made for citizenship in this behalf. Further, the period of service required for naturalisation in certain communities has been reduced to 5 years. But it is clear that all other refugees facing persecution in other countries will be treated as illegal immigrants, which makes this Act highly restrictive in its approach.

Indian lawmakers need to consider this issue with a sensitive approach and reconsider the parameters of naturalisation of refugees, as reducing the refugees to second class residents will violate their right to basic human dignity and a decent opportunity to survive and have a decent standard of living. Though the apprehensions of India in this regard and those of other countries facing refugee problems are not unfounded and are based on understandable concerns, which will be discussed later.

THE POLAND BELARUS MIGRANT CRISIS

The border between Poland and Belarus was marked by humans shivering in cold, living in hunger, and without access to any of the basic amenities needed for a basic standard of living. For us, it seemed like even the supreme creator would have given

up hope for humanity. The crisis continued for months at the borders of both countries. Belarus, in response to EU sanctions, started flooding the Polish border with refugees having complete disregard for their basic human rights and dignity. The migrants were not allowed to return and were forced to enter Poland. Poland also responded in a harsh manner by blocking the border and increasing security in order to push back the incoming migrants. Both countries have shown disrespect for the 1951 Refugee Convention, and Poland, being an EU member country, also violated the European Convention of Human Rights (ECHR), which embodies the principle of non-refoulement under Article 4 Protocol 4[39]. Many EU leaders have accused Belarus of waging hybrid warfare against EU nations by flooding them with migrants.

There are various reasons behind this crisis. One reason is the larger sentiment of the Polish public attached to this issue and also the ideological orientation of the ruling party in Poland. The second reason could be the economic and social issues that arose with the influx of large numbers of migrants into a nation, as that takes a toll on resources and tends to disturb the perception of the nationals towards the plight of refugees. The third could have been the international and geopolitical dynamics of the nations based on their own vested interests. These interests, whatever their

[39] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (1950) 5 (European Convention on Human Rights, as amended) (ECHR) art 4.

nature or genuineness, became a huge reason for the plight of these immigrants, who were victims of these conflicts. Also, the unaccountable and unfettered exercise of power by the leaders of a nation tends to undemocratize the decision-making process, which ultimately leads to incessant conflicts. There can be a host of other reasons for this crisis.

However, Poland, along with Latvia and Lithuania, are blamed more for disrespecting the ECHR. The reactions and steps taken by these nations may be unjustified and are in disregard of basic human rights and international law. However, these reactions are not unfounded, and one can attempt to understand the reasoning behind the reactions of these nations. As discussed above, resource constraints and changes in public perception based on the economic limitations of the nation play a very important role, and a possible solution to balance the genuine concerns of nations with the human rights of refugees and asylum seekers will be discussed in following section.

THE ROHINGYA REFUGEE CRISIS

When it comes to a refugee crisis, a state giving shelter to a stateless population bears most of the consequences, and the Rohingya refugee crisis is one such living example. Rohingya is a Muslim ethnic minority in Myanmar that has been denied citizenship since 1982 on the grounds that the Rohingyas are illegal immigrants from Bangladesh. In 2017, around seven lakh

Rohingya refugees were forced to leave their country, making it one of the fastest-growing refugee crises in the world.[40] The Rohingyas were tortured, raped, and displaced by burning down their houses and even entire villages, which left them with no choice but to migrate to another nation. The Rohingyas fled from Myanmar and took refuge in Bangladesh, and to this date, there are approximately one million refugees residing in Cox's Bazar, Bangladesh, which makes it one of the largest refugee camps in the world.[41] These refugees are given the status of registered refugees and are given relief by the Refugee Relief and Repatriation Commission of Bangladesh.

Bangladesh is not a signatory to the United Nations Refugee Convention of 1951 and its 1967 Protocol, but despite being a non-signatory, Bangladesh has recognised the principle of non-refoulment and provided the Rohingya Muslims relief and shelter from the persecution. But a refugee crisis does not only mean giving shelter to the migrants; it also comes with a lot of security concerns for the nation that provides them shelter.

One of the main security concerns associated with the refugees is crime within these refugee camps. It is not possible for

[40] Reuben Lim Wende, 'Stateless Rohingya continue to struggle for survival in Myanmar' (*UNHCR,* 25 August 2022) < https://www.unhcr.org/news/stories/stateless-rohingya-continue-struggle-survival-myanmar > accessed 19 May 2023.
[41] UNHCR, 'Rohingya Refugee Crisis Explained' (*UNHCR,* 13 July 2022) < https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/ > accessed 20 May 2023.

a developing middle-income country to provide each and every immigrant with proper resources and employment. These countries depend on donations and aid from foreign countries and agencies. Many agencies, such as the United Nations High Commission for Refugees (UNHCR), Médecins Sans Frontières, also known as Doctors Without Borders, and the United Nations International Children's Emergency Fund (UNICEF), provide relief to these immigrants, especially women and children. Now, to sustain even the most basic necessities in such difficult situations, immigrants start getting involved in illegal activities, and as a result, the crime rate increases. The majority of these immigrants are not equipped with any skills and are not literate enough, which also makes them unsuitable for any kind of employment.

In 2018, Bangladesh seized a record 53 million methamphetamine (Yaba) pills, which is also known as the madness drug.[42] Many of these drug dealers were Rohingya. As the refugees are in dire need of money for basic necessities, they fall into the trap of drug trafficking very easily.

According to some reports, Bangladeshi police have seized various firearms, from highly advanced to domestically made[43].

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[42] AFP, 'Bangladesh makes record drugs seizure — 53m meth pills' (*World Asia,* 10 February 2019) <https://gulfnews.com/world/asia/bangladesh-makes-record-drugs-seizure--53m-meth-pills-1.61987724> accessed 20 May 2023.

[43] Tribune Desk, '2 million yaba pills, 14 firearms seized from Rohingya camps in 16 months' (*Dhaka Tribune,* 04 July 2022)

These firearms are not only used for illegal trans-border smuggling but also for committing various crimes such as theft, rape, and murder. This becomes a reason for internal tussles among the refugees in the refugee camps.

The refugees also cross borders to find better opportunities in neighbouring countries. These refugees forge their identities by making fake identity documents and crossing the border illegally. There have been instances where Rohingya refugees were arrested by the police for crossing borders illegally, and fabricated documents such as Aadhaar cards were also recovered by the officials[44]. The Rohingya refugees enter India through the borders of West Bengal, Manipur, and Tripura.

Due to the overcrowding of the refugee camps with Rohingyas, the Government of Bangladesh decided to relocate some refugees to a newly formed island in the Bay of Bengal. In 2020, the GOB relocated around 20,000 refugees to the island, and as of now, the number stands at approximately 30,000. [45] The island is not equipped with any kind of storm and flood protection

<https://www.dhakatribune.com/crime/2022/07/05/2-million-yaba-firearms-seized-from-rohingya-camps-this-year > accessed 20 May 2023.

[44] Express News Services, 'Five Rohingya immigrants arrested in Tripura for illegal border crossing, fake Aadhaar cards' (*The Indian Express,* 19 May 2023) < https://indianexpress.com/article/north-east-india/tripura/five-rohingya-immigrants-arrested-tripura-8618920/ > accessed 20 May 2023.

[45] '"An Island Jail in the Middle of the Sea" Bangladesh's Relocation of Rohingya Refugees to Bhasan Char' (*Human Rights Watch,* 07 June 2021) < https://www.hrw.org/report/2021/06/07/island-jail-middle-sea/bangladeshs-relocation-rohingya-refugees-bhasan-char > accessed 20 May 2023.

measures, and along with this lack of reliable water supplies, schools, health facilities, and food shortages, the residents of the island are often at serious risk.

The Rohingya crisis gives us an account of not just a refugee crisis but also the socio-legal and security concerns related to the settlement of refugees in a nation. Bangladesh is a low- to middle-income developing country, and hosting refugees for an indefinite period puts pressure on its resources.

Since 1971, Bangladesh has already hosted many refugees, and further signing of the 1951 Refugee Convention and its 1967 Protocol could lead to additional pressure to host more refugees, which is not possible with the limited infrastructure of the country. The only way to deal with this problem could be a safe deportation of the refugees back to their country, as indefinite hosting is definitely not the solution. But this is only possible with the cooperation of Myanmar, as regular persecution could again lead to the same situation or even worse in some cases.

THE INDONESIAN LAW ON REFUGEE

Indonesia is one of the few countries in South Asia that hasn't signed the 1951 Refugee Convention but has still shown a humanitarian approach towards refugees over the years. Collaborating with the United Nations High Commissioner for

Refugees and analysing its policies can help give new direction to policy-making in India too.

As of 2022, Indonesia is home to around 13,098 refugees from over 50 countries. The influx of refugees in Indonesia started in the 1990s. Indonesia is one of the major South Asian countries after India that has not signed the 1950 Convention relating to the status of refugees or its 1967 protocol. The majority of refugees in Indonesia came from Afghanistan, Myanmar, and Somalia. The President of Indonesia signed a comprehensive refugee law in 2016.[46]

According to this regulation, a foreign refugee is a person who resides within the boundaries of Indonesia due to fear of persecution due to race, ethnicity, religion, nationality, membership in a particular social group, or different political opinions and does not wish to avail himself of the protection of his own country or be declared a refugee by UNHCR.[47]

As Indonesia doesn't have a national refugee status determination system, the Government authorises UNHCR to

[46] Sreeparna Banerjee, *The Rohingya crisis: Indonesia's immigration issue,* Observer Research Foundation, https://www.orfonline.org/expert-speak/the-rohingya-crisis-indonesias-immigration-issue/ (last updated Jan.18, 2023).
[47] The Handling of Foreign Refugees Concerning the Handling of Foreign Refugees, 2016 (125 of 2016) art 1 (1).

carry out its refugee protection mandate and identify solutions for refugees in the country.

Article 28G (2)[48] and Article 28[49] of the Indonesian Constitution of 1945 and Legislation No. 39 of 1999 concerning human rights, respectively, provide that “Everyone has the right to seek and receive political asylum from another country”.

Article 2[50] of the 2016 Presidential Regulation on Handling Refugees provides that the “handling of refugees is carried out pursuant to cooperation between the central government and the United Nations through the United Nations High Commissioner for Refugees in Indonesia and/or international organisations”.

Furthermore, Article 3[51] of the regulation states that "the handling of refugees must duly observe generally applied international provisions and be in accordance with the provisions of laws and regulations". If, in any case, the refugee’s application is rejected by the United Nations through UNHCR, then such a person can be subject to deportation and be put in an immigration detention centre.

Overall, Indonesia has outsourced the determination of a refugee to the UN through UNHCR instead of having a system of its own,

[48] The Constitution of the Republic of Indonesia, 1945 art 28 G (2).
[49] ibid art 28.
[50] The Handling of Foreign Refugees Concerning the Handling of Foreign Refugees, 2016 (125 of 2016) art 2.
[51] ibid art 3.

and the rights and treatment that are given to the refugee depend on the status provided to a person by this agency.

SUGGESTIONS FOR ADDRESSING THE REFUGEE CRISIS

The Global Compact on Refugees (GCR) is a framework adopted by the United Nations in 2018 to address the challenges posed by large refugee movements. The GCR offers recommendations to improve the global response to refugee situations. It emphasises the importance of international cooperation and burden-sharing among countries to ensure a fair distribution of responsibilities. The GCR calls for the protection of refugees' human rights, including non-refoulement and access to education, healthcare, and legal assistance. It emphasises the need for comprehensive and predictable response plans, early warning systems, and coordination mechanisms. The GCR promotes self-reliance and inclusion, encouraging support for refugees' socio-economic integration and empowerment. It highlights the importance of durable solutions such as voluntary repatriation, local integration, and resettlement. The GCR also stresses the need for sustainable funding mechanisms and engagement with non-state actors. Additionally, it emphasises data collection and evidence-based approaches to inform policies and programmes. By implementing these recommendations, the international community can enhance the effectiveness and

inclusivity of refugee responses, ensuring the well-being of refugees while supporting host communities.

Refugees are humans who are entitled to basic human rights that grant certain levels of opportunities so as to enable them to secure fundamental opportunities for growth and development. Though countries endeavour to protect their citizens on a priority basis and are somewhat justified in their approach, refugees cannot be left at the mercy of unknown circumstances facing them, as they are humans at the end of the day. Furthermore, neglecting these refugees leads to an increase in crimes and an unsafe environment for the nationals of the country. The democratic principles are inevitably based on respect for basic human dignity, and so countries claiming themselves to be democratic must make concerted efforts in this regard.

A possible solution further along this line could be the creation of a common fund pool that would be established by nations that are signatories to the Refugee Convention. This fund could be managed with a similar institutional setup and guidelines as the IMF, but with suitable modifications introduced in the relief disbursement process to make it faster and more efficient. Contributions to the common fund could be based on the principles of Common but Differentiated Responsibilities (CBDR), as affirmed at the 1992 Earth Summit. These principles can be adapted to the specific circumstances within the domain of refugee protection. The collective international will can play a

crucial role in this regard, as the contributions to the fund should come from nations with stronger financial and economic stability. Additionally, countries from where refugees originate should be held accountable, and the powers of the International Court of Justice (ICJ) to sanction state officials can be enhanced in this regard. Wherever possible, repatriation should be prioritised to facilitate the return of refugees to their country of origin.

CONCLUSION

The challenges posed by the modern-day refugee crisis demand a collaborative approach from the international community. In todays' contemporary era, where the majority of countries have adopted the democratic form of governance, the achievement of democratic principles of equality and brotherhood is still not achieved, which is evident from the treatment of refugees by these democratic nations. Merely signing the international protocols has never led to their adherence. The need of the hour is to strike a balance between the interests of the nation and the fundamental human rights of the refugees.

The United Nations Global Compact on Refugees (GCR) provides a comprehensive framework calling for international cooperation, burden sharing, and the protection of refugee rights. It emphasizes the need for comprehensive, self-directed response plans with an emphasis on self-reliance and sustainable solutions.

The basic human rights and entitlements of refugees require the involvement of the entire international community. Ignoring their plight not only threatens their well-being but also poses dangers to the host society and its democratic principles. To effectively meet these challenges, it proposes the creation of a single bank, similar to IMF but designed for refugee assistance, guided by principles of Common but Differentiated Responsibilities. This approach saves the powers of the countries, boosts recognitions of the plight of the refugees, encourages strong financial assistance to support refugee protection, and address the legitimate social and economic interests of the countries that host refugees.

An analysis of the distinctive approaches of India and Indonesia in handling refugees and both being non-signatory to the Refugee Convention reveals that Indonesia has demonstrated a humanitarian approach, collaborating with the United Nations High Commissioner for Refugees (UNHCR), while, on the other hand, India navigates refugee issues on a case-by-case basis. Strengthening the accountability of countries of origin, such as India and Indonesia, and fostering regional cooperation aligns with the broader global strategy outlined by the GCR.

In addition, countries of origin should strengthen their accountability in matters relating to refugees, respecting the exercise of jurisdiction by international institutions such as the International Court of Justice (ICJ) and recognizing national

authorities. Prioritizing repatriation where possible ensures a permanent return. By enhancing international cooperation through the implementation of these recommendations, the world can work towards an effective, inclusive, and humanitarian response to the refugee crisis.

DENOTIFIED TRIBES AND CRIMINAL LAW: UNVEILING DISCRIMINATION WITHIN INDIA'S JUSTICE SYSTEM

Rohit Gora[1]

ABSTRACT

This paper delves into the enduring struggles faced by Denotified Tribes (DNT) within India's criminal justice system, uncovering the persistence of discrimination despite the country's 75 years of independence. Focused on the intersection of law, history, sociology, and human rights, this study scrutinizes the disconcerting dissonance between the formal ideals of equality and the harsh realities experienced by DNT tribes.

Drawing from the Durkheimian theory, this paper begins by examining the historical evolution of the concept of the criminal class. It elucidates how DNT tribes were unjustly branded as criminals solely by virtue of their birthright, exposing the profound atrocities they have endured throughout history. The paper further traces the transition from the archaic "Criminal Tribes Act" to contemporary denotification and the introduction of the "Habitual Offenders Act," assessing the

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lingering impacts of these legal changes on identity and societal perceptions.

Moving beyond legal frameworks, the study explores the socio-economic vulnerabilities that often lead to higher crime rates among DNT communities. It underscores the state's responsibility in addressing these underlying issues, emphasizing the necessity of accountability in precluding punitive measures. Moreover, the paper critically examines instances of police atrocities against DNT tribes, highlighting the deep-seated biases that continue to perpetuate systemic discrimination.

The paper ultimately underscores the urgent need to reconcile the chasm between theoretical egalitarianism and the reality faced by DNT tribes within India's criminal justice system. By interrogating historical legacies, legal structures, societal perceptions, and state responsibilities, this paper provides a multidimensional analysis which seeks to foster a more equitable and just society for all.

***Keywords**: Denotified Tribes, Criminal Law, Discrimination, Criminal Justice System, Societal Perceptions*

INTRODUCTION

Despite the passage of 75 years since India's Independence, Denotified Tribes (DNT) continue to grapple with

the deprivation of a dignified existence, a promise enshrined within Article 21 of the Constitution. Within the intricate framework of the criminal justice system, these tribes endure the weight of prejudice and stereotypes, disconnected from any foundation in scientific evidence, resulting in the perpetuation of societal discrimination.[2] Our collective efforts to secure the rights of Denotified and nomadic tribes, collectively referred to as DNT tribes, within a civilized and democratic society have faltered, exposing a disconcerting dissonance between formal egalitarian ideals and ground-level realities.

While the overarching legal system appears to radiate equality, this veneer belies a disturbing truth. At the grassroot, DNT tribes bear witness to stark brutality, human rights violations, and systemic discrimination, instigated by both the custodians of law and society itself. Despite constitutional promises of justice, their lived experiences evoke an uncomfortable paradox, demanding a closer examination of the system's efficacy and the urgency of redressal.

This paper aims to analyze the actual treatment inflicted upon these DNT tribes within the legal justice system in contemporary times.

[2] Susan Abraham, "Steal or I'll Call You a Thief: 'Criminal' Tribes of India" (1999) 34(27) Economic and Political Weekly 1751–53 <http://www.jstor.org/stable/4408149> accessed 30 July 2023.

HISTORICAL PROCESS OR EVOLUTION OF THE CONCEPT OF THE CRIMINAL CLASS

Denotified tribes endure discrimination and are unjustly branded as criminal tribes solely based on their birthright. This practice exposes the profound atrocities faced by these tribes, highlighting how their mere association with a particular community strips them of their basic human rights.

Applying the Durkheimian theory, crime is defined as any act that challenges a prevailing collective sentiment. Even when this collective sentiment is discriminatory, it is upheld by the prevailing system. Durkheim's theory asserts that a society entirely devoid of crime is implausible, and an increase in crime is indicative of a pathological state.[3] The categorization of crimes is a judgmental process that designates certain acts and their perpetrators as criminals. In this context, when society deems an act criminal, individuals who commit that act are designated as 'bad criminals.'[4]

Development of the Concept of 'Criminal Group' in the Modern West

In the modern Western context, criminals were often viewed as biological degenerates. Early scientific explanations of

2 Mukul Kumar, 'Relationship of Caste and Crime in Colonial India: A Discourse Analysis' (2004) 39 Economic and Political Weekly 1078–87 <http://www.jstor.org/stable/4414739> accessed 30 July 2023.
4 ibid.

criminality were predominantly focused on biological and physical factors, as argued by Manheim. Scholars like Cesare Lombroso and Ferri expanded the scope to include social, geographical, and psychological elements, alongside biological foundations, in their attempts to comprehend criminal behavior. Subsequently, social positivists introduced personality and other socially oriented approaches, while the discourse shifted towards examining the living conditions of various groups.

This transition was first evident in France and later found its way to Britain, evident in the formulation of the 1824 Vagrancy Act. However, from a contemporary standpoint, the division of individuals based on biological criminal traits seems inherently unscientific.[5] During the industrial revolution in the Western world, the need to clear forests for capitalist exploitation clashed with the presence of forest tribes, leading to opposition. It can be argued that laws were formulated under the guise of biological traits and other theories to legitimize efforts aimed at civilizing these groups and curbing their opposition.[6] But the question

[5] Jay Joseph, 'Is Crime in the Genes? A Critical Review of Twin and Adoption Studies of Criminality and Antisocial Behavior' (2001) 22 The Journal of Mind and Behavior 179–218 <http://www.jstor.org/stable/43853952> accessed 18 July 2023.

[6] Mukul Kumar, 'Relationship of Caste and Crime in Colonial India: A Discourse Analysis' (2004) 39 Economic and Political Weekly 1078–87 <http://www.jstor.org/stable/4414739> accessed 30 July 2023.

arises that, was criminal law an appropriate means of addressing these communities?[7]

UNRAVELING THE CRIMINAL TRIBES ACT: POST-INDEPENDENCE SHIFTS AND DENOTIFICATION

The notion of a 'criminal tribe' was not inherent to Indian history;[8] it was introduced by colonial rulers in 1836 through the Thugee Act[9] and further solidified with the comprehensive Criminal Tribes Act of 1871.[10] T.V. Stephens forwarded the thesis that, just as the caste system was a distinctive feature of Indian society, associating specific trades with castes, crime is also endemic to certain communities.[11] However, the premise that such prejudice is universally innate, and the subsequent state-

[7] Jay Joseph, 'Is Crime in the Genes? A Critical Review of Twin and Adoption Studies of Criminality and Antisocial Behavior' (2001) 22 The Journal of Mind and Behavior 179–218 <http://www.jstor.org/stable/43853952> accessed 18 July 2023.

[8] Anastasia Piliavsky, 'The 'Criminal Tribe' in India before the British' (2015) 57 Comparative Studies in Society and History 323–54 <http://www.jstor.org/stable/43908348> accessed 18 July 2023.

[9] Radhika Singha, ''Providential' Circumstances: The Thuggee Campaign of the 1830s and Legal Innovation' (1993) 27 Modern Asian Studies 83–146 <http://www.jstor.org/stable/312879> accessed 27 July 2023.

[10] K. M. Kapadia, 'The Criminal Tribes of India' (1952) 1 Sociological Bulletin 99–125 <http://www.jstor.org/stable/42864482> accessed 19 July 2023.

[11] Susan Abraham, "Steal or I'll Call You a Thief: 'Criminal' Tribes of India" (1999) 34(27) Economic and Political Weekly 1751–53 <http://www.jstor.org/stable/4408149> accessed 30 July 2023.

sponsored criminalization it led to, bears the potential to wreak havoc upon humanity.[12]

It appears that this analogy was devised to legitimize unjust actions, yielding a false and preposterous basis. Applying statistical deductive logic to label certain tribes as 'congenital criminals'[13] is a flawed approach. The legislation granted local governments the authority to petition the governor general to designate certain tribes as criminal tribes if they were deemed to engage in non-bailable offenses. Many of these tribes were migratory in nature, lacking a fixed abode, which also contributed to their denotification.[14]

However, the availability of discretion to officials contributed to arbitrariness in tribe selection for this act. This discretion often lacked a foundation in research or data concerning the tribes' criminal history. For instance, the classification of Banjaras as a criminal tribe occurred despite their limited involvement in criminal activities.[15]

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[12] S. Vishwanathan, 'Suspects Forever' Frontline, The Hindu (8 June 2002) <https://frontline.thehindu.com/other/article30245103.ece> accessed 30 July 2023.

[13] Charles A. Ellwood, 'Classification of Criminals' (1911) 4 Journal of Criminal Law and Criminology <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1044&context=jclc> accessed 30 July 2023.

[14] Ajay Dandekar, 'Invisible People, Inaudible Voices: The Denotified Tribes of India' (2014) 41 India International Centre Quarterly 90–96 <http://www.jstor.org/stable/24390752> accessed 30 July 2023.

[15] Michael Jackson, 'The Sentencing of Dangerous and Habitual Offenders in Canada' (1997) 9 Federal Sentencing Reporter 256, 261 <https://doi.org/10.2307/20639999> accessed 24 July 2023.

"The implementation of these acts led to various cruel practices by those in power, resulting in executions and the forced separation of parents and children, all under the guise of reformative objectives. [16] In instances of committing a crime, the initial sentence was one year of imprisonment, followed by several years for subsequent offenses. Remarkably, even minor infractions like petty theft could lead to life transportation.[17] It raises a poignant concern: when the severity of punishment surpasses the gravity of the crime, the concept of retribution metamorphoses into vengefulness.[18]

These communities weren't passive recipients of such harsh treatment. Many rose in rebellion, notably during the 1857 uprising against foreign rule. [19] In response, the government retaliated vehemently against these labeled 'criminal tribes,' a response driven by anger and the desire for retribution.[20]

Pressure from Indian leaders advocating against discrimination and a growing global awareness of human rights eventually led to amendments in the act in 1911, 1924, and 1944.

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[16] M Gandhi, Denotified Tribes: Dimensions of Change (5th edn, Kanishka Publisher 2008).

[17] Susan Abraham, "Steal or I'll Call You a Thief: 'Criminal' Tribes of India" (1999) 34(27) Economic and Political Weekly 1751–53 <http://www.jstor.org/stable/4408149> accessed 30 July 2023.

[18] Andrew Oldenquist, 'An Explanation of Retribution' (1988) 85(9) The Journal of Philosophy 464, 478 <https://doi.org/10.2307/2026803> accessed 30 July 2023.

[19] Susan Abraham, "Steal or I'll Call You a Thief: 'Criminal' Tribes of India" (1999) 34(27) Economic and Political Weekly 1751–53 <http://www.jstor.org/stable/4408149> accessed 30 July 2023.

[20] ibid.

These amendments aimed to mitigate the act's provisions.[21] It can be argued that these changes were influenced by the pressure exerted by both Indian leaders and a global community that increasingly championed equitable and liberal principles.[22]

The Transition from 'Criminal Tribes' to 'Denotified Tribes'

Following India's independence, a government-appointed commission delved into the merits of the existing act, leading to a recommendation for its repeal. As a result, the Nehru government repealed the act in 1952.[23] Subsequently, these tribes came to be recognized as denotified tribes. During the same period, the Habitual Offenders Act was introduced based on recommendations from the Ayyangar Committee.[24] Unlike the prior act, this legislation pertained to individuals rather than entire communities.

[21] B. P. Singh, 'Denotified Tribes or Vimukt Jatis of Punjab' (2010) 40(2) Indian Anthropologist 71–77 <http://www.jstor.org/stable/41920128> accessed 15 July 2023.

[22] Keith Laybourn, 'The Rise of Labour and the Decline of Liberalism: The State of the Debate' (1995) 80(259) History 207–226 <http://www.jstor.org/stable/24422523> accessed 18 July 2023.

[23] Ajay Dandekar, 'Invisible People, Inaudible Voices: The Denotified Tribes of India' (2014) 41 India International Centre Quarterly 90–96 <http://www.jstor.org/stable/24390752> accessed 30 July 2023.

[24] ibid.

It's worth noting that the 'born criminal'[25] principle, which had been previously associated with certain communities, was theoretically discarded with these changes. However, the practical manifestation of this rejection might not have entirely shifted at the social level.[26]

Navigating Identity and Rights: Denotified Tribes in India

As a culturally and socially marginalized group, members of the DNT tribes find themselves vulnerable to the labels historically imposed by the state apparatus – labels that have borne 'negative' connotations such as 'criminal tribes' and 'denotified tribes.'[27] These specific designations not only demarcate and segregate these communities but also contribute to their discrimination. I believe that assigning a category name that is intrinsically linked to criminal activities casts an unwarranted negative perception on them within society. Even the term

[25] Marvin E. Wolfgang, 'Pioneers in Criminology: Cesare Lombroso (1835-1909)' (1961) 52(4) The Journal of Criminal Law, Criminology, and Police Science 361, 391 <https://doi.org/10.2307/1141263> accessed 30 July 2023.

[26] Michael Jackson, 'The Sentencing of Dangerous and Habitual Offenders in Canada' (1997) 9 Federal Sentencing Reporter 256, 261 <https://doi.org/10.2307/20639999> accessed 18 July 2023.

[27] Meena Radhakrishna, 'Urban Denotified Tribes: Competing Identities, Contested Citizenship' (2007) 42(51) Economic and Political Weekly 59–64 <http://www.jstor.org/stable/40276878> accessed 30 July 2023.

'denotified,' while indicating a transition from being labeled as criminal, retains echoes of their past branding.[28]

Among the denotified tribes were groups like Nat, Banzara, Irula, Pardhis, Kanjars, and Tadvis, constituting approximately 198 tribes and accounting for 10% of the Indian population. These communities, characterized by their nomadic nature, lack permanent settlements and often fall victim to both the harshness and corruption within administrative and legal systems.[29] Engaged in occupations often deemed undignified, such as slaughtering and scavenging, they grapple to sustain their livelihoods.

Justice Ravindra Bhat of the Supreme Court acknowledges the disproportionate impact of the criminal justice system on Denotified Tribes (DNTs).[30] Despite the principles enshrined in India's preamble and constitution, discriminatory practices continue, thanks to legislations like 'The Habitual Offender Act (1952)'. Notably, bodies like the National Human Rights Commission (NHRC) in 2004, the National Commission to

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[28] Susan Abraham, "Steal or I'll Call You a Thief: 'Criminal' Tribes of India" (1999) 34(27) Economic and Political Weekly 1751–53 <http://www.jstor.org/stable/4408149> accessed 30 July 2023.

[29] Sunil D. Santha et al, 'Migration, Vulnerability and Urban Livelihoods in Climate Change, Livelihoods and Health Inequities: The Vulnerability of Migrant Workers in Indian Cities' (2015) International Institute for Environment and Development, 11–29 <http://www.jstor.org/stable/resrep01310.10> accessed 15 July 2023.

[30] The Print, 'Justice Ravindra S Bhat Highlights Disproportionate Impact of Criminal Justice System on Denotified Tribes' (The Print, 31 August 2022) <https://theprint.in/india/justice-ravindra-s-bhat-highlights-disproportionate-impact-of-criminal-justice-system-on-denotified-tribes/1110373> accessed 30 July 2023.

Review the Working of the Constitution (NCRWC) in 2002, and the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) have recommended the repeal of the Habitual Offender Act of 1952.

DNT Tribes, Dominant Caste, and Untouchability

Even in contemporary times, the belief in the existence of biological criminogenic traits lingers in society, with traces observable even among law-enforcing authorities. Authorities subjected DNT individuals to pathological examinations in an attempt to identify differences that could legitimize their classification as a 'criminal class.'[31] However, these efforts often failed to align with the desired result sought by the dominant caste.

Instances of mob lynching by the dominant class in modern times further underscore the entrenched perception that DNT tribes are irredeemable and warrant extermination.[32] A poignant case study surfaces from the 1984 carnage[33], where out of the 3000 Sikhs killed, a significant number belonged to the

[31] Wayne J. Villemez, 'Social Class and Criminality' (1977) 56(2) Social Forces 474, 502 <https://doi.org/10.1093/sf/56.2.474> accessed 18 July 2023.

[32] Sanjay Kolekar, 'Violence against Nomadic Tribes' (2008) 43(26/27) Economic and Political Weekly 569–71 <http://www.jstor.org/stable/40278917> accessed 18 July 2023.

[33] Meena Radhakrishna, 'Urban Denotified Tribes: Competing Identities, Contested Citizenship' (2007) 42(51) Economic and Political Weekly 59–64 <http://www.jstor.org/stable/40276878> accessed 28 July 2023.

Banjara community before converting to Sikhism[34]. Numerous instances illustrate how the dominant class restricts DNT individuals from engaging in dignified work.[35]

It appears that this discrimination is not merely a result of their lower numerical strength, but also due to their widespread presence across the territory. Unlike the dominant classes, they struggle to amass a significant vote bank, rendering their demands largely unaddressed by the government.

Despite their historical separation from the caste system[36], these marginalized tribes found themselves labeled anew due to their impoverished economic status and society's unfavorable perception. They were assigned the symbol status of 'criminal tribes,' positioned as stratified lower castes burdened with the stigma of criminality. Consequently, they often face even harsher treatment than untouchables.[37]

[34] Sujota Gothoskar, 'Police's Continued Victimisation of 'Denotified' Tribal Communities Can No Longer Go Unchallenged' (The Wire, 13 December 2017) <https://m.thewire.in/article/politics/polices-continued-victimisation-denotified-tribal-communities-can-no-longer-go-unchallenged> accessed 18 July 2023.

[35] Dilip D'Souza, 'Kiran Bedi's Slur against 'Cruel Ex-Criminal Tribes' Proves That Age-Old Prejudice Is Still Alive' (Scroll.in, 3 August 2016) <https://scroll.in/article/813139/kiran-bedis-slur-against-cruel-ex-criminal-tribes-proves-that-age-old-prejudice-is-still-alive> accessed 18 July 2023.

[36] Sanjay Kolekar, 'Violence against Nomadic Tribes' (2008) 43(26/27) Economic and Political Weekly 569–71 <http://www.jstor.org/stable/40278917 > accessed 18 July 2023.

[37] ibid.

DNT Tribes and Police Atrocities

Involvement of denotified tribes often leads to police investigations that bypass established protocols. Members of denotified tribes, such as the Pardhi community, have persevered against prejudice and police violence over years of stigmatization and persecution, even culminating in tragic suicides as acts of protest against injustice.

Instances of the improper exercise of authoritative power in practical scenarios are abundant, and a few are delineated below:

a. In West Bengal, police were implicated in the deaths of 42 members of the Lodha community.

b. A distressing incident involved police stripping a woman of her sari, ultimately leading to her demise.[38]

c. Unsubstantiated arrests for theft resulted in merciless beatings leading to fatalities[39]. These people are considered 'beasts of the field' unable to "get rid of their turn of thieving".[40]

[38] S. Vishwanathan, 'Suspects Forever' Frontline, The Hindu (8 June 2002) <https://frontline.thehindu.com/other/article30245103.ece> accessed 30 July 2023.
[39] ibid.
[40] Dilip D'Souza, 'Kiran Bedi's Slur against 'Cruel Ex-Criminal Tribes' Proves That Age-Old Prejudice Is Still Alive' (Scroll.in, 3 August 2016) <https://scroll.in/article/813139/kiran-bedis-slur-against-cruel-ex-criminal-tribes-proves-that-age-old-prejudice-is-still-alive> accessed 18 July 2023.

d. Custodial deaths occurred due to police fabricating evidence to depict situations as accidental.[41]

e. A regrettable instance involved the wrongful conviction and death penalty for six denotified tribe's members; though rectified in 2009, it took 16 years to address the error.[42]

Amidst these troubling circumstances, it is evident that stereotypes against Denotified Nomadic Tribes (DNTs) permeate various facets of society, including the police, media, and even some judicial circles. Most instances of atrocities go unreported, and only individuals of exceptional courage seek recourse through the judiciary. The potential for biases within the judicial system poses further challenges for these communities striving for justice.

"There is a stereotype against Denotified Nomadic Tribes (DNTs) in police, media, society, and even some judges".[43] All the atrocities are not reported and only exceptionally courageous people knock on the door of the judiciary in exceptional situations. If the court would have biases against these people, which these people first need to rebut, then it will be difficult for them to live a just life.

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[41] ibid.

[42] Imaad Hasan, 'Denotified 68 Years Ago, 'Criminal' Tribes Still Fight Stigma, Poverty' (The Outlook, 30 August 2020) <https://www.outlookindia.com/website/story/india-news-denotification-68-years-ago-on-this-day-ex-criminal-tribes-still-fight-stigma-poverty/359558> accessed 30 July 2023.

[43] Bhangya Bhukya, 'Unveiling the World of the Nomadic Tribes and Denotified Tribes: An Introduction' (2021) 56(36) Economic and Political Weekly (Engage) <https://www.epw.in/engage/article/unveiling-world-nomadic-tribes-and-denotified> accessed 30 July 2023.

DNT People and State Responsibility

The prevalence of high crime rates among DNT tribes can be attributed to a complex interplay of factors, prominently including pervasive poverty, limited employment opportunities, challenging living conditions, low levels of education, and enduring social injustices. These elements collectively perpetuate an environment wherein the control exerted by these communities over these conditions remains minimal. Notably, these are domains where the state bears a certain degree of responsibility. Yet, instances of the state's failure to effectively address these underlying issues abound.

When the state's efforts fall short of curtailing these adversities, it often resorts to punitive measures as a display of taking action against crime. Paradoxically, one underlying cause of crime can be traced back to the state's inability to preemptively address it. Acknowledging the state's responsibility in this context does not imply direct culpability for the crimes committed, but rather underscores the significance of accountability and the state's forward-looking obligation.[44]

[44] Alice Ristroph and Lindsay Farmer, 'The Definitive Article' (2018) 68(1) The University of Toronto Law Journal 140–65 <https://www.jstor.org/stable/90019661> accessed 18 July 2023.

CONCLUSION

In conclusion, this study illuminates the enduring challenges confronted by Denotified Tribes (DNT) within the intricate fabric of India's criminal justice system. It underscores the disconcerting gap between the formal ideals of equality and the harsh realities experienced by DNT tribes. The analysis reveals the deep-seated discriminatory roots embedded in the criminalization of these communities, perpetuating enduring stereotypes and societal biases. Despite legal reforms and denotification, DNT tribes continue to grapple with persistent discrimination, police atrocities, and socio-economic vulnerabilities.

The multifaceted examination presented in this paper serves as a compelling call to action, urging policymakers, legal scholars, and society at large to reassess their understanding of DNT tribes and actively work towards dismantling discriminatory practices. Concrete steps such as specific policy interventions, legal reforms, and societal awareness initiatives are urgently needed. By acknowledging the state's responsibility and advocating for comprehensive reforms, a more equitable and just society can be envisioned.

This research contributes significantly to the scholarly discourse on marginalized communities, inviting further exploration and discussion on the intersection of law, history, and human rights within the context of India's criminal justice system.

The urgency of addressing these challenges is underscored by the disjuncture between the formal guarantees of equality and the lived experiences of DNT tribes, reinforcing the imperative for transformative change.